Torture in the Eyes of the Beholder: The Psychological Difficulty of Defining Torture in Law and Policy\(^1\)

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Abstract

This article draws upon recent social psychological research to demonstrate the psychological difficulty in 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 to assess the quality of a construct or metric in the social sciences. We hold that evaluations of interrogation tactics using the current standard are both unreliable and invalid. We first argue for the torture standard’s unreliability, pointing to the marked variation in the manner in which different jurisdictions interpret and employ the torture prohibition. 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 more narrow interpretations of torture when faced with a perceived threat to their nations’ national 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 experiencing an extreme visceral state when making their evaluations, the hot-cold empathy gap results in systematic underestimation of the severity of tactics. This, in turn, leads to an under-inclusive conception of ‘torture’ being applied in domestic interrogation policy and international torture law.
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 Dorfman

Whatever the realities of its current practice, there is remarkable consensus among countries regarding the unacceptability of employing torture to procure information from foreign political detainees. A wide range of international treaties ban torture unconditionally, most notably, the United Nations Convention against Torture (CAT), the International Convention on Human Rights and Fundamental Freedoms (ECHR), the American Convention on Human Rights (ACHR), [and] the African Charter on Human and Peoples’ Rights… “); De Wet, The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law, 15 EUROPEAN 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); Al-Adsani v. United Kingdom, App. No. 35763/97, 34 EUR. H.R. REP. 11, P 29 (2001) (stating, “[I]t has long been recognized 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”); (citation omitted); Prosecutor v. Furundzija, ICTY Case No. IT-95-17/1, Trial Chamber Judgment, P 144 (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.”). All ICTY cases are made publicly available at http://www.icty.org.

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 SCHAAK & RONALD C. SYE, 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.


3 See, e.g., 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) (providing that the torture prohibition appears in more sixty-five countries’ national constitutions); Chris Ingelse, THE UN COMMITTEE AGAINST TORTURE: AN ASSESSMENT 4 (The Hague, Kluewer Law International 2001) (evidencing the ubiquity of provisions prohibiting torture by reference to myriad 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… “); De Wet, The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law, 15 EUROPEAN 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); Al-Adsani v. United Kingdom, App. No. 35763/97, 34 EUR. H.R. REP. 11, P 29 (2001) (stating, “[I]t has long been recognized 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”); (citation omitted); Prosecutor v. Furundzija, ICTY Case No. IT-95-17/1, Trial Chamber Judgment, P 144 (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.”). All ICTY cases are made publicly available at http://www.icty.org.

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Covenant on Civil and Political Rights,\(^5\) and the four Geneva Conventions.\(^6\) 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., by claiming that the torture was carried out by ‘rogue’ subordinates, or (3) denial that the acts which are the basis of the charge in fact 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 – e.g., when a nation feels acutely threatened. And 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,\(^7\) which included water boarding, forced abstention from sleep and enclosure within a dark, confined box with insects.\(^8\) The debate

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\(^5\) International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, S. Exec. Doc. No. E, 95-2 (1978), 999 U.N.T.S. 171 (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) [hereinafter ICCPR].


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 paper, we will refer to the compendium of treaties and conventions that seek to limit torture collectively as “the torture prohibition.”

\(^7\) See, e.g., Martha Minow, What is the Greatest Evil, 118 HARV. L. REV. 2134, 2134 (2005) (“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.”).

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. This highlights a vexing reality of international law: It is often easier for everyone to agree to wholly abjure an act than it is for everyone to agree on what exactly that act is.

The frequency with which debates arise over whether particular acts constitute torture poses a serious challenge to one popular school of thought that holds that torture is easily distinguishable from less severe tactics -- that there is a discernable bright line between torture and cruel treatment. Proponents of this school allude to a kind of gut instinct (what Jeremy Waldron has colorfully characterized as “a sort of visceral ‘puke’ test”)9 that can be relied on to recognize true torture. Though no a priori categorical definition of torture can conceivably be chiseled out, torture, the argument goes, torture remains easily recognizable because “you know it when you see it.”10 In describing just how we can recognize torture, a slew of visceral responses have been cited. Former U.S. Deputy Assistant Attorney General Mark Richard, for example, suggested that the concept of torture encompasses “conduct the mere mention of which sends 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.”\textsuperscript{12}

Rejecting the gut instinct perspective, we argue 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 can be relied upon to aid in distinguishing between enhanced tactics and torture, we contend that the psychological complexity of visceral experience plays an important role in \textit{obstructing} our ability to arrive at an unbiased evaluation of what constitutes torture. Specifically, we contend that evaluations of enhanced interrogation tactics are subject to a “cold-to-hot empathy gap,” a psychological phenomenon that impedes the ability of people to evaluate viscerally charged experiences that they themselves are not immediately experiencing.\textsuperscript{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.\textsuperscript{14}

We recently conducted a series of experiments to gauge whether the empathy gap affects evaluations of enhanced interrogation tactics.\textsuperscript{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 others to classify a tactic that induces that state as torture. In direct contradiction to arguments that the line between torture and enhanced interrogation can be determined with reference to a visceral response, therefore, our research suggests that \textit{the perceived line between torture and enhanced interrogation actually shifts with the visceral experience of the evaluator}. Moreover, because the administrators and judges evaluating interrogation tactics are unlikely to be experiencing an extreme visceral state when making their evaluations, our findings warn that they are at risk

\textsuperscript{12} Convention on ‘Enhanced’ Interrogation, \textit{supra} note 10 (statement of Malcolm W. Nance).

