

A precarious gap in U.S. criminal codes for cases of child torture and suggested model statute

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ABSTRACT

Child torture includes a combination of two or more cruel inhuman degrading treatments for long periods of time, such as: intentionally starving the child, forcing the child to sit in urine or feces, binding or restraining the child, repeatedly physically injuring the child, exposing the child to extreme temperatures without adequate clothing, locking the child in closets or other small spaces, and forcing the child into stress positions or exercise which results in prolonged suffering permanent disfigurement/dysfunction, or death.¹

This study is a comprehensive analysis of the 50 U.S. state criminal codes and the D.C. criminal code, and identifies a gap in at least fourteen state codes for cases of child torture.² Every state code prohibits causing physical harm to a child, but not every state code criminalizes the mental trauma that occurs or a child when the torture does not result in a serious physical injury.

If the child dies from the torture, then prosecutors can charge murder. However, in cases where the child survives without serious physical injuries, the only charges that fit the elements of the crime in many states are misdemeanors (crimes punishable with a jail sentence of less than one year). For example, South Dakota has adopted a statute to explicitly address the issue. The South Dakota child torture statute reads, “Any person who abuses, exposes, tortures, torments, or cruelly punishes a minor in a manner which does not constitute [a felony], is guilty of a ...felony.”

U.S. state child torture statutes explicitly criminalize torturing children or a synonymous action such as “causing unjustifiable suffering.” Three variations of child torture statutes exist within U.S. state criminal codes. Thirty-six-state criminal codes and the DC criminal code contain a form of felony child torture statute. For fourteen states without a felony child torture statute, a gap in the criminal code exists that often allows people who have tortured children to serve light sentences usually reserved for slight misconduct. Legislation is suggested in these states. This study further highlights a model statute based on the survey of various U.S. child torture statutes.

1. Literature review

In the past two decades within the United States, both the medical and legal community have authored relevant articles on child torture as a form of child abuse. In 1998, for the *Journal of Clinical Pediatrics*, David Allasio MSW, and Howard Fischer MD, authored *Torture v. Child Abuse: What's the Difference?* articulating, child torture is distinct from the most commonly recognized abusive acts in severity, continuous nature, and intent of the perpetrator³. In 2006, Tournel, G. MD et al. publish a medical case study titled, *Child Barbarity and Torture: A Case Report*, in the *American Journal of Forensic Medicine and Pathology*. The case report describes a case of child torture.

In 2014, Knox et al., published the medical article *Child Abuse as a*

form of Child Torture in the *Journal of Adolescent Trauma* with the intent of developing a coherent medical definition to assist in identifying and diagnosing these cases. The study defined child torture as a longitudinal period of abuse characterized by at least two physical assaults, and two or more forms of psychological maltreatment (e.g., terrorizing, isolating), resulting in prolonged suffering, permanent disfigurement/dysfunction, or death.⁴ The article also suggests child torture is usually prolonged or repeated and includes procedures with both severe psychological and physical cruelty designed to establish the perpetrator's dominance and control over the victim's psyche.⁵ Victims suffer a severe combination of extreme physical and psychological maltreatment that involves intense humiliation and terrorization.⁶ It also usually includes neglect of medical needs resulting from abusive injuries or

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¹ *Id.*

² Fourteen U.S. criminal codes do not contain a child torture statute, however even the states with a child torture state may have one that is inadequate in terms of loopholes.

³ David Allasio & Howard Fischer, *Torture v. Clinical Child Abuse: What's the Difference*, 37 *J. Clinical Pediatrics* 267 (1998).

⁴ Knox at 44.

⁵ Barbara L. Knox et al., *Child Torture as a Form of Child Abuse*, 7 *J. CHILD ADOLESCENT TRAUMA* 38, 46-49 (2014).

⁶ *Supra* note 15 at 37.

starvation.⁷ Unlike less acute forms of abuse, it does not result from the perpetrator's episodic or unchecked anger toward the child.⁸ Many victims are homeschooled and isolated away from others.⁹ The study also notes the criminal sentences the perpetrators received ranged from probation to life in prison for the same types of heinous acts.¹⁰

The first substantial legal investigation of the issue was published in 2011 by Suzanna Tlapula and Amanda Appelbaum for the National District Attorneys Association.¹¹ The article cataloged any and all instances of “torture” in U.S. Criminal laws. The study found prohibition of torture was found in animal cruelty, sentencing enhancements to murder, capital/non-capital punishment sentencing guidelines, obscenity statutes, sadomasochist statutes, human trafficking statutes, and parental termination/reunification determinations statutes, and child abuse statutes.

In 2014, Christopher Browne, followed with a *Tortured Prosecution: Closing the Gap in Virginia's Criminal Code by Adding a Torture Statute* which analyzed Virginia's criminal code articulating the case for a stand-alone child torture statute.¹² In 2016 Tania Tetlow, published “*Criminalizing 'Private' Torture*” articulating the need for a stand-alone torture statute for other classes of vulnerable victims.¹² This study is the only study to analyze all state U.S. Criminal Codes to determine whether each jurisdiction's code contains a child torture statute, and the first to classify the types of child torture statutes within U.S. Criminal Codes.

2. Methodology

To determine whether a state code contained a child torture statute, the author analyzed all fifty state criminal codes and the D.C. criminal code individually, in addition to the U.S. federal statutory code. After the initial statutory analysis of the state and federal codes, the research was sent to the National Association of Prosecutor Coordinators, the National District Attorneys Association, and through the National Center for Child Abuse Statistics and Policy's over 2500-member listserv of multidisciplinary professionals investigating and prosecuting child abuse cases requesting comment by local professionals on the analysis for each state. All comments were reviewed and or incorporated into this report. The timeframe from the beginning of the analysis to completion of the study was over 28 months.

