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Personality Disruption as Mental Torture: The CIA, Interrogational Abuse, and the U.S. Torture Act

DAVID LUBAN* & KATHERINE S. NEWELL**

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INTRODUCTION: THE “TORTURE DEBATE” AGAIN? WHY NOW?

This Article is a contribution to the torture debate. It argues that the abusive interrogation tactics used by the United States in what was then called the “global war on terrorism” are, unequivocally, torture under U.S. law. To some readers, this might sound like déjà vu all over again. Hasn’t this issue been picked over for nearly fifteen years? It has, but we think the legal analysis we offer has been mostly overlooked.¹ We argue that the basic character of the CIA’s interrogation of so-called “high-value detainees” has been misunderstood: both lawyers and commentators have placed far too much emphasis on the dozen or so “enhanced interrogation techniques” (EITs) short-listed in government “torture memos,” and far too little emphasis on other forms of physical violence, psychological stressors, environmental manipulations, and abusive conditions of confinement that are crucial to the question of whether the detainees were tortured. Furthermore, we dispute one of the standard narratives about the origins of the program: that it was the brainchild of civilian contractor psychologists because—in the CIA’s words—“[n]on-standard interrogation methodologies were not an area of expertise of CIA officers or of the US Government generally.”² This narrative ignores the CIA’s role in devising these methods, in spite of the decades of prior CIA research and doctrine about forcing interrogation subjects into a state of extreme psychological debilitation, and about how to do so—by making them physically weak, intensely fearful and anxious, and helplessly dependent. By neglecting this history and focusing on the contractors and the EITs they devised, this narrative contributes to the misunderstanding that the torture debate is about EITs and nothing else. In effect, a “torture debate” about EITs and the torture memos neglects the purloined letter in front of our eyes: the abusive conditions the CIA inflicted on prisoners even when they were not subject to EITs, including abuses that the torture memos never bothered to discuss. Unpacking what this debate is really about turns out to be crucial to understanding that such interrogation methods are torture under existing U.S. law. The U.S. Torture Act includes a clause in its definition of mental torture that was intended to ban exactly the kind of interrogation methods the CIA had researched, out of concern that our Cold War adversaries were using them: mind-altering procedures “calculated to disrupt

1. The closest we have found to our analysis is Metin Başoğlu, *Definition of Torture in US Law: Does It Provide Legal Cover for “Enhanced Interrogation Techniques”?*, in TORTURE AND ITS DEFINITION IN INTERNATIONAL LAW: AN INTERDISCIPLINARY APPROACH 409–32 (Metin Başoğlu ed., 2017). Like ours, Başoğlu’s analysis focuses on the U.S. statutory definition of mental torture; it nevertheless differs from our analysis in important ways, particularly in the analysis of specific intent, Başoğlu’s greater emphasis on the medical aftereffects of “enhanced” interrogation, and the special emphasis he places on the so-called “enhanced interrogation techniques” as distinct from other forms of abuse. *See id.*

2. CIA, COMMENTS ON THE SENATE SELECT COMMITTEE ON INTELLIGENCE REPORT ON THE RENDITION, DETENTION, AND INTERROGATION PROGRAM 49 (2013) [hereinafter CIA, COMMENTS], https://www.CIA.gov/library/reports/CIAs_June2013_Response_to_the_SSCI_Study_on_the_Former_Detention_and_Interrogation_Program.pdf [<https://perma.cc/KP9A-P4L2>].

profoundly the senses or the personality.”³ That is precisely the “non-standard interrogation methodology” the CIA employed after 9/11.

We begin, however, by explaining why the issue continues to matter.

Before 9/11, there was no public “torture debate” in America.⁴ This is not to say that the United States had a squeaky clean record—domestically, police departments regularly (though illegally) used the “third degree” to extract confessions,⁵ and internationally, U.S. agencies had a record of quiet collusion with torture by foreign allies.⁶ But these were embarrassments, and nobody other than an occasional provocateur defended torture in public.⁷ The 9/11 attacks changed that almost overnight.⁸ Since then, the torture debate has waxed and waned, but it has not gone away.

3. 18 U.S.C. § 2340(2)(B) (2012).

4. A telltale sign that torture was a non-issue before 9/11 is that torture scenes rarely appeared in television shows, and when they did, the torturers were nearly always villains. Torture scenes became far more frequent after 9/11, and now the perpetrators were often depicted as heroes. See Jane Mayer, *Whatever It Takes*, NEW YORKER (Feb. 11, 2007), <https://www.newyorker.com/magazine/2007/02/19/whatever-it-takes>.

5. Persistent use of the “third degree” was a significant factor in the Supreme Court’s *Miranda v. Arizona* decision. See 384 U.S. 436, 445–58 (1966) (documenting the use of physical and mental abuse in police interrogations). That such practices persisted can be seen in ensuing judicial opinions, headline stories documenting abuses, and large financial settlements for police interrogational abuse. E.g., *United States v. Lee*, 744 F.2d 1124, 1125 (5th Cir. 1984) (discussing the use of water torture by law enforcement officers in Texas); Zusha Elinson & Dan Frosch, *Cost of Police-Misconduct Cases Soars in Big U.S. Cities*, WALL ST. J. (July 15, 2015, 10:30 PM), <https://www.wsj.com/articles/cost-of-police-misconduct-cases-soars-in-big-u-s-cities-1437013834> (discussing the recent increase in settlement and court judgment costs paid by many police departments); Juleyka Lantigua-Williams, *A Digital Archive Documents Two Decades of Torture by Chicago Police*, ATLANTIC (Oct. 26, 2016), <https://www.theatlantic.com/politics/archive/2016/10/10000-files-on-chicago-police-torture-decades-now-online/504233/> (discussing the opening of the Chicago Torture Archive, which includes documentation of torture incidents between 1972 and 1991); *\$6 Million Awarded in False Confession Lawsuit*, NBC NEWS (Aug. 31, 2006, 9:35 PM), http://www.nbcnews.com/id/14609924/ns/us_news-crime_and_courts/t/million-awarded-false-confession-lawsuit/#.XU157ZNKi_I [<https://perma.cc/SSU9-RHBN>] (discussing the case of a man who falsely confessed to murdering his wife after a thirty-eight hour interrogation).

6. For a new and illuminating historical study of the American tradition of both excusing and decrying the use of torture, see generally W. FITZHUGH BRUNDAGE, *CIVILIZING TORTURE: AN AMERICAN TRADITION* (2018). An earlier study of this tradition is ALFRED W. MCCOY, *A QUESTION OF TORTURE: CIA INTERROGATION, FROM THE COLD WAR TO THE WAR ON TERROR* (2006). For a discussion of U.S. collusion with torture by allies, see *infra* Part IV.

7. A prominent early advocate of torture was Patrick J. Buchanan, the journalist, politician, and erstwhile presidential candidate. See Patrick J. Buchanan, *The Right Time for Torture*, SKEPTIC, Jan.–Feb. 1977, at 16, 18–19, 57–58. Professor Michael Levin has also been an advocate for torture. See Michael Levin, *The Case for Torture*, NEWSWEEK, June 7, 1982, at 13. Both writers may fairly be described as provocateurs.

8. See, e.g., Amy Argetsinger, *At Colleges, Students Are Facing A Big Test*, WASH. POST (Sept. 17, 2001), https://www.washingtonpost.com/archive/local/2001/09/17/at-colleges-students-are-facing-a-big-test/b2195efd-8022-4b26-95bb-ce2b8404ee3f/?utm_term=.2463418a87bd (reporting a quiz in a university ethics class one week after 9/11 on which most students answered that captured terrorists should be executed on sight or tortured and interrogated); Abraham McLaughlin, *How Far Americans Would Go to Fight Terror*, CHRISTIAN SCI. MONITOR (Nov. 14, 2001), <https://www.csmonitor.com/2001/1114/p1s3-usju.html> (reporting that 32% of Americans favored torturing terrorism suspects); Walter Pincus, *Silence of 4 Terror Probe Suspects Poses Dilemma for FBI*, WASH. POST (Oct. 21, 2001), <https://www.washingtonpost.com/archive/politics/2001/10/21/silence-of-4-terror-probe-suspects-poses->

Torture burst into the headlines in 2004 with the Abu Ghraib revelations,⁹ followed soon after by the exposure of one of several torture memos written by Department of Justice lawyers in the prestigious Office of Legal Counsel (OLC). This memo virtually guaranteed that U.S. interrogators working overseas would not be prosecuted for torture.¹⁰ Spurred by Abu Ghraib, and by rumors of abusive

dilemma-for-fbi/951c04bc-d51b-4574-ba34-3735f0570719/?utm_term=.7ccb401c5d57 (reporting that FBI agents and Justice Department investigators were considering torture six weeks after 9/11); Jim Rutenberg, *Torture Seeps into Discussion by News Media*, N.Y. TIMES (Nov. 5, 2001), <https://www.nytimes.com/2001/11/05/business/torture-seeps-into-discussion-by-news-media.html> (reporting that torture had become a topic of conversation “in bars, on commuter trains, and at dinner tables”).

9. The 2003 torture of Iraqi prisoners by U.S. military police at Abu Ghraib prison was first brought into the mainstream discussion on an episode of *60 Minutes II* on April 28, 2004. See Rebecca Leung, *Abuse of Iraqi POWs by GIs Probed*, CBS NEWS (Apr. 27, 2004), <https://www.cbsnews.com/news/abuse-of-iraqi-pows-by-gis-probed/> [<https://perma.cc/M5NS-4V4X>]. A few days later, the veteran investigative reporter Seymour M. Hersh published an account. Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORKER (Apr. 30, 2004), <https://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib?reload=true>. Two days later, the Army released its own report, known as the “Taguba Report.” Antonio M. Taguba, DEP’T OF DEF., ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE (2004), <https://fas.org/irp/agency/dod/taguba.pdf> [<https://perma.cc/YRK5-QEP9>]. The military police who committed the abuses took horrifying photographs of themselves abusing the prisoners—photographs that caused a world-wide scandal. See Leung, *supra*. The abuses came to light because a military whistleblower gave the photos to his commanders. See *id.*

10. Because we will be referring to eight of these memos repeatedly, we introduce the following abbreviations. The most famous of the torture memos, which was released publicly in 2009, is sometimes called the “Bybee-Yoo memo” because its principal author was John C. Yoo. This is the Bybee Law Memo: (1) Memorandum from Jay S. Bybee, Assistant Attorney Gen., Dep’t of Justice, to Alberto R. Gonzales, Counsel to the President, *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A* (Aug. 1, 2002) [hereinafter Bybee, *Standards of Conduct Memo*], <https://www.justice.gov/olc/file/886061/download> [<https://perma.cc/T48X-SWPC>].

A second Bybee memo, issued the same day (and also written by John C. Yoo), discussed ten specific modes of abuse. It remained secret until the Department of Justice released it in 2009. This was the Bybee Techniques Memo: (2) Memorandum from Jay S. Bybee, Assistant Attorney Gen., Dep’t of Justice, to John Rizzo, Acting Gen. Counsel, CIA, *Interrogation of al Qaeda Operative* (Aug. 1, 2002) [hereinafter Bybee, *Interrogation of al Qaeda Operative Memo*], <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-bybee2002.pdf> [<https://perma.cc/7TNA-G6BG>].

A third memo, which retracted and supplanted the explosively controversial Bybee Law Memo, was released publicly in 2005. This was the Levin Law Memo: (3) Memorandum from Daniel Levin, Acting Assistant Attorney Gen., Dep’t of Justice, to James B. Comey, Deputy Attorney Gen., Dep’t of Justice, *Re: Legal Standards Applicable under 18 U.S.C. §§ 2340–2340A* (Dec. 30, 2004) [hereinafter Levin, *Legal Standards Memo*], https://www.globalsecurity.org/security/library/policy/national/doj-dag_torture-memo_30dec2004.pdf [<https://perma.cc/PR9E-GUCP>].

The remaining memos were also released publicly by the Justice Department in 2009. First is the Bradbury Techniques Memo: (4) Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney Gen., Dep’t of Justice, to John A. Rizzo, Senior Deputy Gen. Counsel, CIA, *Re: Application of 18 U.S.C. §§ 2340–2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee* (May 10, 2005) [hereinafter Bradbury, *Interrogation of a High Value Detainee Memo*], <https://www.justice.gov/olc/file/886271/download> [<https://perma.cc/EX8F-GRB3>]. Second is the Bradbury Combined Use Memo: (5) Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney Gen., Dep’t of Justice, to John A. Rizzo, Senior Deputy Gen. Counsel, CIA, *Re: Application of 18 U.S.C. §§ 2340–2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees* (May 10, 2005) [hereinafter Bradbury, *Combined Use Memo*], <https://www.justice.gov/sites/default/files/olc/legacy/2013/10/21/memo-bradbury2005-2.pdf> [<https://perma.cc/MT3L-VAJV>]. Third is the Bradbury Article 16 Memo: (6) Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney Gen., Dep’t of Justice, to John A. Rizzo,

interrogations at secret CIA “black sites,” Congress passed a law in late 2005—the Detainee Treatment Act of 2005 (DTA)—tightening prohibitions on detainee mistreatment.¹¹ In 2006, on the eve of Congressional debate over a new system of military commissions, President Bush revealed the covert CIA program to the public when he announced the transfer of some of its formerly “disappeared” targets to Guantánamo.¹² The program goes by the name “rendition-detention-interrogation,” or RDI. Throughout the years of ensuing drama over the RDI program, presidential power, and the proper “disposition” of the men at Guantánamo, torture was always at issue—at least in Washington.

The torture debate eventually simmered down, and both candidates in the 2008 presidential campaign opposed torture. President Obama banned abusive interrogations during his first day on the job and prohibited government agents from relying on the torture memos,¹³ which OLC subsequently withdrew.¹⁴ In 2015,

Senior Deputy Gen. Counsel, CIA, *Re: Application of United States Obligations under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees* (May 30, 2005) [hereinafter Bradbury, *Article 16 Memo*], <https://www.justice.gov/olc/file/886281/download> [<https://perma.cc/86SB-QWBL>].

These memos are also anthologized in DAVID COLE, *THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE* (David Cole ed., 2009).

These first six memos on interrogation are what are colloquially called “the torture memos.” In addition, we will refer to two OLC opinions on conditions of confinement: (7) Letter from Steven G. Bradbury, Acting Assistant Attorney Gen., Dep’t of Justice, to John A. Rizzo, Acting Gen. Counsel, CIA (Aug. 31, 2006) [hereinafter Letter from Steven G. Bradbury to John A. Rizzo], <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/letter-rizzo2006.pdf> [<https://perma.cc/2QYU-WN5J>] (applying common Article 3 of the 1949 Geneva Conventions to CIA conditions of confinement); and (8) Memorandum from Steven G. Bradbury, Acting Assistant Attorney Gen., Dep’t of Justice, to John A. Rizzo, Acting Gen. Counsel, CIA, *Re: Application of the Detainee Treatment Act to Conditions of Confinement at Central Intelligence Agency Detention Facilities* (Aug. 31, 2006) [hereinafter Bradbury, *Detainee Treatment Act Memo*], <https://www.justice.gov/olc/file/886291/download> [<https://perma.cc/5QRD-U26Z>] (addressing the same set of facts regarding the Detainee Treatment Act).

11. See Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (2005). Also known as the McCain Amendment, the DTA is codified at 42 U.S.C. §§ 2000dd, 2000dd-0, 2000dd-1, and 2000dd-2.a (2012).

12. President George W. Bush, Address at the White House Discussing Creation of Military Commissions to Try Suspected Terrorists (Sept. 6, 2006), <https://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html%22> [<https://perma.cc/Q48E-BD83>].

13. Exec. Order No. 13,491, 74 Fed. Reg. 4893, 4894 (Jan. 22, 2009).

14. Memorandum from David J. Barron, Acting Assistant Attorney Gen., Dep’t of Justice, to the Attorney General, Dep’t of Justice, *Withdrawal of Office of Legal Counsel CIA Interrogation Opinions* (Apr. 15, 2009), https://www.justice.gov/sites/default/files/olc/opinions/2009/04/31/withdrawalofficelegalcounsel_0.pdf [<https://perma.cc/4C87-PR8E>]; see also Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney Gen., Dep’t of Justice, *Re: Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001* (Jan. 15, 2009), <https://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memostatusolcopinions01152009.pdf> [<https://perma.cc/3BNH-6WEG>] (explaining that several of the propositions in OLC opinions issued between 2001 and 2003 no longer reflected the views of OLC). We note, however, that OLC never withdrew the two memos on conditions of confinement. See Letter from Steven G. Bradbury to John A. Rizzo, *supra* note 10; Bradbury, *Detainee Treatment Act Memo*, *supra* note 10. These memos do not explicitly discuss interrogations, although it is our argument in this Article that conditions of confinement and interrogational abuses are inseparable.

Congress wrote most of Obama's restrictions into law.¹⁵ Throughout most of the Obama Administration, the torture debate remained dormant, with two revealing exceptions. The debate first erupted anew in 2009 when the Department of Justice released the Bush Administration's remaining torture memos,¹⁶ and again in 2014 when the Senate Select Committee on Intelligence released the executive summary of its torture report (2014 SSCI Report).¹⁷ In both cases, former Bush Administration officials and their political supporters reacted furiously.¹⁸ By then the issue was deeply politicized: seven in ten Republicans favored torture in some circumstances, and more than half of Democrats believed that torture is rarely or never justified.¹⁹

Politicization set the stage for torture to re-emerge as a headline topic in the 2015 presidential primary campaign. To rousing cheers, candidate Donald Trump asked rhetorically, "Would I approve waterboarding?" and answered, "You bet your ass I would—in a heartbeat. And I would approve more than that."²⁰ He reassured his audience: "Believe me, it works. And you know what? If it doesn't work, they deserve it anyway, for what they're doing."²¹ This was not just campaign rhetoric. In his first week in office, in what was reported to be a draft executive order leaked from the White House, President Trump sought to revoke President Obama's ban on abusive interrogation.²² The draft order highlights that its target was "radical Islamism," and whoever edited it repeatedly crossed out other language to substitute the word "Islamism"—suggesting that abusive

15. See Pub. L. No. 114-92, § 1045, 129 Stat. 977, 977–99 (2015) (codified as amended at 42 U.S.C. § 2000dd-2 (2012 & Supp. V 2017)).

16. See Terry Frieden, *Obama Releases Internal Bush Justice Department Memos*, CNN (Mar. 2, 2009, 8:33 PM), <http://www.cnn.com/2009/POLITICS/03/02/justice.memos.released/> [<https://perma.cc/PA5U-89XK>].

17. S. REP. NO. 113-288, at 8–10 (2014).

18. See generally Dan Amira, *Who Defends 'Torture'?*, INTELLIGENCER (Apr. 21, 2009), http://nymag.com/daily/intelligencer/2009/04/who_supports_torture.html (providing an overview of political commentary in the aftermath of the release of the torture memos); see also *CIA Saved Lives*, <http://ciasavedlives.com/index.html> [<https://perma.cc/6967-ZHED>] (a website created by former senior officers of the Central Intelligence Agency to defend the RDI program). The 2014 SSCI Report includes a lengthy and vituperative rebuttal by members of the Republican minority on the Committee, see S. REP. NO. 113-288, at 520–683, which complements the CIA's own rebuttal, see generally CIA, COMMENTS, *supra* note 2. These are indicative of the renewed controversy.

19. See Emily Badger, *From Moderate Democrats to White Evangelicals, Nearly Every Demographic Group Believes Torture Can Be Justified*, WASH. POST (Dec. 16, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/12/16/from-moderate-democrats-to-white-evangelicals-nearly-every-demographic-group-believes-torture-can-be-justified/?utm_term=.bf95c69733eb (reporting the results of a poll conducted by the Washington Post and ABC News).

20. Jenna Johnson, *Donald Trump on Waterboarding: 'If It Doesn't Work, They Deserve It Anyway,'* WASH. POST (Nov. 23, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/11/23/donald-trump-on-waterboarding-if-it-doesnt-work-they-deserve-it-anyway/?utm_term=.0dd5103e72b2.

21. *Id.*

22. See Executive Order—Detention and Interrogation of Enemy Combatants (draft), <https://www.nytimes.com/interactive/2017/01/25/us/politics/document-Trump-draft-executive-order-on-detention-and.html> [<https://nyti.ms/2k0uoJp>]; Charlie Savage, *Trump Poised to Lift Ban on C.I.A. 'Black Site' Prisons*, N.Y. TIMES (Jan. 25, 2017), <https://www.nytimes.com/2017/01/25/us/politics/cia-detainee-prisons.html>. We note that this draft order is not classified.

techniques would be reserved for use against Muslims.²³ To date, President Trump has not issued the order.

President Trump nominated several supporters of what are euphemistically called “harsh interrogations” for high government positions.²⁴ Although new CIA director Gina Haspel pledged at her confirmation hearing not to resume abusive interrogation even if the president orders it, she never actually admitted that it was either illegal or wrong.²⁵ Haspel’s CIA predecessor Mike Pompeo told the Senate at his own confirmation hearing that he would consult with agency experts on whether President Obama’s interrogation rules were an “impediment” to intelligence gathering that needed to be removed.²⁶

In November 2015, before these nominations, former CIA Director Michael Hayden remarked, “If some future president is going to decide to waterboard, he’d better bring his own bucket, because he’s going to have to do it himself.”²⁷ Apparently he was certain that government officials, including those in intelligence agencies, were through with “enhanced” interrogation. That is no longer obvious, if it ever was. This is why the debate continues to matter.

There is a puzzle here. Torture is a federal felony that can carry a sentence of up to twenty years in prison.²⁸ Without controversy, Congress passed the law creating this felony (the U.S. Torture Act) in 1994 after the United States joined an

23. Executive Order—Detention and Interrogation of Enemy Combatants (draft), <https://www.nytimes.com/interactive/2017/01/25/us/politics/document-Trump-draft-executive-order-on-detention-and.html> [<https://nyti.ms/2k0uoJp>].

