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## BEYOND THE TORTURE MEMOS: PERCEPTUAL FILTERS, CULTURAL COMMITMENTS, AND PARTISAN IDENTITY

Cassandra Burke Robertson\*

*Efforts to hold the torture memo authors professionally accountable for their advice will face two difficulties. First, it will likely be difficult to prove that the memos were written in bad faith. While legal scholars and other lawyers agree nearly universally that the memos represent bad legal advice, bad advice does not necessarily equate to bad-faith advice. The existence of perceptual filters and deep partisan identification may have shaped the lawyers' views of the situation in ways that appear unfathomable to outsiders. Second, even if the Office of Professional Responsibility finds evidence of professional misconduct, there is a risk that efforts to hold the memo authors accountable will lack widespread political support, as onlookers view such efforts through their own perceptual frameworks and partisan commitments.*

### I. INTRODUCTION

Who should face accountability for the mistreatment of prisoners in the war on terror? Five years ago, the scope of prisoner abuse at Abu Ghraib was first revealed; this year, the Justice Department admitted that a single suspect was waterboarded one hundred and eighty-three times.<sup>1</sup> Some at the bottom of the political hierarchy have already been convicted for their participation in prisoner abuse.<sup>2</sup> Those closer to the top of the political hierarchy also find their actions subject to scrutiny, as the Department of Justice's Office of Professional Responsibility is carrying out an investigation into the professional conduct of the lawyers who authored the memos permitting "enhanced interrogation."<sup>3</sup>

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\* Assistant Professor, Case Western Reserve University School of Law. Thanks to Peter Burke, Thomas Robertson, Michael Scharf, Jan E. Stets, Robert Strassfeld, and the participants at the Frederick K. Cox International Law Center War Crimes Research Symposium on September 11, 2009 for helpful discussion and feedback on this project.

<sup>1</sup> Scott Shane, *Waterboarding Used 266 Times on 2 Suspects*, N.Y. TIMES, April 19, 2009, at A1.

<sup>2</sup> See David S. Cloud, *Private Gets 3 Years for Iraq Prison Abuse*, N.Y. TIMES, Sept. 28, 2005, at A20.

<sup>3</sup> David Johnston & Scott Shane, *Interrogation Memos: Inquiry Suggests No Charges*, N.Y. TIMES, May 6, 2009, at A1 ("The report by the Office of Professional Responsibility, an internal ethics unit within the Justice Department, is also likely to ask state bar associations

This article argues that efforts to hold the memo authors professionally accountable for their advice will face two difficulties. First, it will likely be difficult to prove that the memos were written in bad faith. While legal scholars and other lawyers agree nearly universally that the memos represent bad legal advice, bad advice does not necessarily equate to bad-faith advice. The existence of perceptual filters and deep partisan identification may have shaped the lawyers' views of the situation in ways that appear unfathomable to outsiders.<sup>4</sup> Second, even if the Office of Professional Responsibility finds evidence of professional misconduct, there is a risk that efforts to hold the memo authors accountable will lack widespread support, as those efforts may be viewed by partisan opponents as lacking political legitimacy.<sup>5</sup> Onlookers will also view such efforts through their own perceptual frameworks and partisan commitments, and may therefore not agree that the memo authors' conduct deserves to be punished. In particular, this article argues that between 2005 and 2009 there was a redefinition of cultural commitments associated with partisan identity. In 2004 there was still a broad anti-torture American identity, but that identity became fragmented by 2008, with support for torture breaking along partisan lines. In time, cultural commitments may again shift to allow a united American identity that condemns torture. Until that happens, however, it is likely that accountability efforts will further entrench partisan animosity.

## II. THE TORTURE MEMOS

The conventional narrative of the torture memos is that they represent the worst sort of venality—that the lawyers in the Office of Legal Counsel (OLC) were willing to sacrifice professional ideals of independence in favor of providing legal cover to blatantly illegal acts that the Bush administration wished to undertake.<sup>6</sup> Legal complaints center around two areas: the weak legal analysis of the Yoo/Bybee memo that was later with-

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to consider possible disciplinary action, which could include reprimands or even disbarment, for some of the lawyers involved in writing the legal opinions, the officials said.”).

<sup>4</sup> See *infra* Part III.

<sup>5</sup> See *infra* Part IV.

