

# A Road to Hope: The Path to Defining Child Torture to Protect the Children

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## **A ROAD TO HOPE:**

### *The Path to Defining Child Torture to Protect the Children*

By: *Mary Ahan*

On August 6, 2006, a six-year-old child greeted his mother by walking on his toes.<sup>1</sup> As punishment, his mother made him stand on his toes in a corner for an hour, and when the child again walked on his toes two hours later to greet his mother's boyfriend, the terror began.<sup>2</sup> The boyfriend put the child back in the corner for another hour. Starting to buckle under pain, the child could not stand for another hour and the boyfriend began spanking the child with a spatula.<sup>3</sup> The child was spanked approximately fifty times by both the mother and boyfriend for an hour.<sup>4</sup> The child was forced to continue to stand for four hours while the spankings intensified, and then his hands were duct-taped together and held in the air by a scarf.<sup>5</sup> After enduring over one hundred spankings, the mother pulled the child's hair, and the child fell and hit his head on the floor's base molding.<sup>6</sup> The child's hands were duct-taped behind his back and he was placed in an unlit basement for four more hours.<sup>7</sup> The boy was hospitalized for seven days; he was treated for bruising to his arms and face, severe tenderness in his arm, a laceration to his scalp, and two large, oozing wounds on the buttocks, so severe that they were consistent with burns.<sup>8</sup> The child was brutally tortured, all this because his guardians felt inclined to execute their wrath on the innocent child for his inability to comply with their impossible demands.

Child abuse is an epidemic that plagues the United States. Each year, since 2002, approximately 900,000 American children were identified as victims of child abuse.<sup>9</sup> In 2006 alone, an estimated 1,530 children died due to child abuse and neglect.<sup>10</sup> Every state and territory in the United States has child abuse laws proscribing certain physical, sexual, emotional/mental, neglect, and abandonment acts,<sup>11</sup> but these child abuse laws lack the structure to efficiently prosecute offenders. Although state laws proscribing child abuse exist, child abuse still continues to grow in severity, affirming the position that an additional measure is needed in an attempt to stop child abuse. That measure is the development of a medical definition of child torture and harsher penalties. This editorial is designed to draw attention to the plight of children who are currently being abused by discussing the current definition of child abuse and the emergence of a medical definition of child torture.

#### **What Is Child Abuse?**

In the United States, there are at least fifty statutory definitions: one for each individual state, the federal government, the District of Columbia, and the U.S. territories. The federal government lays the groundwork of the child abuse crime as "a crime committed under any law of a State that involves the physical or mental injury, sexual abuse or exploitation, negligent treatment, or maltreatment of a child by any person."<sup>12</sup> The statutes in all fifty states, except Washington, and the statutes in all U.S. territories define child abuse to include mental injury or emotional abuse.<sup>13</sup> Most states structure their child abuse laws similarly to that of Michigan, which defines child abuse as "harm or threatened

harm to a child's health or welfare that occurs through non-accidental physical or mental injury, sexual abuse, sexual exploitation, or maltreatment, by a parent, a legal guardian, or any other person responsible for the child's health or welfare . . . ."<sup>14</sup>

#### **Battered Child Syndrome**

Dr. Henry C. Kemp first coined the "battered child syndrome" to describe "a clinical condition in young children who have received serious physical abuse, generally from a parent or foster parent."<sup>15</sup> Battered child syndrome originated as a physiological term<sup>16</sup> but is now used to describe the psychological effects on children who are victims of child abuse. Children suffering from battered child syndrome display hypervigilance, the constant monitoring of personal safety and surroundings.<sup>17</sup> They develop a sense of helplessness and a lack of understanding of how their actions affect their safety.<sup>18</sup> Additionally, children suffering from this syndrome exhibit signs of post-traumatic stress disorder<sup>19</sup> and often times develop an anxiety-related disorder (such as depression or separation anxiety).<sup>20</sup>

The effects of child abuse, whether physical or sexual in nature, cause long term emotional and psychological trauma. Without accounting for mental emotional injury sustained from child abuse, all or part of a child's abuse is ignored and minimized. It is not merely the physical injury, but rather the abused children's perspectives that determine the abuse they endured; only the children know the pains that haunt them.

#### **Defining Child Torture**

Currently, there is no medical or legal definition of child torture that is uniformly recognized by lawmakers in the United States, although child torture is proscribed in many child abuse statutes. Currently doctors are working on defining child torture in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV). The hope of doctors working to define child torture is that, once it is medically recognized, perhaps the legal community will follow with statutory prohibitions against child torture. The medical community has already revolutionized other areas of the law by creating medical definitions that were later adopted by the legal community.<sup>21</sup> Doctors are in favor of an aggressive approach to the issue of child torture; they want to create a medical definition of child torture so that child victims can be properly diagnosed as having been tortured, which will facilitate bringing their perpetrators to justice using the aggravated crime of child torture.<sup>22</sup> In the analyzing the development of the medical definition of child torture, the sources that provide the best insight for what elements should be included are international law, the current legal definition of torture, and existing case law.