\textsuperscript{13} Loran F. Nordgren, Joop van der Pligt, & Frenk van Harreveld, \textit{Visceral Drives in Retrospect: Explanations About the Inaccessible Past}, \textit{17 PSYCHOL. SCI} 635, 635 (2007) (citing George Loewenstein, \textit{Out of Control: Visceral Influences on Behavior}, \textit{65 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES} 272 (1996)).

\textsuperscript{14} See, \textit{e.g.}, \textit{id.} at 635 (“Empirical studies in a number of domains confirm the tendency to underestimate the effect of visceral drives.”).

\textsuperscript{15} Loran F. Nordgren, Mary-Hunter Morris & George Loewenstein, \textit{What Constitutes Torture? Psychological Impediments to an Objective Evaluation of Interrogation Tactics} (July 25, 2010) (unpublished manuscript, under review at Psychological Science and on file with the authors).
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...of systematically underestimating the severity of tactics. This, in turn, could lead to an under-inclusive conception of ‘torture’ being applied in domestic interrogation policy and international torture law.

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

In critiquing the ability to objectively identify torture, we employ two critical concepts – reliability and validity – that are utilized in the natural and social sciences to assess the quality of a construct or measure (like IQ, happiness, or, in the case of torture, severity of suffering). Reliability indicates the degree to which a measure yields consistent results. 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. A measure is considered invalid to the extent that it is not accurately measuring 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 “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’ national 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 the 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 experienced severity of the tactic for the person on whom it is administered. Moreover, because the

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

17 See THOMAS D. COOK & DONALD T. CAMPBELL, QUASI-EXPERIMENTATION: DESIGN & ANALYSIS ISSUES FOR FIELD SETTINGS (Houghton Mifflin Company, Boston: 1979) (defining validity as the “best available approximation to the truth or falsity of a given inference, proposition, or conclusion”).
people who evaluate interrogation tactics are unlikely to be experiencing an extreme visceral state when making their evaluations, the impact of the hot-cold empathy gap is that evaluators systematically underestimate the severity of tactics. This, in turn, leads to an under-inclusive conception of ‘torture’ being applied in domestic interrogation policy and international torture law.

Finally, we will discuss what the difficulty of discerning a bright line means for the way that we should think about the torture prohibition more generally. Here, we will draw from Jeremy Waldron’s adept and invaluable distinction between a *malum in se* and a *malum prohibitum* approach to the torture prohibition.\(^{18}\) A *malum in se* approach is properly applied to a prohibition that codifies an absolute wrong, something that “would be wrong whether positive law prohibited [it] or not.”\(^{19}\) Examples might include rape, murder, or theft. A *malum prohibitum* prohibition, in contrast, is treated as though it is only wrong to the extent that it is explicitly forbidden by law. According to this approach, if an action is not explicitly legally forbidden, it is implicitly freely permitted.\(^{20}\) Examples include parking regulations or restrictions limiting the height of a building. These things are only intuitively wrong to the extent that they are expressly forbidden by law. If a zoning regulation prohibits buildings from being more than 90 feet tall, one can assume that an 89 foot tall building is permitted.

A ‘bright line’ between what is prohibited and what is permitted functions very differently depending on whether a prohibition 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. People 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 not expressly prohibited is therefore freely permitted. There are some lines – such as that defining the crime of child molestation – that we would rather people stay as far away from as possible. The point we wish to make here is that, in cases like torture where 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. And to overstep the line means breaching our international obligations to prohibit the use of torture *absolutely*, as well as

\(^{18}\) Waldron, *supra* note 8, at 1691-1693. For definitions of *malum in se* and *malum prohibitum* policy approaches, see infra pgs. 25-27.

\(^{19}\) See Waldron, *supra* note 8, 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.”).

\(^{20}\) Waldron, *supra* note 8 at 1692.
threatening our foreign relationships, harming our international reputation, and endangering our own soldiers who are held as detainees by other countries.

In proceeding, the first part of the paper will illustrate the unreliability of the torture standard by drawing on a comparative historical analysis of torture jurisprudence. Here, we will first review the difficulties introduced by the statutory imprecision of the torture prohibition, focusing particularly on the sources of disparity surrounding the way that different Courts and administrative authorities have interpreted the word “severe” in defining torture. 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. In the second part of the paper, we will introduce psychological research on self-serving and empathic biases to illustrate the invalidity of the torture standard. Here, we will present our own empirical evidence of the empathy gap’s biasing effects on evaluations of the pain arising from enhanced interrogation tactics. In the last part of the paper, we will discuss what the difficulty of objectively defining torture means for the way we think about the torture prohibition more generally. This section focuses primarily on a critical assessment of a malum prohibitum approach to the torture prohibition in light of the impossibility of discerning a bright line between torture and enhanced interrogation.

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 implies 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. Social scientists have developed several classes of reliability and methods for assessing it, but one of the more common conceptions of reliability is inter-rater reliability, which asks whether there is consensus among different judges applying a metric. In this section, we will illustrate the torture standard’s unreliability by conducting a comparative analysis of international torture jurisprudence to highlight the varied conclusions reached across jurisdictions.

21 See, e.g., Frank E. Saal, Ronald G. Downey & Mary A. Lahey, Rating the Ratings: Assessing the Psychometric Quality of Rating Data, 88 PSYCH. BULL. 413 (1980); KILEM L. GWET, HANDBOOK OF INTER-RATER RELIABILITY (2nd ed. 2010).

22 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
The most explicit definition of torture in international law is provided in the CAT, which perhaps explains why the CAT has become the favored conceptualization of the torture prohibition in contemporary international jurisprudence.\(^\text{23}\) Most central to the CAT’s definition of torture is its requirement that a torturous action inflict severe mental or physical pain.\(^\text{24}\) The severity of pain has been extensively utilized as the standard setting torture apart from lesser offenses in international human rights law.\(^\text{25}\) Of course, whereas the ban on torture is intendedly absolute,\(^\text{26}\) the word “severe,” alone, offers only minimal interpretive guidance.\(^\text{27}\)

international courts remarkable latitude in their interpretations of the Torture Convention’s severity requirement.”).


