

# IS TRUTH SERUM TORTURE?

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## INTRODUCTION

This article explores whether administration of an effective truth serum constitutes torture, particularly when used on an involuntary subject to prevent an act of terrorism. In the aftermath of the devastating terrorist attacks against U.S. targets on September 11, 2001,<sup>1</sup> even a liberal columnist found himself announcing that it was “time to think about torture.”<sup>2</sup> Media reports abound with FBI, CIA, and Justice Department investigators who expressed frustration with the silence of terror suspects and considered more extreme methods, including truth serum.<sup>3</sup> Former director of the CIA and FBI, William

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1. See, e.g., NATIONAL COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMM’N REPORT 1-14 (W.W. Norton & Company 2004) (describing the hijacking of U.S. airplanes on September 11, 2001, the subsequent collapse of the World Trade Center towers, the damage to the Pentagon, and the airline crash in Pennsylvania).

2. See Jonathan Alter, *Time to Think About Torture*, NEWSWEEK, Nov. 5, 2001, at 45 (describing the incident of September 11<sup>th</sup> as so horrifying that the U.S. should consider using methods of interrogation formerly deemed unconscionable).

3. See, e.g., Ann Scott Tyson, *US Task: Get Inside Head of Captured bin Laden Aide*, THE CHRISTIAN SCIENCE MONITOR, Apr. 4, 2002, (noting former FBI and CIA director William Webster indicated, and other experts agreed, that the United States is justified in using sodium pentothal and other truth drugs but not physical torture to prevent catastrophic terrorist attacks), available at <http://www.csmonitor.com/2002/0404/p01s03-uspo.html> (last visited Apr. 2, 2005); see Walter Pincus, *Silence of 4 Terror Probe Suspects Poses Dilemma for*

Webster, urged the Pentagon “to administer truth serum drugs to defiant Taliban and al-Qaida prisoners if needed to obtain information that could save lives or prevent fresh terrorist attacks.”<sup>4</sup>

It is unclear whether truth serum is an approved method in the U.S. “war on terror,”<sup>5</sup> but there are indications of abusive interrogation.<sup>6</sup> General James T. Hill, the general in charge of the U.S. prison at Guantanamo Bay, Cuba, which holds suspected Al Qaeda or Taliban detainees, stated that “the military didn’t use injections or chemicals on prisoners.”<sup>7</sup> General Hill additionally claims that the Guantanamo Bay prison and its interrogation system

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*FBI*, WASH. POST, Oct. 21, 2001, at A6 (stating former FBI counterterrorism official’s suggestion that the United States may reach a point when the use of drugs during interrogation is acceptable but, at the same time, recognizing the difference between the use of ‘truth serum’ and ‘beating a guy till he is senseless’); *see also* Daniel Jeffreys, *Carnage in Queens: The Debate Dividing the U.S.... and a Shocking Verdict on American Airline Safety From a Top Security Expert: Will America now resort to torture?*, DAILY MAIL (London), Nov. 13, 2001, at 16 (explaining the U.S. must decide whether torture and truth drugs should be used on terror suspects).

4. *See, e.g.*, Stewart M. Powell, *Truth serum urged for detainees*, MILWAUKEE J. SENTINEL, Apr. 28, 2002, at A16 (describing the pressure defense officials in the U.S. would face to obtain information from detainees suspected of terrorism and the belief that truth serum is a less intrusive method of obtaining information).

5. The United States is not the only state fighting a self-proclaimed “war on terror.” This article focuses on the United States because its war on terror is distinct by virtue of the current status of the United States as the sole superpower. Moreover, few if any other countries proclaim themselves to be the champion of human rights and the rule of law as loudly or as frequently as the United States. *See, e.g.*, BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, U.S. STATE DEPARTMENT, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES – 2003 (Feb. 25, 2004), at <http://www.state.gov/g/drl/rls/hrrpt/2004/> (last visited Apr. 2, 2005) (noting annual reports criticizing human rights conditions in other countries). As a result, a violation of the ban on torture is especially egregious when carried out by the United States.

6. *See* Jeffrey F. Addicott, *Into the Star Chamber: Does the United States Engage in the Use of Torture or Similar Illegal Practices in the War on Terror?*, 92 KY. L.J. 849, 873-98 (2003-2004) (discussing recent allegations of state-sanctioned torture by the United States).

7. *See* Jess Bravin, *Pentagon Report Set Framework for Use of Torture*, WALL ST. J., June 7, 2004, at A1 (assessing a draft report advising the degree of pain or psychological manipulation that U.S. officials could use on detainees while still being considered lawful). *But see False Hopes*, THE ECONOMIST, Jan. 11, 2003 (explaining the refusal of America’s CIA and Pentagon to admit whether they use truth serum).

is a model and calls it humane<sup>8</sup> despite extraordinary public criticism from the International Committee of the Red Cross (“ICRC”). Breaking its usual public silence on detention conditions, the ICRC has released statements expressing concern over improper treatment of so-called “enemy combatants” at Guantanamo Bay.<sup>9</sup> Moreover, allegations of torture have been made regarding prisoners at Abu Ghraib and other prisons in Iraq, Afghanistan, and Guantanamo Bay.<sup>10</sup> Recent reports indicate that interrogators used torture, or at

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8. See Richard Wittle, *General: Guantánamo Facility is Humane; As Some Raise Abuse Concerns, He Says Center One to be Proud Of*, DALLAS MORNING NEWS, Aug. 8, 2004, at A21 (noting General Hill’s belief that they quickly detect and punish any abuses occurring at Guantanamo); see also Powell, *supra* note 4, at A16 (stating in April 2002, Secretary of Defense Donald Rumsfeld similarly indicated that U.S. personnel would not use truth serum on high-profile terror suspects). But see Eric Schmitt, *Rumsfeld Mischaracterizes Findings of 2 Studies on U.S. Abuse at Iraqi Interrogations*, N.Y. TIMES, Aug. 28, 2004, at A1 (disclosing Rumsfeld’s statement in August 2004 that investigations into abuse at Abu Ghraib did not reveal abuse connected to interrogation). Rumsfeld later corrected himself, stating that the investigation revealed “two or three” incidents of abuse connected to interrogation or the interrogation process. *Id.* But, in fact, the Fay report found that

in 16 of the 44 abuse cases the inquiry cited, military intelligence personnel encouraged, condoned or solicited military police officers to commit abuses, from using dogs to terrorize prisoners to placing detainees in dark, poorly ventilated cells that were freezing cold or sweltering hot. In 11 other cases they committed abuses themselves. *Id.*

As the numbers show, Rumsfeld significantly undercounted the number of cases revealing abuse (two or three versus 27). See also Neil A. Lewis, *Fresh Details Emerge on Harsh Methods at Guantanamo*, N.Y. TIMES, Jan. 1, 2005, at A11 (detailing accounts of former intelligence officers and interrogators who describe harsh tactics being used on an estimated one in six detainees).

9. See INT’L COMM. OF THE RED CROSS, OPERATIONAL UPDATE, U.S. DETENTION RELATED TO THE EVENTS OF 11 SEPTEMBER 2001 AND ITS AFTERMATH – THE ROLE OF THE ICRC (2004) (maintaining that any detainees remaining in Guantanamo Bay should either be charged, released, or, at the very least, have their continued detention governed by the law), at <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/D8B5101EE13FCDD6C1256EDD004C580F> (last visited Apr. 2, 2005).

10. See, e.g., Kate Zernike, *Newly Released Reports Show Early Concern on Prison Abuse*, N.Y. TIMES, Jan. 6, 2005, at A1 (discussing military reports and other documents that showed how abuse involved multiple service branches in Guantanamo, Iraq and Afghanistan, beginning in 2002 and continuing after the Abu Ghraib investigations began in the military and the U.S. Congress); see Scott Higham & Joe Stephens, *New Details of Prison Abuse Emerge; Abu Ghraib Detainees’ Statements Describe Sexual Humiliation and Savage Beatings*, WASH.

least inhumane treatment, as an interrogation tactic in the war on terror.<sup>11</sup> Interrogators used extreme tactics such as waterboarding, in which “a detainee is strapped down, dunked under water and made to believe that he might be drowned.”<sup>12</sup> Additionally, former detainees reported that interrogators used unspecified drugs on them during interrogations.<sup>13</sup>

It remains unclear whether the most extreme tactics of physical torture were part of an overall strategy within the current Bush Administration.<sup>14</sup> It is clear, however, that high level officials in the White House, Department of Justice, and Department of Defense determined that abusive treatment was necessary and justified to win the war on terror.<sup>15</sup> For example, then-White House Counsel Alberto

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POST, May 21, 2004, at A1 (describing the various allegations of abuse and photos of mistreatment at Abu Ghraib); *see also* THE INDEP. PANEL TO REVIEW DEP'T OF DEF. DET. OPERATIONS, FINAL REPORT OF THE INDEP. PANEL TO REVIEW DEP'T OF DEF. DET. OPERATIONS, at 5-6 (Aug. 2004) (detailing the investigations into the Abu Ghraib prison abuse scandal and the Independent Panel's findings), at <http://news.findlaw.com/wp/docs/dod/abughraibrpt.pdf> (last visited Apr. 2, 2005); ANTHONY R. JONES & GEORGE R. FAY, INVESTIGATION OF INTELLIGENCE ACTIVITIES AT ABU GHRAIB, at 3-4 [hereinafter FAY REPORT] (finding it clear that incidents of abuse occurred at Abu Ghraib), at [http://www.washingtonpost.com/wp-srv/nation/documents/fay\\_report\\_8-25-04.pdf](http://www.washingtonpost.com/wp-srv/nation/documents/fay_report_8-25-04.pdf) (last visited Apr. 2, 2005).

11. *See* discussion *infra* Parts II-IV (identifying the distinction between torture and cruel, inhuman, or degrading treatment or punishment under the relevant international treaty on torture).

12. *See* Douglas Jehl & David Johnston, *C.I.A. Expands Its Inquiry Into Interrogation Tactics*, N.Y. TIMES, Aug. 29, 2004, at A10 (noting this as an extreme technique used at secret facilities holding high-level Al-Qaeda suspects).

13. *See* Nancy Gibbs et al., *Inside "The Wire," Security breaches. Suicidal detainees. A legal challenge heading to the Supreme Court. Welcome to Guantanamo*, TIME, Dec. 8, 2003, at 40 (explaining that a detainee who filed a lawsuit for wrongful imprisonment against the United States said, "They would give us these tablets that made us senseless").

14. *See* Jehl & Johnston, *supra* note 12, at A10 (questioning whether the specific interrogation techniques used on Mr. Mohammed, the suspected mastermind of September 11<sup>th</sup>, were aggressive methods of interrogation sanctioned by the government); *see also* Addicott, *supra* note 6, at 873-97 (discussing allegations of torture in the U.S. war on terror). Unless otherwise noted, "Bush Administration" refers to the administration of President George W. Bush, 2001-present.

15. *See* Jehl & Johnston, *supra* note 12, at A10 (noting both military and intelligence officials expressed concern that investigations of Abu Ghraib prison, as well as other detainment centers, damaged intelligence efforts and gave too

Gonzales described some provisions of the Geneva Conventions as “quaint” in light of the new kind of war on terror.<sup>16</sup> The Department of Defense disseminated new interrogation procedures after interrogators expressed frustration with the silence of war on terror detainees.<sup>17</sup> Approved interrogation tactics included “stress and duress” tactics banned under international law, such as prolonged hooding, sleep-deprivation, painful physical postures, and menacing by dogs.<sup>18</sup> The Department of Defense may have subsequently disavowed some or all of the prohibited tactics, but this is still an indication of the extreme measures being taken in the war on terror.<sup>19</sup>

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much deference to detainees).

16. See Draft Memorandum from Alberto R. Gonzales, to the President of the United States, Decision Re: Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban (Jan. 25, 2002) [hereinafter Draft Memorandum] (referring specifically to the Geneva Convention’s requirements that captured enemies are entitled to such things as commissary privileges, scrip, athletic uniforms, and scientific instruments), at <http://www.msnbc.msn.com/id/4999148/site/newsweek> (last visited Apr. 2, 2005); see also Eric Lichtblau, *The Cabinet Nominees: the Hearings: Gonzales Speaks Against Torture During Hearing*, N.Y. TIMES, January 7, 2005, at A1 (reporting Alberto Gonzales’ statement that the Bush Administration has had “some very preliminary discussion” about whether the Geneva Conventions should be revised).

17. See Dana Priest & Bradley Graham, *U.S. Struggled Over How Far to Push Tactics; Documents Show Back-and-Forth on Interrogation Policy*, WASH. POST, June 24, 2004, at A1 (tracing the push for more leeway with interrogation back to the military). The pressure to grant leeway occurred during Secretary Rumsfeld’s tenure as a result of the military’s enhanced role in collecting and analyzing information. *Id.* at A1.

18. See, e.g., Edwin Chen, *Harsher Methods Fruitful, U.S. Says; Because of the New Stance, a Terrorist Suspect Yielded Important Secrets About Al Qaeda, Officials Say*, L.A. TIMES, June 23, 2004, at A19 (explaining Rumsfeld approved the new tactics but later rescinded his directive after concerns regarding the treatment of detainees surfaced); see Lisa Hajjar, *Our Heart of Darkness*, AMNESTY NOW, at 1 (2004) (discussing interrogation techniques employed by the U.S. but banned by international law), available at [www.amnestyusa.org/amnestynow/darkness.html](http://www.amnestyusa.org/amnestynow/darkness.html) (last visited Apr. 2, 2005).

19. See, e.g., David Johnston, *Uncertainty About Interrogation Rules Seen as Slowing the Hunt for Information on Terrorists*, N.Y. TIMES, June 28, 2004, at A8 (explaining that the status of suspension of extreme measures is unclear and the rules for interrogation are under review but not necessarily rescinded); see Terence Hunt et al., *Bush Claimed Right to Waive Torture Laws*, ASSOCIATED PRESS, June 23, 2004 (stating the administration refused to explain which interrogation methods the U.S. government has currently approved), at <http://apnews.myway.com/article/20040623/D83CFTFG0.html>. (last visited Apr. 2, 2005).

In addition, it appears that still-classified documents may condone other tactics amounting to torture.<sup>20</sup>

Although the recently approved techniques do not appear to include the use of truth serum, Amnesty International has expressed its concern over “media reports suggesting that US security forces may be considering using ‘pressure techniques’ including the ‘truth serum’ Sodium Pentothal in order to elicit information from detainees during interrogation.”<sup>21</sup> Truth serum is considered something less than torture.<sup>22</sup> For example, *Newsweek*’s Jonathan Alter concluded that the United States could not legalize physical torture—even in a “ticking bomb” scenario<sup>23</sup>—because “it’s contrary to American values.”<sup>24</sup> But truth serum was on the table, even embraced as a less reprehensible tactic.<sup>25</sup> Alter stated: “Short of physical torture, there’s always sodium pentothal (‘truth serum’). The FBI is eager to try it, and deserves the chance.”<sup>26</sup>

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20. See discussion *infra* notes 162-67 and accompanying text (discussing undisclosed memos).

21. See Memo from Amnesty Int’l, to the U.S. Attorney Gen., Amnesty International’s concerns relating to the post 11 September investigations, AI Index: AMR 51/170/2001, at 16, § 9 (Nov. 1, 2001) (noting these techniques would violate human rights treaties to which the United States is a party), available at <http://web.amnesty.org/library/index/ENGAMR511702001> (last visited Apr. 2, 2005).

22. See John T. Parry & Welsh S. White, *Interrogating Suspected Terrorists: Should Torture Be an Option?*, 63 U. PITT. L. REV. 743, 768 n.59 (2002) (indicating the administration of truth serum is probably significantly less harmful than torture, although truth serum still constitutes a violation of privacy, dignity, and bodily integrity).

23. See Daniel Rothenberg, “*What We Have Seen Has Been Terrible*” *Public Presentational Torture and the Communicative Logic of State Terror*, 67 ALB. L. REV. 465, 495 (2003) (describing a ‘ticking bomb’ scenario as a situation where a bomb was, or will be, activated and the interrogators believe the suspect knows the details regarding the bomb).

24. See Alter, *supra* note 2, at 45 (proposing people should keep an open mind regarding certain tactics used to fight terrorism).

25. See Parry & White, *supra* note 22, at 768 n.59 (commenting on the use of truth serum as less of a departure from American moral and constitutional norms than the use of torture).

26. Alter, *supra* note 2, at 45; see also Jim Rutenberg, *Torture Seeps Into Discussion By News Media*, N.Y. TIMES, Nov. 5, 2001, at C1 (discussing an interview where Alter stated that he supports the use of court-sanctioned sodium pentothal on captive enemies, but not physical torture).

More recently, others similarly concluded that physical torture is prohibited, but the use of truth serum is not.<sup>27</sup> This conclusion is flawed. The administration or threatened administration of truth serum should be considered torture.<sup>28</sup>

Part I of this article examines the concept of “truth serum.”<sup>29</sup> Part II discusses the definition of torture and other cruel, inhuman, or degrading treatment under the international Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”) and the conditions of ratification attached to CAT by the United States.<sup>30</sup> In particular, Part II highlights the reservation interpreting U.S. obligations regarding cruel, inhuman, or degrading treatment and the U.S. understanding of the definition of torture.<sup>31</sup> Part III explores whether the ban on cruel, inhuman, or degrading treatment or punishment prohibits the use of truth serum.<sup>32</sup>

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27. See, e.g., Marcy Strauss, *Criminal Defense in the Age of Terrorism: Torture*, 48 N.Y.L. SCH. L. REV. 201, 269-70 (2003/04) (arguing torture should be viewed as presumptively unconstitutional but the use of truth serum is distinguishable from torture). My approach differs from Professor Strauss’ because she concludes that the impact of international law such as CAT is “insignificant” when dealing with U.S. tactics of interrogation. *Id.* at 251-52. See Jason R. Odeshoo, Note, *Truth or Dare?: Terrorism and “Truth Serum” in the Post-9/11 World*, 56 STAN. L. REV. 209, 213 (2004) (speculating the lack of attention to potential use of truth serum is based on the assumption that it is illegal, but concluding it impossible to definitively declare that the torture convention absolutely prohibits the use of truth serum).

28. Cf. *Joint Hearing Before the Select Comm. on Intelligence and the Subcomm. on Health and Scientific Research of the Comm. on Human Resources*, 95th Cong. 25-26 (1977) [hereinafter *Joint Hearing*] (explaining the use of truth serum in interrogation, however humane “as an alternative to physical torture, still raises serious questions of individual rights and liberties”), at [http://www.geocities.com/essa\\_inc/senateintelhearing.txt](http://www.geocities.com/essa_inc/senateintelhearing.txt) (last visited Apr. 2, 2005).

29. See discussion *infra* Part I (describing various attributes of truth serum and its effects).

30. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted and opened for signature, ratification, and accession by resolution of the U.N. General Assembly* Dec. 19, 1984, 39 U.N. GAOR, Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) (entered into force June 26, 1987) [hereinafter CAT] (including both the U.S. ratification as well as the original treaty from 1984).

31. See discussion *infra* Part II (focusing on the conditions attached to U.S. ratification of CAT).

32. See discussion *infra* Part III (using the U.S. Constitution to establish a basis

Part IV examines whether the ban on torture bars the use of truth serum.<sup>33</sup> Specifically, this section analyzes whether truth serum causes severe pain or suffering and, if so, whether such pain is intentionally inflicted as required under the treaty.<sup>34</sup> Part IV draws on U.S. interpretations, legislation, and case law, as well as jurisprudence of the Committee Against Torture<sup>35</sup> and other international bodies. Finally, Part V discusses the loophole in the current understanding of torture and how to deal with it.<sup>36</sup>

The article determines that under the U.S. interpretation of mental torture, the use or threatened use of truth serum causes severe mental pain or suffering.<sup>37</sup> But mental pain or suffering alone is not sufficient under CAT because interrogators must intentionally inflict mental pain or suffering for certain purposes such as obtaining information.<sup>38</sup> With truth serum, the mental pain or suffering would be a side effect of the drug-induced divulgence of information. As a result, the administration of truth serum falls through a lacuna in CAT's definition of torture.<sup>39</sup> Oddly enough, the threatened administration of truth serum *does* constitute torture because the mental pain of a threat satisfies the intent requirement, but the side effect of mental harm from the use of truth serum does not.<sup>40</sup> The contradictory conclusion—threats of truth serum are torture, but the actual use is not—points to a problem with the current understanding

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for the argument that truth serum constitutes cruel, inhuman, or degrading treatment or punishment).

33. See discussion *infra* Part IV (concentrating on the specific requirements used in defining torture).

34. See discussion *infra* Part IV (analyzing severe pain or suffering under CAT in light of U.S. interpretations).

35. See discussion *infra* note 101 (providing a brief description and explanation of the Committee Against Torture, which is the monitoring body created by CAT).

36. See discussion *infra* Part V (offering two potential outcomes if the use, but not the threat, of truth serum is not torture).

37. See discussion *infra* Conclusion (proposing the preferred outcome is to adopt a new understanding of torture).

38. See CAT, *supra* note 30, art. 1 (providing CAT's definition of the term "torture").

39. See discussion *infra* Part IV (analyzing the loophole created in the U.S. interpretation of CAT).

40. See CAT, *supra* note 30, art. 1 (delineating what is required for torture).

of torture under CAT.<sup>41</sup> Given the incoherence and disadvantages of the paradoxical conclusion, both the use and threat of truth serum should be deemed unacceptable.<sup>42</sup> The United States should rule out the possibility of using truth serum on unwilling subjects, even as part of the war on terror.<sup>43</sup>

## I. WHAT IS TRUTH SERUM?

### A. NEXT-GENERATION TRUTH SERUM

U.S. intelligence agents have long sought after truth serum.<sup>44</sup> This article posits the use of an effective, reliable serum that elicits what the subject actually believes to be the truth. Outsiders cannot prove its existence because of the “I’d tell you but then I’d have to kill

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41. See discussion *infra* Part V (offering a new understanding of torture that would eliminate the loophole created by the U.S. interpretation of CAT).

42. See *id.* (explaining that the United States must take a stand against the use of truth serum as it constitutes torture).

43. For other arguments against the use of torture, see generally Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481, 1489 (2004) (arguing for an absolute prohibition on torture); Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278, 324-25 (2003) (conceding an American official may believe that torture as a matter of morality and public policy, in the face of an event like 9/11, is the lesser evil but, at the same time, insisting that the U.S. Constitution prohibits these actions); Strauss, *supra* note 27, at 253-68 (discussing policy arguments such as the ineffectiveness of torture and the use of torture presenting a “slippery slope”). But see, e.g., ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS* 156-63 (2002) (advocating for the use of torture warrants). Torture is not only immoral, it is ineffective, as explained, for example, by Senator John McCain, former POW in Vietnam, who has stated that torture does not work because victims are apt to say what the torturers want to hear. See, e.g., Nick Coleman, *For the U.S., torture seemed in the past*, STAR-TRIB. (St. Paul, Minn.), May 12, 2004, at 20B (noting the impact that this effect will have on U.S. interrogation methods). Its overbroad use may create more terrorists. See, e.g., Strauss, *supra* note 27, at 253-68 (indicating the difficulty, or even impossibility, of strictly limiting the use of torture to specific circumstances and adding that society suffers from torture because when a government implements torture, it reduces the moral difference between a governmental act and a criminal act).

44. See Martin A. Lee, *Truth Serums & Torture*, CONSORTIUM NEWS (Arlington, VA) June 4, 2002 (explaining agents have desired this since at least 1942 when the CIA asked scientists to develop a substance that could be used on enemy spies and POWs), at <http://www.converge.org.nz/pma/cra0499.htm> (last visited Apr. 2, 2005).

you” problem. Anyone with actual knowledge of the government’s efforts to create or obtain such a substance cannot reveal it because any military or other government projects related to truth serum would be classified.<sup>45</sup> It is uncertain that such a substance exists, but it is plausible to believe that the U.S. government is continuing to search for a truth serum that lives up to its name.

The currently acknowledged substances commonly referred to as truth serum—e.g., Sodium Pentothal—do not force the subject to tell the truth, but rather, merely make the subject more talkative.<sup>46</sup> Lowering inhibitions, however, does not guarantee that elicited information will be accurate.<sup>47</sup> This alone is a potent argument to ban its use.<sup>48</sup> Simply put, truth serum as it is publicly known to date does not work.<sup>49</sup> But what if there is a truth serum that lives up to its name? A drug with no negative physical side effects beyond a prick of the needle,<sup>50</sup> a next-generation Sodium Pentothal that actually induced truth telling? If our government were to possess such a

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45. See, e.g., Scott Martelle, *The Truth About Truth Serum: It may make for loose lips but not necessarily elicit honest answers*, L.A. TIMES, Nov. 5, 2001, Part 5, at 1 (noting the remarks of a clinical psychiatry and behavioral sciences professor from USC who claimed that “[n]othing [evidencing truth serum] exists in the research literature. Whether some secret CIA lab has something, I have no idea. They don’t share with me their pharmacological stuff”).

46. See *id.* at 1 (stating “details that might come tumbling out [after so-called truth serum injection] would be as suspect as the ramblings of the drunk on the next bar stool”).

47. See *id.* at 1 (reiterating individuals without inhibitions are not necessarily truthful).

48. Cf. Strauss, *supra* note 27, at 264 (suggesting empirical research is needed to determine the likelihood that truth serum sessions would produce false information that would set back an investigation). Otherwise, valuable time might be spent using an ineffective, unreliable tool, and inaccurate information could lead to futile expenditures of precious resources chasing down erroneous leads. *Id.*

49. See Jessica Pae, Note, *The Emasculation of Compelled Testimony: Battling the Effects of Judicially Imposed Limitations on Grand Jury Investigations of Terrorism and Other Ideological Crimes*, 70 S. CAL. L. REV. 473, 504-05 (1997) (arguing that information obtained after using truth serum is at best unreliable); see also Anupama Katakam, *The Truth Serum Trial*, FRONTLINE, Mar. 12, 2004 (reporting although truth serum used on a suspect by Indian authorities yielded information, there are doubts about its credibility).