3. Findings

Black's Law Dictionary mainly defines torture as, “[t]he infliction of intense pain to the body or mind.” Cruel inhuman degrading treatments such as deprivation of food/water, deprivation of ability to relieve oneself, binding, exposure to extreme temperatures, forced isolation, and forced stress positions causes mental suffering but no physical injury.¹³ The definition of torture by its nature encompasses mental suffering caused by cruel inhuman degrading treatments.¹³

3.1. Federal law

Section 18 U.S.C. § 2304 prohibits public officials “acting under the color of law” from committing torture outside of the United States.¹⁴ The Eighth Amendment of the Constitution prohibits the government from using “cruel and unusual” punishment within the United States.¹⁵ Federal law does not address instances where private individuals commit torture against others.

3.2. State law

Some state laws do address instances where private individuals commit torture against others. California Michigan, Arizona Texas and Connecticut have specific standalone torture laws that criminalize instances where individuals commit torture against another individual of any age.¹⁶ Thirty-six states and the DC criminal codes contain a felony child torture statute. Fourteen state codes do not contain a felony child torture statute. The territorial codes were not analyzed.

All thirty-seven felony U.S child torture statutes fall into one of the following criteria:

as applied to a child:

- (1) the state code explicitly prohibits “torture” or synonymous elements such as “unusual cruelty” “unjustifiable suffering,” “serious emotional damage,” “unjustifiable mental suffering”¹⁷
- (2) the state prohibits causing a mental or physical injury, and further defines that injury to include torture, pain, or an analogous mental suffering component,¹⁸ and
- (3) the state code bans repeated pattern of injuries that result in torture.¹⁹

¹⁴ *United States Attorneys' Manual*, U.S. Dep't Justice (1997) (accessed Jun. 20, 2017), available at <https://www.justice.gov/usam/united-states-attorneys-manual>.

¹⁵ U.S. Const. amend. VIII.

¹⁶ See, e.g. Cal. Penal Code § 189 (“All murder which is perpetrated by means of ...torture is murder in the first degree”).

¹⁷ ALA. CODE § 26-15-3 Torture, Willful Abuse, Etc., Of Child (2018); AZ CODE ANN. § 13-3623 (2018) Child Or Vulnerable Adult Abuse; CAL. PENAL CODE § 206 (2018) Torture; CONN. GEN. STAT. ANN. § 53-20 (2018) Cruelty To Persons; DEL. CODE STATE TIT. 11§ 1103B (2018) Child Abuse; D.C. CODE § 22-1101 (2018) Cruelty To Children Definition; FLA. STAT. § 827.03 (2018) Abuse, Aggravated Abuse, And Neglect Of A Child; GA. CODE ANN. 16-5-70 (2018) Cruelty To Children; ID. CODE ANN. 18 —1501 (2018) Injury To Children; KAN. STAT. § 21-5602 (2018) Abuse of A Child; IOWA CODE § 726.6 (2018) Child Endangerment; MICH. COMP. LAWS SERV. § 750.85 Torture (2018); MISS. CODE ANN. §97-5-39 (2018) Contributing To The Delinquency Of A Child; NEB. REV. STAT. § 28 —707 (2018) Child Abuse Penalties; NEV. REV. STAT. § 200.508 (2018) Abuse, Neglect Or Endangerment Of Child; N.J. STAT. ANN. § 2C:24 —4 (2018) Endangering Welfare Of Children; N.M. STAT. § 30-6-1 (2018) Abandonment Or Abuse Of A Child; OHIO REV. CODE ANN. § 2919.22 (2018) Endangering Children; OKLA. STAT. TIT. 21 ANN. § 843.5 (2018). Child Abuse; S.C. CODE ANN. § 63-5-70 (2018) Unlawful Conduct Toward A Child; S.D. CODIFIED LAWS § 26-10-1 (2018) Abuse Of Or Cruelty To Minor; TENN. CODE ANN. § 39-15-402 (2018) Aggravated Child Abuse And Neglect; UTAH CODE ANN. § 76-5-109 (2018) Child Abuse —Child Abandonment; VT. STAT. ANN. TIT. 13 § 1304 (2018) Cruelty To Child; WA STAT § 40.1-103 (2018) Cruelty And Injuries To Children; WY STAT 6 —2-503 (2018) Child Abuse; Penalty

¹⁸ MO. STAT. § 568.060 (2018) Abuse Or Neglect Of Child; N.C. GEN. STAT. § 14-318.4 (2018) Child Abuse A Felony; N.D. CENT. CODE § 14-09-22 (2018) – Abuse Of Child – Penalty; RI GEN L § 11-9-5.3 (2018); TEXAS PENAL CODE § 22.04 (2018) Injury To A Child; W. Va. Code, § 61-8D-3 (2018); Wis. Stat. Ann. § 948.03 Physical Abuse Of A Child (2018);

¹⁹ COLO. REV. STAT. §18-6-401 (2018) Child Abuse; La. REV. STAT. ANN. § 14:93 (2018) Cruelty To Juveniles; MINN. STAT. § 609.377 (2018) Malicious Punishment Of Child; WASH. REV. CODE 9A.36.120 Child (2018) Abuse In The First Degree;

⁷ Knox at 46.

⁸ *Id.*

⁹ Center for Responsible Home Schooling, *Invisible Children Database* (March 22, 2018), <http://hsinvisiblechildren.org/blog/>

¹⁰ Knox at 44.

¹¹ Suzanna Tlapula & Amanda Appelbaum, Criminal Justice and Child Protection Responses to Cases of Severe Child Abuse: Existing Statutory Frameworks for Torture, NAT'L CTR. FOR PROSECUTION OF CHILD ABUSE (National District Atty Assn 2011).

¹² Christopher G. Browne, Tortured Prosecuting: Closing the Gap in Virginia's Criminal Code by Adding a Torture Statute, 56 Wm. & Mary L. Rev. 269 (2014).

