Coercion's Common Threads: Addressing Vagueness in the Federal Criminal Prohibitions on Torture by Looking to State Domestic Violence Laws

Sarah H. St. Vincent
University of Michigan Law School

Follow this and additional works at: http://repository.law.umich.edu/mlr

Part of the Criminal Law Commons, Human Rights Law Commons, Legislation Commons, and the State and Local Government Law Commons

Recommended Citation
Available at: http://repository.law.umich.edu/mlr/vol109/iss5/4

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
NOTE

COERCION’S COMMON THREADS: ADDRESSING VAGUENESS IN THE FEDERAL CRIMINAL PROHIBITIONS ON TORTURE BY LOOKING TO STATE DOMESTIC VIOLENCE LAWS

Sarah H. St. Vincent*

Under international law, the United States is obligated to criminalize acts of torture and cruel, inhuman, or degrading treatment. However, the federal criminal torture laws employ several terms whose meanings are so indeterminate that they inhibit the statutes’ effectiveness and fail to provide adequate guidance regarding precisely which forms of mistreatment may result in prosecution. These ambiguous terms have given rise to serious and prolonged controversies within the executive branch regarding what torture is—controversies that confirm, and may further compound, the uncertainty of liability under the laws in question.

In order to solve this problem of vagueness and provide definitive guidance to persons in control of detainees, the torture statutes should be revised to prohibit specific forms of mistreatment. This task may be accomplished in a straightforward and logically consistent manner by observing the commonalities between torture and domestic violence, a form of abuse American states have sought to eliminate by outlawing specific types of conduct. Torture and domestic violence constitute two manifestations of the same underlying behavioral phenomenon: the use of isolation, pain, and humiliation to create a sense of fear and helplessness in the victim, thereby increasing his or her willingness to comply with the abusive party’s demands. After establishing this fundamental similarity, this Note proposes a prototype for a revised federal torture statute based upon state domestic violence laws.

* J.D. Candidate, May 2011. The author is profoundly grateful to her note editors, Sada Jacobson Bäby and Matt Miller; to the other members of the notes office of the Michigan Law Review who reviewed successive drafts; to Professor Julian Davis Mortenson for advising this research and writing project; and to Emily Berman for her comments on an early version. Without their insights and tireless assistance, this Note would never have been published.
INTRODUCTION

What is torture?

In 2004, in the midst of a heated internal debate regarding the legality of the use of particular techniques during the interrogations of counterterrorism detainees, the Justice Department's Office of Legal Counsel unequivocally declared that "[t]orture is abhorrent both to American law and values and to international norms." Congress has long adhered to the same principle, consenting to the ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT")—a treaty that obligates state parties to criminalize all acts of torture under their domestic

laws—and adopting several statutes banning torture and providing for lengthy terms of imprisonment for persons convicted of this offense. Yet, the question of which specific forms of detainee treatment should be regarded as criminally punishable acts of torture or cruel or inhuman treatment remains the subject of both legal and popular controversy in the United States. This lack of clarity is only compounded by the federal criminal laws that purport to ban the practice of torture, none of which includes an explicit list of prohibited forms of detainee treatment.

The legislative choice not to enumerate specific banned interrogation techniques or detention conditions is understandable: would-be torturers are creative, and the concern that they would inevitably be able to locate and exploit loopholes in any list of prohibited forms of treatment is a legitimate one. Notably, CAT and the International Covenant on Civil and Political Rights ("ICCPR") adopt a similar approach, imposing blanket prohibitions on torture and cruel, inhuman, or degrading treatment without listing specific prohibited acts. In its official commentary to the ICCPR, the Human Rights Committee has gone so far as expressly to reject the proposal that it provide a list of acts that constitute torture per se, stating tersely that it does not believe such an action is necessary. A majority of scholars who have addressed the issue of torture under American domestic law appear to concur, restricting themselves to analyses of whether particular techniques qualify as torture under the laws as currently drafted, rather than suggesting

---

2. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2(1), Apr. 18, 1988, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85 [hereinafter CAT].


5. See supra note 3.


that the laws themselves should be revised to clarify which specific forms of detainee treatment are illegal and which are not.\textsuperscript{9}

However, as the Justice Department has explicitly acknowledged\textsuperscript{10} the federal provisions criminalizing torture currently employ several ambiguous terms to define the elements of the crime. At minimum, this vagueness inhibits the laws’ ability to do what they were intended to do: effectively prevent torture, ensure that interrogations and detentions comply with the Constitution and treaty law, and—most importantly for the purposes of this analysis—provide adequate guidance to persons in control of detainees regarding which forms of mistreatment may lead to prosecution.\textsuperscript{11} It is also possible that the statutes’ facial ambiguity violates defendants’ rights under the Due Process Clause of the Fifth Amendment, which requires the invalidation of a criminal statute if it “fails to provide a person of ordinary intelligence fair notice of what is prohibited.”\textsuperscript{12}

Evidence that the indeterminacy of key terms has undermined the efficacy of the criminal torture statutes may be seen in the prolonged and ongoing disputes within the government entities most responsible for complying with and enforcing them.\textsuperscript{13} These legal controversies have involved such fundamental questions as, what constitutes torture? How should the ambiguous or unsettled terms used to describe the mens rea, actus reus, and result requirements in the criminal torture statutes be construed? Which forms of detainee treatment are permissible under the laws, and which are banned? Disputes regarding the answers to these questions have been con-

\begin{itemize}
\item \textsuperscript{9} See, e.g., Daniel Kanstroom, On “Waterboarding”: Legal Interpretation and the Continuing Struggle for Human Rights, 32 B.C. INT’L & COMP. L. REV. 203, 216 (2009) (“We have clear enough [torture] definitions for many purposes, including to conclude that waterboarding . . . is . . . clearly illegal.”); Peter Margulies, True Believers at Law: National Security Agendas, the Regulation of Lawyers, and the Separation of Powers, 68 Md. L. Rev. 1, 36-47 (2008) (alleging that the Justice Department’s finding in 2002 that certain coercive interrogation techniques are legal under the torture statutes was not consistent with international law, without suggesting that the statutes should be amended).
\item \textsuperscript{10} See infra note 75 and accompanying text.
\item \textsuperscript{11} See, e.g., H.R. REP. NO. 108-767, at § 1091(b)(1), (3) (2004) (Conf. Rep.) (stating, in response to the disclosure of abuses at the Abu Ghraib detention facility in Iraq, that “[i]t is the policy of the United States to . . . ensure that no detainee shall be subject to torture or cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of the United States” and to “ensure that all personnel of the United States Government understand their obligations . . . to comply with the legal prohibitions against torture, cruel, inhuman, or degrading treatment of detainees in the custody of the United States”); S. REP. NO. 103-107, at § 706 (1994) (stating that the Torture Act was adopted in order to implement CAT and “establish[] appropriate penalties [for torture] taking into account the grave nature of the offense”); see also Padilla v. Yoo, 633 F. Supp. 2d 1005 (N.D. Cal. 2009) (denying in part the defendant’s motion to dismiss, where the plaintiff—a former counterterrorism detainee—alleged that his subjection to interrogation methods approved by the Justice Department as legal under the criminal torture statutes violated his constitutional rights).
\item \textsuperscript{12} United States v. Williams, 553 U.S. 285, 304 (2008). \textit{Williams} was a Fourteenth Amendment case, but \textit{Holder v. Humanitarian Law Project}, 130 S. Ct. 2705, 2719–20 (2010), quotes and applies the \textit{Williams} standard in the context of a Fifth Amendment due process claim, suggesting that the same standard is used to evaluate vagueness under both the Fourteenth and Fifth Amendments.
\item \textsuperscript{13} See infra Section I.B.
\end{itemize}
Coercion's Common Threads

continuing within the executive branch for three decades, and seem likely to prove intractable unless the texts of the laws are revised.  

Recently, a few legal commentators have begun to suggest that the laws should be amended to include more explicit parameters regarding permissible and prohibited types of detainee treatment.  

This Note accepts their argument, and further suggests that the best approach to revising the torture statutes and addressing the problem of textual vagueness is to make changes based on state domestic violence laws. As demonstrated below, both coercive interrogations and domestic violence rely upon the same basic behavioral strategy: the use of isolation, physical pain, and psychological degradation to create a sense of helplessness and dependence in the victim, thereby obtaining his or her compliance with the interrogator’s or abusive partner’s demands. The two forms of abuse are virtually identical in this key respect, and while clear differences remain where the particular nature of the relationship between the perpetrator and victim is concerned, these differences do not affect the analysis.

It is therefore possible to look to state domestic violence laws in order to derive a list of specific acts that produce a degree of pain or suffering the American population finds to be morally intolerable when inflicted for the purpose of obtaining compliance. With some modifications, this list can then be incorporated into the statutes that govern detainee treatment. This framework offers a logically consistent solution to the problem of defining and outlawing torture in a manner that is unambiguous and comprehensive, and that provides adequate notice to persons in control of detainees regarding which forms of treatment may not be inflicted. It is also consistent with a gradual move within the legislative and executive branches toward specifying which interrogation methods are permitted and which are off-limits.

The analysis in this Note focuses exclusively on persons in control of detainees and their ability to forecast with certainty which types of treatment may lead to criminal punishment for torture or cruel or inhuman treatment. It does not address any substantive rights to freedom from torture

14. See infra Section I.B (discussing these controversies concerning statutory construction and application).


16. See infra Part II.

17. See infra Section II.B.

that a detainee may be able to assert under international or domestic law in a
civil case, largely because the extent to which detainees held by the United
States in various locations and under various statutory schemes enjoy consti-
tutional or other protections remains unsettled.\textsuperscript{19} It is also solely concerned
with prospective liability, rather than the question of whether interrogation
methods the United States has authorized and employed in the past should
have been regarded as criminal acts of torture under the laws as they existed
at the time.