<sup>6</sup> See Posting of Brian Tamanaha to Balkinization Blog, Reasons to Infer That the OLC Torture Memos Were Not Issued in “Good Faith”, <http://balkin.blogspot.com/2009/04/how-we-know-that-olc-torture-memos-were.html> (Apr. 22 2009 12:51); Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT'L L. 811 (2005). See also Jesselyn Radack, *Tortured Legal Ethics: The Role of the Government Advisor in the War on Terrorism*, 77 U. COLO. L. REV. 1 (2006); Stephen Gillers, *Tortured Reasoning*, AM. LAW., July 1, 2004; Julie Angell, Comment, *Ethics, Torture, and Marginal Memoranda at the DOJ Office of Legal Counsel*, 18 GEO. J. LEGAL ETHICS 557 (2005); Marisa Lopez, Note, *Professional Responsibility: Tortured Independence in the Office of Legal Counsel*, 57 FLA. L. REV. 685 (2005).

drawn, and the lack of factual support for other memos authorizing specific techniques. Moral complaints suggest that the lawyers were complicit in a policy of torture and abuse.<sup>7</sup>

There is little debate that the withdrawn memo's legal analysis is extraordinarily weak—its analysis was “widely regarded as preposterous,”<sup>8</sup> even spectacularly bizarre.<sup>9</sup> The memo was criticized for defining torture “by lifting language from a Medicare statute on medical emergencies,” “ignor[ing] inconvenient Supreme Court precedents,” and “flatly misrepresent[ing] what sources said.”<sup>10</sup> It was described as “almost a parody of textualism, in which words alone are considered, having no regard for the context of their usage.”<sup>11</sup> Because the analysis was so bad, many assumed that the memo was written in bad faith: “One of these expectations is that the law will be interpreted in good faith, with an eye toward recovering the substantive meaning of a statute, treaty, or line of cases. Violating this expectation is the essence of the unethical conduct of lawyers like Yoo and Bybee.”<sup>12</sup>

Other memos, which gave a more detailed authorization of specific interrogation techniques, were criticized for their lack of factual support rather than deficiencies in legal analysis.<sup>13</sup> In one case, the CIA had asked for an opinion as to whether specific interrogation practices such as sleep deprivation, waterboarding, stress positions, and related techniques could be legally undertaken.<sup>14</sup> The OLC agreed on the legal standard: the techniques were impermissible if they were “specifically intended to inflict severe physical or mental pain or suffering . . . .”<sup>15</sup> The OLC did not analyze

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<sup>7</sup> See, e.g., David Swanson, *Torture Probe: Who's Being Protected Under the Searing Bright Light?*, HUMANIST, July–August 2009, available at [http://www.thehumanist.org/humanist/09\\_jul\\_aug/Swanson.html](http://www.thehumanist.org/humanist/09_jul_aug/Swanson.html).

<sup>8</sup> David Luban, *Torture and the Professions*, 26 CRIM. JUST. ETHICS 2, 58–59 (2007).

<sup>9</sup> See DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 159, 177–79 (2007). See also W. Bradley Wendel, *Executive Branch Lawyers in a Time of Terror: 2008 F.W. Wickwire Memorial Lecture*, 31 DALHOUSIE L.J. 247, 265 (2008) (“In this case, the arguments relied upon by the Bush administration lawyers are so far outside the range of reasonable that it is impossible to take them seriously. That is the basis for concluding that these lawyers acted unethically.”).

<sup>10</sup> Luban, *supra* note 8, at 59.

<sup>11</sup> W. Bradley Wendel, *Deference to Clients and Obedience to Law: The Ethics of the Torture Lawyers (A Response To Professor Hatfield)*, 104 NW. U. L. REV. COLLOQUY 58, 69 (2009).

<sup>12</sup> *Id.* at 70.

<sup>13</sup> See Tamanaha, *supra* note 6.

<sup>14</sup> *Id.*

<sup>15</sup> 18 U.S.C. § 2340(1) (2006). See generally Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, to John A. Rizzo, Senior Deputy General Counsel (May 10, 2005), available at <http://www.fas.org/irp/agency/doj/olc/techniques.pdf> (last visited Nov. 4, 2009) [hereinafter Bradbury Memo].

whether such techniques would be reasonably viewed as inflicting such pain. Instead, as critics point out, the OLC memos defer to the CIA's assurance that their use of such techniques was not intended to cause severe pain or suffering. The memo accepted as a factual predicate that detainees would be "evaluated by medical and psychological professionals" who would ensure that "the detainee's physical condition [was] such that these interventions would not have lasting effect, and his psychological state [was] strong enough that no severe psychological harm would result."<sup>16</sup> Once that factual predicate was accepted, it was a short step to the legal conclusion that the techniques were not specifically intended to cause severe pain or suffering. The memos did not analyze whether outsiders would view such assurances as reasonable in light of what was known about the effects of such techniques.