50. But see Pae, *supra* note 49 at 503 (contending that currently, “truth serum” injections may involve intrusive medical procedures involving serious health risks).

substance, should it use it in our name? This article concludes that it should not.<sup>51</sup>

A CIA report explains that “[a]ny technique that promises an increment of success in extracting information from an uncompliant source is ipso facto of interest in intelligence operations.”<sup>52</sup> In fact, the CIA previously experimented with truth serums and other drugs within the United States, sometimes without the knowledge of the subjects.<sup>53</sup> Project MKULTRA, for example, was a CIA project from 1953-1964 that provided funds for research on drugs and behavioral modification.<sup>54</sup> At least one “unwitting” test subject who unknowingly ingested LSD died as a result of the experiments.<sup>55</sup> Although the CIA stated that such experiments ceased in 1977,<sup>56</sup> similar past assurances were false. For example, the CIA supposedly ended project ARTICHOKE, which included experiments with Sodium Pentothal, but “evidence suggests that Office of Security and Office of Medical Services use of ‘special interrogation’ techniques continued for several years thereafter.”<sup>57</sup> Moreover, the true extent of the CIA’s MKULTRA experiments on unwitting human subjects is unknown because the then-Director of Central Intelligence ordered

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51. See discussion *infra* Conclusion (concluding democratic states, mainly the United States, should not resort to torture, including the use of truth serum).

52. See *Joint Hearing, supra* note 28, at 2 (opening remarks of Sen. Inouye) (describing experiments by intelligence operatives using drugs to acquire information from subjects).

53. See, e.g., Jason R. Odesloo, *Truth or Dare?: Terrorism & Truth Serum in the Post-9/11 World*, 57 STAN. L. REV. 209, 216-21 (2004) (giving a brief history of truth serum and describing U.S. efforts to obtain it from World War II to the 1960s).

54. See *id.* at 220-21 (stating the program’s goal was to develop chemical and biological agents to control human behavior).

55. See *Joint Hearing, supra* note 28, at 2-3 (statement of Sen. Kennedy) (illustrating the subjects were seldom accessible to speak with during the tests and often became ill for days).

56. See *id.* at 8-10 (statement of Director of Central Intelligence, Admiral Stansfield Turner) (discussing the elusive behavior of the CIA during this time period and the sparse information it distributed regarding these tests and projects).

57. See *id.* at 68 (mentioning participants in ARTICHOKE met monthly to discuss the project, but project information past the fall of 1953 is scarce).

all records to be destroyed in 1973.<sup>58</sup>

#### B. PREVENTIVE INTERROGATIONAL TRUTH SERUM

As discussed in the Introduction, the Bush Administration seems to believe that the war on terror justifies the use of previously unacceptable (or at least unnecessary) interrogation techniques on suspected terrorists.<sup>59</sup> If an effective truth serum exists or is developed in the near future, it will be used in the name of preventing another 9/11. Consider the following situation: U.S. officials (whether state or federal law enforcement, military, or intelligence) detain an individual suspected to have information regarding an imminent terrorist attack. Under interrogation, the individual refuses to provide any pertinent information. The officials administer truth serum, which does not cause any physical harm beyond the prick of the needle. The subject responds to subsequent questions by providing truthful answers or, in other words, he states what he believes to be the truth. The drug makes it impossible for the subject to provide false information. For example, if the interrogators ask him the names, location, or contact information of other members of his organization, he will give the information that he believes to be accurate—even if he had previously refused to do so. If the interrogators ask him whether he is committing a crime, he will likely respond that he is not because in his mind, the terrorist group is engaged in “freedom-fighting,” a jihad, or a crusade, not criminal activity. With careful questioning, however, skilled interrogators can obtain the concrete information necessary to thwart a terrorist act, provided the suspect has knowledge of the plan.

This scenario falls under “preventive interrogational torture”—“torture whose aim is to gain information that would assist authorities in foiling exceptionally grave terrorist attacks.”<sup>60</sup> Thus,

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58. See *id.* at 3 (statement of Sen. Kennedy) (noting when the records were destroyed in 1973, a few files were inadvertently missed; in response to a subsequent Freedom of Information Act request, remnants of the records were located in the budget section of CIA archives). Thus, the 1977 hearing was held in response to the later discovery. *Id.*

59. See discussion *supra* notes 15-19 and accompanying text (suggesting the Administration believes that some form of torture may be necessary in the post-9/11 world).

60. See Gross, *supra* note 43, at 1487-88 (arguing an absolute ban on torture,

this article will refer to it as “preventive interrogational truth serum.” Although the current targets of the war on terror are Al Qaeda and related Islamist terrorist groups,<sup>61</sup> this article’s examination applies to any terrorist group, from religious fanatic to white supremacist to “ecoterrorist.”<sup>62</sup>

The analysis will show that preventive interrogational *use* of truth serum would cause severe mental pain or suffering based on the U.S. government’s own reading of CAT.<sup>63</sup> It would not technically be torture, however, because the use of truth serum would not meet other requirements of the stringent definition of torture under CAT.<sup>64</sup> Strangely enough, the *threat* of truth serum would constitute torture under CAT as ratified by the United States.<sup>65</sup>

## II. WHAT IS TORTURE?

### A. INTERNATIONAL LAW

This article focuses on international law, where the definition of torture is most developed and where the prohibition against torture is the strongest. In 1975, the United Nations General Assembly adopted the Declaration on the Protection of All Persons from Being Subjected to Torture or Other Cruel, Inhuman or Degrading

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with extralegal use of torture in extraordinary cases, is superior to the use of torture warrants).

61. See Aliya Haider, *The Rhetoric of Resistance: Islamism, Modernity, & Globalization*, 18 HARV. BLACKLETTER L.J. 91, 91-92 (2002) (referring to Islamist groups, like the Taliban, as radical groups who advocate the destruction of international normalcy).

62. By terrorism, I refer to acts of violence aimed at instilling fear and/or destroying vital political/economic targets or critical infrastructure. While there is no generally accepted definition of terrorism, this definition would encompass groups currently targeted in the war on terror as well as similar groups. For purposes of this discussion, the label of terrorist is effectively imposed by the U.S. government and whether the label “terrorist” is currently overused in the war on terror is irrelevant to this inquiry and beyond the scope of this article.

63. See discussion *infra* Part IV.A (analyzing the definition of severe mental pain or suffering under CAT, including the U.S. conditions).

64. See discussion *infra* Part IV.B (discussing the requirement in CAT that the intentional infliction of torturous acts must be for a certain purpose).

65. See discussion *infra* Part IV.B.2 (explaining why the *threat* of using truth serum falls within the U.S. definition of torture).

Treatment or Punishment (“the Declaration against Torture”).<sup>66</sup> In 1984, the General Assembly adopted the international Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by consensus.<sup>67</sup> The language of the resolution indicated CAT codified an already “existing prohibition under international law.”<sup>68</sup> The ban on official torture is customary international law.<sup>69</sup> Furthermore, it has risen to the level of a *jus cogens* norm binding on all states.<sup>70</sup>

CAT “has now become the benchmark reference”<sup>71</sup> for torture, although many other treaties also ban torture. Additional international documents covering torture and cruel, inhuman or

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66. See NIGEL S. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 4-9 (2nd ed. 1999) (summarizing the history of torture, including U.N. adoption of the Declaration against Torture).

67. See CAT, *supra* note 30, at pmb1. (setting forth CAT’s goals and noting the signing members agreed upon them); see also RODLEY, *supra* note 66, at 20-32 (discussing the various resolutions and working group activity between the Declaration against Torture and CAT in greater detail); J. HERMAN BURGERS & HANS DANIELIUS, *THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT*, 13-18, 32-99 (1988) (detailing the development of CAT and the working group discussions and reports from 1979-1984).

68. See RODLEY, *supra* note 66, at 65 (noting although the prohibition against torture existed, the need for effective means of enforcement sparked the creation of CAT); see also SENATE COMM. ON FOREIGN RELATIONS, *CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT*, S. EXEC. REP. NO. 101-30, at 3 (1990) (“The Convention codifies international law as it has evolved, particularly in the 1970’s, on the subject of torture . . .”).

69. See BETH STEPHENS, *INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS* 257 (1996) (indicating the universal practice of condemning torture, but also remarking that many governments continue to tolerate torture despite these norms).

70. See BURGERS & DANIELIUS, *supra* note 67, at 12 (stating the prohibition against torture is a universally valid rule that can be considered a peremptory norm as defined by Article 53 of the Vienna Convention on the Law of Treaties); see also Kreimer, *supra* note 43, at 316 (asserting despite the conventions which guard against torture, it evolved into a *jus cogens* norm due to “fundamental moral perceptions of the international community”).

71. See RODLEY, *supra* note 66, at 47 (establishing 105 states ratified or acceded to CAT, which also may be considered to apply to all states under general international law).

degrading treatment include: Geneva Conventions; International Covenant on Civil and Political Rights; Convention on the Prevention and Punishment of Genocide; International Convention on the Elimination of All Forms of Racial Discrimination; and the Convention on the Rights of the Child. Regional treaties include: the European Convention for the Protection of Human Rights and Fundamental Freedoms; the African Charter on Human and Peoples' Rights; the American Convention on Human Rights; and the Inter-American Convention to Prevent and Punish Torture.<sup>72</sup> The Rome Statute of the recently created International Criminal Court prohibits torture as a crime against humanity and a war crime.<sup>73</sup>

Despite these other treaties, the primary source of U.S. obligations is CAT.<sup>74</sup> Thus, this article assesses the use of preventive interrogational truth serum under CAT, as ratified by the United States.<sup>75</sup> Torture is defined in Article 1 of CAT as follows:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from

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72. See *id.* at 55-57 (providing a brief description of other treaties poised to combat torture); see also BURGERS & DANIELIUS, *supra* note 67, at 11-12 (presenting a similar history of such treaties); AMNESTY INT'L, COMBATING TORTURE: A MANUAL FOR ACTION, at ch. 1 (2003) (summarizing the evolution in the fight against torture), available at (<http://web.amnesty.org/library/index/engACT400012003>) (last visited Apr. 2, 2005); Johan D. van der Vyver, *Torture as a Crime Under International Law*, 67 ALB. L. REV. 427, 431-34 (2003) (outlining the Torture Convention); see generally Odeshoo, *supra* note 27 (discussing whether the use of truth serum violates various treaties).

73. See Rome Statute of the International Criminal Court, art. 7(1)(8) & 8(2)(ii), U.N. Doc. A/Conf. 183/9 (1998), 2187 U.N.T.S. 90 (1998) (entered into force July 1, 2002) (citing torture as prohibited), available at [http://www.icc-cpi.int/library/about/officialjournal/Rome\\_Statute\\_120704-EN.pdf](http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf) (last visited Apr. 2, 2005).

74. See Dep't of Def., Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations, II.B (Mar. 6, 2003) [hereinafter DOD Working Group Memo] ("The United States' primary obligation concerning torture derives from [CAT]."), available at <http://www.ccr-ny.org/v2/reports/report.asp?ObjID=0Shrzgi8q7&Content=385> (last visited Apr. 2, 2005).

75. See discussion *infra* Part IV (analyzing the use of preventive interrogational truth serum as a potential violation of CAT as modified by the United States upon ratification).

him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>76</sup>

CAT also requires states parties to “undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1 . . . .”<sup>77</sup> Moreover, Article 2 provides: “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”<sup>78</sup>

#### B. U.S. RATIFICATION OF CONVENTION AGAINST TORTURE

The United States ratified CAT in October 1994; the treaty came into force the following month.<sup>79</sup> As an international treaty ratified by the United States, CAT is part of the supreme law of the land under the Supremacy Clause of the Constitution.<sup>80</sup> However, the United States attached conditions to its ratification.<sup>81</sup> Thus this article first discusses the U.S. conditions, known as Reservations,

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76. CAT, *supra* note 30, art. 1.

77. *Id.*, art. 16.

78. *Id.*, art. 2(2).

79. See U.S. DEP’T OF STATE, OFFICE OF THE LEGAL ADVISER, TREATY AFFAIRS, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INT’L AGREEMENTS OF THE U.S. IN FORCE AS OF JAN. 1, 2000, 472 (2000), at [http://www.state.gov/www/global/legal\\_affairs/tifindex.html](http://www.state.gov/www/global/legal_affairs/tifindex.html).

80. See U.S. CONST. art. VI, cl. 2 (stating that the Constitution, laws made pursuant to the Constitution, “and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding”).

81. See U.S. Reservations, Declarations and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong. Rec. S17486-01 (Oct. 27, 1990) [hereinafter U.S. RUDs] (establishing those reservations that modify the CAT).

Understandings and Declarations (“RUDs”).<sup>82</sup> After briefly assessing the validity and content of the RUDs, the article examines relevant U.S. legislation that partially implements CAT.<sup>83</sup> The CAT definition, the U.S. conditions on ratification, and the interpretations of torture in U.S. legislation combine to establish the parameters of U.S. commitments regarding CAT.<sup>84</sup> Part IV analyzes the U.S. commitments regarding “cruel, inhuman or degrading treatment or punishment,” while Part V examines the U.S. obligations regarding torture. Both parts focus on preventive interrogational truth serum in the context of the U.S. war on terror.

### *1. U.S. Reservations, Understandings, and Declarations*

The United States interpreted the provisions of CAT through its package of RUDs.<sup>85</sup> A reservation is a condition that purports to “exclude or to modify the legal effect of certain provisions of the treaty in their application to that State . . . .”<sup>86</sup> A reservation is valid under the Vienna Convention on the Law of Treaties so long as it is not “incompatible with the object and purpose of the treaty” unless otherwise indicated in the treaty itself.<sup>87</sup> CAT does not contain a general provision addressing the validity of reservations, although it does specify that states may reserve the right to opt out of its systematic investigation procedure.<sup>88</sup> An understanding purports to

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82. See discussion *infra* notes 85-94 and accompanying text (conveying the U.S. understandings of CAT within the RUDs).

83. See discussion *infra* Part II.C (examining statutes relevant to torture).

84. See DOD Working Group Memo, *supra* note 74, II.B (explaining the U.S. position on CAT includes a modification of the terms and concepts of “torture,” “substantial grounds” for believing a person will face torture, “degrading treatment,” and an understanding that implementation measures for these provisions already existed, thus fulfilling the CAT requirement for parties to take legislative measures to carry out the terms of this treaty).

85. See U.S. RUDs, *supra* note 81 (stating conditions on U.S. ratification of CAT).

86. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 2, 1155 U.N.T.S. 331, 333, available at <http://www.un.org/law/ilc/texts/treaties.htm> (last visited Apr. 2, 2005).

87. See *id.*, art. 19 (articulating reservations may be attached to ratification unless that reservation is not allowed by the treaty, or is incompatible with the “object and purpose of the treaty”).

88. See CAT, *supra* note 30, art. 28 (providing a state may declare that it does

offer the state's interpretation of the treaty provision(s) without modifying obligations under the treaty. A statement labeled an "understanding" or "declaration" may be considered a reservation if it modifies or excludes the effect of the treaty.<sup>89</sup>

The first U.S. reservation equates "cruel, inhuman or degrading treatment or punishment" ("CIDT") in Article 16 of CAT with the U.S. Constitution's "cruel and unusual punishment" ban.<sup>90</sup> The first understanding to Article 1's definition of torture includes (1) an interpretation of "severe pain or suffering, whether physical or mental"; (2) a limitation of torture to acts in custody or control; (3) an interpretation of "lawful sanctions"; (4) a definition of "acquiescence" of an official; and (5) an exclusion of violations of legal procedural standards from the definition of torture.<sup>91</sup> Four additional understandings interpret other articles of the treaty that are irrelevant to this article.<sup>92</sup>

The first section of the understanding to Article 1, interpreting "severe pain or suffering," is particularly significant here. This understanding can be broken down into two parts.

[First,] in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and [second] that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) 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; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances

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not recognize the competence of the committee under Article 20 and may withdraw this reservation at any time).

89. See *id.* (describing the label of reservation as applicable to any unilateral statement no matter the wording).

90. See U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

91. U.S. RUDs *supra* note 81, at II(1)(b)-(e). The second reservation limits referrals to the International Court of Justice. *Id.* at I(2).

92. See *id.* at II(2)-(4) (interpreting Article 3 regarding substantial grounds for finding a person would be subject to torture if returned to a country; interpreting Article 14 regarding private right of action; affirming the death penalty; and interpreting obligations under Articles 10-14 and 16 in light of the federal system).

or other procedures calculated to disrupt profoundly the senses or personality.<sup>93</sup>

Before evaluation, it must be determined whether the reservation regarding Article 16 (CIDT) and the understanding to Article 1 (torture) are proper conditions to the U.S. ratification of CAT.<sup>94</sup>

## 2. *Validity of U.S. Reservations, Understandings, and Declarations*

The first reservation (to Article 16 CIDT) and the first U.S. understanding (to Article 1 torture) are of questionable validity. Nevertheless, it does not appear that they wholly violate the object and purpose of the treaty.<sup>95</sup> It could be argued that the first U.S. understanding is actually a reservation, because it purports to modify or exclude the effect of the treaty, specifically, by changing the definition of torture.<sup>96</sup> Although labeled an understanding, it could be contested that it actually attempts to limit the definition by its requirement of specific intent, prerequisites for mental pain or suffering, and interpretation of acquiescence.<sup>97</sup> Indeed, the Netherlands criticized this U.S. understanding on the ground that it “appears to restrict the scope of the definition of torture under article 1 of the Convention.”<sup>98</sup>

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93. *Id.* at Understanding 1(a).

94. *See id.* at I(1), II(1)(a) (reserving “cruel, inhuman or degrading treatment or punishment” as equivalent to the Eighth Amendment cruel and unusual punishment clause and interpreting “severe pain or suffering”).

95. *See* Vienna Convention on the Law of Treaties, *supra* note 86, art. 19(c), 1155 U.N.T.S. 331, 337 (asserting states cannot form a reservation incompatible with the “object and purpose” of the treaty).

96. *See* U.S. RUDs, *supra* note 81, at II(1)(a) (establishing an understanding of the interpretation of mental harm and specific intent).

97. *See id.* at II(1)(a)-(e) (providing an understanding of various terms in the CAT definition of torture).

98. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Declarations and Reservations to CAT, *adopted and opened for signature, ratification, and accession by resolution of the U.N. General Assembly* Dec. 19, 1984, 39 U.N. GAOR, Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) [hereinafter *Objections to CAT*] (Objection of the Netherlands) (considering the U.S. understanding to have no impact on the obligations of the U.S. under CAT), at <http://www.ohchr.org/english/law/cat-reserve.htm> (last visited

The United States countered that the first understanding is not a reservation and is not in conflict with the definition of torture in CAT.<sup>99</sup> The United States contended that there is no inconsistency between Article 1 and the specific intent or mental harm aspects of the first U.S. understanding.<sup>100</sup> The United States explained in its testimony before the Committee Against Torture<sup>101</sup> that the understanding “did not modify the meaning of article 1, but rather clarified it, adding the precision required by the U.S. domestic law.”<sup>102</sup>

Members of the Committee Against Torture have considered the U.S. RUDs. While discussing the U.S. report, one member of the Committee expressed concern regarding the first understanding as well as the reservation to Article 16 (CIDT).<sup>103</sup> A different member,

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Apr. 2, 2005).

99. See *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Initial Report of the United States of America*, Comm. Against Torture, 24th Sess., Summary Record of the First Part of the 427th mtg. ¶ 6, CAT/C/SR.427 (2000) [hereinafter *U.S. Report to Committee Against Torture*] (statement of Mr. Yeomans—USA) (defending the U.S. decision to “clarify” Article 1 of CAT with the inclusion of a specific intent requirement), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.SR.427.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.SR.427.En?Opendocument) (last visited Apr. 2, 2005).

100. See *id.* (maintaining the distinction that a specific intent requirement serves as a clarification and not a change in meaning of the definition of torture).

101. See CAT, *supra* note 30 (establishing a monitoring body, the Committee Against Torture, in Article 17, that considers reports submitted periodically by states parties (Article 19), inquires into systematic practice of torture within states parties (Article 20), and considers interstate (Article 21) and individual (Article 22) complaints of treaty violations). The United States has chosen not to join the individual complaint procedure and no interstate complaints or inquiries have been lodged against the United States. See U.S. RUDs, *supra* note 81. But it did submit its report to the Committee on October 15, 1999. See *U.S. Report to Committee Against Torture*, *supra* note 99, ¶ 18.

102. See *U.S. Report to Committee Against Torture*, *supra* note 99, ¶ 6 (statement of Mr. Yeomans—USA) (contending that any clarifications in U.S. ratification of CAT would not affect its obligations, only how the U.S. would apply these articles in domestic law).

103. See *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Initial Report of the United States of America*, Comm. Against Torture, 24th Sess., Summary Record of the First Part of the 424th mtg. ¶ 33, CAT/C/SR.424 (2000) [hereinafter *Committee Consideration of U.S. Report*] (statement of Mr. Silva Henriques Gaspar) (questioning validity of U.S. RUDs),

Mr. Camara, criticized only the Article 16 reservation.<sup>104</sup> Committee member Camara remarked that CAT allowed reservations only under Article 28 (opting out of Article 20, which provides for Committee investigations of systematic torture); thus, the U.S. reservation to Article 16 is inadmissible.<sup>105</sup> In response to the criticism, the United States noted that CAT, by its terms, does not rule out reservations to other provisions. In addition, it noted that no state had adopted the position of Committee member Camara.<sup>106</sup>

In fact, three countries objected to the U.S. reservation to Article 16 (CIDT) on various grounds: Finland (finding the general reference to national law insufficient because it casts doubt on the U.S. commitment to CAT), the Netherlands (considering the U.S. reservation incompatible with the object and purpose of CAT and explaining that it is unclear how the U.S. Constitution will relate to the Convention's obligations), and Sweden (referring to a similar objection Sweden made to the U.S. reservations to the International Covenant on Civil and Political Rights, where Sweden found that the U.S. reservations limited its responsibilities under the Covenant and, therefore, were incompatible with the Covenant's object and purpose).<sup>107</sup> In the end, however, the Committee as a whole

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*available* *at*  
[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.SR.424.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.SR.424.En?Opendocument)  
(last visited Apr. 2, 2005).

104. See *id.* at ¶ 31 (arguing that the U.S. reservation is unacceptable).

105. See *id.* (contending that the U.S. reservation is invalid).

106. See *U.S. Report to Committee Against Torture*, *supra* note 99, ¶ 33 (Mr. Koh of U.S. delegation) (defending U.S. reservations); see also *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment: Hearing Before Senate Comm. on Foreign Relations*, 101st Cong. 100-20 (1990) (statement of David Forte, Professor of Law, Cleveland Marshall College of Law) (arguing CAT intended to be open to reservations, while states are left to find a definition of torture focused on criminal aspects of the act, either through reservations or legislation).

107. See *Objections to CAT*, *supra* note 98 (Objections of Finland, the Netherlands, and Sweden) (detailing these countries' objections to the U.S. RUDs to CAT); see also *International Covenant on Civil and Political Rights: Declarations and Reservations, adopted and opened for signature, ratification and accession by General Assembly Dec. 16, 1966*, 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316 (1966) (Objection of Sweden) (containing the text of Sweden's objection later incorporated into its Objections to CAT), *available at* [http://www.ohchr.org/english/countries/ratification/4\\_1.htm](http://www.ohchr.org/english/countries/ratification/4_1.htm) (last visited Apr. 2, 2005).

commented on the reservation to Article 16, but not the interpretative understanding of Article 1.<sup>108</sup> With regard to Article 16, the Committee expressed concern that the reservation's effect would be "to limit the application of the Convention."<sup>109</sup> As a result, the Committee recommended that the United States withdraw its reservations and understandings to CAT.<sup>110</sup> Nonetheless, the Committee did not specifically condemn the U.S. reservations or understandings in its response to the U.S. report, nor has it done so in other general comments.<sup>111</sup>

By contrast, other United Nations committees that monitor human rights have determined that U.S. RUDs to other treaties are invalid. For example, the Human Rights Committee considered reservations to the International Covenant on Civil and Political Rights ("ICCPR") in its General Comment 24.<sup>112</sup> Without mentioning any

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108. See *Civil and Political Rights Including the Questions of Torture and Detention: Report of the Special Rapporteur*, U.N. ESCOR 57th Sess., Provisional Agenda Item 11(a), ¶ 1265, U.N. Doc. E/CN.4/2001/66 (2001) (noting the Special Rapporteur's non-binding opinion that the U.S. constitutional standard for cruel and unusual punishment "falls short of the prohibition under general international law" of CIDT and that CIDT is binding on the United States "regardless of the State's reservation to article 16"), available at <http://www.hri.ca/forthecord2001/documentation/commission/e-cn4-2001-66.htm> (last visited Apr. 2, 2005).

109. See *Report of the Committee Against Torture*, U.N. GAOR, 24th Sess., Concluding Observations & Comments: United States of America, ¶ 179, U.N. Doc. A/55/44 (2000) (expressing numerous concerns regarding U.S. obligations under CAT), available at <http://wwwserver.law.wits.ac.za/humanrts/usdocs/torturecomments.html> (last visited Apr. 2, 2005).

110. See *id.* ¶ 180 (recommending as well that the United States "enact a federal crime of torture in terms consistent" with the Convention).

111. See *id.* (listing the Committee's concerns over the U.S. declarations and reservations but only offering recommendations as opposed to an outright condemnation).

112. See *General Comment 24 (52): General Comment on Issues Relating to Reservations Made Upon Ratification or Accession to Covenant or the Optional Protocols thereto, or in Relation to Declarations Under Article 41 of the Covenant*, U.N. Human Rights Comm., U.N. Doc. CCPR/C21/rev.1/Add.6 (1994) [hereinafter *General Comment 24*] (describing the Committee's position with regard to the application of international law principles to the making of reservations), available at <http://heiwww.unige.ch/humanrts/gencomm/hrcom24.htm#one> (last visited Apr. 2, 2005); see also *International Covenant on Civil and Political Rights*, adopted and

states parties, it described reservations that are incompatible with the object and purpose of the treaty—several of which are aimed at U.S. RUDs to the ICCPR.<sup>113</sup> Furthermore, the Human Rights Committee determined that incompatible reservations are void and took the controversial step of deciding that the invalid reservations are severable.<sup>114</sup> Thus, under the Human Rights Committee's approach, the reserving country remains a state party to the treaty even if it would never have ratified the ICCPR without the severed reservations. In addition, the Human Rights Committee specifically condemned a U.S. reservation regarding the death penalty in response to the U.S. report to that committee regarding compliance with the ICCPR.<sup>115</sup>

The Committee Against Torture, however, chose not to follow this model, instead merely recommending withdrawal of RUDs. Thus, it appears that neither the reservation to Article 16 (CIDT) nor the understanding to Article 1 (torture) is a clear violation of the object and purpose of CAT.<sup>116</sup> Moreover, because this article focuses on the U.S. war on terror, the analysis will accept the U.S. RUDs as clarifications of the U.S. obligations under CAT.<sup>117</sup>

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*opened for signature, ratification, and accession by resolution of the U.N. General Assembly Dec. 16 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (another human rights treaty, which the United States ratified with a package of RUDs).*

113. *See General Comment 24, supra* note 112, ¶ 8 (determining that a state may not reserve the right to violate peremptory norms, for example, by reserving the right to torture or to execute children).

