

Torture in the Eyes of the Beholder: The Psychological Difficulty of Defining Torture in Law and Policy*

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ABSTRACT

This Article draws upon recent social psychological research to demonstrate the psychological difficulty of distinguishing between torture and enhanced interrogation. We critique the accuracy of evaluations made under the current torture standard using two constructs—reliability and validity—that are employed in the social sciences to assess the quality of a construct or metric. We argue that evaluations of interrogation tactics using the current standard are both unreliable and invalid. We first argue that the torture standard is unreliable because of the marked variation in the manner in which different jurisdictions interpret and employ it. Next, we draw on recent social psychological research to demonstrate the standard’s invalidity. We identify the existence of two separate systematic psychological biases that impede objective application of the torture standard. First, the self-serving bias—a bias that motivates evaluators to interpret facts or rules in a way that suits their interests—leads administrators to promote narrower interpretations of torture when faced with a

* The authors would like to especially thank Martha Minow, Sam Issacharoff, David Cole, and Cindy Estlund for their helpful comments on an earlier draft.

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perceived threat to their own, as compared with other nations', security. Thus, the threshold for torture is tendentiously raised during exactly the periods of time when torture is most likely to be used. Second, our own research on the hot-cold empathy gap suggests that an assessment of an interrogation tactic's severity is influenced by the momentary visceral state of the evaluator. People who are not currently experiencing a visceral state—such as pain, hunger, or fear—tend to systematically underestimate the severity of the visceral state. We argue that, because the people who evaluate interrogation tactics are unlikely to be in the visceral state induced by the tactic when making their evaluations, the hot-cold empathy gap results in systematic underestimation of the severity of tactics. Therefore, the hot-cold empathy gap leads to the application of an underinclusive conception of "torture" in domestic interrogation policy and international torture law.

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INTRODUCTION

[Torture] presupposes, it requires, it craves the abrogation of our capacity to imagine others' suffering, dehumanizing them so much that their pain is not our pain [It places] the victim outside and beyond any form of compassion or empathy, but also demands of everyone else the same distancing, the same numbness

–Ariel Dorfman¹

Whatever the realities of current practice, states have formed a remarkable consensus regarding the unacceptability of employing torture to procure information from political detainees.² Torture is unconditionally banned by a wide range of international treaties,

1. Ariel Dorfman, *Forward: The Tyranny of Terror: Is Torture Inevitable in Our Century and Beyond?*, in TORTURE: A COLLECTION 8 (Sanford Levinson ed., 2004).

2. See, e.g., *Al-Adsani v. United Kingdom*, 2001–XI Eur. Ct. H.R. 79, ¶ 59 (“[I]t has long been recognised that the right . . . not to be subjected to torture . . . enshrines one of the fundamental values of democratic society. It is an absolute right, permitting of no exception in any circumstances.”); *Prosecutor v. Furundzija*, Case No. IT–95–17/1, Trial Chamber Judgment, ¶ 144 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

It should be noted that the prohibition of torture laid down in human rights treaties enshrines an absolute right, which can never be derogated from, not even in time of emergency. . . . This is linked to the fact . . . that the prohibition on torture is a peremptory norm or *jus cogens*.

Furundzija, Case No. IT–95–17/1, at ¶ 144 (emphasis added). All International Criminal Tribunal for the former Yugoslavia (ICTY) cases are made publicly available at <http://www.icty.org>. See also CHRIS INGELSE, THE UN COMMITTEE AGAINST TORTURE: AN ASSESSMENT 4 (2001) (evidencing the ubiquity of provisions prohibiting torture by reference to a myriad of international covenants and declarations including the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights and Fundamental Freedoms (ECHR), the American Convention on Human Rights (ACHR), and the African Charter on Human and Peoples’ Rights); Suzanne M. Bernard, *An Eye for an Eye: The Current Status of International Law on the Humane Treatment of Prisoners*, 25 RUTGERS L.J. 759, 789 (1994) (noting that the torture prohibition appears in more than sixty-five countries’ national constitutions); Erika de Wet, *The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law*, 15 EUR. J. INT’L L. 97 (2004) (providing a general academic discussion of the universality of the torture prohibition warranting its elevation to the status of *jus cogens*).

The Convention’s definition of torture is regularly claimed as the most universally accepted definition of torture. See, e.g., GAIL H. MILLER, *DEFINING TORTURE* 6 (2005); BETH VAN SCHAACK & RONALD C. SLYE, *INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT: CASES AND MATERIALS* 499 (2007); Kenneth Lasson, *Torture, Truth Serum, and Ticking Bombs: Toward a Pragmatic Perspective on Coercive Interrogation*, 39 LOY. U. CHI. L.J. 329, 334 (2008). As such, the Convention’s definition will be assumed the authoritative legal definition of torture throughout this Article.

including the United Nations Convention against Torture (CAT),³ the International Covenant on Civil and Political Rights,⁴ and the four Geneva Conventions.⁵ Rather than admitting any intentional decision to torture detainees, countries responding to a charge of torture typically mount one of three standard defenses: (1) denial that the claimed acts occurred; (2) denial of personal responsibility, e.g., claiming that the torture was carried out by “rogue” subordinates; or (3) denial that the relevant interrogation techniques constitute torture. The fact that individuals and nations rarely, if ever, acknowledge that they committed torture underlines the sacrosanctity with which the prohibition of torture is generally regarded.

Torture is to nations, however, what adultery is to politicians—an act that is both condemned and committed with numbing frequency. Like adultery, torture often occurs in the heat of the moment, when a nation feels acutely threatened. Also like adultery, as exemplified by President Clinton’s denial that he had “sex” with Monica Lewinsky, there is often much greater agreement about the unacceptability of the act than about how, exactly, the act should be defined.

The problem is perfectly illustrated by the controversy surrounding the interrogation tactics employed by the United States in CIA secret prisons,⁶ including waterboarding, forced abstention

3. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2, Dec. 10, 1984, S. TREATY DOC. No. 100–20 (1988), 1465 U.N.T.S. 85 [hereinafter CAT].

4. International Covenant on Civil and Political Rights, arts. 4, 7, Dec. 16, 1966, S. EXEC. DOC. No. E, 95–2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR] (providing in Article 7 that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,” with an accompanying non-derogation clause in Article 4).

5. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, art. 17, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (“No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever.”); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

Article 3 of all four Geneva Conventions provides an express prohibition against the use of cruel treatment and torture against civilians or unarmed members of the armed forces. Throughout this Article, we will refer to the compendium of treaties and conventions that seek to limit torture collectively as “the torture prohibition.”

6. See, e.g., Martha Minow, *What Is the Greatest Evil?*, 118 HARV. L. REV. 2134, 2134 (2005) (reviewing MICHAEL IGNATIEFF, *THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR* (2004)) (“Images of prisoner abuse at the hands of American troops at Abu Ghraib circulate the globe and supply evidence to support the worst charges of American arrogance and depravity.”).

from sleep, and enclosure within a dark, confined box with insects.⁷ The debate surrounding these “enhanced interrogation tactics” (as they have been euphemistically called) has not centered on whether or not torturing prisoners is permissible, but rather on whether or not any of these tactics amounted to torture.⁸ This highlights a vexing reality of international law: it is often easier for everyone to agree to wholly abjure an act than on what, exactly, that act is.

The frequency with which debates arise over whether particular acts constitute torture poses a serious challenge to the popular belief that torture is easily distinguishable from less severe tactics—that there is a discernable bright line between torture and other cruel treatment. Proponents of this school of thought allude to a kind of gut instinct (what Jeremy Waldron has colorfully characterized as “a sort of visceral ‘puke’ test”) that can be relied on to recognize true torture.⁹ Although no a priori categorical definition of torture can conceivably be chiseled out, the argument goes, torture remains easily recognizable because “you know it when you see it.”¹⁰ In describing just how one can recognize torture, a slew of visceral responses have been cited. For example, former U.S. Deputy Assistant Attorney General Mark Richard suggested that the concept of torture encompasses “conduct the mere mention of which sends

7. See Memorandum from Jay S. Bybee, Assistant Att’y Gen., U.S. Dep’t of Justice, to Alberto G. Gonzales, Counsel to the President (Aug. 1, 2002) [hereinafter Bybee Memorandum] (interpreting the definition of “torture” under the CAT “in the context of the conduct of interrogations outside the United States”), reprinted in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 172 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

The practice of torture in the modern era is not limited to the United States, but appears unsettlingly ubiquitous across developed nations, suggesting that this affront to civilized society “is not just a rogue-state, third-world, banana-republic phenomenon.” Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 *COLUM. L. REV.* 1681, 1684 (2005); see also Judith Shklar, *The Liberalism of Fear*, in *LIBERALISM AND THE MORAL LIFE* 21, 27 (Nancy Rosenblum ed., 1989) (stating that contemporary torture has “flourished on a colossal scale”).

8. See, e.g., Clark Hoyt, Op-Ed., *Telling the Brutal Truth*, *N.Y. TIMES*, Apr. 26, 2009, at WK12 (discussing the debate among media outlets about whether to characterize the tactics adopted by the CIA as “torture”).

9. Waldron, *supra* note 7, at 1695 (complaining that “the trouble [with such a test] is that we seem to puke or chill at different things”).

10. *Torture and the Cruel, Inhuman and Degrading Treatment of Detainees: The Effectiveness and Consequences of ‘Enhanced’ Interrogation: Hearing Before the H. Subcomm. on the Constitution, Civil Rights, and Civil Liberties*, 110th Cong. 59 (2007) [hereinafter *Convention on ‘Enhanced’ Interrogation*] (statement of Rep. Melvin Watt, Member, H. Comm. on the Judiciary) (claiming that this is what “the [George W. Bush] Administration would have us believe”); see also Ralf Alleweldt, *Protection Against Expulsion Under Article 3 of the European Convention on Human Rights*, 4 *EUR. J. INT’L L.* 360, 363 (1993) (“The concept of torture, in its core, needs no definition. Torture, be it performed by physical or modern psychological methods, is easily recognizable.”).

chills down one's spine,"¹¹ and former CIA instructor Malcolm Nance stated that the "acts and calumnies" that comprise torture "force us to look away for [a] moment."¹²

Rejecting the gut instinct test, this Article argues that a bright line between torture and enhanced interrogation is exceedingly difficult to draw in an objective fashion. In fact, contrary to the aforementioned assumption that visceral reactions are a reliable aid in distinguishing between enhanced tactics and torture, this Article contends that the psychological complexity of visceral experience actually obstructs our ability to arrive at an unbiased evaluation of what constitutes torture. Specifically, we argue that evaluations of enhanced interrogation tactics are subject to a "hot-to-cold empathy gap," a psychological phenomenon that impedes the ability of people to evaluate viscerally charged experiences that they are not immediately experiencing.¹³ The empathy gap captures the insight, documented in numerous empirical studies, that people who are not currently experiencing a visceral hot state—herein defined as any compelling aversive emotional state such as fear, hunger, fatigue, or pain—regularly underestimate its intensity.¹⁴

We recently conducted a series of experiments to gauge whether the empathy gap affects evaluations of enhanced interrogation tactics.¹⁵ These experiments confirm that people suffer from innate empathic biases when assessing the severity of interrogation tactics. In a series of three social psychological experiments, we found that individuals who are currently experiencing a state that is induced by an enhanced interrogation tactic—for example, fatigue, coldness, or social isolation—tend to evaluate that tactic as significantly more painful and unethical than participants who are not experiencing the state. People experiencing a visceral state are also more likely than

11. *Convention Against Torture: Hearing Before the S. Comm. on Foreign Relations*, 101st Cong. 16 (1990) [hereinafter *Convention Against Torture Hearing*] (statement of Mark Richard, Deputy Assistant Att'y Gen., U.S. Dep't of Justice).

