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Tortured Prosecuting: Closing the Gap in Virginia's Criminal Code by Adding a Torture Statute

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NOTES

TORTURED PROSECUTING: CLOSING THE GAP IN VIRGINIA'S CRIMINAL CODE BY ADDING A TORTURE STATUTE

TABLE OF CONTENTS

INTRODUCTION	270
I. TORTURE LAWS ACROSS THE UNITED STATES	274
II. THE ELEMENTS OF TORTURE	275
<i>A. Mens Rea: Intent, Purpose, and Knowledge</i>	275
<i>B. Cruel or Extreme Pain</i>	284
<i>C. Temporal Requirement</i>	285
<i>D. Physical and Mental Injuries</i>	286
<i>E. Physical or Custodial Control</i>	288
III. MODEL TORTURE STATUTE	290
IV. POTENTIAL CONCERNS WITH THE TORTURE STATUTE	294
<i>A. Statutory Vagueness</i>	294
<i>B. Risk of Minimizing the Seriousness of Torture</i>	296
V. APPLICATION OF MODEL TORTURE STATUTE TO <i>GORE</i>	297
CONCLUSION	298

INTRODUCTION

*“From time to time a criminal case arises for which current laws do not seem to ‘fit’ the elements of the case. When that happens, it can be difficult for prosecutors to find a charge that can be supported by the evidence and that will carry an appropriate punishment.”*¹

Such a situation in which current laws do not fit the case’s facts recently occurred in Gloucester, Virginia. On April 28, 2011, while knocking on doors during a routine robbery investigation, members of the Gloucester County Sheriff’s Department made a startling discovery at the home of Brian and Shannon Gore in Gloucester County, Virginia.² As police moved from room to room, they found a fully decorated child’s room.³ That room was for the Gores’ son.⁴

Police discovered another room that appeared to be for storage.⁵ The room was dark and full of boxes.⁶ In the room, there was also a crib topped with a heavy piece of wood and several large boxes acting as a lid.⁷ Inside that makeshift cage, a naked little girl reached out from behind its bars.⁸ She “was whimpering, grunting, and making animalistic noises.”⁹ Officers found the girl crouched with her knees pressed against her chest and her heels touching her

1. MICH. HOUSE FISCAL AGENCY, FIRST ANALYSIS: PROHIBIT TORTURE, HOUSE BILL 5268, 5269 (2005) (discussing and analyzing Michigan’s law regarding torture).

2. Russell Goldman, *Virginia Parents Accused of Murder, Keeping Starving Child in Cage*, ABC NEWS (May 4, 2011), <http://abcnews.go.com/US/virginia-parents-accused-murder-keeping-starving-child-cage/story?id=13528448> [<http://perma.cc/6RW8-948R>]; Matt Sabo, *Court Documents Reveal Details in Gloucester Caged Girl Case*, DAILY PRESS (Mar. 4, 2013), http://articles.dailypress.com/2013-03-04/news/dp-nws-gore-appeal-0305-20130304_1-shannon-gore-brian-gore-documents [<http://perma.cc/UVG2-G2SR>].

3. See Kim Robins, *Gores Sentenced to 30 Years on Child Abuse Charges*, GLOUCESTER-MATHEWS GAZETTE-J. (June 10, 2013), http://gazettejournal.net/index.php/news_article/gores_sentenced_to_30_years_on_child_abuse_charges [<http://perma.cc/7UCP-CHFS>]; Sabo, *supra* note 2.

4. Sabo, *supra* note 2.

5. *Id.*

6. *Id.*

7. Robins, *supra* note 3.

8. See *id.*

9. *Id.*

buttocks.¹⁰ Several inches of feces lined the interior of the cage.¹¹ The child was so starved that she had resorted to eating her own skin.¹²

She had sustained severe injuries. The six-year-old weighed just fifteen pounds—the size of a six-month-old baby.¹³ Her head was the size of a three-year-old child's, and she could not extend her legs due to long-term confinement and malnutrition.¹⁴ Open sores covered her heels and buttocks as a result of remaining in the same position for long durations of time.¹⁵ Because her confinement deprived her brain of essential nutrients during key developmental stages, she suffered permanent brain damage.¹⁶ Later testing indicated that the girl, now close to nine years old, would never be able to live independently and would always suffer from emotional and psychological challenges.¹⁷ Neither Brian nor Shannon Gore could explain why they had caged and starved their child.¹⁸ From police interviews and trial testimony, however, it became clear that the Gores' actions went beyond mere child abuse.

For months, possibly years, the girl's parents imprisoned their child in the makeshift cage in the back of their home, allegedly to conceal her existence. No one knew that the couple had a baby girl.¹⁹ At first, the Gores left the child in the cage when they were at work and took her out when they returned home.²⁰ Eventually, however, the Gores grew increasingly unconcerned about taking her out of the cage, so much so that she remained confined in the cage for long

10. *Id.*; Sabo, *supra* note 2.

11. *See* Sabo, *supra* note 2.

12. Goldman, *supra* note 2.

13. Joanne Kimberlin, *Gloucester Residents In Dark as Child Abuse Came to Light*, PILOTONLINE.COM (June 5, 2011), <http://hamptonroads.com/2011/06/gloucester-residents-dark-child-abuse-came-light> [<http://perma.cc/E28F-D9RF>]; Robins, *supra* note 3.

14. Robins, *supra* note 3; Sabo, *supra* note 2.

15. Goldman, *supra* note 2; Kimberlin, *supra* note 13.

16. *See* Robins, *supra* note 3.

17. *Id.*

18. *See id.*; Lena Sullivan, *Virginia Parents Brian and Shannon Gore Arrested as Starved 6-Year-Old Found Caged*, GA. NEWSDAY (May 3, 2011), <http://www.georgianewspaper.com/news/national/67640-virginia-parents-brian-and-shannon-gore-arrested-as-starved-6-year-old-found-caged.html> [<http://perma.cc/SZ6S-JBZE>].

19. Kimberlin, *supra* note 13.

20. Robins, *supra* note 3.

periods of time.²¹ Brian Gore stated that he and his wife fed the child sporadically and sometimes he would leave her a Pop-Tart.²² When asked why they stopped feeding their child, Brian Gore said that he and his wife were tired of “[her] and it was easier to deal with [her] this way.”²³ They recognized that eventually the child would get sick and die.²⁴

A grand jury could not successfully indict the Gores on attempted murder charges because they periodically fed the child.²⁵ After searching for applicable statutes under which to charge the Gores, the prosecutor charged them with aggravated child abuse—a felony with a 10-year maximum term of imprisonment²⁶—and aggravated malicious wounding, which is punishable by up to life in prison.²⁷ The Gores pled guilty to both charges and the judge sentenced them to thirty years in prison—ten years for aggravated child abuse and twenty years for aggravated malicious wounding.²⁸ However, had the child not suffered a permanent injury, which is one of the elements of aggravated malicious wounding,²⁹ the Gores would not have faced the possibility of life in prison. Instead—assuming a conviction for malicious wounding—the Gores would have faced a maximum possible punishment of thirty years in prison (ten years for child abuse and twenty years for malicious wounding).³⁰ Given that judges rarely issue the maximum sentence, it is likely that the Gores would have received less than thirty years.³¹

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* The prosecution initially charged the Gores with attempted murder, but never presented an indictment. Case Information, Commonwealth v. Gore, CR11000343-00, (Va. Cir. Ct. March 10, 2012), available at <http://perma.cc/TTG8-V6XN>. The judge dismissed the charges. *Id.*

26. VA. CODE ANN. § 18.2-371.1 (West 2014).

27. *Id.* § 18.2-51.2.

28. Sabo, *supra* note 2.

29. Compare VA. CODE ANN. § 18.2-51 (malicious wounding), with § 18.2-51.2 (aggravated malicious wounding).

30. See sources cited *supra* notes 26-27.

31. See sources cited *supra* notes 26-27. As this Note was headed for publication, the Gores were also indicted for the murder of their seven-month-old son, whose remains were found buried under a shed behind the couple's home. Andy Fox, *Parents Charged with Homicide Given Public Defenders*, 10 WAVY.COM (May 27, 2014), <http://wavy.com/2014/05/27/mother-who-caged-daughter-now-charged-with-sons-murder> [<http://perma.cc/9FZU-MG58>].