Part I demonstrates that the federal laws criminalizing torture are so fa-
cially indeterminate that they have given rise to serious and intractable legal
controversies regarding which particular forms of detainee treatment they
prohibit. Part II describes the commonalities between coercive interroga-
tions and domestic violence, establishing that the two types of abuse are
simply context-specific manifestations of the same behavioral phenomenon.
On the basis of these observations, Part III draws upon state domestic vio-
lence laws in creating a revised federal torture statute that prohibits specific
forms of mistreatment. While this prototype statute would require additional
refinement prior to adoption, it nevertheless provides a practical and consis-
tent framework for solving the problem of vagueness described in Part I.

\section*{I. Vague and Ambiguous Language in the Federal Torture
Statutes Has Created Intractable Legal Controversies}

Taken together, the provisions of federal law criminalizing torture demon-
strate an apparently sincere desire on the part of Congress to eliminate
this type of mistreatment.\textsuperscript{20} Similarly, courts\textsuperscript{21} and the executive branch\textsuperscript{22}
have recognized for decades that torture committed by persons acting under
color of law violates the law of nations; when submitting CAT to the Senate
for ratification, the Reagan Administration even suggested that the crime
should be subject to a form of universal jurisdiction.\textsuperscript{23} Plainly, within the

\begin{itemize}
\item \textsuperscript{19} See, e.g., Al Maqaleh v. Gates, 605 F.3d 84 (D.C. Cir. 2010) (holding that the protections
of the Suspension Clause do not extend to alien detainees held under the authority of the executive
branch at Bagram Airfield in Afghanistan); Al-Zahrani v. Rumsfeld, 684 F. Supp. 2d 103, 108–09
(D.D.C. 2010) (concluding that special factors preclude alien detainees from bringing actions
403 U.S. 388 (1971) for alleged mistreatment in violation of the Fifth and Eighth Amendments,
without reaching the issue of whether Congress may constitutionally strip the federal courts of ju-
risdiction over all claims by "enemy combatant[s]" held at Guantanamo related to the conditions of
their confinement).
\item \textsuperscript{20} See supra notes 3, 11, 18.
\item \textsuperscript{21} E.g., Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980); Siderman de Blake \textit{v.}
Republic of Argentina, 965 F.2d 699, 716 (9th Cir. 1992).
\item \textsuperscript{22} Memorandum for the United States as Amicus Curiae at 3, 12–20, Filartiga, 630 F.2d
876 (No. 79-6090) [hereinafter Memo for the U.S.].
\item \textsuperscript{23} Ronald Reagan, \textit{Message to the Senate, Dep't St. Bull.}, August 1988, at 79, 79. The
precise meaning of "universal jurisdiction" remains unsettled in international law, although it is
generally taken to mean "jurisdiction to prescribe in the absence of any other accepted jurisdictional
nexus," such as territory or nationality, "at the time of the relevant conduct." Roger O'Keefe, \textit{Uni-
versal Jurisdiction: Clarifying the Basic Concept}, 2 J. Int'l Crim. Just. 735, 744–46 (2004). For
\end{itemize}
Coercion’s Common Threads

three branches of government, there is a consensus that torture is a heinous offense that violates fundamental principles of justice.24

In this spirit, in the early 1990s the United States became a party to CAT and the ICCPR, both of which place absolute and non-derogable bans on torture and cruel, inhuman, or degrading treatment.25 The ICCPR provides simply that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment” and that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”26 CAT includes a more complete definition of torture, providing that the term means:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person 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.27

Despite the sweeping character of these prohibitions, the United States has entered reservations to the two treaties that make it clear that the country considers itself to be bound only by the provisions concerning torture and cruel, inhuman, or degrading treatment to the extent that they coincide with domestic legal understandings of those terms.28 Since courts have uniformly

the purposes of CAT, the Reagan Administration understood it to mean that “[e]ach State Party is required either to prosecute torturers who are found in its territory or to extradite them to other countries for prosecution.” Reagan, supra.


25. CAT, supra note 2, at arts. 1, 2(2), 16; ICCPR, supra note 7, at arts. 4, 7. Under both international and American law, there is a distinction between torture and lesser acts of mistreatment that do not rise to the level of torture but nevertheless are severe enough to be banned. See, e.g., 18 U.S.C. § 2441(d)(1)(B) (2006); CAT, supra note 2; ICCPR, supra note 7; Al-Quraishi v. Nakhla, No. 08-1696, 2010 WL 3001986, at *41-45 (D. Md. July 29, 2010). However, as acknowledged by the Committee against Torture, “[i]n practice, the definitional threshold between ill-treatment and torture is often not clear.” Committee against Torture, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: General Comment No. 2: Implementation of article 2 by States parties, ¶ 3, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008). Article 7 of the ICCPR, supra note 7, supports the contention that both torture and cruel, inhuman, or degrading treatment are banned on equal terms, accord PARRY, supra note 15, at 37–38. The alleged legal distinctions between the two forms of mistreatment are therefore not directly relevant to the analysis presented in this Note, although they might serve as grounds for modification of the prototype statute proposed infra Part III.

26. ICCPR, supra note 7, at arts. 7, 10(1).

27. CAT, supra note 2, at art. 1(1) (excluding from the definition “pain or suffering arising only from, inherent in or incidental to lawful sanctions”).

28. 138 CONG. REC. 8070-71 (1992) (enumerating the United States’ reservations, declarations, and understandings with regard to the ICCPR); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Declaration and Reservations: United States, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/doc/Publication/MTDSG/Volume%
indicated that CAT’s provisions are not self-executing, and since Congress has never passed legislation implementing the ICCPR, prosecutors and defendants must necessarily look to U.S. law when seeking to determine whether a criminal act of torture has occurred.

However, the statutory scheme regulating the treatment of detainees by American nationals or in American custody is complex, with several overlapping criminal laws purporting to ban the practices of torture and cruel or inhuman treatment. As discussed below, none of these laws provide a clear and comprehensive definition of the crime of torture, with the arguable exception of the Detainee Treatment Act of 2005 (“DTA”). This legislative failure to impose universal and unambiguous limitations on permissible forms of detainee treatment has given rise to several serious controversies, particularly within the executive branch, concerning the proper interpretation and application of the laws. These unresolved disputes, in turn, create a danger of legal uncertainty for persons who exercise control over detainees, as well as a danger that acts of severe mistreatment will not be prevented or punished. The courts appear unlikely to resolve this uncertainty in the foreseeable future, meaning that the statutes’ facial vagueness—in addition to

See infra Section I.A.

The DTA bars the use of interrogation practices not authorized by the Army Field Manual on human intelligence collection, while creating a good-faith exception to liability under the criminal torture statutes for those who act in reasonable reliance upon an official finding that a form of detainee treatment does not constitute torture. DTA, supra note 18, at §§ 1402, 1404. The current Army Field Manual supersedes the version referred to in the DTA. DEP’T OF THE ARMY, FM 2-22.3: HUMAN INTELLIGENCE COLLECTOR OPERATIONS vi (2006) [hereinafter ARMY FIELD MANUAL].

The criminal torture laws applicable to civilians appear to have resulted in only one conviction since the Torture Act was passed in 1994, suggesting that the courts are not likely to address the meaning of the statutes’ terms comprehensively in the foreseeable future. See United States v. Belfast, 611 F.3d 783, 793, 799 (11th Cir. 2010) (confirming that the defendant, indicted in 2007, was the first person to be prosecuted under the Torture Act). Meanwhile, most civil cases concerning detainee abuses allegedly committed as part of American counterterrorism initiatives have almost uniformly been dismissed on unrelated grounds. See, e.g., Arar v. Ashcroft, 585 F.3d 559 (2d Cir. 2009) (dismissing suit on grounds that special factors precluded action against individual officials under Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971)), cert. denied, 130 S. Ct. 3409 (2010); Rasul v. Myers, 563 F.3d 527 (D.C. Cir. 2009) (dismissing suit on the basis of Bivens factors), cert. denied, 130 S. Ct. 1013 (2009); Saleh v. Titan Corp., 580 F.3d 1 (D.C. Cir. 2009) (dismissing suit on grounds that the court lacked jurisdiction under Alien Tort Statute, 28 U.S.C. § 1350 (2006)); El Masri v. United States, 479 F.3d 296 (4th Cir.
being potentially unconstitutional under the Due Process Clause of the Fifth Amendment—is likely to continue to give rise to heated controversy unless Congress substantially revises the laws’ provisions.

The texts of the criminal torture statutes are set forth in Section I.A below, with particular attention to terms that are not adequately defined or that otherwise make it difficult to discern whether a given form of detainee treatment is prohibited. Section I.B then describes the ongoing legal controversies that have arisen from the legislature’s failure to adopt more specific definitions of torture and cruel or inhuman treatment. These controversies provide additional evidence that the statutes are not sufficiently clear to enable persons in control of detainees to ascertain with confidence which types of treatment may lead to the lengthy terms of imprisonment or capital punishment that result from a torture conviction.

A. The Terms Used to Define the Elements of the Crime of Torture Are Vague or Ambiguous

1. The War Crimes Act and the Torture Act

The War Crimes Act of 1996 was intended to criminalize grave breaches of Common Article 3 of the Geneva Conventions under U.S. domestic law, and purports to ban acts of torture committed by or upon U.S. nationals or members of the U.S. armed forces during non-international armed conflicts.


34. See City of Chicago v. Morales, 527 U.S. 41, 56 (1999) (stating that the failure “to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits” is sufficient to render a criminal law impermissibly vague under the Due Process Clause of the Fifth Amendment); see also Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) (“No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.”).

35. Under the War Crimes Act, a conviction for torture will result in a fine or imprisonment for life or a term of years, or—if the victim dies as a result of the criminal act—the death penalty. 18 U.S.C. § 2441(a) (2006). Under the Torture Act, a conviction for torture will result in a fine or imprisonment for up to twenty years, or—if the victim dies—imprisonment for life or the death penalty. Id. § 2340(a).

