

## **Torture in the Law of the Fifty American States: Searching for Definition\***

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### **Abstract**

Torture is the subject of considerable contemporary debate on both the national and international stages. In particular, questions regarding torture appear in a number of settings related to the current War on Terrorism. A significant aspect of this debate is the definition of torture: Just what is torture or a tortuous act? This study examines how American states have viewed torture within the context of their own laws and offers

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perspective for the current global debate. Whether viewed in the context of a specific crime, as an aggravating factor at sentencing or even as applied to the mistreatment of animals, the practice of the American states with respect to torture provides a domestic context from the United States for the discussion of torture and its meaning in the 21st Century. My examination reveals, that at the state level, the basic definitional question is largely unanswered.

### *Introduction*

Recent world events have raised serious questions about an old and sordid topic – the torture of human beings (McCoy, 2006). Of course, the context for these questions is the 9/11 attack and the current War on Terrorism. Given this context, the torture debate is not one of mere theoretical conjecture but one of actual application. The treatment of humans during detentions, interrogations, and kidnappings is a significant aspect of the current war. In fact, basic issues of legality, propriety, and effect have been part of the War on Terrorism since that September. Vice President Richard Cheney offered an early view of these issues in a Meet the Press interview on September 16, 2001:

We also have to work, though, sort of the dark side, if you will. We've got to spend time in the

shadows in the intelligence world. A lot of what needs to be done here will have to be done quietly, without any discussion, using sources and methods that are available to our intelligence agencies, if we're going to be successful. That's the world these folks operate in, and so it's going to be vital for us to use any means at our disposal, basically, to achieve our objective. (Fisher, 2001)

However, even before we can debate torture and the dark side versus successfully achieving objectives, I believe that we must in the first instance define torture. Finding a suitable definition has not been easy but is extremely important. For, as Gail Miller of the Floersheimer Center for Constitutional Democracy at the Cardozo School of law argues:

Defining the boundaries of what constitutes torture has unfortunately emerged as a pressing legal issue. . . . Today, there are multiple legal definitions and interpretations of the term "torture." Yet, agreement on a universal definition is critical if torture is to be eradicated. While a difficult task, defining torture is vitally important for the following reasons. First, governments must be bound by a clear and constant standard that cannot be manipulated in times of crisis. Second, public officials need guidance as to the lawfulness of

their tactics. Lastly, the international community must be able to hold governments accountable for torturous acts. Without a definition that is both clear and generally agreed upon, all three tasks are hampered (Miller, 2005, p. 1).

My paper is part of a larger study aimed at first defining and then, hopefully, gaining a more clear understanding of the torture phenomenon. Torture is a complex subject that, when looked at closely, is also plainly reprehensible and disgusting. Perhaps a significant reason for difficulty in defining torture, particularly in times of war, is that the treatment of persons held during hostilities is subject to more than one source of law and interpretation. In fact, the torture term is addressed by both international and U.S. law and, within the context of American federalism, by both federal and state law. Therefore, any attempt to define torture within the current debate should consider not only international law but also domestic U.S. law at both the federal and state level. Considering that actions of the United States have allegedly been torturous, the American understanding of the definition of torture is a serious aspect of the current debate (Greenberg & Dratel, 2005; Greengerg, 2006; Monbiot, 2006).

### *Current International Law*

Given its long and checkered past, it is not surprising that torture is codified in contemporary international law.

The primary expression of the current international definition can be found in the United Nations Convention against Torture and Other Inhuman and Degrading Treatment or Punishment:

*Article 1*

1. For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

*Article 2*

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.
3. An order from a superior officer or public authority may not be invoked as a justification of torture. . . .

According to the International Committee of the Red Cross (ICRC), Article 1 of The 1984 United Nations Convention Against Torture sets out the definition of torture under customary international law. Additionally, the ICRC does not view the official capacity condition as a necessary component of international humanitarian law. The ICRC uses a hierarchy of treatments in this area:

The ICRC uses the broad term "ill-treatment" to cover both torture and other methods of abuse prohibited by international law, including inhuman, cruel, humiliating, and degrading

treatment, outrages upon personal dignity and physical or moral coercion.

The legal difference between torture and other forms of ill treatment lies in the level of severity of pain or suffering imposed. In addition, torture requires the existence of a specific purpose behind the act – to obtain information, for example.

The various terms used to refer to different forms of ill treatment or infliction of pain can be explained as follows:

- \* Torture: existence of a specific purpose plus intentional infliction of severe suffering or pain;
- \* Cruel or inhuman treatment: no specific purpose, significant level of suffering or pain inflicted;
- \* Outrages upon personal dignity: no specific purpose, significant level of humiliation or degradation.
- \* Methods of ill treatment may be both physical and/or psychological in nature and both methods may have physical and psychological effects (International Committee, 2005).

The United States is a signatory to the “Torture Convention” and the Convention was formally ratified in 1994. The U.S. has enacted federal legislation (discussed below) to comply with the Torture Convention requirement that signatory states implement the terms of the convention within their own domestic law. The United States Senate provided the following understanding in its resolution of advice and consent to the ratification of the Torture Convention:

The United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from

- (1) the intentional infliction or threatened infliction of severe physical pain or suffering;
- (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
- (3) the threat of imminent death; or



- (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality (S. Exec. Rep. No. 101-30, 36; 1830 U.N.T.S. 320, Oct. 21. 1994).

Other agreements under international law address torture. For example, the 1949 Geneva Convention relative to the Treatment of Prisoners of War (Geneva III), to which the United States is a signatory, specifically prohibits torture and other listed torture-related acts:

*Article 3*

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated

humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) Taking of hostages;
- (c) Outrages upon personal dignity, in particular, humiliating and degrading treatment;
- (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Additionally, the International Covenant on Civil and Political Rights, ratified by the United States in 1992, provides that "No one shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment" (Article 7) and that "All persons deprived of their liberty

shall be treated with humanity and with respect for the inherent dignity of the human person" (Article 10).

### *Current U.S. Federal Law*

In the United States torture is specifically addressed at the federal level by various statutes. The definition of torture under federal law which implements the Torture Convention is laid out in 18 USC §§ 2340:

Section 2340. Definitions As used in this chapter –

- (1) "torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;
- (2) "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from –
  - (A) the intentional infliction or threatened infliction of severe physical pain or suffering;

- (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
  - (C) the threat of imminent death; or
  - (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality; and
- (3) "United States" includes all areas under the jurisdiction of the United States including any of the places described in sections 5 and 7 of this title and section 46501(2) of title 49.

Torture is specifically made a crime in § 2340A:

- (a) Offense. - Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this

subsection, shall be punished by death or imprisoned for any term of years or for life.

