Criminal Justice and Child Protection Responses to Cases of Severe Child Abuse: Existing Statutory Frameworks for Torture

By Suzanna Tiapula\(^1\) and Amanda Appelbaum\(^2\)

Editor’s Note: In this analysis, we offer a comprehensive overview of the current legal framework for torture. The statutes analyzed for this study explicitly reference the word “torture” or analogous acts that have been recognized by courts as torture. Statutes referencing torture reflect a range of legislative responses, including both criminal and civil statutes. Criminal laws prohibit and penalize both physical and sexual torture, while civil statutes reference torture in matters of family law, employment law, and public health law.

Child abuse leaves a footprint on the heart.
—Anna Salter

If child abuse leaves a footprint on the heart, then the severe child abuse now beginning to be recognized medically as “serial child torture,” truly stains our societal soul.

Severe child abuse is being reviewed by teams of medical researchers for medical classification as “serial child torture.” Improved institutional responses by medical and mental health professionals and criminal justice and child protection professionals would enable us to identify children at risk of serial child torture. An analysis of the existing statutory framework for torture will serve as the basis for subsequent analysis of criminal justice and child protection responses.

Only fourteen states have child maltreatment statutes that specifically identify torture as an element of child abuse.\(^4\) Seven of the fourteen require that the torture be “intentional” or “willful.” The District of Columbia and New Mexico also include recklessness or negligence as mens rea for child torture.\(^6\)

Another statutory framework for child torture involves the statutes addressing ritualized abuse of a child.\(^7\) Illinois, Idaho and Montana criminalize abuse of a child when these occur as part of a ceremony, rite, ritual or any other similar observance.\(^8\) Examples of prohibited acts under these statutes include: forced ingestion,\(^9\) forcing a child into a coffin or grave,\(^10\) and torturing or sacrificing animals or humans.\(^11\) Louisiana has a comparable statute but is not specific to child victims.\(^12\)

Two states, California\(^13\) and Michigan,\(^14\) explicitly recognize torture as a crime. The California statute has specific language addressing motive.\(^15\) Michigan’s statute is similar except it does not require motive.\(^16\) Additionally, Michigan’s statute...
including definitions: “cruel” means brutal, inhuman, sadistic, or that which torments; “great bodily injury” means...serious impairment of a body function...internal injury, poisoning, serious burns or scalding, severe cuts, or multiple puncture wounds;” and, “severe mental pain and suffering” means a mental injury that results in a substantial alteration of mental functioning that is manifested in a visibly demonstrable manner.”

Sixteen jurisdictions specifically reference torture in their homicide laws. For example, the Arizona Supreme Court has held that murder by torture is a type of first degree murder “committed when the defendant intends to cause extreme pain and suffering for the purpose of revenge, extortion, persuasion, or some other untoward propensity.” Two states specifically identify the intent required for the crime of torture. Idaho requires an “intentional application of torture...which results in the death of a human being.” Oklahoma classifies the “willfully torture” of a child as first degree murder. Another seven jurisdictions identify specifically “murder perpetrated by means of torture” or “murder committed in the course of torture.” The New York Murder in the First Degree statutes include acts which cause the death of a victim and which are committed “in an especially cruel and wanton manner.”

Similarly, Utah’s Aggravated Murder statutes criminalize homicide committed in “especially heinous, atrocious, cruel, or exceptionally depraved manner, any of which must be demonstrated by physical torture.” Rhode Island’s murder statute defines first degree murder as that “perpetrated by...any kind of willful, deliberate, malicious and premeditated killing,” which the state Supreme Court has held includes murder committed in a manner involving torture.

Many of the murder and homicide statutes address the element of “pattern or practice of assault or torture against a child or children.” Thus, under federal law, it is not enough that the murder was committed or perpetrated by torture, but instead, the torture must have been inflicted on at least two occasions. Oregon has adopted similar language in several of its murder and manslaughter statutes, which all criminalize homicide of a child under the age of fourteen when the defendant “has previously engaged in a pattern or practice of assault or torture of the victim or another child under fourteen.” Washington also has two murder by torture statutes requiring a “pattern or practice of assault or torture.” Maine is the only state that criminalizes torture when it is a part of an attempted murder.