Liability may result regardless of whether the act in question was committed within or outside the United States, so long as it took place "in the context of and in association with" a non-international armed conflict—a category that includes the hostilities between the United States and Al Qaeda.

Under the act, "torture" is defined as:

The act of a person who commits, or conspires or attempts to commit, an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind.

The law also prohibits "[c]ruel or inhuman treatment," defined as "an act intended to inflict severe or serious physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions), including serious physical abuse, upon another within [the defendant's] custody or control." "Severe mental pain or suffering," in turn, is defined by reference to the Torture Act (discussed below), which provides that the term means:

[P]rolonged mental harm caused by or resulting from—

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality . . . .

38. Id. § 2441(c)(3).
41. Id. § 2441(d)(1)(B). The War Crimes Act criminalizes rape, sexual assault or abuse, mutilation, maiming, and serious bodily injury in separate provisions. Id. § 2441(d)(1)(E)–(H). "[S]erious bodily injury" is defined as bodily injury involving "a substantial risk of death," "extreme physical pain," "protracted and obvious disfigurement," or the "protracted loss or impairment of the function of a bodily member, organ, or mental faculty." Id. § 2441(d)(2)(B) (adopting the definition of serious bodily injury used in 18 U.S.C. § 113(b)(2), which itself adopts the definition used in 18 U.S.C. § 1365(b)(3)).
42. Id. § 2340(2). The meaning of "other procedures calculated to disrupt profoundly the senses or the personality" remains disputed. See Physicians for Human Rights, Break Them Down: Systematic Use of Psychological Torture by US Forces 104 (2005), available at http://physiciansforhumanrights.org/library/report-2005-may.html.
The list of acts found in this definition of mental pain or suffering appears to be exclusive, such that a defendant who specifically intended to inflict psychological distress through unlisted acts such as sexual assault or isolation, no matter how debasing or prolonged, would not be liable for torture. Meanwhile, the term “severe physical . . . pain or suffering” remains undefined, despite its critical importance. Notably, for the purposes of liability for cruel or inhuman treatment, the law defines “serious physical pain or suffering” as bodily injury involving, inter alia, “extreme physical pain,” “a substantial risk of death,” or the “significant loss or impairment” of a limb or organ. Given that “serious” is a lesser standard than “severe” under the War Crimes Act, it is difficult to imagine what degree of pain would be regarded as sufficiently agonizing for liability for torture to result under this legislation; the text of the law leaves the issue unresolved.

The definition of torture found in the Torture Act of 1994, whose criminal provisions are applicable to all American nationals acting under color of law outside the United States (regardless of whether any form of armed conflict exists), is substantially similar to that found in the War Crimes Act, retaining the same terminology with regard to physical and mental pain or suffering as well as the specific intent requirement. “[S]evere mental pain or suffering” is defined as described above, while the meaning of “severe physical . . . pain or suffering,” as under the War Crimes Act, is not specified in the text. Similarly, the Torture Act, like the War Crimes Act, provides no explanation of the mens rea standard of specific intent—an omission that, as discussed below, has given rise to extended confusion and controversy.

2. The Detainee Treatment Act

Adopted in the wake of revelations of abuses by U.S. Army personnel at the Abu Ghraib prison facility in Iraq, the DTA provides that “[n]o person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility” shall be subject to any form of treatment not expressly authorized in the Army Field Manual on Human Intelligence Collector Operations (“Army Field Manual”). At the
same time, it provides that in any criminal prosecution of a U.S. official, agent, or member of the armed forces for abuses committed during counter-terrorism interrogations, "it shall be a defense" that the acts in question "were officially authorized and determined to be lawful at the time that they were conducted" and that the defendant reasonably lacked awareness that the acts were unlawful. Thus, although the act's provisions are not criminal statutes, the legislation—in combination with the Army Field Manual—essentially specifies some types of detainee treatment that will not result in criminal liability.

Like the War Crimes Act and the Torture Act, the DTA may initially appear to offer substantive guidance to persons in control of detainees, particularly since the current Army Field Manual expressly prohibits a number of forms of coercive treatment. However, the act's reliance on the manual to supply precise limits on detainee treatment remains problematic for several reasons. Most importantly for the purposes of the present analysis, the manual itself expresses uncertainty regarding the legality of the techniques it authorizes, stating that "certain applications of approaches and techniques may approach the line between permissible actions and prohibited actions" and warning that "[i]t may often be difficult to determine where permissible actions end and prohibited actions begin." These equivocal cautionary statements indicate that the manual, standing alone, cannot provide sufficient guidance regarding prospective liability for torture or cruel or inhuman treatment. Additionally, as mentioned above, the manual is issued by the Department of Defense and may be altered unilaterally at any time, meaning that the United States' consideration of particular forms of detainee treatment as lawful or unlawful remains unpredictable and subject to sudden change, potentially inhibiting the foreseeability of criminal prosecution.

regardless of his or her nationality or institutional affiliation, as long as the custody and control requirements are met. However, the scope of the act contains significant gaps, as it does not apply to persons detained in CIA facilities or interrogated by Americans in foreign prisons. Suleman, supra, at 260. An executive order issued in early 2009, Exec. Order No. 13,491, 74 Fed. Reg. 4,893, 4894 (Jan. 22, 2009), fills these gaps, but as a presidential directive, it remains revocable.

49. 42 U.S.C.A. § 2000dd-1(a) (West Supp. 2010). This provision was inserted late in the drafting process in order to avoid a presidential veto. Suleman, supra note 48, at 257–58.

50. These include, inter alia, waterboarding, mock executions, the infliction of physical pain, forced nudity and sexual abuse, electric shock, the induction of "hypothermia or heat injury," and deprivation of "necessary food" or medical care. ARMY FIELD MANUAL, supra note 32, § 5-75. The manual continues to permit a number of forms of detainee treatment that leading civil rights organizations have criticized as abusive. E.g., The Army Field Manual: Sanctioning Cruelty?, AMNESTY INT'L, (Mar. 19, 2009, 2:58 PM), http://www.amnesty.org.au/hrs/comments/20575; see also Close Torture Loopholes in the Army Field Manual, CENTER FOR CONST. RTS., http://ccrjustice.org/get-involved/action/close-torture-loopholes-army-field-manual (last visited Nov. 14, 2010).

51. ARMY FIELD MANUAL, supra note 32, § 5-76.

52. See Suleman, supra note 48, at 261.
B. Prolonged Legal Controversies Confirm and Compound the Vagueness of the Statutes

The facial vagueness of the current definitions of torture under federal law has led to protracted controversies among government bodies regarding what torture is—controversies that not only confirm, but may also exacerbate, the uncertainty of the statutes’ application. An August 2002 memorandum by the Justice Department’s Office of Legal Counsel concerning the meaning of the federal torture laws and their applicability to CIA interrogators—often referred to as the “Bybee Memo,” after Jay Bybee, the assistant attorney general who signed it—may be the best-known example of these struggles to provide definitive guidance regarding the parameters of liability for torture. However, efforts by the executive branch to clarify what exactly constitutes the crime of torture have been proceeding in earnest for more than thirty years, with little progress—a situation that has not been remedied by the passage of the War Crimes Act, the Torture Act, or the DTA.

In an amicus curiae brief filed in support of the appellants in Filartiga v. Pena-Irala in 1979, the Carter Administration expressed support for a broad definition of the crime of torture. The definition it provided was substantially similar to the one later incorporated into CAT, employing a mens rea of general intent and banning any act by which a person acting in an official capacity inflicts severe physical or mental pain or suffering for a prohibited purpose, such as obtaining information or a confession. However, the Reagan Administration adopted a sharply different view when submitting CAT to the Senate for ratification only nine years later, urging the legislators to attach reservations to several of the convention’s key provisions. In particular, the administration suggested that liability for torture should be restricted to “extreme” and “unusually cruel” acts such as “sustained systematic beating, application of electric currents to sensitive parts of the body,” or “tying up or hanging in positions that cause extreme pain.” It also supported the imposition of a highly restrictive mens rea requirement, stating that “in order to constitute torture, an act must be . . . specifically intended to inflict excruciating and agonizing physical or mental pain or suffering.” This specific intent would not be present, the administration

54. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).
55. See Memo for the U.S., supra note 22, at 17–18. The United States sided with the appellants in arguing that torture violates the law of nations and is therefore cognizable under the Alien Tort Statute. Id. at 5, 12–20.
56. Id. at 17–18. The definition was drawn from the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1(1), G.A. Res. 3452 (XXX), U.N. Doc. A/RES/3452 (Dec. 9, 1975), which preceded CAT.
58. Id. at 13–14.
59. Id. at 15.
maintained, where the party inflicting such pain or suffering acted in "self-
defense or defense of others"—an exception that may have been designed to
preclude liability in so-called "ticking time bomb" scenarios.60 Thus, only
extremely harsh and essentially sadistic acts of detainee abuse would have
been punishable under this understanding of the crime.

As the Senate engaged in final negotiations concerning the reservations
in 1990, the George H. W. Bush Administration continued to support the
imposition of a mens rea requirement of specific intent, but no longer in-
sisted that this intent must involve a desire to inflict pain or suffering that is
"excruciating and agonizing" (an interpretation the Senate had rejected).61
However, with regard to the actus reus, the Justice Department continued to
promote the view that torture is limited to "conduct the mere mention of
which sends chills down one's spine: the needle under the fingernail, the
application of electric shock to the genital area, the piercing of eyeballs,
etc."62 The final version of the Senate's reservations is ambiguous on this
point, stating that "in order to constitute torture, an act must be specifically
intended to inflict severe physical or mental pain or suffering," but omitting
any mention of "unusually cruel" or "extreme" conduct.63

Left with this legacy of uncertainty, and receiving little assistance from
the indeterminate language of the Torture Act and War Crimes Act, the ex-
ecutive branch in the post-September 11 era has continued to struggle to
provide a legally supported and lasting interpretation of any of the elements
of the crime of torture. These ongoing controversies support the contention
that the statutes are vague, and may also further inhibit the ability of persons
in control of detainees to forecast with certainty whether the use of particu-
lar interrogation techniques or detention conditions will someday result in
criminal prosecution.