Additionally a statute authorizing civil suits in cases of torture, the Torture Victims Protective Act, 28 U.S.C. § 1350 note (2000), offers a different definition of torture:

Torture- For the purposes of this Act—

- (1) the term torture means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and
- (2) mental pain or suffering refers to prolonged mental harm caused by or resulting from

- (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
- (B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
- (C) the threat of imminent death; or
- (D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

Congress has recently added two statutes relating to torture. Section 1003 of the Detainee Treatment Act of 2005 prohibits cruel, inhuman, or degrading treatment or punishment of persons under U.S. control. More specifically, Section 1003 states:

- (e) Cruel, Inhuman, or Degrading Treatment or Punishment Defined- In this section, the term cruel, inhuman, or degrading

treatment or punishment means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.

This limitation is referred to in the subsequently passed Military Commissions Act of 2006:

Section 948r. Compulsory self-incrimination prohibited; treatment of statements obtained by torture and other statements

- (a) In General- No person shall be required to testify against himself at a proceeding of a military commission under this chapter.
- (b) Exclusion of Statements Obtained by Torture- A statement obtained by use of torture shall not be admissible in a military commission under this chapter, except against a person accused of torture as evidence that the statement was made.

(c) Statements Obtained Before Enactment of Detainee Treatment Act of 2005- A statement obtained before December 30, 2005 (the date of the enactment of the Defense Treatment Act of 2005) in which the degree of coercion is disputed may be admitted only if the military judge finds that—

- (1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and
- (2) the interests of justice would best be served by admission of the statement into evidence.

(d) Statements Obtained After Enactment of Detainee Treatment Act of 2005- A statement obtained on or after December 30, 2005 (the date of the enactment of the Defense Treatment Act of 2005) in which the degree of coercion is disputed may be admitted only if the military judge finds that—



- (1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value;
- (2) the interests of justice would best be served by admission of the statement into evidence; and
- (3) the interrogation methods used to obtain the statement do not amount to cruel, inhuman, or degrading treatment prohibited by section 1003 of the Detainee Treatment Act of 2005.

### *U.S. Interpretation*

The current international definitional debate is largely centered on interpreting and reconciling the various provisions of international law within the context of U.S. federal law and perceived security needs under the War on Terrorism. This debate is at the intersection of international and domestic U.S. law. A key factor is again: "How is torture to be defined?" One now well known attempt at this is the August 1, 2002 Memorandum of Law from the DOJ Office of Legal Counsel entitled: RE: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A. This document, prepared by Jay Bybee with the assistance of John Yoo for Alberto R. Gonzales, Counsel to the President (later,

the Attorney General of the United States) argues for a particularly narrow definition of torture.

Basically, the Bybee Memo's argument limits torture, as defined by U.S. law, to the use of actions specifically intended to cause "severe pain or suffering whether physical or mental." (Bybee, 2002, p. 1) "Severe pain" is viewed as involving intensity that rises "to the level of death, organ failure, or the permanent impairment of a significant body function" (Bybee, 2002, p. 1). Merely cruel, inhuman or degrading actions that produce less pain are not covered (Bybee, 2002, p. 1). With respect to psychological torture, the memo also argues that torture requires specific intent to cause prolonged mental harm. Only mental harm that "results in significant psychological harm of significant duration, e.g., lasting for months or even years" is covered by the definition (Bybee, 2002, p. 1). Also, under a specific intent requirement, an interrogator's good-faith belief (1) that pain will not occur or (2) that the purpose of the action is for some purpose other than the infliction of pain will constitute a defense to a torture charge (Bybee, 2002, pp. 3-5). With respect to the use of mind-altering drugs as torture, the Memo also concludes that to qualify as torture, drugging "acts must penetrate to the core of an individual's ability to perceive the world around him, substantially interfering with his cognitive abilities, or fundamentally alter his personality" (Bybee, 2002, 11). The Memo goes on to examine the U.N Torture Convention and finds that it confirms the view that torture under the law "reaches only the most heinous acts" as defined in the Memo itself (Bybee, 2002, p. 22).

Clearly, this August 2002 Memo offers a particularly narrow view of torture and allows for the use of a number of rigorous interrogation techniques. The Memo has been widely criticized (see Clark & Meruss, 2004; Levinson, 2004; Lewis, 2005; Monboit, 2006; Torture and Democracy, 2004; Roth, 2004; Smith 2004). And, in fact, the Bybee Memo was eventually supplanted by another memorandum – the December 30, 2004 Memorandum of Law from the Office of Legal Counsel entitled: Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A. This second Memo drafted by Daniel Levin, which again attempts to define torture, begins with the introduction:

Torture is abhorrent to American law and values and to international norms. This universal repudiation of torture is reflected in our criminal law, for example, 18 U.S.C. §§ 2340-2340A; international agreements, exemplified by the United Nations Convention Against Torture (the “CAT”); customary international law; centuries of Anglo-American Law; and the longstanding policy of the United States, repeatedly and recently reaffirmed by the President (Levin, 2004, p. 1 citations omitted).

This 2004 Memo reassesses and refines the previous Bybee-Yoo definitional statement on torture. For example, the Memo declares that “physical suffering” must be limited to “physical” and distinguishes physical suffering from

adverse “mental sensations” (Levin, 2004, p. 11). The 2004 Memo goes on to find that severe physical suffering is a factor of intensity as well as duration (Levin, 2004, pp. 11-12). This Memo abandons the severe pain requirement of “to the level of death, organ failure, or the permanent impairment of a significant body function” (Levin, 2004, p. 2). However, with respect to “severe mental pain or suffering,” the Memo confirms that only mental pain or suffering stemming from the specific predicate acts listed in the statute, such as the administration of mind altering drugs or the threat of imminent death are torture (Levin, 2004, pp. 13-14). As to the term “prolonged mental harm,” the Memo considers only mental harm of extended duration to qualify as torture (Levin, 2004, p. 14). On the other hand, despite seeming to change positions on several aspects of the definition of torture, the 2004 Memo declares in footnote 8:

While we have identified various disagreements with the August 2002 Memorandum, we have reviewed this Office’s prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum (Levin, 2004, p. 2).

The analysis offered by these two DOJ Memos clearly illustrates the debate over the definition of the term torture and, to some degree, the values at stake in this debate. The most recent federal legislation in this area, the Detainee

Treatment Act of 2005 and the Military Commissions Act of 2006, does not provide additional congressional guidance regarding the definition of torture – leaving interpretation with the Executive Branch. The latest version of the Executive's view of torture is set out in an Executive Order issued on July 20, 2007. The order, entitled: Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency, sets out broad boundaries for CIA interrogation action. The order does not clearly set out what actions are prohibited and offers no real definition of torture. It also appears to authorize techniques that go beyond DOD interrogation limits (DeYoung, 2007).