Twenty-six states have statutes with provisions for enhanced sentencing when a murder includes elements of torture. Twenty states have statutes explicitly naming torture as an aggravating factor for capital punishment. Seven of these statutes list torture as evidence that the murder was committed in a depraved or wanton manner or in an especially cruel, heinous, or atrocious way. Similarly, five statutes list as an aggravating factor that the murder was “outrageously or wantonly vile, horrible or inhuman in that it involved torture.” The remaining eight statutes state that it is an aggravating factor when either the murder was committed by torture or involved torture while the victim was still alive. Of the twenty statutes citing torture as an aggravating factor for capital punishment, only three actually define what torture is—Arkansas, New York, and Wyoming define torture as the infliction of extreme physical pain or suffering.

In addition to the twenty states with statutes listing “torture” specifically as an aggravating factor for capital punishment, there are also seven states that have precedent interpreting torture as one of the aggravating factors for sentencing. Alabama, Arizona, Connecticut, Louisiana, Mississippi, Nebraska, and Oklahoma have statutes listing as an aggravating factor that the crime was committed in an “especially heinous, atrocious, or cruel” manner and have case law holding that this phrase includes torture.

States without the death penalty that list torture as a factor for enhanced sentencing include Alaska, Hawaii, Maine, Michigan, New Jersey and Rhode Island. Alaska, New Jersey, and Rhode Island all have statutes permitting or requiring the court to impose a life sentence for murder when the defendant tortured the victim prior to the victim’s death. Both the New Jersey and Rhode Island statutes also specify that a life sentence without the possibility of parole shall be within the court’s discretion. Hawaii’s statute permits a court to sentence a defendant convicted of murder to life imprisonment without parole if the murder was “especially heinous, atrocious, or cruel.” The Supreme Court of Hawaii has held that this section requires the State to prove that the defendant intentionally or knowingly inflicted, and the victim suffered “unnecessary torture.” Courts have held in Maine that torture is an aggravating circumstance justifying the imposition of a life sentence for murder.

Emerging Trends for Prosecution of Child Torture
In analyzing the various physical torture laws, several trends became apparent.

Many of the statutes related to torture require that the defendant had previously engaged in either a specified number of abusive acts or in a pattern or practice of a specified number of acts. In Alaska, murder by child abuse requires “at least two separate acts” inflicting serious injury. Similarly, federal murder “perpetrated as a part of a pattern or practice of assault or torture against a child or children” also requires “assault or torture engaged in on at least two occasions.” Other statutes are less specific and do not identify how many acts of abuse are required for the crime, but still require some type of patterned behavior. Iowa’s “Child Endangerment” statute requires “an intentional act or series of intentional acts;” Oregon’s homicide statutes require that “the person has previously engaged in a pattern or practice of assault or torture of the victim or another child under 14 years of age;” and Washington’s “Assault of a Child in the First Degree” and “Homicide by Abuse” statutes requires that the perpetrator had previously engaged in a “pattern or practice” of abusive behavior. Iowa has even codified the crime of engaging in a
pattern or practice of abuse in a separate law called, “Multiple Acts of Child Endangerment.”55 The law criminalizes anyone who has committed “three or more acts of child endangerment”66 within a period of twelve months involving the same child, where one or more of the acts results in serious injury to the child or results in a skeletal injury to a child under the age of four.”57

In most jurisdictions, the definition of torture involves an analysis of pain. Twelve jurisdictions define torture.58 Ten of the twelve definitions describe torture as the infliction of “pain” and/or “suffering.”59 Eight of those definitions qualify the type of pain and suffering inflicted by torture, explaining that it is a type of “extreme,” “grievous,” “severe” pain or suffering. Arkansas and Idaho have additional temporal criteria, requiring that the infliction of extreme pain must be for a “prolonged” period of time.63 Michigan’s murder statute and the federal murder statute both include “physical or mental pain and/or suffering” in their definitions of torture and are the only statutory definitions to include a mental component.65 Two states that do include an analysis of pain or suffering in their definitions of “torture.” South Carolina defines “torture” as “serious physical abuse,”66 and Nebraska defines “torture” as “serious physical, sexual or psychological abuse,” and “the imposition of extreme suffering.”67