#### **International Treaty and Legal Definitions**

The Convention Against Torture (CAT) defines torture as “the means by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him . . . information or a confession, punishing him for an act he . . . has committed or is suspected of having committed, or intimidating or coercing him . . . .”<sup>23</sup> Black’s Law Dictionary defines torture as, “the infliction of intense pain to the body or mind to punish, to extract a confession or information, or to obtain sadistic pleasure.”<sup>24</sup> Both of these definitions include three significant elements: (i) severe or intense pain or suffering, (ii) to the body or mind, including physical injury and mental anguish, and (iii) for a purpose, including the satisfaction of the sadistic pleasure of the torturer.

### Case Law Definitions

Most states include “torture” in their statutory definitions of child abuse, but provide no definition of torture itself.<sup>25</sup> While it would seem this is broad, courts have held the contrary. Michigan courts have held child torture statutes are not unconstitutionally vague, since the term “torture” does have a commonly understood meaning giving a person of ordinary intelligence fair notice that his contemplated conduct is forbidden.<sup>26</sup> It is not problematic, since “torture” is an element of the child abuse crime, not a crime unto itself. Many states that define “torture” do not have child torture statutes;<sup>27</sup> rather child torture has primarily been defined through case law.

In *Canler v. Kentucky*, the Kentucky Supreme Court held that severe spanking resulting in serious physical injury or permanent scarring may constitute “torture, cruel confinement or cruel punishment,” as statutorily prohibited.<sup>28</sup> In instances where an interpretation of child torture is necessary, it is the jury’s function to determine whether the amount of force used during a spanking constitutes cruel punishment.<sup>29</sup> The focus in *Canler* was on the injury sustained by the child. In *In re A.G. et al.*, the Illinois Appellate Court concluded that “torture” includes conduct that solely involves the infliction of emotional harm, mental pain and suffering, mental anguish and agony.<sup>30</sup> This case recognized that torture includes non-physical injury. The Supreme Court of California still upholds the rule in *People v. Steger* that in order for the jury to determine whether the defendant had intent to inflict extreme and prolonged pain (torture), jurors should consider all of the circumstances and not rely solely on the victim’s wounds.<sup>31</sup> When proving child torture in California, a key item of proof is the defendant’s intent.

### Elements In The Medical Definition of Child Torture

The medical definition of child torture should have certain elements for states to model their statutes after. The medical definition should contain the following elements: (i) intent to cause cruel physical or mental pain and suffering, (ii) infliction of serious bodily injury, or emotional harm, or severe mental pain or suffering, (iii) some protraction in time, (iv) upon another person within his or her custody or physical control.

The first element is intent to cause severe injury with a cruel, sadistic purpose. The intent to torture should not be inferred from the injuries on the child’s body. Intent should be inferred from the type of act and duration or frequency. The child’s awareness of pain, or lack thereof, should not be used to negate intent. The second element is the infliction of serious

bodily or mental harm. Based on the battered child syndrome, it is essential that both physical and mental injury be included in the medical definition of child torture, for the definition to fully address the injuries that victimized children sustain. All abuse is torture in that it has traumatic and long-lasting effects on a child, but including “severe” is a threshold that separates child abuse and torture. It is imperative that there not be a requirement on how much injury a child must sustain in order to qualify as torture, since this would only send a message to child torturers to cease the act before they meet that leave of physical injury. The third element is that the act or acts occur over a period of time, such as a severe beating that continues for four hours or a mother that burns her child with a cigarette everyday for a month. However, it is important that a single act may constitute child torture, so long as the other elements are satisfied. The fourth element is regarding control; not only is the tormentor in control of the child victim but also forces the child to endure an act and/or perform an act against his or her will.

### Implication Within The Legal Community

A medical definition will serve as a template for enacting state legislation for child torture. Upon states developing legislation regarding child torture, researchers will be able to assess the effectiveness of each state’s definition, subsequently allowing states to mimic and adopt the most effective statutes. In addition to developing a definition of child torture, states will have to decide between three options of how to enforce the new statute: (i) keep torture within their child abuse statutes as an element of the child abuse statute, (ii) use child torture as a sentencing enhancement or aggravating factor, or (iii) make child torture a new crime.