24. Trump nominated the following federal judges who have supported “harsh interrogations” in the past: James Ho to the Fifth Circuit, Gregory Katsas to the D.C. Circuit, Joan Larsen to the Sixth Circuit, and Howard Nielson as a district judge for the District of Utah. See ALLIANCE FOR JUSTICE, AFJ NOMINEE REPORT: GREGORY KATSAS 6, 8, 13 (2017), <https://www.afj.org/wp-content/uploads/2017/10/AFJ-Katsas-Report.pdf> [<https://perma.cc/W58K-QJB2>]; ALLIANCE FOR JUSTICE, AFJ NOMINEE REPORT: JOAN LARSEN 1, 6–7 (2017), <https://www.afj.org/wp-content/uploads/2017/07/AFJ-Larsen-Report.pdf> [<https://perma.cc/MPH2-DHQA>]; ALLIANCE FOR JUSTICE, AFJ NOMINEE SNAPSHOT: JAMES HO 1–2 (2017), <https://www.afj.org/wp-content/uploads/2017/11/AFJ-Snapshot-Ho.pdf> [<https://perma.cc/BET2-4628>]; Benjamin Haas, *Trump’s Torture Appointees*, JUST SECURITY (Mar. 15, 2018), <https://www.justsecurity.org/53882/torture-appointees/> [<https://perma.cc/JND2-QTT3>]. He also nominated the following agency lawyers who have supported “harsh interrogations”: Steven Engel to head DOJ’s Office of Legal Counsel; Steven Bradbury to be the General Counsel of the Department of Transportation; and Mike Pompeo to be Secretary of State. See Jamie Ducharme, *John McCain Tried to Block a Routine Trump Appointment over Torture*, TIME (Nov. 15, 2017), <https://time.com/5025470/john-mccain-steven-bradbury-torture/>; Haas, *supra*; Seung Min Kim, *McCain Opposes Trump Nominee over Torture Memos*, POLITICO (Nov. 8, 2017, 4:02 PM), <https://www.politico.com/story/2017/11/08/john-mccain-trump-nominee-steven-engel-torture-244706> [<https://perma.cc/6N7C-5UJD>].

25. See Katherine Hawkins, *Enhanced Evasion Techniques*, JUST SECURITY (May 21, 2018), <https://www.justsecurity.org/56574/enhanced-evasion-techniques/> [<https://perma.cc/9M4D-SNMB>].

26. See Elias Groll, *Kansas Rep. Pompeo, Toying with Torture, Confirmed as New CIA Chief*, FOREIGN POL’Y (Jan. 23, 2017, 7:22 PM), <https://foreignpolicy.com/2017/01/23/kansas-rep-pompeo-toying-with-torture-confirmed-as-new-cia-chief/> [<https://perma.cc/29GL-CZSU>].

27. Jeff Stein, *CIA Would Refuse Trump Torture Orders, Top Former Officials Say*, NEWSWEEK (Feb. 12, 2016, 12:29 PM), <http://www.newsweek.com/cia-would-refuse-trump-torture-426012>. John Rizzo, the CIA’s general counsel during the “enhanced interrogation” program, agreed, and John Yoo, author of two Bush-era torture memos, commented that President Trump misunderstood the purpose of harsh interrogation measures. *Id.*

28. See 18 U.S.C. §§ 2340–2340A (2012).

international anti-torture treaty: the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).²⁹ Today, CAT has 167 member states—85% of the world's governments; India and Iran are the only major-power holdouts.³⁰ Notably, CAT declares that “[n]o 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.”³¹ The United States voiced no opposition to this clause, either at the time of ratification or later.

And yet, despite our own laws, polls consistently find the United States among the most pro-torture countries in the world.³² In a 2016 poll of eleven countries involved in armed conflicts, the United States ranked third in pro-torture sentiment behind Israel and Nigeria and well ahead of South Sudan and Yemen.³³ Pew Research began its polling on torture in 2004, soon after the Abu Ghraib scandal and the publication of the first torture memo. Even in the backwash of these scandals in 2004, 43% of those surveyed thought torturing suspected terrorists is sometimes or often justified.³⁴ Over the next decade, pro-torture public opinion climbed. It reached the 50% threshold in 2009, when the Obama Justice Department released the remaining torture memos.³⁵ By 2016, pro-torture public opinion stood at 58%, a number surpassed only in Israel, Kenya, Lebanon, Nigeria, and Uganda (out of thirty-eight surveyed countries).³⁶ This peculiar form of American exceptionalism should alert us that the U.S. torture debate is just that: a debate about an issue that most peoples, like most states, still think is beyond debate—whether torture can be justified.

29. The United States signed CAT in 1988 and ratified it in 1994. *See generally* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT] (listing dates of signatures, accessions, and ratifications to the CAT). Two years later, Congress also adopted the War Crimes Act of 1996, which criminalizes torture committed in an armed conflict by U.S. nationals or members of the U.S. armed forces. Pub. L. No. 104-192, 110 Stat. 2104 (1996) (codified as amended at 18 U.S.C. § 2441 (2012)).

30. CAT, *supra* note 29, at 155–209 (listing dates of signatures, accessions, and ratifications to the CAT).

31. CAT, *supra* note 29, art. II, ¶ 2.

32. *See, e.g.*, Richard Wike, *Global Opinion Varies Widely on Use of Torture Against Suspected Terrorists*, PEW RES. CTR. (Feb. 9, 2016), <http://www.pewresearch.org/fact-tank/2016/02/09/global-opinion-use-of-torture/> [https://perma.cc/4ZJL-NX37]; INT'L COMM. OF THE RED CROSS, PEOPLE ON WAR: PERSPECTIVES FROM 16 COUNTRIES 10 (2016), <https://www.icrc.org/en/publication/people-war-perspectives-16-countries> [https://perma.cc/5E2S-9JGJ] (finding, for example, that U.S. opinion ranks third behind Israel and Palestine in believing torture is not wrong, but simply part of war). In a decade-old international poll, support for torture in the United States placed it eighth in pro-torture opinion out of twenty-five countries, behind China, Indonesia, Iraq, Israel, Kenya, the Philippines, and Russia. *One-Third Support 'Some Torture,'* BBC NEWS (Oct. 19, 2006, 2:07 AM), http://news.bbc.co.uk/2/hi/in_depth/6063386.stm [https://perma.cc/U9XJ-PGTA]. For figures regarding U.S. public opinion based on Pew Research Center polls over a decade, see DAVID LUBAN, TORTURE, POWER, AND LAW 298, 301 (2014).

33. *See* INT'L COMM. OF THE RED CROSS, *supra* note 32.

34. LUBAN, *supra* note 32, at 301.

35. *Id.*

36. Wike, *supra* note 32.

In reality, there have been three torture debates in America: one legal, one moral, and one that is sometimes called “pragmatic.” The legal debate is whether the techniques used by the United States are torture, lesser forms of what CAT calls “cruel, inhuman or degrading treatment” (CIDT), or neither. The moral debate is whether torture or CIDT are right or wrong—more precisely, whether their use is ever morally acceptable for interrogation purposes. The pragmatic debate is whether torture “works”—whatever that means. A fourth debate, over whether torturers should be held accountable, has not been nearly as prominent in U.S. discourse, probably because neither Republicans nor the Obama Administration had any stomach for accountability.³⁷

Curiously, the moral debate and the debate over whether torture works seldom take the law into account; pro-torture publicists hardly notice that there is law on the subject. This may reflect public ignorance: in a 2016 survey, 37% of torture supporters said they did not realize their country had agreed to ban torture and that knowing about the ban changed their pro-torture opinion.³⁸ It may also be that the torture memos (and publicists like Rush Limbaugh) successfully muddied the waters and persuaded many people that what the United States did is not “torture,” or is only debatably so. Several independent polls have found that between one-quarter and one-third of surveyed Americans do not consider waterboarding to be torture.³⁹

Our Article will focus on the legal debate. We ask whether the interrogational procedures used by the CIA at black sites are torture under the letter of U.S. law. Our answer is yes. Specifically, we argue that these procedures fulfill the statutory

37. See LUBAN, *supra* note 32, at 271–306 (providing a detailed discussion of the Obama Administration’s reluctance to hold officials accountable).

38. INT’L COMM. OF THE RED CROSS, *supra* note 32, at 11.

39. See, e.g., *CBS News Poll—Senate Torture Report*, SCRIBD (Dec. 14, 2014), <https://www.scribd.com/document/250168165/CBS-News-Poll-Senate-Torture-Report> (reporting that 26% of respondents, N=1,003, in a December 2014 CBS News poll did not consider waterboarding to be torture); *Terrorism*, POLLINGREPORT.COM, www.pollingreport.com/terror2.htm [<https://perma.cc/EB2A-Y22Q>] (last visited Sept. 17, 2019) (reporting that 31% of respondents, N=513, in a November 2011 CNN/Opinion Research Corporation poll did not consider waterboarding to be torture). A 2009 CNN/ORC poll asked whether any of CIA techniques were torture, and 36% of subjects, N=2,019, answered no. Paul Steinhauer, *Poll Finds Lack of Support for ‘Torture’ Investigations*, CNN (May 6, 2009, 3:16 PM), www.cnn.com/2009/POLITICS/05/06/bush.torture/ [<https://perma.cc/M7KL-LLUX>]. We take these numbers from a summary helpfully provided by Benjamin Valentino. E-mail from Benjamin Valentino, Assoc. Professor of Gov’t, Dartmouth Coll., to David Luban, Georgetown Univ. Law Ctr. (June 20, 2018, 5:50 PM GMT) (on file with authors) (summarizing the above results and reporting the results of an additional poll in which 28.6%, N=840, answered that waterboarding is not torture). Polls and public discussion focus solely on waterboarding, presumably because it is universally thought to be the harshest of the CIA’s techniques. Presumably, even fewer subjects would agree that the other techniques are torture. Valentino notes that in all these polls, the answers are often politically polarized, with upwards of 80% of Democrats describing waterboarding as torture, but only 50% of Republicans agreeing. *Id.* For more on Limbaugh’s response, see Gabe Wildau & Andrew Seifter, *Limbaugh on Torture of Iraqis: U.S. Guards Were “Having a Good Time,” “Blow[ing] Some Steam Off,”* MEDIAMATTERS (May 5, 2004, 3:40 PM), <https://www.mediamatters.org/research/2004/05/05/limbaugh-on-torture-of-iraqi-us-guards-were-ha/131111> [<https://perma.cc/PWC5-ULSM>].

requirements of mental torture because they were calculated to profoundly disrupt the personalities of the prisoners on whom they were inflicted.⁴⁰

As we noted earlier, discussions of whether the CIA's procedures are torture usually overlook the statutory connection between personality disruption and mental torture.⁴¹ Perhaps for that reason, no commentators that we know of explicitly dispute our conclusion, with one exception: the torture memos themselves, which all conclude that the RDI procedures are not mental torture. OLC withdrew those memos, but they did so without providing a substitute analysis of the torture statute, and without singling out specific legal errors in the memos themselves. Officially, there is a legal vacuum regarding whether the RDI procedures are torture; neither OLC nor any other government agency has ever declared that the procedures are or are not torture as the law defines it. Nor has any agency explained where, specifically, the torture memos got the law wrong. We aim to fill that vacuum. We believe our analysis will be useful to legal scholars and historians, but also to litigators and judges in torture-related cases, and to intelligence professionals and legal advisers.

By focusing on the *legal* question "is this torture?," we do not mean to denigrate the importance of the *moral* question. Nor do we deny that the question of whether torture "works" is the most common one in public discourse (although we deplore that public discourse cares so little about morality and law). Our aim is solely to clarify the muddy waters that the torture memos created. We will show that the interrogational procedures used by CIA personnel at black sites were torture under the letter of the U.S. torture statute.⁴² The same argument would apply to any novel procedures that future ingenious interrogators might devise, if they are comparable to those we discuss.

We focus exclusively on U.S. law because we do not want to be sidetracked into questions about the role of international law in the U.S. legal system. As we will see, the U.S. Torture Act offers a narrow definition of mental torture that is not found in CAT. This means that what counts as mental torture under

40. This is the definitional language in the Torture Act. See 18 U.S.C. § 2340(2)(B) (2012). U.S. military interrogations at Guantánamo and in Afghanistan and Iraq were shaped by the same governmental decision to embrace torture, but we will focus on the CIA. See, e.g., STAFF OF S. COMM. ON ARMED SERVS., 110TH CONG., INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY xxvii–xxviii (Comm. Print 2008).

41. See *supra*, note 1. We note that there has been a great deal of pro and con writing about the torture memos, but little of it focuses on mental torture, and almost none of it focuses on personality disruption as mental torture. One of us has treated the subject of mental torture in an earlier Article. See David Luban & Henry Shue, *Mental Torture: A Critique of Erasures in U.S. Law*, 100 GEO. L.J. 823 (2012), reprinted in LUBAN, *supra* note 32, at 153–94, and in HENRY SHUE, *FIGHTING HURT: RULE AND EXCEPTION IN TORTURE AND WAR* 87–129 (2016). This earlier paper mentioned the possibility of an analysis like the one we offer in the present Article but did not pursue it. See Luban & Shue, *supra*, at 843, 848.

42. A full inquiry into detainees' treatment at the black sites would consider much more than their "interrogation." It would examine acts used to control or punish them, living conditions (perhaps extending over the course of years), the adequacy of medical treatment addressing the vicissitudes of aging as well as damage caused by all of the above, and so on. Here, we consider these events only as they relate to "interrogation."

international understandings of CAT might not be torture under U.S. law. Congress enacted torture statutes to implement CAT at the time of ratification, but an implementing statute need not track the treaty it implements word for word, and the U.S. statute does not even come close. Under familiar principles of U.S. foreign relations law, it is the U.S. statute, not the treaty or customary international law, that counts as domestic law and binds U.S. interrogators.⁴³ This is why it matters that the techniques we are discussing constitute torture not only under international law but under domestic statutory law as well.

We have emphasized that the “torture debate,” which was born of post-9/11 anxieties that we suspect Americans shared across party lines, has become a partisan political debate. This is something to regret. We are focused on a legal issue and are deliberately bracketing out moral, pragmatic, and political questions. We have no doubt that law is not exempt from politics, but ours is not a partisan argument. We hope readers accept the argument in the spirit in which we are offering it.

We proceed as follows. Part I clarifies several terminological issues that are essential to the discussion that follows, notably, aiding our response to the delicate question of how to describe the CIA’s abusive interrogational methods. Part II outlines and introduces our argument. The next three Parts form the core of our argument. Part III explains why focusing on the handful of “enhanced interrogation techniques” ignores the cumulative effect of all the other abuses, an effect that the CIA had studied for decades. Part IV scrutinizes those studies more deeply, explaining that the intended aim of cumulative abuse was personality transformation, sometimes described as “regression,” and later as “learned helplessness.” Part V presents our legal argument: that procedures calculated to disrupt the personality in the way described in the previous Part violate a clause of the torture statute that Congress included to prohibit abuses of precisely this character. The Conclusion examines possible legal defenses to accusations of torture and explains that regardless of their validity, the interrogational abuses constitute torture as it is defined by U.S. law.

I. A NOTE ON TERMINOLOGY

Words matter. Do we call the abuses under discussion torture; do we call them cruel, inhuman, or degrading; or do we call them something else, like “harsh tactics” or “brutal tactics”? When President George W. Bush publicly confirmed that the CIA abused prisoners in its black sites, he used the euphemism “an alternative set of procedures,” without saying to what they served as alternatives.⁴⁴ The CIA short-listed a handful of abuses, namely those discussed in the Bybee

43. When the United States ratified the treaty, the Senate attached an understanding that torture means what § 2340 defines it to mean, along with a declaration that CAT’s substantive articles are not self-executing, which means they have no independent force of law except in whatever form Congress adopts to implement them. See 136 CONG. REC. 36,192–93 (1990); see also Bybee, *Standards of Conduct Memo*, *supra* note 10, at 1, 12–13, 16–20 (discussing the ratification history of CAT).

44. See Bush, *supra* note 12.

and Bradbury Techniques Memos, and variously called them “enhanced measures,” “physical and psychological pressures,” “[c]onditioning [t]echniques,” “corrective or coercive techniques,” and, most recently, “non-standard interrogation methodologies.”⁴⁵ Most often, they were called “enhanced interrogation techniques” (EITs).⁴⁶ However, in a draft memo from November 2001, the CIA did not mince words and wrote that “[a] policy decision must be made with regard to U.S. use of torture in light of our obligations under international law”⁴⁷ Likewise, an undated draft letter from the CIA’s Counterterrorism Center to the Justice Department explains that interrogating Abu Zubaydah would use methods that “normally would appear to be prohibited” by the Torture Act and requests an advance declination of prosecution.⁴⁸

The methods certainly would appear to be prohibited. Despite their misleadingly bland official descriptions, these methods were violent and ugly, and observers were shaken.⁴⁹ Waterboarding, described colloquially by torture apologists as “splashes” of water,⁵⁰ was first approved as a process in which a saturated

45. See, e.g., Memorandum from [Redacted] to [Redacted], *Eyes Only—Per Your Request* (Jan. 17, 2003), https://www.thetorturedatabase.org/files/foia_subsite/6_0.pdf [<https://perma.cc/6NAU-8ZJ8>] (discussing “enhanced measures”); CIA, BACKGROUND PAPER ON CIA’S COMBINED USE OF INTERROGATION TECHNIQUES 1, 4, 7, 9 (n.d.) [hereinafter CIA, BACKGROUND PAPER], <https://www.aclu.org/files/torturefoia/released/082409/olcremand/2004olc97.pdf> [<https://perma.cc/GKB7-5ZV3>] (referring to “physical and psychological pressures,” “[c]onditioning [t]echniques,” and “corrective or coercive techniques”); CIA, COMMENTS, *supra* note 2, at 49 (discussing “[n]on-standard interrogation methodologies”).

46. Specifically in the OLC memos, CIA operational and medical guidelines, and briefings to Administration officials and Congressional members.

47. CIA, HOSTILE INTERROGATIONS: LEGAL CONSIDERATIONS FOR CIA OFFICERS 8 (Draft, Nov. 26, 2001), <https://www.cia.gov/library/readingroom/docs/0006541504.pdf> [<https://perma.cc/M4AT-H8ZE>]. Note that this memo was written months before the capture of Abu Zubaydah, the first high-value detainee subjected to RDI detention and interrogation.

48. E-mail from [Redacted], Assoc. Gen. Counsel, CTC/Legal Grp., to [Redacted], *EYES ONLY – DRAFT* (July 8, 2002), <https://www.cia.gov/library/readingroom/docs/0006541505.pdf> [<https://perma.cc/YH53-9NPB>]. The request for advance declination did not succeed. Abu Zubaydah (born Zain al-Abidin Muhammad Husayn) is a Saudi national captured in Pakistan in 2002 who is currently imprisoned in Guantánamo. He is alleged to be a senior al-Qaeda official, although he has not been charged with any crimes. He was the first prisoner interrogated by the CIA using “enhanced interrogation,” and he was waterboarded eighty-three times. It was in connection with Abu Zubaydah’s interrogation that OLC produced its first two torture memos, the Bybee Law Memo, Bybee, *Standards of Conduct Memo*, *supra* note 10, and the Bybee Techniques Memo, Bybee, *Interrogation of al Qaeda Operative Memo*, *supra* note 10.

49. The CIA’s Chief Medical Officer, from the Office of Medical Services (OMS), reported that “the intensity of the ongoing interaction was graphically evident” and witnesses were “profoundly affected”—so much so that OMS recommended detailing a psychologist or psychiatrist to treat the on-site staff. SUMMARY AND REFLECTIONS OF CHIEF OF MEDICAL SERVICES ON OMS PARTICIPATION IN THE RDI PROGRAM 18 & n.35 (2007) [hereinafter SUMMARY AND REFLECTIONS], https://www.aclu.org/sites/default/files/field_document/oms_summary.pdf [<https://perma.cc/HZL6-LVXR>]. The recommendation was vetoed by the Office of Technical Service, “a reflection of long-standing antipathy between OMS and [CIA’s Office of Technical Service (OTS)] on the psychology side.” *Id.* at 18 n.35.

50. See Carol Rosenberg, *Bush Aide Says KSM Counted Off Seconds During Waterboarding*, MIAMI HERALD (May 16, 2011, 7:48 PM), <https://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article1938130.html> [<https://perma.cc/U7RK-TWJM>]; see also JOSE A. RODRIGUEZ, JR., HARD MEASURES: HOW AGGRESSIVE CIA ACTIONS AFTER 9/11 SAVED AMERICAN LIVES 53 (2012)

cloth “slightly restricted” a detainee’s airflow, “[t]he sensation of drowning [was] immediately relieved by the removal of the cloth,” and the process “inflict[ed] no pain or actual harm whatsoever.”⁵¹ The reality was much worse. Three years later, OLC retroactively deemed waterboarding acceptable despite the knowledge that detainees could experience “excessive filling of the airways and loss of consciousness”;⁵² “the interrogator [could] cup his hands around the detainee’s nose and mouth to dam the runoff”;⁵³ and a detainee who lost consciousness could receive a punch to the gut (“a subxyphoid thrust”), and be subjected to “aggressive medical intervention.”⁵⁴ OLC acted retroactively because this 2005 legal opinion was tailored to approve events that had already happened—without its approval.⁵⁵

People now use the term “EITs” to refer either to the actions short-listed in the torture memos, or to signify the larger family of interrogational actions the list represents. The former is technically accurate, but it is as misleading now as when the euphemism was first devised. “EITs” are not the only abusive actions taken by CIA interrogators, nor, perhaps, are they even the worst.

For example, CIA personnel threatened detainees’ families,⁵⁶ including children.⁵⁷ CIA lawyers deemed such threats lawful so long as they were merely conditional⁵⁸: “If one child dies in America, and I find out you knew something

(describing the rationale behind establishing CIA “black sites” as preventing abuse of prisoners during interrogations).

51. Bybee, *Interrogation of al Qaeda Operative Memo*, *supra* note 10, at 4, 11.

52. Bradbury, *Interrogation of a High Value Detainee Memo*, *supra* note 10, at 15 n.19 (quoting CIA medical guidelines). CIA medical personnel attributed this emergency to the subject, who “may simply give up,” “for reasons of physical fatigue or psychological resignation.” *Id.* As we describe below, the CIA’s abuse was *intended* to cause “physical fatigue [and] psychological resignation.” *Id.*

53. *Id.* at 13.

54. *Id.* at 15 n.19.

55. *See id.* at 6 n.9. “In at least one waterboarding session, Abu Zubaydah ‘became completely unresponsive, with bubbles rising through his open, full mouth.’” S. REP. NO. 113-288, at 43–44 (2014). “The description of the episode stated that ‘on being righted, he failed to respond until the interrogators gave him a xyphoid thrust (with our medical folks edging toward the room).’” *Id.* at 44 n.206. “Over a two-and-a-half-hour period, Abu Zubaydah coughed, vomited, and had ‘involuntary spasms of the torso and extremities’ during waterboarding.” *Id.* at 41.

56. In one instance, CIA personnel threatened a detainee by saying that if he did not talk, “[w]e could get your mother in here,” and, “[w]e can bring your family in here.” OFFICE OF INSPECTOR GEN., CIA, SPECIAL REVIEW: [REDACTED] COUNTERTERRORISM DETENTION AND INTERROGATION ACTIVITIES (SEPTEMBER 2001–OCTOBER 2003) ¶ 94 (2004), https://www.thetorturedatabase.org/files/foia_subsite/cia_26.pdf [<https://perma.cc/P5TU-ZZYR>] [CIA, SPECIAL REVIEW]. Another detainee was “an ‘intellectually challenged’ individual whose taped crying was used as leverage against his family member.” S. REP. NO. 113-288, at 16 n.32.