The legal framework for torture in many jurisdictions includes the element of motive.68 Idaho,69 Michigan,70 Nebraska,71 and federal statutes72 require only that the act of torture be committed for the purpose of causing such pain and suffering. Illinois requires that the infliction of “extreme physical pain” be “motivated by an intent to increase or prolong the pain, suffering or agony of the victim.”73 Both Arizona and California define torture as the infliction of pain “for the purpose of revenge, extortion, persuasion,”74 or for “any sadistic purpose”75 or for “some other untoward propensity.”76 The Arizona Supreme Court has made very clear that intent to cause extreme pain, alone, is not enough—that there must also be evidence that the defendant did so for one of the enumerated purposes.77 Additionally, the Arizona Supreme Court has held that torture may not be inferred by the mode of injury without separate evidence of intent.78 Perhaps North Carolina79 has the most comprehensive definition of torture because it requires both that the pain is inflicted for a specific purpose and also that the infliction of pain is part of a larger pattern of abuse. The North Carolina Supreme Court has approved an instruction defining torture as “the course of conduct by one of more persons which intentionally inflicts grievous pain and suffering upon another for the purpose of punishment, persuasion, or sadistic pleasure.”80 “Course of conduct” is defined as “the pattern of the same or similar acts, repeated over a period of time, however short, which established that there existed in the mind of the defendant a plan, scheme, system or design to inflict cruel suffering upon another.”81

Although the “mayhem” statutes don’t explicitly list torture, many of the acts are relevant for analysis of child torture cases. California,82 Massachusetts,83 Mississippi,84 and Wisconsin85 all have “Mayhem” statutes, which criminalize cutting or maiming the tongue, eye, ear, nose, lip, organ or any limb or member of another person.86

**Sexual Torture**

Thirty states currently use the term sadomasochistic abuse in their obscenity or child sexual exploitation/child pornography laws.87 These states generally define sadomasochistic abuse as flagellation or torture or the condition of being fettered, bound or otherwise physically restrained.88 Five other states’ sexual exploitation and obscenity laws also prohibit flagellation, torture, or physically restraining someone as an act of sexual gratification, but do not define this conduct as sadomasochism.89 However, these laws may not be applicable to cases of serial child torture, even where the torture involves sexual abuse. First, twenty-one states also require that the torture, flagellation, or physical restraint be done by or upon a person who is nude or clad in undergarments, a mask or a bizarre otherwise revealing costume.90 Second, and most importantly, as exploitation or obscenity-related laws, these statutes all criminalize possessing, distributing, or creating materials or performances involving sexual torture, not the commission of sexual torture itself. Therefore, unless the sexual torture is being represented, depicted, or otherwise displayed for others to see, these laws would not apply to cases of serial child torture where the child is being sexually abused. In two states, North Dakota and Vermont, these limited obscenity statutes91 are the only laws in those states specifically referring to torture.

At the other end of the spectrum are the two states with specific statutes addressing the sexual torture of children; Alabama codifies sexual torture, making it a crime to “penetrate[e] the vagina or anus or mouth of another person with an inanimate object by forcible compulsion with the intent to sexually torture or to sexually abuse” or for a person sixteen years or older to “penetrate[e] the vagina or anus or mouth of a person who less than twelve years old with an inanimate object with the intent to sexually torture or sexually abuse.”92 Alabama’s statute is, however, limited to sexual abuse with an inanimate object. Idaho has two statutes criminalizing sadomasochistic abuse.93

One unusual statutory reference involves the link between torture and prostitution; Minnesota prohibits torture as a means of coercing persons into prostitution, although the statute is not specific to children or to sexual torture.94

Four states have enhancement statutes for sexual abuse involving torture: Minnesota, Missouri; Rhode Island; and North Carolina.95 The sentence for criminal sexual conduct in the first degree96 or criminal sexual conduct in the second degree97 in Minnesota will be enhanced to life imprisonment without release or to life imprisonment where the fact finder determines two or one “heinous elements” existed, respectively.98 Under the statute, “heinous elements” include that the offender tortured the victim, with “torture” defined as
“the intentional infliction of extreme mental anguish or extreme psychological or physical abuse, when committed in an especially depraved manner.”

In Missouri, a defendant will be sentenced to life without eligibility for parole for committing forcible rape of a child less than twelve years when such forcible rape was “outrageously or wantonly vile, horrible or inhumane, in that it involved torture or depravity of mind.”

North Carolina’s statutes allows a court to sentence a defendant to a longer term of imprisonment, up to life imprisonment without parole, if the defendant was convicted of rape of a child or of a sexual offense with a child and the court finds “factors of egregious aggravation” including “the depraved torture or mutilation of the victim, or extraordinary physical pain inflicted on the victim.”

Finally, Rhode Island mandates that any person convicted of first degree child molestation sexual assault who “committed the offense in conjunction with circumstances involving…torture” and who is also determined to be a “high-risk of re-offense offender” is monitored electronically via an active global positioning system for life and attends a sex offender treatment program for the duration of any probation period.