This Note argues that Virginia should close a gap in its criminal code by creating a new crime for when a perpetrator physically or mentally tortures a victim. The recent case in Gloucester County illustrates the deficiencies of Virginia's criminal statutes. Although the Gores subjected their baby daughter to unspeakable physical and mental suffering through acts that amount to nothing less than torture, Virginia's criminal laws do not specifically address this type of conduct. When situations like these arise, prosecutors struggle to find crimes that meet the facts of the case and provide adequate punishment.

Most academic work on torture law has focused on international laws, particularly laws that pertain to the treatment of enemy combatants.³² Although this Note will reference and analyze international torture laws as well as federal torture laws, it predominantly focuses on state laws that address torture. Part I of this Note will provide a broad overview of torture laws across the United States. Part II will examine the different elements of state torture laws, with particular focus on the differing approaches to torture under Michigan's and California's torture statutes. In that section, this Note will argue that any torture statute should include mental and physical suffering, and unlike California's torture statute, motive should not be an element of the crime of torture because it needlessly restricts prosecutors and fails to cover all instances of torture. Part III draws upon state torture laws in creating a model state torture statute. Part IV addresses constitutional concerns with torture laws and argues that the model torture statute is not unconstitutionally vague. Finally, Part V applies the model torture statute to *Gore*.

32. See, e.g., Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291, 329 (1994); Oona A. Hathaway et al., *Tortured Reasoning: The Intent to Torture Under International and Domestic Law*, 52 VA. J. INT'L L. 791, 797-98 (2009) (arguing that international and U.S. torture laws require the same mens rea); Rebecca B. Schechter, Note, *Intentional Starvation as Torture*, 18 AM. U. INT'L L. REV. 1233, 1257 (2003) (contending that international law should recognize starvation as torture); Sarah H. St. Vincent, Note, *Coercion's Common Threads: Addressing Vagueness in the Federal Criminal Prohibitions on Torture by Looking to State Domestic Violence Laws*, 109 MICH. L. REV. 813, 817-18 (2011) (arguing that federal criminal torture laws are vague and should be revised to prohibit specific forms of mistreatment).

I. TORTURE LAWS ACROSS THE UNITED STATES

Torture is a familiar subject under international and federal law. In 1994, the United States ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (CAT)—a treaty that requires state parties to “ensure that all acts of torture are offences under [their] criminal law[s].”³³ The United States subsequently enacted the “Torture Act.”³⁴ Much of the scholarly debate on torture focuses on the interpretation and utility of these laws.³⁵ However, at the state level, a fairly robust statutory framework addresses torture. Many states mention torture in their homicide laws.³⁶ In California, for example, “[a]ll murder which is perpetrated by means of ... torture ... is murder of the first degree.”³⁷ The Arizona Supreme Court also held that murder by torture is a type of first-degree murder “committed when the defendant intends to cause extreme pain and suffering for the purpose of revenge, extortion, persuasion, or some other untoward propensity.”³⁸ The New York aggravated murder statute identifies murder committed in the course of torture.³⁹ According to the statute, first-degree murder includes instances in which “the defendant acted in an especially cruel and wanton manner pursuant to a course of conduct intended to inflict and inflicting torture upon the victim prior to the victim’s death.”⁴⁰

Another common statutory framework is the inclusion of torture as an aggravating factor for enhanced sentencing when a murder

33. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 4, Dec. 10, 1984, S. TREATY DOC. No. 100-20 (1988), 1465 U.N.T.S. 85, available at <http://perma.cc/E68J-A99Q> [hereinafter Convention Against Torture].

34. 18 U.S.C. § 2340 (2012).

35. See *supra* note 32.

36. 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 Attorneys Association), November 1, 2011, at 2, available at <http://perma.cc/SL84-KK44>.

37. CAL. PENAL CODE § 189 (West 2012).

38. Tlapula & Appelbaum, *supra* note 36, at 2 (citing *State v. Morales*, 630 P.2d 1015, 1019 (Ariz. 1981)).

39. N.Y. PENAL LAW §§ 125.26-125.27 (McKinney 2014).

40. *Id.*

includes acts of torture.⁴¹ Many states name torture as an aggravating factor for capital punishment.⁴² Virginia is one of these states, but Virginia does not define torture.⁴³ In fact, of the twenty states that include torture as an aggravating factor for capital punishment, only Arkansas,⁴⁴ New York,⁴⁵ and Wyoming⁴⁶ specifically define torture.

Many jurisdictions also include torture in their child abuse statutes.⁴⁷ For example, in the District of Columbia, a person commits the crime of cruelty to children in the first degree if that person “intentionally, knowingly, or recklessly tortures ... a child under 18 years of age ... and thereby causes bodily injury.”⁴⁸

Despite international treaties and federal laws criminalizing torture that does not result in death, California and Michigan are the only two states that have specific anti-torture statutes.⁴⁹ These two statutes—as well as federal and international torture laws—provide a point of reference for defining torture. As will be discussed below, this Note will analyze the elements of these statutes to formulate a precise yet workable definition of torture that will provide prosecutors with an effective tool to combat an especially horrible crime.

II. THE ELEMENTS OF TORTURE

A. Mens Rea: Intent, Purpose, and Knowledge

The driving force behind the California torture statute is the idea that the mindset of a torturer is particularly dangerous and therefore deserving of additional punishment.⁵⁰ In California, torture is a specific intent crime, meaning the perpetrator must

41. See, e.g., ALASKA STAT. § 12.55.125 (2014).

42. See, e.g., ARK. CODE ANN. § 5-4-604 (West 2014).

43. See VA. CODE ANN. § 19.2-264.2 (West 2014).

44. Tlapula & Appelbaum, *supra* note 36, at 2 (citing ARK. CODE ANN. § 5-4-604).

45. *Id.* (citing N.Y. PENAL LAW §§ 125.26-125.27 (McKinney 2014)).

46. *Id.* (citing WYO. STAT. ANN. § 6-2-102 (2014)).

47. See, e.g., CONN. GEN. STAT. § 53-20 (2014).

48. D.C. CODE § 22-1101 (2014).

49. Tlapula & Appelbaum, *supra* note 36, at 2 (citing CAL. PENAL CODE § 206 (West 2014); MICH. COMP. LAWS ANN. § 750.85 (West 2014)).

50. See *People v. Pre*, 11 Cal. Rptr. 3d 739, 746 (Ct. App. 2004).

intend to inflict the physical effects suffered by the victim.⁵¹ Intent is generally inferred from actions that demonstrate the perpetrator did not merely intend to injure or kill the victim, but also wanted the victim to suffer. Actions courts typically consider as evidence of the specific intent to torture include, but are not limited to: inflicting multiple blows to vulnerable body parts, cutting or burning the victim, restraining the victim, moving the victim, and inflicting injuries upon the victim after he or she is incapacitated.⁵² Although the California courts stress that the focus should not be on the injuries the victim suffered, but rather on the actions of the defendant, courts do look at the victim's injuries to establish intent.⁵³ Other circumstantial evidence, including statements by the defendant that show the defendant's callous disregard for the victim's suffering, are also probative of intent.⁵⁴

Michigan's mens rea standard includes the intent to cause *either* physical pain or mental pain.⁵⁵ In reality, this distinction is slight. Mental pain usually flows from the infliction of physical pain.⁵⁶ Upon finding that the victim suffered a mental injury, courts usually infer that the accused intended to inflict mental pain by

51. "Every person who, with the *intent to cause cruel or extreme pain and suffering* for the purpose of revenge, extortion, persuasion, or for any sadistic purpose, inflicts great bodily injury ... upon the person of another, is guilty of torture." CAL. PENAL CODE § 206 (emphasis added); *see also* *People v. Baker*, 120 Cal. Rptr. 3d 313 (Ct. App. 2002) (holding that section 206 requires the state to prove beyond a reasonable doubt that the perpetrator acted with the specific "intent to cause cruel and extreme pain and suffering").