Observing that the term "severe" remains undefined with respect to
physical pain or suffering under the Torture Act, the Justice Department fa-
mously advised the president's counsel in the August 2002 Bybee Memo
that the victim's physical pain "must be equivalent in intensity to the pain
accompanying serious physical injury, such as organ failure, impairment of
bodily function, or even death" in order for torture liability to result.64 Re-
garding the provision's specific intent requirement, the memo's authors
concluded that the infliction of severe pain or suffering must have been the

60. Id. at 16; see also John T. Parry, Torture Nation, Torture Law, 97 GEO. L.J. 1001, 1038
(2009) (noting that the Reagan Administration's reference to "legitimate acts of self-defense or
defense of others," REAGAN DOCUMENT, supra note 57, at 16, "[l]eft unclear, perhaps deliberately
... whether this understanding would have made room for other common law defenses—such as
necessity—that might have been in greater tension with the non-derogable ban on torture").
61. OPR REPORT, supra note 1, at 184–85 (2009); Parry, supra note 60, at 1039–40.
62. Parry, supra note 60, at 1040 (quoting Convention Against Torture: Hearing Before the S.
Comm. on Foreign Relations, 101st Cong. 16 (1990) (statement of Mark Richard, Deputy Assistant
Att'y Gen., U.S. Dep't of Justice)).
63. CAT Reservations, supra note 28, at 7.
defendant's "precise objective." A defendant could therefore escape liability by showing that he merely knew that "severe pain or suffering was reasonably likely to result from his actions," by demonstrating that he had acted "with a good faith belief that his conduct would not produce the result that the law prohibits," by asserting a necessity defense, or by showing that his act was one of individual or collective self-defense. Where individual techniques were concerned, the memo suggested that courts were not likely to regard coercive forms of detainee treatment as torture unless the acts in question were at least as extreme as those that had previously resulted in damages against foreign perpetrators under the Torture Victim Protection Act of 1991, a civil statute enabling victims of torture (including foreign nationals) to sue foreign perpetrators for damages in U.S. courts. Representative examples of such acts, the memo claimed, included "severe beatings" with iron bars, rape, mock executions, and electric shocks to the genitalia.

In a second memorandum issued on the same date (and sometimes described as the "Classified Bybee Memo"), the Justice Department went on to find that ten specific interrogation techniques were legal under the Torture Act, including grasping a detainee by the face or throat with both hands; slamming him into a "flexible false wall"; striking him in the jaw with an open hand; confining him in a dark space small enough to prevent him from standing or fully extending his limbs; confining him in such a small, dark space with insects; forcing him to lean forward against a wall with his arms extended, supporting his weight with his fingertips; placing him in other stress positions, such as "kneeling on the floor while leaning back at a 45 degree angle"; depriving him of sleep for up to eleven consecutive days; and subjecting him to waterboarding, a form of asphyxiation. Although the memorandum made no mention of this fact, the CIA and FBI were already embroiled in fierce disputes regarding the legality of these techniques under the torture laws—disputes that proved to be irreconcilable, with the FBI eventually refusing to permit its agents to participate in any counterterrorism interrogation involving the use of such methods.

65. Id. at 3.

66. Id. at 3–4, 39–46. The memo did acknowledge that "when a defendant knows that his actions will produce the prohibited result," the factfinder will be likely to infer that he acted with specific intent. Id. at 4.


68. Bybee Memo, supra note 43, at 24–27. The OPR report later criticized this characterization of jurisprudence under the Torture Victim Protection Act, finding that the Bybee Memo "focused on the more brutal examples of conduct courts have found to be torture, and downplayed less severe examples in the reported decisions." OPR REPORT, supra note 1, at 186–90.


70. OPR REPORT, supra note 1, at 33, 73.
The Bybee Memo and Classified Bybee Memo thus provided some guidance regarding specific acts the authors believed were permissible under the criminal torture laws, notwithstanding the FBI's rejection of this guidance as legally invalid. However, the Justice Department rescinded the memos71 less than two years after they were issued due to an apprehension that they might have been legally unsound and, six months later, embraced a new interpretation of the laws.72 This new interpretation emphasized that in order for pain to be considered "severe" for the purposes of torture liability, it must be extreme, but need not be equivalent to the pain that would arise from organ failure or death.73 Additionally, although the memorandum accepted the proposition that a good-faith defense could be used to negate the specific intent requirement, it cast doubt on the idea that a defendant could escape liability for torture on the grounds that he had acted in self-defense or defense of others, suggesting that this argument confused intent with motive.74 While reaffirming the legality of the CIA's use of most of the specific interrogation methods it had approved in prior memoranda, the department also began to express uncertainty and discomfort regarding the range of techniques it had authorized: its advice to the CIA in early 2005 made the striking assertion that "these are issues about which reasonable persons may disagree," and included an explicit complaint that the department's analyses "ha[d] been made more difficult by the imprecision of the statute."75

In late 2005, Congress took the lead in regulating interrogations, passing first the DTA76 and then, less than a year later, the Military Commissions Act of 2006.77 The judiciary also began to assert a role in this regard with the

71. See Memo to James B. Comey, supra note 1, at 2. This memorandum was intentionally drafted "in a form that could be released to the public" and does not refer explicitly to the Classified Bybee Memo. Id. However, the reference to "prior opinions," id. at n.8, as well as subsequent investigations, suggest that the 2004 memo was intended to supersede both the Bybee Memo and the Classified Bybee Memo, although the department had not yet completed an analysis to replace the Classified Bybee Memo, see infra note 72.

72. See Memo to James B. Comey, supra note 1, at 1–2. The memorandum to Comey refrained from explicitly stating that the interpretations of the criminal torture laws found in the Bybee Memo were incorrect. Instead, it alluded to "[q]uestions" that had "been raised ... about various aspects of the statutory analysis" in that memorandum, and asserted that "[w]hile we have identified various disagreements with the August 2002 Memorandum, we have reviewed [the Office of Legal Counsel’s] prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum." Id. at 1, 2 & n.8. Thus, the question of whether the Bybee Memo’s analyses were incompatible with the text of the laws remained unresolved.

73. Id. at 5–8.

74. See id. at 16–17.


76. DTA, supra note 18.

77. Relevant provisions of the Military Commissions Act of 2006 include sections 948r(b)–(d) and 950v(b)(11), which restricted the commissions’ admission of statements obtained through coercion and revised the War Crimes Act to include its current definition of torture. Military Comis-
Supreme Court’s June 2006 decision in *Hamdan v. Rumsfeld*, which found that the protections of Common Article 3 of the Geneva Conventions apply to all persons detained by the United States during non-international armed conflicts, including the conflict with Al Qaeda. In the absence of more definitive guidance from the courts or legislature, however, the executive branch continued to face the task of interpreting federal torture laws on behalf of the military and intelligence agencies, which it accomplished by issuing the revised Army Field Manual and by promulgating an executive order allowing the CIA to continue to use harsh interrogation techniques despite the ruling in *Hamdan*.

The executive branch’s interpretations of the torture laws shifted dramatically when the Obama Administration took office, demonstrating that policymakers remain divided regarding how the terms used in the laws should be understood. First, on January 22, 2009, the president signed an executive order declaring that no interrogation of a detainee in U.S. custody or control may utilize any method not approved in the Army Field Manual, a stricture binding upon the CIA and other government agencies as well as the military. Then, in February 2010, the Justice Department’s Office of Professional Responsibility (“OPR”) publicly released a report reviewing the George W. Bush-era memoranda concerning the torture laws, and finding that the legal research and reasoning used to support the Bybee Memo and Classified Bybee Memo were so flawed as to amount to professional misconduct on the part of the drafter and signer. However, while willing to state that these memos “did not represent thorough, objective, and candid legal advice,” the authors of the OPR report declined to provide their own interpretation of the elements of the criminal torture statutes or explain which forms of detainee treatment the statutes should be understood to prohibit. Instead, they restricted themselves to observing, for example, that the meaning of “specific intent” is “ambiguous” and “not use[d] consistently” by the courts, and that the memos’ drafter failed to cite adequate or appropriate legal sources in support of his interpretation of “severe pain.”

---

78. *Hamdan v. Rumsfeld*, 548 U.S. 557, 628–31 (2006). Although these provisions were not the focus of the Court’s decision, Common Article 3 prohibits, inter alia, “cruel treatment,” “torture,” and “outrages upon personal dignity, in particular, humiliating and degrading treatment.” Geneva Convention relative to the Treatment of Prisoners of War, *supra* note 36, at art. 3(1) (hereinafter Common Article 3).

79. *See supra* Section I.A.2.


83. *OPR REPORT, supra* note 1, at 159–60.

84. *Id.* at 169.

85. *Id.* at 176–84.
report's authors thus chose not to resolve the ultimate question of whether the memos had “arrived at a correct result” in interpreting the statutes or finding that certain interrogation techniques were legal under them.\footnote{Id. at 160.}

The purpose of the foregoing discussion is not to critique the legal reasoning of various administrations or officials concerning the proper interpretation of the torture statutes, or their views regarding the legality of particular techniques under those statutes. Instead, it is intended to demonstrate that despite decades of extensive legal debate and analysis within the executive branch, the United States continues to lack a settled legal understanding of what constitutes torture or cruel or inhuman treatment. This lack of understanding has not been remedied by the passage of the criminal torture statutes; in fact, the statutes’ vague terminology remains susceptible to sharply differing official interpretations—interpretations whose fluctuations (in combination with the “imprecision” of the laws themselves, as explicitly acknowledged by the Justice Department)\footnote{See supra note 75 and accompanying text.} have contributed to a climate of near-total uncertainty regarding which forms of detainee treatment the United States regards as torture. In light of the statutes’ stated purpose of providing effective prevention and predictable criminal punishment of acts of torture and cruel or inhuman treatment,\footnote{See supra note 11.} as well as the risk of unconstitutional vagueness under the Fifth Amendment’s Due Process Clause, Congress should amend these laws to clarify which types of mistreatment will result in prosecution.