57. CIA contractors told a detainee that, “if anything happens in the United States, ‘[w]e’re going to kill your children.’” S. REP. NO. 113-288, at 487 n.2654 (alteration in original); *see also id.* at 85 (noting that CIA agents at a detention site threatened the same detainee’s children; *id.* at 91 (“[D]etention site personnel hung a picture of [his] sons in his cell as a way to ‘[heighten] his imagination concerning where they are, who has them, [and] what is in store for them.’” (alteration in original))).

58. *See* S. REP. NO. 113-288, at 85 (“CTC Legal . . . later told the inspector general that these threats were legal so long as the threats were ‘conditional.’”).

about it, [*then*] I will personally cut your mother's throat."⁵⁹ CIA personnel sexually assaulted detainees by inserting tubes into their rectums and pumping in water and pureed food "without a determination of medical need," in order to demonstrate the interrogator's "total control over the detainee."⁶⁰ Detainees were left to urinate and defecate in their cells or on themselves.⁶¹ None of these abuses were labeled "EITs" or discussed in the torture memos. Nor were they among what the CIA later acknowledged were "unauthorized" abuses, such as racking a pistol near the head of a hooded detainee;⁶² operating a cordless drill near his body;⁶³ or "hard takedowns."⁶⁴ Detainees were manipulated into causing their own pain and suffering as they struggled to maintain stressful physical positions under threat of violence if they moved, a particularly devious form of physical and psychological abuse the CIA learned from the Soviet KGB, which the OLC memos ignored.⁶⁵

Furthermore, the "EIT" designation did not account for (and rather obscured) the CIA's ultimate purpose: to force detainees into a state of profound psychological debilitation. This was the "principal effect [and] primary goal" of the CIA's

59. CIA, SPECIAL REVIEW, *supra* note 56, at ¶ 78 (emphasis added).

60. S. REP. NO. 113-288, at 82–83; *see also id.* at 100 & n.584, 488 & n.2660 (discussing the widespread use of rectal rehydration). We use the term "sexual assault" advisedly. Under federal law, anal penetration, "however slight," with an object "with an intent to abuse, humiliate, harass, [or] degrade . . . any person" is defined as a sexual act, *see* 18 U.S.C. § 2246(2)(d)(1)(H) (2012), and a forcible sexual act is aggravated sexual abuse, *see* 18 U.S.C. § 2241 (2012).

61. *See* S. REP. NO. 113-288, at 490 ("In the interrogation of Abu Hazim, a waste bucket was removed from his cell for punishment."). Janat Gul was allowed to remove his own diaper after a forty-seven-hour session of standing sleep deprivation. *Id.* at 137.

62. OFFICE OF INSPECTOR GEN., CIA, REPORT OF INVESTIGATION: UNAUTHORIZED INTERROGATION TECHNIQUES AT [REDACTED] (2003-7123-IG) ¶ 7 (2003) [hereinafter CIA, REPORT OF INVESTIGATION], <https://www.cia.gov/library/readingroom/docs/0006541525.pdf> [<https://perma.cc/RKX3-4DK5>].

63. *Id.* at ¶ 8.

64. CIA, COMMENTS, *supra* note 2, at 3–4 (explaining the nature of "hard takedowns").

65. "Wall standing" and other "stress positions" were indeed listed as EITs in the Bybee and Bradbury Techniques Memos, ostensibly because they caused muscle fatigue. Muscle fatigue was the only effect discussed by the OLC memos, which concluded that the pain and suffering of muscle fatigue is not severe. *See* Bybee, *Interrogation of al Qaeda Operative* Memo, *supra* note 10, at 2–3, 10; Bradbury, *Interrogation of a High Value Detainee* Memo, *supra* note 10, at 9, 33–34. What the memos neither mention nor analyze is the self-imposed pain and suffering of being forced under threat of violence to hold oneself immobile in a standing or other position, far past the point of fatigue. Yet American POWs in prior conflicts reported that such constrained postures were a "form of torture" and "excruciating" because they, the victims, were forced into a contest with themselves. Albert D. Biderman, *Communist Attempts to Elicit False Confessions from Air Force Prisoners of War*, 33 BULL. N.Y. ACAD. MED. 616, 620–621 (1957); CIA, COMMUNIST CONTROL TECHNIQUES: AN ANALYSIS OF THE METHODS USED BY COMMUNIST STATE POLICE IN THE ARREST, INTERROGATION, AND INDOCTRINATION OF PERSONS REGARDED AS "ENEMIES OF THE STATE" 37–38 (1956), <https://www.CIA.gov/library/readingroom/docs/CIA-RDP78-03362A000800170001-2.pdf> [<https://perma.cc/723T-KC4S>]. The debilitating effect of "self-imposed pressure" was a key element of SERE training, the relevance of which we explain below, and its devastating effect was a significant take-away from the CIA's Cold War research. *See* MCCOY, *supra* note 6, at 89. On the meaning and importance of placing victims in a position where they seemingly inflict pain and suffering on themselves, *see* generally David Sussman, *What's Wrong With Torture?*, 33 PHIL. & PUB. AFFS. 1 (2005).

many tactics,⁶⁶ and this fact lies at the heart of our argument.

For convenience we will introduce our own euphemism for this wider class of abuses: “family of interrogational abuses” (FIAs). We do so to make clear that we are not talking only about the handful of actions the CIA designated “enhanced interrogation techniques,” but rather about all of the physical and psychological abuses connected to the intended or actual psychological debilitation of detainees, singly and as a course of conduct.

Some of these abuses do not in and of themselves rise to the level of torture. But, heaped one on top of the other, or as stepping-stones to something worse, they may add up to torture. Psychological pain, suffering, and harm can manifest physiologically, and vice versa, amplifying the effect of “minor” abuses. As we will see below, some of the research behind the CIA’s interrogation program showed that multiple small-scale abuses and disorientations can have a profound destructive effect on the personality.⁶⁷

At the risk of linguistic fussiness, we will reserve the term EITs to refer specifically to the abuses designated as such by the CIA, and the term FIAs to refer to the broader category of interrogational actions taken by the CIA at the black sites, singly and as a course of conduct.

More broadly, FIAs can be understood to include FIA-like tactics used by non-CIA interrogators, domestic and foreign—for example, those used by U.S. military interrogators at Guantánamo and in Afghanistan and Iraq,⁶⁸ the “five techniques” used against IRA prisoners by British interrogators in the 1970s,⁶⁹ and the various abuses and stress positions employed by Israel’s security forces.⁷⁰ FIAs should also be understood to include modes of abuse that have not yet been devised, so long as they are comparable in character to EITs and related abuses in

66. Bradbury, *Combined Use Memo*, *supra* note 10, at 10 (“[T]he principal effect, as well as the primary goal, of interrogation using these techniques is psychological—to create a state of learned helplessness and dependence conducive to the collection of intelligence in a predictable, reliable, and sustainable manner””).

67. The CIA confirmed this at the black sites. *See* S. REP. NO. 113-288, at 53 (2014) (“CIA Headquarters authorized the proposed interrogation plan for al-Najjar, to include the use of loud music (at less than the level that would cause physical harm such as permanent hearing loss), worse food (as long as it was nutritionally adequate for sustenance), sleep deprivation, and hooding. More than a month later, on September 21, 2002, CIA interrogators described al-Najjar as ‘clearly a broken man’ and ‘on the verge of complete breakdown’ as result [sic] of the isolation.” (footnotes omitted)).

68. *See* FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DoD DETENTION OPERATIONS 68, app. D, app. E (2004), <https://apps.dtic.mil/dtic/tr/fulltext/u2/a428743.pdf> [<https://perma.cc/4TTV-B3T3>]; RANDALL MARK SCHMIDT & JOHN T. FURLOW, ARMY REGULATION 15-6: FINAL REPORT: INVESTIGATION INTO FBI ALLEGATIONS OF DETAINEE ABUSE AT GUANTANAMO BAY, CUBA DETENTION FACILITY 6–26 (2005), https://www.thetorturedatabase.org/files/foia_subsite/pdfs/schmidt_furlow_report.pdf [<https://perma.cc/ML8A-W2VZ>].

69. *See* Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 5–6 (1978) (detailing the “five techniques”: wall standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink).

70. *See* HCJ 5100/94 Pub. Comm. Against Torture in Isr. v. Israel 53(4) P.D. 8–11 (1999) (detailing techniques used by the General Security Service, or Shin Bet). For a larger examination of so-called bloodless torture by democracies, see generally Darius Rejali’s magisterial study TORTURE AND DEMOCRACY (2007).

the program. The point of the broader label is to avoid confining the legal argument to the abuses actually short-listed in the Bybee and Bradbury Techniques Memos and the Bradbury Combined Use Memo. That would simply invite future interrogators to devise novel abuses.⁷¹ For present purposes, however, we will confine ourselves to FIAs used by the CIA in the RDI program.

For the moment, we deliberately abstain from calling them “torture.” Our argument is that under U.S. law, strictly interpreted, the FIAs are indeed torture—but for that very reason, we will not beg the question by using that label in advance of the argument. President Barack Obama called them torture.⁷² We too believe they are torture—but that is our conclusion, and before we get there, we will hold back that label and stick with the euphemisms.

To summarize:

- (1) We use the phrase “enhanced interrogation techniques” (EITs) solely to refer to the handful of actions the CIA designated “EITs.”
- (2) We use the phrase “family of interrogational abuses” (FIAs) to refer to EITs, plus all the physical and psychological abuses connected to the intended or actual psychological debilitation of detainees, singly and as a course of conduct. The term FIAs is therefore a more inclusive term—it includes EITs but other abuses as well, including physical violence, psychological stressors, environmental manipulations, and abusive conditions of confinement.
- (3) We do not label these “torture” not because we doubt they are torture, but because we do not want to beg the question with conclusory labeling.

We avoid the label “torture lite,” sometimes used by commentators to refer to bloodless torture that leaves no physical marks or scars.⁷³ The term is propagandistic and confusing—propagandistic because it makes these abuses sound frivolous compared to “real” torture (the medieval kind), and confusing because, if it is torture, there is nothing “lite” about it.

Finally, we use the terms “interrogators,” “interrogation,” and “interrogational” advisedly. Interrogators and national security professionals argue that

71. See OFFICE OF THE U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS, ISTANBUL PROTOCOL: MANUAL ON THE EFFECTIVE INVESTIGATION AND DOCUMENTATION OF TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 29 (2004), <https://www.ohchr.org/Documents/Publications/training8Rev1en.pdf> [<https://perma.cc/353Z-PXLK>] (“[E]xperience has shown that when confronted with . . . a ‘package-deal’ approach to torture, perpetrators often focus on one of the methods and argue about whether that particular method is a form of torture.”).

72. See, e.g., President Barack Obama, News Conference at the JW Marriott Ihilani Resort & Spa (Nov. 14, 2011), <http://www.whitehouse.gov/the-press-office/2011/11/14/news-conference-president-obama> [<https://perma.cc/4MZR-KUQD>]; President Barack Obama, Remarks by the President on National Security (May 21, 2009), <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-national-security-5-21-09> [<https://perma.cc/QSE2-LYU6>]; President Barack Obama, Remarks at the National Defense University (May 23, 2013), <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-barack-obama> [<https://perma.cc/US8U-HLMP>].

73. See generally Jessica Wolfendale, *The Myth of “Torture Lite,”* 23 ETHICS & INT’L. AFF. 47 (2009) (criticizing the widespread use of this term).

these words do not accurately describe the CIA's extraordinary actions because abusing subjects is not the same as interrogating them,⁷⁴ and the CIA itself corrupted the standard distinction between interrogation (an adversarial process) and debriefing (a cooperative process where subjects are free to leave).⁷⁵

II. THE ARGUMENT IN BRIEF

Information emerging over the years about the supposedly scientific basis for the interrogation program is key to our argument, and we discuss it in more detail in Part V below. We conclude that this information proves the FIAs are torture under U.S. law.

Throughout the debate, the U.S. Government and apologists for FIAs defended abusive interrogation with two arguments: first, a legal argument that the FIAs are not torture under the letter of the law, and second, a pragmatic argument that they worked. The abuses were carefully designed to be, in the words of President George W. Bush, "safe, and lawful, and necessary."⁷⁶ At first, it might have seemed that the two defenses harmonize: it is *because* the abuses were so carefully designed that "they worked" without ever crossing the line into torture. The OLC memos concluded that EITs did not cross that line by taking the CIA's word that it was carefully monitoring the severity of pain and suffering to make sure it never crossed the legal threshold.⁷⁷ As researcher Gregg Bloche emphasizes, the presence of medical personnel at the interrogations reinforced the scientific aura of the program—and dubious medical assurances, taken at face value, were central to the OLC memos' legal blessing of EITs.⁷⁸

In reality, we will argue, the two defenses were on a collision course. The interrogation program was building on decades of research that supposedly provided a

74. Steve Kleinman helpfully noted this for us at a conference on torture at the University of Pennsylvania's Center for Ethics and the Rule of Law. Mark Fallon advised us similarly. See E-mail from Mark Fallon, Former Deputy Commander, DOD Criminal Investigation Task Force, to David Luban & Katherine S. Newell (Oct. 30, 2018) (on file with authors).

75. An "interrogation" involves a subject who cannot leave and does not want to provide intelligence information; a "debriefing" involves a subject who is free to leave and shares the debriefer's goal of producing actionable intelligence. See INTELLIGENCE SCI. BD., EDUCING INFORMATION: INTERROGATION: SCIENCE AND ART—FOUNDATIONS FOR THE FUTURE 97 (Phase 1 Report, 2006), <http://www.fas.org/irp/dni/educing.pdf> [<https://perma.cc/8NSC-C9F5>]. The RDI program defined "interrogators" and "debriefers" differently—"interrogators" were authorized to apply EITs, but "debriefers" were not. See CIA, REPORT OF INVESTIGATION, *supra* note 62, at 7. Had the CIA used these terms properly, no black site questioning could have been called a "debriefing."

76. See Bush, *supra* note 12.

77. See, e.g., Bybee, *Interrogation of al Qaeda Operative* Memo, *supra* note 10, at 4; Bradbury, *Interrogation of a High Value Detainee* Memo, *supra* note 10, at 5 & n.8, 11, 29 n.34; Bradbury, *Article 16* Memo, *supra* note 10, at 3, 8, 12–13, 30, 38; Bradbury, *Combined Use* Memo, *supra* note 10, at 11, 13–14.

78. See M. GREGG BLOCHE, THE HIPPOCRATIC MYTH: WHY DOCTORS ARE UNDER PRESSURE TO RATION CARE, PRACTICE POLITICS, AND COMPROMISE THEIR PROMISE TO HEAL, 143–44, 146–47 (2011). As Bloche and neuroscientist Shane O'Mara point out, the medical assurances were not evidence-based, and sometimes flew in the face of medical evidence. See *id.*; SHANE O'MARA, WHY TORTURE DOESN'T WORK: THE NEUROSCIENCE OF INTERROGATION 30–34 (2015). O'Mara, a neuroscientist, dismisses the medical arguments in the OLC memos as "a decorative use of scientific language." *Id.* at 33.

scientific basis for what the CIA was doing.⁷⁹ Many people have a simple view of interrogation through torture: the interrogator ups the level of pain until the subject finally screams, “Stop! I’ll talk!” The strategy elaborated in the research is quite different: rather than coercively overcoming resistance on the spot, the “enhanced” techniques would eliminate the subject’s will and ability to act contrary to his captors’ wishes. The aim is mind control, not coercion through pain; “[t]he goal of interrogation is to create a state of learned helplessness and dependence conducive to the collection of intelligence in a predictable, reliable, and sustainable manner.”⁸⁰ Again: “Our goal was to reach the stage where we have broken any will or ability of subject to resist or deny providing us information (intelligence) to which he had access.”⁸¹ Again: “In sum, we must fully understand the science behind the enhanced measures we employ as well as focus on how to physically control the detainee in an effort to psychologically manipulate the detainee towards learned helplessness, compliance and transition to debriefing/cooperation.”⁸² Compliance was meant to be lasting and absolute, to the point where interrogators were certain that if a detainee in this state did not provide more information, it meant he had no more information to give.⁸³

But, crucially, the U.S. statutory definition of mental torture includes as one of its modes the use of “procedures calculated to disrupt profoundly the . . . personality.”⁸⁴ As we will show, that means the interrogation program fulfills the *actus reus* of the crime of mental torture: applying procedures to cause profound disruption of the personality. That is no coincidence; the statute was drafted only a few years after congressional hearings exposed the CIA’s decades of research into mind-control and behavior modification, which was prompted by supposed mind-control techniques used by our Cold War adversaries.⁸⁵ Profound disruption

79. See BLOCHE, *supra* note 78, at 122–41; M. Gregg Bloche, *Torture-Lite: It’s Wrong, and It Might Work*, WASH. POST (May 27, 2011), https://www.washingtonpost.com/opinions/torture-lite-its-wrong-and-it-might-work/2011/05/19/AGWIVzCH_story.html. For additional descriptions of this research, see generally MCCOY, *supra* note 6, and MICHAEL OTTERMAN, *AMERICAN TORTURE: FROM THE COLD WAR TO ABU GHRAIB AND BEYOND* (2007), among other sources.

80. CIA, BACKGROUND PAPER, *supra* note 45, at 1.

81. Cable from [Redacted] to ALEC, *Eyes Only – Status of Interrogation Phase* (Aug. 20, 2002), <https://www.cia.gov/library/readingroom/docs/0006541510.pdf> [<https://perma.cc/8JXC-GEK9>].

82. E-mail from [Redacted] to [Redacted], *EYES ONLY—Interrogation Support* (n.d.), https://www.thetorturedatabase.org/files/foia_subsite/70.pdf [<https://perma.cc/3HMQ-SDBW>].

83. See SUMMARY AND REFLECTIONS, *supra* note 49, at 41 (“A psychologist/interrogator later said that waterboard use had established that [Abu Zubaydah] had no further information on imminent threats—a creative but circular justification.”); S. REP. NO. 113-288, at 137 (2014) (“After having initially cited Gul’s knowledge of the pre-election threat, as reported by the CIA’s source, the CIA began representing that its enhanced interrogation techniques were required for Gul to deny the existence of the threat, thereby disproving the credibility of the CIA source.”).

84. 18 U.S.C. § 2340 (2012).

85. See COMM’N ON CIA ACTIVITIES WITHIN THE U.S., REPORT TO THE PRESIDENT 225–28 (1975), <https://www.cia.gov/library/readingroom/docs/CIA-RDP80M01133A000900130001-5.pdf> [<https://perma.cc/XW5D-YL5G>]; see also *Cold War Era Human Subject Experimentation: Hearing Before the Legislation & Nat’l Sec. Subcomm. of the H. Comm. on Gov’t Operations*, 103d Cong. 1–3 (1994) [hereinafter *Cold War Era Human Subject Experimentation Hearing*]; *Human Drug Testing by the CIA, 1977: Hearings on S. 1893 Before the Subcomm. on Health & Sci. Research of the S. Comm. on Human*

of the personality was exactly what the research took as its goal. In the words of an early CIA interrogation manual, “As the interrogatee slips back from maturity toward a more infantile state, his learned or structured personality traits fall away”⁸⁶

Just as importantly, the very claim of “calculated” design based in psychological science and years of research fulfills the *mens rea* of that crime, which is specific intent. “The intent . . . is to make the subject very disturbed”⁸⁷ In fact, a 1985 CIA interrogation manual explains that breaking down subjects’ resistance through FIAs is “successful” if “it causes serious psychological damage and therefore is a form of torture.”⁸⁸ Thus, the battery of FIAs constitute acts of mental torture.

To be clear, we are not asserting that the CIA and other interrogators *did* have a sound scientific basis for their adventures in abuse. It might be junk science, and some analysts suspect it is.⁸⁹ In any event, the program was not subjected to anything remotely resembling controlled scientific testing, so it was unsound science regardless of whether it was junk science.⁹⁰ This is not relevant to our legal argument. Regardless of whether the science is real, the pain and suffering were real, and the intention to inflict it was too.

Nor are we conceding that “torture worked.” Even the CIA has stopped saying EITs were operationally effective, relying on the “unknowability” of pinpointing

Res., 95th Cong. 199 (1977) [hereinafter *Human Drug Testing Hearings*]; *Project MKULTRA, the CIA’s Program of Research in Behavioral Modification: Joint Hearing Before the Select Comm. on Intelligence and the Subcomm. on Health & Sci. Research of the S. Comm. on Human Res.*, 95th Cong. 62 (1977) [hereinafter *MKULTRA Joint Hearing*]; *Biomedical and Behavioral Research, 1975: Joint Hearings on Human-Use Experimentation Programs of the Department of Defense & Central Intelligence Agency & S. 2515 Before the Subcomm. on Health of the S. Comm. on Labor & Pub. Welfare & the Subcomm. on Admin. Practice & Procedure of the S. Comm. on the Judiciary*, 94th Cong. (1975).

86. CIA, KUBARK COUNTERINTELLIGENCE INTERROGATION 41(1963), <http://www.gwu.edu/%7Ensarchiv/NSAEBB/NSAEBB122/CIA%20Kubark%201-60.pdf> [<https://perma.cc/G535-97GH>]. The second and third parts of this report are available at <http://www.gwu.edu/%7Ensarchiv/NSAEBB/NSAEBB122/CIA%20Kubark%2061-112.pdf> [<https://perma.cc/N4N8-MKGB>] and <http://www.gwu.edu/%7Ensarchiv/NSAEBB/NSAEBB122/CIA%20Kubark%20113-128.pdf> [<https://perma.cc/8EGL-DVAC>].

87. SUMMARY AND REFLECTIONS, *supra* note 49, at 15–16 (quoting a white paper by the CIA’s Office of Technical Service that “assessed the relative risk of the various techniques” used in U.S. Military training that were later incorporated by the CIA).

88. See CIA, HUMAN RESOURCE EXPLOITATION TRAINING MANUAL L-3 (rev. 1985), <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB122/CIA%20Human%20Res%20Exploit%20H0-L17.pdf> [<https://perma.cc/AAL6-54E3>] (containing handwritten notations discussing the intent behind using FIAs). The other half of this Manual is available at <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB122/CIA%20Human%20Res%20Exploit%20A1-G11.pdf> [<https://perma.cc/7N6C-9UKC>].

89. See generally O’MARA, *supra* note 78, and JOHN W. SCHIEMANN, DOES TORTURE WORK? (2016), for detailed skeptical arguments about whether “torture works.”