**Civil Torture Laws**

**Parental Rights and Child Welfare Torture Laws**

Torture is also addressed in many states via their child protection statutes. Twenty-seven states include torture as a factor in their juvenile or equivalent codes governing parental rights. Of these twenty-seven states, eighteen list torture as a factor precluding the reunification. Most of these statutes list abandonment, chronic abuse, sexual abuse and torture as aggravating factors or circumstances. Four states include neglect as a factor as well.

Oklahoma’s statute is, perhaps, the most detailed: aggravating circumstances which would preclude reunification of the family include: “chronic abuse including, but not limited to, physical, emotional, or sexual abuse, or sexual exploitation which is repeated or continuing;” “torture that includes, but is not limited to, inflicting participating in or assisting in inflicting intense physical or emotional pain upon a child repeatedly over a period of time for the purpose of coercing or terrorizing a child or for the purpose of satisfying the craven, cruel, or prurient desires of the perpetrator or another person;” “chronic neglect that includes, but is not limited to, a persistent pattern of family functioning in which the caregiver has not met or sustained the basic needs of a child which results in harm to the child;” and “neglect that has resulted in a diagnosis of the child as a failure to thrive.”

Oregon’s child protection statute includes intentional starvation as one of the factors to be considered in any analysis of reunification. Although New Jersey’s statute does not specifically reference torture, it requires that reasonable efforts to reunify the child with a parent shall not be necessary if aggravated circumstances of abuse, neglect, cruelty, or abandonment exist. Abuse of a child would include “using excessive physical restraint on the child under circumstances which do not indicate that the child’s behavior is harmful to himself, others or property;” and cruelty of a child is defined as including “inflicting unnecessarily severe corporal punishment upon a child, inflicting upon a child unnecessary suffering or pain, either mental or physical, habitually tormenting, vexing or afflicting a child, any willful act of omission or commission whereby unnecessary pain and suffering, whether mental or physical, is caused or permitted to be inflicted on a child, or exposing a child to unnecessary hardship, fatigue or mental or physical strains that may tend to injure the health or physical moral well-being of such child.”

In family court actions, torture is also used as a factor in termination of parental rights. Twelve of the twenty-seven states list torture as a factor in the analysis of termination.

Three state statutes explicitly outline why torture renders the parent unable to properly care for the child and why termination of parental rights is in the child’s best interest.

Two states establish torture as a rebuttable presumption for termination being in the child’s best interest. The factors for terminating parental rights are similar, or in some cases the same, as those considered for reunification. Several of the statutes also include specific factors in the analysis of termination, including: starvation; cruel confinement or cruel punishment.

Three states use torture as a factor for other purposes during a parental rights proceeding. In Delaware, the court may declare a child to be abused and in need of services where evidence shows the child has been tortured.

West Virginia allows a court the state to take custody of an abused or neglected child pending a preliminary hearing if the child’s parent has subjected any child to torture, as an aggravating circumstance that poses “imminent danger to the physical well-being” of the child.

The standard of proof for child protection statutes varies by jurisdiction. Seven states require the court to find by “clear and convincing evidence” that a parent or guardian has subjected the child to torture. One statute requires the court to find that a child was tortured “based upon a preponderance of the evidence,” and one requires that a parent actually be convicted of aggravated battery of the child.

Only fourteen statutes explicitly recognize torture of a child in the home triggers as a factor to be considered in the determination of parental rights for other children in the home.

**Regulations Linked To Analysis Of Torture**

Michigan has several employment regulations that affect employees or potential employees who have been charged with or convicted of a crime involving torture. Psychiatric or similar facilities for people with mental retardation may not employ, independently contract with, or grant clinical privileges to any individual having direct contact to patients or residents if that individual has been convicted of a felony or misdemeanor involving cruelty or torture. Similarly, health
facilities that provide bed services or a home for the aged, including home health agencies, also are prohibited from employing, independently contracting with, or granting clinical privileges to any individual having direct contact to patients or residents if the individual has been convicted of a felony or misdemeanor involving cruelty or torture. Additionally, teachers who have been convicted of a felony or misdemeanor involving torture may have their teaching licenses suspended by the superintendent of public instruction after a contested hearing held under Michigan’s Administrative Procedures Act of 1969 (Mich. Comp. Laws § 24.201 – 24.328 (2010)).