114. *See id.* ¶ 18 (“such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation.”).

115. *See Concluding Observations of the Human Rights Committee: United States of America*, U.N. Doc. CCPR/C/79/Add.50, ¶ 279, A/50/40 (1995) (concluding a reservation regarding the death penalty, maintaining a right to impose the death penalty on juveniles and otherwise expanding the scope of death-eligible crimes is incompatible with the object and purpose of the ICCPR), *available at* <http://www1.umn.edu/humanrts/usdocs/hrcuscomments.html> (last visited Apr. 2, 2005).

116. *See id.* (explaining reservations found to violate the object and purpose of CAT will be considered void and will not be in effect for the reserving party).

117. *See* Letter of William J. Haynes, II, General Counsel of the Dep't of Defense, to Senator Patrick Leahy (June 25, 2003), *in* ASS'N OF THE BAR OF THE CITY OF NEW YORK, COMM. ON INT'L HUMAN RIGHTS, COMM. ON MILITARY AFFAIRS AND JUSTICE: HUMAN RIGHTS STANDARDS APPLICABLE TO THE UNITED

## C. U.S. DOMESTIC LAW ON TORTURE

The United States has repeatedly taken a strong rhetorical stance against the use of torture or CIDT. In its report to the Committee Against Torture, the United States proclaimed:

Torture is prohibited by law throughout the United States. It is categorically denounced as a matter of policy and as a tool of state authority. Every act constituting torture under the Convention constitutes a criminal offence under the law of the United States. No official of the Government, federal, state or local, civilian or military, is authorized to commit or to instruct anyone else to commit torture. Nor may any official condone or tolerate torture in any form. No exceptional circumstances may be invoked as a justification of torture. United States law contains no provision permitting otherwise prohibited acts of torture or other cruel, inhuman or degrading treatment or punishment to be employed on grounds of exigent circumstances (for example, during a “state of public emergency”) or on orders from a superior officer or public authority, and the protective mechanisms of an independent judiciary are not subject to suspension. The United States is committed to the full and effective implementation of its obligations under the Convention throughout its territory.<sup>118</sup>

Despite this sweeping pronouncement, the United States has taken only limited steps to implement its commitments under CAT. First, the initial declaration to CAT deems the treaty to be non-self-executing, as is typical for U.S. ratification of human rights treaties.<sup>119</sup> As a result, victims of torture cannot bring a cause of action under CAT. Second, the United States has foreclosed the remedy of petitioning the Committee Against Torture by refusing to opt into CAT’s individual complaint procedure.<sup>120</sup> The United States

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STATES’ INTERROGATION OF DETAINEES app. A (indicating the obligation to conduct interrogations in “a manner that is consistent with [CAT] as ratified by the United States in 1994”), available at <http://www.abcny.org/pdf/HUMANRIGHTS.pdf> (last visited Apr. 2, 2005).

118. See *U.S. Report to Committee Against Torture*, *supra* note 99, ¶ 6 (affirming the U.S. stance against torture).

119. See U.S. RUDs, *supra* note 81, at Declaration 1 (“declar[ing] that the provisions of Articles 1 through 16 of the Convention are not self-executing” in the United States).

120. See CAT, *supra* note 30, art. 22 (providing a “State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a

did opt in to the interstate procedure under Article 21, but this mechanism is rarely if ever used in human rights treaties.<sup>121</sup> Third, civil remedies are limited. Recourse for victims of torture abroad is available in the form of civil suits under the Alien Tort Claims Act (aliens only) and the Torture Victims Protection Act (torture under “foreign authority” only).<sup>122</sup> Fourth, despite ratification of CAT, there is no single federal crime of torture broad enough to fully implement CAT.<sup>123</sup>

Rather, U.S. legislation takes a piecemeal approach to torture. The United States “considered existing law to be adequate to its obligations under the Convention and determined that it would not be appropriate to establish a new federal cause of action, or to ‘federalize’ existing state protections, through adoption of omnibus

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violation by a State Party of the provisions of the Convention”) (emphasis added). “No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.” *Id.*

121. See U.S. RUDs, *supra* note 81, at Declaration 2 (recognizing the competence of CAT “to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations” under Article 21 of the Convention); see also CAT, *supra* note 30, art. 21 (outlining the procedure to be followed when a State Party believes that another State Party is not fulfilling the terms of the Convention). The procedure calls for a lengthy process including attempts at friendly settlement and conciliation. *Id.* The state may refer the matter to the Committee Against Torture after six months of attempted friendly settlement. *Id.* The Committee then has one year to issue a report, with a solution if possible. *Id.* Committee meetings considering the matter are confidential. *Id.*

122. See Alien Tort Claims Act, 28 U.S.C. § 1350 (2000) (stating that “district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”); see also *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980) (holding torture constitutes a violation of the law of nations for purposes of the alien tort statute); Torture Victims Protection Act, Pub. L. No. 102-256, Mar. 12, 1992, 106 Stat. 73 (1992) (codified as amended 28 U.S.C. § 1350 (2000)) (allowing U.S. citizens and aliens to seek damages for torture or extrajudicial killings but limiting its jurisdiction to acts committed by those acting under the authority of foreign nations). See generally U.S. DEP’T OF STATE, INITIAL REPORT OF THE UNITED STATES OF AMERICA TO THE U.N. COMMITTEE AGAINST TORTURE, ¶ 281 (1999) [hereinafter INITIAL REPORT OF THE UNITED STATES] (highlighting the differences between both statutes in regard to jurisdiction), at <http://wwwserver.law.wits.ac.za/humanrts/cat/usa2000.html>.

123. See INITIAL REPORT OF THE UNITED STATES, *supra* note 122, ¶ 178 (admitting that no federal statute “specifically defines or prohibits torture or directly implements the central provisions of this Convention”).

implementing legislation.”<sup>124</sup> Congress did, however, pass legislation criminalizing acts of torture *outside the United States*. United States Criminal Code, Section 2340 et seq. criminalizes acts of torture committed outside U.S. territorial jurisdiction by a U.S. national or by an alleged offender who is present in the United States.<sup>125</sup> To date, no cases have been brought under this statute.<sup>126</sup> Despite its lack of use, this legislation is still relevant as “Section 2340’s definition of torture track[s] the definition set forth in CAT, as elucidated by the United States’ [RUDs] submitted as part of its ratification.”<sup>127</sup> In

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124. *Id.* ¶ 60.

125. *See* 18 U.S.C. § 2340 (1994) (listing several definitions for terms utilized throughout the statute); *see also* 18 U.S.C. § 2340A (extending the statute’s reach to cover both U.S. nationals and non-U.S. nationals found in the United States, who commit torture abroad); 18 U.S.C. § 2340B (“Nothing in this chapter shall be construed as precluding the application of State or local laws on the same subject, nor shall anything in this chapter be construed as creating any substantive or procedural right enforceable by law by any party in any civil proceeding.”).

126. *See* MICHAEL JOHN GARCIA, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, THE U.N. CONVENTION AGAINST TORTURE: OVERVIEW OF U.S. IMPLEMENTATION POLICY CONCERNING THE REMOVAL OF ALIENS, at CRS-13 (2004) [hereinafter CRS REPORT FOR CONGRESS] (revealing CRS did not encounter even one case where the Department of Justice relied on 18 U.S.C. § 2340), *available at* <http://fpc.state.gov/documents/organization/36230.pdf> (last visited Apr. 2, 2005). Other statutes might be used in cases involving mistreatment of detainees. *Id.* For example, a recent prosecution of a military contractor in Afghanistan accused in the death of an Afghan prisoner is based on 18 U.S.C. § 113 (2004), assaults within special maritime and territorial jurisdiction of the United States. *See* Indictment, United States v. Passaro (E.D.N.C. 2004) (No. 5:04-CR-211-1) (charging CIA contractor with criminal assault of an Afghan prisoner detained by U.S. military personnel at U.S. army base in Afghanistan, who died while in custody), *available at* <http://news.findlaw.com/hdocs/docs/torture/uspasaro61704ind.html> (last visited Apr. 2, 2005). Several commentators have called for prosecution of those U.S. citizens allegedly responsible for torture at Abu Ghraib prison in Iraq. *See, e.g.*, Elizabeth Holtzman, *Bush has a lot to answer for on Iraq Torture*, NEWSDAY, June 16, 2004 (suggesting torture statute should be utilized in connection with Abu Ghraib), *at* <http://www.truthout.org/cgi-bin/artman/exec/view.cgi/10/4895#> (last visited Apr. 2, 2005); *see* Marjorie Cohn, *War Crimes, Truthout—Perspective*, May 13, 2004 (same), *at* <http://www.truthout.org/cgi-bin/artman/exec/view.cgi/9/4445> (last visited Apr. 2, 2005).

127. *See* U.S. Department of Justice, Office of Legal Counsel: Memorandum for Alberto R. Gonzales, Counsel to the President, at 12-13 (August 1, 2002) [hereinafter OLC Memo], *available at* <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf> (last visited Apr. 2, 2005).

addition to Section 2340, immigration regulations have been adopted to implement CAT provisions related to nonrefoulement (non-return) of persons to countries where they would be subjected to torture.<sup>128</sup> Thus, U.S. law is still lacking in terms of direct enforcement of CAT.<sup>129</sup> Federal criminal legislation covers acts of torture abroad, leaving ordinary criminal law to cover other acts of torture.<sup>130</sup> Additionally, civil remedies under U.S. law also focus on torture abroad.<sup>131</sup>

Despite limited avenues of redress for torture by or within the United States, it is still crucial to determine whether the United States commits torture in order to mobilize shame over U.S. actions. In the arena of international human rights, norm enunciation and deterrence are often as important as an enforceable result.<sup>132</sup> In the context of a private cause of action for torture, for example, even unenforceable declaratory or default judgments are significant.<sup>133</sup> They announce to the world that an important norm has been violated and may empower the plaintiff “by creating a bargaining chip for use in other political fora.”<sup>134</sup> Similarly, a determination that

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128. See CRS REPORT FOR CONGRESS, *supra* note 126, at CRS-7-8 (providing the Department of Homeland Security’s estimates that in the first four years of implementing CAT Article 3 regulations to immigration proceedings, “approximately 1,700 aliens were granted deferral or withholding of removal based on CAT protections”).

129. See discussion *supra* note 123 and accompanying text (stating no U.S. statute directly implements CAT provisions).

130. See discussion *supra* note 125 and accompanying text (revealing 18 U.S.C. § 2340A only reaches individuals who commit torture abroad).

131. See discussion *supra* note 122 and accompanying text (explaining federal civil remedies are only available to victims of torture committed abroad).

132. See Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2349 (1991) (arguing in traditional international law litigation, plaintiffs pursue prospective aims in addition to their own personal compensation and redress).

133. See *id.* at n.11 (declaring although uncollected judgments fail to compensate victims, they can serve other purposes such as the deterrence of future similar conduct, the denial of safe haven to violators, and the “enunciation of legal norms opposing the conduct for which the defendant was found liable”).

134. See *id.* at 2349 (contrasting the “dualist” views of international jurisprudence, which view international law as binding upon nations in their relations with one another, with transnational litigation, which allows individual plaintiffs to claim rights directly).

the use or threatened use of effective truth serum constitutes torture might serve as a moral denunciation, possibly deterring future practice. Thus, in order to mobilize shame and moral outrage against the hostile use of truth serum, it is necessary to analyze it under CAT as the United States has ratified it.<sup>135</sup>

#### D. U.S. LEGAL INTERPRETATIONS OF TORTURE

In examining U.S. obligations under CAT, this article draws on several legal memos that became public after the release of appalling photos of abuse from Abu Ghraib prison in Iraq.<sup>136</sup> The memos were first leaked to the Washington Post and described as follows:

The [August 1, 2002, Justice Department's Office of Legal Counsel for Alberto R. Gonzales, counsel to President Bush] memo was written at the request of the CIA. . . . The White House asked the Justice Department's Office of Legal Counsel for its legal opinion on the standards of conduct under [CAT]. The Office of Legal Counsel is the federal government's ultimate legal adviser. The most significant and sensitive topics that the federal government considers are often given to the OLC for review. In this case, the memorandum was signed by Jay S. Bybee, the head of the office at the time. Bybee's signature gives the document additional authority, making it akin to a binding legal opinion on government policy on interrogations. Bybee has since become a judge on the 9th U.S. Circuit Court of Appeals. Another memorandum, dated March 6, 2003, from a Defense Department working group convened by Defense Secretary Donald H. Rumsfeld to come up with new interrogation guidelines for detainees at Guantanamo Bay, Cuba, incorporated much, but not all, of the legal thinking from the OLC memo.<sup>137</sup>

The March 2003 memo ("DOD Working Group Memo") was leaked in early June 2004.<sup>138</sup> On June 22, 2004, the Bush

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135. See discussion *supra* notes 108-116 and accompanying text (explaining disapproval short of outright condemnation by the Committee Against Torture of the U.S. reservation to Article 16 and understanding to Article 1).

136. See discussion *supra* note 10 and accompanying text (providing reports on the alleged abuse of Iraqi prisoners at Abu Ghraib).

137. See Dana Priest, *Justice Dept. Memo Says Torture 'May Be Justified,'* WASH. POST, June 13, 2004 (detailing internal memorandum from the CIA asking the Office of Legal Counsel to consider the legality of aggressive interrogation methods), available at <http://www.washingtonpost.com/wp-dyn/articles/A38894-2004Jun13.html> (last visited Apr. 2, 2005).

138. See Neil A. Lewis & Eric Schmitt, *Lawyers Decided Bans on Torture*

Administration released the August 1, 2002 memo (“OLC Memo”), along with other memos, letters, and orders related to recent interrogation policy (specifically, regarding Afghanistan and Iraq as well as the U.S. prison for “enemy combatants” at Guantanamo Bay).<sup>139</sup> President Bush has stated that he authorized only action that would be “consistent with international treaty obligations”<sup>140</sup> but has never indicated whether he ever relied on controversial White House Office of Legal Counsel (“OLC”) interpretations of those obligations.

The OLC and DOD Working Group memos both discuss the interpretation of torture and CIDT under CAT and related U.S. law. They assert an extremely narrow interpretation of torture. For example, severe physical pain or suffering is apparently limited to death, loss of limb, or loss of organ function.<sup>141</sup> In addition, the memos assert the controversial position that torture could be justified by necessity, self-defense and/or the Commander-in-Chief power.<sup>142</sup>

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*Didn't Bind Bush*, N.Y. TIMES, June 8, 2004, at A1 (disclosing a legal memorandum written by a team of administration lawyers stating that President Bush was not bound by any international treaty or any federal anti-torture law because his authority as Commander-in-Chief allowed him to approve any interrogation technique needed to protect the nation's security).

139. See Priest, *supra* note 137 (detailing release of OLC and other memos); see also OLC Memo, *supra* note 127, at 38 (claiming “[o]ne of the core functions of the Commander-in-Chief is that of capturing, detaining, and interrogating members of the enemy”); *infra* Part IV (providing an in-depth discussion of the OLC's “torture” interpretation); DOD Working Group Memo, *supra* note 74, at 20 (“In light of the President's complete authority over the conduct of war, without a clear statement otherwise, criminal statutes are not read as infringing on the President's ultimate authority in these areas.”).

140. See Press Release, Office of the White House Press Secretary, President Bush Holds Press Conference Following the G8 Summit (June 10, 2004) (mentioning George W. Bush could not recall whether he had ever read the OLC memo), available at <http://www.whitehouse.gov/news/releases/2004/06/20040610-36.html> (last visited Apr. 2, 2005).

141. See OLC Memo, *supra* note 127, at 5-6 (adapting the definition of “severe pain” as described in various U.S. statutes concerned with defining an emergency medical condition for the purpose of health care benefits). “Although these statutes address a substantially different subject from Section 2340, they are nonetheless helpful for understanding what constitutes severe physical harm.” *Id.* at 6.

142. See *id.* at 39-42 (arguing individual offenders could claim that their conduct was necessary to avoid future harm to others that superseded the harm caused by their torture, or that the use of force was a legitimate application of self-defense because the potential harm was perceived as imminent and the amount of force

The DOD Working Group Memo concludes that the President is not bound by CAT or the federal torture statute, Section 2340, because the Commander-in-Chief can approve any method necessary for national security.<sup>143</sup>

Republican Senator Lindsey Graham recently “accused the Bush Administration of ‘playing cute with the law’ in its treatment of prisoners in Iraq and elsewhere.”<sup>144</sup> He criticized the memos on torture for endangering the military.<sup>145</sup> Many prominent legal scholars have also harshly criticized the memos. Harold Hongju Koh, dean of the Yale Law School and Assistant Secretary of State for Democracy, Human Rights and Labor in the Clinton Administration, described the legal analysis as “embarrassing” and “utterly unjustifiable.”<sup>146</sup> Dean Koh compared the assertion of Commander-in-Chief power to commit torture to an executive claim of “the power to commit genocide, to sanction slavery, to promote apartheid, to license summary execution.”<sup>147</sup> A bipartisan group of prestigious

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used was proportional to the harm sought to be avoided).

143. See DOD Working Group Memo, *supra* note 74, at 21 (“In order to protect the President’s inherent constitutional authority to manage a military campaign, 18 U.S.C. § 2340A (the prohibition against torture) must be construed as inapplicable to interrogations undertaken pursuant to his Commander-in-Chief authority.”); see also OLC Memo, *supra* note 127, at 31-46 (contending the prosecution of anyone under 18 U.S.C. § 2340A, who commits torture during interrogation of enemy combatants, would be an unconstitutional interference with the President’s authority as Commander-in-Chief). But the DOD Working Group Memo also recognized that the ban on torture is absolute under CAT, and the United States does not have a reservation or understanding to the contrary. See DOD Working Group Memo, *supra* note 74, at 5. Specifically, the memo acknowledged that Article 2 provides “acts of torture cannot be justified on the grounds of exigent circumstances, such as a state war or public emergency, or on orders from a superior officer or public authority.” *Id.* Therefore, the arguments relating to justification via necessity or following orders of the Commander-in-Chief are inapposite as they relate to torture under CAT.

144. See Lichtblau, *supra* note 16 (describing Senate Judiciary Committee hearing of Alberto Gonzales, nominee for Attorney General).

145. See *id.* (stating the current Bush Administration’s approach to interrogation has “dramatically undermined” the campaign against terrorism and endangered U.S. troops who might be taken into custody).

146. See Adam Liptak, *Legal Scholars Criticize Memos on Torture*, N.Y. TIMES, June 25, 2004, at A14 (commenting it is not unusual for generally liberal law professors to differ with broad interpretations of presidential power but “their attack on the professional quality of the memos was unusually sharp”).

147. See *id.* (also quoting others who have been less critical in evaluating the

lawyers, including twelve former judges, issued a statement asserting that the memos “ignore and misinterpret the U.S. Constitution and laws, international treaties and rules of international law.”<sup>148</sup> “The critics spanned the political spectrum, reflecting a degree of consensual outrage not often witnessed in an era defined largely by the red-blue divide on issues of public import.”<sup>149</sup>

In response to the public outcry, the Bush Administration backed away from the positions in the memos, at least in part. Even if all of the positions in the memos have since been abandoned by the Bush Administration, they provide the most extreme arguments in support of preventive interrogational torture. But it is still not clear whether the Bush Administration has fully repudiated the controversially narrow interpretation of torture put forth in the memos. At the June 2004 Press Briefing where the memos were released, then-White House Counsel Alberto Gonzales stated the following with regard to disowning the analysis in the memos:

Now, to the extent that some of these documents, in the context of interrogations, explored broad legal theories, including legal theories about the scope of the President’s power as Commander-in-Chief, some of their discussion, quite frankly, is irrelevant and unnecessary to support any action taken by the President. The administration has made clear before, and I will reemphasize today that the President has not authorized, ordered or directed in any way any activity that would transgress the standards of the torture conventions or the torture statute, or any other applicable laws.

Unnecessary, over-broad discussions in some of these memos that address abstract legal theories, or discussions subject to misinterpretation, but not relied upon by decision-makers are under review, and may be replaced, if appropriate, with more concrete guidance addressing only

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memorandums by characterizing the analysis as merely incomplete or unpolished).

148. See Lawyers’ Statement on Bush Admin.’s Torture Memos, August 4, 2004 (protesting the memos’ erroneous legal conclusions), at <http://www.independentjudiciary.com/resources/docs/0804statement.pdf> (last visited Apr. 2, 2005).

149. See Robert K. Vischer, *Tortured Ethics: Abu Ghraib and the Moral Lawyer*, at 2 (Oct. 5, 2004), ST. JOHN’S LEGAL STUD. RES. PAPER (using the participation of the attorneys in the Department of Justice’s Office of Legal Counsel in the Abu Ghraib prisoner abuse scandal to discuss attorneys’ own moral convictions in a broad professional context) (paper on file with author, abstract available at <http://ssrn.com/abstract=601203>).

those issues necessary for the legal analysis of actual practices. But I must emphasize that the analysis underpinning the President's decisions stands and are not being reviewed.<sup>150</sup>

He went on to clarify that the “unnecessary and over-broad” positions were those asserting that a presidential determination of necessity or self-defense might provide immunity from prosecution for torture.<sup>151</sup> He also stated, “Whatever broad language might be included in this legal memo, the United States government has never authorized torture in reliance on the argument that the convention against torture, or the torture statute are somehow inapplicable to the current conflict.”<sup>152</sup> But he refused to answer questions about the memo's analysis of the definition of torture. In response to a question about the criticism of the OLC interpretation of torture as too narrow, Gonzales replied, “I haven't looked at that memo closely recently. So in terms of what that memo actually says, I'm not going to comment specifically on it.”<sup>153</sup>

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150. See Judge Alberto Gonzales et al., Press Briefing at the Eisenhower Executive Office Building (June 22, 2004) (arguing the memo reflects a policy that the administration finds necessary to wage a global war against terror and that the new face of war, with combatants who do not abide by the Geneva Convention, presents unprecedented “legal and practical questions for policymakers trying to defend the United States”), available at <http://www.whitehouse.gov/news/releases/2004/06/print/20040622-14.html> (last visited Apr. 2, 2005).

151. See *id.* (noting the U.S. neither commits nor condones torture and there has been no presidential determination permitting torture in the name of self-defense and security).

152. See *id.* (insisting the U.S. has only used interrogation techniques against Taliban and Al Qaeda members and in Iraq in accordance with U.S. obligations under CAT).

153. See *id.* (avoiding a question about the memo's interpretation of torture and noting that the Department of Justice would be giving a briefing “so they can certainly talk about their definition of torture”). The DOJ press briefing was not recorded or transcribed. See John W. Dean, *The Torture Memo By Judge Jay S. Bybee that Haunted Alberto Gonzales's Confirmation Hearings*, FINDLAW, Jan. 14, 2005 (explaining pen and pad background as a briefing that only those with media credentials can attend; no record or transcript is available); see also Department of Justice Media Advisory, Senior Justice Department Official to Hold Background Briefing June 22, 2004 (pen and pad briefing) (describing background briefing), at [http://www.usdoj.gov/opa/pr/2004/June/04\\_opa\\_427.htm](http://www.usdoj.gov/opa/pr/2004/June/04_opa_427.htm) (last visited Apr. 2, 2005).

Thus, the administration initially repudiated the memo's most radical positions regarding the President's authority as Commander-in-Chief and other justifications for torture, but this did not affect the memo's controversial analysis of what behavior constitutes torture. The administration, however, took a different stance on the memo after President Bush nominated Gonzales for Attorney General.<sup>154</sup> Days before the Senate hearings on Gonzales' nomination, the OLC released a new memo regarding the legal interpretation of torture.<sup>155</sup> The new memo ("Revised OLC Memo") "supersedes" the OLC Memo of August, 2002 "in its entirety."<sup>156</sup>

It is not entirely clear, however, that the legal interpretations regarding Commander-in-Chief power and potential defenses to liability have been disavowed as erroneous; rather, they are referred to as "unnecessary" in light of the President's statements that U.S. personnel should not engage in torture.<sup>157</sup> When asked whether he agreed with the memo's position that the Commander-in-Chief could ignore the ban on torture if the President found it unconstitutional, Gonzales replied: "I guess I would have to say that hypothetically that authority may exist."<sup>158</sup> The Revised OLC Memo does broaden the interpretation of the definition of torture in some respects, for example, by explicitly disagreeing with its limitation of severe pain to serious physical injury such as organ failure or death.<sup>159</sup> In

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154. See Neil A. Lewis, *Justice Dept. Toughens Rule on Torture*, N.Y. TIMES, Jan. 1, 2005, at A1 (referring to the nomination of Alberto Gonzales to be Attorney General).

155. See *id.* (describing an unannounced posting of a memo on the Department's website one week before the hearings where Gonzales was expected to be questioned about his role in formulating the much criticized policies on interrogation).

156. See U.S. Dep't of Justice, Office of Legal Counsel: Memorandum for James B. Comey, Deputy Attorney Gen., at 1-2 (Dec. 30, 2004) [hereinafter Revised OLC Memo] (describing questions raised about the August 2002 memo and announcing its replacement by this memo), available at <http://news.findlaw.com/hdocs/docs/terrorism/doj torture123004mem.pdf> (last visited Apr. 2, 2005).

157. See *id.* at 2 (stating because discussion of Commander-in-Chief power and potential defenses was unnecessary, the analysis has been omitted as inconsistent with the President's directive).

158. See Lichtblau, *supra* note 16 (relating the opinions of Alberto Gonzales on presidential powers to allow torture for purposes of interrogation).