\(^\text{24}\) 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) (identifying the severity of endured pain as the “distinguishing characteristic of torture that sets it apart from similar offences”) (citing Prosecutor v. Delalic et al., ICTY Case No. IT-96-21-T, Trial Chamber judgment, P. 468 (1998)).

In fact, the word “severe” was a source of much debate among the Convention’s drafters, who held heated debates regarding whether it ought to be deleted or replaced by “extreme” or “extremely severe.” See AHCHENE BOULESHA, THE U.N. CONVENTION ON TORTURE AND THE PROSPECTS FOR ENFORCEMENT 16 (1999); J. HERMAN BURGERS & HANS DANELIUS, 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 4, 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., Oxford University Press 2002).

\(^\text{25}\) See, e.g., Prosecutor v. Kvocka, et al., ICTY Case No. IT-98-30/1, Trial Chamber Judgment, P142 (2001) (referring to a threshold severity of pain as “the distinguishing characteristic of torture that sets it apart from similar offenses”); Cullen, supra note 24, 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”).

\(^\text{26}\) See CAT, supra note 4, at Article 2, ¶ 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, On Terrorists and Torturers (Statement by the UN High Commissioner for Human Rights, for Human Rights Day, New York, 7 December 2005), available at http://www.unama-afg.org/news_statement/Others/2005/others/05dec07-Louise%20Arbour%20Statement.doc (calling the “absolute” prohibition of torture “a cornerstone of the international human rights edifice”).

\(^\text{27}\) VAN SCHAACK & SLYE, supra note 3, at 499 (lamenting the standard as “virtually impossible to apply); NIGEL RODLEY, THE TREATMENT OF PRISONERS UNDER
Courts applying the CAT’s torture standard argue that the severity threshold of the torture label warrants the attachment of a “special stigma” to set torturous actions apart from other “cruel, inhuman or degrading” treatments that provoke less exacting consequences. The idea that torture is properly understood in reference to a category of less severe actions is one unifying strain of geographically disparate torture jurisprudence. The international criminal tribunals for former Yugoslavia (ICTY), for example, define torture in 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.” The Trial Chamber in Brdanin argues that “[t]he seriousness of the pain or suffering sets torture apart from other forms of mistreatment.” Similarly, the European Court of Human Rights (ECHR) suggests that “[i]n determining whether a particular form of ill-treatment should be qualified as torture, consideration must be given to the distinction… between this notion and that of inhuman or degrading treatment.” This trend is equally present in past US guidance issued during the Reagan administration, which classified torture as existing “at the extreme end of cruel, inhuman and degrading treatment.” The distinction between torture and cruel or inhuman treatments has been given particular emphasis because, while the CAT introduces an absolute ban on those acts deemed to be “torture,” it only imposes an obligation to “undertake to prevent” those acts deemed to be cruel or inhumane. Some 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

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28 Aydin v. Turkey, 25 September 1997 (Judgment) European Court of Human Rights, para. 82.
29 CAT, supra note 4.
32 Judgment, Brdanin (IT-99-36) Trial Chamber, 1 September 2004, ¶483. This standard was not rejected in the case’s recent appeal, cf. Judgment, Brdanin (IT-99-36), Appeals Chamber, 3 April 2007, §241 et seq.
34 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).
35 CAT, supra note 4, at Art. 2, Art. 16.
forceful interrogations. As the United States argued in a memo released contemporaneously to 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.”

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,” as well as “sustained systematic beating … and tying up or hanging in positions that cause extreme pain.” Past guidance from the European Court of Human Rights (ECHR) includes arbitrary arrests and custodial deaths among the acts that facially qualify as torture. The ICTY, too, has carved out a special category for facially-obvious manifestations of torture that “establish per se the suffering of those upon whom they were inflicted.” In ICTY jurisprudence, once acts that fall in this category – which includes rape and mutilation of body parts – are proven to have occurred, 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.

However, outside of these most horrific archetypes of torture, courts have differed substantially in their interpretation of precisely where the line should be drawn to separate torture from cruel treatments. Two categories of modern interrogation tactics that are particular sources of dissention across jurisdictions are enhanced interrogation tactics and psychological interrogation tactics.

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

43 See, e.g., Convention Against Torture Hearing, supra note 11 (statement of Human Rights Watch) (warning that “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 (London: Amnesty Int’l Publications, 1984) (cautioning “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. 1978) (“Torture is become increasingly scientific. Alongside physical brutality and mutilation, the use of sophisticated mechanised (sic.) equipment is becoming more and more common. A particular cause for concern is the growth of psychological and pharmacological methods of torture.”).

A testament to the trend towards the scientific enhancement of interrogation is the increasingly compromised role played by doctors in the development and administration of interrogation tactics. As one commentator notes, “While once doctors present at an interrogation were generally there to prevent the victims death, today medical science plays an active role in improving the torture’s techniques.” Radtke, supra note 43, at 5.

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 on Interrogation Abuse: Psychologists’ Group Bars Member Participation in Certain Techniques, WASH. POST, August 20, 2007, available at http://www.washingtonpost.com/wp-dyn/content/article/2007/08/19/AR2007081901513.html (last visited Dec. 17, 2009) (referring to the prohibited interrogation methods as “immoral, psychologically damaging and counterproductive in eliciting useful information”).