¹³ Metin Bagoglu, MD, PhD, *A Multivariate Contextual Analysis of Torture and Cruel, Inhuman, and Degrading Treatments: Implications for an Evidence-Based Definition of Torture*, 2 Am. J. Orthopsychiatry 79, 135 (2009).

The term torture is also cited in the following other contexts: animal cruelty, sentencing enhancements to murder, capital/non-capital punishment sentencing guidelines, obscenity statutes, sadomasochist statutes, human trafficking statutes, and parental termination/reunification determinations statutes. These statutes were purposefully excluded from the analysis due to relevance and application to limited circumstances.

State felony child torture laws are heterogeneous. The maximum penalties vary from two years in jail²⁰ to a lifetime in prison.²¹ Some felony child torture statutes only apply if the perpetrator of the acts has legal custody of the child,²² others criminalize all acts of torture against children regardless of whether the perpetrator had legal custody of the child,²³ or range in between requiring at least an informal custody agreement.²⁴ Additionally, in certain states, the application of the child

torture statute is limited by a serious bodily injury requirement.²⁵ Lastly, while a child is usually considered a person under the age of 18 years, some state statutes limit the application of the child torture provisions to only younger children.²⁶

The chart below includes for the 50 U.S. states and District of Columbia, the language used to criminalize torture as a felony within the criminal codes, required the age of the victim at the time of the offense in order for the statute to apply, legal custodial relationship required, the required intent of the perpetrator, whether the statute requires a physical injury to also occur, and the penalties. The relevant child torture statutes are cited in the footnotes. For states without a child torture statute, the closest alternative charge that could be used to prosecute a child torture case without serious physical injury is included.

State	Language used to criminalize torture	Required age for the victim	Required custody agreement	Type of bodily injury required	Penalty	Mens Rea
Alabama ¹	Torture, Willfully Abuse, Cruelly Beat	Under 18	None	None	10 Years	Willfully
Alaska ²	No child torture statute					
Arizona ³	Cause serious emotional damage as evidenced by severe anxiety, depression, withdrawal or untoward aggressive behavior	(Under the age of 18), and adult victim (who is unable to protect himself from abuse, neglect or exploitation by others because of a mental or physical impairment).	Having the care or custody	None	5 years	Intentionally, knowingly, recklessly Criminally negligently
Arkansas ⁴	No child torture statute					
California ⁵	Torture	Protects all ages	None	*Lacerations by court case	Life	To cause cruel pain
Colorado ⁶	Pattern of conduct that results in torture	Under 18	None	Serious bodily injury	Up to 20 years	None
Connecticut ⁷	Torture, torments, cruelly punishes	Protects all ages	None	None	1–5 years	Intentionally
Delaware ⁸	Previous pattern, torture	Under 18	None	* Serious bodily injury	2–25 years	Intentionally and recklessly
District Of Columbia ⁹	Tortures, beats otherwise maltreats	Under 18	None	Bodily injury (includes pain)	No more than 15	Intentionally, knowingly, recklessly
Florida ¹⁰	Tortures, maliciously punishes, willfully cages	Under 18	None	None	Up to 30 years	Intentionally
Georgia ¹¹	Causes cruel or excessive physical or mental pain	Under 18	None	None	5–29 years	Maliciously
Hawaii ¹²	No child torture statute					
Idaho ¹³	Inflicts unjustifiable physical pain or mental suffering	Under 18	None	Great bodily harm (anything more severe than slight harm)	1–10 years	Willfully
Illinois ¹⁴	No child torture statute					
Indiana ¹⁵	No child torture statute					
Iowa ¹⁶	Torturing or cruelly beating, inflicting cruel or inhuman corporal punishment	Under the age of 18	None	Bodily harm (anything less than severe bodily harm)	Up to 10 years	Knowingly intentionally
Kansas ¹⁷	Torturing or cruelly beating,	Under 18	None	None	Up to 11.3 years	Knowingly intentionally
Kentucky ¹⁸	Torture, cruel confinement, or cruel punishment	Under the age of 12 years or is physically or mentally helpless	None	None	Up to 10 years	Intentionally, wantonly, recklessly
Louisiana ¹⁹	Unjustifiable pain or suffering	Under 17	None	None	Up to 10 years	Intentionally, criminally negligent
Maine ²⁰	No child torture statute					
Maryland ²¹	No child torture statute					
Massachusetts ²²	No child torture statute					

²⁰ E.g., VT. STAT. ANN. TIT. 13 § 1304 Cruelty to child
²¹ E.g., CAL. PENAL CODE § 206 Torture (2018)
²² E.g., N.M. Stat. § 30 —6-1 Abandonment or Abuse Of A Child (2018).
²³ E.g., Miss. Code Ann. §97 —5-39 Contributing To The Neglect Or Delinquency Of A Child; Felonious Abuse And/Or Battery Of A Child (2018).
²⁴ E.g., N.J. Stat. Ann. § 2C:24 —4 Endangering Welfare Of Children (Has Legal Custody Or Assumed Responsibility To Care For Child).

²⁵ E.g., DEL. CODE STATE Tit. 11§ 1103B Cruelty To Children Definition
²⁶ E.g., TEXAS PENAL CODE § 22.04 Injury to a Child, Elderly Individual, or Disabled Individual (2018).