With respect to my research, the original 2002 Bybee Memo served as a catalyst for my examination of U.S. domestic law. The Memo cites not only international law but also U.S. domestic state law in its analysis. Footnote six of the Memo specifically cites the law of the American states: “Torture is a term also found in state law” (Bybee, 2002, pp. 13-14.). My paper is largely based on the rationale of this particular footnote in which Bybee and Yoo direct our attention to domestic state law for guidance in defining torture.

Within the structure of American federalism, the laws of the states play a significant role regarding the everyday lives of Americans. There has been a dynamic interplay between federal law and state law since the days of the Articles of Confederation. While, for the most part, state law cannot bind federal law with respect to federal issues, state law has served as a consideration in the development of

federal law. A particular salient example for the current discussion is the role state law plays in federal determinations with regard to Eighth Amendment cases involving cruel and unusual punishment. In addressing the question of the applicability of the death penalty to mentally retarded defendants, the U.S. Supreme Court employs a standard of consideration that takes into account "evolving standards of decency" (*Trop v. Dulles*, 1958, p. 101). In applying this standard, the Court has looked to state law as an important factor to gauge the national consensus of decency in applying the death penalty. For example, as a result of this analysis, the Court found that thirty states prohibited the sentencing of mentally retarded defendants to death. This finding was viewed by the Court as evidence of a consensus that such a sentence violated the Eighth Amendment of the U.S. Constitution (*Atkins v. Virginia* 2002). Therefore, as suggested by footnote Six of the Bybee Memo, I believe that state law with respect to the states' view of torture can be a valuable consideration regarding a definition of torture on the national and even international level. An examination of this American sub-national view of torture is the aim of this paper.

### *Methodology*

My methodology for this preliminary inquiry into the domestic definition of torture is relatively simple. I used the LEXIS/NEXIS database and a word search for "torture" in American state statutes and in state case law. My searches

located specific texts of the statutory and case law from all of the fifty states that address the issue of torture. An examination of the states' legislative acts and judicial decisions reveal that the term is used throughout the nation within a number of contexts. For example, while some states have specific crimes of torture, such as murder by torture, most states consider torture as an aggravating factor when imposing sentences in criminal cases. Some states have specific torture related statutes regarding vulnerable individuals, such as children and the elderly. Additionally, most states have torture crimes related to the treatment of domestic animals and livestock.

### *Findings<sup>1</sup>*

My review of the law in the fifty states reveals that most states address or consider torture in some way. In fact only two, New Mexico and Wisconsin, do not appear to directly address torture of humans or animals at all. The following tables summarize my findings regarding the approaches taken by the fifty states with respect to torture. In particular, these summaries set out the basic approach taken by American states toward addressing torture within their

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<sup>1</sup> Data entries are summarized from a LEXIS/NEXIS search of statutes and case law of the fifty American states. This search was conducted during the summer of 2006. Specific citations to the voluminous number of statutes and case decisions reviewed are omitted. These materials are held by the author.

criminal law. This is a first step to finding a domestic definition of torture.

A limited number of American states address torture directly. Five of our fifty states have specific torture statutes (Table 1). For example, Alabama criminalizes the forcible compulsion of certain sexual acts under the felony of sexual torture (Code of Alabama § 13A-6-65.1). California's torture statute criminalizes the infliction of great bodily injury with the intent to cause cruel or extreme pain or suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose (Cal. Pen. Code § 206). Idaho's statutes parallel § 206 of the California Code in its torture-murder crime (Idaho Code § 18-4001). And, § 750.85 of the Michigan Penal Code criminalizes, as torture, the infliction of great bodily injury or severe mental pain or suffering with the intent to cause cruel or extreme physical or mental pain and suffering. Connecticut has a statute that criminalizes cruelty to persons that specifically includes intentional torture (Conn. Gen. Stat. § 53-20).

As I conducted my research, it became clear that most states addressed torture within the context of aggravating circumstances at sentencing. Aggravation as a general concept is described in the standard Black's Law Dictionary as follows:

Any circumstance attending the commission of a crime or tort which increases the guilt or enormity or adds to its injurious consequences, but which is above and beyond the essential



constituents of the crime or tort itself (Black's 1968, p. 87).

**Table 1: States with Specific Torture Statutes**

Alabama	Sexual Torture – forcible use of an inanimate object
California	Torture – infliction of great bodily injury with intent to cause cruel or extreme pain and suffering for revenge, extortion, persuasion or for any sadistic purpose
Connecticut	Cruelty to Persons – intentionally tortures, torments or cruelly or unlawfully punishes another person
Idaho	Torture-Murder – death caused by intentional infliction of extreme and prolonged pain with the intent to cause suffering or death
Michigan	Torture - infliction of great bodily injury or severe mental pain upon another person within custody of physical control with intent to cause cruel or extreme physical or mental pain and suffering

Torture as an aggravating factor increases the severity of punishment. This approach is widely used by the American states. However, ten states do not use torture as a specific reason to increase the severity of sentencing for some other underlying crime (Table 2).

**Table 2: States without Torture as an Aggravating Factor**

Arizona	Ohio
Kentucky	Texas
Maryland	Vermont
New Mexico	West Virginia
North Dakota	Wisconsin

On the other hand nine states have chosen to use torture as an aggravating factor for specific crimes (Table 3).

Most states, thirty-three or 66 percent, have addressed torture by widely applying torture as an aggravating factor for crimes in general rather than limiting it to specific crimes (Table 4).

In addition to the use of torture as a specific or general aggravating factor, a number of states have identified certain vulnerable persons that need special protection from torture (Table 5). These states have included torture as specific aspects of crimes against children and the elderly.

With regard to the states that use torture as a factor in the criminal laws protecting humans, their definitional characteristics can be divided into a number of basic (Table 6).