44 See, e.g., Reyes, supra note 36, at 595 (“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….’’); Report of the Human Rights Committee, GAOR, 37th Session, Supplement No. 40 (1982), Annex V, General Comment, 7(16), para. 2 (statement of Sir Nigel Rodley, UN Special Rapporteur on Torture) (“[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.”).

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 due because “mental suffering is often transitory, causing no lasting harm.” Convention Against Torture Hearing, supra note 11 (statement of Mark Richard, Deputy Assistant Attorney Gen., U.S. Dep’t of Justice).
the exploitation of phobias, the breaking of sexual taboos, and solitary confinement.  

Because many of these enhanced interrogation and psychological interrogation tactics involve subjecting detainees to visceral experiences that people regularly experience to some degree or another – experiences like feeling cold, fatigued, hungry, or lonely – they are unlikely to be recognized to be as painful as more shocking forms of physical brutality. However, the suffering induced by enhanced and psychological interrogation, though exceedingly difficult to ascertain and measure, can be just as harmful as more obvious forms of torture. Several medical studies have concluded that purely psychological treatments are capable of causing as much long term mental damage and emotional suffering as their physical counterparts. And in a 2007 study of the long-term psychological effects of torture, researchers compared the effects of enhanced interrogation methods like isolation and stress positions with obvious forms of physical torture. The researchers concluded that the effects of the enhanced tactics did “not seem to be 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.”

45 See Reyes, supra note 36; see also HERMAN BURGERS & HANS DANIELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TERROR AND OTHER CRUEL, INHUMANE AND DEGRADING TREATMENT 118, 118 (1988) (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).


47 See Yarwood, supra note 15, at 336 (“Psychological manifestations of torture challenge reliance on a solely objective analysis of suffering, due to the difficulties in measuring intangible psychological injuries.”).


49 Metin Basogul, Maria Livanou, & Cvetana Crnobaric, Torture vs Other Cruel, Inhuman, and Degrading Treatment: Is the Distinction Real or Apparent?, 64 ARCHIVES OF GEN. PSYCH. 277, 284 (2007). See also Wolfendale, supra note 57, at 5-6 (providing a number of other examples where people subjected to enhanced tactics suffered from long term amnesia and psychosis).
Some jurisdictions have refused to consider enhanced interrogation and psychological tactics as torture. 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 the suffering of the particular intensity and cruelty implied by the word torture.” Explaining the Court’s reasoning, Judge Fitzmaurice stated “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?” 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 death; the administration of mind altering substances; or the threat that death or pain will be inflicted on another person.”

However, other jurisdictions have held 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. They have held that “it is no requirement that [torture’s] suffering [be] visible… [and therefore] no defence [sic] that victims did not show effects of physical or mental pain or suffering.” And the ECHR has adopted a broader understanding of mental suffering, deeming 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.

50 Barry Klayman, The Definition of Torture in International Law, 51 TEMP. L. Q. 449, 498 (1978) (suggesting that torture is largely limited to “only [the] most brutal and atrocious behavior[s]”).
52 Id. (separate opinion of Judge Fitzmaurice).
53 8 CFR § 208.18(a).
54 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 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. See Van Schaack & Syle, supra note 3, at 517.
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 present a source of variation for international applications of the torture standard. In particular, enhanced interrogation tactics and psychological tactics – such as those that were controversially employed during the Bush administration -- are tolerated by some jurisdictions but condemned as torture by others. Disparities in the manner in which separate jurisdictions evaluate enhanced interrogation and psychological interrogation tactics highlight the practical difficulty of drawing a bright line between torture and cruel or inhuman treatment. These differences suggest a lack of reliability in the torture standard as currently interpreted and applied in practice.

A commonplace in social science methodology is that reliability is a necessary, but not sufficient condition for validity. If different measures of the same construct produce radically different estimates, there is no way that all the estimates can be correct. Yet, even if all the measures do produce the same estimate, it is not necessarily the case that the estimate is valid. Thus, by virtue of its unreliability the torture standard is necessarily invalid. However, as we will demonstrate in the next section, the current torture standard is also independently invalid because it is impeded by two systematic psychological biases: the self-serving bias (or motivated attribution bias) and the hot-cold empathy bias. 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. And, due to 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.

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“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.’ … [Liberals] tend to 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.”

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 represents the measure’s accuracy, or the degree to which the measure successfully captures the construct it is intended to measure. To understand the distinction, imagine that a scientist used 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, as a person’s weight is not an accurate proxy for intelligence.

The validity of the severity standard for torture relies upon 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. Unfortunately, evaluations at each of these levels are impeded by psychological biases. First, self-serving biases and the phenomenon of motivated attribution suggest that policy-makers will be inclined to allow the administration of more painful tactics when their nations are experiencing periods of political turmoil or paranoia. Second, empathic biases cloud judges’ ability to correctly evaluate the level of pain provoked by a particular interrogation tactic. The hot-to-cold empathy gap research suggests that judges who are not experiencing the type of pain that a tactic provokes will tendentiously underestimate the tactic’s severity.

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

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58 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”).
59 Loran Nordgren et al., forthcoming. (“[P]eople’s ability to accurately assess painful events that they are not actively experiencing is severely limited.”).
60 See Nordgren et al., supra note 15.
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 that they receive in a way that justifies their a priori preferred conclusion. 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 in a way that supports that conclusion. This tendency is especially strong when we perceive that we would benefit personally from one potential conclusion, a psychological predilection referred to as the “self-serving bias.” We tend to naturally discount information that threatens the things that we believe in or enjoy. In one study, for example, women were given information about the health risks of caffeine. Women who were heavy caffeine users reported being significantly less convinced by the information than women who were light caffeine users. These findings suggest that women who regularly enjoyed caffeine – who valued caffeine more – were less motivated to believe that it was harmful than women who were less committed to caffeine use. Another study that employed a mock-litigation scenario found that the self-serving bias influences people to make optimistic predictions of the likely outcome of their case at trial and a fair settlement award. And finally, a survey conducted shortly after 9-11 found that only 15% of people in Arab countries reported believing reports that the attacks on the twin towers were committed by Arabs, suggesting that they were motivated to discount information that implicated someone who shared their ethnicity in a terrorist crime.