90. M. Gregg Bloche, *Toward a Science of Torture?*, 95 TEX. L. REV. 1329, 1344–48 (2017). In fact, mining the interrogation program for scientific data testing its efficacy would constitute a war crime under 18 U.S.C. § 2441(d)(1)(C) (2012) (listing as prohibited conduct “[t]he act of a person who subjects, or conspires or attempts to subject, one or more persons within his custody or physical control to biological experiments without a legitimate medical or dental purpose and in so doing endangers the body or health of such person or persons”).

the precise reason a detainee did (or did not) say something useful.⁹¹ In any event, the right “pragmatic” questions to ask are whether any timely and accurate information emerged that would not have come out using lawful, non-abusive interrogation procedures, and whether information was lost because non-abusive interrogation procedures were not used. Notably, two of the torture memos make the damning admission that the CIA gave detainees only one chance to provide actionable intelligence before beginning “enhanced” interrogation;⁹² in fact, detainees were sometimes subjected to “enhanced” interrogation prior to questioning.⁹³ A “pragmatist” would also ask whether adopting torture as state policy harmed national security by recruiting enemies, repelling allies, and frightening away potential informants.⁹⁴ The pragmatist would also ask whether diverting law-enforcement and military personnel to follow up about disinformation given by abused prisoners created a net harm to national security. Khalid Sheikh Mohammed, for example, reportedly boasted about the false red-alerts he triggered.⁹⁵ Again, none of this is relevant to our argument, and it is not our purpose in this Article to address these questions. Whether torture “works” or “worked”—whatever that means—has nothing to do with whether it is torture.

III. TWO NARRATIVES OF CIA “ENHANCED INTERROGATION”

By now there is a familiar story about how the CIA’s torture program came about. In late 2001, government officials had already decided that “the gloves [would] come off” and the war on terrorism would be conducted, at least in part, on “the dark side.”⁹⁶ But, the story goes, the CIA did not have “interrogators,”

91. Compare then-CIA Director George Tenet’s statement to the CIA OIG in 2004—“the use of EITs has proven to be extremely valuable in obtaining enormous amounts of critical threat information,” CIA, SPECIAL REVIEW, *supra* note 56, at ¶ 218—with then-CIA Director John Brennan’s admission ten years later—“[t]he cause and effect relationship between the use of EITs and useful information subsequently provided by the detainee is, in my view, unknowable,” *Transcript: CIA Director John Brennan Addresses Senate’s Report on CIA Interrogation Program*, ABC NEWS (Dec. 11, 2014, 4:00 PM), <https://abcnews.go.com/International/transcript-cia-director-john-brennan-senates-report-cia/story?id=27539690> [<https://perma.cc/35N9-GB52>].

92. See Bradbury, *Combined Use Memo*, *supra* note 10, at 4–5; Bradbury, *Article 16 Memo*, *supra* note 10, at 7.

93. See S. REP. NO. 113-288, at 484 (2014) (“CIA detainees were frequently subjected to the CIA’s enhanced interrogation techniques immediately after being rendered to CIA custody.”).

94. See Philip Zelikow, *Legal Policy for a Twilight War*, 30 Hous. J. INT’L L. 89, 106 (2007); Douglas A. Johnson et al., *The Strategic Costs of Torture: How “Enhanced Interrogation” Hurt America*, FOREIGN AFF. (Sept./Oct. 2016), <https://www.foreignaffairs.com/articles/united-states/strategic-costs-torture>.

95. See INT’L COMM. OF THE RED CROSS, ICRC REPORT ON THE TREATMENT OF FOURTEEN “HIGH-VALUE” DETAINEES IN CIA CUSTODY 37 (2007), <https://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf> [<https://perma.cc/M9GA-Y426>]; see also RON SUSKIND, *THE ONE PERCENT DOCTRINE: DEEP INSIDE AMERICA’S PURSUIT OF ITS ENEMIES SINCE 9/11*, at 115–16 (2006) (detailing disinformation from Abu Zubaydah leading to massive diversion of law-enforcement personnel). Former U.S. Army interrogator William Quinn told one of the authors about significant diversion of military personnel in Iraq to pursue false leads from interrogations. Telephone Interview by David Luban with William Quinn (May 2006).

96. Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, WASH. POST (Dec. 26, 2002), <https://www.washingtonpost.com/archive/politics/2002/12/26/us-decries-abuse-but>

and they needed help.⁹⁷ Around that time, a pair of contract psychologists, James Mitchell and Bruce Jessen, provided the Agency with ideas on how to conduct interrogation.⁹⁸ Both had military backgrounds, and both had been involved in a training program for U.S. military members called Survival, Evasion, Resistance, Escape (SERE).⁹⁹ The most rigorous form of SERE training (so-called “Level C”) is designed for troops and civilians who run the greatest risk of enemy capture—notably, U.S. Special Forces and others that operate behind enemy lines, such as certain air crew.¹⁰⁰ Completing the training is mandatory for those most likely to need it, but trainees may quit at any time. Part of SERE training—the “resistance” part—involves rough, abusive interrogations by SERE instructors role-playing enemies who have captured the trainee.¹⁰¹ As explained below, the abuses were modeled on those used by U.S. Cold War adversaries. Among other physical abuses, some trainees were waterboarded, slapped, walled, put into stress positions, immersed in water, and put into small boxes.¹⁰² They were subjected to fear, despair, and humiliation; they were threatened, intimidated, and insulted; they were punished for unwanted responses to questioning.¹⁰³ Each physical abuse was tied to a psychological effect: a slap to the face or abdomen not only caused pain, but was meant to “instill fear and despair, to punish selective behavior, [and] to instill humiliation or cause insult.”¹⁰⁴ Slamming the

defends-interrogations/737a4096-2cf0-40b9-8a9f-7b22099d733d/ (quoting Cofer Black, then-head of the CIA Counterterrorist Center). Two weeks after 9/11, Vice President Dick Cheney said in an interview with NBC’s Tim Russert about U.S. strategy against terrorists, “We also have to work, though, sort of the dark side, if you will.” Vice President Dick Cheney, *The Vice President Appears on Meet the Press with Tim Russert* (Sept. 16, 2001), <https://georgewbush-whitehouse.archives.gov/vicepresident/news-speeches/speeches/vp20010916.html> [https://perma.cc/5EAS-EZN5]. The phrase became a metaphor and meme for secret, harsh methods. See JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* (2008) (using the phrase as the title for a narrative account of the CIA’s torture program).

97. We use scare quotes around “interrogators” because in ordinary police and military usage, the word does not refer to someone who specializes in physical and psychological abuse.

98. SUMMARY AND REFLECTIONS, *supra* note 49, at 13 (“SERE psychologists Mitchell and Jessen . . . were tasked with devising a more aggressive approach to interrogation. Their solution was to employ the full range of SERE techniques. They, together with other OTS psychologists, researched these techniques, soliciting information on effectiveness and harmful after effects [sic] from various psychologists, psychiatrists, academics, and the Joint Personnel Recovery Agency (JPRA), which oversaw military SERE programs.”). Mitchell came on board first and subsequently brought in Jessen. *See id.* at 11.

99. See DEP’T. OF DEFENSE, DEPARTMENT OF DEFENSE INSTRUCTION NUMBER 1300.21: CODE OF CONDUCT (CoC) TRAINING AND EDUCATION § 4.3.2 (2001), https://biotech.law.lsu.edu/blaw/dodd/corres/pdf/i130021_010801/i130021p.pdf [https://perma.cc/5XDD-DDQQ] (establishing SERE and detailing who must receive Level C training).

100. *Id.* § 5.3.2.1.

101. On the nature of SERE training, see *Interview with Malcolm Nance*, TORTURING DEMOCRACY (Nov. 15, 2007), https://nsarchive2.gwu.edu/torturingdemocracy/interviews/malcolm_nance.html#training [https://perma.cc/2R9V-VDHL].

102. *The Treatment of Detainees in U.S. Custody: Hearings Before the S. Comm. on Armed Servs.*, 110th Cong. 207–209 (June 17 & Sept. 25, 2008), <https://www.govinfo.gov/content/pkg/CHRG-110shrg47298/pdf/CHRG-110shrg47298.pdf> [https://perma.cc/3B2W-4CDV].

103. *Id.*

104. *Id.* at 207–08.

subject against a wall was meant to serve the same purpose.¹⁰⁵ Stress positions “create[d] a distracting pressure [and] demonstrate[d] self-imposed pressure.”¹⁰⁶ Waterboarding “instill[ed] a feeling of drowning,” but also “instilled fear and despair.”¹⁰⁷

As bad as this sounds, these pressures were designed to be “minor” compared to their real-world analogues¹⁰⁸—abuses used by enemies undeterred by the Geneva Conventions.¹⁰⁹ These FIAs were inflicted by the Soviets and other adversaries upon captured Americans and their own citizens, and the U.S. military studied them carefully and refined them.¹¹⁰ SERE instructors were carefully monitored to ensure they did not lose self-control—for example, by slapping a student too hard or making the student vulnerable to the effects of “learned helplessness.”¹¹¹ SERE operated with firm, established rules designed to prevent harm to trainees. Mitchell and Jessen provided the same or similar rules that would (supposedly) also prevent the torture of high-value detainees believed to hold information about imminent attacks on the United States, as they were beaten, waterboarded, and denied food and sleep. SERE trainees were not hurt, so detainees would not be either.¹¹²

But instead of dialing down the pressure, U.S. interrogators in the RDI program would crank it up to train students to break terrorists. This resulted in variations that were harsher and more violent than treatment in SERE.¹¹³ Furthermore, interrogators used the enhanced SERE methods during continuously abusive confinement far more prolonged than confinement periods at SERE training.¹¹⁴

Mitchell, Jessen, and other CIA psychologists reportedly had been schooled in the scientific theory of “learned helplessness,” on which their interrogation ideas

105. *Id.* at 207.

106. *Id.* at 209.

107. *Id.*

108. *See id.* (statement of Dr. Jerald Ogrisseg, Former Chief, Psychology Services, 336th Training Group, United States Air Force Survival School).

109. *See id.* (statement of Sen. Carl Levin, Chairman, S. Comm. on Armed Services).

110. *See* Scott Shane, *Soviet-Style ‘Torture’ Becomes ‘Interrogation,’* N.Y. TIMES (June 3, 2007), <https://www.nytimes.com/2007/06/03/weekinreview/03shane.html>; *see also* STAFF OF S. COMM. ON ARMED SERVS., 110TH CONG., INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY xxvi (Comm. Print 2008) (“[T]he techniques used were based, in part, on Chinese Communist techniques used during the Korean War to elicit false confessions [from U.S. personnel].”).

111. DEP’T OF DEFENSE, PRE-ACADEMIC LABORATORY (PREAL) OPERATING INSTRUCTIONS ¶ 5.3.1 (2002), <https://info.publicintelligence.net/DoD-PREAL.pdf> [<https://perma.cc/LED2-5CJD>].

112. Journalists and commentators sometimes say that “techniques” used by the CIA were reverse-engineered from SERE, but it is more accurate to say that the two programs channeled the same Cold War research. SERE did so to defend against abusive interrogations, and the CIA to conduct them.

113. The CIA’s OMS Chief reported that “the interrogation techniques used on SERE trainees were simply used on detainees.” SUMMARY AND REFLECTIONS, *supra* note 49, at 10 n.19. This is demonstrably false, as we describe below.

114. The CIA’s interrogations lasted months, while SERE training lasts less than three weeks, only a small part of which involves confinement. *See* SURVIVAL, EVASION RESISTANCE AND ESCAPE (SERE) COURSE, (PHASE II SFQC), https://www.soc.mil/SWCS/SWCS%20Courses/COURSE%20PDF/1stBn/SERE_PACKING_LIST20DEC_2018.pdf [<https://perma.cc/B5WN-HLQE>]

turned.¹¹⁵ “Learned helplessness” is a theoretical phenomenon “in which exposure to a series of unforeseen adverse situations gives rise to a sense of helplessness or an inability to cope with or devise ways to escape such situations, even when escape is possible.”¹¹⁶ The phrase was coined by psychologist Martin Seligman and was originally based on animal experiments he conducted in the late 1960s.¹¹⁷ In Seligman’s famous experiments, giving dogs repeated electrical shocks that they could not control eventually caused them to simply lie still and whimper even when placed in a cage where they could easily escape the shocks.¹¹⁸ His key conclusion was that subjecting animals to stressors that are out of their control induces a state of depressed passivity, such that they do not even try to escape the stressors.¹¹⁹ This is learned helplessness.

The idea that learned helplessness would induce compliance in interrogations, not just passivity and depression, is by no means an obvious inference, and we are not endorsing it.¹²⁰ Nevertheless, the CIA went all in, and Mitchell and Jessen both “interrogated” detainees.¹²¹ The CIA asked for legal guidance from OLC,

115. In December 2001, Mitchell, Jessen, and CIA psychologists reportedly met with Martin Seligman, the pioneer of learned helplessness theory, at Seligman’s home, “to fully understand the psychological theory of ‘learned helplessness.’” DAVID HOFFMAN ET AL., SIDLEY AUSTIN LLP, REPORT TO THE SPECIAL COMMITTEE OF THE BOARD OF DIRECTORS OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION: INDEPENDENT REVIEW RELATING TO APA ETHICS GUIDELINES, NATIONAL SECURITY INTERROGATIONS, AND TORTURE 44, 48 (rev. ed. 2015), <http://www.apa.org/independent-review/revised-report.pdf> [<https://perma.cc/R84V-9PK2>]. This meeting had earlier been reported in Scott Shane, *2 U.S. Architects of Harsh Tactics in 9/11’s Wake*, N.Y. TIMES (Aug. 11, 2009), <https://www.nytimes.com/2009/08/12/us/12psychs.html>. Hoffman believed Mitchell and others at the CIA were “clearly incorporating” the “psychological theory of ‘learned helplessness’” into the interrogation program. HOFFMAN ET AL., *supra*, at 44. “Our evidence shows that Mitchell was very interested in the application of the learned helplessness theory to interrogations of uncooperative detainees.” *Id.* at 49; *see also* MAYER, *supra* note 96, at 156 (explaining that people who spoke with Mitchell recalled him saying that “it was like an experiment, when you apply electric shocks to a caged dog, after a while, he’s so diminished, he can’t resist” (internal quotation marks omitted)); Shane, *supra* (recounting Mitchell’s praise of Dr. Seligman’s work on “learned helplessness”). However, while being sued, Mitchell and Jessen asserted that they did not advocate for the use of “learned helplessness,” insisting that CIA personnel used the term incorrectly. *See e.g.*, Transcript of Videotaped Deposition of John Bruce Jessen at 160:13–163:24, 166:21–167:11, *Salim v. Mitchell*, No. 2:15-cv-286-JLQ (E.D. Wash. Jan. 20, 2017); Defendants’ Statement of Undisputed Facts at 12–13, *Salim v. Mitchell*, No. 2:15-cv-286-JLQ (E.D. Wash. May 22, 2017).

116. *Learned Helplessness*, DICTIONARY.COM, [https://www.dictionary.com/browse/learned-helplessness?](https://www.dictionary.com/browse/learned-helplessness?sts) <https://perma.cc/7GFS-KYNN> (last visited Sept. 25, 2019).

117. Martin E. P. Seligman, *Learned Helplessness*, 23 ANN. REV. MED. 407, 407–08 (1972).

118. *Id.* Seligman hoped to put his research to use in understanding and treating human depression, not interrogation. *See id.* He met with CIA personnel in 2001 to brief them on the theory—although there is no evidence that he was told it was for purposes of an interrogation program. *See* HOFFMAN ET AL., *supra* note 113, at 44–46. On Seligman’s role, and his ambiguous statements about it, *see* BLOCHE, *supra* note 78, at 140–41.

119. Seligman, *supra* note 117, at 408.

120. By contrast, the connection between learned helplessness and psychological trauma has been thoroughly documented in many studies conducted by Metin Başoğlu and his colleagues. *See generally* Başoğlu, *supra* note 1 (discussing and providing references regarding helplessness and trauma).

121. *See* Memorandum for the Record from the Chief, Counterintelligence Evaluation Branch, Counterterrorism Grp., Counterintelligence Ctr., *Rahman Death Investigation—Interview of John B. Jessen* (n.d.), https://www.thetorturedatabase.org/files/foia_subsite/cia_1_0.pdf [<https://perma.cc/>

describing a repertoire of ten abusive SERE-reminiscent “techniques” that would be used on Abu Zubaydah. OLC obliged with a pair of memos on August 1, 2002. One, the Bybee Law Memo, provided a general analysis of the U.S. torture statutes.¹²² A second, the Bybee Techniques Memo, applied the legal analysis to the ten techniques and found that none of them constituted an act of torture, provided that certain safeguards (such as medical monitoring) were in place.¹²³ In part, this conclusion was based on the techniques’ genesis in SERE:

You [the CIA] have found that the use of these methods together or separately [in SERE training], including the use of the waterboard, has not resulted in any negative long-term mental health consequences. The continued use of these methods without mental health consequences to the trainees indicates that it is highly improbable that such consequences would result here. Because you have conducted the due diligence to determine that these procedures, either alone or in combination, do not produce prolonged mental harm, we [OLC] believe that you do not meet the specific intent requirement necessary to violate Section 2340A.¹²⁴

Instead of a SERE manual prescribing exactly how an instructor should position his hand when slapping a student, the CIA now had an OLC memo allowing “interrogators” to inflict pain and suffering up to a level equivalent to that of “organ failure, impairment of bodily function, or even death.”¹²⁵ By 2005, other OLC torture memos had approved a list of thirteen “techniques.”¹²⁶

Mitchell subsequently published a memoir,¹²⁷ and he and Jessen became lightning rods for torture opponents. They were sued,¹²⁸ and several psychologists connected with the RDI program, including Mitchell, were subjected to ethics

K486-XCPX] (detailing the CIA’s interview of Jessen in January 2003 regarding the death of Gul Rahman, in which Jessen stated that he interrogated Rahman “two or three other times with . . . Jim Mitchell”); Resume of James E. Mitchell (n.d.), https://www.thetorturedatabase.org/files/foia_subsite/69.pdf [<https://perma.cc/NTA2-FD2D>].

122. See generally Bybee, *Standards of Conduct* Memo, *supra* note 10 (analyzing U.S. torture statutes).

123. See Bybee, *Interrogation of al Qaeda Operative* Memo, *supra* note 10, at 15–18.

124. *Id.* at 17–18.

125. Bybee, *Standards of Conduct* Memo, *supra* note 10, at 1 (“We conclude that for an act to constitute torture as defined in Section 2340, it must inflict pain that is difficult to endure. Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.”).

126. These are the Bradbury Techniques Memo, Bradbury, *Interrogation of a High Value Detainee* Memo, *supra* note 10, the Bradbury Article 16 Memo, Bradbury, *Article 16* Memo, *supra* note 10, and the Bradbury Detainee Treatment Act Memo, Bradbury, *Detainee Treatment Act* Memo, *supra* note 10.

127. See JAMES E. MITCHELL, *ENHANCED INTERROGATION: INSIDE THE MINDS AND MOTIVES OF THE ISLAMIC TERRORISTS TRYING TO DESTROY AMERICA* (2016).

128. The lawsuit, *Salim v. Mitchell*, No. 2:15-cv-286-JLQ (E.D. Wash. 2017), was eventually settled, but the settlement terms are confidential. See *CIA Torture Psychologists Settle Lawsuit*, ACLU (Aug. 17, 2017), <https://www.aclu.org/news/cia-torture-psychologists-settle-lawsuit> [<https://perma.cc/QJR9-PT53>].

complaints.¹²⁹ Other civilian psychologists, including some in the leadership of the American Psychological Association, also came under hostile scrutiny for their collusion in abusive interrogation.¹³⁰ CIA psychologists have kept a low profile, for the most part.

Much of this story is true. But, according to this story, the civilian psychologists, all of whom were experts, were leading and the CIA followed along. Here, we are skeptical. As the CIA explained:

Non-standard interrogation methodologies were not an area of expertise of CIA officers or of the US Government generally. We believe their expertise was so unique that we would have been derelict had we not sought them out when it became clear that CIA would be heading into the uncharted territory of the program.¹³¹

The central feature of this story is that it puts primary responsibility on the contract psychologists who devised a menu of “interrogation techniques” based on SERE training, on which they were experts.¹³² It is the CIA’s official story: “the closest proximate expertise” for the program was experience with SERE and psychological research “on such topics as resistance training, captivity familiarization, and learned helplessness.”¹³³

Without minimizing the role of Mitchell and Jessen, we think focusing on them is a dangerous distraction. First of all, the CIA studied the psychology of interrogation for decades, and brutal interrogation involving “psychic demolition”¹³⁴ was hardly uncharted territory. It was written into manuals, including a manual on “human resource exploitation” (HRE)—a euphemism for interrogation—as late as the early 1980s.¹³⁵ The manual includes FIAs that the CIA itself later recognized as torture, and CIA instructors trained interrogators from our Latin American allies in the dark arts it described. We provide details in Part V below.

To think that the CIA gave up extracting information from unwilling subjects as it distanced itself from coercive interrogations is naïve, to say the least. The

129. See HOFFMAN ET AL., *supra* note 113, at 474–521; *see also id.* at 485–93 (discussing the ethics complaint against James Mitchell).

130. *See, e.g., id.*, at 379, 386–88; Deborah Popowski, *Ohio Court Rules Licensing Board Need Not Investigate Torture Allegations Against Local Psychologist*, HUMAN RIGHTS@HARVARD LAW (Sept. 3, 2013), <http://hrp.law.harvard.edu/criminal-justice/ohio-court-rules-licensing-board-need-not-investigate-torture-allegations-against-local-psychologist/> [<https://perma.cc/8YVH-4SAL>].

131. CIA, COMMENTS, *supra* note 2, at 49 (emphasis omitted).

132. This process is described in the OLC memos described in *supra* note 10. *See also* Katherine Eban, *Rorschach and Awe*, VANITY FAIR (July 17, 2007, 12:00 AM), <https://www.vanityfair.com/news/2007/07/torture200707> [<https://perma.cc/4ERP-X3FQ>] (arguing that psychologists working on contract to the CIA “had actually designed the tactics and trained interrogators,” and that Mitchell and Jessen played “a central role”). We do not think this untrue, but it is incomplete.

133. CIA, COMMENTS, *supra* note 2, at 49.

134. Eban, *supra* note 132 (using the phrase to describe the interrogation of Abu Zubaydah).

135. *See* CIA, HUMAN RESOURCE EXPLOITATION TRAINING MANUAL, *supra* note 88, at K-1, L-1–2. For further discussion, *see infra* Part V.