159. See Revised OLC Memo, *supra* note 156, at 9 n.17 (advising what acts

addition, the memo seems to expand the interpretation of specific intent by declining to reiterate the requirement of proof that the “precise objective” of the actor is to inflict pain or suffering, although it retains the requirement of specific intent.<sup>160</sup> The interpretation of the OLC is “definitive” according to the former White House Counsel.<sup>161</sup>

Despite the recent developments regarding the original OLC Memo, there are other memos that might provide similar or even more controversial interpretations of torture. According to Senator Patrick Leahy, the documents released by the Bush Administration are only a “small subset” of the relevant documents.<sup>162</sup> There is a still-classified August 2002 memo that is “far more detailed and explicit than another August 2002 document generated by Justice’s Office of Legal Counsel concerning U.S. obligations under anti-torture law.”<sup>163</sup> It is said to spell out specific interrogation methods

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would and would not constitute torture under U.S. obligations to CAT); *see also* discussion *infra* Part IV.A.1 (discussing interpretation of severe pain or suffering).

160. *See* Revised OLC Memo, *supra* note 156, at 16 n.27 (discussing precise objective test); *see also* discussion *infra* Part IV (analyzing severe pain or suffering as well as specific intent requirement).

161. *See* Draft Memorandum from Alberto R. Gonzales, for the President (Jan. 25, 2002) (referring to the OLC position as definitive while considering the benefits and disadvantages to applying the Geneva Convention on Prisoners of War to the conflict with Al Qaeda and the Taliban in response to the DOJ’s legal opinion that the Convention does not apply to Al Qaeda and that there are reasonable grounds to believe that it also does not apply to the Taliban), *available at* <http://www.msnbc.msn.com/id/4999148/site/newsweek> (last visited Apr. 2, 2005); *see also* Priest, *supra* note 137 (noting the signature of the head of OLC on the memo renders it “akin to binding legal opinion on government policy on interrogations”).

162. *See* Sen. Patrick Leahy, Reaction to White House Release of Certain Documents Relating to the Prison Abuse Scandal (June 22, 2004) (displaying the Senator’s frustration with the manner in which Congress has been denied its oversight duties and stressing the need for an investigation to examine the prison abuse scandal), *available at* <http://leahy.senate.gov/press/200406/062204b.html> (last visited Apr. 2, 2005).

163. *See* Toni Locy & John Diamond, *Memo lists acceptable ‘aggressive’ interrogation methods*, USA TODAY, June 27, 2004 (describing memos inaccessible to the public that could sanction interrogation techniques harsher than those in publicly-disclosed memos), *available at* [http://www.usatoday.com/news/world/2004-06-27-cia-interrogation-methods\\_x.htm](http://www.usatoday.com/news/world/2004-06-27-cia-interrogation-methods_x.htm) (last visited Apr. 2, 2005).

that the CIA could use against Al Qaeda members.<sup>164</sup> Moreover, a footnote in the Revised OLC Memo refers to other OLC opinions regarding treatment of detainees that are not superseded by the Revised OLC Memo and are reportedly still classified.<sup>165</sup> According to unnamed officials, the footnote means that the classified opinions sanctioning coercive techniques under the old memo are still valid under the Revised OLC Memo.<sup>166</sup> In addition, the White House recently pressured Congressional leaders to delete from the intelligence reform legislation a measure that “would have explicitly extended to intelligence officers a prohibition against torture or inhumane treatment, and would have required the CIA as well as the Pentagon to report to Congress about the methods they were using.”<sup>167</sup> Thus, the original interpretation of torture in the OLC Memo will be used in conjunction with the Revised OLC Memo to analyze U.S. commitments under CAT.

### III. CIDT (CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT)

It is unlikely that preventive interrogational truth serum would constitute CIDT when the U.S. reservation is taken into account. Domestic relief based on the U.S. Constitution, however, might exist if truth serum is considered to be particularly egregious and shocking. The U.S. reservation to Article 16<sup>168</sup> of CAT provides:

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164. *See id.* (reporting the Justice Department wrote the memo in response to a CIA request for specific guidance on the handling of “high-value al-Qaeda captives”).

165. *See* Douglas Jehl & David Johnston, *White House Fought Curbs on Interrogations, Officials Say*, N.Y. TIMES, Jan. 13, 2005, at A1 (citing officials who describe the opinions as still-classified); *see also* Revised OLC Memo, *supra* note 156, at 2 n.8 (stating conclusions in prior opinions on treatment of detainees would not be different under new standards).

166. *See* Jehl & Johnston, *supra* note 165 (noting that “[t]he footnote meant, the officials said, that coercive techniques approved by the Justice Department under the looser interpretation of the torture statutes were still lawful even under the new, more restrictive interpretation”).

167. *Id.* (describing restrictions on extreme interrogation tactics that were approved by the Senate but deleted in the face of White House opposition).

168. *See* CAT, *supra* note 30, art. 16 (providing that “each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as

[T]he United States considers itself bound by the obligation under Article 16 to prevent ‘cruel, inhuman or degrading treatment or punishment,’ only insofar as the term ‘cruel, inhuman or degrading treatment or punishment’ means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.<sup>169</sup>

Although the U.S. reservation focuses on cruel and unusual punishment under the Eighth Amendment, other constitutional bases for banning interrogational torture are also briefly discussed below.<sup>170</sup>

#### A. BAN ON CRUEL AND UNUSUAL PUNISHMENT

In general, the Eighth Amendment ban on cruel and unusual punishment does not apply to torture during interrogations.<sup>171</sup> “As a technical legal matter, the protections of the Eighth Amendment apply only to ‘punishments’, that is, to the treatment of individuals who have been convicted of a crime and are therefore in the custody of the Government.”<sup>172</sup> In *Ingraham v. Wright*,<sup>173</sup> the Supreme Court affirmed this determination:

An examination of the history of the [Eighth] Amendment and the decisions of this Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes. We adhere to this longstanding limitation and hold

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defined under article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”).

169. U.S. RUDs, *supra* note 81, at Reservation 1.

170. See discussion *supra* Part II.B.2 (concluding the Committee Against Torture neither found the reservation incompatible with the object and purpose of the treaty nor indicated that the reservations were incompatible and severable, although it recommended that the RUDs be withdrawn). As a result, the analysis of U.S. obligations regarding CIDT will accept the U.S. reservation. *Id.*

171. See SENATE COMM. ON FOREIGN RELATIONS, CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, S. EXEC. REP. NO. 101-30, at 19 (1990) (determining that the limited scope of the Eighth Amendment protects “only those convicted of crimes”).

172. See INITIAL REPORT OF THE UNITED STATES, *supra* note 122, ¶ 108 (citing *Ingraham v. Wright*, 430 U.S. 651, 664 (1977)).

173. 430 U.S. 651 (1977).

that the Eighth Amendment does not apply to the paddling of children as a means of maintaining discipline in public schools.<sup>174</sup>

Because *Ingraham* dealt with corporal punishment in public schools, it is unclear whether its reasoning would apply to official interrogation of suspected terrorists. In *Hudson v. McMillian*,<sup>175</sup> the Court held that excessive physical force used against a prisoner, such as a beating that causes minor bruising and swelling, may constitute cruel and unusual punishment even without significant physical injury.<sup>176</sup> In reaching this determination, the Court relied on *Estelle v. Gamble*<sup>177</sup> for the proposition that “proscribing torture and barbarous punishment was ‘the primary concern of the drafters’ of the Eighth Amendment.”<sup>178</sup> This arguably implies that the Eighth Amendment covers even pre-conviction punishment such as torturous interrogation. But the *Hudson* Court also cited *Wilkinson v. Utah*<sup>179</sup> for the statement: “it is safe to affirm that punishment of torture . . . and all others in the same line of unnecessary cruelty, are forbidden

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174. See *id.* at 664 (deciding the students did not have Eighth Amendment protections and the teachers and administrators were privileged at common law to inflict such corporal punishment as necessary for the students’ education and discipline).

175. 503 U.S. 1 (1992).

176. See *id.* at 7 (establishing that in determining whether the use of force was wanton and unnecessary, other factors such as “the need for application of force, the relationship between that need and the amount of force used, the threat ‘reasonably perceived by the responsible officials,’ and ‘any efforts made to temper the severity of a forceful response’” should also be considered). The absence of serious injury, therefore, does not bar the finding of cruel and unusual punishment. *Id.* See also *Hope v. Pelzer*, 536 U.S. 730 (2002) (holding that the inmate was subjected to cruel and unusual punishment when he was exposed to serious risk of harm by being handcuffed to a hitching post in the sun for seven hours with little water and no bathroom breaks).

177. 429 U.S. 97 (1976) (finding although a deliberate indifference to a prisoner’s serious illness or injury constitutes cruel and unusual punishment in violation of Eighth Amendment, a prisoner’s *pro se* complaint showing that medical personnel had seen and treated him on seventeen occasions within a three-month period was insufficient to state a cause of action against physician although other officials might be liable).

178. See *Hudson*, 503 U.S. at 9 (citing *Gamble*, 429 U.S. at 102, to illustrate the original intent behind the Eighth Amendment).

179. 99 U.S. 130 (1879) (sentencing person convicted of capital offense in territories to death by shooting does not violate Eighth Amendment).

by [the Eighth Amendment].”<sup>180</sup> The latter language indicates that “cruel and unusual punishment” is indeed limited to punishment and thus inapplicable to interrogation.<sup>181</sup> Therefore, preventive interrogational truth serum would not constitute CIDT. But even if torturous interrogation does not fall under the Eighth Amendment, it might be barred by the Fifth Amendment Self-Incrimination Clause<sup>182</sup> or the Fifth or Fourteenth Amendments’ Due Process Clause.<sup>183</sup>

#### B. PRIVILEGE AGAINST SELF-INCRIMINATION

The admission into evidence of a confession, which was derived by the use of truth serum, in a criminal proceeding would most likely violate the privilege against self-incrimination.<sup>184</sup> Yet torturous

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180. *Hudson*, 503 U.S. at 9 (citing *Wilkerson*, 99 U.S. at 136).

181. *But see* Celia Rumann, *Tortured History: Finding Our Way Back to the Lost Origins of the Eighth Amendment*, 31 PEPP. L. REV. 661, 665 (2004) (arguing the history of and interpretations of the Eighth Amendment suggest that it should apply more broadly to cover interrogation and possibly ban the use of compulsive questioning); *see also* A.L. DeWitt, *The Ultimate Exigent Circumstance*, 5 KAN. J. L. & PUB. POL’Y 169, 176 (1996) (“The use of pain to extract information might be considered a form of punishment, irrespective of whether a person had been properly tried and convicted.”); Sen. Richard Durbin, Floor Statement on the Durbin Torture Amendment, 150 Cong. Rec. S. 6781 (June 15, 2004) (claiming “[d]uring the Constitutional Convention, George Mason, who is known as ‘the Father of the Bill of Rights,’ explained that the Fifth Amendment ban on self-incrimination and the Eighth Amendment ban of cruel and unusual punishment both prohibit torture and cruel treatment”), available at <http://www.americanprogress.org/site/pp.asp?c=biJRJ8OVF&b=91568&printmode=1> (last visited Apr. 2, 2005).

182. *See* U.S. CONST. amend. V (“No person shall . . . be compelled in a criminal case to be a witness against himself. . .”).

183. *See* U.S. CONST. amends. V & XIV, § 1 (“No person shall . . . be deprived of life, liberty, or property, without due process of law. . .” and incorporating this right to the states by providing “nor shall any State deprive any person of life, liberty, or property, without due process of law . . .”).

184. *See* George L. Blum, Annotation, *Sufficiency of Showing that Voluntariness of Confession or Admission Was Affected By Alcohol or Other Drugs – Drugs or Narcotics Administered as Part of Medical Treatment and Drugs or Intoxicants Administered by the Police*, 96 A.L.R.5th 523 (2004) (examining the voluntariness of confession, admission, or waiver of rights after ingestion of a drug or narcotic and finding that the influence of drugs or narcotics at the time of confession is a factor to consider in determining the level of coercion or voluntariness); *see also* N. J. Marini, Annotation, *Physiological or Psychological Truth and Deception*

interrogation itself would not necessarily violate the privilege against self-incrimination. The Bush Administration made a similar “trial rights” argument with regard to the *Miranda*<sup>185</sup> warning. The OLC argued that the Fifth Amendment’s Self-Incrimination Clause is a trial right that would not prohibit “an unwarned custodial interrogation as a constitutional violation *in itself*.”<sup>186</sup> Similarly, torturous interrogation would not violate the Fifth Amendment unless and until a coerced statement is introduced during a criminal proceeding, based on the OLC’s rationale that the Fifth Amendment is a trial right.<sup>187</sup> Thus, so long as the subject is never prosecuted, preventive interrogational torture does not violate the ban on self-incrimination.

On the other hand, the privilege against self-incrimination might be broad enough to cover interrogations even where no criminal charges are brought. In a recent case considering a civil claim based on coercive interrogation, the Supreme Court appeared divided on this issue. In *Chavez v. Martinez*,<sup>188</sup> Martinez was shot during an

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*Tests*, 23 A.L.R.2d 1306 (2004) (addressing the admissibility in evidence of results of physiological or psychological tests to determine scientifically the truth or falsity of oral statements or testimony and suggesting that a criminal confession made under the influence of a drug is obtained involuntarily and therefore inadmissible); Donald T. Kramer, Annotation, *Admissibility of Physiological or Psychological Truth and Deception Test or Its Results to Support Physician’s Testimony*, 41 A.L.R.3d 1369 (2004) (illustrating the fact that one has undergone physiological or psychological truth or deception tests is generally admissible, but that the admissibility of the results of, or recording of, the test to support physician testimony is dependent upon the particular court).

185. See *Miranda v. Arizona*, 384 U.S. 436 (1966) (establishing procedures to ensure the privilege against self-incrimination during police interrogation).

186. See Memorandum from Asst. U.S. Attorney General Jay Bybee, to U.S. Department of Defense General Counsel William Haynes 3 (Feb. 26, 2002) (explaining neither the Self-Incrimination Clause nor *Miranda* established all possible guidelines by which agents of the federal government should conduct interrogations), available at <http://www.washingtonpost.com/wp-srv/nation/documents/022602bybee.pdf> (last visited Apr. 2, 2005).

187. See *id.* at 4 (arguing for a “public safety” defense to *Miranda* warnings). Although the memo stresses the use of *Miranda* as “a rule of conduct for law enforcement officers to prevent practices that might lead to defendants making involuntary statements,” it sets forth a broad public safety defense that could be interpreted to justify torturous interrogation. *Id.*

188. 538 U.S. 760 (2003) (remanding civil claim against police sergeant for torture based on rights under substantive due process).

altercation with the police.<sup>189</sup> While Martinez was undergoing medical treatment for bullet wounds that left him permanently blind and paralyzed from the waist down, a police officer questioned him despite Martinez's repeated statements "I am dying," "I am choking," and "I am not telling you anything until they treat me."<sup>190</sup> Martinez was not prosecuted for the crime that the police were investigating when they stopped him and he subsequently sued the police sergeant for violating his constitutional rights.<sup>191</sup>

Four Justices rejected the Fifth Amendment self-incrimination basis for Martinez's civil suit under § 1983.<sup>192</sup> Justices Thomas, O'Connor, Scalia, and Chief Justice Rehnquist determined, "The text of the Self-Incrimination Clause simply cannot support the Ninth Circuit's view that the mere use of compulsive questioning, without more, violates the Constitution."<sup>193</sup> Coercion alone does not violate the Self-Incrimination Clause unless the compelled statements are used against the individual in a criminal case.<sup>194</sup> Martinez's privilege against self-incrimination was not violated because he was never made to incriminate himself through introduction of the statements in a criminal case.<sup>195</sup>

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189. *See id.* at 763-64 (explaining the details of the dispute between Martinez and the police officer which led to the gun wounds and the arrest of Martinez).

190. *Id.* (noting interview lasted approximately ten minutes and the police officer did not issue Miranda warnings at any point).

191. *See id.* at 764-65 (reporting Martinez's complaint maintained that the police officer's actions violated both his Fifth and Fourteenth Amendment rights).

192. *See id.* at 766-73 (Thomas, J., announcing the judgment of the Court and delivering an opinion in which the Chief Justice joined in its entirety and Justice O'Connor and Scalia joined in part) (deciding that, absent a prosecution for a crime, Martinez could not have been called to act as a witness against himself, and that the Fifth Amendment protections were not invoked); *see also* 42 U.S.C. § 1983 (1994) (mandating in part that any person who causes a citizen of the U.S. to be deprived "of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . .").

193. *Chavez*, 538 U.S. at 767 (Thomas, J., announcing the judgment of the Court and delivering an opinion).

194. *See id.* at 770 (reaffirming the Fifth Amendment privilege may only be asserted if an individual is coerced to produce evidence that is later used against him or her in a criminal action).

195. *See id.* at 767 (concluding Martinez was never a witness against himself since his statements were never admitted as testimony in a criminal case).

In contrast, Justice Souter, in an opinion joined by Justice Breyer, stated that although an expansion of the Fifth Amendment protection would be necessary to recognize Martinez's claim, the need for expansion alone is not sufficient to reject his claim.<sup>196</sup> Where the core guarantee against self-incrimination would be endangered without a "complementary protection," the privilege would support additional protection such as a ban on compulsory interrogation.<sup>197</sup> Nevertheless, Martinez failed to make the "powerful showing" necessary for such an expansion.<sup>198</sup>

Three Justices were willing to go further than the position held by Justice Souter.<sup>199</sup> Justices Stevens and Ginsburg joined Justice Kennedy in holding that the Self-Incrimination Clause imposes substantive restraints on governmental conduct, rather than merely functioning as an evidentiary rule applicable solely at trial.<sup>200</sup> According to this view, the privilege applies when the police compel a statement.<sup>201</sup> "The Constitution does not countenance the official imposition of severe pain or pressure for purposes of interrogation."<sup>202</sup> A constitutional right is violated as soon as torture

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196. *See id.* at 777-78 (Souter, J. concurring) (providing examples of how Fifth Amendment guarantees would be at risk if individuals were not provided with certain complementary protections).

197. *See id.* (Souter, J. concurring) (suggesting judges may need to exercise their judicial capacity to protect Fifth Amendment rights).

198. *See id.* at 778 (Souter, J. concurring) (expressing concern over lack of a limiting principle to Martinez's argument to expand protection of the privilege against compelled self-incrimination to the point of the civil liability on these facts).

199. *See id.* at 790 (Kennedy, J. concurring in part and dissenting in part) ("Justice Souter and Justice Thomas are wrong, in my view, to maintain that in all instances a violation of the Self-Incrimination Clause simply does not occur unless and until a statement is introduced at trial . . .").

200. *See id.* at 791 (Kennedy, J. concurring in part and dissenting in part) (discussing that such a limited view of the Self-Incrimination Clause would not adequately safeguard the right against compulsion that the Clause seeks to prohibit).

201. *See id.* (putting forth the argument that the Clause provides a "continuing right against government conduct intended to bring about self-incrimination").

202. *Id.* at 795-96 (Kennedy, J. concurring in part and dissenting in part) (maintaining a violation of the Self-Incrimination Clause does occur even when the coerced statement is not introduced at trial).

is used, not “held in abeyance” until the victim is prosecuted.<sup>203</sup> Justice Ginsburg stated that the privilege against self-incrimination is “[c]losely connected with the struggle to eliminate torture as a governmental practice.”<sup>204</sup> According to Justice Stevens, the audio recording of the interrogation by the officer “vividly demonstrates that respondent was suffering severe pain and mental anguish throughout petitioner’s persistent questioning.”<sup>205</sup> These three Justices would have affirmed the Ninth Circuit’s finding of a § 1983 claim based on the Fifth Amendment, but this would have left the Court with no controlling authority.<sup>206</sup> Thus, they joined with Justice Souter’s opinion remanding for reconsideration based on due process.<sup>207</sup>

In light of the multiple rationales and opinions in *Chavez v. Martinez*, it appears that the privilege against self-incrimination could apply to interrogations, but a party must meet a high threshold in order to provide a basis for a majority finding on the current Court (i.e., a “powerful showing” sufficient to convince Justices Souter and Breyer to join Justices Kennedy, Stevens and Ginsburg in finding that the conduct constitutes a violation).<sup>208</sup> The Fourteenth Amendment Due Process Clause, however, may be more readily applicable to a claim of interrogational torture.<sup>209</sup>

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203. See *Chavez*, 538 U.S. at 789-90 (Kennedy, J. concurring in part and dissenting in part) (stressing how a future privilege does not negate a present right).

204. *Id.* at 801-02 (Ginsburg, J. concurring in part and dissenting in part) (affirming the privilege against self-incrimination is a facet of civilized government conduct).

205. See *id.* at 786 (Stevens, J. concurring in part and dissenting in part) (providing a transcript of the questioning that occurred in the emergency room of the hospital).

206. See *id.* at 799 (Kennedy, J. concurring in part and dissenting in part) (stating the choice to join in Justice Souter’s opinion was based on a decision to ensure a controlling judgment of the Court).

207. See *id.* (Kennedy, J. concurring in part and dissenting in part) (noting the ruling on substantive due process grounds could provide much of the critical protection that the Self-Incrimination Clause should secure).

208. See discussion *supra* notes 192-207 and accompanying text (providing overviews of the Justices’ differing opinions and rationales).

209. See *Chavez*, 538 U.S. at 779 (Souter, J. concurring) (suggesting a claim of outrageous police conduct actionable under § 1983 must find its base in

## C. SUBSTANTIVE DUE PROCESS

In *Townsend v. Sain*, the Supreme Court determined that the admission of a drug-induced confession in a criminal case violates the Constitution.<sup>210</sup> The Court determined that a confession is inadmissible when the individual's will is overborne or the confession is not the product of free will.<sup>211</sup> In fact, the Court stated: "It is difficult to imagine a situation in which a confession would be less the product of free intellect, less voluntary, than when brought about by a drug having the effect of a 'truth serum.'"<sup>212</sup>

But is coercive interrogation, in and of itself, a violation of the constitutional right to due process? Several scholars have argued that interrogational torture—regardless of prosecution—violates the Constitution based on substantive due process.<sup>213</sup> The Supreme Court in *Rochin v. California* famously held that a method of obtaining evidence for a criminal prosecution that "shocks the conscience" violates the Due Process Clause.<sup>214</sup> The Court equated the police conduct to "methods too close to the rack and the screw to permit of

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substantive due process).

210. See *Townsend v. Sain*, 372 U.S. 293, 307 (1963), *rev'd on other grounds* by *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992) (finding standards governing confessions resulting from physical intimidation and psychological pressure are the same standards governing drug-induced statements).

211. See *id.* at 307 (asserting such a confession is inadmissible due to its coerced nature).

212. *Id.* at 307-08; see Strauss, *supra* note 27, at 222 ("use of 'truth serum' would almost certainly render a confession inadmissible in a court of law because an accused's self-determination and free will would be violated in the most basic sense"); see also DERSHOWITZ, *supra* note 43, (arguing torturous interrogation does not violate the Constitution unless the statement is admitted in court).

213. See, e.g., Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278, 294 (2003) (concluding interrogation tactics that shock the conscience of the court violate the Constitution as a substantive matter, although neither the Self-Incrimination Clause nor the Eighth Amendment alone apply to investigatory torture).

214. See *Rochin v. California*, 342 U.S. 165, 172-74 (1952) (detailing conduct where police officers saw the petitioner swallow capsules suspected to contain illegal drugs, subsequently attempted to forcibly extract the capsules from the petitioner's mouth, and then later had petitioner's stomach pumped against his will).

constitutional differentiation.”<sup>215</sup> The Court explained that involuntary confessions are excluded not only because of unreliability, but because the use of coerced confessions is repugnant to society’s sense of fairness.<sup>216</sup>

The Bush Administration has conceded that under the Fifth and Fourteenth Amendment due process clauses, interrogation techniques that “shock the conscience” are to be analyzed under substantive due process, rather than the standard due process balancing test.<sup>217</sup> According to the DOD Working Group Memo, beating or sufficiently intimidating a suspect during the course of an interrogation could amount to conscience-shocking conduct.<sup>218</sup> In addition, “certain psychologically-coercive interrogation techniques could constitute a violation of substantive due process,” although the use of deceit or sympathy would not.<sup>219</sup>

Since *Rochin v. California*, the Court has determined that involuntary extraction of blood does not shock the conscience.<sup>220</sup> In *Breithaupt v. Abram*, the Court held that drawing blood while a suspected drunk-driver was unconscious did not offend a sense of justice.<sup>221</sup> The Court emphasized that such action was not deemed

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215. See *id.* at 172 (noting the government agents engaged in tactics that were “bound to offend even hardened sensibilities”).

216. See *id.* at 173 (emphasizing the fairness concern in addition to reliability).

217. See DOD Working Group Memo, *supra* note 74, at 42 (citing *Rochin v. California* for the proposition that some conduct is so egregious that it cannot be justified).

218. See *id.* at 44.

219. See *id.* (providing examples of circuit court decisions in which psychologically-coercive interrogation tactics violated substantive due process, especially if the express purpose of such tactics was to keep the suspect from testifying in his own defense).

220. See *Breithaupt v. Abram*, 352 U.S. 432 (1957) (holding that the warrantless extraction of blood from an unconscious defendant by a physician acting at the direction of the police did not violate the defendant’s right to due process under the Fourteenth Amendment, and was therefore properly admitted in a prosecution for manslaughter); see also *Schmerber v. California*, 384 U.S. 757 (1966) (holding that the results of a blood-alcohol test conducted over the defendant’s objection were admissible).

221. See *Breithaupt*, 352 U.S. at 435-37 (maintaining due process is measured against an entire community’s sense of justice and civility, and not the personal reactions of a particular individual).

brutal or offensive when performed under the supervision of a physician in a hospital.<sup>222</sup> In *Schmerber v. California*, the Court used a similar approach to analyze a blood sample's admissibility under the Fifth Amendment privilege against self-incrimination and the Fourth Amendment right to be free of unreasonable search and seizure.<sup>223</sup> The Court did not address whether the conduct would shock the conscience and thereby violate due process.<sup>224</sup> But, as in *Breithaupt*, the Court stressed that a blood test is a highly effective, routine procedure carried out in accordance with accepted medical standards.<sup>225</sup>

The administration of a next-generation truth serum might be characterized as an effective and low risk medical procedure,<sup>226</sup> although mental trauma is likely, as discussed in Part IV. Thus, the Court might well find the use of truth serum to be closer to the acceptable blood extraction than the unconstitutional stomach pumping.<sup>227</sup>

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222. See *id.* at 435 (noting blood tests have become a routine aspect of everyday life and that a blood sample taken by a skilled technician does not constitute action that "shocks the conscience").