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 perceive that person to have acted for immoral reasons or to have a bad

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64 Mark D. Alicke, Culpable Causation, 63 J. PERSONALITY & SOC. PSYCH. 368 (1992); Mark D. Alicke, Culpable Control and the Psychology of Blame, 126 PSYCH. BULL. 556 (2000).
moral character. We are also naturally motivated to believe information that supports a particularly vivid, novel or frightening conclusion, even if it is actually highly unlikely. Thus, people generally overestimate the likelihood that they will be injured in dramatic and frightening events like tornadoes, floods, and terrorist attacks.

Applied to the realm of interrogation, research on motivated attribution and self-serving biases warns that policy-makers may be motivated to interpret the torture prohibition in a way that allows them to employ more extreme interrogation tactics during periods of crisis, when they are both politically and psychologically motivated to take proactive measures to quell the potential threat of terrorist attacks. At such points, policy-makers regularly argue that they have an interest in, and a justification for, identifying and implementing the most “extreme” measures

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66 See 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”); 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.”)
68 See ROSEN, supra note 66, at 73 (reporting survey results just after 9-11 indicated that the average person believed that there was a 20% chance that they would be injured in a terrorist attack during the next year); See also 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….”); Lobel &Loewenstein, supra note 66, at 1070 (“The problem of vivid, emotional miscalculation of risk is particularly acute in the antiterrorism context, since fear is a particularly strong emotion…”).
69 Indeed, a number of distinguished scholars have contended that it is proper for governments to respond to perceived threats employing a cost-benefit analysis and, if needed, dramatically increasing the severity of interrogation practices to prevent a security breach. See, e.g., ERIC POSNER & ADRIAN VERMUELE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS (2007); ALAN 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); John Yoo, Using Force, 71 U. CHI. L. REV. 729 (2004).

But, drawing on psychological tendencies to overestimate risks and interpret evidence in a way that confirms salient, feared conclusions, Professor Lobel has countered 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 (2007). Because this paper 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 our present scope.
allowable. The United States’ activities after 9-11 are illustrative of this risk. Members of the George W. Bush administration argued that, in light of the crucial importance of expeditiously procuring intelligence from detainees to combat the threat of terrorism, we had an interest in, and justification for, utilizing the most ‘extreme’ interrogation tactics that fall short of torture. As Vice President Cheney remarked in a 2008 interview aired on NBC, more stringent interrogation tactics were needed because “[w]e had to collect good first-rate intelligence about what was going on so we could prepare and defend against it.” And indeed, in this tense and urgent political climate, Justice Department officials produced a remarkably narrow interpretation of the torture prohibition. In one infamous document—now commonly referred to as the “Torture Memo”--Assistant Attorney General Jay Bybee concluded:

“Physical 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.”

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. Some

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70 Alan Dershowitz demonstrates this phenomenon in his treatise on torture, wherein he makes the argument that governments can justifiably resort to torture when placed in situations of extreme duress as, for example, when a detainee is aware of the location of a ‘ticking time bomb’ that threatens the lives of innocent citizens. See DERSHOWITZ, supra note 83, at 132-63.

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

72 Id. (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”).

73 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) (statement of Harold Hongju Koh, Dean of Yale Law School) (criticizing the memo as proffering “a definition of torture so narrow that it would have exculpated Saddam Hussein”) [hereinafter Gonzales Hearing].


75 Bybee Morandum, supra note 8, at 172.

The severity standard put forward in the Bybee Memorandum was explicitly rejected by the ICTY in Prosecutor v. Brkanin. ([IT-99-36] Judgment, Appeals Chamber, 3 April 2007, at ¶249). The Bybee Memorandum’s opinion about how the severity standard should be interpreted was retracted by Jack Goldsmith when he replaced Jay Bybee in the Office of Legal Counsel. See Gillers, supra note 74.

76 See Louise Arbour, On Terrorists and Torturers (Statement by the UN High Commissioner for Human Rights, for Human Rights Day, New York, 7 December 2005),
of the permitted tactics – as, for example, the use of dogs to induce fear – seem more intuitively questionable than others. The most controversial of the tactics – waterboarding – is especially difficult to defend, considering that the United States has, in the past, argued in court that enemy soldiers who employed waterboarding committed war crimes.77

More recently, Bybee’s interpretation of the constraints set by the international torture prohibition has been vehemently denounced by the legal academy.78 Harold Koh, former Dean of Yale Law School, called it “the most clearly erroneous legal opinion [that he has] ever read.”79 Though some scholars have criticized the opinion as a product of etiolated ethics within the legal profession,80 the memo also signals several signs of motivated attribution. Bybee repeatedly selectively emphasizes the importance and relevance of information that supports the conclusion that enhanced tactics are permitted, while synchronously discounting or ignoring information that does not. For example, as Jeremy Waldron has pointed out, Bybee highlights the Ireland v. United Kingdom holding that several enhanced interrogation were not torture, but he fails to mention that these tactics nonetheless “were and are absolutely prohibited under the ECHR” as cruel and inhuman treatments.81 And perhaps most indicative of motivated attribution, Bybee inexplicably grounds his definition of the severity attendant to torture on a somewhat obscure – and arguably irrelevant--medical administration statute.82 As motivated attribution 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 were fully and freely permitted.