**Table 3: States with Specific Torture Crimes in Aggravation**

California	Torture as a basis for First Degree Murder – infliction of extremely painful act
Iowa	Torture as a basis for First Degree Kidnapping – physical or mental anguish
New York	Torture as a basis for First Degree Murder – cruel and wanton action leading to extreme physical pain
North Carolina	Torture as a basis for Capital Murder – act speaks for self
Oregon	Torture as a basis for Aggravated Murder – infliction of intense physical pain including the psychological
Rhode Island	Torture as a basis for First Degree Murder – torture or aggravated battery, actions causing suffering and horrific pain
Tennessee	Torture as a basis for First Degree Murder – heinous, atrocious, cruel action – physical as well as mental
Utah	Torture as a basis for Aggravated Murder – heinous, atrocious, cruel action – physical
Washington	Torture as a basis for First Degree Assault – severe physical or mental pain, agony or anguish

**Table 4: States with Torture as a General Aggravating Factor**

Alabama	Torture - heinous, atrocious, cruel conduct – physical and psychological
Alaska	Torture – extreme physical torture and mental anguish
Arkansas	Torture – prolonged infliction of extreme physical pain
Colorado	Torture – cruel, physical and psychological torture
Connecticut	Torture – heinous and cruel, physical and psychological
Delaware	Torture – outrageous or wanton, terror from fear of pain or helplessness
Florida	Torture – heinous, atrocious or cruel, physical or emotional
Georgia	Torture – outrageous or wanton, vile
Hawaii	Torture – heinous, atrocious or cruel, pitiless unnecessary acts, torturous
Idaho	Torture – heinous, atrocious or cruel, including torture
Illinois	Torture – infliction of extreme physical pain
Indiana	Torture – infliction of substantial pain or suffering

**Table 4, continued**

Kansas	Torture – heinous, atrocious or cruel, including torture and considers mental anguish or physical abuse before death
Louisiana	Torture – heinous, atrocious or cruel, pitiless infliction of physical or psychological pain, sense of impending doom a factor
Maine	Torture – infliction of gratuitous suffering or acting with extreme cruelty
Massachusetts	Torture – infliction of extreme pain, total disregard of suffering
Michigan	Torture – action designed to increase fear, anxiety and suffering, aggravated physical abuse
Minnesota	Torture – treat with particular cruelty
Mississippi	Torture – heinous, atrocious or cruel, conscienceless or pitiless physical or mental torture
Missouri	Torture – outrageously or wantonly vile, horrible or inhumane actions including the physical or psychological
Montana	Torture – as a means of the crime including brutal actions
Nebraska	Torture – heinous, atrocious or cruel, inflicting physical or mental pain

**Table 4, continued**

Nevada	Torture – pain as an element, closely related to mutilation
New Hampshire	Torture – heinous or cruel treatment similar to physical abuse
New Jersey	Torture – outrageously or wantonly vile, horrible or inhumane actions including the physical or psychological
North Carolina	Torture – heinous, atrocious or cruel actions including the physical and psychological
Oklahoma	Torture – heinous, atrocious or cruel actions including the physical and mental
Pennsylvania	Torture – heinous, atrocious or cruel actions causing considerable pain and suffering
South Carolina	Torture – physical torture; serious, vile, horrible or inhumane abuse upon the body of another
South Dakota	Torture – outrageously or wantonly vile, horrible or inhumane actions including the physical or mental anguish
Tennessee	Torture – heinous, atrocious or cruel actions including the physical and mental
Virginia	Torture – outrageously or wantonly vile, horrible or inhumane actions including the physical or psychological
Wyoming	Torture – atrocious or cruel, unnecessarily torturous, infliction of pain or suffering

**Table 5: States with Specific Torture Crimes against the Vulnerable**

Alabama	torture child under 18
Connecticut	torture child under 19
Delaware	torture as abuse of child 18 years old or less
Florida	torture as aggravated abuse of child, or elderly or disabled person
Iowa	torture as child endangerment
Kentucky	torture as criminal abuse of a child in confinement or punishment
South Dakota	torture of a minor
Tennessee	torture as aggravated child abuse (Haley's Law)

**Table 6: Summary of State Definitional Torture Characteristics**

\* Non-physical, mental or psychological torture included

**Infliction of Physical Pain, Suffering, or Anguish**

Alaska*	Massachusetts
Arkansas	New York
California	Oregon*
Illinois	Rhode Island
Indiana	Washington*
Iowa*	

**Table 6, continued****Heinous, Atrocious, or Cruel Acts Inflicting Physical Pain or Suffering**

Alabama*	Oklahoma*
Colorado*	Pennsylvania
Connecticut*	Nebraska*
Florida*	New Hampshire
Hawaii	North Carolina*
Idaho	Tennessee*
Kansas*	Utah
Louisiana*	Wyoming
Mississippi*	

**Outrageous, Wanton, or Vile Actions Inflicting Physical Pain or Suffering**

Delaware*	South Dakota*
Georgia	Virginia*
Missouri*	South Carolina
New Jersey*	

**Other Miscellaneous Characteristics**

Kentucky	criminal abuse in confinement or punishment child
Maine	extreme cruelty
Michigan*	brutality inflicting fear and anxiety
Minnesota	particular cruelty
Montana	brutal actions
Nevada	pain or mutilation



And finally, while animal cruelty laws are widespread in the states, all but nine of the fifty states specifically criminalize the torture of animals (Table 7).

**Table 7: States without Specific Torture Crimes Protecting Animals**

Arkansas	Iowa	New Mexico
Delaware	Missouri	Washington
Georgia	Montana	Wisconsin

On the other hand, seven states have statutes against the torture of animals while not specifically addressing the torture of humans (Table 8).

**Table 8: States with Specific Torture Crimes Protecting Animals but Not Humans**

Arizona	North Dakota	Texas
Maryland	Ohio	Vermont
West Virginia		

And, finally, two states do not appear to directly address torture in any way in their criminal law (Table 9).

**Table 9: States Not Specifically Addressing Torture in Their Criminal Law**

New Mexico	Wisconsin
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### *Discussion*

The foregoing introduction and findings illustrate divergence in the United States as to approaches taken toward the meaning of the term “torture” at both the international and national level. With respect to a definition for the term at the American domestic state level, the summary listing of definitional characteristics of torture (Table 6) illustrates a variety of ways to approach a definition of torture. Within that variety, three general categories appear with respect to the forty-one states that address the torture of human beings in some way. Each approach emphasizes a somewhat different perspective on the question of just what defines torture. A closer look at how torture is viewed within the categories offers some insight on how the states define torture.

#### *Pain and Suffering*

The first approach looks at the infliction of pain, suffering or anguish as the basic tenet of torture. This approach, perhaps the traditional approach, places emphasis on the results of the acts inflicted on a person. Of the forty-one states that address human torture, eleven, or 26.8 percent, use the infliction of physical pain as the primary determinant. This group of states, ranging from Alaska and Washington to New York and Rhode Island, shows no particular pattern of similarity. They represent large and small populations as well as the West, the East, and the Midwest.

*Heinous, Atrocious, or Cruel*

The second approach to torture involves what might be characterized as the classic terminology: the heinous, atrocious or cruel (often referred to as HAC). While this approach looks to physical pain or suffering, conduct that is judged to be heinous, atrocious or cruel is the key factor. The HAC approach accounts for seventeen, or 41.4 percent, of the forty-one states addressing human torture. And again, the states in this group span the continent from Hawaii and Wyoming in the West to Kansas and Louisiana in the nation's mid-section to North Carolina and Connecticut in the East. As to population, the small is represented by states such as Idaho and the large by states such as Pennsylvania.