Michigan ²³	Inflicts severe mental pain or suffering, commits torture	Protects all ages	None	None	Up to life	Intent to cause cruel or extreme physical or mental pain
Minnesota ²⁴	Intentional act or series of intentional acts with respect to child evidences unreasonable force or cruel discipline	Under 18	Parent, guardian, caretaker	None	0–10 yrs.	Intentional
Mississippi ²⁵	Physically torture a child	Under 18	None	None	Up to life	Knowingly, intentionally, recklessly
Missouri ²⁶	Physical pain illness, or impairment of physical condition	Under 18	None	Physical or mental injury	Up to 14 years	Knowingly
Montana ²⁷	No child torture statute					
Nebraska ²⁸	Cruelly punish, cruelly confined, deprived of food, clothing, shelter	Under 18	None	Physical or mental health	Up to 50 years	Knowingly, intentionally, and negligently
Nevada ²⁹	Unjustifiable physical pain or mental suffering	Under 18	None	None	Up to 20 years	Willfully
New Hampshire ³⁰	No child torture statute					
New Jersey ³¹	Suffer unjustifiable physical pain or mental suffering	Under 18	Any person having a legal duty for the care of a child or who has assumed responsibility for the care	None	up to 10 years	N/a
New York ³²	No child torture statute					
New Mexico ³³	Any person having a legal duty for the care of a child or who has assumed responsibility for the care	Under 18	Tortured, cruelly confined, or cruelly punished	Great bodily harm 1st degree	Up to 18 years	Knowingly, Intentionally, or Negligently
North Carolina ³⁴	Impairment of any mental or emotional function of the child	Under 16	Any person providing care or supervision	Serious bodily injury (definition includes extreme pain)	Up to 32 years in prison	Intentionally
North Dakota ³⁵	Mental injury or bodily injury	Under 18	Parent, adult family or household member, or other custodian of any child	Mental injury or bodily injury (includes physical pain)	Up to 10 years in prison	Willfully
Ohio ³⁶	Torture or cruelly abuse	Child under 18 or a mentally or physically handicapped child under 21	“parent, guardian, custodian, person having custody or control, or person in loco parentis”	Serious physical harm (definition includes acute pain prolonged suffering)	2–8 years	None
Oklahoma ³⁷	Torturing or maiming child	Under 18	Parent or another person	None	Up to life	Willfully maliciously
Oregon ³⁸	No child torture statute					
Pennsylvania ³⁹	No child torture statute					
Rhode Island ⁴⁰	Any injury including mental that arises other than serious bodily injury (includes mental)	Under 18	Having care of the child	Other physical injury	5–10 years	Intentionally, knowingly,
South Carolina ⁴¹	Physical, mental health or safety	Under 18	Charge or custody of child	None	3–10 years	None
South Dakota ⁴²	Tortures	Under 18	None	None	Up to 15 years	Knowingly
Tennessee ⁴³	Torture	Under 18	None	None	Up to 60 years	None
Texas ⁴⁴	Includes causing pain within definition	Under 14, elderly, disabled	None	Bodily injury (includes pain)	Up to life-time in jail	Intentionally, knowingly or recklessly
Utah ⁴⁵	Serious physical injury definition includes torture	Under 18	Having care or custody of child	Serious physical injury	Up to 15 years in prison	Intentionally, Knowingly, or Recklessly
Vermont ⁴⁶	Causes child unnecessarily suffering	Under 18	Any person over 16 having charge of child	None	Up to 2 years in prison	Willfully
Virginia ⁴⁷	To cause or permit child to be tortured	Under 18	Employing or having custody of child	None	Up to 5 years	Willfully negligently
Washington ⁴⁸	Causing child pain equivalent to torture	Under 13	Any person over 16 having charge of child	Bodily harm (includes pain).	Up to life in prison	Intentionally
West Virginia ⁴⁹	No child torture statute					
Wisconsin ⁵⁰	Bodily harm including pain, repeated acts of physical abuse	Under 18	None	Bodily harm including pain	Up to life-time in prison	Intentionally, recklessly
Wyoming ⁵¹	Torture or cruel confinement	Under the age 18	None	None	Up to 25 years	Intentionally, recklessly

¹ ALA. CODE § 26-15-3 Torture, Willful Abuse, etc., of Child.

² AS 11.51.100. Endangering The Welfare of a Child in the First Degree (lists starvation but does not list torture or a synonymous mental trauma element).

³ AZ Code § 13–3623. Child or vulnerable adult abuse; emotional abuse.

⁴ ARK. CODE ANN. § 5–27-206 Endangering the welfare of a minor in the third degree – class B misdemeanor ((closest available statute for mental injury requirement however it is a misdemeanor)). According to Child Endangerment, Nat'l Dist. Attorneys Ass'n (2014)) (jail to 90 days).