History suggests that the tendency to loosely interpret the torture prohibition in times of national emergency is not limited to the United

available at http://www.unama-afg.org/news/_statement/Others/2005/_others/05dec07- Louise%20Arbour%20Statement.doc (arguing that the ban on torture has come “under attack” in the midst of the modern “war on terror”).
78 For a partial catalogue of the criticism received by the opinion, see Michael Traynor, Citizenship in a Time of Repression, 2005 Wis. L. REV. 1,5 (2005).
79 Gonzales Hearing, supra note 73, at 536.

Some scholars have maintained that the Bybee memorandum is indicative of more deep-seeded ethical flaws, resulting in too many U.S. lawyers today approaching policy advice as though it were advocacy.

80 See, e.g., Burt Neuborne et al., Torture: The Road to Abu Ghraib and Beyond, in KAREN GREENBERG, THE TORTURE DEBATE IN AMERICA, 13, 14 (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).
81 See Waldron, supra note 8.
82 See id. (criticizing 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…”.).
States or to the current “war on terror.” In one article, 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. Such times particularly test the mettle of the torture prohibition because, though the prohibition was initially crafted to limit the severity of state interrogation policies, states under duress are incentivized to push the limits in their interrogation policies. The majority of cases on which international torture jurisprudence is grounded herald from countries that were plagued with prolonged periods of war and tenuous security situations, for example, Northern Ireland bombarded with attacks from the IRA, Israel after a series of lethal terrorist attacks, and the war-battered Balkan states in the 1990s. Policies of increased severity can affect citizens as well as foreign nationals, as evidenced by the infamous forced removal of Japanese Americans to internment camps World War II. Importantly, however, no matter how clearly prohibited interrogation practices appear to be in retrospect, countries and administrations regularly claim that, at the time, they did not believe the tactics to be torture. This suggests that threatening situations like perceived national security threats do not only affect the interrogation tactics employed, but also the manner in which the definition of torture is interpreted and applied. Although motivated attribution does not directly threaten an administration’s ability to set a bright line for torture, it does suggest that countries are inclined to shift the bright line to narrow the

83 See, e.g., Lobel, supra note 69.
84 See, e.g., Waldron, supra note 8, at 1700 (“[T]he prohibition on torture is intended mainly as a constraint on state policy…”).
85 See, e.g., Lobel, supra note 69 (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. ERIC POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS (2007). But, 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, supra note 69.
87 See Judgement Concerning the Legality of the General Security Service’s Interrogation Methods, 38 I.L.M. 1471, 1474-84 (1999) (opinion of President A. Barak) (reprinted in VAN SCHAACK & SLYE, supra note 3, at 518-530) (reporting that terrorist attacks had recently killed 121 Israeli citizens).
88 The “mass atrocities” – including war crimes and genocide – that took place in the former Yugoslavia during this decade prompted the U.N. to create the International Criminal Tribunal for the former Yugoslavia (ICTY). See About the ICTY, available at http://www.icty.org/sections/AbouttheICTY.
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definition of torture when facing a national threat. The torture prohibition is intended to be absolute and its boundaries should not be affected by security concerns. But, motivated attribution when facing security threats may lead to motivated re-definition of torture, rendering the prohibition less absolute than intended. Thus, motivated attribution 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, a judgment that psychological research suggests that humans are extremely ill-equipped to make. Over the past fifteen years, psychologists have amassed significant evidence that people exhibit what one of us has termed a “cold-to-hot empathy gap:” the tendency for people in a cold state (i.e., not experiencing hunger, pain, sexual arousal, etc.) to underestimate the influence a hot, emotional state will have on their preferences and behavior. Empirical evidence of empathy gap effects has been found across a variety of emotional states including sexual arousal, hunger, fear and drug craving. 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. A week later students who indicated they would be willing to perform the mime were then given the opportunity to do so. Based on the empathy gap, they predicted that students would not be able to appreciate just how embarrassing it is to mime

90 George Loewenstein, Out of Control: Visceral Influences on Behavior, 32 ORG. BEHAVIOR HUMAN DECISION PROCESSES 272 (1996). For a specific discussion of how the phenomenon relates to the torture context, see id. at 283.
94 Michael A. Sayette, George Loewenstein, Kasey M. Griffin & Jessica J. Black, Exploring the Cold-to-Hot Empathy Gap in Smokers, 19 PSYCH SCI 926 (2008).
95 See Van Boven et al., supra note 93.
in front of one’s classmates when the event is one full week away. In line
with this prediction, they found that far fewer students were willing to
actually perform the mime than had predicted they would one week prior to
the event. Moreover, and consistent with the empathy gap account of the
phenomenon, when students were shown a scary film clip prior to making
the decision, they were less likely to volunteer to mime one week later.
This suggests that students who were feeling some degree of fear were
better able to understand the stage fright that would attend the future mime
performance.

Empathy gap effects have also been demonstrated for physical pain,
the emotional state most relevant to interrogation methods. The medical
literature, for example, has consistently found that physicians underestimate
the severity of their patients’ 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—suggesting that they had initially underestimated the intensity of
the pain of childbirth.

In one laboratory study, participants were asked whether they would
be willing to undergo pain in exchange for monetary compensation. 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).
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.

In another experiment, the experimenters used pain to hinder
participants’ performance on a memory test. Later on, participants were
asked to indicate how the pain and various other factors impacted their
performance. They found that participants who made their attributions in a
pain-free state underestimated the influence that pain had on their


Nordgren et al., *supra* note 13.
performance, whereas participants who made their attributions while experiencing pain accurately assessed its influence.

