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Icongraphy of Torture: Going beyond the Tortuous Torture Debate

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ICONGRAPHY OF TORTURE: GOING BEYOND THE TORTUOUS TORTURE DEBATE

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> Do you understand the process? The harrow begins to write; when it has finished writing the first draft on the man's back, the cotton layer rolls and slowly heaves the body to one side in order to make more room for the harrow. In the meantime the places where the wounds have been inscribed settle against the cotton, which, because of its special preparation, immediately stops the bleeding and clears the way for the script to sink in more deeply. Here, as the body continues to turn, the serrated edge of the harrow tears the cotton from the wounds, flings it into the pit, and the harrow gets back to work. And so it goes on writing, more and more deeply, for twelve hours. During the first six hours the condemned man lives almost as he did before, except that he is in pain.[1]

I. INTRODUCTION

The torture debate is seriously misguided. It has transformed torture from a universally condemned crime to a regrettable but sometimes necessary state function. This Article attempts to put torture back to where it should have remained, namely, among other universally prohibited acts such as genocide and crimes against humanity. To define torture we need look no further than iconographic images of torture, such as the following rendering of Kafka's Harrow:

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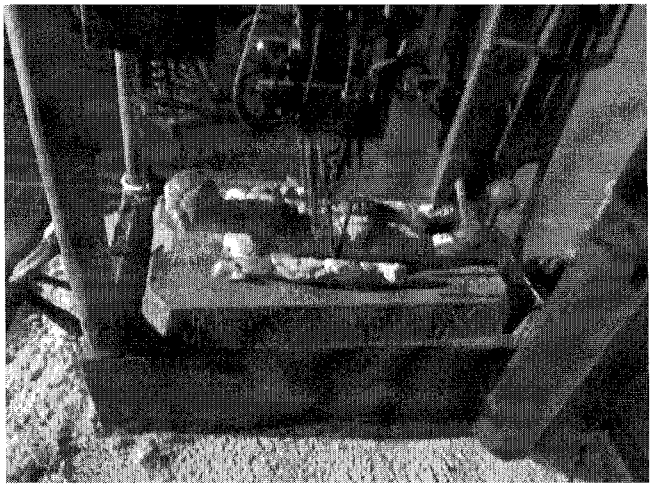
1. FRANZ KAFKA, *In the Penal Colony, in* KAFKA'S SELECTED STORIES 44 (Stanley Corngold ed. 2007).



Kafka's Harrow, Prague[2]

Yet, despite the power of an image like this, torture receives countless further nuanced analyses.

The United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment defines torture 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, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[3]

Torture seems to involve any number of elements that cry out for definition and differentiation: severe pain, physical pain, suffering, mental pain, mental suffering, cruel treatment, inhuman treatment, and degrading treatment. Yet, participants in the debate should resist this lure, which proves difficult to do. Lawyers and philosophers have dominated the torture debate. This should not be surprising since both are heavily invested in the distinction drawing business. Find a distinction; argue a case. Find a distinction; publish an article. Yet, these distinction-infested debates have hindered rather than moved the torture debate forward.[4] Participants in the torture debate have fallen into a definitional-

2. Photo: Kafka's Harrow (Thomas Simon) (owned by author).

3. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Torture Convention].

4. *See, e.g.*, Office of the High Comm'r on Human Rights, Interpretation of Torture in the Light of the Practice and Jurisprudence of International Bodies (2011), http://www.ohchr.org/Documents/Issues/Torture/UNVFVT/Interpretation_torture_2011_EN.pdf

distinction trap. Does torture include physical and mental pain? Is there a difference between torture and cruel, inhuman, or degrading treatment? Does a torture prosecution require a showing of general or specific intent? These questions raise interesting academic issues. However, they only muddy the waters of the torture debate.

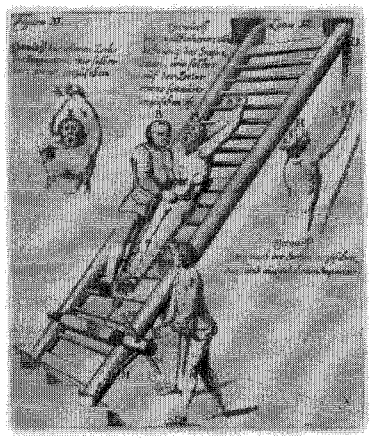
The torture debate also manifests a flawed view of international criminal law. International criminal law is not national criminal law writ large. Using national law as a model has disastrous consequences for international criminal law. For example, intent plays a very different role in international criminal law than it does in national criminal law. Overall, international crimes lack nuanced particularity. International criminal law represents the international community's attempt to provide a focus on the grave breaches, the systematic and widespread atrocities, clearly reprehensible acts, etc. Making fine-tuned distinctions steers attention away from the big picture.