- ⁵ CAL. PENAL CODE § 206 torture.
- ⁶ COLO. REV. STAT. §18—6-401 Child abuse.
- ⁷ CONN. GEN. STAT. ANN. § 53—20 Cruelty to persons.
- ⁸ DEL. CODESTATE tit. 11§ 1103B.
- ⁹ D.C. CODE § 22—1101.
- ¹⁰ FLA. STAT. § 827.03. Abuse, aggravated abuse, and neglect of a child.
- ¹¹ GA. CODE ANN. 16—5-70 Cruelty to children.
- ¹² HAW. STAT. § 709—906 (2014). Abuse of family or household members; penalty (first conviction minimum of 48 hours in jail; misdemeanor)) ((closest available statute according to *Physical Child Abuse Penalties*, NAT'L DIST. ATTORNEYS ASS'N (2014)).
- ¹³ Id. CODE ANN. 18-1501. Injury to Children.
- ¹⁴ 720 ILL. COMP. STAT. § 5/12-3.05 (2014). Aggravated battery ((closest available statute according to *Physical Child Abuse Penalties*, NAT'L DIST. ATTORNEYS ASS'N (2014)).
- ¹⁵ IND. CODE ANN. § 35—42-2-1. Battery (2014) (closest available statute according to *Physical Child Abuse Penalties*, NAT'L DIST. ATTORNEYS ASS'N (2014)).
- ¹⁶ IOWA CODE § 726.6 Child endangerment.
- ¹⁷ KAN. STAT. § 21-5602 Abuse of a child.
- ¹⁸ Ky. REV. STAT. Ann. § 508.12 Criminal abuse in the first, 508.100.
- ¹⁹ LA. REV. STAT. ANN. § 14:93 Cruelty to juveniles.
- ²⁰ ME. REV. STAT. ANN. Tit. 17-A § 207-A (2014). Domestic violence assault (closest available statute according to *Physical Child Abuse Penalties*, NAT'L DIST. ATTORNEYS ASS'N (2014)). Assault B. The person has attained at least 18 years of age and intentionally, knowingly or recklessly causes bodily injury to another person who is less than 6 years of age. Violation of this paragraph is a Class C crime, other wise misdemeanor).
- ²¹ Maryland has a statute, Md. CODE ANN. CRIM. LAW. § 3-601 (2016), which discusses severe physical injury to a minor. We did not include the statute due because it did not use the word torture (using the word cruel without including a strong mental suffering component); and the severe physical suffering is strictly defined as an injury with bleeding within the skull, physical injury that creates a substantial risk of death, causes permanent or protracted serious disfigurement loss of any bodily organ, or impairment of any bodily member; it is more analogous to an assault statute rather than the torture statutes included within the compilation. The statutes that have some form of physical injury component included in this compilation have a heavy mental suffering component (either by using the word torture which innately has a very strong mental suffering component), defines physical injury to include mental suffering, or include much smaller injuries including cuts, and bruising caused with the intent to cause cruel extreme pain within its definition.
- ²² MASS. GEN. LAWS ANN. Ch. 265 § 13J (2014). Assault and battery upon a child; penalties- requires severe bodily injury (closest available statute according to *Physical Child Abuse Penalties*, Nat'l Dist. Attorneys Ass'n (2014)).
- ²³ MICH. COMP. LAWS SERV. § 750.85 Torture.
- ²⁴ MINN. STAT. § 609.377 MALICIOUS punishment of child.
- ²⁵ Miss. CODE ANN. §97-5-39 Contributing to the neglect or delinquency of a child; felonious abuse and/or battery of a child.
- ²⁶ MO. STAT. § 568.060 Abuse or Neglect of Child.
- ²⁷ MONT. CODE § 45-5-201 (2014). Assault ((closest available statute according to *Physical Child Abuse Penalties*, NAT'L DIST. ATTORNEYS ASS'N (2014)); also Mont. Code § 45-5-207. Criminal endangerment — penalty. (1).
- ²⁸ NEB. REV. STAT. § 28-707 Child Abuse Penalties.
- ²⁹ NEV. REV. STAT. § 200.508 Abuse, neglect or endangerment of child.
- ³⁰ N.H. REV. STAT. § 631:2 Second Degree Assault (2014). ((closest available statute according to *Physical Child Abuse Penalties*, NAT'L DIST. ATTORNEYS ASS'N (2014)). Requires serious bodily injury or a dangerous weapon.
- ³¹ N.J. STAT. ANN. § 2C:24-4 - Endangering welfare of children.
- ³² N.Y. PENAL LAW § 120.05 (2014). Assault ((closest available statute according to *Physical Child Abuse Penalties*, NAT'L DIST. ATTORNEYS ASS'N (2014)) (requires intent to cause physical injury). N.Y. Penal Law § 260.10 Endangerment (the endangerment statute is a misdemeanor).
- ³³ N.M. STAT. § 30-6-1 Abandonment or abuse of a child.
- ³⁴ N.C. GEN. STAT. § 14-318.4 Child abuse a felony.
- ³⁵ N.D. CENT. CODE § 14-09-22 – Abuse of child – Penalty.
- ³⁶ OHIO REV. CODE ANN. § 2919.22 Endangering children.
- ³⁷ OKLA. STAT. Tit. 21 Ann. § 843.5 (2014). Child abuse.
- ³⁸ OR. REV. STAT. § 163.205 (2014). Criminal mistreatment in the first degree – neglect ((closest available statute according to *Physical Child Abuse Penalties*, NAT'L DIST. ATTORNEYS ASS'N (2014)); assault laws (for felony requires physical injury to person under 10 years old).
- ³⁹ 18 PA. CONS. STAT. ANN. § 2702 (2014). Aggravated assault ((closest available statute according to *Physical Child Abuse Penalties*, NAT'L DIST. ATTORNEYS ASS'N (2014)).
- ⁴⁰ RI GEN L § 11-9-5.3.
- ⁴¹ S.C. CODE ANN. § 63-5-70 Unlawful Conduct Toward A Child.
- ⁴² S.D. CODIFIED LAWS § 26-10-1 Abuse of or cruelty to minor.
- ⁴³ TENN. CODE ANN. § 39-15-402 Aggravated Child Abuse and Neglect.
- ⁴⁴ TEXAS PENAL CODE § 22.04 Injury to a Child, Elderly Individual.
- ⁴⁵ UTAH CODE ANN. § 76-5-109 Child abuse–Child abandonment.
- ⁴⁶ VT. STAT. ANN. Tit. 13 § 1304Cruelty to child.
- ⁴⁷ VA STAT § 40.1-103 Cruelty and injuries to children.
- ⁴⁸ WASH. REV. CODE 9A.36.120 Child abuse in the first degree.
- ⁴⁹ W. Va. Code, § 61-8D-3.
- ⁵⁰ WIS. STAT. ANN. § 948.03 Physical abuse of a child.
- ⁵¹ WY STAT 6-2-503Child abuse; penalty.

For the fourteen state criminal codes without a felony child torture statute, a gap in the criminal code exists that allows people who have tortured children to serve sentences usually reserved for slight misconduct. The thirty-six state criminal code and DC criminal code contain heterogenous felony child torture statutes: some with extensive

loopholes regarding the age of the child and type of custody agreement required, and a great range in penalties as well as mens rea. Further study is needed to determine the effectiveness of the existing child torture statutes.