CIA had long maintained a cadre of operational psychologists ready to vet potential sources, willing and unwilling, and a research program to improve the accuracy of their results, including in the field of the detection of deception.¹³⁶ The Office of Technical Support (OTS) included psychologists who had “interests in interrogation [that] extended back almost fifty years”¹³⁷ and it was the successor to the division that developed the “total psychological theory of interrogation” the CIA had employed for decades, described below.¹³⁸ After 9/11, OTS quickly became essential to developing EITs and getting approval from the Department of Justice and the White House, and to providing the RDI program with personnel.¹³⁹ OTS is the office to which the counterterrorism program leaders turned and through which Mitchell entered the picture.

The CIA was also not entirely without operational expertise.¹⁴⁰ Scattered through the Agency were senior CIA officers with “extensive experience in interrogation,”¹⁴¹ even if their job titles were not “interrogator.” The CIA had

136. See, e.g., HOFFMAN ET AL., *supra* note 115, at 157 (noting that witnesses who worked with various branches of the CIA described a CIA office with a “primary goal . . . to assess potential assets or informants for credibility, discretion, capability, and other performance metrics”; within this office, one branch “conducted assessments of potential assets,” while another “developed and improved the assessment methodology”). The Washington Post has referred to “a training program intended to help the agency detect double agents and assess recruits for foreign espionage” where “[t]he trainers taught strategies for extracting sensitive information but prohibited coercive tactics.” Joby Warrick & Peter Finn, *Internal Rifts on Road to Torment: Interviews Offer More Nuanced Look at Roles of CIA Contractors, Concerns of Officials During Interrogations*, WASH. POST (July 19, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/07/18/AR2009071802065_pf.html.

137. SUMMARY AND REFLECTIONS, *supra* note 49, at 11.

138. See Memorandum from J.S. Earman, Inspector Gen., CIA, to Dir. of Cent. Intelligence, *Report of Inspection of MKULTRA* 1 (July 26, 1963) [hereinafter Memorandum from J.S. Earman], <https://info.publicintelligence.net/CIA-MKULTRA-IG.pdf> [<https://perma.cc/K8HL-LQUZ>] (describing CIA program for research into mind-control and behavior modification, MKULTRA, as project of CIA Technical Support Staff, later renamed Technical Services Division); see also OFFICE OF TECHNICAL SERVICE, CENTRAL INTELLIGENCE AGENCY, 50 YEARS SUPPORTING OPERATIONS 18 (2001), https://www.cia.gov/library/readingroom/docs/DOC_0001225679.pdf [<https://perma.cc/5YQD-4CDH>] (reporting that CIA Technical Services Division was renamed Office of Technical Service in 1973).

139. See, e.g., Memorandum from [Redacted], Dir., [Redacted] OTS, to the Deputy Dir. for Sci. & Tech., [Redacted] OTS Support to CIA’s Interrogation Programs (May [redacted], 2004), <https://www.thetorturedatabase.org/document/cia-memo-deputy-director-science-and-technology-re-ots-support-cias-interrogation-programs> [<https://perma.cc/736E-KHNQ>] (describing OTS’s direct role in developing, justifying, and applying EITs); E-mail from [Redacted] to [Redacted], *OTS Officers Involved in the Detention, Rendition or Interrogation of Terrorists since 9-11-01* (n.d.), https://www.thetorturedatabase.org/files/foia_subsite/67.pdf [<https://perma.cc/93EN-ZKPK>].

140. This is consistent with reports that “[i]nstitutional memory ebbed as those familiar with these methods (and capable of employing them) quit or retired.” BLOCHE, *supra* note 78, at 128. The pool of knowledge had dwindled, but there is a difference between some and none.

141. See, e.g., Cable from [Redacted] to [Redacted], *Eyes Only – COS: Support Plan for Interrogation of Abu Zubaydah*, at ¶ 3, 5 (Apr. 2, [redacted]), https://www.thetorturedatabase.org/files/foia_subsite/35.pdf [<https://perma.cc/Y7FK-XG2N>] (“Headquarters is assembling [redacted] personnel to include . . . interrogation specialists . . . Interrogation specialists: [redacted] Office of Security and [redacted] OTS [redacted] officers who have had extensive experience in interrogation [redacted]. Each has employed established interrogation methodologies with success. Idea is to send both as well as a psychologist or psychiatrist to develop the best strategy possible with [redacted].”). According to Ali Soufan, Abu Zubaydah’s CIA interrogation team included an interrogator, a polygrapher, analysts,

conducted coercive interrogations and trained allies in their use as recently as the mid-1980s, well within the timespan of a professional career for a senior CIA officer in 2001. Crucially, the person who became the chief of interrogations in the CIA's Renditions Group had been doing precisely that earlier in his career. Again, we provide details in Part V below.¹⁴²

This goes to a larger truth: the CIA had a historical, institutional relationship with torture and with torturers.¹⁴³ Whatever squeamishness CIA decisionmakers may have possessed did not last long. What Jessen and Mitchell proposed was not news to the CIA; it was not a kind of lightbulb or "eureka!" moment.

Mitchell and Jessen played many vital roles in the program and went on to reap extremely lucrative contracts. But it is implausible to imagine that a pair of walk-on contractors led a major, sensitive counterterrorism operation. The former head of the Agency's Counterterrorism Center (CTC) eventually said as much when questioned under oath.¹⁴⁴ In the blunt words of the CIA psychologist who recruited Mitchell, "Jim Mitchell, et al. didn't take a pee without written approval from headquarters."¹⁴⁵

We do not doubt that focusing the story on Mitchell, Jessen, and "SERE techniques" is a congenial fiction. Having independent contractors serving as lightning rods and scapegoats, making the rounds of talk shows, publishing a self-serving memoir (that needed Agency pre-approval), and being promoted in the media as the program's masterminds takes the focus off the CIA itself. It portrays the program in a false light, as a post-9/11 improvisation, rather than as a culmination of decades of research and experience. Similarly, calling EITs "reverse-engineered SERE techniques"—associating them with exercises Americans use to train our own military—sounds much better than revealing their origin in abuses long reviled by the United States as torture when used by the Soviets and Communist Chinese, and by the CIA twenty years before 9/11.

Moreover, it is absurd to call these abuses "techniques," meaning approaches to getting someone to reveal information. To call face slapping, belly slapping, and walling "techniques" makes as little sense as saying that punching someone in the face and kicking them in the groin are two "techniques" of beating them. This is not merely a verbal quibble. When intelligence professionals speak of

support staff, security personnel, and a psychologist hired as a contractor. ALI H. SOUFAN, *THE BLACK BANNERS: THE INSIDE STORY OF 9/11 AND THE WAR AGAINST AL-QAEDA* 393 (2011).

142. See *infra* text accompanying note 200.

143. See, e.g., THE COMM. ON INT'L HUMAN RIGHTS OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. & THE CTR. FOR HUMAN RIGHTS & GLOB. JUSTICE, NYU SCH. OF LAW, *TORTURE BY PROXY: INTERNATIONAL AND DOMESTIC LAW APPLICABLE TO "EXTRAORDINARY RENDITIONS"* 8–13 (2004), <https://chrj.org/wp-content/uploads/2018/01/TortureByProxy.pdf> [<https://perma.cc/H7R2-842G>].

144. Transcript of Videotaped Deposition of Jose Rodriguez at 160:10–160:15, *Salim v. Mitchell*, No. 2:15-cv-286-JLQ (E.D. Wash. Mar. 7, 2017) ("Independent contractors do not make decisions. . . . Independent contractors are subject matter experts. They give us knowledge that we don't possess, they make recommendations, but the ultimate decision-makers were the staff people, the leadership of the Counter-Terrorism Center.")

145. BLOCHE, *supra* note 78, at 142 (quoting Kirk Hubbard, Chief of Operations of the CIA's Operational Assessment Division, whom Bloche interviewed).

interrogation techniques, they mean overall approaches—for example, giving incentives, building emotional rapport, or creating fear.¹⁴⁶ Elevating EITs by calling them techniques suggests that they are more distinctive, and therefore more special, than other abuses, and deflects attention from the latter. As we now argue, that is a mistake.

The focus on Mitchell, Jessen, and a SERE-like repertoire focuses attention solely on the short-listed EITs. That is the second, more crucial mistake in the standard narrative: it equates the torture program solely with what was going on in the interrogation room when detainees were slapped, hosed down, wall-slammed, put in boxes, and waterboarded.¹⁴⁷

Once the CIA had decided to break down the resistance of the detainees through cumulative abuses, it seems obvious that every aspect of their interrogation and confinement would be tailored to that end. In the interrogation room, but also in their cells, they would be subjected to an unpredictable battery of small and large abuses beyond their control—precisely the way “learned helplessness” theoretically worked in dogs. And it would be the sum total of all these abuses, not each of them taken individually, that would break the subject’s resistance. That, as we will see, is one of the core teachings of the earlier CIA interrogation manuals. But, as we next argue, it is the sum total of all these abuses, not necessarily any individual “technique,” that crosses the line into torture.

Some of the interrogational abuses the CIA considered less significant than those approved by OLC were nearly indistinguishable from those that were. For “cold water dousing”—not short-listed as an “enhanced” technique until after it had been used many times¹⁴⁸—detainees could be placed naked in a make-shift tub made of tarp while cold water was poured on them, or hosed down repeatedly while they were shackled naked and subsequently placed in rooms with temperatures as low as fifty-nine degrees Fahrenheit.¹⁴⁹ Sleep deprivation, whether long

146. For example, the U.S. Army’s field manual on interrogation in effect at the time identifies five “approach techniques”: direct, incentive, emotional, increased fear-up, and pride and ego. DEP’T OF THE ARMY, FM 34-52 INTELLIGENCE INTERROGATION 3-14 (Sept. 28, 1992), <https://fas.org/irp/doddir/army/fm34-52.pdf> [<https://perma.cc/2H8P-4RLD>]. This manual would not distinguish between face slapping and belly slapping; on the contrary, it asserts that “[a]ny form of beating” is torture. *Id.* at 1-8. Although the terminology changes in the successor manual, it too uses the term “technique” to refer to generic approaches. DEP’T OF THE ARMY, FM 2-22.3 (FM 34-52) HUMAN INTELLIGENCE COLLECTOR OPERATIONS 8-6 to 8-19 (Sept. 6, 2006), <https://fas.org/irp/doddir/army/fm2-22-3.pdf> [<https://perma.cc/V3NE-CF88>].

147. In this context, it makes Orwellian sense for the CIA to deny they had “interrogators” on staff before EITs were adopted, provided that “interrogator” is defined solely as someone authorized to apply EITs.

148. Water dousing was “re-defined” as an EIT in January 2004. See Disposition Memorandum, *Alleged Use of Unauthorized Interrogation Techniques*, OIG Case 2004-7604-IG 6 (Dec. 6, 2006), https://www.thetorturedatabase.org/files/foia_subsite/pdfs/cia_production_c06541723_alleged_use_of_unauthorized_interrogation_techniques.pdf [<https://perma.cc/5868-6TZB>].

149. See S. REP. NO. 113-288, at 105 (2014).

enough to be “enhanced” or not, variously involved a detainee: stripped of his clothing (maybe wearing a diaper); shackled with his arms overhead; blasted with loud sounds; chilled with an air conditioner; held in continuous light or complete darkness; isolated in near-solitary confinement; subsisting on short rations; “interrogated” around the clock; threatened while hooded; and so on.¹⁵⁰ Detainees were conditioned to reflexively associate abuse with certain objects. These associations were so powerful that detainees would experience intense anxiety and distress in their mere presence.¹⁵¹ One detainee was reportedly beaten if he moved from his prayer mat.¹⁵²

Even medical personnel, whose presence at interrogations was supposed to ensure that detainee pain and suffering did not rise to the level of torture, were involved in abuse. CIA medical personnel allowed detainees to experience horrific hallucinations from sleep deprivation.¹⁵³ These medical personnel were instrumental to interrogation: they timed medical attention to interfere with detainees’ sleep or deprive them of the passage of time;¹⁵⁴ they performed rough and “unexpected” rectal exams.¹⁵⁵ They forced at least one detainee to participate

150. See, e.g., *id.* at 49, 53.

151. For example, specialized collars used during walling and waterboarding triggered this reaction. MITCHELL, *supra* note 127, at 158 (“Once [the] Pavlovian association was formed, the [walling] towel represented a potential adverse consequence and elicited a conditioned fear response . . .”).

152. Military Commissions Defense Counsel for Ammar al Baluchi reported that he was beaten at the black sites if he moved from his prayer mat. See Unofficial Transcript of Oral Argument at 10552:1–10552:13, *United States v. Khalid Sheikh Mohammad* (Feb. 18, 2016), [https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(TRANS18Feb2016-PM1\).pdf](https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS18Feb2016-PM1).pdf) [<https://perma.cc/2ZMK-SGVG>]. “To this day, Ammar essentially never leaves his [prayer] mat. [At military commission hearings,] the first thing he does before sitting down is to put his mat on his chair.” E-mail from James G. Connell III to Katherine S. Newell (Sept. 9, 2018, 11:45 AM) (on file with authors). Katherine S. Newell personally observed this behavior on September 10, 2018.

153. See, e.g., S. REP. NO. 113-288, at 109 (“Arsala Khan was described as barely able to enunciate, and being ‘visibly shaken by his hallucinations depicting dogs mauling and killing his sons and family.’ According to CIA cables, Arsala Khan ‘stated that [the interrogator] was responsible for killing them and feeding them to the dogs.’” (alteration in original)); *id.* at 132 (“Hassan Ghul experienced hallucinations, but was told by a psychologist that his reactions were ‘consistent with what many others experience in his condition,’ and that he should calm himself by telling himself his experiences are normal and will subside when he decides to be truthful. The sleep deprivation, as well as other enhanced interrogations, continued, as did Ghul’s hallucinations.” (footnotes omitted)); *id.* at 137 (“Janat Gul was ‘not oriented to time or place’ and told CIA officers that he saw ‘his wife and children in the mirror and had heard their voices in the white noise.’ . . . [Gul] asked to die, or just be killed.” (alteration in original) (footnotes omitted)).

154. Cable from [Redacted] to [Redacted], *Eyes Only – Adjustment to the Abu Zubaydah Interrogation Strategy 4* (May [redacted], 2002), https://www.thetorturedatabase.org/files/foia_subsite/81.pdf [<https://perma.cc/L2SU-6D3P>].

155. S. REP. NO. 113-288, at 488. Rectal exams were conducted with “excessive force” on two detainees at DETENTION SITE COBALT. See *id.* at 100 n.584. “CIA records indicate that one of the detainees, Mustafa al-Hawsawi, was later diagnosed with chronic hemorrhoids, an anal fissure, and symptomatic rectal prolapse.” *Id.*; see also Cable from [Redacted] to [Redacted], *Eyes Only – [Redacted] as of 1900 Hours (Local Time) 30 June 2002* (June [redacted], 2002), https://www.thetorturedatabase.org/files/foia_subsite/55_0.pdf [<https://perma.cc/92X9-CRCD>] (noting that Zubaydah had initially been tense during a medical exam, perhaps in “[a]n anticipatory reaction given his recent unexpected rectal exam”).

in his own sexual abuse.¹⁵⁶

Detainees' surroundings were unpleasant. Cells could be pitch black or blindingly white.¹⁵⁷ For hours or days, detainees could be deprived of physical movement;¹⁵⁸ light or darkness;¹⁵⁹ quiet¹⁶⁰ or sound;¹⁶¹ a sense of the passage of time;¹⁶² human voices;¹⁶³ solid food;¹⁶⁴ escape from the smell of their own urine and feces;¹⁶⁵ or even the texture of the bars of their cells.¹⁶⁶ Detainees lived in

156. Majid Khan was made to remove a feeding tube inserted in his own rectum as part of an "aggressive treatment regimen" conducted in response to his refusal of solid food. S. REP. NO. 113-288, at 115 & n.680. For the significance of this, see generally Sussman, *supra* note 65 (arguing that a characteristic of torture is the experience of self-betrayal when a victim is forced to participate in his or her own abuse).

157. See S. REP. NO. 113-288, at 422 n.2369 ("According to a CIA cable, cells at DETENTION SITE COBALT were 'blacked out at all times using curtains plus painted exterior windows. And [sic] double doors. The lights are never turned on.'"); Memorandum from [Redacted] to [Redacted], *Eyes Only – Behavioral Interrogation Team SIT Report* ¶ 3 (Apr. 7, 2002) [hereinafter *Behavioral Interrogation Team SIT Report*], https://www.thetorturedatabase.org/files/foia_subsite/94o.pdf [<https://perma.cc/V554-327W>] ("The recommended interrogation room and holding cell modifications included the painting of the room white, installation of halogen lights in both the holding cell as well as the interrogation room, the installation of a white curtain to partition off the holding cell from the interrogation room, the building of a vestibule to provide added control of potential orientation cues, the placement of short nap carpeting on the walls of the interrogation room to dampen sound, the sanding of the holding cell bars to reduce [Abu Zubaydah's] ability to stimulate his sensorium via rubbing of the bars.").

158. See, e.g., S. REP. NO. 113-288, at 50 n.240 (an interrogation team reportedly "found one detainee who, "as far as [they] could determine," had been chained to the wall in a standing position for 17 days").

159. See CIA, SPECIAL REVIEW, *supra* note 56, at ¶ 89 n.43 (listing "continual use of light or darkness in a cell" as a standard interrogation technique).

160. See *Behavioral Interrogation Team SIT Report*, *supra* note 157, at ¶ 3.

161. See CIA, SPECIAL REVIEW, *supra* note 56, at ¶ 89 n.43 (listing "loud music" and "white noise" as standard interrogation techniques).

162. See OFFICE OF MEDICAL SERVICES, CIA, OMS GUIDELINES ON MEDICAL AND PSYCHOLOGICAL SUPPORT TO DETAINEE RENDITION, INTERROGATION, AND DETENTION 10 (2004) [hereinafter OMS GUIDELINES], <https://www.cia.gov/library/readingroom/docs/0006541536.pdf> [<https://perma.cc/SQ6M-W6A2>] (explaining that detainees were deprived of all measurements of time "through continuous light and variable schedules"). In the Human Resource Exploitation Training Manual, the CIA included "persistent manipulation of time," "retarding and advancing clocks," and "serving meals at odd times" in a list of "non-coercive techniques" that can induce regression. CIA, HUMAN RESOURCE EXPLOITATION TRAINING MANUAL, *supra* note 88, at L-17.

163. At DETENTION SITE COBALT, there was reportedly "absolutely no talking inside the facility" and "[e]verything [was] done in silence and [in] the dark." S. REP. NO. 113-288, at 60. "[I]n an attempt to diminish affirmation of [redacted] as an individual and to restrict psychological affiliation, by anyone other than [redacted] the medical staff will be instructed to use hand signals to communicate with [redacted] and when necessary to communicate with [redacted] through [redacted]." Cable from [Redacted] to [Redacted], *Eyes Only – Interrogation Plan [Redacted]* 2 (Apr. 12, 2002) [hereinafter *Cable, Interrogation Plan*], https://www.thetorturedatabase.org/files/foia_subsite/50_0.pdf [<https://perma.cc/Z2BN-79YQ>].

164. S. REP. NO. 113-288, at 493 ("At least 30 CIA detainees were fed only a liquid diet of Ensure and water for interrogation purposes.").

165. Or so we infer. See CIA, SPECIAL REVIEW, *supra* note 56, at ¶ 96 (stating that interrogators "smoked cigars and blew smoke in Al-Nashiri's face during an interrogation [reportedly] to 'cover the stench' in the room").

166. See *Behavioral Interrogation Team SIT Report*, *supra* note 157, at ¶ 3 (describing "the sanding of holding cell bars" done to reduce the occupant's "ability to stimulate his sensorium via rubbing of the bars").

fear and uncertainty—How would they be hurt next? Would it be worse? Would their answers satisfy interrogators? Would they be killed?

Detainees were also right to question whether they would ever leave CIA custody and what their lives would be like once they were no longer being actively questioned.¹⁶⁷ Indeed, OLC wrote two memos on conditions of confinement—never withdrawn—that approved years of total isolation, blindfolding, perpetual noise, forced shaving¹⁶⁸—which OLC observed was “more like an interrogation technique than a condition of confinement”¹⁶⁹—and lights on twenty-four hours a day.¹⁷⁰ The CIA represented these not as interrogation techniques, but as detention conditions with “an impact on the detainee undergoing interrogation.”¹⁷¹ As with the torture memos, the conditions of confinement memos ask only about legal lines that cannot be crossed, strongly suggesting that the question posed to OLC was some version of “how bad can we make it?”

In short, the distinction between “enhanced interrogation techniques” and every other unpleasantness imposed upon the detainees is artificial and misleading. The detainees experienced the entire course of conduct in the RDI program holistically; they presumably did not know or care which abuses were on the OLC menu and which were not. The standard narrative puts an exaggerated and unrealistic focus on itemized EITs. This is a classic case of missing the forest for the trees.

We believe this is a crucial point because a combination of abuses can collectively inflict severe pain or suffering. It is nonsensical to ask which one of those abuses pushed the conduct across the severity threshold, in just the same way it is nonsensical to ask which of the passengers on an overloaded boat was the one who sank it. Even toddlers understand that “who sank the boat?” is a phony question—*Who Sank the Boat?* is the title of a children’s classic.¹⁷²

Recognizing this point makes it glaringly obvious how misleading the two OLC “techniques” memos—the Bybee Techniques Memo and the Bradbury Techniques Memo—are. OLC conceded that torture cases require a holistic examination—a look at the totality of the circumstances¹⁷³—but it provided

167. For several years, the CIA planned to hold detainees permanently. See S. REP. NO. 113-288, at 35 (discussing the possibility that a detainee “will remain in isolation and incommunicado for the remainder of his life”); see also OMS GUIDELINES, *supra* note 162, at 1 (discussing the “permanent detention of captured terrorists in long-term facilities” as a context in which the medical guidelines may be applied).

168. See Bradbury, *Detainee Treatment Act Memo*, *supra* note 10, at 4 & n.3, 5, 14; Letter from Steven G. Bradbury to John A. Rizzo, *supra* note 10, at 7, 8, 10, 12–13.

169. Bradbury, *Detainee Treatment Act Memo*, *supra* note 10, at 4 n.3.

170. Bradbury, *Detainee Treatment Act Memo*, *supra* note 10, at 5; Letter from Steven G. Bradbury to John A. Rizzo, *supra* note 10, at 10.

171. CIA, BACKGROUND PAPER, *supra* note 45, at 4.

172. PAMELA ALLEN, *WHO SANK THE BOAT?* (1982), is written for children ages two to five. It asks: Who sank the boat? Was it the cow, the donkey, the sheep, the pig, or the last animal to board: the tiny little mouse?