### Child Torture as an Element Within Child Abuse Statutes

The medical definition of child torture will certainly have different elements and severity than child abuse and it is not effective for a state to keep child torture buried within the child abuse statute.<sup>32</sup> Keeping child torture as an element in a child abuse statute will prevent longer sentences from being imposed on perpetrators. For example, in Alabama “[a] responsible person . . . who shall torture, willfully abuse, cruelly beat or otherwise willfully maltreat any child under the age of 18 years shall, on conviction, be guilty of a Class C felony.”<sup>33</sup> In Alabama a Class C felony is punishable by not more than ten years and not less than one year and one day.<sup>34</sup> However, if a person seriously injures a child she or he may be convicted of aggravated child abuse, a Class B felony,<sup>35</sup> which carries a penalty of not more than twenty years and not less than two years.<sup>36</sup> The opportunities for a longer sentence are limited by this option, and the Alabama Code is one clear example of why child torture should be a sentencing enhancement or aggravating factor.

### Child Torture as a Sentencing Enhancement or Aggravating Factor

Using child torture as sentencing enhancement or aggravating factor is the most effective option. This allows for the defendant to be charged under the child abuse statute, while the child torture definition can be used to explain how and why

the crime was so egregious that the defendant should have an enhanced sentence. Hawaii currently has a statute allowing for torture to be used as a sentencing enhancement for second degree murder; when torture is inflicted, the sentence is enhanced from life imprisonment with the possibility of parole to life imprisonment without the possibility of parole.<sup>37</sup> Consider the Alabama statute discussed in the section above. With a sentencing enhancement or aggravating factor, a child torture perpetrator could receive double the sentence currently allowed under the statute. The benefit of using the definition of child torture as a sentence enhancement or an aggravating circumstance is that the child torture act is not separated from the child abuse crime.<sup>38</sup> Child torture cases are more egregious versions of child abuse cases. It is the egregious and heinous nature of the child torture act that is added onto the child abuse act.

### Child Torture as a Separate Crime

Child torture is not a new, separate crime from the child abuse; it is a heightened level of child abuse. The child abuse crime becomes a lesser included offense of child torture. If child abuse and child torture were made into separate crimes, prosecutors would lose the opportunity to prove that the conduct is child torture within the meaning of the child abuse statute and would instead need to prove child torture using more elements and higher standards. The main advantage of having a child torture crime is the defendant would serve a much harsher penalty. However, this is offset by a sentencing enhancement, which could render an offender to serve a similar sentence. As a separate crime, prosecutors may charge defendants with child torture as a bargaining tool for guilty pleas, minimizing the seriousness of the child torture act. The benefits weigh against a separate child torture crime, since its use could be manipulated and its purpose jeopardized.

### Conclusion

The six-year-old boy who was brutally beaten and tortured, by being spanked over a hundred times with a wooden spoon by his mother and her boyfriend to the point he had lacerations, blisters, was bleeding, and was falling, had endured more trauma in one day than most of us could fathom. His cuts and blisters healed, but his soul is forever injured. Child abuse does not begin or end with the physical wounds. It carries life-long emotional and psychological wounds. The development of a medical definition of child torture will provide uniformity throughout states' laws, while also providing for harsher penalties. This would be a big leap in combating the epidemic of child abuse.

<sup>1</sup> *People v. Nyies*, 2008 WL 4604068,1 (Mich. Ct. App. Oct. 16, 2008) (upholding a jury verdict convicting the defendant mother of torture and first-degree child abuse). The judge sentenced the defendant to twelve to thirty years imprisonment for the torture conviction, and eight to fifteen years for the first-degree child abuse conviction. *Id.*

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 2.

<sup>9</sup> U.S. DEPT. OF HEALTH & HUMAN SERV., CHILD MALTREATMENT 38-40 tbl.3-

4 (2006).

<sup>10</sup> *Id.* at xv.

<sup>11</sup> The three main forms of child abuse are physical, sexual, and emotional. Neglect and abandonment generally are proscribed in separate statutes.

<sup>12</sup> 42 U.S.C.A. § 5106g (2008).

<sup>13</sup> See generally WASH. REV. CODE § 26.44.020 (2008) (defining child abuse as sexual abuse, sexual exploitation, or injury of a child by any person under circumstances which harm the child's health, welfare, or safety).

<sup>14</sup> MICH. COMP. LAWS ANN. § 722.622 (2008).

<sup>15</sup> C. Henry Kempe et al., *The Battered-Child Syndrome*, 181 JAMA 17 (1962). Dr. Kempe's findings were based on a nationwide survey of 71 hospitals which collectively documented 302 cases of battered child syndrome during one year, and of these cases 33 children died and 85 suffered permanent brain injury. *Id.*

<sup>16</sup> Dr. Kempe stated that the "syndrome should be considered in any child exhibiting evidence of possible trauma or neglect (fracture of any bone, subdural hematoma, multiple soft tissue injuries, poor skin hygiene, or malnutrition) or when there is a marked discrepancy between the clinical findings and the historical data as supplied by the parents." *Id.* at 24.

<sup>17</sup> Reginald M. Parker, *When No One Hears Their Cries: Battered Child Syndrome as a Defense: State v. Janes*, 19 T. MARSHALL L. REV. 431, 439 (1994).