52. *People v. Assad*, 116 Cal. Rptr. 3d 699 (Ct. App. 2010) (holding that defendant acted with the intent to inflict cruel pain when he repeatedly struck his son in the front, back, and sides of his torso after his son had already suffered injuries to the same regions of his body); *People v. Misa*, 44 Cal. Rptr. 3d 805 (Ct. App. 2006) (concluding that defendant intended to cause cruel pain when he struck victim in the head repeatedly over significant period of time and displayed callous indifference to the victim's obvious need for medical attention); *People v. Baker*, 120 Cal. Rptr. 2d 313, 318-19 (Ct. App. 2002) (holding that defendant intended to cause his wife extreme pain when he poured gasoline on her, set her on fire, and then idly sat by and watched her burn).

53. *People v. Burton*, 49 Cal. Rptr. 3d 334, 337 (Ct. App. 2006) ("A jury may consider the severity of the wounds in determining whether the defendant intended to torture.").

54. *People v. Quintero*, 37 Cal. Rptr. 3d 884, 893-94 (Ct. App. 2006) (holding that evidence that defendant repeatedly attacked victim's face with a knife and made taunting remarks indicated that defendant acted with the purpose to cause cruel suffering).

55. MICH. COMP. LAWS ANN. § 750.85 (West 2014).

56. *Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, UNHCHR, at 45 (1999), available at <http://perma.cc/E32T-A9F7>.

physically injuring the victim.⁵⁷ It is possible, however, to torture through purely or predominantly psychological means. For example, in *People v. Murphy*, the court inferred from the perpetrators' actions that they intended to inflict mental pain and suffering.⁵⁸ The perpetrators bound and injured the victims, threatened to cause bodily injury with golf clubs, knives, and guns, and even informed the victims that one of the intruders had killed before and would kill again if the victims did not comply with their demands.⁵⁹ Although they did not suffer significant physical injuries, all four victims testified that they suffered negative long-term mental effects because of the incident.⁶⁰ This was sufficient to support a finding that the perpetrators acted with the requisite intent.⁶¹

Besides threats of physical harm, other forms of mental torture often include limiting the victim's access to sensory stimuli and threatening sexual assault.⁶² As will be discussed below, the mental effects of torture are often just as severe, if not worse than the physical effects.⁶³ Consequently, because the torturer often intends to inflict psychological pain, any definition of torture must include a mental component in its standard.

California also includes the additional element of motive in its torture statute.⁶⁴ California defines torture as the intentional infliction of extreme pain and suffering "for the purpose of *revenge, extortion, persuasion, or for any sadistic purpose.*"⁶⁵ California courts have held that the purpose requirement is what distinguishes torture from aggravated assault.⁶⁶ The legislature interpreted torture as the product of a "calculating and cold blooded individual whose motivation for personal gain or satisfaction is deserving of

57. *People v. Murphy*, No. 293385, 2010 WL 4679582, at *3 (Mich. Ct. App. Nov. 18, 2010).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *See infra* Part II.D.

63. *See infra* Part II.D.

64. CAL. PENAL CODE § 206 (West 2014); *see also* IDAHO CODE ANN. § 18-4001 (2014) (including a motive element); *State v. Pierce*, 488 S.E.2d 576, 588 (N.C. 1997) (holding that torture within the meaning of N.C. GEN. STAT. § 14-17 (2014) requires that the defendant act for the "purpose of punishment, persuasion, or sadistic pleasure").

65. CAL. PENAL CODE § 206 (emphasis added).

66. *People v. Pre*, 11 Cal. Rptr. 3d 739, 746 (Ct. App. 2004).

additional punishment.”⁶⁷ Despite this fairly exacting mens rea standard, the state does not need to show that the torturer premeditated his actions.⁶⁸

It is easy to imagine instances in which the defendant tortures his victim for the purpose of revenge (the jealous boyfriend punishing his cheating girlfriend), extortion (a thief trying to extract the combination to a safe), or persuasion (a gang member pumping a rival gang member for information), but it is the last enumerated purpose—any sadistic purpose—that has proven more difficult to define. Although many people associate sadistic pleasure with sexual activity, California courts have adopted a broader definition, interpreting “sadistic” purpose under the torture statute to mean “the infliction of pain on another person for the purpose of experiencing [personal] pleasure.”⁶⁹

In practice, the California courts use “sadistic purpose” as a catch-all phrase that allows the state to prove the necessary purpose requirement when the defendant engages in especially disturbing acts and there is little other evidence pointing to another enumerated motive. For example, in *People v. Pre*, the defendant—a complete stranger—broke into a woman’s house, viciously attacked her, choked her into unconsciousness twice, and then bit her ear while she was unconscious.⁷⁰ With little evidence pointing to other motives, the court inferred that the defendant acted with a sadistic purpose when he bit the victim’s ear. “This evidence showed that the defendant did not just engage in assault but had a separate sadistic purpose when he bit the victim’s ear.”⁷¹ In response to the dissent’s argument that the assailant’s conduct was not sufficiently “violent and callous” to constitute torture when compared to the actions of the defendant in *People v. Singleton*⁷²—the case that inspired the

67. *Id.*

68. *Id.* at 743.

69. *Id.*

70. *Id.* at 741.

71. *Id.* at 746.

72. 169 Cal. Rptr. 333 (Ct. App. 1981). In *Singleton* the defendant kidnapped and sexually abused his victim, then chopped off her hand and dumped her in a ditch. *Id.* The defendant was then later paroled after serving only seven years. See *People v. Pre*, 11 Cal. Rptr. 3d 739, 746 (Ct. App. 2004) (Benke, J., dissenting) (citing *Singleton*, 169 Cal. Rptr. at 335). *Id.* The crime of torture was included in Proposition 115 to ensure that such heinous crimes received a minimum punishment of life in prison. *Id.* (interpreting the legislative intent behind the

California legislature to pass the torture statute—the majority reiterated that the purpose of “additional punishment ... is not based on the ... presence of extreme violence, since extreme violence may exist in circumstances involving other conduct such as an explosion of violence Rather, ... the additional punishment is imposed because the defendant’s *intent* to inflict pain for a sadistic purpose is deserving of additional punishment.”⁷³ The idea that the focus should be on the defendant’s intent, and that factual comparisons of levels of violence and suffering to other cases offer little value to this analysis, is heavily ingrained in California precedent.⁷⁴

At first blush, adding a purpose requirement to the definition of torture may seem like the right approach. After all, Article 1 of the Convention Against Torture states that to constitute torture the accused must inflict severe pain upon the victim for a prohibited purpose.⁷⁵ However, several countervailing reasons counsel against such an approach. First, the requirement “that an act of torture have an illegal purpose implies either that torture done with no purpose or torture done with a legal purpose is somehow legitimate.”⁷⁶ Such a dubious proposition may explain why courts applying international anti-torture law—which includes a purpose requirement similar to California—rarely focus on the purpose requirement.⁷⁷ Most likely this is because “the purpose requirement could be viewed as a dangerous limitation, resulting in intentional government sponsored severe suffering failing to constitute torture.”⁷⁸ Second, in the international community, there is a strong sentiment that the prohibition of torture “seems more than any

passage of section 206).

73. *Pre*, 11 Cal. Rptr. 3d at 746 (citation omitted).

74. See *People v. Hale*, 88 Cal. Rptr. 2d 904, 913 (Ct. App. 1999) (rejecting argument that evidence was insufficient because defendant’s acts were not as bad as those in other torture cases); *People v. Jung*, 84 Cal. Rptr. 2d 5, 9 (Ct. App. 1999) (explaining that “other victims of torture may have suffered more than the victim in this case sheds no light on the sufficiency of the evidence of defendant’s intent to cause ... severe pain and suffering”); *People v. Barrera*, 18 Cal. Rptr. 2d 395, 406 (Ct. App. 1993) (rejecting argument that the assailant’s conduct needs to be sufficiently similar to that of the defendant in *Singleton*).