More recently, Assistant Attorney General Steven Bradbury claimed that only those interrogation tactics that "shock the conscience" are prohibited as unconstitutional. *Justice Department's Office of Legal Counsel: Hearing Before the Subcomm. on the Constitution, Civil Rights and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 18 (2008).

12. *Convention on 'Enhanced' Interrogation*, *supra* note 10, at 60 (statement of Malcolm W. Nance, Anti-Terrorism/Counter-Terrorism Intelligence Specialist, Former Survive, Evade, Resist, Extract (SERE) Instructor).

13. Loran F. Nordgren et al., *Visceral Drives in Retrospect: Explanations About the Inaccessible Past*, 17 *PSYCHOL. SCI.* 635, 635 (2007) (citing George Loewenstein, *Out of Control: Visceral Influences on Behavior*, 65 *ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES* 272, 284–85 (1996)).

14. *See, e.g., id.* at 635 ("Empirical studies in a number of domains confirm the tendency to underestimate the effect of visceral drives.").

15. Loran F. Nordgren et al., *What Constitutes Torture? Psychological Impediments to an Objective Evaluation of Interrogation Tactics*, *PSYCHOL. SCI.* (forthcoming) (on file with authors).

others to classify as torture (as opposed to “interrogation”) a tactic that induces that state. Therefore, in direct contradiction to arguments that the line between torture and enhanced interrogation can be determined by reference to a visceral response, our research suggests that the perceived line between torture and enhanced interrogation actually shifts with the visceral experience of the evaluator. Moreover, because administrators and judges evaluating interrogation tactics are unlikely to be experiencing a significantly elevated visceral state when making their evaluations, our findings suggest that they are at risk of systematically underestimating the severity of the tactics. This underestimation could lead them to apply an underinclusive conception of “torture” in domestic interrogation policy and international torture law.

The ultimate goal of this Article is to identify the psychological reasons why, under stressful conditions, even well-meaning countries will err on the side of violating norms against torture. We first draw on recent psychological research that demonstrates (1) the difficulty of demarcating a bright line between torture and enhanced interrogation tactics, and (2) the mechanisms driving a psychological tendency to endorse an underinclusive conception of torture in periods of political distress.

In critiquing the human ability to objectively identify torture, we will employ two critical concepts that are utilized in the natural and social sciences to assess the quality of a construct or measure (such as IQ, happiness, or, in the case of torture, severity of suffering): reliability and validity.¹⁶ Reliability indicates the degree to which a measure yields consistent results.¹⁷ Validity indicates the degree to which a measure yields meaningful results, or the extent to which the test in question is actually measuring what it purports to measure.¹⁸ A measure is considered invalid if it does not accurately measure what it is intended to measure. Applying these concepts, we argue that current legal definitions of torture are both unreliable and invalid. Efforts to objectively implement current torture standards are unreliable because different evaluators interpret torture to mean different things. A comparative review of torture jurisprudence suggests very low levels of concordance across judges and jurisdictions, especially with regard to the status of so-called

16. See generally EDWARD G. CARMINES & RICHARD A. ZELLER, RELIABILITY AND VALIDITY ASSESSMENT 11–13 (1979) (explaining how reliability and validity can be assessed to determine the viability of empirical metrics in social scientific research).

17. See 3 ROSS E. TRAUB, RELIABILITY FOR THE SOCIAL SCIENCES: THEORY AND APPLICATIONS 1 (1994) (“[R]eliability connotes a kind of consistency . . . of the measurements being described.”).

18. See THOMAS D. COOK & DONALD T. CAMPBELL, QUASI-EXPERIMENTATION: DESIGN & ANALYSIS ISSUES FOR FIELD SETTINGS 37 (1979) (defining validity as the “best available approximation to the truth or falsity” of a given inference, proposition, or conclusion).

“enhanced interrogation tactics” and psychological tactics. Evaluations of the severity of interrogation tactics are invalid because of the existence of two separate systematic psychological biases. First, the self-serving bias—a bias that motivates evaluators to interpret facts or rules in a way that suits their interests—leads administrators to promote more narrow interpretations of torture when faced with a perceived threat to their nations’ security. Thus, the threshold for torture is tendentiously raised during exactly the periods of time when torture is most likely to be used. Second, as discussed above, the hot–cold empathy gap impedes evaluators’ ability to make objective assessments of torture. Because of this bias, an assessment of an interrogation tactic’s severity is influenced by the momentary visceral state of the evaluator, a variable wholly unrelated to the actual experienced severity of the tactic. Moreover, because the people who evaluate interrogation tactics are unlikely to experience extreme visceral states while making their evaluations, the hot–cold empathy gap causes evaluators to systematically underestimate the severity of interrogation tactics. This underestimation leads to the application of an underinclusive conception of “torture” in domestic interrogation policy and international torture law.

Finally, this Article discusses how the difficulty of discerning a bright line affects the way that we should think about the torture prohibition more generally. We draw from Jeremy Waldron’s adept and invaluable distinction between a *malum in se* and a *malum prohibitum* approach to the torture prohibition.¹⁹ A *malum in se* approach is properly applied to a prohibition that codifies an absolute wrong, an act that “would be wrong whether positive law prohibited [it] or not.”²⁰ Examples might include rape, murder, or theft. In contrast, a *malum prohibitum* offense is treated as though it is only wrong because the law explicitly forbids it.²¹ According to this approach, if an action is not explicitly legally forbidden, it is implicitly freely permitted.²² Examples include parking violations or noncompliance with restrictions limiting the height of a building. These acts are only intuitively wrong to the extent that they are expressly forbidden by law. If a zoning regulation prohibits buildings

19. Waldron, *supra* note 7, at 1691–93. See *infra* Part III for definitions of *malum in se* and *malum prohibitum* policy approaches.

20. See Waldron, *supra* note 7, at 1701 (warning that “[t]here are some scales one really should not be on, and with respect to which one really does not have a legitimate interest in knowing precisely how far along the scale one is permitted to go”); see also *id.* at 1699 (“We know that in almost all cases when we replace a vague standard with an operationalized rule, the cost of diminishing vagueness is an increase in arbitrariness.”).

21. *Id.* at 1691–92.

22. *Id.*

from being more than ninety-feet tall, one can assume that an eighty-nine-foot-tall building is permitted.

A “bright line” between what is prohibited and what is permitted functions very differently depending on whether a prohibited offense is interpreted as *malum in se* or *malum prohibitum*. Under a *malum prohibitum* interpretation of the torture prohibition, a bright line is of the utmost importance because it, in effect, defines the prohibition. Interrogators may approach the line with impunity, so long as they do not cross it. However, under a *malum in se* approach, a bright line is much less important. One cannot assume that anything that is not expressly prohibited is therefore freely permitted. There are some lines—such as the line defining the crime of child molestation—that society would rather people stay as far away from as possible. Therefore, when considering a crime like torture, for which a bright line is impossible to discern (the standard by which it is defined being both unreliable and invalid), a *malum prohibitum* approach is inherently flawed; in such cases, administrators suffer from an imminent risk of crossing the line they seek to approach. To overstep the line means breaching our international obligation to prohibit absolutely the use of torture. Moreover, crossing the line threatens our foreign relationships, harms our international reputation, and endangers our soldiers who are held as detainees by other countries.

Part I of this Article illustrates the unreliability of the torture standard by drawing on a comparative historical analysis of torture jurisprudence. We first review the difficulties introduced by the imprecision of the torture prohibition. This review focuses on the sources of disparity in judicial and administrative interpretations of the word “severe.” Salient inconsistencies among international courts center, for example, on what kinds of actions cause “severe” pain and whether purely mental pain can be “severe” enough to be classified as torture. Part II introduces psychological research on self-serving and empathic biases to illustrate the invalidity of the torture standard. In it, we present our own empirical evidence of the empathy gap’s biasing effects on evaluations of the pain arising from enhanced interrogation tactics. Part III discusses what the difficulty of objectively defining torture means for the way we think about the torture prohibition more generally. In light of the impossibility of discerning a bright line between torture and enhanced interrogation, Part III focuses primarily on a critical assessment of a *malum prohibitum* approach to the torture prohibition.

PART I: THE UNRELIABILITY OF THE TORTURE STANDARD: A COMPARATIVE REVIEW OF TORTURE LAW

The claim that there is a discernable bright line between torture and enhanced interrogation assumes that current conceptions of

torture provide a workable metric for identifying torture. When social scientists assess the quality of a metric or construct, they first examine whether the construct is reliable, meaning that it yields consistent results.²³ Social scientists have developed several classes of reliability and methods for assessing it,²⁴ but one of the more common tests of reliability is “inter-rater reliability,” which asks whether there is consensus among different judges applying a metric.²⁵ This Part demonstrates the unreliability of the torture standard by conducting a comparative analysis of international torture jurisprudence that highlights the varied conclusions reached across jurisdictions.²⁶

The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) provides the most explicit international definition of torture, which might explain why the CAT has become the favored conceptualization of the torture prohibition in contemporary international jurisprudence.²⁷ Central to the CAT’s definition of torture is its requirement that a torturous action inflict “severe” mental or physical pain.²⁸ The severity of pain has been extensively utilized as the standard setting torture apart

23. See generally 3 TRAUB, *supra* note 17 (developing a concept of reliability with reference to educational and psychological measurements).

24. See, e.g., KILEM L. GWET, HANDBOOK OF INTER-RATER RELIABILITY (2d ed. 2010); Frank E. Saal et al., *Rating the Ratings: Assessing the Psychometric Quality of Rating Data*, 88 PSYCHOL. BULL. 413, 419 (1980).

25. See Saal et al., *supra* note 24, at 419.

26. See, e.g., Julianne Harper, Comment, *Defining Torture: Bridging the Gap Between Rhetoric and Reality*, 49 SANTA CLARA L. REV. 893, 901 (2009) (complaining that the “lack of clarity regarding what constitutes ‘severe pain or suffering’ has given international courts remarkable latitude in their interpretations of the Torture Convention’s severity requirement”).

27. See, e.g., MILLER, *supra* note 2, at 6; VAN SCHAACK & SLYE, *supra* note 2, at 499; Lasson, *supra* note 2, at 334.

28. See, e.g., Anthony Cullen, *Defining Torture in International Law: A Critique of the Concept Employed by the European Court of Human Rights*, 34 CAL. W. INT’L L.J. 29, 32 (2003) (quoting Prosecutor v. Kvočka, Case No. IT-98-30/1, Trial Chamber Judgment, ¶ 142 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 2, 2001)) (identifying the severity of endured pain as the “distinguishing characteristic of torture that sets it apart from similar offences”).