*Outrageous, Wanton, or Vile*

A third group of states has adopted an approach that also looks to the actual conduct involved. This approach views torture from the perspective of actions that are deemed outrageous, wanton or vile (OWV) and that cause physical pain or suffering. Seven, or 17 percent, of the forty-one states take this approach. These states range in population from the small, as in Delaware, to the large, as in New Jersey. These states range in location from South Dakota in the West to South Carolina on the East Coast. Both the OWV group and the HAC group of definitions emphasize the acts involved in the treatment of the alleged victim. These two approaches make up twenty-four states,

or 58.5 percent, of the forty-one states addressing human torture.

### *Other Approaches*

In addition to the three general approaches, there is a group of six states that apply various miscellaneous approaches to the definition of torture. These states, which represent 14.2 percent of the forty-one states and which range from Maine to Minnesota to Nevada, look to such factors involving physical pain or suffering as extreme cruelty or mutilation.

Finally, the findings summarized in the listings above point to one other important consideration in the debate over the torture definition – non-physical torture. Whether characterized as mental or psychological or emotional pain, anguish or suffering, a number of the states considered non-physical suffering as part of the definition of torture. Of the forty-one American states that address human torture, twenty, or 48.7 percent, include the non-physical.

The findings of this research indicate, not with any particular surprise, that the approaches taken by the American states regarding aggravation are not uniform. While the various approaches may be grouped into three general categories, plus miscellaneous groupings, there is clearly no one definition for torture. And, even within these groupings, no real central core definition appears. In addition, there is serious debate in the American legal community over the lack of necessary specificity of these various approaches and the resultant potential for

unconstitutional vagueness—particularly with respect to death sentences (Shell, 1981; Mello, 1984; Rosen, 1986; Bowers, 1995; Banghart 1999; Cleek, 2001; Grida, 2004).

On the other hand, two key factors regarding torture under state criminal law are suggested by the research. First, torture is a factor that is viewed negatively in the American states. Even with the variations in defining torture, it is clear that torture is something that has been criminalized by the states. This is reflected in the finding, for example, that forty of the fifty American states classify torture as an aggravating factor (specific or general) in sentencing under their criminal laws. A second point of note is that, for a significant number – almost 50 percent – of the states addressing human torture, torture is more than just physical pain or suffering. This supports the view that torture includes the non-physical or psychological pain and suffering. A closer look at the findings indicates that in the categories that look to the type of conduct or act, the HAC and OWV approaches, sixteen of the twenty-four states or 66 percent include the psychological consideration in their definition of torture. And even within the more traditional result oriented pain and suffering approach, four, or 36.3 percent, of the eleven states considered the psychological.

This inclusion of psychological pain and suffering in the torture definition has special meaning in the context of warfare since WWII. “Modern” scientific techniques have been added to the interrogator's toolbox over the last fifty years or so. Many of these tools relate to the psychological much more than the physical. As chronicled by Professor Alfred McCoy of the University of Wisconsin – Madison,

these techniques have the advantage of leaving no evidence of physical abuse while still applying serious stress to persons undergoing interrogations (McCoy, 2006, pp. 158-159). McCoy documents the rise of psychological torture or interrogation techniques since the end of WWII and particularly as a response to the "Cold War." Many of the psychological interrogation techniques have arisen from the mind control and sensory deprivation experiments of that period (McCoy, 2006, pp. 21-59). In particular, McCoy notes that many of these Cold War techniques appear in the current debates over interrogation in the War on Terrorism (McCoy 2006, pp. 108-150). Given this, the broad inclusion of psychological pain and suffering in the definition of torture at the state level is noteworthy.

### *Conclusions*

In her timely compendium of "torture memos" and government reports that have been associated with the current global debate over allegations of torture by interrogators of the United States in the War on Terrorism, Karen J. Greenberg of New York University notes that "the word *torture*, long an outcast from the discourse of democracy, is now in frequent usage" (Greenberg 2005, p. xvii). With this contemporary usage, the definition of the term torture is a basic element of our current world situation. It would appear that the question of "Who?" gets a specific treatment is obviously a potentially life defining matter on the individual level in many parts of the world.

Perhaps just as important, the question of "How are we going to treat them?" is a potentially society defining matter on the national level. There are also questions regarding justification, necessity, proportionality, and exceptions. The importance of these issues to a nation and, in the long run, the planet cannot be ignored. However, we must first start with defining the term "torture."

The debate over the definition of torture is complex and ongoing. I suggest that examination of all levels of torture definitions can be useful in the current debate. My research looks at only one perspective for defining torture—that of how torture is viewed under the law of the domestic American states. While this area of the law may seem far removed from many of the basic factors of the debate in international law, the American domestic definition is from an aspect of law that bears consideration. This is particularly true when considering that the current torture debate within the context of the "War on Terrorism " is a debate that is both international and domestic. How American law addresses torture in its own criminal law is certainly of some arguable relevance.

Within the context of American domestic criminal law, forty states, or 80 percent, of the fifty states consider torture to be a general or specific aggravating factor. This high percentage indicates that torture has been a concern for a significant number of Americans. These domestic laws represent what torture means to the various societies of the individual American states. Perhaps the views on torture in international situations are different. Certainly the circumstances of the application of laws regarding torture to

cases as an aggravating factor in a state sentencing hearing are not the same as those arising with the interrogation of detainees – criminal sentencing for horrendous crimes versus allegations of horrendous treatment of prisoners or captives in time of war. But then again, should the *definition* of the outlawed conduct be that different in these two situations. As a matter of fact, some of the approaches taken by the states mirror the international debate. For example, the DOJ Memos look at the level of pain and how to handle the non-physical situations. The American state approaches to the torture definitions apply consideration of the heinous, atrocious or cruel (HAC) and the outrageous, wanton or vile (OWV) characteristics in analyzing similar situations. The states' approaches may have some parallels to the international situations. The specifics of how the various states apply these approaches may be helpful here.

My research is rather preliminary at this point. This is true on two levels. First, there are a large number of actual state cases that flesh out the application of the approaches described in this research, especially for the HAC and OWV approaches. More can be done to define or explain these applications, such as a detailed review of the reasoning in case decisions applying state torture laws. Second, some states deal with torture in settings outside the standard criminal law process such as domestic violence and juvenile justice as well as police brutality. Additionally, torture, as a concept, is even applied to non-humans – animal and livestock. These are areas of future study.