II. COERCIVE INTERROGATIONS AND DOMESTIC VIOLENCE: COMMON GROUND

Recently, Professor Lewis proposed that Congress address the non-specificity of the torture laws by creating a rebuttable presumption that any form of treatment military instructors are not permitted to inflict upon soldiers during training programs necessarily results in severe physical or mental pain or suffering and therefore, in the context of detention or interrogation, constitutes torture.\footnote{Lewis, supra note 15, at 122. In addition to this basic stricture, Lewis would impose “bright line” bans on certain egregious abuses, including “medical experimentation, exposure to chemical/biological agents, murder, rape, mock executions, and mutilation.” Id.} The logic underlying this argument has some persuasive force: military instructors wield a power to inflict physical discomfort and psychological stress upon soldiers in a manner akin to the power wielded by interrogators over detainees, suggesting that it might be appropriate to regulate the two sets of relationships in a similar fashion.\footnote{Lewis himself characterizes his approach as “[b]asing the treatment of detainees upon the treatment afforded to one’s own forces during wartime”—an idea for which he finds support in international humanitarian law. Id. at 120–21. However, he does not clarify why the correct standard under this framework should be the treatment that may be inflicted upon the members of one’s own forces during training (e.g., waterboarding), rather than while they are actually detained or impris-}
However, the settings and motives of military training and detention differ in several critical respects. For example, military training is undertaken voluntarily, trainees know that the forms of treatment to which they are subjected during training will not continue indefinitely, and trainees may be confident that the military authorities overseeing the training, however harsh, have a long-term interest in their well-being. The situation of counterterrorism detainees differs dramatically in each of these respects, meaning that the impact of various physically and psychologically coercive techniques on detainees may be very different from (and much more severe than) their impact on soldiers in training.

Another intuitive model for revising the torture statutes might entail the derivation of a list of prohibited acts from international and foreign jurisprudence. However, Congress has demonstrated hostility toward this approach, both by attaching the reservations to CAT and the ICCPR described in Section I.A above and by mandating that a court construing the War Crimes Act may not use any “foreign or international source of law” as the basis of its decision. Furthermore, international and foreign judicial decisions concerning torture generally provide only post hoc, particularized determinations regarding whether a certain form of detainee treatment constituted torture. These isolated data points might help to inform revisions of the torture laws, but it would be difficult to construct a comprehensive normative framework based upon them—especially where types of acts that courts and tribunals have not yet addressed are concerned. This approach could also give rise to further controversies within the government regarding the correct interpretations of the foreign and international laws and decisions in question, as indicated by past disagreements within the Justice Department concerning the proper interpretation of relevant judgments of the European Court of Human Rights and the Supreme Court of Israel.

91. See S. ARMED SERVS. COMM., 110TH CONG., SENATE ARMED SERVICES COMMITTEE INQUIRY INTO THE TREATMENT OF DETAINES IN U.S. CUSTODY xix (Comm. Print 2008). Additionally, the Senate Armed Services Committee has stated that the harsh treatment inflicted on trainees during the military’s Survival, Evasion, Resistance, and Escape (“SERE”) training program—the source of many of the interrogation techniques approved in the Bush-era memoranda—are abusive and unlawful when applied to detainees. Id. at xxvii (finding that the “techniques used in SERE school are inconsistent with the obligations of U.S. personnel under the Geneva Conventions” when inflicted on detainees); see also Scott Shane & Mark Mazzetti, In Adopting Harsh Tactics, No Look at Past Use, N.Y. TIMES, Apr. 22, 2009, at A1 (confirming SERE as the source of the Bush-era interrogation techniques).


93. See supra notes 28, 36.

Assuming, then, that Congress would likely prefer to revise the torture statutes by looking to American law, one is confronted with the task of choosing—in a manner that is neither arbitrary nor conclusory—the state or federal laws upon which it would be most appropriate to base these revisions. For this purpose, a useful analogy may be drawn between coercive interrogations and domestic violence, which all states have sought to eliminate by adopting criminal statutes. In both public discourse and legal commentary, coercive interrogations and domestic violence continue generally to be regarded as entirely unrelated matters. However, as the discussion below demonstrates, these two forms of abuse are rooted in the same basic behavioral phenomenon: the use of pain, isolation, and humiliation to create a sense of powerlessness and dependence in a resistant party, thereby gaining compliance from him or her. The desired forms of compliance may differ, but the ultimate goal—that of eroding the victim's individual identity and will so that she or he ceases to resist the interrogator's or abusive partner's demands—remains the same. These fundamental similarities support the use of state domestic violence statutes as a model for remedying the vagueness problem in the federal torture laws, as proposed in Part III.

Section II.A shows that physically and psychologically coercive interrogations tend to follow a distinct pattern: first, the subject is isolated from the outside world, including all persons who might be able to intervene to halt the interrogation or provide emotional support. He is then forced to endure painful or humiliating practices designed to reduce him to a state of hopelessness or learned helplessness so that he will be more willing to acquiesce.

---

95. See 50 State Statutory Surveys: Criminal Laws: Crimes: Domestic Violence (Statutes), 0030 SURVEYS 7, at 6–7 (West 2009) [hereinafter State Surveys]; see also infra Part III. A few state penal codes, most notably California's, include a concept they describe as "torture"—with little or no elaboration—as an aggravating circumstance for homicide. See, e.g., CAL. PENAL CODE § 190.2(a)(18) (West 2010). Such laws address the sadistic infliction of pain during the course of a homicide, as distinct from the phenomenon of the use of isolation and physical or psychological coercion as a means of obtaining compliance; they are therefore beyond the scope of this Note.


97. It is true that the same phenomenon could be observed in the context of an ordinary domestic prison. See, e.g., Philip G. Zimbardo et al., Reflections on the Stanford Prison Experiment: Genesis, Transformations, Consequences, in OBEDIENCE TO AUTHORITY: CURRENT PERSPECTIVES ON THE MILGRAM PARADIGM 193, 200–01 (Thomas Blass ed., 2000). This fact might suggest that it would be possible to develop a framework for reforms to the criminal torture statutes based on types of treatment that guards and other personnel are not permitted to inflict upon inmates in domestic prisons. Admittedly, prison personnel accused of mistreating inmates could—in addition to being subject to civil suits—be charged with a criminal offense, such as battery. However, the selection of such offenses from the full panoply of state criminal laws to which an abusive prison guard might be subject, and the decision to include them in a revised criminal torture statute, would inevitably be an arbitrary "cherry-picking" exercise. State domestic violence laws, by contrast, offer a pre-selected and non-arbitrary set of behaviors that the states regard as criminally culpable when used in a manner analogous to coercive interrogations.
Coercion's Common Threads

March 2011

833

to the interrogating authority's demands. Section II.B then establishes that the same pattern is employed by abusive partners in the domestic violence context, and addresses several potential counterarguments.

A. Breaking the Will: Patterns of Coercion Used to Obtain Compliance During Interrogations

Worldwide, coercive interrogations in countries with profound political and cultural dissimilarities tend to involve surprisingly similar methods. Many of these methods are physical, including beating, stress positions, electric shock, starvation, rape, and suffocation or asphyxiation; however, acts of psychological manipulation and abuse are also common. The short-term effect of these techniques is to isolate, frighten, and produce unbearable shame in the victim, creating a sense of helplessness and dependence. This destruction of the individual will results, in turn, in a greater willingness to comply with the interrogator's demands.

Courts, legal commentators, psychologists, and medical experts alike have agreed that the fundamental aim of coercive interrogations is to "break" detainees in this manner, a fact the Bush-era interrogation memoranda also repeatedly and explicitly acknowledged.

As early as 1963, in the KUBARK Counterintelligence Interrogation manual, the CIA encouraged the use of interrogation practices designed to


99. See, e.g., Physicians for Human Rights, supra note 42, at 48, 56 (reporting that psychological coercion and sexual shaming in the interrogation context "destroy the victim's sense of privacy, intimacy, trust of others and security, as well as [his] sense of self," leading to "deep feelings of despair and self-loathing"); Zimbardo et al., supra note 97, at 200-01 (describing the 1971 Stanford prison experiment, in which volunteers playing the role of guards subjected volunteers playing the role of prisoners to "humiliating" and "dehumanizing" techniques such as stripping, sleep deprivation, isolation, and forced exercises until many of the objects of this treatment became cowed and "zombie-like"); David Luban, Liberalism, Torture, and the Ticking Bomb, 91 Va. L. Rev. 1425, 1430-32 (2005) (observing that the "aim of torture is to turn its victim into someone who is isolated, overwhelmed, terrorized, and humiliated," thereby eliminating his sense of individual freedom and dignity).

100. See Physicians for Human Rights, supra note 42, at 48.

101. See id. U.S. courts' observations on this subject are discussed below. See infra notes 114-118 and accompanying text.