In fact, the word “severe” was a source of much debate among the Convention’s drafters who held heated debates regarding whether severe should be deleted or replaced by “extreme” or “extremely severe.” See AHCENE BOULESBAA, THE U.N. CONVENTION ON TORTURE AND THE PROSPECTS FOR ENFORCEMENT 16 (1999); J. HERMAN BURGERS & HANS DANIELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 117–18 (1988). The Convention’s torture definition also requires that the pain be intentionally inflicted for a specific purpose, such as to acquire information, and that the perpetrator be someone acting in an official capacity. See CAT, *supra* note 3, art. 1. For a more comprehensive discussion of the definition of torture as applied in international and human rights law, see Nigel S. Rodley, *The Definition(s) of Torture in International Law*, in CURRENT LEGAL PROBLEMS 467–93 (M.D.A. Freeman ed., 2002).

from lesser offenses in international human rights law.²⁹ Of course, whereas the ban on torture is intended to be absolute,³⁰ the word “severe,” alone, offers only minimal interpretive guidance.³¹

Courts applying the CAT’s torture standard argue that the severity threshold warrants the attachment of a “special stigma”³² to set torturous actions apart from other “cruel, inhuman or degrading” treatments that provoke less exacting consequences.³³ The definition of torture by comparison to less severe actions is one unifying strain in geographically disparate torture jurisprudence.³⁴ The International Criminal Tribunal for the former Yugoslavia (ICTY), for example, defines torture by reference to other actions provoking “serious mental and physical suffering that falls short of the severe mental and physical suffering required for the offense of torture.”³⁵ In *Brdanin*, the Trial Chamber explained that “[t]he seriousness of the pain or suffering sets torture apart from other forms of mistreatment.”³⁶ Similarly, the European Court of Human Rights (ECHR) suggests that “[i]n determining whether a particular form of

29. See, e.g., *Kvočka*, Case No. IT-98-30/1-T, ¶ 142; Cullen, *supra* note 28, at 32 (suggesting that the severity of pain as the distinguishing factor of torture “is reflected in the jurisprudence of the ICTY, the European Court of Human Rights and the Human Rights Committee”).

30. See CAT, *supra* note 3, art. 2 (“No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”); Louise Arbour, UN High Comm’r for Human Rights, Statement Made for Human Rights Day: On Terrorists and Torturers (Dec. 7, 2005), available at <http://www.unhchr.ch/hurricane/nsf/0/3B9B202D5A6DCDBCC12570D00034CF83?opendocument> (calling the “absolute” prohibition of torture “a cornerstone of the international human rights edifice”).

31. NIGEL S. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 98 (2d ed. 1999) (“To sum up on the issue of how severe or aggravated inhuman treatment has to be for it to amount to torture is virtually impossible.”); see also *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A.) (1978) (separate opinion of Judge Zekia) (conceding that “the word ‘torture’ . . . is not capable of an exact and comprehensive definition”); Cullen, *supra* note 28, at 33 (“Although the term ‘severe’ is vague and open to interpretation, to include a specific threshold of pain or suffering in the definition would arguably result in an excessive limitation on its application.”).

32. *Aydin v. Turkey*, App. No. 23178/94, 25 Eur. H.R. Rep. 251, ¶ 82 (1997).

33. See CAT, *supra* note 3, art. 16 (noting that torture is an extreme version of “cruel, inhuman or degrading” treatment).

34. See Lisa Yarwood, *Defining Torture: The Potential for ‘Abuse,’* 2008 J. INST. JUST. INT’L STUD. 324, 327 (2008) (“The variety in expressions of the prohibition [against torture] is substantively unified in defining torture to the exclusion of ‘inhuman treatment.’”).

35. *Prosecutor v. Kvočka*, Case No. IT-98-30/1-T, Trial Chamber Judgment, ¶ 161 n.318 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 2, 2001).

36. *Prosecutor v. Brdanin*, Case No. IT-99-36, Trial Chamber Judgment, ¶ 483 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004). This standard was not rejected in the case’s recent appeal, *Prosecutor v. Brdanin*, Case No. IT-99-36, Appeals Chamber Judgment, ¶¶ 241–50 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 3, 2007).

ill-treatment should be qualified as torture, consideration must be given to the distinction . . . between this notion and that of inhuman or degrading treatment.”³⁷ This trend is equally present in U.S. guidance issued during the Reagan Administration, which classified torture as existing “at the extreme end of cruel, inhuman and degrading treatment or punishment.”³⁸ The distinction between torture and cruel or inhuman treatment is given particular emphasis because, while the CAT introduces an absolute ban on “torture,” it only imposes an obligation to “undertake to prevent” cruel or inhuman treatment.³⁹ Some commentators point to this difference to substantiate an argument that, rather than being prohibited absolutely, cruel or inhuman treatments can be employed when extreme circumstances warrant more forceful interrogations. As the United States argued in a memo released contemporaneously with the CAT’s finalization, “the attempt to establish the same obligations for torture as for lesser forms of treatment would result either in defining obligations concerning [cruel, inhuman, or degrading treatment] that were overly stringent or in defining obligations concerning torture that were overly weak.”⁴⁰

Some interrogation tactics seem to be clearly recognized as torture and universally condemned. U.S. officials have provided some examples of these most obvious manifestations of torture, including “the needle under the fingernail, the application of electric shock to the genital area, [and] the piercing of eyeballs,”⁴¹ as well as “sustained systematic beating . . . and tying up or hanging in positions that cause extreme pain.”⁴² Past guidance from the ECHR includes arbitrary arrests and custodial deaths among the acts that

37. Aktas v. Turkey, App. No. 24351/94, ¶ 313 (2003), available at <http://www.echr.coe.int>.

38. MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, S. TREATY DOC. NO. 100-20, at 3 [hereinafter MESSAGE FROM THE PRESIDENT].

39. CAT, *supra* note 3, art. 16.

40. MESSAGE FROM THE PRESIDENT, *supra* note 38, at 15. The United States has only agreed to prevent cruel, inhuman, or degrading treatments “insofar as the term means the cruel, unusual and inhuman treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.” 136 CONG. REC. S17,491 (daily ed. Oct. 27, 1990); see also Hernán Reyes, *The Worst Scars Are in the Mind: Psychological Torture*, 89 INT’L REV. OF THE RED CROSS 591, 593 (2007) (noting that the CAT “impos[es] on states ‘only’ the obligation to ‘undertake to prevent’ cruel, inhuman or degrading treatment,” and that “[s]tates have used this to argue that while torture is forbidden, cruel, inhuman or degrading treatment may be justified under exceptional circumstances”).

41. Bybee Memorandum, *supra* note 7, at 19–20.

42. MESSAGE FROM THE PRESIDENT, *supra* note 38, at 13–14.

facially qualify as torture.⁴³ Similarly, the ICTY carved out a special category for facially obvious manifestations of torture that “establish *per se* the suffering of those upon whom they were inflicted.”⁴⁴ In ICTY jurisprudence, once the prosecution proves the occurrence of acts that fall into this category, which includes rape and mutilation of body parts,⁴⁵ the prosecution is absolved of the burden of providing a medical certificate to prove their severity, because the acts conclusively imply the requisite severity for torture.⁴⁶

However, outside of these most horrific archetypes of torture, courts differ substantially in their interpretation of precisely where the line should be drawn to separate torture from cruel treatments. In particular, enhanced interrogation tactics and psychological interrogation tactics generate considerable disagreement across jurisdictions.

Enhanced interrogation tactics are ambiguous almost by design. They are the product of deliberate attempts to engineer tactics that provoke subtle forms of pain, relying on technological, psychological, and pharmacological innovations that maximize the pain or discomfort of the detainee’s experience while leaving minimal perceptible evidence of brutality.⁴⁷ Examples include sleep

43. See *Chahal v. United Kingdom*, App. No. 22414/93, 23 Eur. H.R. Rep. 413, ¶¶ 45–56, 80 (1996) (reviewing evidence that such practices were taking place in India, and holding that such practices are “contrary to Article 3”).

44. *Prosecutor v. Kunarac*, Case No. IT-96-23&23/1, Appeals Chamber Judgment, ¶ 150 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002).

45. *Prosecutor v. Kvočka*, Case No. IT-98-30/1-T, Trial Chamber Judgment, ¶ 144 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 2, 2001).

46. *Kunarac*, Case No. IT-96-23&23/1, ¶ 150.

47. See, e.g., *Convention Against Torture Hearing*, *supra* note 11, at 94 (statement of Human Rights Watch) (“In recent years governments that practice torture increasingly have sought to devise methods that cause intense pain but leave no marks. The era of psychological torture appears to be ahead of us.”); AMNESTY INT’L, *TORTURE IN THE EIGHTIES* 15 (1984) (“The treatment in law of torture, whether by definition or in jurisprudence, must keep pace with modern technology, which is capable of inducing severe psychological suffering without resort to any overt physical brutality.”); see also Herbert Radtke, *Torture As an Illegal Means of Control*, in *THE DEATH PENALTY AND TORTURE* 3, 4–5 (Franz Bockle & Jacques Pohier eds., Miranda Chayton trans., 1979) (“Torture is becoming increasingly scientific. Alongside physical brutality and mutilation, the use of sophisticated mechanised equipment is becoming more and more common. A particular cause for concern is the growth of psychological and pharmacological methods of torture.”).

The increasingly compromised role played by doctors in the development and administration of interrogation tactics is a testament to the trend towards the scientific enhancement of interrogation. As one commentator notes, “[w]hile once doctors present at an interrogation were generally there to prevent the victim’s death, today medical science plays an active role in improving the torturer’s techniques.” Radtke, *supra*, at 4. In an effort to quell the escalating entanglement of medical professionals in the practice of interrogation, the American Psychological Association voted in 2007 to bar their members from any future involvement in a number of commonly employed interrogation practices, including forced sleep deprivation, assumption of painful bodily positions, and exposure to extreme temperatures. See Shankar Vedantam, *APA Rules*

deprivation, forced assumption of painful physical positions, or exposure to extreme temperatures.

Psychological interrogation tactics likewise present a category rife in ambiguity, in part because, by definition, the misery such tactics produce is entirely “in the mind.”⁴⁸ Widely employed psychological tactics include the exploitation of phobias, the breaking of sexual taboos, and solitary confinement.⁴⁹

Because many of these enhanced interrogation and psychological interrogation tactics involve subjecting detainees to visceral sensations that people regularly experience to some degree or another—such as feeling cold, fatigued, hungry, or lonely—they are less recognizably painful than more shocking forms of physical brutality.⁵⁰ However, the suffering induced by enhanced and psychological interrogation, though exceedingly difficult to ascertain and measure,⁵¹ can be just as harmful as more obvious forms of torture. Several medical studies have concluded that purely psychological tactics are capable of causing as much long-term mental damage and emotional suffering as their physical counterparts.⁵²

on Interrogation Abuse: Psychologists' Group Bars Member Participation in Certain Techniques, WASH. POST, Aug. 20, 2007, at A03 (referring to the prohibited interrogation methods as “immoral, psychologically damaging and counterproductive in eliciting useful information”).

48. See, e.g., Reyes, *supra* note 40, at 596 (“Physical forms of pain and suffering are more readily understood than *psychological* forms, although physical suffering may also be hard to quantify and measure objectively . . .”); see also *id.* (“[T]he notion of ‘intensity of suffering’ is not susceptible of precise gradation, and in the case of mainly mental as opposed to physical suffering, there may be an aura of uncertainty as to how . . . [to assess] the matter in any individual case.” (quoting Sir Nigel Rodley, former UN Special Rapporteur on Torture) (internal quotation marks omitted)).

Indeed, the Bush Administration complained that the concept of mental harm referenced in the CAT was the source of its “greatest problem” with the Convention, because “mental suffering is often transitory, causing no lasting harm.” *Convention Against Torture Hearing*, *supra* note 11, at 17 (statement of Mark Richard, Deputy Assistant Att’y Gen., U.S. Dep’t of Justice).

49. Reyes, *supra* note 40, at 604–08; see also BURGERS & DANIELIUS, *supra* note 28, at 118 (listing recognized forms of psychological torture, including mock executions, being forced to watch or hear the torture of others, prolonged isolation, and deprivation of light, food, sleep, or water).