75. Convention Against Torture, *supra* note 33, at art. 1.

76. Schechter, *supra* note 32, at 1257.

77. Copelon, *supra* note 32, at 327 & n.136.

78. Schechter, *supra* note 32, at 1257 n.137. The “Torture Memos,” as discussed below, are perfect examples of the dangerous effect that a purpose requirement can have on government policy making concerning torture. See *infra* 83-84 and accompanying text.

other human right to be judicially accepted” as a norm that cannot be abrogated, even during times of national emergency.⁷⁹ If a state actor is never justified in using torture, then surely the same applies to a private actor. With this in mind, the purpose requirement looks more like a meaningless, albeit potentially dangerous, statutory construction meant to provide the statute with a superficial appearance of being different. The California courts’ interpretations of the torture statute, in which they proclaimed that there are only two elements to torture, illustrates the questionable utility of the purpose requirement: “Torture has two elements: (1) infliction of great bodily injury on another, and (2) the specific intent to cause cruel or extreme pain and suffering for revenge, extortion, persuasion, or any sadistic purpose.”⁸⁰

Of course, motive is not completely irrelevant and should be considered as evidence of the assailant’s intent. Michigan courts follow this approach and take into account the assailant’s relationship and past interactions with the victim when analyzing intent.⁸¹ By not having a purpose requirement, Michigan’s torture statute avoids the pitfalls of the California statute.

However, Michigan’s *mens rea* standard is not without its faults. Although Michigan does not require proof of motive, the accused must act with the specific intent to cause cruel or extreme pain and suffering.⁸² “Specific intent,” however, is a notoriously vague and confusing term prone to accidental or intentional misinterpretation.⁸³ Perhaps the most famous examples of this confusion are the

79. Schechter, *supra* note 32, at 1258 n.146; *id.* at 1259 (“The purpose requirement of the torture definition [under the CAT] repudiates this norm by implying that either government abuse committed without a reason is not torture, or that government abuse carried out with a legal purpose is permitted.”).

80. *People v. Baker*, 120 Cal. Rptr. 2d 313, 317 (Ct. App. 2002).

81. *See People v. Dabish*, No. 301622, 2013 WL 4081028, at *3 (Mich. Ct. App. Aug. 13, 2013) (finding evidence that defendant was angry at the victim for a previous incident and had called the victim a whore on previous occasions probative of defendant’s intent to torture).

82. MICH. COMP. LAWS ANN. § 750.85 (West 2014) (“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.”) (emphasis added); *see People v. Lang*, No. 308985, 2013 WL 4081154, at *4 (Mich. Ct. App. Aug. 13, 2013) (holding that section 750.85 is a specific intent crime).

83. *See, e.g., United States v. Bailey*, 444 U.S. 394, 403 (1980) (noting the confusion surrounding the terms “general intent” and “specific intent” that plagues the common law). In

“Torture Memos” that advised the CIA and the Department of Defense on the legality of enhanced interrogation techniques under international and United States torture laws.⁸⁴ Under international law, torture is a specific intent crime. Article 1 of the Convention Against Torture defines torture in part as “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.”⁸⁵ As Oona Hathaway points out in her article *Tortured Reasoning*, the mens rea standard for torture under the CAT is somewhat confusing because torture requires pain or suffering to be “intentionally inflicted on a person” for a proscribed purpose.⁸⁶ It is possible to conclude that the “intentionally inflicted” requirement must meet the purposeful intent standard—that it was the perpetrator’s conscious goal to cause extreme pain—notwithstanding the prohibited purpose requirement.⁸⁷ However, based on the negotiating history of the CAT and subsequent international legal precedent, it is clear that the accused must only “knowingly” inflict pain and suffering.⁸⁸ In other words, the perpetrator’s awareness that his conduct caused extreme pain sufficiently satisfies the intent element.

The United States implemented its obligations under the CAT.⁸⁹ Unfortunately, the definition of torture under the U.S. statute reads quite differently as compared to the CAT’s definition. The U.S. statute defines torture as “an act committed by a person acting under the color of law *specifically intended* to inflict severe physical or mental pain or suffering.”⁹⁰ The purpose requirement is noticeably absent. The authors of the Torture Memos relied on this change

People v. Gould, 570 N.W.2d 140 (Mich. Ct. App. 1997) the court struggled to classify a law that made it a crime to knowingly or intentionally cause serious physical or mental harm to a child as requiring specific or general intent because the crime contained the word “knowingly.”

84. Memorandum from Jay S. Bybee, Assistant Att’y Gen., Dep’t of Justice, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2349-2340A (Aug. 1, 2002), *available at* <http://perma.cc/MDD9-S5HE> [hereinafter Torture Memo].

85. Convention Against Torture, *supra* note 33, at art. 1.

86. Hathaway et. al., *supra* note 32, at 795.

87. *Id.*

88. *Id.* at 803.

89. Pub. L. 103-236, Title V, § 506(a), Apr. 30, 1994, 108 Stat. 463.

90. 18 U.S.C. § 2340 (2012) (emphasis added).

when they concluded that for an act to constitute torture, “the infliction of such pain must be the defendant’s precise objective.”⁹¹ In other words, a defendant would avoid prosecution if he knowingly, but not purposefully, inflicted severe physical pain on a detainee.⁹²

Academics have thoroughly debunked the statutory interpretation and legal reasoning of the Torture Memos.⁹³ Regardless, the main takeaway from this saga for Virginia—and other states that may consider passing a torture statute—is the importance of statutory clarity and specificity, particularly for the mens rea standard. Vague terms such as “intent” leave room for potential tightening or widening of the mens rea standard. Accordingly, precise definitions of the mens rea standard are preferable.

The next question is determining the proper mens rea standard for a state torture statute. Recognizing the inherent imprecision of terms like “intent,”⁹⁴ the drafters of the Model Penal Code devised precise and helpful definitions for many of the possible mental states.⁹⁵ For example, a person acts “purposefully” as to a particular result, if he consciously desires that result.⁹⁶ By contrast, a person acts “knowingly” if he is aware that that result is practically certain to follow from his conduct, whatever his desire may be as to that result.⁹⁷

For torture, knowledge is the appropriate mens rea standard.⁹⁸ A purpose standard fails to cover all foreseeable instances of torture. Absent direct or overwhelming circumstantial evidence of the accused’s subjective desire, this hurdle is difficult for the prosecution to overcome. A purposeful standard would not cover an

91. Torture Memo, *supra* note 84, at 3.

92. Hathaway et al., *supra* note 32, at 795.

93. *Id.* at 792.

94. *See generally* United States v. Bailey, 444 U.S. 394, 403 (1980).

95. MODEL PENAL CODE § 2.02 (2012); Hathaway et al., *supra* note 32, at 201 n.40 (“[The Code] establishes four levels of culpable criminal intent ranging, in order, from the most culpable to the least culpable level; purposeful, knowing, reckless, and negligent.”) (quoting FRANK AUGUST SCHUBERT, CRIMINAL LAW: THE BASICS 157 (2d ed. 2010)).

96. MODEL PENAL CODE § 2.02 (2012).

97. *Id.*

98. In Michigan, specific intent includes purpose or knowledge that the prohibited result will occur. *See* People v. Spry, 254 N.W.2d 782, 787 (Mich. Ct. App. 1977) (holding that specific intent is the subjective desire or knowledge that the prohibited result will occur).

individual who through cowardice or convenience subjects someone to torture. *Gore* is a perfect example of this situation. Based on the totality of the facts and circumstances, a jury would likely conclude that Mr. and Mrs. Gore thought that their child was either a burden they did not want to bear, or that the child's existence had to be concealed.⁹⁹ What started off as neglect or child abuse gradually snowballed into torture as the Gores likely reasoned that it was easier to continue starving and caging their child than to confront the reality of the situation and accept the wrongfulness of their actions. Although they most likely did not desire to make their child suffer, the Gores were certainly aware that their actions were having such an effect.