223. See *Schmerber*, 384 U.S. at 760, 767-71 (securing from a suspect evidence of his/her blood-alcohol content was appropriate action incident to arrest because a delay would have degraded the evidence since the percentage of alcohol in the bloodstream begins to diminish shortly after drinking stops).

224. See *id.* at 759-60 (rejecting petitioner's due process claim because the blood extraction was performed by a physician and in a hospital environment using a simple, medically acceptable process).

225. See *id.* at 771-72 (suggesting a technique of a more rudimentary variety or a procedure performed by non-medical personnel in a non-medical environment might not be tolerated).

226. See Strauss, *supra* note 27, at 237-38 (speculating a court is unlikely to find that the injection of "truth serum" amounts to severe bodily intrusion or is a process which shocks the conscience). But see Jessica Pae, Note, *The Emasculation of Compelled Testimony: Battling the Effects of Judicially Imposed Limitations on Grand Jury Investigations of Terrorism and Other Ideological Crimes*, 70 S. CAL. L. REV. 473, 502-03 (1997) (arguing so-called truth serum drugs carry an inherent risk of death, nerve damage and other injuries).

227. See Strauss, *supra* note 27, at 237-39 (contending the Supreme Court's decision in *Breithaupt v. Abrams* bolsters the position that a due process violation would require something more brutal or offensive than the taking of a sample of blood by a member of the medical profession); see also Odeshoo, *supra* note 27, at 230 (speculating conduct at issue in *Rochin* might be viewed as a greater breach of due process than use of truth serum).

The multiple opinions in *Chavez v. Martinez*,<sup>228</sup> however, make it difficult to make predictions with any confidence. A bare majority of the Court determined: “Whether Martinez may pursue a claim of liability for a substantive due process violation is . . . an issue that should be addressed on remand, along with the scope and merits of any such action that may be found open to him.”<sup>229</sup>

According to Justice Stevens, the Due Process Clause protects against behavior that shocks the conscience or interferes with rights implicit in the concept of ordered liberty.<sup>230</sup> He concluded that the interrogation amounted to torture aimed at obtaining an involuntary confession. “As a matter of law, that type of brutal police conduct constitutes an immediate deprivation of the prisoner’s constitutionally protected interest in liberty.”<sup>231</sup> Justice Souter relied on Justice Steven’s opinion to conclude that Martinez has a “serious argument” in support of a substantive due process claim based on official action rising to the “conscience-shocking” level.<sup>232</sup>

Justices Thomas and Scalia and Chief Justice Rehnquist acknowledged that the narrow scope of the Self-Incrimination Clause’s protection<sup>233</sup> does not mean “that police torture or other abuse that results in a confession is constitutionally permissible so long as the statements are not used at trial; it simply means that the Fourteenth Amendment’s Due Process Clause, rather than the Fifth Amendment’s Self-Incrimination Clause would govern the

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228. See discussion *supra* notes 188-209 and accompanying text (discussing *Chavez v. Martinez*, including various opinions regarding the claimed violation of the privilege against self-incrimination).

229. *Chavez v. Martinez*, 538 U.S. 760, 779-80 (2003) (Souter, J., concurring).

230. See *id.* at 787 (Stevens, J., concurring in part and dissenting in part) (explaining how unusually coercive police interrogation procedures do violate the standard).

231. *Id.* at 786 (depicting, in a transcript of a sound recording during his interrogation by Chavez, the agony of Martinez expressing his belief he was about to die).

232. See *id.* at 779-80 (Souter, J., concurring) (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998), to show that any argument for a damages remedy depends on the particular charge of outrageous conduct by the police).

233. See discussion *supra* Part III.B (recounting the constitutional protections under the self-incrimination clause).

inquiry . . . .”<sup>234</sup> Nevertheless, these four justices determined that Chavez’s questioning was not conscience-shocking.<sup>235</sup> The conclusion of Justice Thomas’ opinion, joined in its entirety only by Chief Justice Rehnquist, stated: “Because Chavez did not violate Martinez’s Fifth and Fourteenth Amendment rights, he was entitled to qualified immunity. The judgment of the Court of Appeals for the Ninth Circuit is therefore reversed and the case is remanded for further proceedings.”<sup>236</sup> Justice Scalia insisted that there is no basis for remand to determine the substantive due process claim because it was either decided already by the Ninth Circuit or forfeited.<sup>237</sup> Despite the apparent disagreement over the outcome of the case, it was remanded to the Ninth Circuit Court of Appeals.<sup>238</sup> On remand, the court found that Martinez’s allegations are sufficient to “shock the conscience” and violate the right to be free from coercive interrogation.<sup>239</sup> It therefore appears that the administration of truth serum would be considered by the lower courts, and possibly a majority of the Supreme Court, to be a violation of due process if it is sufficient to “shock the conscience.”<sup>240</sup>

Regardless of the substantive due process argument, the use or threatened use of truth serum is not CIDT under CAT because the U.S. understanding limits it to “cruel and unusual punishment.”<sup>241</sup> Of

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234. *Chavez*, 538 U.S. at 773 (Thomas, J., announcing the judgment of the Court and delivering an opinion).

235. *See id.* at 774-75 (determining methods were not “so brutal and so offensive to human dignity” that they “shoc[k] the conscience”).

236. *Id.* at 776 (asserting there is no right not to be talked to).

237. *See id.* at 783 (Scalia, J., concurring in part in the judgment) (denying the Court has authority to remand under the circumstances).

238. *See Martinez v. City of Oxnard*, 337 F.3d 1091 (9th Cir. 2003), *cert. denied*, 124 S.Ct. 2932 (2004) (determining a police sergeant’s alleged coercive interrogation of a suspect, after the suspect had been shot by another police officer, would violate a suspect’s clearly established due process rights).

239. *See Martinez*, 337 F.2d at 1092 (stating it is a right, fundamental to ordered liberty, to be free from coercive police interrogation).

240. *But see DeWitt, supra* note 181, at 174 (stating it is “by no means clear that the Court would find the use of mind-altering substances in this instance [ticking nuclear bomb scenario] shocking”).

241. *But cf. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment: Hearing Before Senate Comm. on Foreign Relations*, 101st Cong. 100-20 (1990) (statement of Senator Jesse Helms)

course, if truth serum violates other constitutional rights,<sup>242</sup> this in itself would prohibit use by the United States regardless of CAT standards.

#### IV. PREVENTIVE INTERROGATIONAL TRUTH SERUM AS TORTURE

Although U.S. commitments related to CIDT do not bar truth serum, U.S. commitments regarding torture may ban its use. The analysis concludes that the use of interrogational truth serum does not constitute torture, but its threatened application does.

Based on Article 1 of CAT, the definition of torture<sup>243</sup> can be broken down as follows: (1) an act causing severe physical or mental pain or suffering (2) intentionally inflicted on the victim (3) for

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(allowing for the argument that the substantive due process clause protection for those under interrogation is merely an extension of the cruel and unusual punishment clause). This would be a plausible argument when discussing the incorporation of the Eighth Amendment through the Fourteenth Amendment to the states; but when courts interpret the Due Process Clause without reference to “cruel or unusual punishment” as discussed above, it must be assumed that due process itself is the locus of the right.

242. See DeWitt, *supra* note 181 (indicating there may also be a potential Fourth Amendment claim, but that the exceptions of exigent circumstances or public safety might provide a basis for the Court to allow the use of “chemically-induced cooperation”); see also Strauss, *supra* note 27, at 238 n.133 (stating truth serum is likely justified even without probable cause or warrant if exigent circumstances exist). In addition, coercive interrogation might give rise to a First Amendment claim related to freedom of belief and speech. See Brief of Amicus Curiae ACLU of Eastern Missouri in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit at pt. III.A, *U.S. v. Sell* 282 F.3d 560, (8th Cir. 2002) (No. 02-5664), 2002 WL 32135465 (raising the argument that involuntary medication may give rise to a First Amendment claim because it interferes with one’s ability to think and to communicate ideas).

243. See CAT, *supra* note 30, art. 1 (defining torture in pertinent part as the intentional infliction of severe pain or suffering:

for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity).

The list of purposes is illustrative, not exhaustive. OLC MEMO, *supra* note 127, at 14.

certain purposes (4) by an official actor. Parts three and four are clearly met in the preventive interrogational truth serum scenario described above.<sup>244</sup> Parts one and two are more problematic, even assuming that the truth serum subject is conscious of the mind control exerted during the session.<sup>245</sup>

The next-generation truth serum would involve no physical pain but would also allow the subject to maintain awareness throughout the session, though without the ability to censor his responses during questioning. This waking nightmare scenario would mean potential mental pain or suffering occurring simultaneously with the administration of the truth serum.<sup>246</sup> This scenario raises two questions under CAT: (1) Does the mental harm caused by mind control via truth serum rise to the level necessary for torture? (2) Does the mental pain have to take place *before* the truth serum session, as a beating would take place before a coerced confession? This Part first examines whether the potential anguish arising from a truth serum session is sufficient to constitute “severe” mental pain or suffering. It then explores whether mental pain contemporaneous with the purpose (i.e., a side effect) would satisfy the intent requirement.

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244. In the interrogational truth serum scenario, a government interrogator—a public official or person acting in an official capacity—is administering, or threatening to administer, truth serum for the purpose of obtaining information from a suspected terrorist. Thus, preventive interrogational truth serum would satisfy parts three and four of the definition of torture.

245. See discussion *infra* Part I.A (describing effects of next-generation truth serum).

246. Alternatively, the mental pain or suffering might be felt subsequent to the truth serum session. In other words, the subject might be unaware of what he is saying while he is under the influence of the truth serum. If this were the case, the mental pain would arise after the truth serum wears off and the subject realizes that the officials have the information. If a side effect of truth serum were the loss of memory of the session, it is possible that the subject would never know or at least never be certain that his statements led to the demise of a planned attack. Even if he were to learn for certain, such knowledge might not be gained until some time after the session. As a result, it is unlikely that the use of truth serum where the subject is unaware of its effects would fit the definitional language requiring an act, by which pain or suffering is intentionally inflicted.

### A. SEVERE MENTAL PAIN OR SUFFERING

The anticipated defenses to a claim that preventive interrogational truth serum causes severe mental pain or suffering are:

- (1) CAT's requirement of "severe" mental pain or suffering cannot be satisfied;
- (2) U.S. understanding 1's requirement of prolonged harm cannot be satisfied;
- (3) U.S. understanding 1's requirement of a "mind altering" drug that disrupts the senses or personality cannot be satisfied.

Based on decisions of international bodies, as well as the *travaux préparatoires* and legislative history of CAT, the requirement of "severe" pain or suffering does not categorically exclude truth serum. In addition, the U.S. understanding encompasses truth serum because preventive interrogational truth serum can cause prolonged mental pain by affecting the sense of self and personality.<sup>247</sup>

#### 1. Severe Mental Pain under CAT

##### a. Prior Decisions of Human Rights Bodies

Mental pain or suffering has not been extensively discussed by the Committee Against Torture, most likely because the majority of complaints deal with physical torture or a combination of physical and mental pain, particularly under Article 3.<sup>248</sup> In one recent case, the individual opinion of Fernando Marino and Alejandro Gonzalez Polete put forth an expansive reading of torture.<sup>249</sup> Unlike the rest of

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247. See Strauss, *supra* note 27, at 274 n.36 (stating CAT includes truth serum as prohibited torture, and the Regulations adopted by the United States to implement the Convention seemingly agree); see also 18 U.S.C. § 2340 (expressing torture includes the administration or threatened application of mind altering substances calculated to disrupt profoundly the sense or the personality).

248. See discussion *supra* note 101 (describing CAT provisions establishing the Committee Against Torture and how the Committee operates as a monitoring body). Article 3 prohibits the return of an alien to a country where she would be subjected to torture. CAT, *supra* note 30.

249. See *Views of the Committee Against Torture Under Article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 29th Sess., Annex, Complaint No. 161/2000, *Dzemajl v. Yugoslavia* (individual opinion by Mr. Fernando Mariño and Mr. Alejandro González Poblete under rule 113 of the Rules of Procedure), CAT/C/29/D/161/2000 (2002) (arguing

the Committee, these members would have found torture where a Roma community was violently displaced from its settlement.<sup>250</sup> The individual opinion concluded that the facts showed a “presumption of ‘severe suffering,’ *certainly ‘mental’*” but also physical even in the absence of direct aggression.<sup>251</sup> This opinion illustrates the broad range of facts that can give rise to severe mental suffering; due to the split among the Committee, however, no definitive meaning for “severe pain or suffering” can be discerned.

Other human rights bodies have considered the ban on torture, including mental torture. The European Commission on Human Rights has defined mental torture as the “infliction of mental suffering by creating a state of anguish and stress by means other than bodily assault.”<sup>252</sup> As one judge of the European Court of Human Rights stated, “One is not bound to regard torture as only present in a mediaeval dungeon where the appliances of the rack and thumbscrew or similar devices were employed. Indeed in the present-day world there can be little doubt that torture may be inflicted in the *mental* sphere.”<sup>253</sup> The European Court of Human Rights has indicated that some types of evidence, like that derived from a “truth drug, coercion or torture,” are “absolutely prohibited as a matter of

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that the conduct in question was not merely “cruel, inhuman or degrading treatment,” but that it constituted torture), at <http://sim.law.uu.nl/SIM/CaseLaw/fulltextcat.nsf/ac824e16154a0621c1256d3d003321f6/dc5a7bb97f8a90e741256d52003d6cbe?OpenDocument> (last visited Apr. 2, 2005).

250. *See id.* (finding the nature of the resettlement was aggravated by the fact that some of the complainants were still hidden in the settlement when the houses were burnt and destroyed, the alleged victims were vulnerable and the acts were committed with a significant level of racial motivation).

251. *See id.* (emphasis added) (establishing torture where the members of the group were forcibly displaced from their homes, did not receive compensation seven years after this happened, and were part of an ethnic group known to be vulnerable).

252. *See* RODLEY, *supra* note 66, at 90 (citing 12 *Yearbook—The Greek Case* 461 (1967) for the European Commission’s definition of mental harm).

253. *See* Ireland v. United Kingdom, 2 Eur. Ct. H.R. 25 (ser. A) (separate opinion of Judge O’Donoghue) (1978); 2 E.H.R.R. 25 (1979-80) (emphasis added) (noting the European Convention for the Protection of Human Rights & Fundamental Freedoms which provides: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”); *see also* European Convention for the Protection of Human Rights & Fundamental Freedoms, art. 3, *opened for signature* Apr. 11, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953).

public policy.”<sup>254</sup> This dictum implies that use of truth serum would be considered torture, but does not provide a conclusive determination or rationale. Because persuasive authority is not particularly helpful, the intent of the drafters of CAT must be examined.

*b. Intent of the Drafters of CAT*

The working groups that drafted CAT did not debate what would be covered by severe mental pain or suffering.<sup>255</sup> Nonetheless, it is possible to evaluate the positions of various states to discern a plausible interpretation of the severity requirement.<sup>256</sup> The OLC’s initial interpretation of the negotiating history of CAT overstates the severity requirement.

According to the OLC, “the state parties to CAT rejected a proposal to include in CAT’s definition of torture the use of truth drugs, where no physical or mental suffering was apparent. This rejection at least suggests that such drugs were not viewed as amounting to torture per se.”<sup>257</sup> The effective truth serum discussed here does not cause significant physical pain. But mental pain is another matter. The rejected proposal could indicate that the states drafting CAT intended to *include* truth drugs where mental suffering *is* apparent.

The OLC misinterpreted the rejection of the proposal by Barbados.<sup>258</sup> Barbados suggested that the definition of torture be

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254. See *Schenk v. Switzerland*, 140 Eur. Ct. H.R. (ser. A) at 261 (1988); 13 E.H.R.R. 242 (1991) (holding that where corroborating evidence exists, unlawfully obtained evidence might be admitted at trial without violating right to fair trial).

255. See AHCENE BOULESBAA, *THE U.N. CONVENTION ON TORTURE AND THE PROSPECTS FOR ENFORCEMENT* 18 (1999) (stating because the Working Group did not debate the meaning of “mental suffering,” it is still unclear).

256. See *id.* at 18 (providing examples of state proposals defining torture). Portugal proposed the inclusion of the use of psychiatry in the definition of torture, while Barbados has suggested that the definition of mental suffering should be expanded to include sophisticated weapons of torture like truth drugs which do not produce apparent physical or mental suffering. *Id.* at 19.

257. See OLC MEMO, *supra* note 127, at 22 (citing BURGERS & DANIELIUS, *supra* note 67, commonly considered the main source of the *travaux preparatoires* for CAT).

258. See *id.* at 22 (construing states’ rejection of the CAT proposal of including the use of truth drugs as torture, as an indicator that these states did not view the

expanded to cover the use of truth drugs regardless of mental or physical pain.<sup>259</sup> The failure to adopt this proposal does not indicate that the use of “truth drugs” falls outside the definition of torture. The failure to include the proposed language could be the result of a decision to omit a list of prohibited acts for fear that the list would be seen as exhaustive. For example, the definition of torture in CAT does not expressly ban medical or scientific experiments on unwilling subjects for no therapeutic purpose, as an earlier human rights treaty had done.<sup>260</sup> But this does not mean that such experiments are allowed under CAT. Rather, they would constitute torture when they result in “severe pain or suffering.”<sup>261</sup> Thus, the involuntary administration of truth serum could also amount to torture when it results in severe mental pain or suffering.

There is no extensive discussion in the negotiating history of the definition of “severe.”<sup>262</sup> Torture and cruel, inhuman, or degrading treatment did not become two separate categories until CAT. The pre-CAT Declaration Against Torture had defined torture as an “aggravated and deliberate” form of CIDT;<sup>263</sup> in other words, the Declaration Against Torture considered torture one type of cruel, inhuman or degrading treatment or punishment. The reference to torture as a particularly aggravated and deliberate form of CIDT in the Declaration Against Torture supports the argument that torture must be exponentially more extreme and severe as compared to

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use of truth drugs as torture per se); *see also* Odeshoo, *supra* note 27, at 249-50 (claiming failure to adopt Barbados’ proposal indicates that the use of truth serum is not torture). The Revised OLC Memo does not address the *travaux préparatoires*. Revised OLC Memo, *supra* note 156 (replacing original OLC Memo).

259. *See* BURGERS & DANIELIUS, *supra* note 67, at 45 (describing proposal of Barbados).

260. *See id.* at 118 (citing Article 7 of the International Covenant on Civil and Political Rights).

261. *See id.* (explaining the failure of CAT to ban medical or scientific experiments does not exclude them from torture where there is severe pain or suffering).

262. BOULESBAA, *supra* note 255, at 17 (stating the Working Group discussed only briefly what constitutes “severe” and in their Commentaries, states did not address the issue).

263. *See* RODLEY, *supra* note 66, at 389 (Annex 1) (defining torture as something that “constitutes an aggravated and deliberate form of cruel, inhuman, or degrading treatment or punishment”).

CIDT.<sup>264</sup> However, the “aggravated and deliberate” language was rejected in drafting CAT; language referring to acts “which are not sufficient to constitute torture” was also rejected.<sup>265</sup> Instead, CAT’s Article 16 on CIDT refers to “other acts of [CIDT] which do not amount to torture . . . .”<sup>266</sup> Thus, it is not clear how much more “extreme” an act must be to constitute torture, although there is a clear implication that torture is the “gravest form” of cruel, inhuman or degrading treatment.<sup>267</sup>

The OLC contends that the ratification history of CAT shows that only the most extreme conduct will rise to the level of torture; in other words, “severe” is a very high threshold to meet.<sup>268</sup> The use of the term “severe” implies that “only acts of a certain gravity shall be considered torture.”<sup>269</sup> Moreover, the OLC contends that the negotiating history of CAT also supports this reading: torture must be more than cruel, inhuman, or degrading treatment or punishment; it must be deliberate and extreme pain.<sup>270</sup> According to the United

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264. *See id.* (supporting the argument that torture and CIDT are different gradations of the same idea).

265. *See id.* at 99 (articulating the “aggravated and deliberate” language was subjected to criticism from the beginning because CIDT was at the time undefined and might be interpreted differently in different parts of the world).

266. *Id.* (noting the deletion was probably made in order to expedite the process by way of compromise).

267. *See* BURGERS & DANIELIUS, *supra* note 67, at 80 (emphasizing the change from “which do not constitute torture” to “which do not amount to torture” indicates that torture is the gravest form of CIDT).

268. *See* OLC Memo, *supra* note 127, at 16-20 (discussing the position of the Reagan and Bush administrations on ratification); *see also* Revised OLC Memo, *supra* note 156, at 6 (describing torture as an extreme form of CIDT).

269. BURGERS & DANIELIUS, *supra* note 67, at 117 (stating alternative wordings such as “extreme” or “extremely severe” pain were suggested during the *travaux préparatoires*).

270. *See* OLC Memo, *supra* note 127, at 21 (noting that almost all of the suggested definitions of torture illustrate the consensus that torture is an extreme act designed to cause agonizing pain). *But see* Revised OLC Memo, *supra* note 156, at 8 n.17 (refraining from requiring “excruciating and agonizing pain” based on distinction between accepted RUDs and proposed Reagan understanding to Article 1). *See* discussion *infra* notes 278-281 and accompanying text (discussing distinction between the proposed and accepted RUDs).

States, “the negotiating history should also reflect the requisite intensity and severity inherent in torture.”<sup>271</sup>

Yet the negotiating history shows that the Working Group did not adopt the U.S.-proposed “deliberate and extreme” language, or its equivalent.<sup>272</sup> As part of the Working Group drafting CAT, the United States proposed that the definition of torture include deliberate and extreme infliction of pain: “any act by which *extremely severe* pain or suffering, whether physical or mental, is deliberately and maliciously inflicted on a person . . . .”<sup>273</sup> The U.S. also proposed use of the phrase “deliberately and maliciously” in place of a list of purposes.<sup>274</sup> The Working Group did not adopt the U.S. proposal to include a “deliberate and malicious” component.<sup>275</sup> Moreover, it did not adopt the proposed language of “extremely severe.”<sup>276</sup>

The “extreme” language was again proposed and rejected when the U.S. Senate ratified CAT with a package of RUDs.<sup>277</sup> Although the Reagan Administration attempted to broaden the severity language via the RUDs, the Senate did not adopt the proposed Reagan understanding to Article 1.<sup>278</sup> The Reagan Administration proposed that torture “must be a deliberate and calculated act of an extremely cruel and inhuman nature, specifically intended to inflict

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271. BURGERS & DANIELIUS, *supra* note 67, at 44-45 (discussing that with regard to the character of the act constituting torture, the United States indicated that the results of the act were not determinative, but rather the severity of the act).

272. *See id.* at 41 (describing U.S. insistence on focusing on torture rather than on other acts of cruel, inhuman or degrading treatment).

273. *Id.* (emphasis added) (explaining some governments had submitted alternatives to the original Swedish draft proposal, especially with regard to the definition of torture).

274. *Id.* at 46.

275. *Id.* at 41.

276. CAT, *supra* note 30 (providing torture must cause “severe” pain or suffering).

277. *See* Revised OLC Memo, *supra* note 156, at 8 (highlighting that the proposal to include only acts of an “extremely cruel nature, causing excruciating and agonizing pain” was not adopted as an understanding).

278. *See id.* at 18 (explaining the Senate did not give its advice and consent to the Convention until the first Bush Administration, using less vigorous language).

excruciating and agonizing physical or mental pain or suffering.”<sup>279</sup> The Senate criticized this language for “setting too high a threshold of pain for an act to constitute torture,”<sup>280</sup> and the first Bush Administration dropped the language in favor of the understanding discussed in Part II.B.1. As the State Department explained, the revised understanding would not raise the threshold of pain already required under CAT,<sup>281</sup> indicating that the Reagan understanding would have altered the definition of torture under CAT. Thus, while severity is required, the *travaux préparatoires* of CAT and the legislative record regarding U.S. ratification indicate that the severity requirement should not be overstated.<sup>282</sup>

The OLC would presumably argue that the use of truth serum does not cause “severe” mental pain or suffering amounting to torture, even under a more limited understanding of “severe.” In interpreting 18 U.S.C. § 2340A, criminalizing torture abroad, the OLC offers arguments relevant to the interpretation of CAT. Relying on dictionary definitions, the OLC contends that “severe pain or suffering” means that “pain or suffering must be of such a high level of intensity that the pain is difficult for the subject to endure.”<sup>283</sup> The Revised OLC Memo quotes the Senate Foreign Relations Committee report: “The term ‘torture,’ in the United States and international usage, is usually reserved for extreme, deliberate and unusually cruel

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279. SENATE COMM. ON FOREIGN RELATIONS, REPORT ON CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, S. EXEC. REP. NO. 101-30, at 15 (1990) (noting the understandings included are to protect against the improper application of the Convention to legitimate U.S. law enforcement actions).

280. *Id.* at 9 (specifying the language of the Reagan Administration’s proposed understanding and the Senate criticism of it).

281. *Id.* at app. A, Bush Administration Reservations, Understandings And Declarations, As Transmitted: Letter from Janet G. Mullins, Asst. Secretary, Legislative Affairs, Department of State, to Senator Pell, Dec. 10, 1989 (assuring the package now contains a revised understanding to the definition of torture).

282. *See id.* at 9 (explaining rejection of the Reagan Administration’s proposed language because it set too high a threshold for an act to constitute torture).

283. OLC Memo, *supra* note 127, at 5 (supplying the dictionary definition of severe as “unsparing in exaction, punishment, or censure” or “inflicting discomfort or pain hard to endure; sharp; afflictive; distressing; violent; extreme; as severe pain, anguish, torture”); *see* Revised OLC Memo, *supra* note 156, at 5 (continuing reliance on dictionary definition of severe, including “extreme” and “hard to sustain or endure”).

practices, for example, sustained systematic beating, application of electrical currents to sensitive parts of the body, or tying up or hanging in positions that cause extreme pain.”<sup>284</sup> These examples of severe pain or suffering, however, are not applicable to *mental* pain or suffering.