50. See, e.g., Clifford D. May, Op-Ed., *Interrogation Tactics Weren’t Torture, American Officials Shouldn’t Be Prosecuted*, U.S. NEWS & WORLD REP., May 18, 2009, available at <http://www.usnews.com/opinion/articles/2009/05/18/interrogation-tactics-weren-t-torture-american-officials-shouldnt-be-prosecuted.html> (suggesting that many of the techniques reviewed in the torture memos, including “sleep deprivation, ‘stress positions,’ and the playing of loud music [are] hardly what most people (much less the relevant laws) would define as torture”).

51. See Yarwood, *supra* note 34, at 336 (“Psychological manifestations of torture challenge reliance on a solely objective analysis of suffering, due to the difficulties in measuring intangible psychological injuries.”).

52. See Stuart Grassian & Nancy Friedman, *Effects of Sensory Deprivation in Psychiatric Seclusion and Solitary Confinement*, 8 INT’L J.L. & PSYCHIATRY 49, 53–55 (1986) (reporting that solitary confinement can cause hallucinations, extreme anxiety,

Additionally, in a 2007 study of the long-term psychological effects of torture, researchers compared the effects of enhanced interrogation methods, such as isolation and stress positions, with obvious forms of physical torture.⁵³ The researchers concluded that the effects of the enhanced tactics did “not seem to be substantially different from physical torture in terms of the extent of mental suffering they cause, the underlying mechanisms of traumatic stress, and their long-term traumatic effects.”⁵⁴

Some jurisdictions refuse to consider enhanced interrogation and psychological tactics as torture.⁵⁵ In *Ireland v. United Kingdom*, for example, the ECHR ruled that the combined application of five enhanced interrogation treatments—including hooding, wall-standing, exposure to loud noises, starvation, and sleep deprivation—“did not occasion suffering of the particular intensity and cruelty implied by the word torture.”⁵⁶ Explaining the Court’s reasoning, Judge Fitzmaurice stated that “if the five techniques are to be regarded as involving torture, how does one characterize e.g. having one’s finger-nails torn out, being slowly impaled on a stake through the rectum, or roasted over an electric grid?”⁵⁷ The United States adopts a relatively tolerant stance toward psychological interrogation methods, eschewing only mental suffering that is “prolonged” and arises “from the infliction or threatened infliction of severe physical pain or suffering”; “the administration . . . of mind altering substances”; or the threat that death or pain will be inflicted on another person.⁵⁸

However, other jurisdictions hold that tactics that are not facially obvious examples of torture may amount to torture in some situations. The ICTY, for example, explicitly leaves open the possibility that more subtle tactics might amount to torture, depending on how they are administered and the situations in which they occur:⁵⁹ “it is no requirement that [torture’s] suffering [be]

hypersensitivity, and an inclination to induce self-harm); Alan Zarembo, *Psychological Torture Just as Bad, Study Finds: Damage Is Equal to That from Physical Abuse, Investigators Report*, L.A. TIMES, Mar. 6, 2007, at A4.

53. Metin Basogul et al., *Torture vs. Other Cruel, Inhuman, and Degrading Treatment: Is the Distinction Real or Apparent?*, 64 ARCHIVES OF GEN. PSYCHOL. 277, 277, 284 (2007).

54. *Id.* at 284; see also Jessica Wolfendale, *The Myth of “Torture Lite,”* 23 ETHICS & INT’L AFF. 47, 50–51 (2009) 62 (providing other examples of people who, when subjected to enhanced tactics, suffered from long-term amnesia and psychosis).

55. Barry M. Klayman, *The Definition of Torture in International Law*, 51 TEMP. L.Q. 449, 498 (1978) (suggesting that under the definition of torture adopted in the *Ireland v. United Kingdom* case, torture is largely limited to “only [the] most brutal and atrocious behavior[s]”).

56. 25 Eur. Ct. H.R. (ser. A) ¶ 167 (1978).

57. *Id.* ¶ 35 (separate opinion of Judge Fitzmaurice).

58. 8 C.F.R. § 208.18(a)(4) (2010).

59. For example, while the ICTY jurisprudence instructs that the most barbaric acts constituting per se torture are sufficient for a finding of torture, no one

visible . . . [and therefore] no defence that victims did not show effects of physical or mental pain or suffering.”⁶⁰ The ECHR also adopts a broader understanding of mental suffering, recognizing that several classes of psychological interrogation tactics—including intimidation, humiliation, threats to others, and sensory deprivation—can provoke the requisite suffering to amount to torture.⁶¹

In conclusion, whereas there is a broad consensus that the most shocking or repulsive archetypes of torture should be classified as such, tactics that straddle the line between torture and interrogation generate divergent international applications of the torture standard.⁶² In particular, some jurisdictions tolerate enhanced interrogation tactics and psychological tactics—such as those that were controversially employed during the Bush Administration⁶³—while other jurisdictions condemn these tactics as torture. This disparity in interpretation highlights the practical difficulty of drawing a bright line between torture and cruel or inhuman treatment. These differences suggest that the torture standard, as currently interpreted and applied, lacks reliability.

A commonplace in social science methodology is that reliability is a necessary, but not sufficient, condition for validity.⁶⁴ If different

type of treatment or tactic is categorically necessary for a determination that an interrogation involved torture; instead, the Court evaluates the severity of interrogation treatments on a case-by-case basis. VAN SCHAACK & SLYE, *supra* note 2, at 517.

60. Prosecutor v. Kunarac, Case No. IT-96-23&23/1, Appeals Chamber Judgment, ¶¶ 135, 150 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002).

61. For a thorough discussion of the history of the case law in this area, see Love Kellberg, *The Case-Law of the European Commission of Human Rights on Art. 3 of the ECHR*, in THE INTERNATIONAL FIGHT AGAINST TORTURE 97, 104 (Antonio Cassese ed., 1991). See also Akkoç v. Turkey, App. Nos. 22947/93 & 22948/93, 2000-X Eur. Ct. H.R. 456, ¶¶ 116–17 (2000) (holding that threats directed at a woman's children, ultimately causing diagnosed post-traumatic stress disorder, amounted to torture).

62. See David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1437–38 (2005).

There is a vast difference . . . between the ancient world of torture, with its appalling mutilations . . . and the tortures that liberals might accept: sleep deprivation, prolonged standing in stress positions, extremes of heat and cold, bright lights and loud music—what some refer to as ‘torture lite.’ . . . [L]iberals generally draw the line at forms of torture that maim the victim's body. This . . . marks an undeniable moderation in torture, the world's most immoderate practice.

Id.; see also Wolfendale, *supra* note 54, at 58 (arguing that there is no veritable distinction between enhanced interrogation and torture that would permit use of the former); Joseph Lelyveld, *Interrogating Ourselves*, N.Y. TIMES, June 12, 2005, § 6 (Magazine), at 12 (distinguishing between enhanced interrogation and torture, and arguing for the permissibility of forms of enhanced interrogation).

63. See *supra* notes 26, 28, 31, 34 and accompanying text.

64. See *Reliability and Validity*, in THE BLACKWELL ENCYCLOPEDIA OF SOCIAL PSYCHOLOGY 128, 128 (Antony S.R. Manstead et al. eds., 1996).

measures of the same construct produce radically different estimates, there is no way that all of the estimates can be correct. Yet, even if all of the measures do produce the same estimate, it is not necessarily the case that the estimate is valid. By virtue of its unreliability, the torture standard is necessarily invalid. However, as the next Part demonstrates, the current torture standard is also independently invalid because its interpretation is distorted by two systematic psychological biases: the self-serving bias (or motivated reasoning bias) and the hot-cold empathy gap. Because of self-serving biases, policy makers are naturally motivated to construe the torture prohibition narrowly during periods when they feel that their national security is threatened. As a result of the hot-cold empathy gap, it is extremely difficult for those that are removed from the first-hand experience of torture to understand the extent of its severity.

PART II: THE INVALIDITY OF THE TORTURE STANDARD:
SYSTEMATIC PSYCHOLOGICAL BIASES AFFECTING
EVALUATIONS OF INTERROGATION TACTICS

In addition to reliability, social scientists evaluate the quality of a measure or a construct with reference to its validity. Whereas a measure's reliability captures the consistency with which it is applied, validity gauges the measure's accuracy, or the degree to which the metric successfully captures the construct it is intended to measure.⁶⁵ To understand this distinction, imagine that a scientist uses a weighing scale to measure intelligence. The scale may very well produce reliable results; it would provide the correct weight each time that a person stepped onto it. However, the metric would nevertheless be invalid because a person's weight is not an accurate proxy for intelligence.

The validity of the torture standard requires accurate assessments at two distinct levels. First, at a general level, it requires judges to correctly identify the precise point at which pain becomes severe enough to amount to torture. Second, and more specifically, it requires judges to accurately ascertain the severity of pain or discomfort that a given interrogation tactic has caused or will cause a detainee.⁶⁶ Unfortunately, evaluations at each of these levels are impeded by psychological biases. First, due to self-serving biases and motivated reasoning, policy makers will be inclined to allow more painful interrogation tactics when their nations are experiencing

65. See COOK & CAMPBELL, *supra* note 18, at 37 (referring to "validity" as "the best available approximation to the truth or falsity of propositions").

66. See Jari Pirjola, *Shadows in Paradise—Exploring Non-Refoulement As an Open Concept*, 19 INT'L J. REFUGEE L. 639, 651 (2007) (characterizing this question as one that "remains open to interpretation").

political turmoil or paranoia. Second, empathic biases cloud judges' ability to correctly evaluate the level of pain provoked by a particular interrogation tactic.⁶⁷ The hot-to-cold empathy gap research suggests that judges will tendentiously underestimate a tactic's severity if they are not experiencing the type of pain that the tactic provokes.⁶⁸

Together, these psychological biases suggest that applications of the severity standard for torture are impacted by at least two factors that are unrelated to the severity of a tactic: the political situation in which an evaluation occurs and the evaluator's momentary visceral state. Insofar as the severity standard changes in response to factors that are not at all related to a treatment's severity, it is invalid.

A. *Self-Serving Biases and Motivated Inference in Evaluations of Interrogation Tactics*

In social psychology, the theory of "motivated inference" describes people's biased tendency to interpret information in a way that justifies their a priori preferred conclusion.⁶⁹ The theory suggests that, instead of always evaluating available information in a rational and objective manner, we often enter an analysis with a preferred conclusion and interpret or selectively favor information to support that conclusion.⁷⁰ This tendency is especially strong when we perceive that we would benefit personally from one potential conclusion, and psychologists refer to this predilection as the "self-serving bias."⁷¹ People tend to naturally discount information that threatens the things that they believe in or enjoy. In one study, for example, women were given information about the health risks of caffeine.⁷² The heavy caffeine users were significantly less convinced by the information than the light caffeine users.⁷³ These findings suggest that women who regularly enjoyed caffeine—who presumably valued caffeine more—were less motivated to believe that it was harmful than women who were less committed to caffeine use. Another study, which employed a mock-litigation scenario, found that

67. Nordgren et al., *supra* note 15, at 14 ("[P]eople who are not actively experiencing pain tend to underestimate its severity.").

68. See Nordgren et al., *supra* note 13, at 635–36.

69. Ziva Kunda, *Motivated Inference: Self-Serving Generation and Evaluation of Causal Theories*, 53 J. PERSONALITY & SOC. PSYCHOL. 636, 636 (1987).