Professor Brian Tamanaha finds this factual acceptance to violate the lawyer's duty, concluding that the OLC:

[I]ssued a legal opinion sanctioning the legality of these interrogation practices based entirely upon the promise of the potential criminal suspects that they would not violate the law when engaging in these practices. . . . [T]here was no independent or reliable factual basis to support the legal opinion. Without such a factual basis, the legal opinion simply could not be issued in good faith.<sup>17</sup>

### III. PERCEPTUAL FILTERS

But does either bad legal analysis or reliance on self-serving factual assumptions necessarily equate to bad-faith legal practice? In a recent article,<sup>18</sup> I argued that cognitive bias and associated blind spots may better explain such lapses. Both the unsupported legal claims of the Yoo/Bybee memo and the reliance of the "techniques memo" on the CIA's own self-serving assessment seem to fit in with classic bias blind spot research.<sup>19</sup> If the memo authors were trying to provide legal cover for a pre-ordained result, they did a very bad job of it—if the lawyers truly acted in bad faith, why would they not manufacture the appearance of more reliable data, rather than openly relying on self-serving assessments? It seems more likely that the authors were simply blind to how the rest of the world would view their analysis, and that they never thought to question the accuracy or relia-

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<sup>16</sup> Bradbury Memo, *supra* note 15, at 6.

<sup>17</sup> Tamanaha, *supra* note 6.

<sup>18</sup> See Cassandra Burke Robertson, *Judgment, Identity, and Independence*, 42 CONN. L. REV. 1 (2009), available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=cassandra\\_robertson](http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=cassandra_robertson).

<sup>19</sup> *Id.*

bility of the CIA's assessment. If they saw no reason to question the accuracy of the CIA's assurances, they would not expect others to do so either.

Social scientists have long known that people interpret facts and events in ways that conform to their prior expectations and allegiances. In 1954, a study of a Princeton-Dartmouth football game revealed that Princeton and Dartmouth fans viewed the game very differently.<sup>20</sup> Princeton fans were more likely to notice Dartmouth rule infractions, and vice versa. Fans were also likely to interpret those rule violations differently, believing that the other team's infractions were more likely to have been intentional than those of their own team. These differences in attention and interpretation have been referred to as a "perceptual filter."<sup>21</sup>

Perceptual filters also exist in the political realm. A study of Bosnian Serb, Muslim, and neutral observers showed that each group viewed media coverage of the 1994 Sarajevo market bombing very differently and formed different conclusions about who was responsible for the bombing.<sup>22</sup> Other studies showed similar effects in U.S. Presidential election coverage<sup>23</sup> and the Israeli/Palestinian conflict.<sup>24</sup> These differences are more than simply differences of opinion—they are unconscious differences in perception, unknown to the individuals involved, that cause individuals to differ both in their perception of factual matters and their interpretation of those facts.<sup>25</sup>

Such perceptual filters were almost certainly at work in the Office of Legal Counsel.<sup>26</sup> Under the Bush administration, hiring was highly parti-

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<sup>20</sup> See Albert H. Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 49 J. ABNORMAL & SOC. PSYCHOL. 129 (1954).

<sup>21</sup> See, e.g., Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Misdemean Stock Market Investors (and Cause Other Social Harms)*, 146 U. PA. L. REV. 101, 108 (1997).

<sup>22</sup> See Kimberly Matheson & Sanela Dursun, *Social Identity Precursors to the Hostile Media Phenomenon: Partisan Perceptions of Coverage of the Bosnian Conflict*, 4 GROUP PROCESSES & INTERGROUP REL. 116, 123 (2001).

<sup>23</sup> See Russell J. Dalton et al., *Partisan Cues and the Media: Information Flows in the 1992 Presidential Election*, 92 AM. POL. SCI. REV. 111 (1998).

<sup>24</sup> See R.P. Vallone et al., *The Hostile Media Phenomenon: Biased Perception and Perceptions of Media Bias in Coverage of the Beirut Massacre*, 49 J. PERSONALITY & SOC. PSYCHOL. 577 (1985).

<sup>25</sup> For example, when one Dartmouth alumnus was unable to perceive the same infractions that the Princeton alumni had told him about, he assumed that he had not been given the whole film—it never occurred to him that he simply viewed the game differently than the Princeton group. He sent the following telegram to the researchers: "Preview of Princeton movies indicates considerable cutting of important part please wire explanation and possibly air mail missing part before showing scheduled for January 25[.] [W]e have splicing equipment." Hastorf & Cantril, *supra* note 20, at 132.

<sup>26</sup> Such perceptual filters also affect moral judgment through "ethical fading," which is defined as the "tendency to interpret the situation so that it does not implicate one's ethical or

san.<sup>27</sup> John Yoo, like many others in the administration, defined himself as a partisan Republican who was keenly interested in the political success of his party.<sup>28</sup> This shared mindset likely made Yoo and others subject to the same perceptual filters of the administration they served. A political opponent—or even a neutral observer—would thus be more likely to see the weaknesses in the factual assumptions and legal analysis the memos contained. A political sympathizer would be less likely to see those weaknesses, and would therefore be more likely to give legal advice that the administration viewed favorably, even without any deliberate attempt to subvert the law. Thus, the perceptual filters created a type of “echo chamber” where dissenting views were not just unaired, but were actually unseen and unknown.