At this point in my research, I am not prepared to offer a general definition of torture. More research and



reflection is necessary. The specifics of individual cases from the American states may provide some additional data on just what is meant by the term "torture." The Appendix to this paper offers some examples of the specifics of what these cases address. On the other hand, I believe that my research confirms the earlier quote from Gail Miller of the Floersheimer Center regarding the difficulty and necessity of clearly defining this term. As my findings indicate, this clear definition does not appear to be found in the criminal law of the American states. While there are some common approaches to just what is to be considered a torturous act, I found no core characteristic to serve as a foundation for a universal definition.

Finally, I feel I must make a basic comment on my research effort. In limiting this paper to generalized findings, I fear that, in some respects, I am offering an unduly sanitized picture of the torture problem. The specifics of what humans do and have done to each other, as conveyed in the criminal aggravation cases of the American states, is profoundly depressing. I am sure that examples of torture in the world of interrogations are of a similar ilk. As I read the torture cases from the American states, I must say that it is as if I come upon an abyss. And beyond the edge, there is only a deep and dark pit – only chaos. In Karen Greenberg's book, *The Torture Debate in America*, she notes in her introduction "that very few Americans are eager to engage in the debate about the revival of torture as an overt practice conducted in their name" (Greenberg, 2006, p. 1). Unfortunately, this debate needs to occur. And, as a result, research exploring how we define torture needs to be done.

The need to define and then ultimately face torture does not appear to be a thing of humankind's past. As a result, the need to examine torture from all aspects of the law including the defining element of torture itself seems to be a part of humankind's present but perhaps - if we are successful - not of the future.

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### *Appendix*

Some relatively recent examples of actions held to be torture under the law in American states can be found in excerpts from state case law:

Ex parte Gary Frank Key 891 So. 2d 384, 390 (2004) Supreme Court of Alabama

In this case the court specifically held the victim suffered from psychological torture:

Key had been convicted of stalking the victim, and during the car chase and while she was in the car in the ditch she was aware of Key's propensity for violence and his intent to kill her or to inflict great bodily injury on her. The victim was forced to suffer psychological torture from the moment she saw Key pulling his vehicle up next to Robbie Doyle's car, throughout the car chase, during the time she was trapped in the car with no means of escape, while Key repeatedly shot her, and up until she was anesthetized for surgery. While this Court cannot be certain of the exact amount of time that elapsed during the course of those events, the victim here suffered psychological torture for a greater period of time than did the victim in Rieber. Thus, we hold that the evidence supports the finding that the victim suffered psychological torture for an appreciable period.

Randy Schoenwetter v. State of Florida 931 So.2d 857, 874 (2006)  
Supreme Court of Florida

In this case, the court examines torture under the HAC approach:

Heinous, Atrocious, or Cruel Aggravator

Schoenwetter next argues the heinous, atrocious, or cruel (HAC) aggravating circumstance does not apply to the murder of Ronald Friskey. We stated in *Lynch v. State*, 841 So. 2d 362, 369 (Fla. 2003), that when we analyze the heinous, atrocious, or cruel aggravator, the focus is not on the intent of the assailant, but on the actual suffering caused to the victim. In determining whether the HAC factor was present, the focus should be upon the victim's perceptions of the circumstances as opposed to those of the perpetrator. See *Farina v. State*, 801 So. 2d 44, 53 (Fla. 2001).

The record reflects and the trial court found that the HAC aggravator applied to Ronald Friskey. Ronald Friskey died an extremely torturous death. The medical examiner's testimony revealed Ronald was stabbed at least ten times. The wounds were on various parts of his body (including defensive wounds on his hands), he lost a lot of blood, and he had difficulty breathing. Ronald Friskey was alive and conscious throughout the attack as evidenced by the defendant's confession, and by the fact that Ronald lived long enough to drag himself next door to seek help and was able to state his belief that his entire family was killed. In addition to the physical torture he endured, Ronald was emotionally tortured by witnessing the defendant's attack on his ten-year old daughter and his wife.

The heinous, atrocious, or cruel aggravating circumstance is applicable to the murder of Ronald Friskey.

State of Iowa v. Larry Dean White 668 N.W. 2d 850, (2003) Supreme Court of Iowa

In this case, the court finds torture within acts of terror:

It would be contrary to legislative intent and common sense to find "torture" must include an element of physical injury. It is reasonable to assume the legislature was aware of the duality of the term "torture" and would have explicitly limited it to physical torture if that was what the legislature had intended the term to mean. In re A.G., 757 N.E.2d at 524, 528-29. Furthermore, other Iowa Code sections lend support to the conclusion that "torture" encompasses mental anguish unaccompanied by physical injury. Iowa Code section 702.18 defines "serious injury" to include "disabling mental illness," or extensive bodily injury. Iowa Code § 702.18(1)(a), (b). We conclude "torture" as it is used in Iowa Code section 710.2 includes mental anguish unaccompanied by physical or sexual assault. In other words, "torture" is either physical and/or mental anguish.

There is substantial evidence showing White intentionally tortured Nelson. When she arrived home, Nelson took a shower. As she dried her hair, Nelson saw the bathroom door move and slowly open. She saw the barrel of a shotgun in the mirror. Nelson dropped the hairdryer and turned around. There stood her estranged husband standing at the threshold with a shotgun. White forced Nelson at gunpoint upstairs to her bedroom. She was so consumed with fear that White was going to shoot her, Nelson walked backwards up the stairs. All the while, White pointed the shotgun at Nelson's chest.

At the top of the stairs, Nelson saw the video recorder. She saw the red light was on and knew she was being taped. She saw shotgun shells lined up in a row on the stand near the television. Nelson believed she was going to die. White ordered Nelson to sit on the bed or he would shoot her knee. As he said this, White pointed the gun at Nelson's knee. White then placed a



chair in front of the video recorder and ordered Nelson to sit there. Nelson moved to the chair. At all times, White kept the shotgun pointed at her. He interrogated her. He accused her of sexual infidelity. He demanded she tell the truth about having intimate relationships with other men. Nelson answered his questions. She was hysterical; she was trembling uncontrollably, crying and sobbing, wailing and screaming, and begging for her life. Nelson said, "I don't want you to kill me," and White responded, "Then answer my questions." Nelson pleaded to him not to kill her because their children needed her. White responded, "They'll be alright." When Nelson asked White why he was doing this to her he said, "I'll be in jail as soon as I leave if I don't shut you up . . . . You can't keep your mouth shut."