Though 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 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.  

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 the experience. Upon retrospective or abstract evaluation in the absence of a hot state, therefore, 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.’ This argument as applied to pain, in particular, is corroborated by Professor Stephen Morley, an expert in the area, who argues that it is extremely rare for subjects’ memories of pain to involve any actual re-experience of the pain. Rather, Morley contends, pain memories generally only consist of a recognition that some abstract pain once occurred. This suggests that we are prone to a predictable inability to appreciate the intensity of painful events that we are not currently experiencing.

When applied to the question of whether a particular act constitutes torture, the empathy gap effect predicts that people who are not currently experiencing the type of pain caused by a particular interrogation tactic will underestimate the severity of pain it produces -- a psychological impediment that 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 like sleep deprivation, stress positions, exposure to cold, and water boarding, 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. 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 the treatment of Tibetan prisoners in China, captured Irish

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100 See Loewenstein, supra note 90.
102 Id.
103 Nordgren, Morris & Loewenstein, supra note 15.
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Nationalist in Northern Ireland, Palestinian detainees in Israel and, most recently, alleged terrorists confined at the U.S. military facilities in Guantanamo Bay. And solitary confinement is not only used in military interrogations, but is also extensively practiced domestically by police and civilian detention centers.\(^{104}\)

In the experiments, subjects were presented with a vignette describing one of the tactics\(^ {105}\) 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.\(^ {106}\) To test the idea that an empathy gap might be affecting 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).


\(^{105}\) 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.”

\(^{106}\) 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 examined. First, the empathy gap affected their severity assessments: participants in a cold state (i.e., pain free) 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 to categorize the tactic as legally acceptable interrogation (as opposed to unlawful torture) compared to participants who were experiencing pain.

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 under-inclusive 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 also abounds of 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?” 107 Also, on two separate occasions, members of the media – Chicago radio personality Eric “Mancow” Muller and Vanity Fair writer Christopher Hutchins – have voluntarily undergone water boarding in an effort to garner first hand proof that the tactic does not amount to torture. 108 Mancow claimed that he initially felt that he would “laugh [waterboarding] off.” 109 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.” 110 Hitchens confessed to being haunted by the experience for months afterward, professing “if

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107 Quoted in Tom Malinowski, The Logic of Torture, WASH. POST (27 June, 2007), B07.
109 Id.
110 Id.
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waterboarding does not constitute torture, then there is no such thing as torture.”

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 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 counter-intuitive 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. The fact that policy-makers might have at some point in the past experienced some version of the type of pain produced by a particular method of torture, therefore, does not mitigate the types of problems highlighted by the existence of the empathy gap.

As a practical matter for the definition of torture, our empathy gap findings emphasize the innate subjectivity of torture; purely “objective” evaluations of tactics that are removed from emotion and visceral experience tend to produce inherently biased underestimations of tactics’ severity. 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. In an understanding released contemporaneously to its ratification of the CAT, the U.S. 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.” To constitute torture under this understanding, an act must not only have resulted in severe suffering for the victim, but must have also been knowingly and specifically intended to do so by its perpetrators. However, evidence of the empathy gap in torture evaluations counsel against the intent requirement. Indeed, our findings suggest that it

112 See Convention Against Torture Hearing, supra note 11, at 17 (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”).
is extremely likely that interrogators who are not actually experiencing first-hand the pain or distress they are causing never truly understand the depth of the severity of their actions.\(^\text{114}\)

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 tactics using the severity standard for torture. Thus, our research provides more evidence of the invalidity of the severity standard as a construct useful for determining a bright line between torture and lesser treatments. Together with the difficulty of achieving inter-rater reliability, the potential biasing effects of situation-driven motivated inferences in defining torture and the empathy gap suggest that the severity standard is both an unreliable and invalid construct for defining a bright line between torture and enhanced interrogation. In the following section, we will discuss the practical implications of our argument so far, focusing on the question of what the inability to define a bright line means for torture policy more generally.

**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 the kind of thing that “we know when we see.” This, in turn, 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 underlying interest in knowing the borderline of acceptable action, most often with the purpose of approaching it.\(^\text{115}\) In this section, we will employ Jeremy Waldron’s distinction between a *malum in se* and a *malum prohibitum* interpretation of the torture prohibition to argue for the inappropriateness of policy approaches that seek to establish and approach the bright line that defines torture.\(^\text{116}\) A *malum in se* approach is properly applied to a prohibition, such as that against rape, that codifies an

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\(^{114}\) In fact, others have argued that professional interrogators may be especially prone to the empathy gap. *See* David Luban, *supra* note 57, 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”).

\(^{115}\) *See* Waldron, *supra* note 8, 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”).

\(^{116}\) *Id.* at 1692 (citing New Jersey v. T.L.O., 469 U.S. 325, 379 & n.21 (1985); Jordan v. De George, 341 U.S. 23, 236-38 (1951)).
absolutely wrong. Legally codified expressions of such prohibitions are efforts to “articulate this sense of wrongness and fill in the details to make that sense of wrongness administrable.” However, if some act is not explicitly prohibited under the codified expressions, it does not necessarily follow that the act is permitted and certainly not that it 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. Indeed, the image of a person who consciously structured their romantic interactions with the goal of hewing as close as possible to the line demarcating rape is repugnant, and such an individual would not be seen as blameless even if they were never to cross 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.

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. If an action is not explicitly mentioned or addressed in the prohibition, it is therefore permitted. 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 the case of rape, 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.