#### IV. TORTURE AND POLITICAL IDENTITY

Perceptual filters cannot be cast aside easily; instead, they are deeply embedded in individuals' identities. As noted in the prior section, sharing commitments with others makes it more likely that perceptual filters will also be shared: “[p]eople who share formative identities tend to apprehend facts in a similar way in part because they are likely to be drawing on common life experiences when interpreting what various events signify.”<sup>29</sup> These perceptual frameworks are not random. Rather, people “face strong psychological pressure to fit their perceptions of how the world does work to their shared appraisals of how the world should work” in order to avoid dissonance and to protect their status within groups whose members share their core values.<sup>30</sup>

Thus, a person's political identity will affect not just his or her opinions about relevant policy choices: it will also affect his or her perception of the facts underlying those policy choices.<sup>31</sup> In social psychology terms,

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moral duties.” Andrew M. Perlman, *Unethical Obedience by Subordinate Attorneys: Lessons from Social Psychology*, 36 HOFSTRA L. REV. 451, 470 (2007).

<sup>27</sup> See, e.g., Editorial, *Contradiction: Washington Contrast*, CHARLESTON GAZETTE (WV), Apr. 9, 2009, available at <http://wvgazette.com/Opinion/Editorials/200904090956>.

<sup>28</sup> See generally JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* (2006).

<sup>29</sup> Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why, in 'Acquaintance Rape' Cases 3* (Yale Law Sch., Pub. Law, Working Paper No. 196), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1437742](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1437742).

<sup>30</sup> *Id.*

<sup>31</sup> Dan M. Kahan et al., *Culture and Identity-Protective Cognition: Explaining the White-Male Effect in Risk Perception*, 4 J. EMPIRICAL LEGAL STUD. 465 (2007) (“[I]ndividuals tend to conform their view of the risks of putatively dangerous activities—commerce and technology, guns, abortion—to their cultural evaluations of them. Because individuals' identities are threatened when they encounter information that challenges beliefs commonly held within their group . . . , the result is political conflict over risk regulation among groups committed to opposing hierarchical and egalitarian, individualistic and communitarian

people's identities consist of various roles and group memberships, each of which has shared cultural and social meanings—thus, a person may be a lawyer (a role identity), parent (another role identity), Republican (a group identity), and an American (another group identity). When another's evaluation of oneself is consistent with one's own self-conception, "self-verification" is achieved.<sup>32</sup> When another's appraisal is at odds with one's own self-view, emotional distress will result. A person will either change his or her behavior in order to obtain feedback from others that facilitates self-verification, or the individual will adopt cognitive strategies to cope with the inconsistency, such as selectively focusing on information that appears to confirm one's own self-view.<sup>33</sup>

A role identity and group identity are related by having meanings that are held in common.<sup>34</sup> For example, the meaning of being a member of the Republican party and a lawyer within the Republican administration involved sharing the common meaning of "fighting terrorism." Administration lawyers verified this meaning in their identity by authorizing so-called "enhanced interrogation"—but to do so, they unconsciously filtered contradictory legal authority forbidding torture. Authorizing such techniques simultaneously verified their membership in the Republican party, as the action approved of techniques desired by administration leaders.

Essentially, the role and group identities and the meanings held within these identities (of the acceptability of torture in the fight against terrorism) shaped the memo authors' perception and legal advice. This is not unusual: a lawyer may often provide a client with a desired answer not out of any conscious desire to bend the law in favor of the client, but rather out of an unconscious filtering of information that causes the lawyer to focus more intently on favorable precedent while contrary authority goes unnoticed. Filtering is especially likely when the lawyer is a "true believer" in the client's cause, as John Yoo was; in such cases, both lawyer and client are apt to overlook non-conforming feedback.<sup>35</sup> Thus, a lawyer might provide the answers the client desires not because of pressure or venality, but

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worldviews." See also Sheldon Stryker and Peter J. Burke, *The Past, Present, and Future of Identity Theory*, 63 *SOC. PSYCHOL. Q.* 284, 286 (2000).

<sup>32</sup> Jan E. Stets & Peter J. Burke, *Identity Theory and Social Identity Theory*, 63 *SOC. PSYCHOL. Q.* 224, 225 (2000) ("In identity theory, the core of an identity is the categorization of the self as an occupant of a role, and the incorporation, into the self, of the meanings and expectations associated with that role and its performance.").

<sup>33</sup> See Jan E. Stets & Alicia D. Cast, *Resources and Identity Verification from an Identity Theory Perspective*, 50 *SOCIOLOGICAL PERSP.* 517, 522 (2007); William B. Swann, Jr., *The Trouble With Change: Self-Verification and Allegiance to the Self*, 8 *PSYCHOL. SCI.* 177, 178 (1997).

<sup>34</sup> Stets & Burke, *supra* note 32, at 228.