Even if the examples of “severe” pain are inapposite when considering mental pain, the OLC would likely contend that truth serum would nonetheless fail to inflict severe mental pain or suffering.<sup>285</sup> The OLC asserts that international decisions have determined various aggressive interrogation methods to be CIDT, rather than torture.<sup>286</sup> For example, the European Court of Human Rights found that relatively sophisticated methods (the “five techniques”) employed to break suspected IRA terrorists constitute cruel, inhuman, or degrading treatment but not torture.<sup>287</sup> According to the OLC, “even though the court had concluded that the techniques produce ‘intense physical and mental suffering’ and ‘acute psychiatric disturbances,’ they were not [of] sufficient intensity or cruelty to amount to torture.”<sup>288</sup>

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284. Revised OLC Memo, *supra* note 156, at 6 (revising the original OLC Memo that argued that “‘severe pain,’ as used in Section 2340, must rise to a similarly high level—the level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure or serious impairment of bodily functions—in order to constitute torture.”); *see* OLC Memo, *supra* note 127, at 5-6 (referring to statutes that use the term “severe pain” to define an emergency medical condition). The original reliance on this very narrow interpretation of “severe” has been abandoned. *See* Revised OLC Memo, *supra* note 156, at 8 n.17 (“We do not believe that [statutes defining ‘emergency medical condition’ for purpose of determining health benefits] provide a proper guide for interpreting ‘severe pain’ in the very different context of the prohibition against torture . . .”).

285. *See* OLC memo, *supra* note 127, at 7 (explaining decisions by the European Court of Human Rights and the Israeli Supreme Court have supported the position that aggressive interrogation techniques were at most CIDT).

286. *See id.* at 27 (contending that these decisions reinforce the view that there is a clear distinction between the two standards and that only extreme conduct will constitute torture as opposed to CIDT); *see also* Revised OLC Memo, *supra* note 156, at 6 n.14 (reiterating distinction between torture and CIDT).

287. *See id.* at 28-29 (citing *Ireland v. United Kingdom* in illustrating that “five techniques” include wall-standing, hooding, noise, sleep deprivation and deprivation of food and drink)

288. OLC Memo, *supra* note 127, at 29 (stating the European Court of Human Rights reached this conclusion based on the distinction between torture and CIDT);

The OLC ignores that fact that critics have characterized this decision as erroneous and likely politically motivated.<sup>289</sup> Even a member of the European Court of Human Rights accused the majority of bias in his separate opinion concluding that the five techniques constitute torture.<sup>290</sup> Judge O'Donoghue asserted that the court abused the margin of appreciation, a doctrine that gives leeway to states to act during emergencies.<sup>291</sup> He charged the majority with using the principle in favor of the United Kingdom "as a blanket exculpation for many actions taken which cannot be reconciled with observance of the obligations imposed by the Convention."<sup>292</sup> He subsequently accused the court of departing from "cold objectivity."<sup>293</sup> Moreover, the Court may have been influenced by the United Kingdom's abandonment of the five techniques and its "solemn and unqualified undertaking not to reintroduce these techniques . . . and the other measures taken by the United Kingdom to remedy, impose punishment for, and prevent the recurrence of, the

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*see* Revised OLC Memo, *supra* note 156, at 6 n.14 (citing *Ireland v. United Kingdom* in explaining the distinction between torture and lesser forms of CIDT). The OLC Memo also relied on Supreme Court of Israel, Judgment Concerning the Legality of the General Security Service's Interrogation Methods of Sept. 6, 1999, Motion for an Order *Nisi*, H.C. 5100/94, 53(4) P.D. 817, 38 I.L.M. 1471 (1999), available at <http://62.90.71.124/eng/verdict/framesetSrch.html> (last visited Apr. 18, 2005) because the court never found the use of "moderate physical pressure" to constitute torture, even while noting that such a conclusion was unnecessary because the court banned the techniques as unauthorized. OLC Memo, *supra* note 127, at 30.

289. *See, e.g.*, Julie Lantrip, *Torture and Cruel, Inhumane or Degrading Treatment in the Jurisprudence of the Inter-American Court of Human Rights*, 5 ILSA J. OF INT'L & COMP. L. 551, 560 (1999) (describing *Ireland v. United Kingdom* as a "ground-breaking, although criticized" case); *see* Rhonda Copelon, *Recognizing the Eggregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291, 320 (1994) (depicting *Ireland v. United Kingdom* decision of European Court as "widely criticized").

290. *Ireland v. United Kingdom*, 2 Eur. Ct. H.R. 25 (ser. A) (separate opinion of Judge O'Donoghue) (1978); 2 E.H.R.R. 25 (1979-80).

291. *See id.* (noting he is a "firm upholder" of the doctrine that a margin of appreciation should be extended to a state acting in an emergency, but that this went too far).

292. *Id.* (referring to facts of wall-standing, hooding, and sleep and food deprivation as outside the bounds of actions that a state may take in an emergency).

293. *Id.* (citing passages of the majority's judgment as illustrative examples of this departure).

various violations found by the Commission [on Human Rights, whose report the European Court was reviewing].”<sup>294</sup>

The Revised OLC Memo relies on judicial interpretations of civil statutes for torture<sup>295</sup> to illustrate the minimum threshold for “severe” pain or suffering. For example, in *Simpson v. Socialist People’s Libyan Arab Jamahiriya*,<sup>296</sup> the court held that the plaintiff had failed to state a claim for torture where she alleged that she was forcibly removed from a cruise ship that had taken shelter in a Libyan port, threatened with death and separated from her husband for months before her release.<sup>297</sup> The court concluded that “[a]lthough these alleged acts certainly reflect a bent toward cruelty on the part of their perpetrators, they are not in themselves so unusually cruel or sufficiently extreme and outrageous as to constitute torture . . . .”<sup>298</sup> The court offers no explanation of its reasoning.

The Revised OLC Memo also relies on *Price v. Socialist People’s Libyan Arab Jamahiriya (Price II)*,<sup>299</sup> where allegations of beatings without details of severity, timing, duration, location on body, and weapons were insufficient to allege “torture.”<sup>300</sup> In *Price II*, however, the court emphasized that the complaint “is simply too conclusory” and remanded the case so that plaintiffs could amend the

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294. *Id.* ¶ 152 (discussing the fact that the United Kingdom did not contest its breaches of Article 3 of the Convention or the Court’s jurisdiction to examine such breaches).

295. *See* Torture Victims Protection Act, Pub. L. No. 102-256, Mar. 12, 1992, 106 Stat. 73 (1992) (codified as amended 28 U.S.C. § 1350 note (2000)) (allowing U.S. citizens and aliens to seek damages for torture or extrajudicial killings but limiting its jurisdiction to acts committed by those acting under the authority of foreign nations); *see also* Foreign Sovereign Immunities Act § 1605(a)(7), P.L. No. 94-583, 90 Stat. 2891 (1976), codified as amended at 28 USC §§ 1330, 1391(b), 1441(d), 1602-11 (2000) (removing immunity of state sponsors of terrorism for acts such as torture and hostage-taking).

296. 326 F.3d 230 (D.C. Cir. 2003).

297. *See id.* at 232 (holding plaintiff failed to state a claim for torture or hostage-taking and remanding to allow opportunity to amend complaint).

298. *Id.* at 234 (reversing claim for torture under Foreign Sovereign Immunities Act).

299. *See* 294 F.3d 82 (D.C. Cir. 2002) (holding that allegations fail to state a claim for torture or hostage-taking).

300. *See* Revised OLC Memo, *supra* note 156, at 9 (citing *Price II*).

complaint.<sup>301</sup> Because the complaint alleged “no useful details” about the nature of the alleged physical abuse, the court could not determine severity.<sup>302</sup> The court indicated that the beatings might constitute torture, but that the conclusory pleadings do not demonstrate intense pain or suffering.<sup>303</sup> Thus, based on *Price II*, a mere allegation of forced administration of truth serum would be insufficient to allege torture due to lack of severity, but the case does not foreclose the possibility that a well-pleaded complaint could satisfy the severity requirement.

One could argue, however, that the effects of a drug pale in comparison to mock execution or mental pain arising from witnessing the physical torture of another, for example, being forced to witness a wife or child being raped or killed.<sup>304</sup> At first glance, these acts seem more horrible than an injection of truth serum. But deeper analysis will reveal that the infliction of hostile mind control might cause severe harm. Other acts that have been generally recognized as inflicting severe mental pain or suffering include: (1) acts that imply threats or create fear in the victim (e.g., making the victim believe he or family members will be killed if he fails to cooperate);<sup>305</sup> (2) forcing a victim to witness horrifying acts (e.g.,

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301. See *Price II*, 294 F.3d at 85, 94 (remanding to allow plaintiffs to attempt to amend complaint to satisfy stringent definition of torture).

302. See *id.* at 94 (adding the complaint also stated nothing about the purpose of the alleged torture).

303. See *id.* (also determining that the complaint failed to satisfy the requirement of purpose, leaving it to the court to “conjure some illicit purpose”).

304. See U.S. RUDs, *supra* note 81, at Understanding 1(a) (defining mental pain or suffering as prolonged mental harm resulting from the infliction or threatened infliction of severe physical pain or suffering, the administration or threatened administration of mind altering drugs, the threat of imminent death, or the threat that another person will imminently be subjected to these acts). This language does not explicitly refer to mental pain caused by witnessing the act on another person, as opposed to the threat of such an act. *Id.* But it is clear that witnessing these acts might result in or cause such mental pain. See, e.g., *Doe v. Qi*, 349 F. Supp. 2d 1258 (N.D. Cal. 2004) (finding mental torture based on witnessing the infliction of severe physical pain or suffering of a close friend). Similarly, the CAT definition of torture does not explicitly include witnessing such acts or even threats. Nevertheless, both threats of imminent abuse and witnessing abuse have often formed the basis for torture. See BURGERS & DANIELIUS, *supra* note 67, at 118 (torture includes acts that imply threats or force witnessing of abuse).

305. See BURGERS & DANIELIUS, *supra* note 67, at 118 (explaining that the kinds

execution or torture of others);<sup>306</sup> and (3) deprivation of basic needs of a person (e.g., deprivation of food, water, or sleep).<sup>307</sup>

The U.S. courts have recognized that these types of acts can rise to the level of mental torture. For example, the allegations in the revised complaint in *Price III* satisfied the severity requirement via allegations of both physical and mental torture.<sup>308</sup> In addition to detailed allegations of physical abuse, the plaintiffs alleged mental pain or suffering, specifically, that prison officials forced them to watch beatings of other prisoners on three separate occasions and told them that they would receive the same treatment if they did not confess.<sup>309</sup> The court determined that these allegations satisfied the “high standards” for a claim of mental torture.<sup>310</sup> In another civil case involving torture, *Doe v. Qi*,<sup>311</sup> the court found severe mental pain or suffering where an individual alleged that Chinese authorities forced her to watch the sexual assault of a close friend.<sup>312</sup> Like mental anguish resulting from another person’s suffering, mental anguish from truth serum could rise to the level of severe mental pain or

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of acts inflicting severe mental pain can be very different).

306. *See id.* (supplying as an example the act of forcing an individual to witness execution or torture of other detainees or his own family members).

307. *See id.* (explaining that in all of these cases, the pain or suffering has to be severe in order for the act to constitute torture).

308. *See Price v. Socialist People’s Libyan Arab Jamahiriya*, 274 F. Supp. 2d 20 (D.D.C. 2003), *aff’d*, 389 F.3d 192 (D.C. Cir. 2004) (*Price III*) (holding that plaintiffs’ allegations state a claim for mental torture under the Foreign Sovereign Immunities Act, which gives victims of state-sponsored torture a cause of action against the state).

309. *See id.* at 25 (specifying one Tunisian prisoner was beaten even after he lost consciousness, one Libyan journalist was beaten, and one prisoner was beaten with truncheons and a hammer because he had shared food, which he had received from his friends or relatives, with the plaintiffs).

310. *Id.* (alleging further that approximately two days after being forced to watch other prisoners’ beating, plaintiffs were interrogated by three prosecutors, and informed they had one last chance to sign confessions admitting they were spies).

311. 349 F. Supp. 2d 1258 (N.D. Cal. 2004) (holding certain Chinese officials responsible for torture and arbitrary detention of some plaintiffs and entering default judgment on those claims).

312. *See id.* at 1318 (finding that the alleged acts rise to the level of torture under the Torture Victims Protection Act [substantially similar to CAT’s definition]).

suffering.<sup>313</sup> Mental pain creates a sense that the pain is self-inflicted, intensifying the suffering.<sup>314</sup> The hostile use of truth serum might well be extreme enough to constitute severe mental pain or suffering, particularly when the U.S. interpretation of “mental pain” is controlling.

## 2. Severe Mental Pain as Modified by the United States

The United States provided its own standard for mental pain or suffering in its RUDs to CAT. The understanding to the definition of torture provides in pertinent part: “mental pain or suffering refers to *prolonged mental harm* caused by or resulting from . . . the *administration, application, or threatened administration* or *application, of mind altering substances* or other procedures calculated to disrupt profoundly the senses or the personality . . . .”<sup>315</sup> Thus, according to the U.S. definition of mental pain or suffering, psychological pain or suffering resulting from a mind altering substance such as truth serum and causing long-term mental harm would constitute torture.

The United States adopted this understanding in order to provide the constitutionally-required precision necessary for criminal offenses.<sup>316</sup> The Department of Justice asserted that an understanding was necessary due to the lack of a consensus or coherent body of

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313. Compare E.V. Kontorovich, *Make Them Talk: truth serum ought to be a weapon in our antiterror arsenal*, WALL. ST. J., June 18, 2002, at A16 (arguing truth serum is not brutal and is more properly treated as a search than as torture); HUMAN RIGHTS WATCH, THE LEGAL PROHIBITION AGAINST TORTURE (stating truth serum “does not involve the infliction of severe pain” but is prohibited under international law), at <http://www.hrw.org/press/2001/11/TortureQandA.htm> (last visited Apr. 2, 2005); AMNESTY INT’L, MEMO TO THE US ATTORNEY GEN. – AI’S CONCERNS RELATING TO THE POST 11 SEPT INVESTIGATIONS, AI Index AMR 51/170/2001, at 17-18 (equating truth serum with CIDT rather than torture), available at <http://web.amnesty.org/library/index/engamr511702001> (last visited Apr. 2, 2005), with Odeshoo, *supra* note 27, at 238 n.146 (citing Human Rights Watch and Amnesty International as commentators who argue that truth serum is torture).

314. See Copelon, *supra* note 289, at 313 (observing some of the most insidious forms of torture are ones that do not involve brutality at all).

315. U.S. RUDs, *supra* note 81, at Understanding 1 (emphasis added).

316. See INITIAL REPORT OF THE UNITED STATES, *supra* note 122, ¶ 95 (explaining that a precise definition of torture is required in order for such crimes to be enforceable under the U.S. Constitution).

international law concerning the requisite degree of mental pain or suffering.<sup>317</sup> The Department described the understanding as one that “condemns as torture intentional acts such as those designed to damage and destroy the human personality . . . .”<sup>318</sup> According to the State Department, it does not raise the threshold of pain required for torture under international law.<sup>319</sup>

It will be shown that truth serum causes prolonged mental harm and is a mind altering substance. The core of a person—her own mind, her beliefs, thoughts, judgment—is negated when under the influence of an effective truth serum. The significance of this loss results in significant mental pain or suffering. Truth serum invades the mind in a profoundly disturbing way, and its absolute control over the mind and personality during the session might be compared to a physical invasion: truth serum as the equivalent to mental rape, leading to prolonged mental harm.

*a. Proof of Prolonged Mental Harm*

In order to prove severe pain or suffering, the mental harm must be prolonged.<sup>320</sup> The requirement of “prolonged” mental harm is apparently an American addition, not discussed in the *travaux*

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317. See SENATE COMM. ON FOREIGN RELATIONS, CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, S. EXEC. REP. NO. 101-30, at 17 (1990) (insisting the understanding was necessary in order to satisfy individual due process under the U.S. Constitution).

318. *Id.* (quoting the U.S. understanding of the definition of torture as mental suffering). *But see id.* at 73 (Statement of Charles Rice, Professor of Law, Notre Dame Law School, criticizing the ambiguous meaning of mental pain understanding, specifically “other procedures calculated to disrupt profoundly the senses or personality”).

319. *See id.* at 10 (maintaining U.S. reservations to CAT merely specify its obligations without modifying them).

320. *See* U.S. RUDs, *supra* note 81, at Understanding 1 (recognizing that, under the language of the understanding, prolonged mental harm can stem from the administration or threatened administration of mind altering drugs or “other procedures”). The reference to “other procedures” is not applicable here, because the use of truth serum by definition equates to the administration of a (potentially mind altering) substance; hence, there is no need to look at “other procedures.” *Id.* The analysis will therefore begin with “prolonged mental harm” and then examine the administration or threatened administration of truth serum in a preventive interrogational context. *Id.*

*preparatoires*.<sup>321</sup> Nonetheless, it is not a problematic addition because no reasonable interpreter of the torture definition would assert that fleeting pain is sufficient. Moreover, the United States recently recognized that harm “need not be permanent,” based on the negotiating history of CAT.<sup>322</sup> The United States “considered that it might be useful to develop the negotiating history which indicates that although conduct resulting in permanent impairment of physical or mental faculties is indicative of torture, it is not an essential element of the offence.”<sup>323</sup> Thus, mental harm must be more than momentary or fleeting but need not be permanent.<sup>324</sup>

The OLC asserts that “prolonged” means harm “endured over some period of time” or causing “lasting” damage.<sup>325</sup> The OLC initially contended that pain or suffering must result in “significant psychological harm of significant duration, e.g., lasting for months or even years.”<sup>326</sup> Specifically, “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 if untreated, might satisfy the prolonged harm requirement.”<sup>327</sup> More recently, the OLC revised its position to drop the requirement of months or years.<sup>328</sup> Development of mental

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321. See generally BURGERS & DANELIUS, *supra* note 67 (noting the extensive description of the various working groups drafting CAT contains no reference to “prolonged” pain or suffering).

322. See OLC Memo, *supra* note 127, at 21 (stating permanent harm from the acts of torture is not essential to prove a violation of CAT).

323. BURGERS & DANELIUS, *supra* note 67, at 44.

324. See *id.* at 20 (requiring mental suffering be of a significant duration but not permanent).

325. See OLC Memo, *supra* note 127, at 7 (relying on dictionary definition since “‘prolonged mental harm’ appears nowhere else in the U.S. Code nor does it appear in relevant medical literature or international human rights reports”); see also Revised OLC Memo, *supra* note 156, at 14 (relying on similar dictionary definitions).

326. *Id.* at 1 (providing a standard for the length of time one must experience psychological pain or suffering to qualify as torture).

327. *Id.* at 7 (describing two possible mental disorders that could satisfy the prolonged mental suffering requirement); see Revised OLC Memo, *supra* note 156, at 14 n.25 (agreeing development of mental disorder such as PTSD or chronic depression, among other causes, could cause prolonged mental harm).

328. See Revised OLC Memo, *supra* note 156, at 14 n.24 (discussing first OLC

disorders can constitute prolonged mental harm “of some lasting duration” short of months.<sup>329</sup>

Many scenarios can be imagined where the hostile use of interrogational truth serum would cause Posttraumatic Stress Disorder (“PTSD”).<sup>330</sup> For example, think of a high level FBI agent who knows of an Al Qaeda sleeper cell in the United States that is planning a future attack on a large U.S. city. Before the government can take action, Al Qaeda kidnaps the agent and injects truth serum. The agent reveals the government’s plan to arrest the cell and thwart its attack. The Al Qaeda members flee, leaving the agent behind, alive but unable to immediately escape. Armed with the knowledge gained from the use of truth serum, the cell evades arrest and immediately detonates a dirty bomb at the Sears Tower in Chicago. Tens of thousands are killed and maimed through shrapnel, radiation, and the resulting panic. The contamination shuts down the city, throwing the nation’s economy into a tailspin. The agent breaks out of his place of captivity, only to learn of the devastation and destruction caused by his words. His coerced confession led to the deaths of thousands of innocent people. Thousands of others will die a slow and horrible death from radiation poisoning. The agent will suffer significant emotional trauma from both the hostile mind control and the horrific results of his inability to withhold the information. Given the harm that his words have caused, the emotional trauma is likely to result in PTSD or similar mental harm.

PTSD can be triggered by a variety of traumas. The Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) provides examples of many different types of traumatic events that can trigger PTSD.<sup>331</sup> These include the direct experience of torture, incarceration

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memo requirement of months or years).

329. *See id.* (stating mental harm must be of some lasting duration, but disagreeing with suggestion that mental harm must endure at least months or years).

330. *See* OLC Memo, *supra* note 127, at 21 (recognizing PTSD as a possible condition that could satisfy the U.S. requirement that the torturous act cause prolonged harm); *see also* Revised OLC Memo, *supra* note 156, at 14 n.25 (agreeing development of mental disorder such as PTSD could constitute prolonged mental harm, although not limiting it to such cases).

331. *See* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 463-64 (1994).

as a prisoner of war, and violent physical assault.<sup>332</sup> PTSD can also be the result of experiences that happened to others such as learning about the serious injury of a close friend or family member or a child's life-threatening disease.<sup>333</sup> If PTSD can be caused by these more attenuated events, the direct experience of the agent described above might cause PTSD as well.

PTSD, moreover, is "especially severe or long lasting when the stressor is of human design (e.g., torture, rape)."<sup>334</sup> The effects of truth serum might be considered mental rape—the wholesale invasion and control of the mind against the will of the individual. Physical rape is associated with "very high rates" of PTSD.<sup>335</sup> "It would generally be accepted that this [high rate] is not surprising because a priori reasoning suggests that rape is a very specific stressor which involves an extreme threat to the person, an invasion, a loss of control, and a feeling of helplessness."<sup>336</sup> The mind control inherent in truth serum could be seen as a similar invasion, leading to a total loss of control and extreme feeling of helplessness.<sup>337</sup> Obviously, the physical invasion of rape is far worse than the needle prick envisioned as the only physical effect of truth serum.<sup>338</sup> But even when rape does not involve an "overt threat of violence, the extent of personal invasion, helplessness and assault is great."<sup>339</sup> Thus, the purely mental assault of truth serum would result in a sense

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332. *See id.* (supplying examples of traumatic events that could trigger PTSD).

333. *See id.* (stating whether the triggering event happens to oneself or others, the person's response to the event has to involve a sense of fear, helplessness, or horror).

334. *Id.* (observing the likelihood of developing PTSD increases where the stress related object is closer in proximity to the subject).

335. L. STEPHEN O'BRIEN, *TRAUMATIC EVENTS AND MENTAL HEALTH* 131 (1998).

336. *Id.*

337. *Cf.* Jessica Pae, Note, *The Emasculation of Compelled Testimony: Battling the Effects of Judicially Imposed Limitations On Grand Jury Investigations of Terrorism and Other Ideological Crimes*, 70 S. CAL. L. REV. 473, 505-06 (1997) (noting subjects under the effect of truth serums distort reality and have less control over their thoughts and expressions than subjects under hypnosis).

338. *See* discussion *infra* Part I.B (positing effects of next-generation truth serum).

339. O'BRIEN, *supra* note 335, at 131-32.

of personal invasion and helplessness so vast that it results in prolonged mental harm such as PTSD.

Even if mental harm from interrogational truth serum does not rise to the level of PTSD, it meets the lesser forms of prolonged mental harm described by the OLC. For example, the OLC favorably cites case law finding that long-term, ongoing harm constitutes severe mental harm.<sup>340</sup> The symptoms of severe mental harm included anxiety, flashbacks, nightmares, difficulty sleeping, depression, nervousness, irritability, and difficulty trusting people.<sup>341</sup> Being a victim of mind control will likely cause ongoing mental trauma such as anxiety, difficulty trusting people, nightmares and/or depression. The law enforcement agent who involuntarily aided a terrorist attack is likely to feel a sense of anguish, guilt, and failure for the rest of her life. At the least, it will cause difficulty sleeping, anxiety, and irritability.<sup>342</sup> The effects of having another person take over your mind and completely override your will, as in the example of coerced cooperation with terrorists,<sup>343</sup> are likely to cause profound psychic pain. Such anguish would inflict PTSD or at least mental harm such as anxiety or depression. The sense of invasion and helplessness is likely to echo for many months if not years, supporting that it is not only “prolonged” but also “severe.”

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340. See OLC Memo, *supra* note 127, at 24 (citing *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1334, 1336, 1337-8, 1340 (N.D. Ga. 2002), to illustrate severe mental pain can come from threats of severe physical pain and of imminent death); see also Revised OLC Memo, *supra* note 156, at 15 (citing *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1334, 1336, 1337-8, 1340 (N.D. Ga. 2002), as an example of mental pain).

341. See OLC Memo, *supra* note 127, at 26; see also Revised OLC Memo, *supra* note 156, at 15. *But see* *Villeda v. Fresh Del Monte Produce*, 305 F. Supp. 2d 1285 (S.D. Fla. 2003) (finding insufficient evidence of lasting damage where no allegations of prolonged harm; court characterized being held at gunpoint overnight and repeatedly threatened with death as “eight-hour aggravated assault” rather than torture), *cited in* Revised OLC Memo, note 156, at 15.

342. *Cf.* *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1359 (N.D. Ga. 2002) (noting the plaintiff in the case suffered physical and emotional harms years after the traumatic event). *But see* *Odeshoo*, *supra* note 27, at 253 (asserting truth serum’s effect is confined to the period of administration and that there is little reason to believe truth serum causes prolonged harm).

343. See discussion *supra* text accompanying note 338 (describing hypothetical use of truth serum by terrorists on captured U.S. law enforcement official).

*b. Truth Serum as a Mind Altering Substance*

Furthermore, the United States seems to have opened the door to equating truth serum with torture by its understanding, which defines mental harm in terms of mind altering substances.<sup>344</sup> It will be shown that in addition to causing severe pain or suffering in the form of prolonged mental harm, preventive interrogational truth serum is also a mind altering substance that disrupts the senses or personality.<sup>345</sup> By definition, truth serum alters the mind, interfering with cognitive ability.<sup>346</sup> It therefore falls under the U.S. interpretation of mental harm.