70. *Id.*

71. See, e.g., Linda Babcock et al., *Biased Judgments of Fairness in Bargaining*, 85 AM. ECON. REV. 1337, 1337 (1995); Linda Babcock et al., *Creating Convergence: Debiasing Biased Litigants*, 22 LAW & SOC. INQUIRY 913, 914 (1997); Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11 J. ECON. PERSPECTIVES 109, 110 (1997); Kunda, *supra* note 69, at 636; George Loewenstein et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135, 140 (1993).

72. Kunda, *supra* note 69, at 642.

73. *Id.* at 644.

the self-serving bias encourages people to make optimistic predictions of fair settlement awards and the likely outcomes of their cases at trial.⁷⁴ Finally, a survey conducted shortly after 9/11 found that only 15 percent of the people in Arab countries reported believing reports that the attacks on the twin towers were committed by Arabs.⁷⁵ This result suggests that the respondents were motivated to discount information that implicated someone of their ethnicity in a terrorist crime.⁷⁶

Importantly, however, a favored conclusion does not necessarily have to be self-serving. For example, several empirical studies suggest that we are naturally motivated to find a person responsible for a crime if we believe that the person acted for immoral reasons⁷⁷ or possessed a bad moral character.⁷⁸ When in a heightened emotional state, e.g., of fear and anger, we are also more likely to arrive at, or accept, a particularly vivid, novel, or frightening interpretation of events, even if that interpretation is objectively unlikely.⁷⁹ Thus, people generally overestimate the likelihood that they will be injured in dramatic and frightening events like tornadoes, floods,⁸⁰ and terrorist attacks.⁸¹

When applied to interrogation, research on motivated reasoning and self-serving biases suggests that policy makers will have little difficulty in justifying, both to themselves and others, the use of more

74. See Loewenstein et al., *supra* note 71, at 145–53.

75. See Lawrence M. Solan, *Cognitive Foundations of the Impulse to Blame*, 68 BROOK. L. REV. 1003, 1021–22 (2003).

76. *Id.* at 1022.

77. Mark D. Alicke, *Culpable Causation*, 63 J. PERSONALITY & SOC. PSYCHOL. 368, 369–70 (1992); Mark D. Alicke, *Culpable Control and the Psychology of Blame*, 126 PSYCHOL. BULL. 556, 556 (2000).

78. Janice Nadler & Mary-Hunter Morris McDonnell, *The Psychology of Blame: Criminal Liability and the Role of Moral Character 2* (Dec. 21, 2010) (unpublished manuscript) (on file with authors).

79. See JEFFREY ROSEN, *THE NAKED CROWD: RECLAIMING SECURITY AND FREEDOM IN AN ANXIOUS AGE* 74 (2004) (“People believe that they are most likely to be victimized by the threats of which they are most afraid.”); Jules Lobel & George Loewenstein, *Emote Control: The Substitution of Symbol for Substance in Foreign Policy and International Law*, 80 CHI.-KENT L. REV. 1045, 1073 (2005) (suggesting that people typically “overreact[] to . . . problems . . . that are vividly described and easy to visualize”).

80. Paul Slovic et al., *Facts Versus Fears: Understanding Perceived Risk*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982).

81. See ROSEN, *supra* note 79, at 73 (providing survey results obtained shortly after 9/11 that indicated the average person believed that there was a 20 percent chance that they would be injured in a terrorist attack during the next year); see also Lobel & Loewenstein, *supra* note 79, at 1070 (“The problem of vivid, emotional miscalculation of risk is particularly acute in the antiterrorism context, since fear is a particularly strong emotion . . .”); Cass R. Sunstein, *Terrorism and Probability Neglect*, 26 J. RISK & UNCERTAINTY 121, 127–28 (2003) (“[T]he word ‘terrorism’ evokes vivid images of a disaster . . .”).

extreme tactics during periods of crisis.⁸² At such points, policy makers regularly argue that they have an interest in, and a justification for, identifying and implementing measures that, in times of calm, or if observed being implemented by others, they would find unacceptable.⁸³ The United States' activities after 9/11 illustrate this risk. Members of the George W. Bush Administration argued that, in light of the crucial importance of expediently procuring intelligence from detainees to combat the threat of terrorism, the United States had an interest in—and a justification for—utilizing the most extreme interrogation tactics that fall short of torture.⁸⁴ As Vice President Cheney remarked in a 2008 interview aired on NBC, more stringent interrogation tactics were needed because “We had to collect good first-rate intelligence about what was going on so we could prepare and defend against it.”⁸⁵ Indeed, in this tense and urgent political climate, Justice Department officials produced a remarkably narrow interpretation of the torture prohibition.⁸⁶ In one infamous document—now commonly referred to as the “Torture

82. Indeed, a number of distinguished scholars contend that it is proper for governments to respond to perceived threats by employing a cost-benefit analysis and, if needed, dramatically increasing the severity of interrogation practices to prevent a security breach. *See, e.g.*, ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* (2002); RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* 34 (2006); ERIC POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 5 (2007); John Yoo, *Using Force*, 71 U. CHI. L. REV. 729 (2004).

However, Professor Lobel, recognizing psychological tendencies to overestimate risks and interpret evidence in a way that confirms salient, feared conclusions, counters that governments may too readily jettison crucial legal rules in favor of ad hoc balancing in times of perceived crisis. *See* Jules Lobel, *The Preventive Paradigm and the Perils of Ad Hoc Balancing*, 91 MINN. L. REV. 1407, 1432–33 (2007). Because this Article engages with the prohibition of torture under the assumption that it is *absolute*, arguments that torture policies ought to be set with reference to a cost-benefit analysis are beyond the Article's present scope.

83. Alan Dershowitz demonstrates this phenomenon in his treatise on torture, wherein he argues that governments can justifiably resort to torture when placed in situations of extreme duress, such as when a detainee is aware of the location of a “ticking time bomb” that threatens the lives of innocent citizens. *See* DERSHOWITZ, *supra* note 82, at 132–63.

84. *See, e.g.*, *MSNBC Live* (NBC television broadcast Apr. 21, 2008) (arguing that Vice President Dick Cheney “defend[s] torture because it's effective” in combating the threat of terrorism).

85. *Id.* (quoting Vice President Dick Cheney) (adding “[a]nd that's what we did . . . It worked. It's [sic] been enormously valuable in terms of saving lives, preventing another mass casualty attack against the United States”).

86. *See Confirmation Hearing on the Nomination of Alberto R. Gonzales to Be Attorney General of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 534–37 (2005) [hereinafter *Gonzales Hearing*] (statement of Harold Hongju Koh, Dean, Yale Law School) (criticizing the memo as proffering “a definition of torture that would have exculpated Saddam Hussein”).

Memo”⁸⁷—Assistant Attorney General Jay Bybee concluded that “[p]hysical pain amounting to torture must be equivalent in intensity to pain accompanying serious physical injury, such as organ failure, impairment of bodily functions, or even death.”⁸⁸

Bybee’s narrow interpretation of the severity threshold for torture allowed the Administration to condone a number of enhanced interrogation tactics, including deprivation of sleep, food, and water; solitary confinement; and forced assumption of painful physical positions.⁸⁹ Some of the permitted tactics—such as the use of dogs to induce fear—seem more intuitively questionable than others. Waterboarding, the most controversial of the tactics, is especially difficult to defend because the United States previously argued in court that enemy soldiers who employed waterboarding committed war crimes.⁹⁰

More recently, the legal academy has vehemently denounced Bybee’s interpretation of the constraints established by the international torture prohibition.⁹¹ Harold Koh, former Dean of Yale Law School, called it the “most clearly legally erroneous opinion I have ever heard.”⁹² Although some scholars criticize the opinion as a product of etiolated ethics within the legal profession,⁹³ the memo also signals several signs of motivated reasoning. Bybee repeatedly and selectively emphasizes the importance and relevance of information that supports the conclusion that enhanced tactics are permitted, while he synchronously discounts or ignores information that does not support that conclusion. For example, as noted by Jeremy Waldron, Bybee highlights the *Ireland v. United Kingdom* holding that several enhanced interrogation techniques were not

87. See, e.g., Stephen Gillers, *The Torture Memo*, THE NATION, Apr. 9, 2008, available at <http://www.thenation.com/print/article/torture-memo>.

88. Bybee Memorandum, *supra* note 7, at 171. The severity standard put forward in the Bybee Memorandum was explicitly rejected by the ICTY in *Prosecutor v. Brđanin*, Case No. IT-99-36, Appeals Chamber Decision, ¶ 249 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 3, 2007). When he replaced Jay Bybee in the Office of Legal Counsel, Jack Goldsmith retracted the Bybee Memorandum’s opinion about how the severity standard should be interpreted. See Gillers, *supra* note 87.

89. See Arbour, *supra* note 30 (arguing that the ban on torture has come “under attack” in the midst of the modern “war on terror”).

90. Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 COLUM. J. TRANSNAT’L L. 468, 472 (2007).

91. For a partial catalogue of the criticism received by the opinion, see Michael Traynor, Senior Counsel, Cooley Godward LLP, Address for the Sixteenth Thomas E. Fairchild Lecture: Citizenship in a Time of Repression (Apr. 23, 2004), in 2005 WIS. L. REV. 1, 5 (2005).

92. *Gonzales Hearing*, *supra* note 86, at 536.

93. See, e.g., Burt Neuborne et al., *Torture: The Road to Abu Ghraib and Beyond*, in THE TORTURE DEBATE IN AMERICA, 13–14 (Karen Greenberg ed., 2006) (warning that the Bybee Memorandum is indicative of more deep-seeded ethical flaws in the American bar, resulting in too many U.S. lawyers approaching policy advice as though it were advocacy).

torture, but he fails to mention that these tactics nonetheless “were and are *absolutely* prohibited under the ECHR” as cruel and inhuman treatments.⁹⁴ Perhaps most indicative of motivated reasoning, Bybee inexplicably grounds his definition of the severity attendant to torture on a somewhat obscure—and arguably irrelevant—medical administration statute.⁹⁵ As motivated reasoning theory would predict, Bybee recognized the medical statute as important and relevant because it allowed him to reach his preferred conclusion: that enhanced interrogation tactics are fully and freely permitted.

The loose interpretation of the torture prohibition in times of national emergency is not limited to the United States or to the current “war on terror.” Professor Jules Lobel presents evidence of the general tendency for security policies to become more aggressive—under the banner of preventive necessity—in times of perceived national crisis.⁹⁶ Such times test the mettle of the torture prohibition because, though the prohibition was initially crafted to limit the severity of state interrogation policies,⁹⁷ states under duress are incentivized to push the limits in their interrogation policies.⁹⁸ Most international torture jurisprudence heralds from countries that were, at the time, plagued with prolonged periods of war and tenuous security, as occurred in Northern Ireland, bombarded with attacks from the IRA;⁹⁹ Israel after a series of lethal terrorist attacks;¹⁰⁰ and the war-battered Balkan states in the 1990s.¹⁰¹ Policies of increased

94. Waldron, *supra* note 7, at 1706.

95. Waldron criticizes Bybee’s

strange assumption that a term like “severe pain” takes no color from its context or from the particular purpose of the provision in which it is found, but that it *unproblematically means the same* in a medical administration statute . . . as it does in an anti-torture statute

Id. at 1706.

96. Lobel & Loewenstein, *supra* note 79, at 1071–82.

97. Waldron, *supra* note 7, at 1700 (“[T]he prohibition on torture is intended mainly as a constraint on state policy . . .”).