<sup>35</sup> See Robertson, *supra* note 18.



simply because of a limited perception of the facts. Public condemnation is unlikely to change such behavior—approval from clients and other respected individuals would verify the lawyer's self-conceptions, emotionally vindicating the lawyer's actions even in the face of public disapproval.

The advice proffered by the memo authors was not—and could not be—independent of allegiance to the groups in which they belonged.<sup>36</sup> Given this connection, the torture memos may have been much more a product of one playing out a role (here, the lawyer) in a group (of the Republican party) and engaging in perceptual filtering. This filtering process happens unconsciously; unlike a calculated response to venality or outside pressure, it may occur without any conscious awareness by the lawyer. Nevertheless, the lawyers' advice simultaneously served both their role and group identity. By filtering out countervailing legal interpretations, the lawyers were able to maintain a view of themselves as providing independent and competent advice. By offering advice that comported with the administration's goals, they were able to verify the meaning of the Republican party—the acceptability of torture.

But the problem of torture and political identity affected much more than the lawyers: it also shaped the policy commitments of the American public. Here, two group identities overlapped: an American identity that condemned torture, and a Republican group identity that grew to support it. As noted, people tend to view the world in a self-serving manner, allowing them to protect their self-conceptions. Thus, when information about possible torture first entered the national consciousness after the Abu Ghraib photographs were released, the initial American reaction was largely one of denial.<sup>37</sup> While the media in other countries was more likely to characterize the abuse as systemic and reflective of larger U.S. policy decisions, the American media was more likely to characterize it as the result of the immoral activities of a few “hillbilly kids,” unrelated to larger policy objectives.<sup>38</sup> The American identity condemned torture; therefore, when presented with activities that looked very much like torture, Americans viewed

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<sup>36</sup> Stets & Burke, *supra* note 32, at 228 (“[O]ne always and simultaneously occupies a role and belongs to a group, so that role identities and social identities are always and simultaneously relevant to, and influential on, perceptions, affect, and behavior.”).

<sup>37</sup> See Timothy M. Jones & Penelope Sheets, *Torture in the Eye of the Beholder: Social Identity, News Coverage, and Abu Ghraib*, 26 POL.COMM. 278 (2009).

<sup>38</sup> Robert N. Strassfeld, *American Innocence*, 37 CASE W. RES. J. INT'L L. 277, 305 (2006) (noting that the focus on Charles Graner and Lynndie England reinforces the idea that “the events at Abu Ghraib were aberrational and do not represent America” by portraying the events as “the sadistic diversion of ‘trailer trash.’”). By focusing on England and Graner, Americans could view the abuse without threat to their own identities: “Though the American faces in the Abu Ghraib pictures may look like ours, the representation of Graner and England allows many Americans to use class, geography, lifestyle, and education to distance themselves from torture and abuse.” *Id.*

those actions as unusual, unauthorized, and essentially unrepresentative of American policy.<sup>39</sup>

What is even more troubling than such biased perception of torture, however, is how the cultural meaning of torture and abuse changed over the course of time. Initially, the American identity condemned a policy of torture—if it had not, there would have been no reason for Americans to perceive the information from Abu Ghraib as mere isolated abuse, even in the face of evidence suggesting otherwise.<sup>40</sup> But certain administration officials publicly stated a desire to change that identity to one more accepting of harsh tactics. Former Vice President Richard B. Cheney sent this message less than a week after the terrorist attacks on 9/11, arguing that a national identity that highly valued anti-torture policies might be ineffective to combat national threats: “We also have to work through sort of the dark side, if you will . . . It is a mean, nasty, dangerous, dirty business out there, and we have to operate in that arena.”<sup>41</sup>

Cheney’s message did not succeed because it was inherently persuasive; rather, it did so because it was effective in changing the social meaning of what it meant to be a Bush/Cheney Republican. Certainly, he sent a message that we needed to torture to get information. The factual background to back up that assertion, however, was largely absent.<sup>42</sup> What linguistics expert Deborah Tannen refers to as the “metamessage” in this case was much more important than the message itself. She distinguishes between message and metamessage by pointing out that “[i]nformation conveyed by the meanings of words is the message,” but “[w]hat is communicated about relationships—attitudes towards each other, the occasion, and what we are saying—is the metamessage. And it’s metamessages that we

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<sup>39</sup> Jones & Sheets, *supra* note 37, at 290 (concluding that “a shared social identity in the service of a positive national self-image . . . unites journalists and citizenry in interpreting these events in nation-affirming ways.”).

<sup>40</sup> *Id.* (noting that “declassified official memos suggest that at least some of what took place may have been official policy.”).

<sup>41</sup> CHRISTOPHER H. PYLE, *GETTING AWAY WITH TORTURE: SECRET GOVERNMENT, WAR CRIMES, AND THE RULE OF LAW* 5 (2009).