102. These acknowledgments are discussed below. See infra text accompanying notes 106-113.
reduce a detainee ("source") to an infant-like level of helplessness by "[m]anipulating [him] psychologically until he becomes compliant":

Merely by cutting off all other human contacts, the interrogator monopolizes the social environment of the source. . . . He exercises the powers of an all-powerful parent, determining when the source will be sent to bed, when and what he will eat, whether he will be rewarded for good behavior or punished for being bad. The interrogator can and does make the subject's world not only unlike the world to which he had been accustomed but also strange in itself—a world in which familiar patterns of time, space, and sensory perception are overthrown. . . . For example, a source who refuses to talk at all can be placed in unpleasant solitary confinement for a time. Then a friendly soul treats him to an unexpected walk in the woods. . . . Both the Germans and the Chinese have used this trick effectively.\textsuperscript{103}

The manual went on to recommend a variety of techniques aimed at "inducing regression" by creating a sense of "fear and helplessness," including manipulation of the detainee's sense of time, false flag,\textsuperscript{104} prolonged standing, isolation, sensory deprivation, removal of clothing ("because familiar clothing reinforces identity and thus the [detainee's] capacity for resistance"), and threats of pain.\textsuperscript{105}

As the Bush-era legal memoranda demonstrate, many of the enhanced interrogation techniques the Justice Department authorized in the context of the war on terror were expressly designed to humiliate, insult, shame, frighten, or shock detainees, thereby reducing them to a "baseline, dependent state" or a state of learned helplessness.\textsuperscript{106} Before the interrogation began, the detainee was to be reduced to an anonymous and dehumanized condition: "stripped of his clothes, shackled, and hooded, with the walling collar over his head and around his neck."\textsuperscript{107} The detainee would then be slammed into a false wall in order to "shock or surprise" him and "wear down his resistance."\textsuperscript{108} Facial slaps could be used to "induce shock, surprise, or humiliation"; similarly, water could be repeatedly flicked on the detainee "to
instill humiliation, or to cause temporary insult.\textsuperscript{109} If the detainee was to be subjected to sleep deprivation through prolonged shackling in a stress position, he could be placed in an adult diaper, a technique the CIA embraced in 2002 as a deliberate form of humiliation.\textsuperscript{110} Perhaps most crucially, nudity, sleep deprivation, and dietary manipulation could all be used to reduce the detainee to a state of utter dependency, demonstrating to him “that he has no control over basic human needs.”\textsuperscript{111} Ultimately, interrogators could use waterboarding to make the detainee panic and fear for his life.\textsuperscript{112} The primary goal of these techniques, the legal analyses stressed, was “to create a state of learned helplessness and dependence conducive to the collection of intelligence.”\textsuperscript{113}

In a line of cases dating back to 1897, American courts have roundly condemned the tactic of obtaining a suspect’s or detainee’s compliance by creating a sense of helplessness or dependency in this manner, regardless of the legal context of, or circumstances surrounding, the detention.\textsuperscript{114} Perhaps the best-known decision in this regard is 

\begin{quote}

\textit{Miranda v. Arizona}, in which the Court disapprovingly quoted several police manuals recommending that suspects be completely isolated from the outside world during questioning, and that the police interrogator “dominate his subject and overwhelm him with his inexorable will to obtain the truth.”\textsuperscript{115} This type of interrogation environment, in the majority’s assessment, was bound to put the party being questioned “in such an emotional state as to impair his capacity for rational judgment,”\textsuperscript{116} undermining his human dignity and facilitating the violation of his rights.\textsuperscript{117} It was a desire to avoid the production of confessions (or other forms of compliance) through such coercive techniques that led the Court to require police to inform all persons taken into custody of their rights to remain silent and to consult with an attorney.\textsuperscript{118}
\end{quote}

109. \textit{Id.} at 10, 12 (quoting a source that was redacted).

110. OPR \textit{Report}, \textit{supra} note 1, at 243. Later legal memoranda claimed that the diaper’s purpose was practical rather than psychological. \textit{See id.}

111. \textit{Bradbury Memo 2, supra} note 106 (quoting a source that was redacted).

112. \textit{See Bradbury Memo 1, supra} note 75, at 41–42.

113. \textit{Bradbury Memo 2, supra} note 106, at 10 (quoting a source that was redacted).

114. \textit{See, e.g., Blackburn v. Alabama}, 361 U.S. 199, 206 (1960) (finding that the eight-hour isolation and interrogation of a mentally ill man, “who is ignorant of his rights and who has been cut off from the moral support of friends and relatives,” violated the Fourteenth Amendment and was “an effective technique of terror”); \textit{Bram v. United States}, 168 U.S. 532, 557–64 (1897) (finding that statements “produced by inducements engendering either hope or fear” cannot be regarded as having been given freely or voluntarily); \textit{Cooper v. Dupnik}, 963 F.2d 1220 (9th Cir. 1992) (finding that an interrogation involving the deliberate creation of a sense of hopelessness through incommunicado detention, relentless questioning, and religious and sexual humiliation violated the suspect’s Fourteenth Amendment rights).


117. \textit{Id.} at 457.

118. \textit{Id.} at 467–72.
The above examples illustrate the modus operandi of physically and psychologically coercive interrogations. As shown below, this pattern is essentially identical to the patterns of coercion observed in domestic violence, a phenomenon states have sought to eliminate by prohibiting specific types of behaviors.

B. Coercion in Domestic Violence and Interrogations: A Shared Pattern

As recently as the 1970s, courts, law enforcement officials, and policymakers tended to view violence between intimate partners as temporary and discrete events, the outgrowth of disagreements that were best resolved privately between the parties themselves.\(^9\) Meanwhile, psychologists frequently diagnosed victims who failed to leave physically violent relationships as masochistic, believing that a low sense of self-worth led them to desire the abuse.\(^{120}\) Research conducted in last decades of the twentieth century, however, gave rise to profound changes in understandings of domestic violence, with the result that behavioral scientists and health professionals no longer regard victims as masochists, but as persons who have been physically and psychologically coerced into complying with their partners' demands.\(^{121}\)

Today, most psychologists, social workers, and sociologists who have studied the problem view domestic violence as a behavioral pattern in which abusers work to control their victims through tactics such as physical assault, intimidation, false imprisonment, emotional degradation, the destruction of property, or harm to third parties or pets.\(^{122}\) This pattern is usually cyclical, beginning with a tension-building phase in which the abuser's threats or criticisms convey to the victim that she risks serious harm if she does not comply with his demands; culminating in acute episodes of battering or humiliation; and ending with contrite and generous behavior on the part of the abuser in order to strengthen the emotional bond between the abuser and the victim and convince the victim to remain in the relationship.\(^{123}\) Throughout the cycle, abusers typically isolate their victims, forbidding them from seeing family members, friends, or neighbors and preventing them from maintaining employment.\(^{124}\) Victims who attempt to leave the relationship often face stalking or threats of death or injury.\(^{125}\) Thus, although persons

120. Lenore Walker with Kate Richmond et al., History, in THE BATTERED WOMAN SYNDROME 21, 23 (Lenore E. A. Walker ed., 3d ed. 2009).
121. See Lenore E. Walker, Who are the Battered Women?, FRONTIERS: J. OF WOMEN STUD., Spring 1977, at 52.
123. Walker, supra note 121, at 53–54.
124. Johnson, supra note 122, at 1116.
125. See JILL DAVIES ET AL., SAFETY PLANNING WITH BATTERED WOMEN 23, 96 (1998); Patricia Tjaden & Nancy Thoennes, Nat'l Institute of Justice & Ctrs. for Disease Control and Pre-
who suffer domestic violence may initially have entered into relationships with their partners voluntarily, their situation quickly comes to resemble that of persons—such as counterterrorism detainees—who are held under duress.

The specific behaviors used to gain compliance from domestic violence victims often bear a strong resemblance to tactics employed during coercive interrogations. For example, the defendant in the North Carolina case *State v. Norman*, who was convicted of voluntary manslaughter after shooting her husband, had been subjected to physical abuses including slapping, kicking, burning, and cutting.\(^{126}\) Her husband had also repeatedly threatened her with death or serious injury, compelled her to engage in prostitution, deprived her of food, ridiculed her in front of others, and "made her eat pet food out of the pets’ bowls and bark like a dog."\(^{127}\) The abuser in *Trujillo v. State* locked his partner into the house with a padlock, refused to allow her to use the bathroom, forced her to strip, and subjected her to beating, burning, choking, and dousing with water.\(^{128}\) Perhaps most famously, Hedda Nussbaum, whose partner Joel Steinberg was convicted of manslaughter following the death of their illegally adopted daughter in 1987, has described Steinberg’s practice of isolating her from friends and family members; compelling her to forage for her food in trashcans; beating her; and forcing her to crawl on the floor, take baths in ice water, and ask for his permission before eating or sleeping.\(^{129}\) Many of these techniques—including isolation, deprivation of food or sleep, threats, sexual abuse, exposure to extreme temperatures, physical assault, dousing with water, suffocation or asphyxiation, and various forms of humiliation—are identical to those that have been authorized or documented in coercive interrogation contexts.\(^{130}\)

These forms of domestic violence, like the coercive interrogation techniques they so strongly resemble, result in fear, depression, dependence, and learned helplessness, and thus in an erosion of the victim’s will to resist the abuser’s demands.\(^{131}\) Nussbaum has described this process as "brainwash[ing],"\(^{132}\) and many psychologists and legal scholars agree, with some suggesting that the phenomenon of learned helplessness in domestic violence victims closely resembles the forms of learned helplessness and...
post-traumatic stress disorder experienced by torture victims and prisoners of war.\textsuperscript{133}

Critics may object that counterterrorism interrogations differ fundamentally from domestic violence situations because interrogations, unlike the abuse of an intimate partner, sometimes have the ostensible goal of extracting information in order to prevent imminent harm.\textsuperscript{134} For the purposes of the present analysis, it suffices to observe, first, that neither international human rights law nor international humanitarian law recognizes any form of exception to the ban on torture, regardless of the circumstances or the torturer’s ostensible motive.\textsuperscript{135} For example, the ICCPR—in an article to which the United States did not attach reservations—states plainly that torture is prohibited even during a “time of public emergency which threatens the life of the nation,”\textsuperscript{136} and CAT concurs that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”\textsuperscript{137} Nor have American courts given any indication that coercive interrogation methods become permissible when there is a pressing need to obtain information from the individual being questioned; to the contrary, the courts have rejected this type of assertion, even in cases involving dangerous serial criminals.\textsuperscript{138}

Second, any argument that a defendant should not be liable for an act of mistreatment because of the circumstances surrounding the act, rather than because the act itself did not constitute torture under the definition set forth in the applicable law, would be an affirmative defense and would therefore have no bearing on whether the act in question meets the definition of torture. For example, as noted above, the DTA allows a defendant to assert an affirmative good-faith defense where she reasonably lacked awareness that the forms of detainee treatment she employed were not lawful; whether these forms of treatment actually meet the legal definitions of torture or cruel or inhuman treatment remains a separate inquiry.\textsuperscript{139} Thus, while it is true that some persons in control of detainees may engage in physical or psychological coercion due to a belief that these forms of treatment are justifiable or a mistaken belief that they are actually lawful, these possibilities


\textsuperscript{134} See, e.g., Luban, supra note 99, at 1436.