Indeed, it is possible that a desire to prohibit truth serum was the impetus behind the inclusion of the “mind altering” language. The intelligence community was aware that other countries were attempting to produce “truth serum” and feared its use on U.S. citizens.<sup>347</sup> For example, the Director of Central Intelligence indicated as far back as 1977 that other countries might use mind altering drugs and “relaxants that make tongues looser than they would otherwise be.”<sup>348</sup> But there was also a specific fear of the use of LSD on captured Americans.<sup>349</sup> It is not clear whether the potential hostile use of truth serum or other drugs prompted this

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344. See U.S. RUDs, *supra* note 81, at Understanding 1 (defining mental harm in terms of administration or threatened administration of “mind altering drugs”).

345. See discussion *infra* notes 357-368 and accompanying text (using OLC Memo and other definitions of “mind altering” substance to assess truth serum).

346. See MERRIAM-WEBSTER ONLINE DICTIONARY (characterizing “truth serum” as a substance that is used to induce a subject to talk freely), at <http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=truth+serum> (last visited Apr. 2, 2005). “Cognition” is identified as including awareness and judgment. *Id.* at <http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=cognition> (last visited Apr. 2, 2005).

347. See *Joint Hearing*, *supra* note 28 (statement of Director of Central Intelligence, Adm. Turner) (expressing the director’s concern that U.S. prisoners of war were being administered truth serum by foreign operatives).

348. See *id.* at 44 (recognizing U.S. prisoners of war in Korea were likely administered some form of chemical agent that resembles truth serum).

349. See *id.* at 43 (noting although the CIA has no files to prove the assertion, it strongly contends that other countries have used LSD against U.S. citizens).

understanding.<sup>350</sup> Regardless, truth serum would fall under its terms because it disrupts the senses or personality.

According to the OLC, “The phrase ‘mind altering substances’ is found nowhere else in the U.S. Code, nor is it found in dictionaries, but it is often used in case law as a synonym for drugs.”<sup>351</sup> The OLC cites state statutes to further support this position, although the examples given equate mind altering substances with both psychotropic drugs and alcohol.<sup>352</sup> In the U.S. understanding, the phrase “mind altering substances” is paired with “other procedures calculated to disrupt profoundly the senses or the personality.”<sup>353</sup> Thus, a mind altering substance is not simply a drug, but a drug calculated to significantly disrupt the senses or personality.

The OLC posits that the following would profoundly disrupt the senses or personality: drug-induced dementia (significant memory impairment along with loss or impairment of language function, motor function or abstract thinking); onset of “brief psychotic disorder” (delusions, hallucinations, catatonic state); onset of obsessive-compulsive disorder; and pushing to brink of suicide.<sup>354</sup> The consequences of truth serum might well push the subject to the brink of suicide, particularly in the FBI agent scenario described above. Even if it does not, it would likely be on par with obsessive-compulsive disorder as defined by the OLC (time-consuming

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350. See Senate CAT, *supra* note 317 (containing no mention of truth drugs or truth serum within transcripts of hearings or letters, but referred to in attachments). Excerpts of M. Cherif Bassiouni’s “An Appraisal of Torture in International Law and Practice: The Need for an International Convention for the Prevention and Suppression of Torture” are attached to the Senate Committee on Foreign Relations Hearings on the CAT. *Id.* at 143-44. In the excerpt, Bassiouni describes psychological methods used to produce severe pain or suffering including “straightforward, even non-painful, [drugs] such as various truth drugs.” *Id.* There are no indications, however, that this detail was noted by those voting to ratify CAT.

351. OLC Memo, *supra* note 127, at 9 (listing various cases where drugs were recognized as mind altering substances). The Revised OLC Memo does not address this issue. Revised OLC Memo, *supra* note 156.

352. See OLC Memo, *supra* note 127, at 10 (providing various state statutes that support the proposition that mind altering substances are drugs and alcohol).

353. U.S. RUDs, *supra* note 81, at Understanding 1.

354. See OLC Memo, *supra* note 127, at 11 (listing examples that would constitute a profound disruption of the personality since the phrase is not found in any U.S. law).

repetitive behavior plus obsession).<sup>355</sup> Moreover, this list is not exhaustive.<sup>356</sup>

“The phrase ‘disrupt profoundly the senses or personality’ is not used in mental health literature nor is it derived from elsewhere in U.S. law.”<sup>357</sup> Relying on dictionary definitions of “disrupt” and “profound,” the OLC determines that a drug “calculated to disrupt profoundly” must be designed to have a deep and extreme effect on the subject.<sup>358</sup> Interrogational truth serum “must penetrate to the core of an individual’s ability to perceive the world around him, substantially interfering with his cognitive abilities, or fundamentally alter his personality.”<sup>359</sup>

Truth serum, by definition, would substantially interfere with the unwilling subject’s cognitive abilities. Cognition is “the act or process of knowing including both awareness and judgment.”<sup>360</sup> Truth serum would wipe out the subject’s judgment, rendering him incapable of silence or subterfuge.<sup>361</sup> An effective truth serum would block his ability to censor his answers.<sup>362</sup> It would negate his ability

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355. *See id.* (noting examples of obsessive-compulsive disorder such as compulsive repetitive behaviors).

356. *See id.* (characterizing obsessions as intrusive thoughts unrelated to reality).

357. *Id.* (adding that the phrase “mind altering substances” also does not appear in any dictionary or anywhere within the U.S. Code but acts as a common synonym for “drugs”).

358. *See id.* at 10-11 (comparing the effect to a drug-induced dementia where the subject suffers from severe memory destruction).

359. *Id.* (describing, as an example, an individual’s inability to retain new information or remember information he previously was interested in); *see also* Odeshoo, *supra* note 27, at 252 (contending there is a convincing argument that truth serum profoundly disrupts the senses based on impairment of sense of time, memory and awareness while under truth serum).

360. MERRIAM WEBSTER ONLINE DICTIONARY (supplying the accepted definitions of the word “cognition”), at <http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=cognition&x=0&y=0> (last visited Apr. 2, 2005).

361. *See* THE FREE DICTIONARY.COM (explaining certain truth serums interfere with a subject’s higher cognition), at <http://encyclopedia.thefreedictionary.com/Truth%20serum> (last visited Apr. 2, 2005).

362. *See* MERRIAM-WEBSTER ONLINE DICTIONARY (defining truth serum as a substance that induces a subject to “talk feely” while under questioning), at <http://63.240.197.90/cgi-bin/dictionary?book=Dictionary&va=truth+serum> (last

to think of ways to elude the question by lying or refusing to answer. This state would likely lead to cognitive dissonance, the “psychological conflict resulting from incongruous beliefs and attitudes held simultaneously.”<sup>363</sup> The subject would suffer from the contradiction between his desire to refuse to provide information and his compelled cooperation with interrogators.<sup>364</sup>

This interference with cognitive abilities is sufficient under the U.S. understanding of mental harm. But preventive interrogational truth serum would also fundamentally alter the subject’s *personality* by transforming him into an automaton who must answer the question put to him.<sup>365</sup> His personality would be radically altered by the act of divulging information he wishes to keep secret.<sup>366</sup> His real personality would be virtually wiped out during the session, and significantly affected afterward.<sup>367</sup> Personality cannot be divorced from beliefs; the interrogational truth serum session, by design,

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visited Apr. 2, 2005); *see also* discussion *supra* Part I.A (positing “next-generation” truth serum).

363. *Cf. id.* (defining “cognitive dissonance” as a psychological conflict), at <http://63.240.197.90/cgi-bin/dictionary?book=Dictionary&va=cognitive+dissonance&x=13&y=8> (last visited Apr. 2, 2005).

364. *See* Anupama Katakam, *The Truth Serum Trial*, FRONTLINE, Mar. 12, 2004 (describing the effects of truth serum on Abdul Karim Telgi, the mastermind behind the stamp paper scam in India); *see also* discussion *supra* Part I.A (positing that subjects under effective truth serum are forced to divulge information upon interrogation).

365. *See id.* (noting that, according to Indian Government sources, Mr. Telgi “sang like a canary” while under the effects of the serum); *see also* discussion *supra* Part I.A (describing inability to remain silent under effective truth serum).

366. *See id.* (stating Mr. Telgi divulged secrets such as who he had monetary transactions with, places he operated, bank accounts, and business associates); *see also* discussion *supra* Part I.B (describing a truth serum that lives up to its name); Part IV.A.2.a (discussing potential effects of hostile use of truth serum on law enforcement officer by terrorists).

367. *See* discussion *supra* Part I.A (illustrating effects of next-generation truth serum); *see also* Odeshoo, *supra* note 27, at 252 (asserting personality of individual under truth serum “may well undergo profound alteration”); NICHOLAS SAUNDERS, *E FOR ECSTASY* 4 (1993) (presenting the potential after effect hazards of Methylendioxyamphetamine (“MDMA”), a drug once tested as a truth serum), *available at* [http://blackroses.textfiles.com/drugs/e4xtc\\_a.txt](http://blackroses.textfiles.com/drugs/e4xtc_a.txt) (last visited Apr. 2, 2005).

forces the subject to betray his belief system.<sup>368</sup> For example, consider the highly trained law enforcement officer who is rendered helpless, unable to stanch the flow of words involuntarily aiding the enemy. How could his cognitive abilities not be “interfered with” when he has lost control of his own mind and been forced to betray his beliefs and his country? How could his personality—his very sense of self—not be profoundly affected? Truth serum, therefore, is a mind altering substance calculated to disrupt profoundly the senses or personality.

*c. Threatened Administration of Mind Altering Drugs*

Similarly, the threat of using truth serum results in prolonged mental harm, thereby satisfying the U.S. interpretation of severe mental pain or suffering.<sup>369</sup> Under the U.S. understanding, mental harm includes “threatened administration or application” of mind altering substances.<sup>370</sup> The fear of involuntary interrogational truth serum could cause similar effects as its use.

Although the OLC did not discuss threatened use of mind altering substances, it analyzed “threat” with regard to other forms of mental harm.<sup>371</sup> It favorably cites *Mehinovic v. Vuckovic*, a case involving severe mental pain due to the threat of severe physical pain and imminent death.<sup>372</sup> The OLC determined that an explicit or implicit

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368. See MARTIN LEE & BRUCE SHLAIN, *ACID DREAMS THE CIA, LSD AND THE SIXTIES REBELLION* 23 (1985) (discussing the CIA’s interest in LSD because of the drug’s ability to suspend a subject’s belief system), available at <http://www.wardrobe.pwp.blueyonder.co.uk/texts/1189/aciddrms.txt> (last visited Apr. 2, 2005).

369. See discussion *supra* Part IV.2 (describing the standard used by the United States in interpreting what constitutes “severe mental pain or suffering”).

370. See U.S. RUDs, *supra* note 81, at Understanding 1 (defining severe mental pain or suffering as, *inter alia*, prolonged mental harm caused by administration or threatened administration of mind altering substances).

371. See *id.* (addressing the first predicate act in the mental harm understanding: “prolonged mental harm caused by or resulting from (a) the intentional infliction or threatened infliction of severe physical pain or suffering . . .”). The Revised OLC Memo does not address this issue, although it does favorably cite the same case as the first memo as an example of extreme conduct, which constitutes torture. See generally Revised OLC Memo, *supra* note 156, at 10 (citing *Mehinovic v. Vuckovic* to establish acts such as limiting water and food, cutting figures into a subject’s forehead, and hanging and beating as torture).

372. See *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002)

threat is analyzed under a “reasonable person in the same circumstances” standard.<sup>373</sup> Based on this rationale, a reasonable person suspected of having knowledge of an impending terrorist attack would likely consider the implied or explicit mention of truth serum (such as, “we have ways of making you talk”) as a threat. If the implied threat of physical pain inflicts severe mental pain or suffering, then the threat of truth serum will do the same.<sup>374</sup>

Moreover, the U.S. government must believe that the threat does cause mental harm, or it would not include it in its understanding of mental pain or suffering.<sup>375</sup> In addition to the threatened administration of drugs, the U.S. interpretation of mental harm includes the threatened infliction of severe physical pain or suffering and the threat of imminent death.<sup>376</sup> It also includes a more attenuated threat: “the threat that another person will be imminently subjected” to death, severe pain or suffering, or the administration of mind altering substances.<sup>377</sup> If the threat of subjecting another person to mind altering drugs is likely to cause mental harm, then it logically follows that the threat of direct hostile administration of truth serum would also yield mental harm.

An individual would likely suffer severe anguish at the thought of being subjected to an effective truth serum due to fear of its consequences: complete loss of control accompanied by coerced betrayal of compatriots or cause.<sup>378</sup> This anguish may actually

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(holding Bosnian Serb police officer liable for several acts, including torture, cruel and inhuman treatment, arbitrary detention, and crimes against humanity under international law, committed against Muslim Bosnian refugees); *see also* OLC Memo, *supra* note 127, at 26 (analyzing the Court’s finding of both physical and mental torture based on the facts of *Mehinovic v. Vuckovic*).

373. *See* OLC Memo, *supra* note 127, at 9 (citing the reasonable person standard as the common approach to assessing the existence of a threat of severe pain or suffering).

374. *See* discussion *supra* note 305 and accompanying text (noting several acts that imply threats that are generally recognized as inflicting severe mental pain or suffering).

375. *See* U.S. RUDs, *supra* note 81, at Understanding 1 (referring the threatened administration of a mind altering drug as one possible cause of prolonged mental harm).

376. *See id.* (listing possible causes of prolonged mental harm).

377. *Id.*

378. *But cf.* Odeshoo, *supra* note 27, at 242 (claiming the nature of information

increase due to the additional fear of the unknown. The subject might believe that a conscious confession would give him some measure of control, as opposed to a truth serum session where there might be no limits on the type of secrets uncovered; who knows what kind of personal questions the interrogators might ask, irrelevant to the supposed purpose of preventive interrogation, just because they can? Thus, the threatened administration of truth serum, much like the actual use of truth serum, might well cause prolonged “severe pain or suffering,” such as anxiety, or even PTSD.

#### B. INTENTIONALLY INFLICTED FOR THE PURPOSE

By incorporating the use of mind altering drugs into the definition of mental harm, the United States defines torture in such a way that the use of truth serum can cause prolonged severe pain or suffering.<sup>379</sup> Nonetheless, this is not sufficient to prove torture under CAT.<sup>380</sup> Although truth serum can cause severe mental harm, the harm is not *intentionally inflicted* for the purpose of obtaining information (or any similar purpose); rather, the harm is merely a side effect of the use of truth serum.<sup>381</sup> Paradoxically, a lesser act—the threat of application of truth serum—meets the intent requirement because the threat causally and chronologically precedes the fulfillment of the purpose. Thus, preventive interrogation involving the use of truth serum satisfies severe mental pain or

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sought is dispositive in determining whether use of truth serum is torture). Thus, it might be argued that in interpreting mental harm, a value judgment should be made regarding the mental anguish of the subject. *Cf. id.* For example, the mental harm of a law enforcement officer would be recognized, but the terrorist’s mental trauma from loss of control or betrayal of the cause should not be considered severe mental pain because to do so would essentially condone a reprehensible belief system. *Cf. id.* But the mental anguish is not merely results-oriented; it is derived from the utter helplessness and hostile mind control inherent in a truth serum session. It can be recognized without legitimizing the terrorist’s acts or aims, in the same way that crime-fighting methods that shock the conscience are prohibited without validating criminal behavior.

379. See discussion *supra* Part IV.A.2 (arguing the effects of truth serum session are likely to satisfy requirement of prolonged severe mental harm).

380. See U.S. RUDs, *supra* note 81, at Understanding 1 (stating “an act must be specifically intended to inflict” severe pain or suffering).

381. See discussion *supra* Part I (explaining effective truth serum is not intended to cause mental pain, but is simply meant to make it impossible for an individual to provide false information).

suffering, for the purpose of obtaining information by an official (parts 1, 3, 4 of the definition of torture); but it is a split decision on intentional infliction (part 2) because the use of truth serum does not fulfill the intentional infliction requirement while the threatened use of truth serum does.<sup>382</sup>

Preventive interrogational truth serum is an act inflicted for one of the enumerated purposes (obtaining information or a confession) under Article 1 of CAT.<sup>383</sup> However, under the U.S. understanding to Article 1, the act must also be one by which an interrogator intentionally inflicts severe pain or suffering for that purpose.<sup>384</sup> U.S. regulations related to the duty to refrain from sending one back to a country where he is likely to face torture indicate that “an act that results in unanticipated or unintended severity of pain or suffering is not torture.”<sup>385</sup>

Accidental pain would not constitute torture.<sup>386</sup> There would be no intent, for example, where an individual experiences pain during the course of appropriate medical treatment, since such pain would not have been intentionally inflicted in the sense of the definition of torture.<sup>387</sup> “On the contrary, such pain or suffering would be an unintended side effect of the treatment. . . . A similar line of reasoning may be applied to other situations where severe pain or

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382. See discussion *supra* text accompanying notes 243-45 (breaking definition of torture into four parts).

383. See CAT, *supra* note 30, art. 1 (offering several examples of purposes for which torture is used, including obtaining information or a confession, intimidating, coercing, or punishing).

384. See U.S. RUDs, *supra* note 81, at Understanding 1 (clarifying that in order to constitute torture, an act must be made with the specific intention of causing severe physical or mental pain or suffering).

385. See U.S. DEP'T OF STATE: INITIAL REPORT OF THE UNITED STATES OF AMERICA TO THE U.N. COMMITTEE AGAINST TORTURE, ANNEX IV, INS REGULATIONS ON TORTURE (2004) (establishing procedures for raising a claim for protection from torture, and reiterating the fact that, to qualify as torture, an act must be intended to cause severe pain or suffering), at [www.state.gov/www/global/human\\_rights/torture\\_annex4.html](http://www.state.gov/www/global/human_rights/torture_annex4.html) (last visited Apr. 2, 2005).

386. See BURGERS & DANIELIUS, *supra* note 67, at 118 (concluding that where pain or suffering is a result of an accident or mere negligence, the criteria required for categorizing the act as “torture” are not met).

387. See *id.* at 119 (referring to “fully justified medical treatment”).

suffering would be caused by a deliberate act but where nonetheless the element of ‘intentional infliction’ would be lacking.”<sup>388</sup> The administration of truth serum seems to be one of these situations.

### *1. Administration of Truth Serum*

In cases involving the involuntary administration of truth serum, the mental anguish caused is incidental to the actual use of the serum.<sup>389</sup> This raises the question: does contemporaneous pain constitute pain that is intentionally inflicted to obtain information? The purpose of using truth serum is to obtain the truth, not cause pain. But the same could be said of beatings or electric shock used to obtain a confession. Although those physical acts precede the “obtaining of the confession,” the central purpose of them is to induce speech, not pain. The pain is simply the means of obtaining the information. Nevertheless, there is a fundamental difference between the infliction of physical pain and the use of truth serum. The pain of a physical beating is intended to fulfill the purpose—to force a confession, for example. In using truth serum, the interrogator would argue that no pain is intended; it is the truth serum, not the mental pain, that is intended to fulfill the purpose of obtaining information. In other words, truth serum fulfills the purpose regardless of any resulting contemporaneous mental pain.

The intentional infliction requirement, according to the first OLC Memo, means that the “precise objective” of the interrogator must be the infliction of severe pain.<sup>390</sup> Knowing that severe pain would

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388. *Id.*

389. *See* discussion *supra* Part I (arguing the purpose of using truth serum is to obtain truthful information, not to cause pain).

390. *See* OLC Memo, *supra* note 127, at 3 (noting 18 U.S.C. § 2340 requires specific intent, and adding that, if the statute only required general intent, guilt would be sufficiently established by showing the defendant possessed knowledge that his actions were only reasonably likely to cause pain or suffering). The OLC also initially argued that prosecutions for torture as part of the war on terror would be unconstitutional or unlikely given the applicable justification defenses. *See id.* at 36-39 (arguing the Department of Justice could not enforce 18 U.S.C. § 2340A against federal officials acting pursuant to the President’s constitutional Commander-in-Chief authority to wage a military campaign); *see also id.* at 39-46 (providing the justification defenses of necessity and self-defense, which could potentially eliminate criminal liability for certain interrogation methods). The Revised OLC Memo has abandoned these arguments as unnecessary. *See*

likely result from his actions would not be sufficient; this would satisfy only general intent. “Thus, even if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent even though the defendant did not act in good faith.”<sup>391</sup> As a practical matter, though, knowing that severe pain or suffering is reasonably likely to result might be adequate to prove specific intent because juries may be able to infer it from the facts.<sup>392</sup> “[W]hen a defendant knows that his actions will produce the prohibited result, a jury will in all likelihood conclude that the defendant acted with specific intent.”<sup>393</sup> On the other hand, it is possible that an interrogator might decide (or someone may advise him) that juries would be highly unlikely to infer specific intent when dealing with preventive interrogational truth serum. Armed with this knowledge, an interrogator might well use truth serum, justifying its use on the ground that he had no specific intent.

The Revised OLC Memo refers to the “precise objective” test and states: “We do not reiterate that test here.”<sup>394</sup> The Revised OLC Memo does not reject the test, but merely declines to define specific intent.<sup>395</sup> “In light of the President’s directive that the United States not engage in torture, it would not be appropriate to rely on parsing the specific intent element of the statute to approve as lawful conduct that might otherwise amount to torture.”<sup>396</sup> It does, however, make some “observations” with regard to a good faith defense.<sup>397</sup>

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discussion *supra* note 157 and accompanying text (discussing new position on torture and Commander-in-Chief power).

391. See OLC Memo, *supra* note 127, at 4 (concluding a defendant is guilty of torture only if he acts with the express purpose of inflicting severe pain or suffering on an individual within his custody or physical control).

392. See *id.* at 5 (pointing out that while a defendant’s knowledge that severe pain will result from his actions does not constitute specific intent if causing such harm is not his objective, juries are permitted to infer from the factual circumstances that such intent is nevertheless present).

393. *Id.* at 4 (describing the standard that a jury will use in deciding requisite intent).

394. Revised OLC Memo, *supra* note 156, at 16 n.27.

395. See *id.* at 16 (“We do not believe it is useful to try to define the precise meaning of “specific intent . . .”).

396. *Id.* at 16-17.

397. See *id.* at 17 (discussing situations when a defendant would not have

The OLC initially contended that an interrogator could negate a showing or inference of specific intent by arguing that he was unaware of any mental harm of the type caused by truth serum.<sup>398</sup> If an interrogator does not believe that the sense of invasion, helplessness, and loss of control causes prolonged mental harm, he would have a strong argument that he did not specifically intend the pain.<sup>399</sup> The first OLC Memo thus stated that an interrogator could show that he “acted in good faith by taking such steps as surveying professional literature, consulting with experts, or reviewing evidence gained from past experience.”<sup>400</sup> The Revised OLC Memo preserves this exception by stating that “if an individual acted in good faith, and only after reasonable investigation establishing that his conduct would not inflict severe physical or mental pain or suffering, it appears unlikely that he would have the specific intent necessary to violate sections 2340-2340A.”<sup>401</sup> It is therefore possible that government experts would provide material purporting to establish that mental harm is not caused by truth serum sufficient to establish that an interrogator would have a “good faith” defense.

Most significantly, under CAT the use of truth serum must be an “act *by which* severe pain or suffering, whether physical or mental, is intentionally inflicted *for*” a certain purpose, such as obtaining information.<sup>402</sup> If no mental pain resulted from the use of truth serum, the interrogator would still obtain the information. As a result, the administration of truth serum is an act that causes mental pain or suffering, but it is not an act *by which* pain is inflicted in order to

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specific intent).

398. See OLC Memo, *supra* note 127, at 8 (explaining that if a defendant has a good faith belief that his actions will not result in prolonged mental harm, he lacks the mental state necessary for his actions to constitute torture).

399. See *id.* (arguing that because the statute requires that the defendant specifically intend to cause severe mental harm, and because it expressly defines severe mental pain in terms of prolonged mental harm, that mental state must be present with respect to prolonged mental harm).

400. *Id.* at 8 (offering examples of steps that an interrogator may take to demonstrate that he has examined a relevant body of knowledge concerning prolonged mental harm and subsequently, and in good faith, determined that his acts would not cause such harm).

401. *Id.* at 17.

402. See CAT, *supra* note 30, art. 1 (emphasis added) (describing the factors necessary for actions to be considered “torture” under CAT).

obtain the information.<sup>403</sup> The mental pain is a side effect of the act, not causally related to intentionally fulfilling the purpose.<sup>404</sup> The official does not cause the anguish of self-betrayal or loss of control in order to obtain information; it is simply incidental to the administration of truth serum. Therefore, the use of truth serum does not appear to be intentionally inflicted for the purpose of obtaining information.

On the other hand, it is possible that a foreseeable by-product might satisfy specific intent. According to the Eighth Circuit Court of Appeals, specific intent necessary to prove that torture “is satisfied if prolonged mental pain or suffering *either* is purposefully inflicted or is the foreseeable consequence of a deliberate act.”<sup>405</sup> The Third Circuit Court of Appeals reached the same conclusion in a case recognizing that the immigration regulation regarding nonrefoulement requires specific intent in order to prove torture.<sup>406</sup> The court then took into account the interpretation of the regulation:

However, the regulation immediately explains: “[a]n act that results in unanticipated or unintended severity of pain and suffering is not torture.” The intent requirement therefore distinguishes between suffering that is the accidental result of an intended act, and suffering that is purposefully inflicted or the foreseeable consequence of a deliberate conduct. However, this is not the same as requiring a specific intent to inflict suffering.<sup>407</sup>

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403. See discussion *supra* Part I.B, note 51 and accompanying text (positing the administration of the serum does not cause any physical pain beyond the prick of a needle).

404. Cf. *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment: Hearing Before Senate Comm. on Foreign Relations*, 101st Cong. 100-20 (1990) (statement of Mark Richard, Deputy Assistant Attorney General, Department of Justice Criminal Division) (stating the definition of mental pain does not encompass compelled testimony against a friend notwithstanding the “incidental effect of producing mental strain”).

405. *Habttemicael v. Ashcroft*, 370 F.3d 774, 782 (8th Cir. 2004) (emphasis added) (construing federal immigration regulations prohibiting the return of alien to a country where he would be likely subjected to torture); see also discussion *supra* Part II.C (briefly discussing immigration regulations).