<sup>42</sup> See *Psychological Torture, CIA-Style*, HARPER’S, Apr. 1997, at 23–24 (“Intense pain is quite likely to produce false confessions, fabricated to avoid additional punishment. This results in a time-consuming delay while an investigation is conducted and the admissions are proven untrue.”). See also *Hearing on Standards of Military Commissions and Tribunals Before the House Armed Services Comm.* (July 26, 2006) (prepared statement of Michael P. Scharf, Professor of Law and Director of the International Law Center at Case Western Reserve University School of Law), available at <http://www.publicinternationallaw.org/publications/testimony> (last visited Nov. 4, 2009) (criticizing the testimony of Steven Bradbury, acting Assistant Attorney General and head of the DOJ Office of Legal Counsel, who authored the “techniques” memo of May 10); Michael P. Scharf, *Tainted Provenance: When, If Ever, Should Torture Evidence Be Admissible?*, 65 WASH. & LEE L. REV. 129 (2008).

react to most strongly.”<sup>43</sup> Here, the metamessage behind Cheney’s stated message was that this is *who we are*—that Americans, or at least those who support his party, are willing, even eager to get their hands dirty, to work on the “dark side.”

Thus, Cheney was changing the cultural meaning of what it meant to be a Bush/Cheney Republican. Those who had made the cultural commitment to support the Bush/Cheney agenda more broadly were therefore likely to accept a policy “doing whatever is necessary” and believing that such “enhanced interrogations” were indeed necessary to combat terrorist attacks. Such acceptance is consistent with recent research regarding cultural commitments, which suggests that people accept or reject new information based on the commitments they have already accepted.<sup>44</sup> When people had committed to the Bush/Cheney agenda, they were more likely to accept this shift in commitment to “work through . . . the dark side.”<sup>45</sup>

This shift in cultural meaning did not require people to define themselves in ways that were alien to their self-view, but instead built on pre-existing components of the American identity. As other scholars have pointed out, the American identity has more than one aspect: on the one hand, it includes “freedom as a universal ideal” (and a view of the U.S. as “the patron’ for a free global environment”), but it also includes a “focus on strength [and] will” which carries a sense that appearing weak “would excite not the desired respect, but only contempt.”<sup>46</sup> Thus, the American identity includes a cultural meaning of respect for human rights (as part of its emphasis on freedom) and includes a cultural meaning of global authority, which requires the appearance of strength. When American strength appeared to be challenged by the events of 9/11, some have suggested that detainee abuse was a way of re-establishing the perceived strength of American power: “[f]rom this angle, the demonstration of US power through abusing detainees disciplines the world into a US global order . . . .”<sup>47</sup> Thus, accepting “enhanced interrogation” or torture required people to emphasize the “authority” component of the American identity and de-emphasize the “human rights” component, but it did not require wholesale change.

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<sup>43</sup> DEBORAH TANNEN, THAT’S NOT WHAT I MEANT: HOW CONVERSATIONAL STYLE MAKES OR BREAKS YOUR RELATIONS WITH OTHERS 29 (1992).

<sup>44</sup> Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL’Y REV. 149, 151 (2006).

<sup>45</sup> PYLE, *supra* note 41.

<sup>46</sup> Brent J. Steele, ‘Ideals that Were Really Never in Our Possession’: Torture, Honor, and US Identity, 22 INT’L REL. 243, 248 (2008), available at <http://ire.sagepub.com/cgi/reprint/22/2/243.pdf> (quoting Jutta Weldes, *The Cultural Production of Crises: U.S. Identity and Missiles in Cuba*, in CULTURES OF INSECURITY: STATES, COMMUNITIES AND THE PRODUCTION OF DANGER 46 (J. Weldes et al. eds. 1992)).

<sup>47</sup> Steele, *supra* note 46, at 251.

The strategy of re-defining partisan cultural commitment to include a willingness to engage in “enhanced interrogation” worked stunningly well. Between 2005 and 2009—a period of time well after the 9/11 attacks—the percentage of Americans who “believed torture was at least sometimes justifiable” rose from thirty-eight percent to fifty-two percent.<sup>48</sup> Among Republicans as a whole, it was more than sixty-six percent.<sup>49</sup> Among Democrats, however, the percentage was much smaller—approximately thirty-three percent.<sup>50</sup> Interestingly, sixty-two percent of white, Protestant evangelical Christians agreed that torture could be justified, while only forty percent of the nonreligious agreed.<sup>51</sup> It seems unlikely that this disparity could be explained as a matter of religious doctrine; more likely, it is an example of the type of cultural commitment described above. Evangelical Christians were more likely to support the Bush/Cheney ticket based on its social conservatism. When the cultural meaning ascribed to that ticket expanded to include support for torture, those who had already committed their support to the ticket also committed to support their views on torture.<sup>52</sup>