173. See Bradbury, *Combined Use Memo*, *supra* note 10, at 3 (citing Bybee, *Interrogation of al Qaeda Operative Memo*, *supra* note 10, at 9); Bybee, *Standards of Conduct Memo*, *supra* note 10, at 2, 24–27. The Levin Law Memo is silent on the matter. See Levin, *Legal Standards Memo*, *supra* note 10.

nothing of the sort in these memos. The Bybee and Bradbury Techniques memos are first and foremost itemized lists of specific forms of abuse—ten in the Bybee memo and thirteen in the Bradbury memo.¹⁷⁴ For each item on the list, the memos ask the same question: does it inflict severe pain or suffering? And for each, OLC answers no, assuming certain limitations. But because the abuses were part of a larger course of conduct, the question barely makes sense, in the same way that it barely makes sense to ask who sank the boat—or to conclude that if no one passenger sank the boat, it must still be afloat.

The question would only make sense if we understand it in a way that OLC never makes explicit: “If this abuse were inflicted just once on a prisoner who, in every other respect, is well-treated, would it cross the line of severity into torture?” Under such make-believe circumstances, we might conclude that grabbing a prisoner by his shirt is insufficiently severe to constitute torture, whereas waterboarding him is torture—even if it is done only once and he is, in every other respect, well-treated. But, of course, the abuses were not inflicted only once, and the victims were not well-treated in all other respects.

In a separate “combined techniques” memo, Bradbury finally begins to ask whether combining the itemized abuses might cross the line into torture even if none of them does individually.¹⁷⁵ Here, at least, he recognizes that “who sank the boat?” is the wrong question. The severity question must be asked within the context of whole courses of conduct rather than in the context of individual acts.¹⁷⁶ Even here, though, OLC asks only about limited combinations of the thirteen itemized abuses without considering how the prisoners were treated when they were not being interrogated, whether they were subject to abuses not on the list, or whether some measures supposedly used for security purposes might have had abusive purposes as well—security measures with benefits.¹⁷⁷ To illustrate: one of the abuses on the list in the Bybee Techniques Memo is sleep deprivation of seventy-two hours or more.¹⁷⁸ This implies that sleep deprivation of, say,

174. See Bradbury, *Interrogation of a High Value Detainee Memo*, *supra* note 10, at 7–15; Bybee, *Interrogation of al Qaeda Operative Memo*, *supra* note 10, at 2.

175. See Bradbury, *Combined Use Memo*, *supra* note 10, at 1. Bybee also says a proper review requires a look at the totality of the circumstances, but does not meaningfully do so. See Bybee, *Standards of Conduct Memo*, *supra* note 10, at 2, 24–27; Bybee, *Interrogation of al Qaeda Operative Memo*, *supra* note 10, at 9, 11, 15–16.

176. This is not to deny that some individual acts (beatings, pulling out fingernails, rape, electric shock) might be torture even if done only once, and regardless of conditions of confinement.

177. One example of such a measure is the following:

Regardless of actual date of transport, all concurred that [redacted] would be transported in a state of pharmaceutical unconsciousness to decrease potential security concerns as well as to maximize the intended effect of disorienting [redacted] when he awakens in a new environment. The continued and deliberate attempt to deny orienting information for the duration of the interrogation phase will persist.

Cable, *Interrogation Plan*, *supra* note 163, at 1.

178. Bybee, *Interrogation of al Qaeda Operative Memo*, *supra* note 10, at 3, 6.

“only” seventy hours does not even merit a severity inquiry for OLC.¹⁷⁹ If the prisoner is subjected to stressors around the clock (for example, complete isolation from human conduct, perpetual white noise, lights on in the cell twenty-four hours a day), an act might, under those circumstances, inflict severe pain or suffering even if it would not under different and far more benign circumstances.

This disregard for all but the supposedly worst abuses, assessed in isolation, dominates the public debate around CIA torture. The fact is that only waterboarding, supposedly the most extreme and severe of the EITs, has become the near-exclusive focus of public debate.¹⁸⁰ This is, to say the least, unfortunate, and we hope it changes.

As we shall see, this disregard also buries the role of psychic demolition, and obscures the connection between the RDI program and the legal definition of the crime of mental torture.

In sum, and apart from any other analytic failings, the OLC memos failed in a more fundamental way: they asked and answered the wrong questions. Instead of asking whether the entire program of detention and abuse, experienced holistically by the subjects, amount to torture, the memos ask only about individual EITs or specific combinations of EITs.

IV. SOME CIA HISTORY

The CIA’s family of interrogational abuses was built on the science behind the Cold War research into coercion techniques that Communist powers used to induce compliance and shape their victims, including American prisoners of war, into confessors.¹⁸¹ Goaded by fear that the Communists had discovered techniques allowing them to “brainwash” their victims, the United States set about

179. Indeed, when the CIA temporarily suspended use of “enhanced” techniques, interrogators kept Khallad bin Attash awake for seventy hours, allowed him four hours of sleep, then kept him awake another forty-three hours—technically without the use of “enhanced techniques.” See S. REP. NO. 113-288, at 117 (2014). It was not until January 2004 that CIA Headquarters instructed interrogators that sleep deprivation of more than forty-eight hours would henceforth be considered an “enhanced” interrogation technique. *Id.* at 134 n.796. Sleep deprivation of less than forty-eight hours was considered a “standard,” not “enhanced” technique, and Adnan al-Libi was subjected to “sleep deprivation sessions of 46.5 hours, 24 hours, and 48 hours, with a combined three hours of sleep between sessions.” *Id.* at 134 & n.796.

180. See, e.g., James E. Mitchell, *Sorry Mad Dog, Waterboarding Works*, WALL ST. J. (Dec. 9, 2016, 8:29 AM), <https://www.wsj.com/articles/sorry-mad-dog-waterboarding-works-1481242339>.

181. See, e.g., THE MANIPULATION OF HUMAN BEHAVIOR (Albert D. Biderman & Herbert Zimmer eds., 1961); Biderman, *supra* note 65 (anthologizing scientific studies of interrogation); Lawrence E. Hinkle Jr. & Harold G. Wolff, *Communist Interrogation and Indoctrination of “Enemies of the State” : Analysis of Methods Used by the Communist State Police (A Special Report)*, 76 AM. MED. ASS’N ARCHIVES OF NEUROLOGY AND PSYCHIATRY 115 (1956) (analyzing Communist interrogation techniques); CIA, BRAINWASHING FROM A PSYCHOLOGICAL VIEWPOINT (1956), <https://www.cia.gov/library/readingroom/docs/CIA-RDP78-02646R000100100002-4.pdf> [<https://perma.cc/ML7G-DMMJ>] (analyzing Communist brainwashing techniques). For overviews of this science, see BLOCHE, *supra* note 78, at 122–41, MCCOY, *supra* note 6, at 21–59 (discussing this science in a chapter titled “Mind Control”), and OTTERMAN, *supra* note 79. McCoy makes it clear that the CIA spent millions of dollars to fund scores of studies. MCCOY, *supra* note 6, at 37.

studying their methods.¹⁸² The military used this research defensively;¹⁸³ the CIA also looked for an offensive use: to train interrogators.¹⁸⁴

In the late 1940s and early 1950s, the CIA and other components of the U.S. intelligence community initiated research programs to find materials and methods that could be used to alter human behavior. These began with CIA programs focused on “special” interrogation methods such as drugs and hypnosis,¹⁸⁵ and continued through the early 1970s with large “umbrella” projects funding hundreds of subprojects outsourced to legitimate researchers.¹⁸⁶

The most controversial experiments involved secretly dosing “unwitting subjects in normal life settings” with experimental drugs.¹⁸⁷ The surreptitious dosing of thousands of people—friends and foes alike—generated an enormous amount of controversy in later years, and is perhaps one of the Agency’s most notorious scandals.¹⁸⁸

The results of such testing?

As of 1960 no effective knockout pill, truth serum, aphrodisiac, or recruitment pill was known to exist. . . . Three years later the situation remain[ed] substantially unchanged, with the exception that real progress ha[d] been made in the use of drugs in support of interrogation. Ironically, however, the progress here ha[d] occurred in the development of a total psychological theory of interrogation, in which the use of drugs ha[d] been relegated to a support role.¹⁸⁹

So research into esoteric methods such as drugs (as well as hypnosis) failed to satisfy, but the CIA had its total psychological theory of interrogation. This was

182. In classic Cold War parlance, “brainwashing” was “the disintegration of personality accompanied by some shift in value-system.” CIA, *BRAINWASHING FROM A PSYCHOLOGICAL VIEWPOINT*, *supra* note 181, at 58.

183. McCOY, *supra* note 6, at 21–26.

184. *Id.* at 50. The defensive and offensive efforts merged in a seminal work: *THE MANIPULATION OF HUMAN BEHAVIOR*, *supra* note 181.

185. See, e.g., Memorandum for the Record, *Project ARTICHOKE* (Jan. 31, 1975), <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB54/st02.pdf> [<https://perma.cc/V7LG-DSL3>]. “Total isolation” was categorized as “a form of psychological harassment.” *Id.*

186. MKULTRA, the most widely known CIA mind-control research endeavor, was an “umbrella” project, with many subprojects. See McCOY, *supra* note 6, at 26 (describing MKULTRA as the CIA’s “largest and most notorious mind-control program”).

187. Memorandum from J.S. Earman, *supra* note 138, at 10.

188. McCOY, *supra* note 6, at 29–30. Today, much as waterboarding has become the stand-in for abuse in the RDI program, the intelligence community’s mind-control research is best known for tests in which the CIA subjected unwitting subjects to surreptitious doses of lysergic acid diethylamide (LSD). And understandably so—consider the highly publicized 1953 death of researcher Frank Olson from involuntary LSD dosing, an incident for which President Gerald Ford publicly, if belatedly, apologized. *Id.* at 30.

189. Memorandum from J.S. Earman, *supra* note 138, at 17. This report was incorporated into multiple Congressional hearings on CIA and military human subject research; it is not clear if this revelation (or the paragraph that followed, redacted for the public) made an impact. See *supra* note 88.

not a new strategy—Americans knew or believed the Communists were already doing it:

[T]he possibility of critical judgement [could be] reduced or removed by such measures as production of excessive fatigue, isolation, deprivation of various sorts, and sometimes physical torture. When reduced to extreme dependency and confusion, the individual is ready to react favorably to any person or idea which promises to end his painfully confused state.¹⁹⁰

As members of the Senate heard in 1977:

[B]y 1962 and 1963, the general idea that we were able to come up with is that brainwashing was largely a process of isolating a human being, keeping him out of contact, putting him under long stress in relationship to interviewing and interrogation, and that they could produce any change that way without having to resort to any kind of esoteric means.¹⁹¹

The CIA took the idea of a “total psychological theory of interrogation” and ran with it. Among other things, they found that sensory disorientation and self-inflicted pain (through stress positions)—particular topics of interest—were “a combination that would, in theory, cause victims to feel responsible for their own suffering and feel subservient to their inquisitors.”¹⁹² As historian Alfred W. McCoy summarizes:

Refined over the next forty years, the CIA’s method came to rely on a mix of sensory overload and sensory deprivation via the manipulation of seemingly banal factors—heat and cold, light and dark, noise and silence, feast and famine—all meant to attack the five essential sensory pathways into the human mind.¹⁹³

In 1963, this total psychological theory of interrogation coalesced into the CIA’s KUBARK Counterintelligence Interrogation Manual (“KUBARK” is a code name). KUBARK advocated the “principal coercive techniques of interrogation: arrest, detention, deprivation of sensory stimuli through solitary confinement or similar methods, threats and fear, debility, pain, heightened suggestibility and hypnosis, narcosis and induced regression.”¹⁹⁴ The CIA determined that the successful use of coercion in interrogation involves “debility, dependency, and dread,” or more specifically, physical weakness, helpless dependency upon the

190. CIA, BRAINWASHING FROM A PSYCHOLOGICAL VIEWPOINT, *supra* note 181, at iii.

191. *MKULTRA Joint Hearings*, *supra* note 85, at 62 (testimony of John Gittinger, former employee, CIA).

192. ALFRED W. MCCOY, TORTURE AND IMPUNITY: THE U.S. DOCTRINE OF COERCIVE INTERROGATION 22 (2012).

193. *Id.*

194. S. REP. NO. 113-288, at 18 (2014) (quoting CIA, KUBARK COUNTERINTELLIGENCE INTERROGATION, *supra* note 86, at 85).

questioner for the satisfaction of all basic needs, and intense fear and anxiety.¹⁹⁵ KUBARK drew together the early research into Communist coercion methods, added the panoply of subsequent research into mind-control and behavioral modification, and devised what McCoy describes as:

[A] distinctively American approach to psychological torture grounded in a scientific understanding of the sensory pathways to human consciousness. . . .

. . . Through its collaboration with leading behavioral scientists, the agency developed a doctrine that was explicitly psychological and scientific—grounded in cognitive research, published in peer-reviewed journals, and refined by interrogators whose innovations were recorded in classified manuals and memoranda. Using this doctrine, the agency found that physical abuse was, at best, a distraction and that the senses were pathways to the mind that could, when properly manipulated, influence human behavior.¹⁹⁶

The methodology was more than theoretical. Congressional hearings revealed the CIA had test-deployed drugs while interrogating operational targets overseas.¹⁹⁷ It is reasonable to assume they also deployed their total psychological theory of interrogation—and not always overseas:

According to public records, in the mid-1960s, the CIA imprisoned and interrogated Yuri Nosenko, a Soviet KGB officer who defected to the U.S. in early 1964, for three years (April 1964 to September 1967). . . . Nosenko was confined in a specially constructed “jail,” with nothing but a cot, and was subjected to a series of sensory deprivation techniques and forced standing.¹⁹⁸

CIA interrogators did more than use the science—they taught others how to use it, too. “In the early 1980s, a resurgence of interest in teaching interrogation techniques developed as one of several methods to foster liaison relationships. . . . [T]he Agency developed the Human Resource Exploitation (HRE) training program designed to train liaison on interrogation techniques.”¹⁹⁹ As we noted earlier, one CIA officer involved in this training later was a principal in the post-9/11 CIA detention and interrogation program—evidence that the interrogation lore of the KUBARK and HRE Manuals had not been lost:

195. CIA, KUBARK COUNTERINTELLIGENCE INTERROGATION, *supra* note 86, at 83; *see also* CIA, HUMAN RESOURCE EXPLOITATION TRAINING MANUAL, *supra* note 88, at K-1 (discussing the psychological manipulation of subjects of interrogation).

196. MCCOY, *supra* note 192, at 18–19. However, physical abuse was certainly part of the RDI program.

197. *See* Memorandum from J.S. Earman, *supra* note 138, at 16–17.

198. S. REP. NO. 113-288, at 18 n.41; *see also* Memorandum from Howard J. Osborn, Dir. of Security, [Redacted], to the Exec. Sec’y, CIA Mgmt. Comm., “Family Jewels” 5 (May 16, 1973), https://www.cia.gov/library/readingroom/docs/DOC_0001451843.pdf [<https://perma.cc/PS8H-2VKY>] (describing Nosenko’s confinement).

199. CIA, REPORT OF INVESTIGATION, *supra* note 62, at ¶ 10; *see also* MCCOY, *supra* note 6, at 71–99 (describing the development and influence of the HRE training program).

[I]n 1983, a CIA officer incorporated significant portions of the KUBARK manual into the Human Resource Exploitation (HRE) Training Manual, which the same officer used to provide interrogation training in Latin America in the early 1980s, and which was used to provide interrogation training to the [redacted] in 198[redacted]. CIA officer [redacted] was involved in the HRE training and conducted interrogations. The CIA inspector general later recommended that he be orally admonished for inappropriate use of interrogation techniques. In the fall of 2002, [redacted] became the CIA's chief of interrogations in the CIA's Renditions Group, the officer in charge of CIA interrogations.²⁰⁰

But CIA-trained military units in Central America were committing significant human rights abuses and, in 1985, in response to CAT and to damning press revelations about the CIA's counterinsurgency training in Central America and its own internal investigations, the CIA revised its policies regarding interrogations and human rights.²⁰¹ By 1986, the CIA terminated the program.²⁰² By 1988, Congress was investigating reports of Central American atrocities—particularly in Honduras²⁰³—linked to security forces whose members were CIA pupils, and the HRE Manual's contents were revealed in secret Senate Intelligence Committee executive session.²⁰⁴

Most of this history has been known for years. For our purposes, the important point lies in the similarity between the past interrogation lore and the stated aims of the RDI program. Just as RDI psychologists would later propose that interrogators induce in the subject a mental state called “learned helplessness,” the KUBARK and HRE Manuals proposed that interrogators induce a closely similar mental state called “regression”:

It is a fundamental hypothesis of this handbook that these techniques, which can succeed even with highly resistant sources, are in essence methods of inducing regression of the personality to whatever earlier and weaker level is required for the dissolution of resistance and the inculcation of dependence.

200. S. REP. NO. 113-288, at 19 (footnotes omitted); see also MITCHELL, *supra* note 127, at 105–06 (reporting that “the chief interrogator told [Mitchell] he had worked interrogations with anticommunist rebels in Latin America” and that “he had participated in interrogations and was familiar with coercive interrogation techniques”); Peter Foster, *Torture Report: CIA Interrogations Chief Was Involved in Latin American Torture Camps*, TELEGRAPH (Dec. 11, 2014, 7:00 AM), <https://www.telegraph.co.uk/news/worldnews/northamerica/usa/11286727/Torture-report-CIA-interrogations-chief-was-involved-in-Latin-American-torture-camps.html> [<https://perma.cc/9UMU-EB9T>] (issuing one of the few journalistic accounts of this fact).

201. See OTTERMAN, *supra* note 79, at 93; CIA, REPORT OF INVESTIGATION, *supra* note 62, at ¶ 11.

202. CIA, REPORT OF INVESTIGATION, *supra* note 62, at ¶ 12.

203. See, e.g., OTTERMAN, *supra* note 79, at 94–95; *Prisoner Abuse: Patterns from the Past*, NAT'L SECURITY ARCHIVE (Feb. 25, 2014), <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB122> [<https://perma.cc/ZF7D-9KQ5>]. The New York Times published the revelations that spurred the Congressional inquiry. See James Lemoyne, *Testifying to Torture*, N.Y. TIMES (June 5, 1988), <https://www.nytimes.com/1988/06/05/magazine/testifying-to-torture.html>.

204. See, e.g., MCCOY, *supra* note 6, at 96 (explaining that “several interrogation manuals” were uncovered when the Senate Select Committee on Intelligence met to review allegations of atrocities).

All of the techniques employed to break through an interrogation roadblock, the entire spectrum from simple isolation to hypnosis and narcosis, are essentially ways of speeding up the process of regression. As the interrogatee slips back from maturity toward a more infantile state, his learned or structured personality traits fall away in a reversed chronological order, so that the characteristics most recently acquired—which are also the characteristics drawn upon by the interrogatee in his own defense—are the first to go.²⁰⁵

The practical difference between “regression” and “learned helplessness” is more terminological than substantive. In both, the end state is supposed to be the loss of independent will to resist, and in both it is induced by painful or unpleasant experiences outside the victim’s control.

The HRE Training Manual proposed that interrogators induce regression through the application of “psychological techniques” to “control” a subject’s mental state of mind and induce compliance.²⁰⁶ The manual taught interrogators to inflict mental and physical abuses designed to render subjects physically weak and exhausted (debilitation), helplessly dependent on their questioners (dependency), and intensely fearful and anxious (dread).²⁰⁷ “Regression” could be caused by both coercive and non-coercive means.²⁰⁸ The manual asserted that such measures could ultimately induce “a loss of autonomy, a reversion [to] an earlier behavioral level.”²⁰⁹ It noted how “[h]e begins to lose the capacity to carry out the highest creative activities, to deal with complex situations, to cope with stressful interpersonal relationships, or to cope with repeated frustrations.”²¹⁰

A concrete example from the RDI program will illustrate what the abstract-sounding phrase “loss of autonomy, a reversion to an earlier behavioral level” looks like in real life. CIA cables offered as proof that Abu Zubaydah had become suitably “compliant” that when the interrogator “‘raised his eyebrow, without instructions,’ Abu Zubaydah ‘slowly walked on his own to the water table and sat down.’ When the interrogator ‘snapped his fingers twice,’ Abu Zubaydah would lie flat on the waterboard.”²¹¹

In December 1984, the U.N. General Assembly voted to adopt the text of CAT and opened it for ratification.²¹² By 1985, several Latin American states whose

205. CIA, KUBARK COUNTERINTELLIGENCE INTERROGATION, *supra* note 86, at 41.

206. CIA, HUMAN RESOURCE EXPLOITATION TRAINING MANUAL, *supra* note 88, at I.C., A-9.

207. *Id.* at L-3–5.

208. *Id.* at L-17 (explaining that “the purpose of all coercive techniques is to induce regression”). Additionally, the manual lists the following “non-coercive techniques” for inducing regression: “persistent manipulation of time,” “retarding and advancing clocks,” “serving meals at odd times,” “disrupting sleep schedules,” “disorientation regarding day and night,” “unpatterned ‘questioning’ sessions,” “nonsensical questioning,” “ignoring half-hearted attempts to cooperate,” and “rewarding non-cooperation.” *Id.*

209. *Id.* at L-2.

210. *Id.*

211. S. REP. NO. 113-288, at 43 (2014) (footnotes omitted).

212. See G.A. Res. 39/46, at ¶ 2, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984). The 1975 U.N. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or

security forces received U.S. training had signed CAT, placing them under a legal obligation not to undercut the treaty.²¹³ Confronted with these states' declarations that mental torture is an international crime, and faced with the Congressional and press criticism described above, the CIA rewrote the HRE Manual in 1985 to indicate as much.²¹⁴

Compare this passage from the 1983 version of the HRE:

The questioner should be careful to manipulate the subject's environment to disrupt patterns, not to create them. Meals and sleep should be granted irregularly, in more than abundance or less than adequacy, on no discernable time pattern. This [unreadable] disorient the subject and [unreadable] destroy [unreadable] his capacity to resist.²¹⁵

with the revised passage in the 1985 version:

Another coercive technique is to manipulate the subject's environment to disrupt patterns, not to create them, such as arranging meals and sleep so they occur irregularly, in more than abundance or less than adequacy, on no discernible time pattern. This is done to disorient the subject and by [unreadable] destroying his capacity to resist. *However, if successful, it causes serious psychological damage and therefore is a form of torture.*²¹⁶

The italicized sentence shows that the CIA recognized that the FIAs are torture. Then came 9/11.

To summarize this Part, we have shown five chief points:

- (1) The CIA had spent decades studying and teaching methods similar to the RDI program: the use of a combination of EITs and continuous lower-level abuses to cause debilitation, dependency, and dread. We argued against the mistake of focusing on individual EITs in the torture memos and in the public discourse that focuses exclusively on waterboarding, as explained in

Punishment had already defined torture to include mental torture. *See* G.A. Res. 3452 (XXX), art. 1 (Dec. 9, 1975). CAT, however, went further by declaring that torture is an international crime. *See* G.A. Res. 39/46, *supra*, annex, art. 21.