\textsuperscript{135} See, e.g., CAT, supra note 2, at art. 2(2); ICCPR, supra note 7, at arts. 4, 7; Common Article 3, supra note 78; Office of the High Commissioner for Human Rights, supra note 8, § 3.

\textsuperscript{136} ICCPR, supra note 7, at arts. 4(1)–(2); ICCPR Reservations, supra note 28 (providing that article 4 of the ICCPR is not self-executing, but declining to attach any other reservations to that article).

\textsuperscript{137} CAT, supra note 2, at art. 2(2).

\textsuperscript{138} See, e.g., Cooper v. Dupnik, 963 F.2d 1220 (9th Cir. 1992) (finding that the use of coercive interrogation methods violated the Fourteenth Amendment rights of a suspected serial rapist).

\textsuperscript{139} See supra note 49 and accompanying text.
are irrelevant to the initial determination of whether the particular form of treatment to which a detainee was subjected constituted an act of torture.

Critics may also point out that detainees—for example, those apprehended on a foreign battlefield during an armed conflict—and domestic violence victims may be subject to very different legal regimes and levels of constitutional protection. This observation is correct; however, the federal criminal torture laws are concerned only with the behavior of the alleged perpetrator, and make no distinctions on the basis of the detainee’s legal status. Under current federal law, as under international law, the fact that a detainee is apprehended under particular circumstances, suspected of a particular offense, triable by a particular type of court or commission, or subject to a particular subset of laws or protections makes no difference in an assessment of whether a form of treatment to which the detainee was subjected meets the definition of torture. The federal criminal torture laws, like state domestic violence laws, are exclusively concerned with the actions the defendant has allegedly committed, rather than the legal regime to which the victim is subject—or any crime in which the victim has allegedly participated.

In sum, although coercive interrogations and domestic violence take place in different contexts and may be committed pursuant to different motives, the fact that is most salient to the present analysis—that both types of abuse employ physical and psychological coercion, typically in combination with isolation, in order to break the will of the victim and thereby force him or her to become compliant—remains unchanged. When the perpetrator is a person acting under color of law, this pattern of behavior is characterized as “torture” or “cruel or inhuman treatment,” or, at minimum, mistreatment; when the perpetrator is a romantic partner or former romantic partner of the victim, it is described as a domestic violence offense. These differing designations do not alter the essentially identical natures of the behaviors involved.

III. OUTLAWING ABUSE: STATE DOMESTIC VIOLENCE LAWS AND THEIR IMPLICATIONS FOR A PROPOSED FEDERAL BAN ON SPECIFIC COERCIVE INTERROGATION TECHNIQUES

Given the fundamental commonalities between coercive interrogations and domestic violence described above, it makes sense to turn to U.S. state laws criminalizing domestic violence in order to derive a federal ban on torture and cruel or inhuman treatment that is comprehensive and specific, avoiding the problems of indeterminacy that undermine the current statutes. Stated differently, these domestic violence laws would help to give content to a new legal framework for the criminal torture laws premised on the idea

140. See supra note 19 and accompanying text.
141. See supra note 3.
142. See supra notes 3, 135–137 and accompanying text.
of criminalizing the use of isolation and coercion to break the will of a detainee and thereby obtain his compliance. The discussion below provides a survey of the common relevant patterns and trends in the domestic violence laws that American states have adopted, then draws upon these patterns in creating a prototype for a revised federal statute criminalizing torture and cruel or inhuman treatment in a specific and unambiguous manner.

A. Forms of Physical and Psychological Coercion Prohibited

Under State Domestic Violence Laws

American states have taken a variety of approaches to criminalizing physical and psychological coercion between intimate partners. Some, like Alabama, rely upon existing statutes prohibiting crimes such as assault and impose sentencing enhancements if the accused and victim are (or were) intimate partners. Others, such as Hawaii, provide that the commission of certain crimes against an intimate partner will entitle the victim to obtain a protection order (in addition to any civil or criminal remedies for the underlying offense), and criminalize subsequent violations of this order. A few have created freestanding domestic violence offenses, as Illinois did when it adopted a statute prohibiting aggravated domestic battery. Regardless of the approach taken, all have criminalized domestic abuse in some fashion and they have done so in a manner that exhibits consistent patterns. The requisite mens rea for particular domestic violence crimes varies to some extent from state to state, but knowledge and even recklessness are usually sufficient for a finding of liability for some degree of domestic violence offense.

The definitions most states employ in prohibiting acts of domestic violence are remarkably specific, and encompass forms of psychological coercion (such as threats) as well as physical coercion. Where physical abuse is concerned, the definitions typically include assault, battery, reckless endangerment, and insulting or offensive physical contact. Notably, at least three states expressly prohibit choking and strangulation in the

146. See State Surveys, supra note 95. The extent to which various state domestic violence laws are effective in reducing the incidence of coercion between intimate partners is not addressed in this Note.
domestic violence context, with two imposing heightened penalties for this form of battery; whether these prohibitions constitute a pattern is debatable, but they may be indicative of an emerging trend. Bans on rape and sexual assault or abuse are also explicitly incorporated into a large proportion of domestic violence statutes.

A number of state domestic violence definitions provide that individuals may not subject their intimate partners to false or unlawful imprisonment, a practice that may be regarded as analogous to incommunicado detention in the interrogation context (and includes elements of both physical and psychological coercion). Missouri, in particular, has adopted a detailed and context-sensitive interpretation of the offense, banning the act of "knowingly attempt[ing] to cause or caus[ing] the isolation of [a] family or household member by unreasonably and substantially restricting or limiting such family or household member’s access to other persons, telecommunication devices or transportation for the purpose of isolation."

Another practice that incorporates elements of both physical and psychological coercion, and that is included in the domestic violence definitions of at least fourteen states, is harassment. The term’s precise meaning varies from state to state, but Oklahoma’s is representative: “‘Harassment’ means a knowing and willful course or pattern of conduct . . . directed at a specific person which seriously alarms or annoys the person,” “serves no legitimate purpose,” and “would cause a reasonable person to suffer substantial emotional distress.”

Although some state domestic violence definitions continue to focus primarily on physical coercion, most also incorporate at least some forms of psychological abuse. For example, nearly all states prohibit threats of physical violence to an intimate partner or, if intended to coerce or intimidate the intimate partner, to others. Several states ban the destruction of personal property or the injury or killing of an animal in the context of domestic violence, recognizing that such acts are often performed in order to

---

157. Okla. Stat. Ann. tit. 22, § 60.1(3) (West 2003). Additionally, this behavior "must actually cause substantial distress to the person." Id.; cf. Del. Code Ann. tit. 10, § 1041(1)(d) (prohibiting intimate partners from engaging in any "course of alarming or distressing conduct in a manner which is likely to cause fear or emotional distress or to provoke a violent or disorderly response").
intimidate the victim. As noted above, most of the statutes also place some form of prohibition on insulting or offensive touching; harassment; acts that create an apprehension of imminent bodily harm; or false imprisonment, all of which may be regarded as forms of psychological coercion. Bans on harassment found in domestic violence laws often outlaw some forms of non-physical shaming or coercive behavior, such as the use of "abusive or obscene language" or the distribution of sexually explicit images of the victim without his or her consent. Illinois explicitly prohibits individuals from subjecting their intimate partners to "knowing, repeated and unnecessary sleep deprivation," and it is easy to imagine that other states might also regard such a practice as banned under their harassment provisions.

Finally, six states impose sweeping, generalized prohibitions on any form of compulsion between intimate partners: a representative statute bans the act of "[c]ompelling a person by force, threat of force or intimidation to engage in conduct from which the person has a right or privilege to abstain or to abstain from conduct in which the person has a right to engage." Examples of such conduct that would translate easily into the interrogation context might include being forced to drink urine, violate a strongly held religious belief (e.g., by consuming a forbidden food or defacing a religious image), starve, or commit a painful or humiliating act against a family member.

It is true that some state domestic violence definitions are more extensive than others and that physical coercion and threats are often more comprehensively outlawed than non-physical forms of shaming or humiliation. However, common relevant patterns in these state laws attach culpability to at least the following acts between intimate partners if the requisite mens rea is satisfied: isolation or false imprisonment; assault or battery; reckless endangerment; abduction; threats of death or physical injury to the victim or others, including family members or animals; insulting or offensive physical contact; the forcible and unnecessary administration of drugs or other substances without consent; interference with the victim's air supply, such as through strangulation; rape and sexual assault, abuse, or humiliation; destruction or threatened destruction of property in order to coerce or intimidate; any course of conduct intended to produce substantial

159. See, e.g., COLO. REV. STAT. § 18-6-800.3(1) (2010); IND. CODE ANN. § 34-6-2-34.5(4) (West Supp. 2010).
160. See, e.g., ALA. CODE § 13A-11-8(a)(1)(b) (2005); ALASKA STAT. § 11.61.120(a)(6). But see CONN. GEN. STAT. ANN. § 46b-38a(1) (West 2005) ("Verbal abuse or argument shall not constitute family violence unless there is present danger and the likelihood that physical violence will occur").
161. 750 ILL. COMP. STAT. ANN. 60/103(14)(ii).
162. ME. REV. STAT. ANN. tit. 19-A, § 4002(1)(C) (1998); see also ALA. CODE § 13A-6-25 (2005); ALA. CODE § 30-5-2(1)(e) (1998); 750 ILL. COMP. STAT. ANN. 60/103(1), (9); MO. ANN. STAT. § 455.010(1)(c) (West 2003); NEV. REV. STAT. ANN. § 33.018 (LexisNexis 2006); WASH. REV. CODE ANN. §§ 10.99.020(5)(g), 9A.36.070 (West 2002).
163. See Johnson, supra note 122.
emotional distress, potentially extending to sleep deprivation and verbal degradation; and any other use of force, threats, or intimidation to compel the victim to comply with the abuser's demands against his or her will.