By the time of the Republican primaries for the 2008 presidential election, other Republican candidates also reflected this view. In a South Carolina debate, all Republican presidential hopefuls but one “endors[ed] the use of enhanced interrogation techniques, including waterboarding, to uncover the proverbial ticking bomb” to “strong audience applause.”<sup>53</sup> Only John McCain objected to a re-definition of the American identity to include torture, stating that his experience in Vietnam had convinced him that “[i]t’s not about the terrorists; it’s about us. It’s about what kind of country we are.”<sup>54</sup> McCain’s message was one that the audience was not ready to hear, and audience members reacted with silence.<sup>55</sup>

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<sup>48</sup> *Sanctioning of Torture by Americans Betrays All We Stand for*, BEAVER COUNTY TIMES (Pa.), June 11, 2009.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Torture, Religion Should Not Go Hand-In-Hand*, YORK DISPATCH (Pa.), June 10, 2009.

<sup>52</sup> In the fall of 2009, t-shirts reading “I’d rather be waterboarding” were offered for sale by Conservative T-Shirts.com, alongside other shirts stating “Proud Republican,” “Jesus Christ is a Personal Friend of Mine,” and “Annoy a Liberal: Work Hard and Live Free.” See <http://www.conservative-t-shirts.com/conservative-t-shirts/waterboarding-t-shirts.html> (last visited Nov. 4, 2009).

<sup>53</sup> PYLE, *supra* note 41, at 152.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* Of course, McCain did win the Republican nomination. His victory in the primary may suggest either that his position on torture was less important than other considerations, or that the Republican voting public has a different position on torture than the audience, who may have represented only the base of the party.

## V. IMPLICATIONS FOR ACCOUNTABILITY

Because torture itself has entered the partisan divide, any investigation into torture policies will necessarily be subject to partisan perceptual frameworks as well. For an investigation to be successful, it would need to begin with an understanding of what is legal and conclude with an agreement about what actually happened. Unfortunately, both of those goals are unlikely to be achieved. Due to the partisan divide that has been created over the torture issue, as well as the differing perceptual frameworks, it is unlikely that people will agree either on the legal question or the factual one.

Furthermore, both sides question the motivations of the other. Those who were involved in developing the interrogation policies believe they are being unfairly targeted in a partisan witch-hunt. John Yoo, for example, has characterized the Office of Professional Responsibility's investigation into the torture memos as "a short-term political maneuver in response to political criticism."<sup>56</sup> Similarly, Cheney has stated that he believes the Obama administration's proposed investigation is "intensely partisan"—that instead of appreciating the prior administration's efforts to keep the country safe, the new administration is "out there now threatening to disbar the lawyers who gave us the legal opinions."<sup>57</sup> On the other side, members of the Center for Constitutional Rights argue that the memo authors themselves were the ones who manipulated the law for partisan ends:

Responsibility for the torture program cannot be laid at the feet of a few low-level operatives. Some agents in the field may have gone further than the limits so ghoulishly laid out by the lawyers who twisted the law to create legal cover for the program, but it is the lawyers and the officials who oversaw and approved the program who must be investigated.<sup>58</sup>

Thus, any investigation undertaken by the current administration will likely be viewed as legitimate only by those who already supported the administration. Like the Serbs and Muslims reacting to the Sarajevo bombing, or even like the Princeton and Dartmouth fans watching a game, each side is predisposed to focus on the faults of the other. Each side is also pre-

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<sup>56</sup> YOO, *supra* note 28, at 183.

<sup>57</sup> Sam Stein, *Cheney Accuses Obama of Launching "Intensely Partisan" Torture Investigation*, HUFFINGTON POST, Aug. 30, 2009, [http://www.huffingtonpost.com/2009/08/30/ch Cheney-accuses-obama-of-1\\_n\\_272160.html](http://www.huffingtonpost.com/2009/08/30/ch Cheney-accuses-obama-of-1_n_272160.html) (last visited Nov. 4, 2009) (quoting Dick Cheney from a Fox News interview).

<sup>58</sup> *Holder—And Obama—Must Focus on Torture Accountability*, CAPITAL TIMES (Wi.), August 27, 2009, available at [http://host.madison.com/ct/news/opinion/editorial/article\\_a428f29c-1c0e-54e7-b178-873fe3b00e48.html](http://host.madison.com/ct/news/opinion/editorial/article_a428f29c-1c0e-54e7-b178-873fe3b00e48.html).

disposed to impugn the motives of the other. These are not calculated views; they operate at a deeply unconscious level.<sup>59</sup>

Furthermore, studies show that even when individuals attempt to look beyond their own partisan biases, they are unable to; those biases are buried so deeply in the unconscious that they cannot be called up at will.<sup>60</sup> Attempts to overcome unconscious partisan biases may even backfire, as asking people to focus on potential partisan biases can reinforce prior positions.<sup>61</sup> When people put additional time and effort into thinking about the conflict, they don't change the outcome; they believe they are "already being fair."<sup>62</sup> Thus, they simply put the extra time and effort into "supporting the position they already favored, not on rethinking the position they disagreed with."<sup>63</sup>