<sup>18</sup> *Id.*

<sup>19</sup> Ohio v. Nemeth, 694 N.E.2d 1332, 1335 (Ohio 1998).

<sup>20</sup> *Id.*

<sup>21</sup> It was not until there was a medical definition of neglect that states began to implement their own child neglect statutes. See, AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 682 (4th ed. 1999) (stating the section on Problems Related to Abuse or Neglect applies to the "the severe mistreatment of one individual by another through physical abuse, sexual abuse, or child neglect.")

<sup>22</sup> Child torture is child abuse, but it is a more egregious form.

<sup>23</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, opened for signature Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85.

<sup>24</sup> BLACK'S LAW DICTIONARY 1498 (7th ed. 1999).

<sup>25</sup> See generally ALA. CODE § 26-15-3 (2008) ("A responsible person, as defined in Section 26-15-2, who shall torture, willfully abuse, cruelly beat or otherwise willfully maltreat any child under the age of 18 years shall, on conviction, be guilty of a Class C felony."); KY. REV. STAT. ANN. § 508.100 (2008) ("A person is guilty of criminal abuse in the first degree when he intentionally abuses another person . . . and . . . causes torture, cruel confinement or cruel punishment to a person twelve years of age or less, or who is physically helpless or mentally helpless."); KAN. STAT. ANN. § 21-3609 (2007) ("Abuse of a child is intentionally torturing, cruelly beating, shaking which results in great bodily harm or inflicting cruel and inhuman corporal punishment upon any child under the age of 18 years.")

<sup>26</sup> *People v. Shelton*, 138 Mich. App. 510, 360 N.W.2d 234 (1984) (among conflicting authorities noted are *People v. Kelley*, 176 Mich. App. 219, 439 N.W.2d 315 (1989)); *People v. Biegajski*, 122 Mich. App. 215, 332 N.W.2d 413 (1982). Michigan had a child torture statute, but it was repealed in 1988. MICH. COMP. LAWS ANN. § 750.136a (2004).

<sup>27</sup> Oklahoma is an example; they define it as it pertains to the children's code but do not have a separate penalty for "child torture."

<sup>28</sup> *Canler v. Kentucky*, 870 S.W.2d 219 (Ky. 1989).

<sup>29</sup> *Id.*

<sup>30</sup> *In re A.G. et al.*, 757 N.E.2d 524 (Ill. App. Ct. 2001).

<sup>31</sup> *People v. Steger*, 16 Cal.3d 539, 547 (Cal. 1976). The California Supreme Court held there was insufficient evidence of torture murder of three-year old child even though there was evidence of a subdural hemorrhage covering almost the entire left half of the brain; the body was covered from head to toe with cuts, bruises and other injuries, most of which could only have been caused by severe blows; hemorrhaging of the liver, adrenal gland, intestines, and diaphragm; a laceration of the chin; and fractures of the left cheek bone and right forearm. Medical evidence revealed that most of the injuries were inflicted at different times in the last month of the child's life. The defendant step-mother failed to seek medical help for the injuries. The Court said there was evidence she severely beat the child, but not with a cold-blooded intent to inflict extreme and prolonged pain. *People v. Walkey*, is a case with a similar result. 177 Cal.App.3d 268 (Cal. Ct. App. 1986).

<sup>32</sup> Child torture laws must have different elements than child abuse laws, or else it will be duplicative law.

<sup>33</sup> ALA. CODE § 26-15-3 (2008).

<sup>34</sup> ALA. CODE § 13a-5-6 (2008).

<sup>35</sup> ALA. CODE § 26-15-3.1 (2008).

<sup>36</sup> ALA. CODE § 13a-5-6 (2008).

<sup>37</sup> See generally HAW. REV. STAT. § 706-657 (2008) (providing that the prosecution must prove beyond a reasonable doubt that the victim suffered unnecessary torture and that the defendant intentionally or knowingly inflicted unnecessary torture on the victim; unnecessary torture is the infliction of extreme physical and mental suffering). However, torture (which often deals with adults who were tortured then murdered) is very different from child torture. This example was given to show how child torture could serve as an enhancement to child abuse.

<sup>38</sup> At the same time, this is the conundrum of whether to enact a child torture statute. Nearly every state has an aggravated child abuse statute already in place that enhances the penalty for child abuse. Child torture statutes will do the same but with a medical relationship that must be proved in addition to the child abuse.

**The Author is a Third year law student at the Washington College of Law and earned and received a dual B.S. degree in Political Science and Law & Society from Frostburg State University Summa Cum Laude. She would like to thank the attorneys at the National Center for the Prosecution of Child Abuse for their kindness and unending support. It was not until my internship with this office that I fully understood the gravity and atrociousness of child abuse.**