98. See, e.g., Lobel & Loewenstein, *supra* note 79, at 1068 (suggesting that nations often resort to proactive, coercive prevention when an international threat is perceived). Some commentators contend that it is proper for governments to respond to perceived security breaches with dramatically increased interrogation policies. POSNER & VERMEULE, *supra* note 82, at 273. However, drawing on psychological tendencies to overestimate risks and interpret evidence in a way that confirms salient, feared conclusions, other commentators have countered that governments may too readily jettison crucial legal rules in favor of ad hoc balancing in times of perceived crisis. Lobel & Loewenstein, *supra* note 79, at 1068.

99. See, e.g., Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) (1978).

100. See HCJ 5100/94 Pub. Comm. Against Torture v. Israel 53(4) PD 817, ¶ 1 [1999] (Isr.) (reporting that terrorist attacks had recently killed 121 Israeli citizens).

101. The “mass atrocities”—including war crimes and genocide—that took place in the former Yugoslavia during this decade prompted the UN to create the ICTY. *About the ICTY*, ICTY.ORG, <http://www.icty.org/sections/AbouttheICTY> (last visited Jan. 1, 2011).

severity can affect citizens as well as foreign nationals, as evidenced by the infamous forced removal of Japanese-Americans to internment camps during World War II.¹⁰² Importantly, however, regardless of whether interrogation practices appear, in retrospect, to be clearly prohibited, countries and administrations regularly claim that, at the time, they did not believe the tactics to be torture. This trend suggests that perceived national security threats affect not only the interrogation tactics employed, but also the interpretation and application of the definition of torture. Although motivated reasoning does not directly threaten an administration's ability to establish a bright line to define torture, it does suggest that countries are inclined to shift the bright line to narrow the definition of torture when facing a national threat. The torture prohibition is intended to be absolute,¹⁰³ and its boundaries should not be affected by security concerns. However, motivated reasoning when facing security threats may lead to motivated re-definition of torture, rendering the prohibition less absolute than intended. Thus, motivated reasoning in the face of security threats represents one potential systematic bias that threatens the validity of the torture standard.

B. *The Hot-to-Cold Empathy Bias in Evaluations of Interrogation Tactics*

The validity of the torture standard also depends on the accuracy with which courts and policy makers can determine the severity of pain or discomfort that a particular interrogation tactic provokes. Unfortunately, psychological research suggests that humans are extremely ill-equipped to make this judgment. Over the past fifteen years, psychologists have amassed significant evidence that people exhibit a "cold-to-hot empathy gap": a tendency for people in a cold, unemotional state to underestimate the influence that a hot, emotional state will have on their preferences and behavior.¹⁰⁴ Empirical evidence of empathy gap effects has been found across a variety of emotional states, including sexual arousal,¹⁰⁵ hunger,¹⁰⁶

102. See, e.g., David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 989–97 (2002). For a discussion of other instances when the United States has abused its citizens' civil liberties in times of emergencies, see David Cole, *No Reason to Believe: Radical Skepticism, Emergency Power, and Constitutional Constraint*, 75 U. CHI. L. REV. 1329, 1329 (2008).

103. See *supra* text accompanying note 30.

104. Loewenstein, *supra* note 13, at 272. For a specific discussion of how the phenomenon relates to the torture context, see *id.* at 283.

105. See, e.g., Dan Ariely & George Loewenstein, *The Heat of the Moment: The Effect of Sexual Arousal on Sexual Decision Making*, 19 J. BEHAV. DECISION MAKING 87 (2006); George Loewenstein et al., *The Effect of Sexual Arousal on Prediction of Sexual Forcefulness*, 32 J. RES. IN CRIME & DELINQ. 443 (1997); Nordgren et al., *supra* note 13, at 638.

fear,¹⁰⁷ and drug craving.¹⁰⁸ For instance, in one of a series of studies on the fear of embarrassment, researchers asked students in a class whether they would be willing, in one week's time, to perform an embarrassing mime in front of their classmates for a small amount of money.¹⁰⁹ Based on the empathy gap, the researchers predicted that the students, a week removed from the event, would not appreciate just how embarrassing it would be to mime in front of their classmates.¹¹⁰ A week later, the students who indicated that they would be willing to perform the mime were given the opportunity to do so.¹¹¹ In line with their prediction, the researchers found that the number of students who were willing to actually perform the mime was far smaller than the number of students who, a week before, had predicted that they would perform the mime.¹¹² Moreover, as the empathy gap would suggest, when students were shown a scary film clip prior to making the decision, they were less likely to volunteer to mime one week later.¹¹³ This result suggests that the students who were feeling some degree of fear were better able to understand the stage fright that would attend the future mime performance.¹¹⁴

Empathy gap effects have also been demonstrated for physical pain, the emotional state most relevant to interrogation methods. Medical literature, for example, has consistently found that physicians underestimate the severity of their patients' pain.¹¹⁵

106. Loran Nordgren et al., *The Restraint Bias: How the Illusion of Self-Restraint Promotes Impulsive Behavior*, PSYCHOL. SCI. (forthcoming).

107. Leaf Van Boven et al., *The Illusion of Courage in Social Predictions: Underestimating the Impact of Fear of Embarrassment on Other People*, 96 ORG. BEHAV. & HUM. DECISION PROCESSES 130, 130 (2005).

108. Michael A. Sayette et al., *Exploring the Cold-to-Hot Empathy Gap in Smokers*, 19 PSYCHOL. SCI. 926 (2008).

109. Van Boven et al., *supra* note 107, at 133.

110. *Id.*

111. *Id.*

112. *Id.* at 134.

113. See George Loewenstein, *Hot-Cold Empathy Gaps and Medical Decision Making*, 24 HEALTH PSYCHOL. S49, S51 (2005); see also Leaf Van Boven et al., *The Illusion of Courage in Self-Predictions: Mispredicting One's Own Behavior in Embarrassing Situations*, J. BEHAV. DECISION MAKING (July 2010), <http://onlinelibrary.wiley.com/doi/10.1002/bdm.706/full> (noting similar results when students were asked, after being shown a clip from a scary movie, if they would tell a funny story in front of a class in five days time for \$2).

114. See Loewenstein, *supra* note 113, at S51 (recognizing that "the difference between anticipated and actual performing is diminished by showing students an emotionally arousing movie before they make their initial decision"); see also Van Boven et al., *supra* note 113 (noting that people who were exposed to the scary film clip failed to exhibit the "illusion of courage" present in the control group).

115. See, e.g., M. Hodgkins et al., *Comparing Patients' and Their Physicians' Assessments of Pain*, 23 PAIN 273 (1985); Judith Kappesser et al., *Testing Two Accounts of Pain Underestimation*, 124 PAIN 109 (2006); Laetitia Marquié et al., *Emergency Physicians' Pain Judgments: Cluster Analyses on Scenarios of Acute Abdominal Pain*,

There is also evidence that patients underestimate the severity of upcoming medical procedures. For example, one study found that the majority of pregnant women who intended to go without anesthesia during childbirth reversed their decisions once they went into labor.¹¹⁶ This reversal suggests that they had initially underestimated the intensity of the pain of childbirth.¹¹⁷

In one laboratory study, participants were asked whether they would be willing to undergo pain in exchange for monetary compensation.¹¹⁸ Some participants experienced a sample of the pain while they made their decision, whereas other participants experienced the sample pain one week before they made their decision (and thus made their decision pain-free).¹¹⁹ Consistent with the cold-to-hot empathy gap, participants who experienced the pain while they made their decision demanded higher compensation than those who experienced the pain just one week earlier.¹²⁰

Another experiment used pain to hinder participants' performances on a memory test.¹²¹ Later on, participants were asked to indicate how the pain and various other factors impacted their performance.¹²² The researchers found that participants who made their attributions in a pain-free state underestimated the influence that pain had on their performance, whereas participants who made their attributions while experiencing pain accurately assessed its influence.¹²³

Although the majority of research on the hot-cold empathy gap has focused on the effects of emotional states on judgments and behaviors, the theoretical explanation for the bias is rooted in a chronic inability to accurately and abstractly conceive of what the immediate experience of a visceral state entails. The empathy gap exists because much of sensory experience cannot be freely and fully recollected, making it difficult to objectively imagine what it would be like to experience an aversive state.¹²⁴ Although people can generally recall the root and relative force of a visceral drive, they are unable to summon the more compelling sensational aspects that accompanied

16 QUALITY OF LIFE RES. 1267 (2006); C. Pasero & M. McCaffery, *The Undertreatment of Pain*, 101 AM. J. NURSING 62 (2001).

116. Jay J.J. Christensen-Szalanski, *Discount Functions and the Measurement of Patients' Values: Women's Decisions During Childbirth*, 4 MED. DECISION MAKING 47, 47 (1984).

117. *Id.*

118. D. Read & George Loewenstein, *Enduring Pain for Money: Decisions Based on the Perception and Memory of Pain*, 12 J. BEHAV. DECISION MAKING 1, 1 (1999).

119. *Id.* at 7.

120. *Id.* at 11.

121. Nordgren et al., *supra* note 13, at 638.

122. *Id.*

123. *Id.* at 639.

124. *See* Loewenstein, *supra* note 13, at 282-83.

the experience.¹²⁵ Therefore, in attempts to conjure up the experience of a hot state when one is not in such a state, visceral states are only available as simulacrum, stripped of the full panoply of physical and neural fervor that accompanies the experience of a hot state “in the heat of the moment.” Professor Stephen Morley, an expert in the area, corroborates this argument, as applied to pain, by concluding that it is extremely rare for subjects’ memories of pain to involve any actual re-experience of the pain.¹²⁶ Rather, Morley contends, pain memories generally consist only of a recognition that some abstract pain once occurred.¹²⁷ This suggests that we are prone to a predictable inability to appreciate the intensity of painful events that we are not currently experiencing.

This psychological impediment may encourage torture by leading people to judge severe enhanced interrogation practices to be morally or legally acceptable. This may be especially true for enhanced interrogation tactics—such as sleep deprivation, stress positions, exposure to cold, and waterboarding—that do not involve conspicuous brutality or observable physical injury.

In a series of recent experiments designed to directly address this issue, we asked participants to evaluate three common interrogation techniques: exposure to cold temperatures, sleep deprivation, and solitary confinement.¹²⁸ We selected these specific practices because they represent three of the most internationally ubiquitous enhanced interrogation tactics employed in the modern era. The active use of sleep deprivation and cold exposure has been frequently documented in recent global conflicts, including in the treatment of Tibetan prisoners in China,¹²⁹ Palestinian detainees in Israel,¹³⁰ U.S. prisoners of war detained by the troops of Saddam Hussein,¹³¹ and, most recently, alleged terrorists confined at the U.S. military facilities in Guantanamo Bay.¹³² Solitary confinement is

125. *Id.*

126. Stephen Morley, *Vivid Memory for “Everyday” Pains*, 55 PAIN 55, 55 (1993).

127. *Id.*

128. See Nordgren et al., *supra* note 15.

129. *Choezom v. Mukasey*, No. 08–0870, 2008 WL 4898685, at *81 (2d Cir. Nov. 14, 2008) (discussing a State Department report that described how Tibetans were tortured by the Chinese by being “expos[ed] to cold”).

130. See Barak Cohen, *Democracy and the Mis-Rule of Law: The Israeli Legal System’s Failure to Prevent Torture in the Occupied Territories*, 12 IND. INT’L & COMP. L. REV. 75, 85 (2001).

131. *Acee v. Republic of Iraq*, 271 F. Supp. 2d 179, 218 (D.D.C. 2003) (relaying how prisoners of war were subjected to “excruciating physical and mental torture” including “severe sleep deprivation” and “intense cold”), *vacated*, 370 F.3d 41 (D.C. Cir. 2009).