The unconscious nature of such partisan commitments is especially troubling for accountability efforts. It may be that the partisan commitment to torture is currently weaker than other partisan commitments; people may express support for torture because political leaders they agreed with have expressed such support, and they are willing to accept it because it comports with the "authority" aspect of their political identity. That commitment may not yet be deeply entrenched; it may be set aside if Republican political leaders express no support for torture as a component of partisan identity. But that commitment may also be further solidified if prosecutions or professional sanctions indeed take place. What was a temporary emphasis on "authority" over "respect for human rights" might become a more permanent part of partisan identification if, over the next few years, people are asked to reflect on those choices and thereby reinforce their acceptance of torture and detainee abuse.

## VI. CONCLUSION

Given the entrenched divide, is it possible to move forward with a process to seek accountability? Perhaps. Some have suggested that prosecutions are important for restoring the national anti-torture identity; that such accountability is not about the individuals themselves, but would instead

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<sup>59</sup> See Adam Benforado & Jon Hanson, *Naïve Cynicism: Maintaining False Perceptions in Policy Debates*, 57 EMORY L.J. 499, 518–19 (2008) ("Because we perceive ourselves to be objective, we have little reason to think critically about whether our beliefs are, in fact, correct . . . . [O]ur biased theories, beliefs, and expectations, tend to persevere.").

<sup>60</sup> See Cynthia McPerson Frantz, *I AM Being Fair: The Bias Blind Spot as a Stumbling Block to Seeing Both Sides*, 28 BASIC & APPLIED SOC. PSYCHOL. 157, 161 (2006).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 166.

<sup>63</sup> *Id.*

provide a “social statement” that these actions will not be tolerated.<sup>64</sup> What is not clear, however, is whether the partisan divide on torture has become too great to quickly re-create a national identity that condemns such acts.<sup>65</sup>

One possible way to move forward is through a truly bipartisan commission. If indeed the two parties can come together to agree on the interrogation techniques legally authorized under U.S. law, the techniques actually used, and who should be held responsible, such a “social statement” may be possible. Even if the parties disagree about the ultimate limits of torture, they may be able to find some common ground in the middle to condemn at least the most extreme cases. This is a difficult proposition, however: given the current breakdown on partisan lines, it will not be easy to get Republican involvement in such an investigation. And if a bipartisan commission can be created, there is also a risk that the final findings will break down on partisan lines, thus further entrenching the current divide over torture.<sup>66</sup>

In the end, it may simply be that more time is needed to change the cultural meanings associated with partisan identity. If a diminished military presence allows torture to fade into the background, it will become a less salient aspect of political culture. Conversely, an anti-torture meaning might begin to grow out of other sources of shared identities such as religious institutions: human rights advocates have suggested that a uniform religious response condemning torture from “the country’s churches, synagogues, and mosques” might create a stronger religious identity condemning torture.<sup>67</sup> With enough time and distance, the cultural meaning may again shift to allow a united American identity that condemns torture. Until that time,

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<sup>64</sup> Video: Marieke Wierda, Prosecuting Abuses Resulting From U.S. Counter-terror Policy, [http://www.youtube.com/watch?v=7qGzA\\_X5bO4](http://www.youtube.com/watch?v=7qGzA_X5bO4) (last visited Nov. 4, 2009).

<sup>65</sup> In the long run, successful prosecutions might indeed help restore a national consensus. As other scholars have noted, court decisions themselves can play a role in conferring political legitimacy. See, e.g., Robert Dahl, *Decision-Making in a Democracy*, in THE DEMOCRACY SOURCEBOOK 251 (Robert A. Dahl et al. eds., 2003) (“[A]t its best the Court operates to confer legitimacy, not simply on the particular and parochial policies of the dominant political alliance, but upon the basic patterns of behavior required for the operation of a democracy.”). However, such influence takes time to permeate society, and, in any case, requires a favorable court decision that withstands appeal to the Supreme Court.

<sup>66</sup> While avoiding accountability efforts may avoid entrenching the partisan divide over torture, it also risks creating a moral hazard problem: someone seeking to evade prosecution may deliberately stoke the fires of partisanship in order to ensure that the prosecution would be viewed as politically illegitimate. The more politically powerful the individual, the more likely that such strategies would be successful. Whether the harm caused by a wrongdoer avoiding justice weighs more than the harm resulting from partisan entrenchment is a political, legal, and moral question that must be examined in each case.

<sup>67</sup> SHADI MOKHTARI, AFTER ABU GHRAIB: EXPLORING HUMAN RIGHTS IN AMERICAN AND THE MIDDLE EAST 209 (2009).

however, it is likely that accountability efforts will further entrench partisan animosity.