Applied to the construction of interrogation policy, a malum prohibitum approach would mean that we could consult promulgated texts to determine the point at which tactics become severe enough to amount to torture. Then, we could infer that any tactics falling below that threshold are fair game for interrogators. We can tiptoe with impunity as close to the line as we like, so long as we do not cross it. And indeed, for purposes of intelligence-gathering, we have an interest in structuring policies with the ultimate goal of approaching, without crossing, the line. Under this interpretation, therefore, a precise definition of the threshold – in the present

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117 See Waldron, supra note 8, 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”).

118 Id.

119 At minimum, a malum in se approach would suggest a requirement that policymakers 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 paper, there is certainly no consensus that they are. For an introduction to the intricacies of that debate, see Convention on ‘Enhanced’ Interrogation, supra note 10.

120 Waldron, supra note 8 at 1692.
case, the “bright line” between torture and all else – is critically important for setting policy.

The U.S. interrogation policy under the George W. Bush administration is well described by 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 we had an interest in employing the most extreme tactics possible without crossing the line into torture: in getting *as close* to torture as possible. 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 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.\(^\text{121}\) Crucially, the CIA’s impetus for the sudden suspension of enhanced tactics was an effort to confirm their *legality*, or more specifically, garner a legal opinion about whether or not each tactic should be categorized as torture.\(^\text{122}\) This approach implies an underlying assumption that *if* a tactic is legal *then* it is permitted: once a bright line was established, then we could continue on with whatever interrogation methods 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.”\(^\text{123}\)

We agree with Professor Waldron that a *malum prohibitum* approach to the torture prohibition is misguided.\(^\text{124}\) There are a number of reasons

\(^{121}\) See Dana Priest, *CIA Puts Harsh Tactics on Hold; Memo on Methods of Interrogation had Wide Review*, WASH. POST, June 27, 2004, at A01 (confirming that these techniques had been “used to elicit intelligence from al Qaeda leaders such as Abu Zubaida and Khalid Sheik Mohammed”).

\(^{122}\) 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) (Including an interview with former Vice President Dick Cheney claiming that the administration “wouldn’t do [any interrogation tactic] without making certain it was authorized and that it was legal”)[hereinafter *World News*].

\(^{123}\) See *World News, supra note 122* Error! Bookmark not defined.

\(^{124}\) Waldron, *supra note 8* (also arguing that torture is not properly conceived as a *malum prohibitum*).
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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 Convention nor the ICCPR even attempt to proffer a definition for torture, let alone an all-encompassing one. Further, international law expressly indicates that extreme interrogation treatments not amounting to torture are not necessarily permitted. The CAT expressly provides that “cruel, inhuman or degrading” offenses – those just on the other side of torture on a scale of severity -- are *not permissible*. In Ireland v. United Kingdom, for example, though the Court held that the five interrogation tactics in question did not amount to torture, they nevertheless ultimately found that the tactics were prohibited by virtue of being cruel, inhuman and degrading. This suggests that the line between torture and cruel or inhuman treatments may be more symbolic than substantive.

Second, a *malum prohibitum* approach risks becoming quickly outdated or insufficient unless statutory constructions can be revisited and reformed easily to reflect changes in social understandings or the emergence of new activities that are outside the purview of the original statute. This is, of course, true of the tax code; the tax code changes every year to reflect changes in demographics, the economy, and the emergence of new classifications of income. It would become quickly outdated if it did not have this ability to 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 that need to be addressed within the statute.

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, in fact, be accurately be drawn. Where, 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 is especially true in times of crisis, when, as discussed above, administrators are especially psychologically motivated to narrowly construe torture. These are, unfortunately, exactly the times when where one draws the line is most likely to matter.

125 Discussed *infra* at 14.
PART IV: CONCLUSION

In this article, we have sought to demonstrate the multi-faceted 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 treatments does not lend itself to a viable search for a bright line. In evaluating the quality of any attempt to establish draw a bright line definition of torture under the current standard, we have sought to demonstrate the utility of the distinction that research methodologists draw between 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 instances of interrogation that do or do not count as torture, the severity test lacks both reliability and validity. The many divergent approaches to defining torture that emerged in our comparative case analysis of torture jurisprudence suggest 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 levels of inter-rater reliability. Further, psychological research on judgments and decision making suggests that torture evaluations are influenced by two systematic biases, one involving an evaluator’s political situation and the other their momentary visceral state. The self-serving bias and the phenomenon of motivated attribution suggest that we are naturally inclined to construct more narrow conceptions of 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 find 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 find 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.

The social psychological research that we have applied to the context of torture admittedly does not provide answers to 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 that the line tends to be drawn in an under-inclusive way, especially in times of political distress. Whereas torture itself does not change, whether or not we recognize something as torture does change 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 hot-cold-empathy gap -- and the attendant potential for a systematically under-inclusive 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. And in light of our inclinations 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 in periods of political distress. Such an endeavor is made especially urgent given the growing popularity of subtler physical and psychological interrogation tactics being developed, which we are especially likely to underestimate.\(^\text{127}\)

As contended by Judge O’Donoghue, a dissenting voice in the Ireland v. United Kingdom case, “[o]ne 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.”\(^\text{128}\)

Several recent developments in international torture law and policy prognosticate a potential movement toward a more inclusive definition of torture in jurisdictions known previously to 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 in democratic societies.”\(^\text{129}\)

In the U.S., 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 the common Article 3 of the Geneva Convention.\(^\text{130}\) Given the innate psychological tendency to under-evaluate

\(^{127}\)See, e.g., Yarwood, supra note 30, 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…”); AMNESTY INT’L, TORTURE IN THE EIGHTIES 15 (London: Amnesty Int’l Publications, 1984) (cautioning “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”).


the concept of torture and the severity of interrogation tactics, our findings certainly support a movement toward more conservative interrogation policies and a more comprehensive jurisprudential definition of torture.