132. See, e.g., Bob Woodward, *Detainee Tortured, Says U.S. Official: Trial Overseer Cites ‘Abusive’ Methods Against 9/11 Suspect*, WASH. POST, Jan. 14, 2009, at A01.

used in military interrogations, but it is also extensively practiced by domestic police and civilian detention centers.¹³³

In the experiments, subjects were presented with a vignette describing one of the tactics¹³⁴ and were asked to provide an assessment of: (i) the level of pain or discomfort induced by the tactic; (ii) the ethicality of the tactic; and (iii) whether the tactic should be categorized as questioning, interrogation, oppressive interrogation, or torture.¹³⁵ To test whether an empathy gap affected these judgments, some participants made the judgments without actually experiencing the distress of the interrogation tactic, whereas other participants made the judgments while experiencing a mild version of the pain produced by the tactic (i.e., fatigue, social exclusion, or coldness).

133. For a thoughtful discussion of whether domestic solitary confinement may approach the status of a cruel and unusual punishment, see Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. PA. J. CONST. L. 115 (2008).

134. All experimental forms are on file with the authors. An example of one of the vignettes extracted from the experiment materials provides:

A female university student in her mid-twenties is reported missing from her public university. Within twenty-four hours, her family receives a note stating that the student is being held hostage until a ransom is paid. During the course of the investigation, police search the homes of four suspects who were most recently seen with the student before her disappearance. While searching suspect John James' home, the police find evidence including the missing student's purse and cell phone. The police bring James in for questioning.

James is initially unwilling to answer any questions the police ask, but the officers believe that it is crucial to the victim's safety that they extract information from James. They decide to deprive James of sleep to make him more willing to share information with them. Sleep deprivation is a common technique used in such interrogations because it doesn't involve physical aggression but is still highly effective.

The police kept James awake for 48 straight hours. They used three tactics to keep him awake that long. (1) Constant interaction: a police officer was always in the room asking him questions. (2) Stimulants: The police encouraged (but did not force) James to drink caffeinated drinks. (3) Noise and Lights: When the interaction and stimulants began to fail, the police used bright lights and loud music to disrupt his sleep.

135. Participants were provided the following definitions of the four categories:

1. Questioning: i.e., the method is always acceptable for government officials to use.
2. Interrogation: i.e., the method is acceptable for the government to use whenever they have probable cause to believe that a suspect has information pertinent to a crime.
3. Oppressive Interrogation: i.e., only acceptable for the government to use when necessary to avoid imminent harm in the most extreme circumstances.
4. Torture: i.e., this is an unacceptable method for the government to use in any circumstance.

We found statistically significant evidence that the empathy gap biased the participants' evaluations of all three interrogation tactics. First, the empathy gap affected their severity assessments: participants in a cold (i.e., pain free) state underestimated the severity of each interrogation tactic compared to participants who were directly experiencing pain. Second, the empathy gap affected participants' normative assessments: those who were not experiencing any pain assessed the tactics as more ethical than those who were actively experiencing pain. Finally, the empathy gap affected the categorical assessments of participants: participants in a cold state were more likely than participants who were experiencing pain to categorize the tactic as legally acceptable interrogation (as opposed to unlawful torture).

In these first three studies, we demonstrated a discrepancy between the evaluations of interrogation tactics made by those who were and were not experiencing the visceral state induced by the tactic. However, it remained unclear whether those in a neutral state or those in a hot state were more accurate, as compared to the evaluations of people actually experiencing a tactic. To test this, we ran a fourth study on exposure to cold temperatures. This experiment included an ice water and a warm water condition, as before, but we additionally included a condition in which some participants actually experienced the tactic. We had participants in the actual experience condition stand outside without a coat in below-freezing weather while they evaluated the tactic's severity. We then compared these participants' evaluations with those collected from participants in the ice water and the neutral condition. Here, we found that participants in the actual experience and ice water conditions rated the tactic as significantly more severe than participants in the neutral condition. However, the evaluations of participants in the actual experience and the cold-water condition did not significantly differ from each other. This suggests that the experience of a slight version of the visceral state induced by a tactic actually improves the accuracy of judgments about the tactic's severity.

In short, this series of experiments provides robust evidence that our ability to recognize torture is much more psychologically complex than simply "knowing it when you see it." The findings suggest that empathy gaps for physical and psychological pain undermine our ability to objectively evaluate interrogation practices. People simply cannot appreciate the severity of interrogation practices that they themselves are not experiencing—a psychological constraint that in effect encourages an underinclusive understanding of torture. By underestimating the pain of enhanced interrogation, people may perceive objectively torturous practices to be morally or legally acceptable.

Other, more anecdotal evidence supports the empathy gap's sobering effects on evaluations of enhanced tactics. In one famous example, at the bottom of a Justice Department memo in which the use of a stress position involving prolonged standing is described, then-Secretary of Defense Donald Rumsfeld wrote, "I stand for 8-10 hours a day. Why is standing limited to 4 hours?"¹³⁶ Also, on two separate occasions, members of the media—Chicago radio personality Eric "Mancow" Muller and Vanity Fair writer Christopher Hitchens—voluntarily underwent waterboarding in an effort to garner first-hand proof that the tactic does not amount to torture.¹³⁷ Mancow claimed that he initially felt that he would "laugh [waterboarding] off."¹³⁸ On both occasions, the participant's opinion of the tactic was completely altered by the experience. As Mancow admitted afterwards, "it is way worse than I thought it would be . . . and I don't want to say this: absolutely torture."¹³⁹ Hitchens confessed to being haunted by the experience for months afterward, professing that "if waterboarding does not constitute torture, then there is no such thing as torture."¹⁴⁰

A last important aspect of the empathy gap phenomenon is that past experience with pain (or any other emotional state) does not help to bridge the hot-cold empathy gap. For example, in one experiment that we conducted, one group of participants was exposed to pain before, but not during, their evaluation of an interrogation tactic. We found that prior experience with pain did not help people overcome the empathy gap—they had to be actively experiencing pain in order to understand its full severity. This is an important point because one might argue that if policy makers have, at some point in time, experienced the methods that they use in their training, they should have a more objective understanding of pain severity. Yet this is not the case. In fact, in several experiments, we have documented counterintuitive evidence that past experience actually widens the empathy gap because it gives people the false impression that if they managed to endure it, it must not be that bad. Therefore, past experience with an interrogation technique does not mitigate the problems of the empathy gap.

As a practical matter, our empathy gap findings emphasize the innate subjectivity of torture; purely "objective" evaluations that are removed from emotion and visceral experience tend to produce

136. Tom Malinowski, *The Logic of Torture*, WASH. POST, June 27, 2007, at B7.

137. Ryan Pollyea, *Mancow Waterboarded, Admits It's Torture*, NBC CHICAGO (May 22, 2009), <http://www.nbcchicago.com/news/local-beat/Mancow-Takes-on-Waterboarding-and-Loses.html>.

138. *Id.*

139. *Id.*

140. Christopher Hitchens, *Believe Me, It's Torture*, VANITY FAIR, Aug. 2008, at 70.

inherently biased underestimations of the severity of interrogation tactics. This weighs against the strictly objective conception of torture currently endorsed by the United States, which attempts to shift the focus of torture inquiries away from the subjective suffering of the victims by concentrating on the intent and conduct of the interrogators.¹⁴¹ In an understanding released contemporaneously with its ratification of the CAT, the United States provided the caveat that its interpretation of a torturous act required the act to have been “*specifically intended* to inflict severe physical or mental pain or suffering.”¹⁴² Therefore, under this definition, severe mental pain or suffering is insufficient; the interrogator must intend to torture the victim. However, the empathy gap in torture evaluations counsels against the intent requirement. Indeed, our findings suggest that it is extremely likely that interrogators who are not experiencing the pain or distress first-hand never truly understand the severity of their actions.¹⁴³

In our research, we find that the momentary visceral state of an evaluator—a variable wholly unrelated to the severity of interrogation tactics—systematically biases evaluations of the severity of interrogation tactics. Thus, our research provides more evidence of the invalidity of the severity standard as a construct for delineating a bright line between torture and lesser treatments. Together with the difficulty of achieving inter-rater reliability,¹⁴⁴ the potential biasing effects of situation-driven motivated inferences and the empathy gap suggest that the severity standard is both unreliable and invalid. In Part III, we discuss the practical implications of our argument, focusing on the question of what the inability to define a bright line means for torture policy more generally.

141. See *Convention Against Torture Hearing*, *supra* note 11, at 18 (casting torture as “conduct calculated to generate severe and prolonged mental suffering of the type which can properly be viewed as rising to the level of torture”).

142. 136 CONG. REC. S17,486 (daily ed. Oct. 27, 1990). This standard has been criticized extensively by academics. See Renee C. Redman, *Defining “Torture”: The Collateral Effect on Immigration Law of the Attorney General’s Narrow Interpretation of “Specifically Intended” When Applied to United States Interrogators*, 62 N.Y.U. ANN. SURV. AM. L. 465 (2007).

143. In fact, others have argued that professional interrogators may be especially prone to the empathy gap. See Luban, *supra* note 62, at 1446–47 (remarking that interrogators who complete training for their craft are often “inured to levels of violence and pain that would make ordinary people vomit at the sight”).

144. See *supra* text accompanying notes 28–29.

PART III: HONING CLOSE OR STEERING CLEAR: THE IMPORTANCE
OF A BRIGHT LINE IN REFERENCE TO A PROHIBITION

The impossibility of accurately discerning a bright line between torture and enhanced interrogation rebuts the argument that torture is something that “we know when we see.”

This has important implications for the way that we think about and construct torture policy. The search for a bright line between what is prohibited and what is permitted is itself an important indicator of a particular underlying approach: it implies an interest in knowing the borderline of acceptable action, most often with the purpose of approaching it.¹⁴⁵ In arguing for the inappropriateness of policies that seek to establish and approach the bright line that defines torture, this Part employs Jeremy Waldron’s distinction between a *malum in se* and a *malum prohibitum* interpretation of the torture prohibition.¹⁴⁶ A *malum in se* approach is properly applied to a prohibition—such as the prohibition against rape—that codifies an absolute wrong.¹⁴⁷ Legal codification of such prohibitions is intended to “articulate this sense of wrongness and fill in the details to make that sense of wrongness administrable.”¹⁴⁸ However, if some act is not explicitly prohibited by codified law, it does not necessarily follow that the act is permitted, and it certainly does not follow that the act is endorsed. For example, it would be grossly misguided to apply strict textualism to a rape statute and assume that anything not expressly prohibited is therefore freely permitted or even encouraged. It would be repugnant for a person to consciously structure their romantic interactions to hew as close as possible to the line demarcating rape, and such an individual would not be seen as blameless even if that person never crossed the line. Setting policy with reference to a *malum in se* interpretation of a prohibition does not, therefore, end with a determination of the “bright line” that defines what is prohibited.¹⁴⁹

145. See Waldron, *supra* note 7, at 1699, 1701.

146. *Jordan v. De George*, 341 U.S. 223, 236–37 (1951); Waldron, *supra* note 7, at 1692 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 379 n.21 (1985)).

147. See Waldron, *supra* note 7, at 1691 (“So, for example, a statute prohibiting murder characteristically does not make unlawful what was previously permissible; it simply expresses more clearly the unlawfulness of something which was impermissible all along.”).