4. Discussion

4.1. When the elements of the charge do not fit the crime

For states without a felony child torture statute, the elements of the available charges often do not fit the magnitude of the acts committed against the child. Take for example, the case of the James children from Anchorage, Alaska. Anya James adopted the six children over the course of a decade.²⁷

According to the children, their bedrooms were downstairs in a converted garage with a concrete floor.²⁸ Anya James allowed no personal items in the rooms. She forced them to use buckets instead of toilets.²⁹ As punishment, she had them strip naked and use the buckets in front of siblings.³⁰



Solomon “Tommy” James, who lived with his adoptive mother Anya James for 10 years starting at age 8, testified during her sentencing at the Nesbett Courthouse in Anchorage, AK (Bill Roth / Alaska Dispatch News).

During his witness impact statement one of the children, Tommy said he went days without eating and slept on a concrete floor in a 4-by-6-foot room.³¹ When his bones ached from the cold, he'd perch precariously on a heater to sleep.³² His ankles were malformed from so much time spent curled into a ball for warmth.³³ At age 18 when removed from the home, he only weighed 90 pounds.³⁴

According to the witness statements, Anya James served beans or a mushy mix of oatmeal, mashed potatoes and raw eggs in small plastic containers without silverware.³⁵ The siblings fought over the food and licked the containers clean.³⁶ Tommy's siblings were also severely malnourished. The youngest, who was 13, had to be hospitalized

²⁷ Lisa Demer & Richard Mauer, *Anchorage Woman Charged With Abuse Of Adopted Kids*, Anchorage News (May 18, 2011), available at, <https://www.adn.com/alaska-news/article/anchorage-woman-charged-abuse-adopted-kids/2011/05/18/>

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* Michelle Theriault Boots, *In Emotional Hearing, Former Adopted Children Confront Hillside Mother Accused Of Abuse*, Anchorage Daily News (Oct 24, 2017), available at, <https://www.adn.com/alaska-news/2017/10/24/in-emotional-sentencing-former-adoptive-children-confront-hillside-mother-charged-with-abusing-them/>

³² *Id.*

³³ *Id.*

³⁴ *Id.*

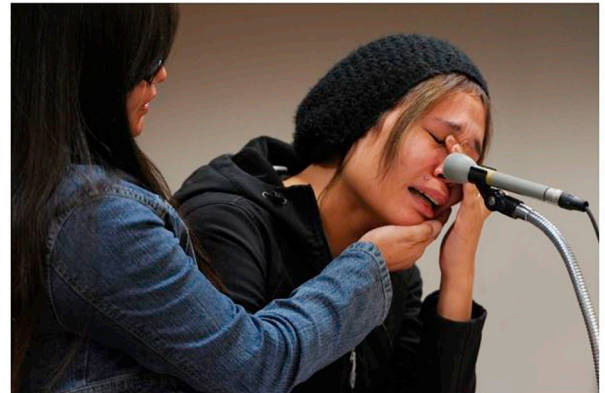
³⁵ Michelle Theriault Boots, *In Emotional Hearing, Former Adopted Children Confront Hillside Mother Accused Of Abuse*, Anchorage Daily News (Oct 24, 2017), available at, <https://www.adn.com/alaska-news/2017/10/24/in-emotional-sentencing-former-adoptive-children-confront-hillside-mother-charged-with-abusing-them/>

³⁶ *Id.*

immediately and two others were bony and looked pre-pubescent even though they were 15 and 20.³⁷ All three were covered by downy hair that is characteristic of starvation.³⁸

Anya James told neighbors the children were disturbed and gave heavy doses of anti-psychotics and tranquilizers to make the victims compliant.³⁹ The doors and windows had alarms.⁴⁰ The rooms had audio and video equipment to track the children, so they could not escape.⁴¹ Anya James did not allow the children to go to school.⁴² Four of the children tried to run away at various times.⁴³ Each was returned to James after James convinced police each child was troubled.⁴⁴

“I’m 25 and I’m still scared,” she said. “My world revolves around my past.”



Eula Parent comforts her biological daughter Zemira James as she testified during the sentencing of her adoptive parent Anya James at the Nesbett Courthouse in Anchorage, AK (Bill Roth / Alaska Dispatch News).

The state originally charged Anya James with: 10 counts of kidnapping, 6 counts of first-degree assault, and 2 counts of endangering the welfare of a child. She faced up to 340 years in jail.⁴⁵

The kidnapping charges apply when restraining a person for ransom or other payment. The kidnapping charges did not fit the elements of the case. The assault charges apply if the perpetrator engaged in conduct that caused physical injury either by an act performed under circumstances that create a substantial risk of death, or by an act that causes serious and protracted disfigurement, protracted impairment of health, protracted loss or impairment of the function of a body member or organ, or that unlawfully terminates a pregnancy. The elements of the assault charge did not neatly fit the elements of the case.

After six years of court proceedings, in 2017, James pleaded guilty to two counts of endangering the welfare of a child. However, James wore an ankle monitor for six plus years of court proceedings and was given credit for “time served” for the years of electronic monitoring. She will likely serve less than two years in jail.

After the sentencing Tommy stated, “It’s not justice. Collectively we’ve had over 50 years taken from us. Fifty years of pain, collectively, between all the time each one of us spent.” In the fourteen states that have a gap in criminal statutory code, outcomes similar to the James injustice can be anticipated.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Alaska vs. James, 3AN-11-05573CR, court records, available at, https://records.courts.alaska.gov/eaccess/search.page.6.1?x=P8g7qK5QNHIhMWA*5oZlIyrsvZebmRdJtmN9iarrzR1av3aBbwuy7AW9Edoe0PlC5ZZDvfd0OajsAT3t2Hp*DA

4.2. The Michigan solution

The Michigan felony torture statute carves out no loopholes for the age of the victim, parental custody status of the perpetrator, and prescribes a strong potential maximum sentence of life in jail for the perpetrator if convicted. The Michigan torture statute is used to prosecute not only child torture cases, but torture in the context of domestic violence, elder abuse, and rape as well.⁴⁶

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.