406. See *Zubeda v. Ashcroft*, 333 F.3d 463, 473 (3d Cir. 2003) (examining a situation involving an alien requesting asylum in the United States due to fear that she would be subject to torture if forced to return to her home country).

407. *Id.* (asserting the requirement of intentional infliction does not necessarily

The mental anguish from a waking nightmare infliction of truth serum seems to be a “foreseeable consequence” of preventive interrogational truth serum; however, it appears that the Third Circuit limited the “foreseeable consequence” rationale to threats. The court continued its explanation of the requirement of specific intent:

[CAT] does not require that the persecutor actually intend to cause the threatened result. It is sufficient if the persecutor causes severe psychological suffering by threatening beatings for one of the specified purposes. . . . The persecutor need not intend to “make good” on his/her threats for the resulting suffering to constitute torture so long as the threats are sufficiently protracted, and/or of such an egregious nature to elevate the foreseeable suffering to the level of “torture.”<sup>408</sup>

Because truth serum’s mentally painful side effect is very different from the mental pain caused by *threatened* torture, the “foreseeable consequence” interpretation is most likely inapplicable,<sup>409</sup> and the administration of truth serum fails to satisfy the specific intent requirement.

## 2. Threatened Administration of Truth Serum

On the other hand, the threat of preventive interrogational truth serum would meet the specific intent test. Unlike the actual use of truth serum, the threat is an act by which an interrogator deliberately inflicts pain in order to obtain information.<sup>410</sup> Whether it is the pain

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create a “specific intent” requirement). Rather, the court maintains that the language of CAT was simply meant to exclude severe pain or suffering “that is an unintended consequence of an intentional act.” *Id.*

408. *Id.* (adding if courts were to require aliens to establish specific intent of his or her persecutors, this could impose huge obstacles to affording the protections which the community of nations, through CAT, sought to guarantee).

409. *But see* Revised OLC Memo, *supra* note 156, at 17 (stating some “observations” regarding specific intent). The Revised OLC Memo might re-open the door seemingly shut in the courts regarding foreseeability. The new discussion states that an individual would not have specific intent where he did not desire the result nor have “‘knowledge or notice’ that his act ‘would likely have resulted in’ the prescribed outcome . . . .” *Id.* Under this reasoning, an interrogator might have specific intent where he knew severe mental pain or suffering was likely. *Id.* The good faith defense, however, along with potential jury nullification would still apply. *See* discussion *supra* notes 391-401 and accompanying text (discussing likelihood of jury inferring specific intent in terrorism context and good faith defense).

410. *See* discussion *supra* Part IV.A.2.c (recognizing the threatened

of intense anxiety or the pain of anticipated mind invasion, the pain itself is the main objective—without it, the interrogator will not achieve his purpose. The whole point of the *threat* of forcible administration of truth serum is to cause such anxiety that the subject divulges the information.<sup>411</sup> One cannot argue that pain is merely incidental, because the pain is the only way to make the threat an effective one. Mental suffering is inarguably the “precise objective” when that is the exact nature of making a threat.<sup>412</sup> The “foreseeable consequence” of threatening to administer truth serum is severe mental anguish—if it were not, there would be no point in making the threat. Thus, the threatened administration of truth serum likely satisfies the requirement of intentional infliction and therefore the definition of torture under CAT as ratified and understood by the United States.<sup>413</sup>

As a result of the intentional infliction requirement, there is a loophole in CAT. The definition presumes that the mental pain precedes the achievement of the stated purpose, i.e., the *pain* causes the subject to surrender information.<sup>414</sup> But with the administration of truth serum, the *substance* causes the subject to speak—the mental anguish is an incidental side effect, which thereby renders the act insufficient to constitute torture. By contrast, the intent behind *threatening* to use truth serum is to cause such pain or suffering that the subject will divulge the information without the need to actually use the serum.<sup>415</sup> Thus, the threat of using truth serum is torture,

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administration of truth serum is an act that can have the effect of causing pain or suffering).

411. *See id.* (explaining when faced with the choice between a conscious confession and one induced by truth serum, a subject is likely to prefer a conscious confession, during which he will at least exercise some measure of control.)

412. *See* discussion *supra* notes 390-397 and accompanying text (discussing the OLC Memo requirement of “precise objective” and Revised OLC Memo refusal to reiterate the requirement). *Compare* OLC Memo, *supra* note 127, at 3 (contending intentional infliction requires that interrogator have the precise objective of inflicting severe pain or suffering), *with* Revised OLC Memo, *supra* note 156, at 16 n.27 (declining to reiterate the precise objective test).

413. *See* discussion *supra* Parts II.B-D (outlining the U.S. definition and interpretation of what constitutes “torture”).

414. *See* CAT, *supra* note 30, art. 1 (providing the various requirements of “torture”).

415. *See* discussion *supra* Part IV.A.2.c (detailing the implications and effects

while its actual use is not. This perverse outcome cannot be what the drafters intended when creating CAT or what the United States sought to accomplish in ratifying it.<sup>416</sup>

## V. A BETTER UNDERSTANDING OF TORTURE

If the conclusion is that the threat of using preventive interrogational truth serum is torture, but its actual use is not, then there are two options. First, accept that the use of truth serum is not prohibited; or second, adopt a new understanding of torture. The second option is preferable.

The first alternative is unpalatable for several reasons. First, the U.S. belief in human autonomy, free will, and individuality should make us profoundly uncomfortable about the invasion of the mind entailed by the hostile interrogational use of truth serum. The suspected terrorist has the same interest in free will as any other human being and would suffer mental pain from having that will overborne by truth serum, just as the FBI agent who involuntarily aids Al Qaeda would suffer. Even the U.S. intelligence community recognizes the importance of free will, referring to the “general abhorrence in Western countries for the use of chemical agents ‘to make people do things against their will . . . .’”<sup>417</sup> Similarly, “It was always a tenet of Army Intelligence that the basic American principle of the dignity and welfare of the individual will not be violated.”<sup>418</sup> The basis for the ban on truth serum, like torture in general, should rest on the principle that individuals should honor the mental integrity of others, “as democracy is based upon respect for such a security.”<sup>419</sup> Truth serum diminishes the person to a mere object from

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regarding the threatened administration of mind altering drugs).

416. See discussion *supra* Part II.A (describing CAT as codifying customary international law ban on torture); see also U.S. RUDs, *supra* note 81, at Understanding 1(a) (providing the use or threatened use of mind altering drugs calculated to profoundly disrupt the mind or personality can cause severe mental pain or suffering and therefore constitute torture).

417. *Joint Hearing*, *supra* note 28, at 28 (commenting that this “general abhorrence” is a major reason why there has not been an openly published systematic study concerning the potentiality of using drugs for interrogation).

418. *Id.* at 96.

419. Jonathan Grebinar, Comment, *Responding to Terrorism: How Must a Democracy Do It? A Comparison of Israeli and American Law*, 31 *FORDHAM URB.*

which information is extracted, while forcing her to act contrary to her beliefs and judgment.<sup>420</sup> A ban on truth serum would uphold both mental and bodily integrity, creating the kind of society in which people would wish to live.<sup>421</sup>

The U.S. Supreme Court recognizes an interest in the bodily integrity of individuals.<sup>422</sup> Justice O'Connor's concurrence in *Cruzan v. Director, Missouri Dep't of Health* explained that "[b]ecause our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause."<sup>423</sup> Further, the idea that the mental integrity of an individual should be accorded equal respect and protection was advanced by Justice Kennedy, who "recently set forth the constitutional importance of the 'autonomy of self . . .'"<sup>424</sup> "Liberty presumes an autonomy of self that includes the freedom of thought, belief, expression, and certain intimate conduct."<sup>425</sup> Indeed, "Our whole constitutional heritage rebels at the thought of giving

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L. J. 261, 271 (2003) (discussing physical and mental integrity as reasons for a ban on torture).

420. See Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481, 1492 (2004) (proposing an absolute prohibition of torture based on moral absolutism).

421. See *id.* at 1504 (acknowledging that although an absolute ban on torture may seem unrealistic as a practical matter, there is nevertheless independent societal value in upholding the myth that an absolute ban exists).

422. See, e.g., *Rochin v. California*, 342 U.S. 165, 169 (1952) (holding the Constitution guarantees respect for personal immunities since they are so rooted in the traditions and conscience of our people as to be fundamental); see also Kreimer, *supra* note 213, at 289 (citing *Rochin* "as a keystone in the constitutional protection of bodily integrity against arbitrary invasion").

423. *Cruzan by Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 287 (1990) (O'Connor, J., concurring) (clarifying how the state's imposition of medical treatment on an unwilling competent adult inevitably involves some form of restraint and intrusion and thus may burden that individual's liberty interests just as much as state coercion).

424. Kreimer, *supra* note 213, at 298 (highlighting how this idea from *Lawrence v. Texas*, 539 U.S. 558, 562 (2003), emphasizes the importance of autonomy within liberty).

425. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (finding unconstitutional a Texas statute that criminalized intimate sexual conduct between two persons of the same sex).

government the power to control men's minds."<sup>426</sup> An effective truth serum induces "the subject to abandon her own volition and become the instrument of the torturer by revealing information. Such government occupation of the self is at odds with constitutional mandate."<sup>427</sup>

The cases allowing forced medication of incompetent criminal defendants are distinguishable from the hostile use of truth serum. Involuntary administration of medication is proper only upon a finding that it is in the interest of both the state and the individual.<sup>428</sup> In *Sell v. United States*,<sup>429</sup> for example, the Supreme Court held that involuntary administration of antipsychotic drugs to render a mentally ill defendant competent to stand trial is justified only if it is the least intrusive alternative to significantly further an important government interest, and it is *medically appropriate*, i.e., in the patient's best medical interest in light of his medical condition.<sup>430</sup> An individual who refuses to divulge information is not suffering from a medical condition, and the forced administration of truth serum cannot be deemed to be in the interest of the subject's health. Thus, preventive interrogational truth serum should be prohibited in order to uphold the mental integrity, free will, and autonomy of every individual.<sup>431</sup>

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426. *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (holding the First and Fourteenth Amendments prohibit states from criminalizing the mere private possession of obscene material).

427. Kreimer, *supra* note 213, at 299 (noting the effects of torture contradict American conceptions of liberty and due process).

428. *See id.* at 299 n.75 (describing the degree to which the administrator of medicine on a patient against her will must be sure that all parties involved will benefit).

429. *See* 539 U.S. 166 (2003) (establishing that the government can administer antipsychotic drugs without consent in order to render mentally ill defendant competent to face serious criminal charges where treatment is medically appropriate, necessary and unlikely to significantly undermine a fair trial).

430. *See id.* at 180-81 (establishing a rule for the future that when the state involuntarily administers antipsychotic drugs, it must be done only as a last resort and only after meeting a high burden of necessity under the circumstances including the best medical interests of the subject).

431. *See* Kreimer, *supra* note 213, at 298 (affirming the idea that individual autonomy is of the utmost importance).

Second, there is the problem of the slippery slope—after terrorists, who will be next? According to Nigel S. Rodley, U.N. Special Rapporteur for Torture, “once torture is permitted on grounds of necessity, nothing can stop it from being used on grounds of expediency.”<sup>432</sup> The use of preventive interrogational truth serum would inevitably creep into other areas.<sup>433</sup> After suspected terrorists, will the government torture all suspected narcotics traffickers, dealers, or users in the name of the war on drugs? Will the government torture all suspected criminals, juvenile delinquents, or ex-cons in the wholesale war on crime? Will the state subject all who want to join the military to truth serum in order to weed out “practicing” homosexuals, bisexuals, or even those with homosexual “tendencies”?

These possibilities are not as far down the slippery slope as they might appear at first glance. In testimony before the U.S. Senate, Attorney General John Ashcroft implied that anyone who disagreed with the Bush Administration’s anti-terrorism tactics was supporting the enemy, i.e., committing treason.<sup>434</sup> His comments addressed “fear-mongers”<sup>435</sup> who expressed concern that these tactics erode constitutional rights and liberties: “To those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to . . . enemies and pause to . . . friends.”<sup>436</sup> A Bush appointee to the U.S. Commission on Civil Rights indicated that another terrorist attack would lead to

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432. RODLEY, *supra* note 66, at 80 (accentuating how torture will become the norm once it is can be established that it is an effective tool to obtain information).

433. *See id.* at 80-81 (showing how the incorporation of justifiability of torture would cut against every formulation of the prohibition against torture).

434. *See* Dan Eggen, *Ashcroft Defends Anti-Terrorism Steps*, WASH. POST, Dec. 7, 2001, at A1 (reporting on the extent to which officials in the Bush Administration went in order to defend their anti-terrorism policies).

435. *See id.* (expressing Ashcroft’s outrage at unidentified critics for “exaggerating or mischaracterizing administration policies,” and contention that the Justice Department “has sought to prevent terrorism with reason, careful balance and excruciating attention to detail”).

436. *See id.* (responding to critiques from the Judiciary Committee on the Bush Administration’s handling of the war on terror).

internment camps for anyone of the same ethnicity as the terrorists,<sup>437</sup> much like the reprehensible Japanese American internment camps of World War II. He later clarified that while the Bush Administration was not considering internment camps, another terrorist attack would give rise to a groundswell of public opinion to banish civil rights by those who fear for their safety.<sup>438</sup>

Branding critics as traitors and raising the specter of internment camps is only a step, not a leap, from interrogating suspected traitors or criminals with the aid of truth serum. As the use of “moderate physical pressure”<sup>439</sup> in Israel<sup>440</sup> has shown, it is impossible to limit the use of torture once it is condoned on even the smallest scale. In Israel, interrogation tactics initially limited to subjects thought to have information about imminent attacks were eventually used against virtually every Palestinian security detainee, numbering in the thousands.<sup>441</sup> Like the fictional futurist world where “thought

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437. See Robert E. Pierre, *Fear and Anxiety Permeate Arab Enclave Near Detroit*, WASH. POST, Aug. 4, 2002, at A3 (predicting the extreme measures that the administration will be forced to resort to in the event of another major terrorist attack).

438. *Id.*

439. Supreme Court of Israel, Judgment Concerning the Legality of the General Security Service’s Interrogation Methods of Sept. 6, 1999, Motion for an Order *Nisi*, H.C. 5100/94, 53(4) P.D. 817, 38 I.L.M. 1471 (1999) (holding “moderate physical pressure” such as shaking, painful positions and sleep deprivation could no longer be used by the General Security Service even to thwart crimes against state security and that there was no necessity defense absent future legislation).

440. See, e.g., MALCOLM D. EVANS & ROD MORGAN, PREVENTING TORTURE: A STUDY OF THE EUROPEAN CONVENTION FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 26-61 (1998) (covering Algeria, Northern Ireland, and Israel). Israel is not, of course, the only state to use torture; nor is it the worst offender. It is one of a few states considered a modern democracy that have admitted to the use of practices that might constitute torture. Great Britain’s actions in Northern Ireland and France’s actions in Algeria are two other often-cited examples of democracies using questionable tactics to suppress terrorist groups. *Id.* Many other authoritarian states, by contrast, use similar or more extreme methods—often indiscriminately—but do not admit such use. See, e.g., BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, U.S. STATE DEP’T, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES – 2003 (2004), at <http://www.state.gov/g/drl/rls/hrrpt/2004/> (last visited Apr. 2, 2005) (annual reports criticizing human rights abuses in other countries, including torture).

441. See HUMAN RIGHTS WATCH, THE LEGAL PROHIBITION AGAINST TORTURE (2004) (discussing how narrowly-authorized Israeli tactics spread to routine interrogations), at <http://www.hrw.org/press/2001/11/TortureQandA.htm> (last

police” arrest those scientifically determined to be prone to violence, the expansion of potential truth serum subjects negates the potential for change, improvement, and progress that is central to the American dream.<sup>442</sup>

Third, the use of torture by the United States lowers our standing in the world and makes it far more difficult to obtain the kind of international cooperation necessary to root out terrorists,<sup>443</sup> as illustrated by the 2004 Abu Ghraib scandal. Deputy Secretary of Defense Paul Wolfowitz, a strong proponent of the U.S.-led invasion of Iraq, conceded that the Abu Ghraib scandal has significantly harmed U.S. diplomacy, telling the House Armed Services Committee, “The damage is enormous.”<sup>444</sup> Similarly, Attorney General Alberto R. Gonzales, former White House Counsel, admitted that the abuse at Abu Ghraib had “hurt the United States badly in its standing in the world.”<sup>445</sup> By using interrogational truth serum on those we consider terrorists, the United States would be giving the green light to other countries to use similar means against those they consider terrorists.<sup>446</sup> Even if the United States was not concerned about the treatment of other nationals by their own states,

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visited Apr. 2, 2005).

442. See Marie Ewald, *Can the Thought Police be Far Behind?*, CHRISTIAN SCI. MONITOR, May 15, 2003 (explaining the origin of the reference in popular culture to thought police, and its impact on how the world thinks about government control of the people), available at <http://www.csmonitor.com/2003/0515/p14s02-stgn.html> (last visited Apr. 2, 2005).

443. See Lichtblau, *supra* note 16 (quoting Republican Senator Lindsey Graham’s allegation that the Bush Administration’s legal position on torture “dramatically undermined the campaign against terrorism by yielding the moral highground”).

444. Colum Lynch, *U.S. Alters Its Plan for Exemption At Court*, WASH. POST, June 23, 2004, at A13 (outlining how the U.S. dropped its plan for open-ended exemptions for U.S. peacekeepers from the International Criminal Court, due to worldwide outrage over the photos of abusive tactics used by U.S. personnel at Abu Ghraib).

445. Lichtblau, *supra* note 16 (stating, nonetheless, CIA officers and other nonmilitary personnel fall outside the bounds of a 2002 directive issued by President Bush pledging humane treatment of prisoners in American custody and that a Congressional ban on cruel, unusual and inhumane treatment has “a limited reach” and does not apply in all cases to “aliens overseas”).

446. See Lynch, *supra* note 444 (predicting the consequences of such careless and detrimental policies by the United States).

American self-interest promotes a ban on truth serum.<sup>447</sup> In many countries, the terrorist label would include U.S. citizens.

In addition, Americans might well be targeted for reciprocal torture if the United States uses truth serum on citizens of other countries. A similar consequence is seen in the aftermath of the Abu Ghraib prison scandal.<sup>448</sup> In June 2004, Islamist militants abducted Paul M. Johnson, an American working in Saudi Arabia, in order to inflict the same torture as that inflicted by U.S. soldiers on Iraqi detainees.<sup>449</sup> His captors subsequently beheaded Johnson in a gruesome video distributed worldwide.<sup>450</sup>

Fourth, various international documents support a ban on truth serum. The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment<sup>451</sup> provides that all detainees “shall be treated in a humane manner with respect for the inherent dignity of the human person.”<sup>452</sup> Furthermore, “No detained person while being interrogated shall be subject to violence, threats or *methods of interrogation which impair his capacity of decision or his judgment.*”<sup>453</sup> The necessary participation of medical

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447. See Odeshoo, *supra* note 27, at 255 (suggesting United States may opt to ban truth serum in order to quiet international community’s concerns about U.S. tactics in the war on terror).

448. See Craig Whitlock, *Islamic Militants Behead American in Saudi Arabia*, WASH. POST, June 20, 2004, at A6 (illustrating the harsh ramifications that can be inflicted on Americans in response to the continued use of torture on prisoners from around the globe).

449. See Donna Abu-Nasr, *Captors Threaten to Abuse Kidnapped American Man*, SAN DIEGO UNION-TRIB., June 14, 2004, at A3 (noting how photos of torture and other abuse at Abu Ghraib show a female U.S. soldier dragging a naked prisoner by a leash, a naked prisoner being menaced with dogs, and forced simulations of sex acts among prisoners, all while allegations of murder and rape are being investigated at various U.S. detention facilities in Iraq, Afghanistan, and Guantanamo Bay, Cuba).

450. See Whitlock, *supra* note 448 (describing how Johnson’s decapitated remains were found on the outskirts of Riyadh, prior to those responsible claiming that he got his fair treatment).

451. See G.A. Res. 43/173, Annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988) (pertaining to all persons deprived of personal liberty).

452. *Id.* at Principle 1.

453. *Id.* at Principle 21 (emphasis added) (pertaining specifically to pre-conviction detainees; prohibiting also acts that take advantage of persons to compel self-incrimination, whether pre- or post-conviction).

professionals in developing or safely administering a drug like truth serum implicates the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>454</sup>

It is a gross contravention of medical ethics, as well as an offence under applicable international instruments, for health personnel, particularly physicians, to engage, actively or passively, in acts which constitute participation in, complicity in, incitement to or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment.<sup>455</sup>

Moreover, "It is a contravention of medical ethics for health personnel, particularly physicians: (a) to apply their knowledge and skills in order to assist in the interrogation of prisoners and detainees in a manner that may adversely affect the physical or mental health or condition of such prisoners or detainees . . . ."<sup>456</sup>

In addition, the Inter-American Convention to Prevent and Punish Torture ("Inter-American Torture Convention") provides a definition of torture that explicitly prohibits the use of truth serum.<sup>457</sup> The Inter-

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454. See G.A. Res. 37/194, Annex, 37 U.N. GAOR Supp. (No. 51) at 211, U.N. Doc. A/37/51 (1982) (illustrating the extent to which the world community bans torture by the inclusion of a provision against torture in the medical ethics of physicians).

455. *Id.* at Principle 2.

456. *Id.* at Principle 4.

457. See RODLEY, *supra* note 66, at Annex 2b (placing the use of truth serum within the definition of torture). Although the U.S. has not signed or ratified this treaty, as a member of the Organization of American States it is bound by the American Declaration of the Rights and Duties of Man, O.A.S. res. XXX, adopted by the Ninth International Conference of American States, Bogota (1984). See Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, Inter-Am. C.H.R. (Ser. A) No. 10, ¶¶ 45, 47 (1989) (finding that the American Declaration is a source of binding international obligations for OAS members), available at [http://www.corteidh.or.cr/serieapdf\\_ing/seriea\\_10\\_ing.pdf](http://www.corteidh.or.cr/serieapdf_ing/seriea_10_ing.pdf) (last visited Apr. 18, 2005); see also Case 9647, Inter-Am. C.H.R. 147, 159 OEA/Ser. L?V?11.71, doc. 9 rev. 1 (1987) (Roach & Pinkerton) (reviewing petition against United States despite its protests that the American Declaration is a nonbinding document). The Inter-American Torture Convention arguably provides guidance for the interpretation of American Declaration rights to security of person (Article 1) and humane treatment when in custody (Article XXV) and thus applies to the United

American Torture Convention, drafted at the same time as CAT, was adopted on December 9, 1985.<sup>458</sup> It provides in pertinent part: “Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.”<sup>459</sup> This definition targets not only anxiety-inducing sensory deprivation techniques, but also mind control via chemicals.<sup>460</sup>

Fifth, coupled with the conclusion regarding the threat of truth serum, the exemption for the use of truth serum is illogical. It simply makes no sense to consider the threat of truth serum to be torture while allowing its actual use. This creates the perverse incentive to go straight to the use of truth serum. In order to avoid committing torture, an interrogator would carefully refrain from any mention of truth serum in order to avoid any indication of a threat; perhaps he would even promise that it would not be used, up until the moment the mysterious substance being injected into the subject takes effect. This cannot be a correct reading of CAT.

Finally, excluding interrogational truth serum is discriminatory, or at least gives the appearance of being discriminatory. A definition of torture that does not cover an interrogation technique that causes pain *and simultaneously* fulfills the purpose (e.g., obtaining information) creates a loophole for only the most technologically advanced countries. Those states with the most resources and technology can develop advanced drugs to elicit information against the will of detainees—and use truth serum without the stigma of committing torture. In other words, advanced states will get away with profoundly disturbing acts by virtue of technical prowess, while less developed states are condemned for committing torture. Of course, ideally, the less technologically advanced states would stop torturous interrogations; but this is even less likely to occur when wealthy

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States.

458. See RODLEY, *supra* note 66, at 51 (providing a broader definition of torture than CAT’s definition).

459. *Id.* at 51 (quoting Article 2).

460. See *id.* at 100 (attacking the notion that torture is merely a physical and pain-driven method of gaining information).

nations are flaunting the nonprohibited use of truth serum.<sup>461</sup> The loophole for the ultra-advanced truth serum “play[s] into the hands of those governments of developing countries that consider the issue of torture to be a discriminatory one. That is, that accusations of torture made by developed countries which have devised more refined techniques to achieve the same purposes are hypocritically leveled at countries less technologically advanced.”<sup>462</sup>

## CONCLUSION

Thus, we are left with option number two—develop a new understanding of torture. Torture should encompass the profound mental harm caused by truth serum whether the harm precedes or exists simultaneously with the purpose of coercing divulgence of information.<sup>463</sup> Even when faced with the challenges of combating global terrorist groups, democratic states cannot resort to torture. “This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand.”<sup>464</sup> Particularly at a time when the United States is suffering at home and abroad from the torture scandals of Abu Ghraib and elsewhere, it is critical that the United States take a firm and unequivocal stand against the forced administration of truth serum.

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461. Cf. RODLEY, *supra* note 66, at 93 n.94 (citing press account of Shah of Iran’s statement that Iran should adopt the same methods of torture as Europeans).

462. *Id.* at 93.

463. See ASS’N OF THE BAR OF THE CITY OF NEW YORK, COMM. ON INT’L HUMAN RIGHTS, COMM. ON MILITARY AFFAIRS AND JUSTICE: HUMAN RIGHTS STANDARDS APPLICABLE TO THE UNITED STATES’ INTERROGATION OF DETAINEES 71 (referring to State Department report on Burma criticizing it for committing “torture” or “other abuse” by using “interrogation techniques designed to intimidate or disorient.”), at <http://www.abcny.org/homepg.html> (last visited Apr. 2, 2005). The same standard ought to apply to U.S. interrogation techniques and therefore prohibit tactics designed to disorient, such as truth serum. *Id.*

464. Supreme Court of Israel, Judgment Concerning the Legality of the General Security Service’s Interrogation Methods of Sept. 6, 1999, Motion for an Order *Nisi*, H.C. 5100/94, 53(4) P.D. 817, 38 I.L.M. 1471 (1999) (finding “moderate physical pressure” on security detainees unauthorized and rejecting necessity defense).