In essence, a knowledge mens rea standard would cover those individuals who subject someone to acts of torture in an effort to conceal a past crime. Here is an example: a boyfriend in a fit of rage strikes his girlfriend, causing significant injury. To cover up his crime, he locks her in his basement where she suffers pain from dehydration and starvation. The boyfriend's goal is to evade arrest, not to cause cruel suffering. But in the process he has physically and mentally harmed his girlfriend to the point of torture. Under a purpose-based mens rea standard, it would be difficult to prosecute the boyfriend for torture. However, under a knowledge standard, this individual would almost certainly be convicted of torture. It is slightly easier to prove that the individual was aware to a practical certainty that his actions had the effect of torturing his victim. Moreover, a knowledge standard does not water down the requirements to prove the crime. Someone who acts with knowledge as to a particularly horrible result of his act does so with a very culpable mental state.¹⁰⁰ Furthermore, knowledge is still a high bar for prosecutors to pass. Therefore, knowledge is the appropriate mens rea standard.

99. *See supra* Introduction.

100. *See supra* note 95.

B. Cruel or Extreme Pain

Many jurisdictions include an analysis of pain in their definition of torture. These jurisdictions specify the type of pain as extreme, severe, grievous, or cruel.¹⁰¹ Both the California¹⁰² and Michigan¹⁰³ statutes include this kind of language. Michigan's statute even provides a definition of "cruel:" "brutal, inhuman, sadistic, or that which torments."¹⁰⁴ The statute, however, specifically states that proof that "a victim suffered pain is not an element of the crime [of torture]."¹⁰⁵ California case law also makes clear that proof of pain is not an element of the crime and that courts should not focus on the pain experienced by the victim.¹⁰⁶

California and Michigan follow the correct approach by not requiring proof of pain. Victims often lose consciousness and may be unaware of what is happening to them.¹⁰⁷ Nonetheless, the defendant's actions are just as heinous and deserving of punishment, regardless of whether the victim is aware of the pain. In addition, proof of pain would shift the focus from the defendant to the victim, whereas criminal jurisprudence focuses on the actions and mindset of the defendant.¹⁰⁸ From a practical standpoint, pain is subjective and difficult to quantify,¹⁰⁹ it is better to focus on the actions of the defendant. Juries can easily understand actions typically associated with torture—burning, cutting, repeated blows, multiple puncture wounds, dragging, scalding—and infer pain from those actions without having to delve into testimonials from the victim about the pain he or she experienced.¹¹⁰

101. *See, e.g.*, ARK. CODE ANN. § 5-4-604 (West 2014); CAL. PENAL CODE § 206 (West 2014); IDAHO CODE ANN. § 18-4001 (2014); 720 ILL. COMP. STAT. 5/9-1 (2014); N.C. GEN. STAT. § 14-17 (2014); N.Y. PENAL LAW §§ 125.26-125.27 (McKinney 2014).

102. CAL. PENAL CODE § 206.

103. MICH. COMP. LAWS § 750.316 (2014).

104. *Id.*

105. *Id.*

106. *People v. Pre*, 11 Cal. Rptr. 3d 739, 746 (Ct. App. 2004).

107. *See, e.g., id.*

108. *See id.*

109. Of course the victim may testify about the pain he or she experienced, and this is a relevant factor.

110. *See, e.g., supra* notes 52-54 and accompanying text.

C. Temporal Requirement

Some jurisdictions, such as Arkansas and Idaho,¹¹¹ require that the infliction of pain occur for a “prolonged period of time.” In her article about child torture, Mary Ahan also suggests that one of the elements of torture should be “some protraction in time.”¹¹² She includes examples of torturous actions that would fulfill this requirement: “a severe beating that continues for four hours or a mother that burns her child with a cigarette every day for a month.”¹¹³ A temporal requirement, however, adds a layer of vagueness that is simply not necessary. How much time is necessary? Thirty minutes, one hour, four hours, days, months? Although it usually takes time to torture a person, torture can be completed in a brief amount of time like many other violent crimes.¹¹⁴ It does not, therefore, appear that protraction in time is a necessary element of torture.¹¹⁵

Similar to protraction in time, other jurisdictions require that the defendant engage in a course of conduct meant to cause the victim extreme pain.¹¹⁶ The North Carolina Supreme Court defined “course of conduct” as a “pattern of the same or similar acts, repeated over a period of time, however short, which established that there existed in the mind of the defendant a plan, scheme or design to inflict cruel suffering upon another.”¹¹⁷ Other state statutes related to child abuse that involve elements of torture require that the defendant engage in a pattern of violent or abusive behavior.¹¹⁸ For example, an Iowa Child Endangerment statute criminalizes any person who has committed “three or more acts of child endangerment ... within a period of twelve months involving the same child ... where one or

111. ARK. CODE ANN. § 5-4-604 (West 2014); IDAHO CODE ANN. § 18-4001 (West 2014).

112. Mary Ahan, *A Road to Hope: The Path to Defining Child Torture to Protect the Children*, AM. U. CRIM. L. BRIEF 16, 16-17 (2009).

113. *Id.* at 17.

114. *See, e.g.*, *People v. Hale*, 88 Cal. Rptr. 2d 904, 913 (Ct. App. 1999) (holding that brevity of defendant’s attack on victim does not preclude the defendant from harboring the requisite intent for the offense of torture).

115. Ahan, *supra* note 112, at 17.

116. *See, e.g.*, *State v. Crawford*, 406 S.E.3d 579, 589 (N.C. 1991).

117. Tlapala & Appelbaum, *supra* note 36, at 3 (quoting *Crawford*, 406 S.E.3d at 589).

118. *See, e.g.*, IOWA CODE ANN. § 726.6A (West 2014).

more of the acts results in serious injury to the child.”¹¹⁹ Although many instances of torture may consist of multiple acts carried out over a prolonged period of time, this is not always the case. A single act of poisoning, burning, or cruelly confining a person can constitute torture if the other elements are present.¹²⁰ Multiple acts or a protraction in time, however, are important factors in proving other elements of torture, namely the perpetrator’s intent to cause severe pain or suffering.¹²¹

D. Physical and Mental Injuries

California’s torture statute requires the victim to sustain a physical injury.¹²² To distinguish torture from lesser crimes, this injury must be severe. In California, the victim must suffer “great bodily injury,” which means “a significant or substantial physical injury.”¹²³ Typical examples of injuries that constitute great bodily injury include broken bones, internal bleeding, stab wounds, severe burns, gunshot wounds, and paralysis.¹²⁴ Unlike other serious crimes such as mayhem, which require a permanent injury, the bodily harm under California’s torture statute does not have to be a permanent, disabling, or disfiguring injury.¹²⁵ In fact, California courts have held that great bodily injury can include more moderate injuries such as abrasions, lacerations and bruising.¹²⁶ This relatively low injury threshold requirement makes sense given that the

119. *Id.*

120. *See, e.g.,* *People v. Baker*, 120 Cal. Rptr. 2d 313, 318 (Ct. App. 2002) (holding that defendant intended to cause his wife extreme pain when he set her on fire and watched her burn).

121. *See, e.g.,* *People v. Brockitt*, No. 311042, 2013 WL 5379646, at *3 (Mich. Ct. App. Sept. 26, 2013) (holding that victim suffered great bodily injury, as defined by torture statute, when his hands were bound behind his back for twelve to fourteen hours, cutting off circulation); *People v. Richmond*, No. 289335, 2010 WL 334694, at *1-2 (Mich. Ct. App. Jan. 28, 2010) (inferring defendant’s intent from the following pattern of conduct: defendant inflicted a severe head injury on the child victim, rubbed victim’s genitals, kissed him, smacked his buttocks, threatened to rape him, and threw ice water on his stomach).

122. CAL. PENAL CODE § 206 (West 2014).

123. *People v. Jung*, 84 Cal. Rptr. 2d 5, 9 (Ct. App. 1999).

124. *See, e.g., supra* notes 52-54, 120-21.

125. *People v. Pre*, 11 Cal. Rptr. 3d 739, 743 (Ct. App. 2004).