⁴⁶ e.g., *People v. Riley*, Nos. 295,838, 298,164, 2011 WL 4501765, at *1 (Mich. Ct. App. Sept. 29, 2011) (per curiam) (affirming defendant's torture conviction for breaking into an elderly man's home, punching him in the face so hard his dentures came out, leaving a shoe print on his face, tying him up, and beating him at length until he repeatedly lost consciousness); *People v. Lachniet*, No. 297836, 2011 WL 2859818, at *1 (Mich. Ct. App. July 19, 2011) (per curiam) (affirming defendant's torture conviction for breaking into an elderly woman's home, punching her repeatedly in the face until she lost consciousness, and tying her up with cords). See, e.g., *People v. Massie*, 48 Cal. Rptr. 3d 304, 308-09 (Ct. App. 2006) (upholding defendant's torture conviction after he raped a stranger in her home, reacted with rage when she told him that Jesus loved him, used various methods to inflict pain, and acted over a long period of time, taking breaks in between); *People v. Pre*, 11 Cal. Rptr. 3d 739, 740–42 (Ct. App. 2004) (holding that the torture conviction was supported by evidence that defendant selected a woman unknown to him, forcibly entered into her apartment, attacked her viciously when she resisted, twice choked her into unconsciousness, and then intentionally inflicted great bodily injury and cruel and extreme pain by biting her while she was helpless and for no other apparent purpose than revenge or sadistic pleasure) See, e.g., *People v. Alvarez*, No. F066511, 2014 WL 5409070, at *1-2 (Cal. Ct. App. Oct. 24, 2014) (affirming defendant's conviction of torture for beating his girlfriend repeatedly with his hands, feet, a shoe rack, and aluminum bat); *People v. McCoy*, 156 Cal. Rptr. 3d 382, 386, 388 (Ct. App. 2013) (affirming defendant's conviction of torture for folding his girlfriend's legs backwards over her head, breaking her back and leaving her a quadriplegic, shoving batteries in her rectum, and smearing feces on her face); *People v. Hamlin*, 89 Cal. Rptr. 3d 402, 411-13 (Ct. App. 2009) (affirming defendant's conviction of torturing his wife and sentence of life in prison for a long history of physical abuse, including strangulation, threats with guns and a sword, hitting her with a taser, hitting her injured wrist with a metal pipe, and threatening to kill her unless she falsely confessed to molesting their children); *People v. Burton*, 49 Cal. Rptr. 3d 334, 336–37 (Ct. App. 2006) (affirming defendant's conviction of torture of the mother of his children for permanently disfiguring her face with four deep cuts in the presence of their young sons); *People v. Baker*, 120 Cal. Rptr. 2d 313, 315–16 (Ct. App. 2002) (affirming defendant's torture conviction for pouring gasoline over his wife and setting her on fire); *People v. Hale*, 88 Cal. Rptr. 2d 904, 908-09 (Ct. App. 1999) (affirming defendant's torture conviction when he entered the victim's bedroom at night, while the victim slept beside her three-year-old daughter, and struck victim twice in the face with a ball peen hammer, cracking a number of her teeth, splitting her lip, and cutting her under the eye, and then stayed and hid in the room to observe victim's pain and terror); *People v. Healy*, 18 Cal. Rptr. 2d 274, 277 (Ct. App. 1993) (affirming defendant's torture conviction when he told the victim she never had any real hardship in her life and that "he needed to create some hardship" to get her to listen to him and proceeded to beat the victim unprovoked, warning the victim not to make any noise during beatings for fear a neighbor would call police). See, e.g., *Studier*, 2015 WL 447408, at *1 (affirming defendant's torture conviction based on an attack against his estranged wife, whom he had abused for years, in which he kicked open her door and assaulted her until dawn, striking her in the face, kicking her in the groin, choking her, threatening her with a steak knife, calling her a whore, and blaming her for the attack); *People v. Hinton*, No. 308019, 2013 WL 514870, at *1 (Mich. Ct. App. Feb. 12, 2013) (per curiam) (affirming defendant's torture conviction when he committed sexual assault against his victim, peed in her mouth, made her put a beer bottle in her vagina, whipped her with a cord while naked, tied her to the bed, and gagged her while he left the house)

4.2.1. Mich. Comp. Laws Serv. § 750.85⁴⁷ Torture; felony; penalty; definitions; element of crime; other laws

The Michigan statute addresses a situation where the perpetrator intends to cause cruel extreme pain and causes that pain to a person within his or her custody and control. The main components of the statute are: (1) the specific intent to cause cruel extreme pain, (2) causing the pain - whether mental or physical, and (3) to someone within the person's custody and control.

4.2.2. Intent

The Michigan Torture statute requires that the perpetrator intended to cause cruel or extreme mental or physical pain. Often, the intent is inferred from actions that demonstrate the perpetrator wanted the victim to suffer.⁴⁸

4.2.3. Act

4.2.3.1. *Infliction of severe mental suffering.* (d) "Severe mental pain or suffering" means a mental injury that results in a substantial alteration of mental functioning that is manifested in a visibly demonstrable manner caused by or resulting from any of the following: (i) The intentional infliction or threatened infliction of great bodily injury. (ii) The administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt the senses or the personality. (iii) The threat of imminent death. (iv) The threat that another person will imminently be subjected to death, great bodily injury, or the administration or application of mind-altering substances or other procedures calculated to disrupt the senses or personality. (3) Proof that a victim suffered pain is not an element of the crime under this section⁴⁹

4.2.3.2. *or Infliction of great bodily injury.* For clear cases of torture, Michigan courts have broadly interpreted the definition of great bodily injury. In the case of *Brockett v. Stoddard*, a three-year-old child's temporary loss of use of limb while his arms were tied behind his back with electrical tape for a substantial period of time while his father urinated on him and placed urine-soaked pants on his head while he was naked in the bath tub was a great bodily injury.⁵⁰ The court interpreted great bodily injury to include among other things even temporary impairment of a body function such as loss of use of a limb for cases of torture.⁵¹

4.2.4. Custody or physical control

Custody or physical control means the forcible restriction of a person's movements or forcible confinement of the person so as to interfere with that person's liberty, without the person's consent or without the person's lawful authority.⁵² Thus, the statute allows: (1) a conviction of a defendant if the victim does not consent to the restriction or

⁴⁷ Mich. Comp. Laws Serv. § 750.85 (2016), [http://www.legislature.mi.gov/\(S\(pejfuayif4pt0rxuobqzvpv\)\)/mileg.aspx?page=GetObject&objectname=mcl-750-85](http://www.legislature.mi.gov/(S(pejfuayif4pt0rxuobqzvpv))/mileg.aspx?page=GetObject&objectname=mcl-750-85)

⁴⁸ Christopher G. Browne, *Tortured Prosecuting: Closing The Gap In Virginia's Criminal Code By Adding A Torture*, 56 WM. & MARY L. REV. 269, 276 (2014).