B. A Revised Federal Statutory Prohibition of Torture and Cruel or Inhuman Treatment

Based on the state domestic violence statutes described above, it is possible to derive a prototype for a revised federal definition of the crimes of torture and cruel or inhuman treatment. This prototype statute represents a framework for revising the laws—one that would facilitate expedient and systematic revisions to the torture statutes but remain open to discussion and modification.

The prototype incorporates each of the common domestic violence prohibitions described above in Section III.A. A small number of other domestic violence prohibitions sometimes found in state laws are, as a matter of common sense, generally inapplicable in the context of a detention facility as opposed to a private residence, and have therefore been omitted from the proposed torture statute; examples of these include trespassing, burglary, and arson. Inapplicable prohibitions of this kind are both exceptional and easily identifiable, and may be omitted from the prototype statute without compromising the logical coherence of the framework, which is based upon coercion. These omissions merely reflect the fact that detentions and interrogations typically do not take place within the detainee's own residence, and that consequently trespassing, burglary, and arson are not forms of coercion that would normally be available to a person in control of the detainee. If a situation arose in which these types of acts


166. See, e.g., Alaska Stat. § 18.66.990(3)(D) (2008); Nev. Rev. Stat. Ann. § 33.018(1)(e)(2). One of the few remaining examples is continual surveillance, and in the context of domestic violence, many states use stalking laws to ban such surveillance. See, e.g., Cal. Fam. Code § 6203(d) (West 2004); Ind. Code Ann. § 34-6-2-34.5 (West 1999); R.I. Gen. Laws § 15-15-1(2)(iv) (2003). In the detention context, it is unlikely that such surveillance would be employed as part of a deliberate effort to coerce or frighten the detainee (as it is used to coerce and frighten domestic violence victims), but if it were to be used in this manner—for example, in combination with a compounding factor such as forced nudity—then a court could regard it falling within the scope of provision (Q) of the prototype statute. See infra note 185 and accompanying text. In the domestic violence context, detention itself can be prohibited in the form of false imprisonment laws, discussed supra notes 154–155 and accompanying text. As noted there, false imprisonment in the domestic violence context is most properly analogized to incommunicado detention where detainees are concerned, since both forms of mistreatment typically entail preventing the victim from maintaining contact with anyone in the outside world—including those who could provide legal assistance, medical or psychological treatment, or emotional support—for the purpose of coercion. (For detainees, detention itself, when not incommunicado, is distinguishable in the sense that it is not intended to produce compliance through the infliction of intolerable fear and psychological distress.) Thus, prohibitions on false imprisonment in the domestic violence context form the basis of the section of the prototype torture statute that bars incommunicado detention. See infra note 169 and accompanying text.
were in fact employed to terrify or otherwise coerce a detainee, then they might be considered to fall within the scope of provision (Q) of the prototype (a residual clause based upon domestic violence provisions and criminalizing purposeful engagement in any otherwise unlisted "course of conduct intended to cause the detainee to experience substantial physical or psychological distress").

Somewhat more problematic are those domestic violence prohibitions that may exemplify emerging trends but do not yet enjoy a clear level of consensus. These prohibitions could be removed from the prototype torture statute at the legislature's discretion; however, any decision in this regard should take account of whether those states that prohibit the act in question do so because it operates to break the victim in the manner described in Part II. If so, then the legislature may wish to retain the prohibition in the context of detainee treatment even where it does not yet enjoy widespread recognition among the states in the domestic violence context.

The prototype statute prohibiting torture and cruel or inhuman treatment under federal criminal law based upon state domestic violence provisions proposed by this Note reads as follows:

The terms "torture" and "cruel or inhuman treatment" are defined as:

(A) Knowingly causing the isolation of a detainee by unduly circumscribing his access to other persons, such as legal representatives, consular representatives, family members, representatives of the International Committee of the Red Cross, clergy, or independent medical personnel, including through abduction, physical restraint, threats, or any other means;

(B) Knowingly causing psychological distress in a detainee by limiting his access to sensory stimuli;

(C) Recklessly engaging in conduct that results in, or creates a substantial risk of, death or physical injury to the detainee;

(D) Purposely engaging in conduct that results in, or creates a substantial risk of, death or physical injury to a third party in order to coerce, punish, intimidate, or humiliate the detainee;

(E) Purposely creating an apprehension of death or imminent physical injury to the detainee, including through express or implied threats, the use or display of a deadly weapon, or other means.

167. See supra Section III.A.
168. See supra note 25.
171. Cf. supra note 150.
172. Cf. supra notes 150, 158.
(F) Purposely creating apprehension of death or imminent physical injury to a third party or to a vertebrate animal in order to coerce, punish, intimidate, or humiliate the detainee;¹⁷⁴

(G) Knowingly making physical contact of an offensive nature with the detainee;¹⁷⁵

(H) Knowingly compelling the detainee to assume or maintain a position that causes physical pain, exhaustion, or unnecessary discomfort, including but not limited to placing the detainee in a cramped space;¹⁷⁶

(I) Purposely administering or applying substances or medical or psychiatric procedures resulting in stupor, unconsciousness, or physical or mental distress or impairment to the detainee, without the detainee's informed and voluntary consent and in the absence of strict medical or psychiatric necessity;¹⁷⁷

(J) Recklessly interfering with the detainee's air supply, such as through suffocation or asphyxiation;¹⁷⁸

(K) Raping the detainee, or raping a third party in order to coerce, punish, intimidate, or humiliate the detainee;¹⁷⁹

(L) Sexually assaulting the detainee, or sexually assaulting a third party in order to coerce, punish, intimidate, or humiliate the detainee;¹⁸⁰

(M) Purposely engaging in other conduct that is sexually humiliating to the detainee;¹⁸¹

(N) Purposely destroying the detainee’s personal property in order to coerce, punish, intimidate, or humiliate the detainee;¹⁸²

(O) Purposely using abusive or obscene language in order to coerce, punish, intimidate, or humiliate the detainee;¹⁸³

(P) Knowingly compelling the detainee by any other form of force, threat, intimidation, or humiliation to engage in conduct from which the detainee has a right or privilege to abstain or to abstain from conduct in which the detainee has a right to engage;¹⁸⁴

¹⁷⁵. Cf. supra note 151.
¹⁷⁸. Cf. supra note 152.
¹⁸⁰. Cf. supra notes 153, 158.
¹⁸³. Cf. supra note 160.
¹⁸⁴. Cf. supra note 162.
(Q) Purposely engaging in any other course of conduct intended to cause
the detainee to experience substantial physical or psychological dis-
tress.\textsuperscript{185}

(R) Attempting to commit any act described in (A)–(Q); or

(S) Threatening explicitly or implicitly to commit any act described in (A)–
(D), (G)–(N), or (Q).

Whether a course of conduct should be punished as torture or, alterna-
tively, as the lesser offense of cruel or inhuman treatment could be
determined by the legislature or by the courts, based on factors such as the
number of times the defendant allegedly subjected a detainee to these acts or
whether the acts in question were committed singly or in combination. The
legislature may also further define terms such as “unduly” (paragraph (A))
and “offensive” (paragraph (G)). The prototype statute’s structure is int-
tended to be flexible enough to accommodate these changes while still
solving the problem of facial vagueness described in Part I in a comprehen-
sive and consistent manner.

CONCLUSION

As presently drafted, American criminal laws purporting to prohibit tor-
ture and cruel or inhuman treatment are facially indeterminate with regard to
the actus reus, mens rea, and result requirements of these offenses, jeopard-
izing the statutes’ ability to prevent acts of torture and provide adequate
notice to persons in control of detainees regarding which forms of treatment
may result in criminal liability. While the DTA and President Obama’s ex-
ecutive order limiting interrogation techniques to those approved in the
Army Field Manual represent steps toward imposing more specific bans on
mistreatment in the detention and interrogation contexts, they do not constit-
tute a permanent or adequate solution to the problem of vagueness. It is
therefore likely that confusion and legal controversy regarding the meaning
of the torture laws will continue to arise within the agencies most responsi-
ble for complying with and enforcing them—unless Congress substantially
revises the statutes.

As the preceding discussion shows, there is a sound basis for adopting
criminal prohibitions on specific forms of detainee treatment based on the
behaviors states have outlawed in their domestic violence provisions. Tor-
ture and domestic violence are both manifestations of a single well-
documented pattern of human behavior: the use of isolation, physical pain,
and psychological degradation to gain control over a resistant individual;
instill in him a sense of hopelessness, helplessness, and dependence; and
thereby gain his compliance. Abusive interrogators employ physically and
psychologically coercive methods to “break” detainees in precisely the same
manner that abusive partners employ coercion to “break” their victims; in
other words, torture and domestic violence are the fruit of the same behav-

\textsuperscript{185.} \textit{Cf. supra} notes 156–157.
ioral tree. Given these facts, it makes sense to look to the states’ bans on physical and psychological forms of domestic violence in order to derive a framework for adopting specific and unambiguous prohibitions on torture and cruel or inhuman treatment in the interrogation setting. Persons in control of detainees, the policymakers who govern their actions, and society at large would all benefit from these clearer criminal laws, which would not only provide unmistakable notice regarding the acts proscribed, but would also help to make concrete the absolute and universal rejection of torture that all three branches of government have recognized as a fundamental principle of the American legal system.