126. *Id.*

California courts are especially concerned with the mindset of the defendant.¹²⁷

The Michigan torture statute defines “great bodily injury” with greater specificity, and like the California statute, it does not require that the physical injury be permanent.¹²⁸ Also, the Michigan torture law is one of the only statutes to include a mental component to injury.¹²⁹ A demonstration that the victim suffered great bodily harm or “severe mental pain or suffering” as a result of the defendant’s actions meets the injury requirement.¹³⁰ The statute defines severe mental pain or suffering as “a mental injury that results in a substantial alteration of mental functioning that is manifested in a visibly demonstrable manner.”¹³¹ Unlike with great bodily injury, the statute goes on to specify that that the mental injury must result from certain actions by the defendant: (1) “infliction or threatened infliction of great bodily injury,” (2) “administration ... of mind-altering substances or procedures,” (3) “threat of imminent death,” or (4) “threat that another person will imminently be subjected to death.”¹³²

Both Michigan and California take the correct approach in not requiring the victim to sustain a permanent physical injury. Such a requirement would only send a message to torturers to “cease the act before they meet that level of physical injury.”¹³³ Furthermore, accepting that the torturer’s mindset is deserving of additional punishment refutes the notion that the severity of the victim’s wounds is determinative of the defendant’s intent to torture. Severe wounds may result from an explosion of violence or an act of animal fury rather than from the intent to inflict severe physical pain.¹³⁴

California’s torture statute, however, offers an incomplete definition of torture by not including mental pain and suffering. Torture can be perpetrated through both physical and psychological

127. *See supra* Part II.B.

128. MICH. COMP. LAWS ANN. § 750.85 (West 2014).

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. Ahan, *supra* note 112, at 17.

134. *People v. Pre*, 11 Cal. Rptr. 3d 739, 743 (Ct. App. 2004).

means.¹³⁵ In reality, the distinction between physical and psychological torture methods is often artificial.¹³⁶ For example, sexual torture causes both physical and psychological symptoms, even when there has been no physical assault.¹³⁷ At least one study shows that “psychological and physical torture both have the same detrimental effects on the survivor’s mental health, since both methods share the same crucial feature: exposing a person to an uncontrollable and unpredictable life-threatening situation of extreme stress.”¹³⁸

One of the most common and debilitating psychological effects of torture is Post-Traumatic Stress Disorder (PTSD).¹³⁹ The main symptoms of PTSD are flashbacks, severe anxiety, insomnia, and hyperarousal.¹⁴⁰ Other effects include depression, hallucinations, paranoia, personality changes, and drug addiction.¹⁴¹ Typical symptoms of child victims include hypervigilance, the constant monitoring of personal safety, helplessness, and separation anxiety.¹⁴² Clearly, the consequences of torture extend well beyond physical pain. To fully account for the methods a torturer may utilize and the injuries a victim may suffer, it is essential that any definition of torture include both physical and psychological components.

E. Physical or Custodial Control

In practice it is impossible for a torturer to inflict extreme physical or mental pain upon the victim without substantially

135. Rona M. Fields, *The Neurobiological Consequences of Psychological Torture*, in THE TRAUMA OF PSYCHOLOGICAL TORTURE 139 (Almerindo E. Ojeda ed., 2008).

136. *Id.* (“[Torture] of any type implies threat, fear, and powerlessness, all of which can and often does impact on brain, spinal cord, and organ integrity and therefore has medical consequences. Given the intricate mind-body connection known in science and philosophy ... physical versus psychological is an irrelevant [distinction].”)

137. Claudia Catani et al., *The Tortured Brain*, in THE TRAUMA OF PSYCHOLOGICAL TORTURE, *supra* note 135, at 173, 184-85.

138. *Id.* at 175.

139. *Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, *supra* note 56, at 28-29.

140. *Id.* at 46-47.

141. *Id.* at 47.

142. Ahan, *supra* note 112, at 16.

curtailing the victim's freedom.¹⁴³ One of the key characteristics of torture is the victim's complete loss of self-autonomy:

Indeed, in an important sense the victim's body and attendant physical sensations cease to be his own instrument, but rather have become the instrument of the torturer [T]he torturer is able to heavily influence other aspects of the victim's mental life, including stream of consciousness ... [and] the victim can ... think of little else but his extreme suffering and the torturer.¹⁴⁴

It is the element of control that the torturer exercises over the victim that differentiates torture from other crimes. Michigan's statute accounts for this by requiring that the victim be within the physical or custodial control of the assailant.¹⁴⁵ Classic examples of physical control include instances in which the victim is tied up or locked in a basement.¹⁴⁶ It is important to interpret physical control more broadly. Michigan defines "custody or physical control" as "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."¹⁴⁷ This definition of control covers assailants who utilize less conventional—but equally effective and dangerous—means of exercising dominion over the victim. For example, in *People v. Dabish*, the Michigan Court of Appeals held that the victim was within the defendant's physical control when he severely beat the victim, left her in his apartment for three hours, and removed the batteries from all the phones in the apartment.¹⁴⁸ By confining the victim to his apartment with no access to a phone to enable her to summon help or seek assistance, the defendant had forcibly restricted or confined the victim.¹⁴⁹

A broad definition of "custodial or physical control" is especially beneficial to vulnerable classes of individuals such as children, the

143. Seumas Miller, *Torture*, STANFORD ENCYCLOPEDIA OF PHIL. (Apr. 29, 2011), <http://plato.stanford.edu/entries/torture> [<http://perma.cc/52H7-Q82Z>].

144. *Id.*

145. MICH. COMP. LAWS ANN. § 750.85 (West 2014).

146. *See, e.g.*, *People v. Brockitt*, No. 311042, 2013 WL 5379646, at *4 (Mich. Ct. App. Sept. 26, 2013) (holding that defendant physically controlled the victim by tying victim's hands).

147. MICH. COMP. LAWS ANN. § 750.85.

148. No. 301622, 2013 WL 4081028, at *5 (Mich. Ct. App. Aug. 13, 2013).

149. *Id.*

elderly, the sick, and the handicapped.¹⁵⁰ In many instances the torturer of these individuals is a parent, spouse, or caretaker—someone whose relationship to the victim makes it easy for him or her to exercise control over the victim and preclude outside aid with the use of only minimal force.¹⁵¹

The Michigan torture law also imposes the additional requirement that the victim be forcibly restricted or confined “without that person’s consent or without lawful authority.”¹⁵² The disjunctive word “or” indicates a separation between two different alternatives.¹⁵³

In other words, the statute allows the conviction (1) of a defendant who has lawful authority to forcibly restrict or confine the victim if the victim does not consent to the restriction or confinement, or (2) of a defendant who does not have lawful authority to forcibly restrict or confine the victim, even if the victim consents to the restriction or confinement.¹⁵⁴

Consequently, the statute protects young children and other people who may lack the capacity to consent. It also protects children who fall victim to a parent’s excessive punishment that might constitute torture.¹⁵⁵ A parent has the constitutional right to punish his or her child, but once that punishment becomes unreasonable the parent no longer acts within his lawful authority; the parent becomes subject to the penalties under the statute if the other elements of torture are satisfied.¹⁵⁶

III. MODEL TORTURE STATUTE

Based on the previous analysis, the definition of torture should contain the following elements: (1) knowledge that one’s actions are

150. See, e.g., *People v. Lachniet*, No. 297836, 2011 WL 2859818, at *1 (Mich. Ct. App. July 19, 2011); *People v. Schaw*, 791 N.W.2d 743 (Mich. Ct. App. 2010); *People v. Richmond*, No. 289335, 2010 WL 334694, at *1 (Mich. Ct. App. Jan. 28, 2010).

151. See, e.g., *supra* notes 148-50.

152. MICH. COMP. LAWS ANN. § 750.85.

153. *Id.*

154. *People v. Brockitt*, No. 311042, 2013 WL 5379646, at *3 (Mich. Ct. App. Sept. 26, 2013).