⁴⁹ Mich. Comp. Laws Serv. § 750.85

⁵⁰ *Id.*

⁵¹ Mich. Comp. Laws Serv. § 750.85; See *Brockett v Stoddard*, Case No. 1:14-cv-939 (W.D.-MI 2014), available at, https://scholar.google.com/scholar_case?case=17877805371042335414&hl=en&as_sdt=20006

⁵² *Id.*

confinement, or (2) a conviction, even in the face of a victim's consent, where a defendant acts without lawful authority to restrict or confine a person.⁵³ In *Michigan v. Anderson*, the court states a child can be presumed to lack the capacity to consent to the forcible restriction and the parent restricted the child without lawful authority.^{54, 55}

4.2.5. Model statute

The Michigan statute is the most comprehensive legal statute currently available. Yet, the Michigan statute can still be improved. The model statute adjusts the intent to a knowing intent rather than a specific intent. While to 9/11 “torture memos” have widely been discredited, the argument that specific intent allows for punishment only where the perpetrator specifically intended pain as his or her precise objective can be countered with a knowing intent. Pairing the word ‘cruelly’ with ‘knowingly’ prevents the statute from becoming overbroad. The model statute also clarifies mental injury by using the definition of mental injury from Mo. Stat. § 568.060.

5. Conclusion

A gap in certain state criminal codes allows perpetrators of heinous acts to escape justice. Federal torture law only prohibits government actors from torturing individuals. Michigan, California, Arizona, Connecticut, and Texas have a torture law prohibiting private individuals from torturing both adults and children. Thirty-six states and DC criminalize perpetuating torture or analogous actions against a child. Some of the statutes are more effective than others. Further research should be conducted to determine the effectiveness of these statutes. For the fourteen state criminal codes that do not have a child torture law, a gap in the criminal code exists that allows people who torture children to face light sentences usually reserved for slight criminal transgressions. Legislative action is suggested to protect this vulnerable population.

Conflict of interest

The author(s) declare that there is no conflict of interest.

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A person who knowingly and cruelly 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.

As used in this section:

- (a) "Cruelly" means brutal, inhuman, sadistic, or that which torments.
 - (b) "Custody or physical control" means the forcible restriction of a person's movements or forcible confinement of the person so as to interfere with that person's liberty, without that person's consent or without lawful authority.
 - (c) "Great bodily injury" means either of the following: (i) includes, but is not limited to, 1 or more of the following: (ia) Loss of a limb or loss of use of a limb; (ib) Loss of a foot, hand, finger, or thumb or loss of use of a foot, hand, finger, or thumb; (ic) Loss of an eye or ear or loss of use of an eye or ear; (id) Loss or substantial impairment of a bodily function; (ie) Serious visible disfigurement; (if) A comatose state; (ig) Measurable brain or mental impairment; (ih) A skull fracture or other serious bone fracture; (ii) Subdural hemorrhage or subdural hematoma; (ij) Loss of an organ. (ii) One or more of the following conditions: internal injury, poisoning, serious burns or scalding, cuts, or multiple puncture wounds.
 - (d) "Severe mental pain or suffering" means an injury to the intellectual or psychological capacity or the emotional condition of a person as evidenced by an observable and substantial impairment of the ability of a person to function within his or her normal range of performance or behavior that was caused by (i) The intentional infliction or threatened infliction of great bodily injury. (ii) The administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt the senses or the personality. (iii) The threat of imminent death. (iv) The threat that another person will imminently be subjected to death, great bodily injury, or the administration or application of mind-altering substances or other procedures calculated to disrupt the senses or personality. (3) Proof that a victim suffered pain is not an element of the crime under this section.
- (4) A conviction or sentence under this section does not preclude a conviction or sentence for a violation of any other law of this state arising from the same transaction.

⁵³ *Michigan v. Anderson*, No. 277370. (Mic. Ct App 2008) (un. pub), https://scholar.google.com/scholar?scidkt=8342402385125555200&as_sdt=2&hl=en

⁵⁴ *Id.*

⁵⁵ Metin Bagoglu, MD, PhD, *A Multivariate Contextual Analysis of Torture and Cruel, Inhuman, and Degrading Treatments: Implications for an Evidence-Based Definition of Torture*, 2 *Am. J. Orthopsychiatry* 79, 135 (2009).

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Juvenile Sex Offenses: Finding Justice, and Berghuis v. Thompkins: Invocation and Waiver of the Miranda Right to Remain Silent, and The Confrontation Clause After Ohio v. Clark: The Path to Reinvigorating Evidenced-Based Prosecution in Intimate Partner Violence Cases was co-published by NDAA and the George Washington Law Review. She has also written three chapters for the American Bar Association's State of Criminal Justice Book Series. For the 2018, Ann co-chairs the victim's committee for the American Bar Association, serves on the criminal justice section council, and is a member of the Commission on Youth at Risk. Ann was also honored to be accepted into the class of 2018 for the prestigious Presidential Leadership Scholars Program as an agent of change. Ann has also worked on Capitol Hill

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