213. Although the United States did not sign CAT until 1988, Argentina, Bolivia, Brazil, Colombia, Panama, Peru, and Venezuela signed by 1985. *See Status of Treaties: Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&clang=_en [<https://perma.cc/89PV-8548>] (last visited Sept. 28, 2019). The legal significance of a signature is that it obligates a state not to undercut the object and purpose of a treaty, even if they have not yet ratified it. *See* Vienna Convention on the Law of Treaties art. 18(a), May 23, 1969, 1155 U.N.T.S. 331, 336.

214. *See* Gary Cohn et al., *Torture Was Taught by CIA: Declassified Manual Details the Methods Used in Honduras; Agency Denials Refuted*, BALT. SUN (Jan. 27, 1997), <https://www.baltimoresun.com/news/bs-xpm-1997-01-27-1997027049-story.html>. The reporters explain that they obtained the KUBARK and HRE Manuals in the course of investigating torture by Honduran security forces in the 1980s, whose abuses turned out to closely track those in the HRE Manual used to teach Latin American allies how to interrogate. *Id.*

215. CIA, HUMAN RESOURCE EXPLOITATION TRAINING MANUAL, *supra* note 88, at L-3.

216. *Id.* (emphasis added) (containing handwritten revisions added in 1985).

Part III. By demonstrating that decades of research summarized in the KUBARK and HRE Manuals had concluded that what matters is the continuous pattern of abuses and disorientations, the present Part reinforces the argument that focus on individual EITs is misleading.

- (2) The initial impetus for studying these methods was witnessing our Cold War adversaries using them on U.S. captives and on their own prisoners.
- (3) The aim of these methods, like those of the RDI program, was to break the subject's personality and undermine his free will.
- (4) There was significant continuity between the earlier programs and the RDI program—the earlier findings were not lost lore, and indeed an agent who had taught the KUBARK and HRE repertoire to Latin American allies became the chief of interrogations in the CIA's Renditions Group.
- (5) As recently as the 1985 HRE manual, the CIA recognized that these techniques were torture.

The relevance of these conclusions to U.S. law is, quite simply, that the abuses inflicted on prisoners in the RDI program are procedures calculated to profoundly disrupt their personalities. This language is built into the statutory definition of mental torture.

We turn next to that legal analysis.

V. THE TORTURE ACT

Recall that the U.S. Torture Act was enacted in order to implement CAT, as the treaty requires. Its definition of the crime of torture, although modeled on the treaty language, is more complex. The first subsection of the statute, 18 U.S.C § 2340, defines acts of torture. An act of torture is one “specifically intended to inflict severe physical or mental pain or suffering” on another person.²¹⁷ That formula—“severe physical or mental pain or suffering”—is the experiential element that distinguishes mere unpleasantness from torture. Specific intent is the *mens rea*.²¹⁸ Finally, the law also requires the following circumstances to find an act of torture:

- (1) The victim is within the custody or control of the torturer;
- (2) The torturer is acting “under the color of law”²¹⁹—thus the law is limited to official torture, not “private” torture; and
- (3) The severe pain or suffering is not “incidental to lawful sanctions.”²²⁰

217. 18 U.S.C § 2340(1) (2012).

218. Note that an act can be torture if it is specifically intended to inflict severe physical or mental pain or suffering, even if it fails to do so.

219. Although “under the color of law” is undefined, we understand it to mean that the torturer is a government agent (which includes private parties such as contractors working for the government) acting within the actual or apparent scope of his or her authority.

220. 18 U.S.C § 2340(1).

Our subsequent discussion will concern cases where these three conditions are met, meaning that the reader should assume we are talking about such cases even if we do not mention the three conditions. Government interrogation of a prisoner for intelligence purposes satisfies all three conditions: the prisoner is in custody, the interrogator is a government agent acting under the color of law, and the aim of pain-infliction is not arrest, punishment subsequent to judgment, or prison discipline (“incidental to lawful sanctions”).²²¹

Even when these three conditions are satisfied, not all acts of torture constitute the crime of torture. The second subsection of the torture statute, 18 U.S.C. § 2340A, expressly limits the crime of torture to acts of torture committed outside the United States.²²² The “outside the United States” condition will normally be met when U.S. intelligence agencies abusively interrogate captured terrorism suspects; those interrogations would presumably not be conducted within the United States because victims would acquire due process rights against abuse the moment they enter the United States.

The statutes do not define physical pain or suffering, or how physical pain and physical suffering differ from each other.²²³ Section 2340 does, however, offer an elaborate definition of severe mental pain or suffering. It defines it as:

the prolonged mental harm caused by or resulting from—

- (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
- (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
- (C) the threat of imminent death; or
- (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-

221. The Senate report on the torture statute explained that “lawful sanctions” is a broader category than punishment, and includes “penalties imposed in order to induce compliance” and “law enforcement actions other than judicially imposed penalties.” S. EXEC. REP. NO. 101-30, at 14 (1990).

222. This limitation was presumably based on federalism concerns that criminalizing torture within the United States would encroach on state law (although under *Missouri v. Holland*, 252 U.S. 416, 433–34 (1920), Congress has the power to implement treaties that encroach on state law). A more cynical interpretation is that making in-country torture a federal crime would expose state and local law enforcement and corrections officers who mistreat criminal suspects and prisoners to federal prosecution. That level of exposure is not politically viable.

223. The Bybee Law Memo reads “pain or suffering” as a single category synonymous with pain, which allows it to conclude that abuses like sleep deprivation that do not inflict pain therefore do not inflict suffering. Bybee, *Standards of Conduct* Memo, *supra* note 10, at 6 n.3. The Levin memo that replaced it disagreed, and it acknowledged that physical pain and physical suffering can be distinct experiences and that either one is torture if it is severe enough. Levin, *Legal Standards* Memo, *supra* note 10, at 10–15.

altering substances or other procedures calculated to disrupt profoundly the senses or personality.²²⁴

In short, severe mental pain or suffering is prolonged mental harm resulting from a handful of narrowly limited causes: physical torture and mind-alteration; threats of death, physical torture, or mind-alteration; and threats of any of these against a person other than the torture victim (presumably someone the victim cares about, although the statute does not require this).

Elsewhere, one of us (Luban, writing with Henry Shue) has criticized this narrow definition, which has no counterpart in CAT.²²⁵ The legislative history reveals that the narrowing was deliberate and done out of concern that a broader definition might expose U.S. law enforcement to torture accusations.²²⁶ For present purposes, however, we take the definition as it stands.

Our focus is on mental torture under clause (B): “the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality.”²²⁷ For now, we leave “mind-altering substances” to one side, as well as disruption of the senses. We want to zero in on the remaining prong of clause (B): “the administration or application, or threatened administration or application, of . . . other procedures calculated to disrupt profoundly the personality.”²²⁸

For short, we will refer to this as the “personality disruption” clause.

Our contention is that the family of abuses EITs represent, in the context of the entire RDI program, constitute torture under the personality disruption clause.

Our qualification—“in the context of the entire RDI program”—requires explanation. Section 2340 defines an “act” of torture, but, as OLC agrees, it also applies to multiple acts, and therefore to an entire course of conduct that is specifically intended to inflict severe physical or mental pain or suffering.²²⁹ As we explained earlier, it is the entire course of abusive conduct, including physical violence, psychological stressors, environmental manipulations, and abusive conditions of confinement, that is supposed to break the subject’s resistance. The subject experiences it as a whole, not as a series of isolated application of EITs in the interrogation room. Asking whether a discrete EIT, taken by itself or even in combination with other EITs, inflicts severe pain or suffering is the phony question of whether that EIT “sank the boat.” In the children’s story, all the animals sank the boat, and asking “was it the pig or the tiny little mouse?” is a fool’s inquiry.

Why did Congress include this section in the statute? The short answer: to criminalize psychological “procedures” to which U.S. service members might be

224. 18 U.S.C. § 2340.

225. See Luban & Shue, *supra* note 41, at 841.

226. *Id.* at 837, 839 n.61.

227. 18 U.S.C. § 2340(2)(B).

228. *Id.* (emphasis added).

229. See Bradbury, *Combined Use Memo*, *supra* note 10, at 3 (“[I]t is possible that certain techniques that do not themselves cause severe physical or mental pain or suffering might do so in combination . . .”).

subjected if they were captured by an adversary who did not abide by international law—the same abuses that SERE trained them to survive and resist. These tactics were developed from what the United States’ Cold War adversaries did to U.S. prisoners of war; even with the dissolution of the Soviet Union in 1991, many of the United States’ adversaries remained the same, and with them the fear that these tactics might be used against Americans. We think the profound disruption clause was included in the statute primarily because of this history.

Furthermore, although U.S. researchers had long since concluded that there was no such thing as a “truth drug,” drugs could still play a supporting role in interrogation, and they could certainly be used in torture conducted for other purposes.²³⁰ And, as described above, outrage over CIA and military mind control research involving drugs was repeatedly refreshed in the period between the United States’ acceptance of CAT, its ratification, and the passage of the Torture Act.²³¹ This is a second reason for including such procedures in the definition of mental torture.

By the time the Torture Act was drafted, these connections were well known. One might think that Congress would not draft a statute that criminalized the very practices the CIA had researched, taught, and occasionally engaged in for years. But when the HRE Manual came before members of the Senate, their shock was mollified when the Director of Central Intelligence assured them that, nevertheless, the CIA had a policy against torture.²³²

VI. APPLYING THE STATUTE

How do we apply the statute to the CIA’s family of interrogational abuses? Singly or taken in combination, are they acts of mental torture under the profound disruption clause of the statute?²³³ As we explain next, the *mens rea* requirement has been an obstacle to showing that abuses count as physical torture under U.S. law. It might seem even more difficult to show that they constitute mental torture. Surprisingly, the opposite is true.

Recall that to count as torture, an act must be “specifically intended to inflict severe physical or mental pain or suffering.”²³⁴ This specific intent requirement raises a familiar interpretive question: does the specific intent apply only to the infliction of pain or suffering, or does it apply to the severity of pain and suffering

230. For a description of Soviet confinement and medication of political prisoners in psychiatric hospitals, which was well-known, see, for example, SIDNEY BLOCH & PETER REDDAWAY, *RUSSIA’S POLITICAL HOSPITALS: THE ABUSE OF PSYCHIATRY IN THE SOVIET UNION* (1977) and SIDNEY BLOCH & PETER REDDAWAY, *SOVIET PSYCHIATRIC ABUSE: THE SHADOW OVER WORLD PSYCHIATRY* (1985).

231. See, e.g., *Cold War Era Human Subject Experimentation Hearing*, *supra* note 85.

232. See, e.g., MCCOY, *supra* note 192, at 224–26 (explaining the secret hearings before the Senate Select Committee on Intelligence to discuss torture allegations).

233. Rebecca Gordon intuitively linked FIAs with personality disruption. See REBECCA GORDON, *MAINSTREAMING TORTURE: ETHICAL APPROACHES IN THE POST-9/11 UNITED STATES* 23 (2014) (“I am not entirely convinced . . . that Section 2340 does permit all of these actions, which seem to me to fall into the prohibited category of ‘other procedures calculated to disrupt profoundly the senses or personality.’”).

234. 18 U.S.C. § 2340(1) (2012).

as well? If the answer is the latter, it is a double *mens rea* requirement: the defendant must have intended to inflict physical pain or suffering, and intended that it be severe. In the only case ever prosecuted under the U.S. Torture Act, *United States v. Belfast*,²³⁵ the jury instructions adopted the latter reading:

“Specific intent to inflict severe physical pain or suffering” means to act with the intent to commit the act as well as the intent to achieve the consequences of the act, namely the infliction of the severe physical pain or suffering. An act that results in the unanticipated or unintended severity of pain and suffering is not torture.²³⁶

Belfast involved horrifying physical tortures; no mental torture was charged as such in the indictment.²³⁷ With mental torture, the interpretive issue is quite different. To see why, we must look closely at the statutory definition of mental torture under section 2340(2)—in particular, what we have called the “profound disruption” clause. Here, unlike in the case of physical torture, the statute defines “severe pain or suffering.” It is “the prolonged mental harm caused by or resulting from [*inter alia*] the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.”²³⁸ This must be specifically intended. Notice that the definition eliminates the word “severe,” and with it the question of whether specific intention applies not only to the infliction of pain or suffering, but also to its severity. The *mens rea* for mental torture is single, not double.

We set aside the question of whether the CIA used mind-altering substances.²³⁹ Our focus will be on “other procedures calculated to disrupt profoundly the

235. 611 F.3d 783 (11th Cir. 2010).

236. Jury Instructions at 6, *United States v. Belfast*, No. 06-20758-CR-ALTONAGA (S.D. Fla. Oct. 30, 2008). The Bybee Law Memo reached the same conclusion: that the statute requires a double *mens rea*. See Bybee, *Standards of Conduct* Memo, *supra* note 10, at 6 n.3. Former OLC head Jack Goldsmith once described OLC opinions as having the power to be “get-out-of-jail-free cards.” JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 96–97 (2007). The specific intent reading in *Belfast* explains why. Once OLC told interrogators that the pain and suffering EITs inflicted was not severe, the second *mens rea* could not be established. This is undoubtedly why the 101 cases of interrogator abuse that then-Attorney General Eric Holder referred to special prosecutor John Durham were all cases where the accused had allegedly exceeded their legal guidance. See Attorney Gen. Eric Holder, Remarks Regarding a Preliminary Review into the Interrogation of Certain Detainees, DEP’T OF JUST. (Aug. 24, 2009), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-regarding-preliminary-review-interrogation-certain-detainees> [<https://perma.cc/M6XV-2SK2>].

237. Indictment at 5–6, *United States v. Belfast*, No. 06-20758-CR-ALTONAGA (S.D. Fla. Dec. 6, 2006), <https://www.justice.gov/sites/default/files/criminal-hrsp/legacy/2010/07/29/12-06-06rbelfastindict.pdf> [<https://perma.cc/7QJQ-9SVW>]. This is not to deny that Roy Belfast and his self-styled “Demon Forces” inflicted mental torture on prisoners in his camp, including forcing a prisoner to watch another prisoner being shot and placing a prisoner in a pit containing chin-high water and a rotting corpse. *Belfast*, 611 F.3d at 793, 795.

238. 18 U.S.C. § 2340(2)(B).

239. According to a declassified cable, the Agency planned to use drugs as an FIA on an unnamed detainee—as a security measure with interrogational benefits—but the record does not say what happened next. Cable, *Interrogation Plan*, *supra* note 163, at 3. There also is a record stating the CIA

senses or the personality,” particularly on those that disrupt the personality. The *mens rea* requirement for acts of mental torture requires the following (divided for clarity into its six parts or elements):

- (1) specific intent to cause
- (2) prolonged mental harm
- (3) resulting from
- (4) the administration or application, or threatened administration or application, of procedures
- (5) calculated
- (6) to disrupt profoundly the senses or personality.

Number 4 is self-evident: the CIA abuses were the administration or application of procedures, namely procedures to induce a debilitated psychological state. Of the other five elements, the last two (numbers 5 and 6) are the crucial ones, because once they are satisfied, the other elements are satisfied as well. More precisely, we argue two crucial points: first, once you have proven Number 6 (profound disruption of the personality), you have proven Number 2 (prolonged mental harm) and Number 3 (causation) as well; and second, once you have proven Number 5 (“calculated”), you have proven Number 1 (specific intent) as well.

Thus, to prove specific intent to inflict severe mental pain or suffering through abusive procedures, proving Numbers 5 and 6 is key. Under the statute, proving that the FIAs were calculated to disrupt profoundly the senses or personality makes the mental pain or suffering “severe,” without the necessity for answering the question, “How severe?”

A. DISRUPTION AND MENTAL HARM

Consider first the requirement that the procedures “disrupt profoundly the senses or personality”—Number 6 above. In the abstract, disruption does not necessarily imply harm. Suppose you give medication to a sad person that quickly makes that person happy. We probably would not say the person was harmed, even though the medication profoundly disrupted the individual’s chronically depressed personality.²⁴⁰

planned to use “disinhibit[ing]” drugs on Abu Zubaydah but ultimately did not. SUMMARY AND REFLECTIONS, *supra* note 49, at 19, 24–26. Nor did the CIA seek OLC approval for drug use, because “CTC/LGL did not want to raise another issue[] with the Department of Justice.” *Id.* at 25.

240. This is not a fanciful hypothetical. Some of the CIA’s experiments with mind-control included administering LSD and other psychedelic drugs, which, in addition to recreational uses, have been studied extensively for therapeutic uses. Some of those studies reported that in appropriately controlled settings these drugs induce feelings of bliss. See generally Matthias E. Liechti, *Modern Clinical Research on LSD*, 42 NEUROPSYCHOPHARMACOLOGY 2114 (2017) (reviewing twenty-five years of clinical studies); Torsten Passie et al., *The Pharmacology of Lysergic Acid Diethylamide: A Review*, 14

But it would be absurd to construe the statute to criminalize benevolence, and the aim of the CIA's family of interrogational abuses was certainly not benevolent.²⁴¹ The aim was to assault the target with endlessly creative forms of physical violence, psychological stressors, environmental manipulations, and abusive conditions of confinement, while systematically dismantling the target's ability to cope with pain and distress by subjecting him to unpredictable and uncontrollable circumstances.²⁴² It was to make the target child-like, submissive, and perpetually fearful, and to deprive him of free will. This is self-evidently mental harm. And the target is supposed to remain in the broken state during subsequent days or weeks of interrogation.²⁴³ In the CIA's words that we quoted earlier, "The goal of interrogation is to create a state of learned helplessness and dependence conducive to the collection of intelligence in a . . . sustainable manner."²⁴⁴ We next demonstrate that this disruption is *prolonged* mental harm.

B. "PROLONGED"

How long is "prolonged"? The Bybee Law Memo does not set a threshold, but its sole example of prolonged mental harm is "the development of a mental disorder such as posttraumatic stress disorder, which can last months or even years, or even chronic depression, which also can last for a considerable period of time," which "might satisfy the prolonged harm requirement."²⁴⁵ By contrast, "the mental strain experienced by an individual during a lengthy and intense interrogation . . . would not violate Section 2340(2)."²⁴⁶ The memo does not explain why the latter is so. If an interrogation lasts weeks or months, why is the mental harm not "prolonged"? Bybee and John Yoo (the memo's author) do not say.

Significant evidence exists that the after-effects of torture have caused enduring mental harm to some of the detainees, which persists even now in the form of

CNS NEUROSCI. THERAPEUTICS 295 (2008) (reviewing older clinical studies). Interrogation rooms are not the controlled settings that induce bliss. As we argue below, the effects of LSD provide a yardstick of "profound disruption" that refutes the interpretation given in the Bybee Law Memo. *See infra* notes 273–78 and accompanying text.

241. *See, e.g.*, Expert Report of Charles A. Morgan III at 17, *Salim v. Mitchell*, No. 15-0286-JLQ (E. D. Wash. August 7, 2017) ("Given their direct claim of seeking to create a state of 'Learned Helplessness' it is clear, however, that they sought to significantly deteriorate the psychological health and functioning of the person to whom they subjected the techniques.").

242. *See, e.g.*, Başoğlu, *supra* note 1, at 409–30.

243. For example, the CIA interrogated Ramzi bin al-Shibh using enhanced interrogation techniques for an estimated thirty-four days. *See* S. REP. NO. 113-288, at 75 (2014). Abu Zubaydah was placed in isolation for forty-seven days without questioning—technically before EITs even began—which then continued for another twenty days. *Id.* at 27. "One senior interrogator, [redacted], told the CIA OIG that 'literally, a detainee could go for days or weeks without anyone looking at him,' and that his team found one detainee who, "as far as we could determine," had been chained to the wall in a standing position for 17 days.'" *Id.* at 50 n.240.

244. CIA, BACKGROUND PAPER, *supra* note 45, at 1.

245. Bybee, *Standards of Conduct* Memo, *supra* note 10, at 7. Note that even chronic depression only "might satisfy the prolonged harm requirement." *Id.* (emphasis added). The memo does not concede that it would satisfy the requirement.

246. *Id.*

PTSD, depression, and other mental illness.²⁴⁷ But long-term clinically recognized after-effects are not a legal requirement. Recognizing this, the Levin Memo withdrew the Bybee–Yoo requirement of months or years of mental harm, although it did so without specifying a shorter unit of time.²⁴⁸ Presumably, if months or years are not required, the relevant time units are days or weeks; a jury could conclude that a particularly grievous mental harm became “prolonged” even sooner. The desired outcome of the FIAs was learned helplessness and dependence that would continue for the days or weeks of interrogation, and once the Bybee standard is rightly rejected, days or weeks will suffice for prolongation. Even if Bybee and Yoo are right that “prolonged” is in the statute to distinguish the forbidden mental harm from the mental strain of interrogation, the fact is that the psychological theory behind these interrogations predicted and intended a sustained state of learned helplessness.

Recall that, under the statute, the application of abusive procedures is not the only *actus reus* of mental torture; the threat of using those procedures is also an *actus reus*.²⁴⁹ Threat was a bedrock concept for the CIA’s previous models of interrogation using psychological stress. In the RDI program, interrogators used both explicit and implied threats as tools of disruption. Once a subject was deemed “compliant,” he could be questioned in earnest—“debriefed” by a subject-matter expert during a “sustained” state of compliance. If he was deemed “no longer compliant,” interrogators could go back to breaking him. The final two instances of waterboarding of Abu Zubaydah were “meant only as a brief reminder when AZ appeared to be backsliding.”²⁵⁰ The process interlaced abuse with threat of abuse, disruption with threat of disruption. Whatever mental harm it caused was prolonged, because the hovering threat of abuse stitched together the actual abuses in a continuum, over the many weeks of interrogation.²⁵¹

In other words: once you have shown that the CIA’s family of interrogational abuses “worked” by inducing sustained “regression” or “learned helplessness”—colloquially, a sustained “broken” state—you have automatically shown both profound disruption of the personality (Number 6) and prolonged mental harm (Number 2). To restate the reason: profound disruption of the personality amounting to a lingering broken state is prolonged mental harm.

247. See, e.g., Carol Rosenberg, *Guantánamo Captive Accused in USS Cole Bombing Suffers from PTSD, Depression*, MIAMI HERALD (June 1, 2013, 9:29 PM), <https://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article1952063.html>.

248. See Levin, *Legal Standards* Memo, *supra* note 10, at 14 n.24 (“Although we believe that the mental harm must be of some lasting duration to be ‘prolonged,’ to the extent that that formulation was intended to suggest that the mental harm would have to last for at least ‘months or even years,’ we do not agree.”).