At some point, White turned off the video recorder and forced Nelson downstairs. This time, Nelson went down the stairs sideways, terrified White would shoot her in the back. White forced Nelson, at gunpoint, into the living room. White put a videotape in the VCR and turned on the television. He forced Nelson to watch the two and a half hours of videotape White recorded as he waited for Nelson to come home. The tape was replete with explicit statements of White's intent to kill Nelson, his accusations against her, and vulgar name-calling. White stayed with Nelson as she viewed the entire two and a half hour video. As Nelson watched the tapes and heard the homicidal ideations of her husband, White repeatedly cocked and uncocked the shotgun. She heard White say on the tape he was going to torture her. She heard White say he was going to shoot her when she returned home. Nelson believed White was going to hurt her. At one point, White allowed Nelson to go into the kitchen for a cigarette and pop. He pointed the gun at Nelson and followed her into the kitchen with it. Some time after Nelson returned to

the living room, White acted like he was going to let Nelson go. He unloaded the shotgun. When the tape was finished, White said to Nelson "You can go. You can go call the police if you want to." Nelson started walking for the door and reached for her cell phone. White jumped up from the recliner and came after Nelson. He grabbed the cell phone out of her hand and blocked the door so Nelson could not leave. He reloaded the shotgun and ordered Nelson back into the living room. Nelson told White everything was her fault and that she deserved what White had done to her. She told him things to boost his ego. White left the house without his shotgun and shotgun shells.

These facts support the jury's conclusion that Nelson was "tortured" within the meaning of Iowa Code section 710.2. This case is more than just a threat with a gun. The record shows repeated acts of terror against Nelson. A psychiatrist who examined the videotapes testified White looked and behaved like a "caged animal." The psychiatrist remarked about White's behavior when he was waiting for Nelson to return home. White repeatedly checked the window for headlights. Every time a car approached the house and White saw the headlights, he became visibly nervous. He watched carefully to determine if it was Nelson coming home. The psychiatrist testified White was "upset" and was ready "for what we call fight or flight."

State of Louisiana v. Michael Weary 931 So. 2d 297, 313 - 314 (2006)  
Supreme Court of Louisiana

In this case, the court examines the HAC approach in light of case law:

Finally, we find there was sufficient evidence to support the jury's finding that [Pg 23] the murder was committed in an especially atrocious, heinous or cruel

manner. This court has given the statutory aggravating circumstance of heinousness a narrow construction, requiring "that to be valid there must exist elements of torture, pitiless infliction of unnecessary pain or serious bodily abuse prior to death." Manning, 2003-1982 p. 67-68, 885 So. 2d at 1103; see also *State v. Brogdon*, 457 So. 2d 616, 630 (La. 1984), cert. denied, 471 U.S. 1111, 105 S. Ct. 2345, 85 L. Ed. 2d 862 (1985). "Torture requires evidence of serious physical abuse of the victim before death." Manning, 2003-1982 p. 69, 885 So. 2d at 1104; *State v. Sonnier*, 402 So. 2d 650, 659 (La. 1981), cert. denied, 463 U.S. 1229, 103 S. Ct. 3571, 77 L. Ed. 2d 1412 (1983). In addition, "[t]his Court has also held that the murder must be one in which the death was particularly painful and one carried out in an inhumane manner." Manning, 2003-1982 p. 68, 885 So. 2d at 1103. A victim's "awareness of impending doom" is relevant to a finding of heinousness. Manning, 2003-1982 p. 70, 885 So. 2d at 1104. Dr. Fraser MacKenzie, an expert pathologist, performed the autopsy and testified about Eric Walber's injuries. Dr. MacKenzie found considerable injury to most of the body surfaces with the main area of injury being to Walber's head and face. In addition to deep lacerations on his scalp and the top of Walber's head, there were incise type wounds on his face. All of the head wounds extended down to Walber's skull. Walber also sustained a palpable fracture of his skull, i.e. one which could be felt with the fingers. Dr. MacKenzie testified that Walber's head wounds could have occurred within a 15, 30 or even 45 minute time period. He stated that [Pg 24] one of the head wounds could have been a fatal blow if the wound was left unattended. In addition, the expert pathologist testified that Walber could have been moved about and beaten over a period of time and still been alive.

The autopsy photographs which were introduced in evidence show extensive cuts and abrasions to most of Walber's body. Moreover, Dr. MacKenzie stated that there were further injuries to Walber which were not depicted on the autopsy photos. Walber's facial features were so contorted from the beating he received that his mother did not recognize him to identify his body.

These physical findings were consistent with Scott's testimony detailing near continuous, vicious beatings of Walber as he was carried from place to place. Scott testified that Walber attempted to escape, and that he moaned throughout his ordeal. Thus, the evidence establishes that Walber was aware of what was happening to him and was suffering pain. Scott testified that Walber did not make any more sounds after he was hit with his own car. Dr. MacKenzie testified that Walber died on Crisp Road.

We find the evidence sufficient for a rational juror to find beyond a reasonable doubt that the defendant subjected Eric Walber to the pitiless infliction of unnecessary pain prior to Walber's death. The serious physical abuse which Walber suffered amounts to torture under our law. Dr. MacKenzie testified that Walber's head injuries were serious enough to be fatal blows if left unattended, however, [Pg 25] Walber did not die immediately but suffered until he was forcibly carried to Crisp Road. Walber's death, coming after being hit and run over by a car three times, was a particularly painful way in which to die. We find that the defendant carried out Walber's death in a particularly inhumane manner and we hold there was sufficient evidence to support beyond a reasonable doubt the jury's finding as to this aggravating circumstance.

State of Montana v. Lester Kills On Top 241 Mont. 378, 397 – 398 (1990)  
Supreme Court of Montana

In this case, the court examines torture as a means of murder:

Defendant contends that the court's finding that the offense of deliberate homicide was committed by means of torture is not supported by the evidence. The fatal blows in Wyoming were brutally accomplished by use of a pipe, a tire iron and a rock. During this beating the victim cried out, "Oh God, no, God, no." Additionally, we cannot rationally separate the final beating from the entire criminal transaction which demonstrated a course of conduct involving brutality and extending over several hours. Prior to delivery of the fatal blows in Wyoming the victim was brutally assaulted several times and confined nude in the small trunk of a car on a cool morning for a number of hours. The evidence established that these prior beatings in Montana were severe enough to be potentially fatal. Dr. Deters testified that the subdural hematoma was potentially fatal. It is not possible to determine from the medical evidence the extent to which the prior beatings contributed to the victim's death. The beatings and restraint, culminating in the bludgeoning to death of the victim, constitute substantial credible evidence that the homicide was committed by means of torture.