155. See, e.g., *id.*

156. *Id.*

practically certain to cause cruel physical or mental pain and suffering; (2) infliction of serious bodily or mental injury; (3) upon another person within one's custody or physical control. These elements are embodied in the following model torture statute:

- (1) A person, who inflicts serious bodily or mental injury upon another person within his or her custody or physical control, commits torture if he acts with knowledge that his actions would cause cruel or extreme physical or mental pain or suffering.
- (2) As used in section (1)
 - (a) "Cruel' means brutal, inhuman, sadistic, or that which torments."¹⁵⁷
 - (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."¹⁵⁸
 - (c) "Serious bodily injury" includes but is not limited to: disfigurement, a fracture, burns or lacerations, mutilation, maiming, stab or puncture wounds, multiple bruises or cuts, forced ingestion of a dangerous substance, or internal injuries.
 - (d) "Serious mental injury" means a mental injury that results in a substantial alteration of mental functioning, which includes, but is not limited to, ongoing or recurring nightmares, the existence of a phobia, depression or other medically diagnosed psychological disorder, extended and unremitting feelings of fear or anxiety, difficulty with physical intimacy, loss of self-esteem, or insomnia. Expert testimony as to the existence or extent of a mental injury is not a requirement under this statute. A person's special susceptibility to mental injury does not constitute an independent cause of the injury such that a defendant is exonerated from criminal liability.¹⁵⁹
- (3) Proof that a victim suffered pain is not an element of torture.
- (4) A person acts with knowledge if he is aware that cruel physical or mental pain or suffering is virtually certain to follow from his conduct, whatever his desire may be as to that result.

157. MICH. COMP. LAWS ANN. § 750.85.

158. *Id.*

159. *See Gonzin v. Commonwealth*, 716 S.E.2d 466, 471 (Va. Ct. App. 2011).

- (5) Torture shall be punishable as a class two felony with a mandatory minimum term of imprisonment of ten years.

The model statute's first element is knowledge that one's actions are practically certain to cause cruel physical or mental pain. Just as in Michigan, torture under the proposed model statute is a specific intent crime. The prosecution must prove that the accused's actions were not only volitional but also that he was aware that his wrongful actions were certain to cause cruel pain. This statute, however, clearly sets out that the prosecution does not need to prove that it was the goal or subjective desire of the accused to cause severe pain. A person who negligently causes another to suffer cruel pain would not be guilty of torture. Knowledge should be inferred from the defendant's actions with particular focus on the type of acts and their duration or frequency.¹⁶⁰ Proof that the victim suffered pain is not required, and the extent of the victim's injuries is relevant to this analysis, but not determinative. As previously mentioned, California defines torture as the infliction of pain "for the purpose of revenge, extortion or persuasion."¹⁶¹ However, a purpose element is unnecessary. As long as the perpetrator acts with knowledge that his actions will cause severe pain and suffering, his mental state is already sufficiently heinous and deserving of heightened punishment. The perpetrator's inflicting cruel pain, however, may be additional probative evidence of his intent.¹⁶²

The statute's second element is the infliction of serious bodily or mental injury. The injury does not need to be permanent. The definition of "serious bodily injury" under the model statute is based on the definition of "serious injury" under Virginia's child abuse statute.¹⁶³ A statutory definition of serious bodily injury will not only provide guidance to prosecutors and judges when determining whether the assailant's actions amount to torture, but will also put future potential assailants on notice as to what kind of conduct the statute prohibits.

160. *See supra* note 121 and accompanying text.

161. CAL. PENAL CODE § 206 (West 2014).

162. *See supra* Part II.A.

163. VA. CODE ANN. § 18.2-371.1 (West 2014) ("For purposes of this subsection, 'serious injury' shall include but not be limited to (i) disfigurement, (ii) a fracture, (iii) a severe burn or laceration, (iv) mutilation, (v) maiming, forced ingestion of dangerous substances, or (vi) life-threatening internal injuries.").

As previously discussed in Part II, it is essential that the torture statute includes mental pain and suffering because the most common consequence of torture is the victim's mental and emotional anguish.¹⁶⁴ Consequently, a defendant may be convicted of torture even if the victim does not sustain a serious physical injury, provided that the victim suffers a mental injury. As with bodily injury, the model statute offers a helpful definition of "serious mental injury" that comports with recent Virginia case law.¹⁶⁵ Only long-lasting and nontrivial mental injuries are sufficient under the statute.

Like Michigan, the Virginia state legislature should consider limiting the reach of the statute's mental component by stipulating that the mental injury must result from a specific set of actions by the defendant.¹⁶⁶ Although mental pain and suffering can be just as traumatic as physical pain, it can be more difficult to prove and has the potential to be abused by victims and prosecutors. Restricting the proscribed conduct which might cause mental pain limits the possibility that victims may testify to false mental injuries. On the other hand, the legislature should seriously consider adding to the predicate acts. Mental pain and suffering resulting from sexual torture and prolonged confinement with limited access to sensory stimuli are not included in the list, but can have equally horrible effects upon a victim's mental health.¹⁶⁷

The final element to consider is control. The assailant has taken steps to confine the victim by limiting her movements and cutting off her access to outside help. The victim is at the mercy of the perpetrator who forces the victim to endure or perform an act against his or her will.¹⁶⁸ The control element is essential to the statute as it clearly differentiates the crime of torture from other offenses, such as aggravated assault or malicious wounding. Michigan's definition of "physical or custodial control" is adequate as it recognizes that the defendant can achieve physical control over the victim in a variety of ways.¹⁶⁹

164. *See supra* Part II.A.

165. *Gonzin v. Commonwealth*, 716 S.E.2d 466, 471 (Va. Ct. App. 2011) (interpreting the meaning of "serious mental injury" under section 18.2-67.3).

166. *See supra* notes 131-32 and accompanying text.

167. *See Schechter*, *supra* note 32, at 1250-52.

168. *See Miller*, *supra* note 143.

169. *See supra* Part II.E.

As for punishment, torture is a serious crime perpetrated by dangerous individuals. It demands a serious punishment similar to crimes that the Virginia criminal code designates as Class 2 felonies, such as unpremeditated murder,¹⁷⁰ burglary with a deadly weapon,¹⁷¹ and aggravated malicious wounding.¹⁷² Torture shares many of the characteristics that make these crimes deserving of such severe penalties: considerable violence, significant harm, and most importantly, a criminal acting with an especially culpable mindset. Under the model statute, the maximum punishment is life in prison. The minimum punishment is ten years' imprisonment. Ten years is a mandatory minimum sentence, meaning judges would not be able to sentence an individual and then suspend a portion of the sentence so that the person serves less than ten years in prison. This framework ensures that those convicted of torture actually spend a minimum of ten years in prison.¹⁷³

IV. POTENTIAL CONCERNS WITH THE TORTURE STATUTE

A. *Statutory Vagueness*

One challenge with writing new statutes is ensuring that the language of the law is specific enough to withstand a “void-for-vagueness” challenge. In Virginia, a criminal statute withstands the void-for-vagueness test if “(1) ordinary individuals are placed on notice as to what behavior is proscribed, and (2) the language is

170. VA CODE ANN. § 18.2-32 (West 2014).

171. *Id.* § 18.2-89.

172. *Id.* § 18.2-51.2.