249. See 18 U.S.C. § 2340(2)(B) (2012).

250. SUMMARY AND REFLECTIONS, *supra* note 49, at 19.

251. For an example of a detainee subjected to multiple periods of intermittent questioning and EIT abuse, interspersed with periods of isolation, consider the story of Mohammad Rahim. See S. REP. NO. 113-288, at 163–67, 165 n.1008, 166 n.1016 (2014).

This is not to say that the lingering broken state is the only prolonged mental harm caused by the FIAs. Even if an interrogation subject never broke, he might still suffer after-effects that count as prolonged mental harm.

C. “RESULTING FROM”

Next consider Number 3, the causal nexus between the FIAs and the prolonged mental harm. If the procedures affect the subject’s personality as the theory of learned helplessness and the KUBARK and HRE Manuals predict, they *cause* the profound disruption of the personality at which the interrogator aims, namely regression or learned helplessness—the breaking of the target’s personality.

D. CALCULATION AS SPECIFIC INTENT

We turn next to the statutory requirement that these techniques be “calculated” to profoundly disrupt the personality—Number 5 in our inventory of elements. The CIA’s family of interrogational abuses was engineered to break the personality of the person subjected to them. That they are “calculated” to cause that effect is precisely the point of citing a scientific theory for the claim that they work as advertised.

But once we know that the CIA’s family of interrogational abuses is “calculated” to cause profound personality disruption (Number 5), it follows automatically that the abuses are specifically intended to cause that effect (Number 1). The key point is simple: if someone commits an act or course of conduct “calculated” to achieve a goal (in this case, profound disruption of the personality), the act or course of conduct is specifically intended to achieve the goal. Intentionally doing what is calculated to achieve *X* implies specific intent to achieve *X*.²⁵²

Relying on years of research into what it takes to profoundly disrupt the personality of the target is plainly “calculation” that went into devising the CIA’s family of interrogational abuses. Such calculation establishes the specific intent needed to prove that these procedures were acts of mental torture.

Some may object that our reading would make the statute’s specific intent requirement redundant with the word “calculated.” If “calculated” already implies “specifically intended,” the statute would not need a separate specific intent requirement, and Congress would not have included it. We disagree. The statute aims to limit mental torture to prolonged mental harm resulting from at least one of four causes. The other three causes (death threats, torture threats, and death or torture threats to another person) do not contain a mental state word like “calculated.” For these causes, separately stating the specific intent requirement is necessary. Grouping acts calculated to profoundly disrupt the personality together with the other three causes under the same umbrella *mens rea* is simply an economical form of statutory drafting.

252. The reverse is not necessarily true: a person can act with specific intent without calculation—for example, in a non-premeditated murder. “Calculation” and “specific intent” are not synonyms. Nevertheless, even if specific intent does not logically imply calculation, calculation implies specific intent.

Thus, to establish the *mens rea* of specific intent to inflict mental torture, one needs to establish only that the interrogator intentionally administered or applied procedures calculated to disrupt profoundly the personality of the target (Numbers 4, 5, and 6 on our list). This is exactly what inflicting the CIA's family of interrogational abuses does. There is no need to prove an additional, separate specific intent to make the mental pain or suffering "severe." The statute has already built that specific intent into the definition of "severe mental pain or suffering" by including the word "calculated" in the statutory phrase: "calculated to disrupt profoundly the personality" of the target.

E. SPECIFIC INTENT VS. KNOWLEDGE

One possible objection to this analysis is that the interrogators may have intended to profoundly disrupt subjects' personalities without specifically intending mental harm—and the crime of torture requires the latter. "Specific intent" has no settled definition in the law, but in this context, specifically intending prolonged mental harm probably means taking prolonged mental harm as your purpose.²⁵³ But—the objection goes—the interrogators' purpose was to induce compliance, not to cause harm. Perhaps the interrogators *knew* their methods inflicted mental harm—but knowing is not the same as intending, and knowledge is a lesser *mens rea* than intent.

We find this response implausible because the psychological debilitation the interrogators intended to cause is prolonged mental harm under another name. The statute does not require that a torturer intends prolonged mental harm *under that name*; no specific intent statute does. To see why this matters, consider an analogy with physical torture. An interrogator who intentionally breaks a subject's arm cannot defend herself by saying, "I intended to break his arm, but I didn't intend to harm him." Breaking his arm *is* harming him. The defense is mere wordplay: it denies specific intent to cause harm solely on the basis that the actor does not call it harm.

The same is true of profound disruption of the personality: it *is* harm. The idea that someone can avoid specific intention to harm simply by directing their intention to compliance rather than harm is too casuistic to take seriously. As G. E. M. Anscombe puts it, that would be "a marvellous way . . . of making any action lawful. You only had to 'direct your intention' in a suitable way. In practice, this means making a little speech to yourself: 'What I mean to be doing is . . .'"²⁵⁴ What Anscombe means is that you *cannot* make an act lawful by making an intent-narrowing speech to yourself. She adds, "It is nonsense to pretend that you

253. The *Belfast* jury instructions suggest that specific intent to inflict severe mental pain or suffering means "intent to commit the act as well as the intent to achieve the consequences of the act, namely the infliction of" prolonged mental harm through one of the four specified acts. See Jury Instructions at 6, *United States v. Belfast*, No. 06-20758-CR-ALTONAGA (S.D. Fla. Oct. 30, 2008); see also *supra* note 236 and accompanying text.

254. G. E. M. Anscombe, *War and Murder*, in *NUCLEAR WEAPONS: A CATHOLIC RESPONSE* 44, 58 (Walter Stein ed., 1961).

do not intend to do what is the means you take to your chosen end.”²⁵⁵ Even if the chosen end is compliance, the means is inflicting abuses calculated to produce prolonged mental harm. Tellingly, the statute groups profound disruption of the senses and personality together with death threats and torture threats, which are unquestionably harms.

And, as we have seen, the CIA recognized that the end-states it sought are harms. Recall language we have quoted earlier: “The intent . . . is to make the subject very disturbed,”²⁵⁶ and “[i]f successful[,] it causes serious psychological damage and therefore is a form of torture.”²⁵⁷ Earlier manuals and the RDI documents reference desired end-states using words that denote harms—regression (“structured personality traits fall away”²⁵⁸), debilitation, dread, and helplessness.

Lest it be thought that the material in the KUBARK and HRE Manuals was long-forgotten lore irrelevant to CIA intentions in 2002, we note first the continuity of personnel—the “chief interrogator” for the new program had been involved in Latin American FIA operations drawing on these manuals.²⁵⁹ Second, OMS reminds us that “[b]oth SERE and initial Agency thinking . . . drew on the same early Agency and military-funded studies. . . . with which Jessen and Mitchell were familiar.”²⁶⁰

F. PROFOUND

The statute does not require us to gauge how severe mental pain or suffering is, precisely because, unlike the case of physical torture, it offers a definition of severe mental pain or suffering. However, the definition does require that the intended disruption of the personality be “profound[.]”²⁶¹ This is a quantitative term, like severity. The difference is that “severe” is a measure of how *intense* the pain or suffering is, whereas “profound” measures how thoroughly the victim’s personality is disrupted—or rather, how thoroughly the victim’s personality is calculated to be disrupted (regardless of whether that level of disruption is actually attained). What end-state were the FIAs calculated to achieve?

Here, we have already seen the intended end-state of the RDI program. The subject would not only lose the will to resist, he would lose even the ability to resist.²⁶² Interrogators could assure themselves the subject did not have more information, because if he did, he would tell them—he simply would not be able to hold it back. This is the eradication of free will—in the words of the HRE

255. *Id.* at 59.

256. SUMMARY AND REFLECTIONS, *supra* note 49, at 15–16 (internal quotation marks omitted) (quoting a white paper by the CIA’s Office of Technical Service).

257. CIA, HUMAN RESOURCE EXPLOITATION TRAINING MANUAL, *supra* note 88, at L-3.

258. CIA, KUBARK COUNTERINTELLIGENCE INTERROGATION, *supra* note 86, at 41.

259. *See supra* note 200 and accompanying text.

260. SUMMARY AND REFLECTIONS, *supra* note 49, at 14 n.25.

261. *See* 18 U.S.C. § 2340(2)(B) (2012).

262. Cable from [Redacted] to ALEC, *Eyes Only – Status of Interrogation Phase*, *supra* note 81, at 2 (“Our goal was to reach the stage where we have broken any will or ability of subject to resist or deny providing us information (intelligence) to which he had access.”).

Manual, “loss of autonomy.”²⁶³ The HRE Manual equates this loss of autonomy with “a reversion to an earlier behavioral level”;²⁶⁴ in KUBARK, it was “regression of the personality” to an “earlier and weaker level,” in which “[t]he interrogatee’s mature defenses crumbles [sic] as he becomes more childlike”;²⁶⁵ in the RDI program, the label was “learned helplessness.”²⁶⁶ Under any of these descriptions (loss of autonomy, regression to a childlike state, learned helplessness), the desired end-state is disruption of the personality that, in commonsense terms, can only be described as profound.²⁶⁷

Recall again the abusive interrogation of Abu Zubaydah, who was brought to the point where he would walk to the waterboard when the interrogator raised his eyebrow and lie down on it when the interrogator snapped his fingers twice.²⁶⁸ Crucially, the CIA took this behavior as an indicator or criterion that Abu Zubaydah was now “compliant”²⁶⁹—further evidence of how profoundly abnormal the desired end-state was. We do not know whether other detainees exhibited such extreme robotic behaviors, but even if they did not, there is little question that this level of brokenness is what the CIA’s procedures were calculated to produce. Taking Abu Zubaydah’s behavior as a benchmark of success reveals in graphic detail the end-state desired by the interrogators.

But, according to Bybee, this robotic behavior is not a profound disruption. The memo defines “profound disruption” by examples and, characteristically, it offers only the most extreme examples: drug-induced dementia that involves significant loss of language and motor function; delusions, hallucinations, or catatonia; obsessive-compulsive disorder; and “pushing someone to the brink of suicide . . . evidenced by acts of self-mutilation.”²⁷⁰ Apparently, only effects symptomatically identical with major mental illness count as profound personality disruption.

This is wrong. Just as the statute does not require that mental harm be prolonged for months or years, it does not require that mind-alteration and profound disruption of the personality be so extreme. The statute itself gives us the yardstick of what counts as profound disruption: a disruption as thorough as the disruption caused, or calculated to be caused, by mind-altering substances or procedures. It is overwhelmingly likely that the scandals over CIA and military experiments on unwitting test subjects played a part in causing Congress to include mind-altering substances and other personality-disrupting procedures in

263. CIA, HUMAN RESOURCE EXPLOITATION TRAINING MANUAL, *supra* note 88, at L-2.

264. *Id.*

265. CIA, KUBARK COUNTERINTELLIGENCE INTERROGATION, *supra* note 86, at 41, 103.

266. CIA, BACKGROUND PAPER, *supra* note 45, at 1. CIA officers were not orthodox with their choice of words: one medical officer described waterboarding as “a tool of regression and control.” S. REP. NO. 113-288, at 84 (2014).

267. “Profound” and “profound personality change” are not terms of art in either law or psychiatry, except in non-relevant contexts.

268. *See* S. REP. NO. 113-288, at 43.

269. *Id.* (internal quotation marks omitted).

270. Bybee, *Standards of Conduct* Memo, *supra* note 10, at 11.

the Torture Act. A 1975 presidential commission and several high-profile Congressional hearings over the previous twenty years had exposed the dimensions of CIA and military mind control research, including experiments with hallucinogenic drugs on non-consenting subjects.²⁷¹ Outrage over these experiments was repeatedly refreshed over a time frame that encompassed the period between the United States' acceptance of CAT, its ratification, and the passage of the Torture Statute.²⁷² The CIA and military tested more than just psychotropic drugs.²⁷³ For the sake of brevity, however, we will consider the LSD tests.

What severity of disruption did the CIA and its partners seek to cause by surreptitiously dosing unwitting human test subjects with psychotropic substances? Just as they did not intend to cause the extreme effects of a “bad trip” or whatever sent Frank Olson out the window, they did not intend to cause the extreme effects the Bybee Law Memo takes as the standard.²⁷⁴ These tests were designed to identify substances and procedures for covert mind-control and human behavior modification, not to cause dementia, catatonia, suicidal ideation, or a compulsion for self-mutilation.²⁷⁵ These results do not fit the ends desired from the LSD tests: dementia and suicidal ideation would not have made a subject a better source of intelligence, nor disabled nor discredited an adversary, without a grave risk of exposure.²⁷⁶ As a practical matter, millions of individuals took and continue to take psychedelic drugs recreationally, without effects anywhere near as extreme as those contemplated in the Bybee Law Memo.²⁷⁷

We know some of the effects the CIA hoped to induce through drugs. Among them: “illogical thinking and impulsiveness to the point where the recipient

271. See *supra* note 85 and accompanying text.

272. In a 2009 investigation into allegations that military interrogators used mind-altering drugs on detainees, the Department of Defense Inspector General used the terms “mind-altering drugs, psychoactive drugs, and psychotropic drugs” interchangeably to mean “any chemical substance that alters brain function resulting in changes in perception, mood, consciousness, and/or behavior”—a plain-meaning definition of “mind-altering drugs” that relies on the nature of the disruption. DEPUTY INSPECTOR GEN. FOR INTELLIGENCE, INSPECTOR GEN., U.S. DEP'T OF DEFENSE, INVESTIGATION OF ALLEGATIONS OF THE USE OF MIND-ALTERING DRUGS TO FACILITATE INTERROGATIONS OF DETAINEES, Report No. 09-INTEL-13, at 1 n.1 (2009), <https://apps.dtic.mil/dtic/tr/fulltext/u2/a639218.pdf> [<https://perma.cc/N2WG-YP8J>]. Although this definition post-dates the Torture Act, it is plausible that Congress contemplated a similar definition.

273. See, e.g., *Cold War Era Human Subject Experimentation Hearing*, *supra* note 85, at 1–3 (mentioning radiation experiments, a biological warfare test with a “cancer-causing compound,” in addition to experiments with “psychochemical agents”).

274. Intentions aside, the CIA and military LSD tests were incredibly risky, unethical, and irresponsible.

275. See Bybee, *Standards of Conduct* Memo, *supra* note 10, at 11.

276. See *MKULTRA Joint Hearing*, *supra* note 85, at 11 (referring to materials used in the LSD tests as “discrediting and disabling”); Memorandum from J.S. Earman, *supra* note 138, at 17 (describing the use of drugs as “high-risk, low-yield”).

277. During the psychedelic era, many users no doubt agreed that the effect on their personality was profound—that was one of the psychedelic movement’s selling points, prominent in books and in the lyrics of innumerable acid rock songs. See, e.g., ALDOUS HUXLEY, *THE DOORS OF PERCEPTION* (1954); TIMOTHY LEARY, *HIGH PRIEST* (1968); TOM WOLFE, *THE ELECTRIC KOOL-AID ACID TEST* (1968). Congress, which criminalized psychedelics in 1968, evidently shared the assessment that these drugs profoundly disrupt the senses and personalities of their users.

would be discredited in public”; easing the process of or otherwise enhancing the “usefulness” of hypnosis; “amnesia for events preceding and during their use”; and “shock and confusion over extended periods of time.”²⁷⁸ Again, with the possible exception of amnesia, these are far less disruptive than the Bybee Law Memo contemplates.

However, these effects are no less disruptive than the desired end-state of the RDI program: even psychedelic drugs do not rob their users of free will. The prolonged loss of free will that the RDI program sought to induce is *more* profound than the effects researchers sought to induce with psychedelic drugs, even if it is *less* profound than the major mental illness Bybee and Yoo write into the statute. In sum, the “mind-altering substances” prong of the torture statute and the historical context defining which mind-altering substances Congress had in mind yield the same conclusion as common sense: the desired RDI end-states are well past the statutory threshold of profundity.

CONCLUSION: FROM ACT TO CRIME

Our aim in this Article is emphatically not to re-litigate the Justice Department’s decision not to prosecute interrogators and officials. Our aim is primarily future-directed: we want to make it clear that resurrecting any version of the FIAs would be a crime under U.S. law. Insofar as we are looking back at the historic RDI program, it is solely for the purpose of calling the abuses visited on its subjects by their rightful name: acts of torture.²⁷⁹ This is more important than pointing fingers at the perpetrators and calling them criminals.

Yet it is worth spelling out what might make them criminals and what might relieve them of criminal responsibility. First, some might think the interrogators might not have known the background of the FIAs they were administering, so they did not calculate that the procedures would profoundly disrupt the personality of the detainees. That seems unlikely—what did they suppose they were doing?—but even if true, it does not matter. As long as someone told them the CIA’s program of abuse would break the prisoners, they knew they were inflicting techniques calculated to bring about this effect. Perhaps they did not know the exact wording of the statute, but ignorance of the law is not an excuse.

In any case, the premise of the objection—that the actual interrogators were not the same individuals who calculated the effects—is untrue. Mitchell and Jessen personally waterboarded detainees. The CIA Chief of Interrogations—the person who wrote about “regression” in the HRE Manual—applied EITs and more. All three taught their methodologies to other “interrogators.”²⁸⁰ CIA

278. *Human Drug Testing Hearings*, *supra* note 85, at 199 (statement of Sen. Richard Schweiker).

279. This purpose is not at all inconsequential. One of us, Katherine S. Newell, provides subject-matter expertise for defense counsel for former CIA detainees now held at Guantánamo for prosecution in military commissions. Questions about their torture are playing a significant role in their trials—some of which are capital.

280. See MITCHELL, *supra* note 127, at 154–55; SUMMARY AND REFLECTIONS, *supra* note 49, at 30 n.62.

higher-ups were the ones who had decided to take the gloves off in the first place and signed off on how that was to be done. They heard about and saw horrific treatment, and sometimes ordered the continued use of EITs on particular detainees over objections or concerns from the field.²⁸¹ Some traveled to observe interrogations first-hand.²⁸² They decided, over and over again, to stay the course, because they believed it worked. Those who ordered the enhanced interrogations knew exactly what was being done and were familiar with the scientific theories behind it.²⁸³

Beyond the interrogators, what were other government employees doing at the black sites? Security officers were frequently hands-on participants in the interrogation rooms.²⁸⁴ CIA medical personnel were told their mission was to help break detainees.²⁸⁵ Linguists heard, saw, and interpreted the words and sounds of detainees in great distress. Reportedly, the CIA contracted with an outside company whose personnel, “on behalf on the CIA,” “participated in the interrogations of detainees held in foreign government custody and served as intermediaries between entities of those governments and the CIA.”²⁸⁶

Second, that officials believed there was a solid basis in research supporting the efficacy of the FIAs shows that they, too, specifically intended the abuses to inflict severe mental pain or suffering as defined by the statute: prolonged mental harm resulting from the administration or application of procedures calculated to disrupt profoundly the senses or personality. Potentially, that could include all those who devised the CIA’s family of interrogational abuses, all those who adopted them because there was a body of research purporting to show how they would “work,” and all those who signed off with the institutional knowledge of the CIA’s historic use and disavowal of coercive interrogation models as improper, a violation of policy, and potentially torture.

OLC wrote legal opinions to the contrary. But their analysis was circular: it was based on CIA assurances that medical monitoring would ensure that detainees’ pain and suffering never crossed the line into “severe,” and then it repeated

281. See SUMMARY AND REFLECTIONS, *supra* note 49, at 18–19; S. REP. NO. 113-288, at 43 (2014) (“Despite the assessment of personnel at the detention site that Abu Zubaydah was compliant, CIA Headquarters stated that they continued to believe that Abu Zubaydah was withholding threat information and instructed the CIA interrogators to continue using the CIA’s enhanced interrogation techniques.”). For back-and-forth debates between CIA Headquarters and personnel in the field about, *inter alia*, Abu Zubaydah, al Nashiri, Khalid Sheikh Mohammad, Ramzi bin al-Shibh, Khallad bin Attash, and others, see generally S. REP. NO. 113-288.

282. See S. REP. NO. 113-288, at 85. Someone identified as “The deputy chief of ALEC Station, [redacted], and [redacted] CTC Legal, [redacted], would later travel to DETENTION SITE GREEN to observe the use of the CIA’s enhanced interrogation techniques against Abu Zubaydah.” *Id.* at 52 n.251.

283. One group that should be assessed for culpability are those who provided false facts upon which OLC’s determination rested, among them CIA lawyers who stood at the intersection between fact and fiction.

284. CIA, BACKGROUND PAPER, *supra* note 45, at 10.

285. Specifically, to help “psychologically ‘dislocate’ [each] detainee, maximize his feeling of vulnerability and helplessness, and reduce or eliminate his will to resist.” OMS GUIDELINES, *supra* note 162, at 8.

286. S. REP. NO. 113-288, at 168.

back to them that the pain and suffering caused by the CIA's family of interrogational abuses was not severe. CIA attorneys applied OLC's legal reasoning to other fact patterns, and presumably determined the same. So, along the lines of the argument we sketched at the beginning of this Conclusion, one might suppose that those relying on these legal opinions lacked specific intent to make the prisoners' pain and suffering severe. That may be true for some of the physical abuses they inflicted, but the defense fails in the case of mental torture, for the reason we have explained at length: if the abuses were calculated to break the personality of those subjected to them, specific intent follows because calculation implies specific intent. No double *mens rea*—specific intent to inflict pain or suffering coupled with specific intent to make it severe—is required for mental torture.

On the other hand, perhaps the perpetrators might succeed in mounting an advice-of-counsel defense had they ever been accused of torture. The Detainee Treatment Act includes a provision meant to immunize interrogators from prosecution, and one clause creates a defense if the individual:

did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful. Good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful.²⁸⁷

That would be an alternative route for turning the torture memos into get-out-of-jail-free cards. Likewise, higher officials relying on the torture memos might press a DTA advice-of-counsel defense. Alternatively, they might press an entrapment by estoppel defense, which “applies in cases where the defendant reasonably relied on a government official’s statement that proscribed conduct is permissible, if the government official actually had legal authority in that area.”²⁸⁸

But even if officials and interrogators might have had an available criminal defense to torture charges based on the erroneous reading of section 2340(2)(B) in the torture memos, our more important conclusion remains untouched: under the statute, the FIAs are torture. The DTA and entrapment by estoppel defenses might excuse individuals, but they do not alter the underlying criminality of the conduct.

As we noted earlier, words matter. Under U.S. law, the right word for the CIA's family of interrogational abuses is “torture.”

287. 42 U.S.C. § 2000dd-1(a) (2012).

288. John Sifton, *United States Military and Central Intelligence Agency Personnel Abroad: Plugging the Prosecutorial Gaps*, 43 HARV. J. ON LEGIS. 487, 513 (2006).