Maryland, Michigan, Minnesota, and Oklahoma have enacted regulations related to torture. The most common type of regulation has to do with toys or video games that depict torture. In Maryland, with the exception of toy guns or model vehicles, a person may not “knowingly manufacture, sell, rent, or offer for sale any toy that is designed to depict torture or to resemble any instrument that is designed specifically for torture.” In Michigan and Oklahoma, a person may not disseminate video or computer games that are “harmful to minors” in their portrayal of “extreme or loathsome violence” or “inappropriate violence,” respectively. Michigan defines “extreme or loathsome violence” to be any “real or simulated graphic depictions of physical injuries or physical violence against parties who realistically appear to be human beings” including actions such as inflicting cruelty, mutilation of body parts, criminal sexual conduct or torture. Oklahoma defines “inappropriate violence” as any description or representation of violence that is patently offensive to prevailing standards in the adult community with respect to what is suitable for minors and which also lacks any serious literary, scientific, medical, artistic, or political value for minors based on criteria such as it uses “brutal weapons designed to inflict the maximum amount of pain,” or it “endorses or glorifies torture or excessive weaponry.”

Finally, the Minnesota Commissioner of the Department of Public Safety in 2006 was charged with appointing a twenty-two member human trafficking task force to conduct a study to help develop a plan to address current trafficking as well as to prevent future trafficking. Under Minnesota law, the task force shall consist of at least eight representatives from nongovernmental organizations that may include representatives of organizations such as those that provide services to victims of torture, trauma, or human trafficking.

1 Director of the National Center for Prosecution of Child Abuse.
2 Staff Attorney, National Center for Prosecution of Child Abuse.
6 D.C. Code § 22-1101 (2010); N.M. Stat. Ann. § 30-6-1 (2010). (The District of Columbia requires a mens rea of “intentionally, knowingly, or recklessly” torturing a child while New Mexico provides for a mens rea of “knowingly, intentionally or negligently and, without justifiable cause or permitting a child to be tortured.”)
15 “Every person who, with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose, inflicts great bodily injury...is guilty of the crime of torture.” Cal. Penal Code § 206 (2010).
16 “A person who, with the intent to cause cruel or extreme physical or mental pain and suffering, inflicts great bodily injury or severe mental pain or suffering upon another person within his or her custody or physical control commits torture and is guilty of a felony punishable by imprisonment for life or any term of years.” Mich. Comp. Laws § 750.85 (2010).
19 State v. Morales, 630 P.2d 1015, 1019 (Ariz. 1981). (“Murder by torture” requires the state to prove first, that the defendant intended to torture or cause “extreme pain and suffering,” second, that defendant committed the torture for one of the “enumerated purposes,” and third, that the victim’s death was caused by the torture; however, it does not require the state to prove intent to cause death. State v. Kountz, 501 P.2d 931 (Ariz. 1972). Additionally, “[i]n order to torture cannot be inferred solely from the mode of assault or injury, but other evidence of intent to cause suffering is also required.” Morales, 630 P.2d at 1019.).
21 Idaho Code Ann. § 18-4001 (2010). (The statute defines torture as either, “the intentional infliction of extreme and prolonged pain with the intent to cause suffering,” or the infliction of “extreme and prolonged acts of brutality irrespective of proof of intent to cause suffering.”).
24 N.Y. Penal Law §§ 125.26, 27 (Consol. 2010). (Torture is defined as “the
intentional and depraved infliction of extreme physical pain.

30 Wash. Rev. Code Ann. § 9A.32.055 (2010) ("Homicide by Abuse") and Wash Rev. Code Ann. 10.95.020 (2010) ("Definition" [Aggravated First Degree Murder]). (Aggravated First Degree Murder requires that the defendant had previously engaged in a pattern or practice of three or more acts of criminal assault against a child in the past five years and also that at the time of the murder, the defendant and the victim were “family or household members.” Criminal assault of a child includes assaulting a child when the person has previously engaged in a pattern or practice of assault or torture of said child [or] person under sixteen years of age.)
31 Me. Rev. Stat. Ann. tit. 17-A, § 152-A (2009). ("A person is guilty of aggravated murder if that person commits attempted murder and, at the time of that person's actions, one or more of the following aggravating circumstances is in fact present...the attempted murder was accompanied by torture, sexual assault or other extreme cruelty inflicted upon the victim.")
37 Ark. Code Ann. § 5-4-604 (2010) ("Torture" means the infliction of extreme physical pain for a prolonged period of time prior to the victim's death.")
38 N.Y. Penal Law §§ 125.26, 27 (Consol. 2010). ("[T]orture" means the intentional and depraved infliction of extreme physical pain that is separate and apart from the pain which otherwise would have been associated with such cause of death.")
39 Wyo. Stat. Ann. § 6-2-102 (2010) ("‘Torture’...means every act, omission or neglect whereby the willful and malicious infliction of pain or suffering is caused, permitted to allowed to continue when there is a reasonable remedy for the relief.")
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