173. One common argument against mandatory minimum sentencing is that it imposes a “one-size-fits-all” approach that prevents judges from fitting the punishment to the individual and the facts underlying their offense. *What are Mandatory Minimums?*, FAMILIES AGAINST MANDATORY MINIMUMS <http://fam.org/mandatory-minimums/> [<http://perma.cc/G5WX-PHDH>] (last visited Sept. 10, 2014). Another argument is that mandatory minimums, especially as applied to gun and drug violations, lead to an unnecessary rise in the prison population, which is paired with increased costs to taxpayers. *Id.* Those concerns are minimal, if non-existent, in the case of mandatory minimum sentencing for torture. The obvious differences between drug offenders and torturers—the unlikelihood of reform and harm to society—underscore the need for prolonged incapacitation. Judges also have sufficient discretion within the ten years to life range to fit the punishment to the individual. Furthermore, torture is rare. The number of convicts and the cost of housing those convicts will most likely be low. *See, e.g.*, MICH. HOUSE FISCAL AGENCY, *supra* note 1 (predicting that a torture statute would likely have a minimal fiscal impact).

specific enough so that it does not unduly encourage arbitrary or discriminatory enforcement.”¹⁷⁴ California’s torture statute has repeatedly passed an identical two-pronged vagueness test.¹⁷⁵ In *People v. Aguilar*, the defendant contended that the phrase “cruel pain” was unconstitutionally vague because “no one knows what ‘cruel pain’ is.”¹⁷⁶ The Court of Appeals disagreed, holding that “cruel” when used as a modifier of “pain” is commonly understood to mean extreme or severe pain.¹⁷⁷ The defendant in that case also contended that the term “torture” was vague “because the statute [did] not include as an element the intent to inflict extreme and prolonged pain.”¹⁷⁸ The California court looked to the dictionary definition of torture as well as prior case law and determined that neither source indicated that torture required the prolonged infliction of pain.¹⁷⁹ Based on this finding, the court held that “torture” was not unconstitutionally vague.¹⁸⁰

Although California case law may be only moderately persuasive in Virginia, the fact that California courts upheld a much more broadly worded statute than the one proposed in this Note is highly suggestive that the proposed torture statute should withstand a vagueness challenge. California’s torture statute only defines one term, “great bodily injury.”¹⁸¹ Conversely, the statute proposed by this Note provides detailed definitions of each of the major terms in the statute—“cruel,” “serious physical or mental injury,” and “physical control”—so as to give people more than sufficient notice of what conduct the statute proscribes.

Of course, for a statute to be truly effective it must aspire to a higher level of specificity than the minimal vagueness standard. In her critique of federal criminal torture laws, Sarah St. Vincent

174. *Brewster v. Commonwealth*, 477 S.E.2d 288, 289 (Va. Ct. App. 1996).

175. *People v. Misa*, 44 Cal. Rptr. 3d 805 (Ct. App. 2006) (holding that California’s torture statute is not unconstitutionally vague because an ordinary person can understand what conduct it prohibits); *People v. Aguilar*, 68 Cal. Rptr. 2d 619 (Ct. App. 1997) (holding that the phrase “cruel or extreme pain and suffering” and the meaning of “sadistic purpose” are not unconstitutionally vague); *People v. Barrera*, 18 Cal. Rptr. 2d 395 (Ct. App. 1993) (holding that torture statute’s use of the term “extortion” is not vague).

176. *Aguilar*, 68 Cal. Rptr. 2d at 621.

177. *Id.* at 622.

178. *Id.* at 623 (alteration in original).

179. *Id.* at 623-24.

180. *Id.* at 624.

181. CAL. PENAL CODE § 206 (West 2014).

argues that the U. S. government should scrap its broadly-worded torture statute and instead criminalize specific methods of torture.¹⁸² At the national level this makes sense. Because the statute applies to state actors—CIA interrogators, prison guards, and so forth—it is important that they be given definitive guidelines of what types of interrogation methods constitute torture, so they can operate with the certainty that their actions will not expose them to criminal liability.¹⁸³ Furthermore, there are common and well-recognized forms of enhanced interrogation methods that state actors utilize.¹⁸⁴ Within the domestic legal context, on the other hand, the lines of morality are more defined. The concern is less about limiting liability and more about giving the states effective tools to combat crime. An exhaustive list of what actions constitute torture risks being underinclusive and would only tie the hands of prosecutors. Conversely, a statute that sets forth extensive definitions of the kinds of injuries the victim must suffer strikes a balance. It provides sufficient notice to future defendants while also giving prosecutors sufficient leeway to prosecute a variety of actions that may constitute torture.

B. Risk of Minimizing the Seriousness of Torture

When attempting to categorize or statutorily define a crime such as torture, which lacks clearly defined parameters and has subjective elements in how it is perceived, there is an inherent risk of minimizing or distorting the seriousness of the crime. In describing his threshold test for obscenity, Justice Potter Stewart famously wrote:

I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [hardcore pornography]; and perhaps I could never succeed in intelligibly doing so. *But I know it when I see it*, and the motion picture involved in this case is not that.¹⁸⁵

182. St. Vincent, *supra* note 32, at 815-18.

183. *See id.* at 846.

184. *See id.* at 833 (“Worldwide, coercive interrogations in countries with profound political and cultural dissimilarities tend to involve surprisingly similar methods. Many of these methods are physical, including beating, stress positions, electric shock, starvation, rape, and suffocation or asphyxiation.”).

185. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (emphasis added).

In many ways torture is like obscenity: difficult to define, but in most cases there is general agreement on what it is. Prosecutors and judges should keep this in mind when deciding to bring or dismiss charges of torture. Although a particular case may meet the basic elements of torture as it is statutorily defined, the charge should be reserved for only those instances of truly heinous and inhuman conduct. There will be a need to walk a line that recognizes the distinction between torture and less serious crimes.

V. APPLICATION OF MODEL TORTURE STATUTE TO *GORE*

The horrific actions taken by Brian and Shannon Gore against their baby girl satisfy the elements of the torture statute proposed by this Note. First, the Gores' course of conduct, and the number and extent of the child's injuries, demonstrate that the Gores knew they were causing their child to suffer both cruel physical and mental pain. The Gores admitted to locking their child in a cramped, makeshift cage in the back of their home.¹⁸⁶ This was not an isolated incident resulting from a brief lapse in judgment. The feces in the cage as well as the child's leg contractures suggest she was stuck in the same position for an extended period of time. Despite having the resources to feed and care for the child, the Gores watched as their baby girl wasted away from hunger. As a result, the child suffered multiple injuries including brain damage, bruising, skeletal contractures, and untold psychological harm. The Gores' statements that they caged their daughter essentially because she had been unruly and difficult to care for further suggest that they knowingly tortured their daughter.¹⁸⁷ Notwithstanding any of the Gores' stated reasons for caging and starving their child, the Gores' actions by themselves would be sufficient to establish knowledge under the statute.

Second, the physical injuries the child suffered meet the definition of "serious bodily injury" as defined by the statute. Under the

186. *See supra* Introduction.

187. These statements by the Gores suggest that they may have caged their daughter for the purpose of punishment—either for bad behavior or because they resented her existence. In California, this would be evidence of motive and could possibly be enough to secure a conviction for torture under section 206. *See* CAL. PENAL CODE § 206 (West 2014).

statute it is not necessary that the victim suffers a permanent injury. Consequently, even if the child had not sustained permanent brain damage, her other physical injuries were sufficiently serious to constitute serious bodily injury.¹⁸⁸ The bruising and open sores covering her body constitute extensive bruising and the contractions of the bones in her legs and skull as a result of confinement and malnutrition certainly qualify as serious bodily injuries.

There was also sufficient evidence to conclude that the child suffered mental injuries. The doctors testified that the child will always have cognitive deficiencies as well emotional, behavioral, and psychological challenges, and will never be able to live independently.

Finally, the control element is easily met. The Gores physically restricted the child's movements by locking her in a cage. The child was completely at the mercy of her parents, and the Gores' status as the child's parents did not give them lawful authority to unreasonably confine their child.¹⁸⁹ The Gores' actions clearly meet all the elements under the proposed torture statute.

CONCLUSION

Torture is not a crime reserved exclusively for unscrupulous interrogators and other Machiavellian state actors willing to break all the rules. Career criminals, husbands, wives, and—as the tragic case in Gloucester County, Virginia, shows—even parents are capable of torture. Unfortunately, many states' criminal codes do not equip prosecutors with the statutory tools they need to effectively punish torturous conduct. Michigan is the exception. California's penal code fails to recognize that torture does not require a discernible purpose separate and apart from the knowledge that one's actions are causing cruel suffering. States without torture statutes, such as Virginia, should follow Michigan's lead and adopt torture statutes that criminalize mental as well as physical torture. Motive should not be an element of the crime, and the statute should provide detailed, but non-exclusive, definitions of key terms. A flexible but specific torture statute that clearly outlines the conduct it seeks to proscribe will close a glaring gap in Virginia's criminal law thus

188. *See supra* Introduction.

189. *See supra* Part II.E.

protecting many of Virginia's most vulnerable citizens from its most dangerous criminals.

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