The determination that these acts were torturous is consistent with this Court's previous holdings regarding torture in death penalty cases. See, e.g., *State v. Dawson* (Mont. 1988), [233 Mont. 345,] 761 P.2d 352, 360, 45 St.Rep. 1542, 1551-52, cert. denied, 109 S.Ct. 3200, 105 L.Ed.2d 708 (1989); (evidence supported finding that deliberate homicide was committed by means of torture where victims were bound and gagged in each others' presence, injected with unknown drugs, and strangled);

State v. McKenzie (1976), 171 Mont. 278, 557 P.2d 1023, vacated, 433 U.S. 905, 97 S.Ct. 2968, 53 L.Ed.2d 1089, (1977), on remand, 177 Mont. 280, 581 P.2d 1205 (1978), cert. denied, 443 U.S. 912, 99 S.Ct. 3103, 61 L.Ed.2d 877 (1979), on remand, 186 Mont. 481, 608 P.2d 428 (1980), cert. denied, 449 U.S. 1050, 101 S.Ct. 626, 66 L.Ed.2d 507 (1980) (holding that deliberate homicide was committed by means of torture where victim was killed by a blow which laid open her head, prior to which she was nonfatally strangled). We conclude that there exists substantial credible evidence to support a finding that defendant caused the victim's death by torture. We affirm the sentencing court's finding on this issue.

State v. Jeremy M. Motyka 893 A.2d 267, 290 - 291 (2006) Supreme Court of Rhode Island

In this case, the court explores torture in the context of aggravated battery:

The jury found that two aggravating circumstances were present in this case--each of which, standing alone, would be sufficient to authorize the court to impose a sentence of life imprisonment without the possibility of parole. See Pacheco, 763 A.2d at 982. After reviewing the record, it is our opinion that the evidence in this case overwhelmingly supports the jury's conclusion that defendant committed the murder intentionally while engaged in the commission of first-degree sexual assault and that he committed the murder in a manner involving both torture and an aggravated battery. Evidence presented at trial, including Dr. Laposata's testimony about the injuries to Ms. Spence-Shaw's genital area, established that Ms. Spence-Shaw was sexually assaulted before she was murdered.

Moreover, the DNA evidence in this case conclusively established that it was defendant who raped her. There was also evidence presented at trial regarding the extensive injuries, both internal and external, that defendant inflicted upon Ms. Spence-Shaw. In addition, Dr. Laposata testified that Ms. Spence-Shaw was still alive when she was raped and then placed underwater in the bathtub. Furthermore, due to the nature of the decedent's injuries, her ability to experience pain remained intact throughout the violent attack, thereby allowing her to suffer from a significant amount of pain prior to her death. The infliction of these horrific injuries, combined with the extent of Ms. Spence-Shaw's suffering, certainly amounted to torture and aggravated battery. Given this evidence, we are in agreement with the jury as to the presence of these two aggravating circumstances.

State of Tennessee v. Steven James Rollins 188 S.W. 3<sup>d</sup> 553, 572 (2006)  
Supreme Court of Tennessee

In this case, the court explores torture in the context of multiple injuries:

The proof also is sufficient to support the jury's finding of the (i)(5) aggravating circumstance: "the murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death." This Court has previously defined "torture" as "the infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious." *State v. Pike*, 978 S.W.2d 904, 917 (Tenn. 1998); *State v. Williams*, 690 S.W.2d 517, 529 (Tenn. 1985). With respect to "serious physical abuse beyond that necessary to produce death," we have previously explained that "serious" alludes to a matter of degree, and that physical, rather than mental, abuse

must be "beyond that" or more than what is "necessary to produce death." See *State v. Nesbit*, 978 S.W.2d 872, 887 (Tenn. 1998); *Odom*, 928 S.W.2d at 26. The (i)(5) aggravating circumstance may be applied if the evidence is sufficient to support either torture or serious physical abuse beyond that necessary to produce death. *State v. Suttles*, 30 S.W.3d 252, 262 (Tenn. 2000). The prosecution offered proof that the defendant inflicted more than twenty non-fatal stab wounds to the victim's body. This proof is sufficient to support a finding that the murder involved serious physical abuse beyond that necessary to produce death. Furthermore, the medical testimony confirmed that the multiple non-fatal stab wounds inflicted upon the victim would have been painful. Defensive wounds to the victim's body, blood on the bottom of the victim's socks, and other physical evidence of a struggle at the scene, indicated that the victim was alive, conscious, moving away from his attacker, and attempting to defend himself against the defendant's brutal assault. This evidence is sufficient to support a finding of torture. In sum, the evidence clearly is sufficient to support the jury's finding of the (i)(5) aggravating circumstance.

*The State of Washington v. Paul E. Peterson* 133 Wn2d 885, 886, 890-891, 893(1997) Supreme Court of Washington

In this case, the court explores torture in the context of an assault:

Defendant was originally charged by information with the crime of first degree assault. On the day of trial, the judge granted the State's motion to amend the information to add an alternative count of attempted second degree murder. Defendant then waived his right to jury trial and the matter was tried to the bench.



According to the findings of fact entered by Judge Sperline following the trial, Defendant and the victim, Julie (Thompson) Mathews, spent the day of May 19, 1994, together drinking alcohol and driving around looking for a place to target shoot. Being unsuccessful in that effort, Defendant drove to the shores of Banks Lake. By about 8:00 p.m., the two had stopped at the lake. Ms. Mathews was sitting on a protruding rock overlooking the lake. She was intoxicated. The two had been arguing. Defendant approached Ms. Mathews rapidly from behind and pushed her off the rock into the water. The water was approximately two feet deep. Defendant walked out into the water where Ms. Mathews had landed, grabbed her by the neck and head, and held her head under the water. Ms. Mathews was flailing her arms, attempting to get free. At one point, her head emerged above the water and she screamed "I can't swim." Clerk's Papers (CP) at 55, 58, 97. Defendant held her head under the water continuously for 10 to 15 seconds until he finally released her and she scrambled up the bank to the car. While under water, Ms. Mathews did not know if she was going to drown or survive; she felt the burning of water in her nose and her lungs. She was terrorized. Defendant pursued Ms. Mathews to the car, where, while she cowered on the ground, he beat her with his fists and kicked her until he was ordered to stop by witnesses who had arrived in response to Ms. Mathews' screams. . . .

Second degree assault by torture requires that a person knowingly inflict "bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture." RCW 9A.36.021(1)(f). In *State v. Brown*, 60 Wn. App. 60, 65, 802 P.2d 803 (1990), the Court of Appeals approved an instruction for second degree assault by torture defining torture as "the infliction of severe or intense pain as punishment or

coercion, or for sheer cruelty.'" (Citing Jury Instruction 9). WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2414 (1969) defines torture as the infliction of intense pain (as from burning, crushing, wounding) to punish or coerce someone . . . anguish of body or mind: excruciating agony: extremity of suffering . . . an extreme annoyance or severe irritation: an intense strain: something pernicious or baneful . . . extreme strain or abuse . . .

The Court of Appeals is reversed and Defendant's conviction reinstated.