148. *Id.*

149. At minimum, a *malum in se* approach would suggest a requirement that policy makers obtain hard evidence that any tactics they employ are more efficacious than less extreme tactics, in addition to being justified under the circumstances. Whereas a debate about the efficacy of extreme interrogation policies is outside the purview of this Article, there is certainly no consensus that they are effective. For an

A *malum prohibitum* approach, in contrast, is appropriately applied to a prohibition that involves something that is only wrong insofar as it is formally prohibited.¹⁵⁰ If an action is not explicitly mentioned or addressed in the prohibition, it is permitted.¹⁵¹ We tend to approach taxes in this way: if some type of asset is not expressly taxed by the tax code, then we can assume that it is not wrong to refrain from paying taxes on it. In contrast to potential rapists, tax payers are expected to shade their economic activities as close as possible to the legal limit, without crossing it, and those who do so are seen as savvy rather than repulsive.

Therefore, a *malum prohibitum* approach to interrogation policy would mean that people could consult legal instruments to determine the point at which tactics become severe enough to amount to torture. Then, they could infer that any tactics falling below that threshold are fair game for interrogators. They can tiptoe, with impunity, as close to the line as they like, so long as they do not cross it. Indeed, for purposes of intelligence gathering, we have an interest in structuring policies with the ultimate goal of approaching the line without crossing it. Under a *malum prohibitum* interpretation, therefore, a precise definition of the threshold—in the present case, the “bright line” between torture and everything else—is critically important for setting policy.

The U.S. interrogation policy under the George W. Bush Administration seemed to follow the *malum prohibitum* approach. Members of the Administration who were in charge of interrogation policy claimed that the risks posed by terrorism were so severe that the United States had an interest in employing the most extreme tactics possible without crossing the line into torture—in getting *as close* to torture as possible.¹⁵² Indeed, the emergence of the category of “enhanced” interrogation tactics is indicative of a *malum prohibitum* approach. Active public debate about the appropriateness of these ambiguous interrogation tactics did not begin until after they had been in widespread use for a number of years. In mid-2004, the

introduction to the intricacies of that debate, see *Convention on ‘Enhanced’ Interrogation*, *supra* note 10.

150. Waldron, *supra* note 7, at 1692.

151. *Id.*

152. Bradford Berenson, one of the White House lawyers involved in decisions about how the Administration should respond to 9/11, says of the days immediately following 9/11:

There were thousands of bereaved American families. Everyone was expecting additional attacks. . . . Preventing another attack should always be within the law. But if you have to err on the side of being too aggressive or not aggressive enough, you’d err by being too aggressive.

Jane Mayer, *The Hidden Power: The Legal Mind Behind the White House’s War on Terror*, NEW YORKER, July 2006, at 44.

CIA announced its plans to suspend, pending legal review, a wide range of these tactics that had been previously employed against detainees suspected of involvement with al-Qaida.¹⁵³ Crucially, the impetus for the sudden suspension of enhanced tactics was an effort to confirm their legality, or, more specifically, to garner a legal opinion about whether or not each tactic should be categorized as torture.¹⁵⁴ This approach implies an underlying assumption that if a tactic is legal, then it is permitted; once a bright line was established, then the United States could continue on with any interrogation methods that did not transgress the line. The established bright line, in effect, would define the policy. Former Vice President Cheney's more recent rhetoric in defense of the use of enhanced tactics betrays a similar assumption: "[In choosing interrogation practices,] we proceeded very cautiously. We checked. We had the Justice Department issue the requisite opinions in order to know where the bright lines were that you could not cross."¹⁵⁵

Professor Waldron is correct that a *malum prohibitum* approach to the torture prohibition is misguided.¹⁵⁶ There are a number of reasons why we should not treat torture like taxes. First, a *malum prohibitum* approach seems contrary to the intent of the covenants and treaties that form the prohibition: it is facially obvious that these treaties are not written like the tax code. They do not attempt to provide an explicit or detailed account of what torture is. Indeed, neither the Geneva Conventions nor the ICCPR attempt to proffer any definition for torture, let alone an all-encompassing one.¹⁵⁷ Further, the CAT expressly provides that "cruel, inhuman or degrading" offenses—those just less severe than torture on a scale of severity—are not permissible.¹⁵⁸ In *Ireland v. United Kingdom*, for example, although the Court held that the five interrogation tactics in question¹⁵⁹ did not amount to torture, it nevertheless ultimately found that the tactics were prohibited by virtue of being cruel,

153. See Dana Priest, *CIA Puts Harsh Tactics on Hold; Memo on Methods of Interrogation Had Wide Review*, WASH. POST, June 27, 2004, at A1 (confirming these techniques had been "used to elicit intelligence from al Qaeda leaders such as Abu Zubaida and Khalid Sheik Mohammed").

154. *Id.* (quoting a former CIA officer's claim that the interrogations had been put on hold "until we can sort out whether we are sure we're on legal ground"); see also *World News: Cheney Defends Hard Line Tactics* (ABC television broadcast Dec. 16, 2008) [hereinafter *World News*], available at <http://abcnews.go.com/Politics/story?id=6464697&page=1> (including an interview with former Vice President Dick Cheney who claims that the Administration "wouldn't do [any interrogation tactic] without making certain it was authorized and that it was legal").

155. *World News*, *supra* note 154.

156. Waldron, *supra* note 7, at 1692–93 (arguing that torture is not properly conceived as a *malum prohibitum*).

157. See *supra* notes 4–5 and accompanying text.

158. See CAT, *supra* note 3, art. 16.

159. See *supra* note 56 and accompanying text.

inhuman, and degrading.¹⁶⁰ This result suggests that the line between torture and cruel or inhuman treatments may be more symbolic than substantive.

Second, a *malum prohibitum* approach risks quickly becoming outdated or insufficient unless statutory constructions can be easily revisited and reformed to reflect changes in social understandings or the emergence of new activities that are outside the purview of the original prohibitive instrument. This is, of course, true of the tax code; the tax code changes every year to reflect changes in things like demographics, the economy, and the emergence of new classifications of income. It quickly would become outdated if it did not evolve with the population. However, adaptive celerity is certainly not a trait of the torture prohibition; it would be prohibitively difficult and costly to hold massive international conventions whenever new interrogation tactics are developed.

Third—and most closely connected to our own research—a *malum prohibitum* approach is only valid to the extent that a bright line between torture and enhanced interrogation can be accurately drawn. If, as we have argued, people are naturally motivated to draw the bright line too high, efforts to approach the bright line face an imminent risk of crossing it. This risk escalates in times of crisis, when, as discussed above, administrators are especially psychologically motivated to narrowly construe torture.¹⁶¹ These are, unfortunately, exactly the times when the bright line is most likely to matter.

PART IV: CONCLUSION

This Article demonstrates the multifaceted challenges obstructing the demarcation of a bright line between torture and enhanced interrogation. The severity standard currently used to distinguish between torture and less extreme techniques does not lend itself to a viable search for a bright line. In evaluating the quality of any attempt to draw a bright line definition of torture under the current standard, we have considered its reliability and validity. Reliability indicates the degree to which the measure yields consistent results over time and across different judges. Validity indicates the degree to which the measure yields results that are meaningful and accurate.

In purportedly classifying types of interrogation that do or do not constitute torture, the severity test lacks both reliability and validity. The divergent jurisprudence addressed in our comparative case

160. 25 Eur. Ct. H.R. (ser. A) (1978).

161. See *supra* Part II.

analysis demonstrates the practical difficulties of using existing standards to “know torture when we see it.” There is marked variation in the way that different jurisdictions define and apply the torture standard, suggesting low inter-rater reliability. Further, psychological research on judgments and decision making suggests that torture evaluations are influenced by two systematic biases, which involve the evaluator’s political situation and his momentary visceral state. The self-serving bias and the phenomenon of motivated reasoning suggest that people are naturally inclined to narrowly define torture in times of political distress. In addition, our own recent experimental studies provide robust evidence that the empathy gap affects evaluations of enhanced interrogation tactics. We found that a person’s evaluations of enhanced interrogation tactics are affected by their immediate visceral proximity to the experiences attendant to the tactic. People who are experiencing a state that is induced by a tactic tend to judge the tactic as less ethical and more severe than people who are not experiencing the state. We also found evidence that the empathy gap affects what people define as torture: when people are experiencing a visceral state induced by a tactic, they are more likely to classify that tactic as torture. Our research suggests that evaluators who are not experiencing the type of pain or discomfort attendant to an interrogation tactic have difficulty understanding the tactic’s severity.

Admittedly, the social psychological research contained in this Article does not answer the question of precisely where the line should be drawn between torture and cruel or inhuman treatments. Instead, social psychology suggests that the line is much more difficult to determine than likely assumed, and the line tends to be drawn in an underinclusive way, especially in times of political distress. Whether or not we recognize something as torture changes depending on the situation and visceral state in which we make our evaluation. This bright line is, therefore, both blurry and inconsistent. Lacking a reliable bright line to consult, a *malum prohibitum* interpretation of the torture prohibition is misguided and likely to result in transgressions.

Ultimately, it is our hope that knowledge of the self-serving bias and the hot–cold empathy gap—and the attendant potential for a systematically underinclusive conception of torture—may lead to more consistent interrogation policies and informed discussions about what torture is and what metrics we should rely on (or not rely on) to recognize it. In light of the inclination to too narrowly construe the torture prohibition, we need to begin researching and enforcing institutional and administrative checks and balances to protect the prohibition from being transgressed during periods of political distress. Such an endeavor is especially urgent because of the growing popularity of subtler physical and psychological interrogation tactics, the severity of which evaluators are especially likely to

underestimate.¹⁶² As contended by Judge O'Donoghue, a dissenting voice in *Ireland v. United Kingdom*, "One is not bound to regard torture as only present in a mediaeval dungeon where the appliances of rack and thumbscrew or similar devices were employed."¹⁶³

Several recent developments in international torture law and policy prognosticate a potential movement toward a more inclusive definition of torture in jurisdictions that previously have adopted relatively conservative torture definitions. For example, the ECHR acknowledged an "increasingly high standard being required in the area of the protection of human rights and fundamental liberties . . . [which calls for] greater firmness in assessing breaches of the fundamental values of democratic societies."¹⁶⁴ In the United States, too, government officials are revisiting and reevaluating the country's interrogation policies. Shortly after taking office, President Obama banned the CIA's use of interrogation treatments that are not also permitted by the U.S. military and ordered that even unlawful combatants would be treated in compliance with Common Article 3 of the Geneva Convention.¹⁶⁵ Given the innate psychological tendency to under evaluate the concept of torture and the severity of interrogation tactics, our findings support a movement toward more conservative interrogation policies and a more comprehensive jurisprudential definition of torture.

162. See, e.g., AMNESTY INT'L, *supra* note 47, at 15; Yarwood, *supra* note 34, at 326 ("Even where there is consensus as to what satisfies a threshold of severe suffering, doubt lingers as to whether there is scope within this standard for contemporary forms of torture . . .").

163. 25 Eur. Ct. H.R. (ser. A.) (1978) (separate opinion of Judge O'Donoghue).

164. *Siliadin v. France*, App. No. 73316/01, 43 Eur. H.R. Rep. 16, ¶ 121 (2005).

165. Michael Isikoff & Mark Hosenball, *The End of Torture: Obama Banishes Bush's Interrogation Tactics*, NEWSWEEK, Jan. 22, 2009, available at <http://www.newsweek.com/id/181007>; Joby Warrick & Karen DeYoung, *Obama Reverses Bush Policies on Detention and Interrogation*, WASH. POST, Jan. 23, 2009, at A06.