Keeping the focus on the big picture does not imply throwing away all distinctions. It is how best to make use of those distinctions that is in question. International criminal law does not consist of a conceptual pie that divides neatly into finely grained, detailed, distinct slices. Instead, international criminal law focuses on a set of egregious, central, core wrongs, and injustices. A crime consists of a "mental" component (the *mens rea*) and an act (the *actus reus*). At this stage, let us focus on criminal acts. The core *actus reus* of the international crime of genocide, for example, is killings. The core *actus reus* of torture, as argued below, is pain.[5] However, finding a better way of interpreting the claim that the basic act of torture consists of the infliction of pain can help avoid the definitional trap. The strategy is to start with those acts, as represented by, for example, the image of Kafka's Harrow, that almost everyone would agree constitute torture. Then, other acts are evaluated according to how closely they visually and conceptually resemble the core act of torture as represented by the iconographic image.

The infliction of pain lies at the heart of the wrongfulness of torture. The "severe pain" referred to in the Torture Convention is Inquisitorial pain, that is, the brutal pain similar in kind to that inflicted on victims during the Middle Ages and depicted in Medieval engravings of the rack (see illustration below). Refined legal or philosophical distinctions impede rather than move the torture debate forward. As this Article demonstrates, the following icon of the rack used during the Inquisition will do better than Kafka's imaginary Harrow.

("Many acts, conducts or events may be viewed as torture in certain circumstances, while they will not be viewed as torture in some other situations. In fact, there is no single definition [of torture] existing under international law. . . It should be recalled that usually in legal dispositions, torture is linked with cruel, inhuman and degrading treatment or punishment or ill-treatment. Torture is not an act in itself, or specific type of acts, but it is the legal qualification of an event or behaviour, based on the comprehensive assessment of this event or behaviour. Therefore, the difference between these different qualifications, torture, cruel, inhuman and degrading treatment or punishment or ill-treatment depends on the specific circumstances of each case and is not always obvious.").

5. *See infra* Section III.



Medieval Rack[6]

Part II introduces this novel iconographical approach to torture, whereby the rack of the Inquisition serves as the icon for determining which acts constitute torture. Part IIA shows how icons serve as moral and legal templates for evaluating purported harms. Holocaust icons help to determine which acts qualify as acts of genocide. Similarly, the icon of the Inquisition's rack should serve as an icon for assessing what acts qualify as torture. Yet, not every icon is created equal. Some icons, such as the Chinese practice of death by a thousand cuts, should be rejected as inappropriate. Part IIB demonstrates how to use the iconographical method to determine whether certain acts of neglect qualify as child abuse.

Part III examines the *actus reus* and *mens rea* elements of the crime of torture. Part IIIA defends the claim that, just as killing constitutes the core act of the crime of genocide, so pain makes up the core act of torture. This section shows how an iconographic approach helps to undermine some troublesome categories of acts that allegedly do not rise to the level of torture, including psychological pain and mental suffering as well as cruel, inhuman, and degrading treatment. Part IIIB defends the claim that the institutional intent of the state is the *mens rea* element of torture. It further rejects attempts to establish specific intent as the *mens rea* of torture. Finally, Part IV, building on the previous claims, makes arguments for treating torture as a universal prohibition without any exceptions.

II. ICONOGRAPHY

According to the anthropologist Clifford Geertz, the law is "part of a distinctive manner of imagining the real."[7] Images play a crucial role in law.

6. Photo: TORTURE: A COLLECTION 4 (Sanford Levinson ed., 2006) (photo originally an engraving appended to the Austrian Empire's 1769 Criminal Procedure Code).

7. CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 184 (3rd ed. 1983) (promoting symbolic anthropology, which examine the interpretation of symbols).

Images, models, metaphors, and exemplars also have played and play an important role in science. Not only propositions but also certain kinds of pictures used in science can have truth-value.[8] The billiard-ball model of gas, the double-helix model, the solar system model of the atom—all of these models proved crucial to science.[9]

Icons are symbolic, pictorial, paradigmatic representations.[10] They are, in part, short hands for descriptive and prescriptive statements. These statements include both descriptions of historically situated events and historical narratives that tie together similar events. Moreover, the statements also are prescriptive that is, moral judgments of condemnation. Yet, these icons are more than just statements. They have a critical emotive content. They represent and trigger a deep-seated moral revulsion. A photograph of a mass grave provides a paradigmatic example of an icon that typically provokes a universal condemnation. The short hand feature of icons is not just a convenience; it marks a virtue of icons. A demand to spell out the statements connected with an icon represents a moral failing. The need to persuade someone of the immorality of mass graves indicates something amiss. This is not to say that there is never a need to defend or expand upon an icon through commentary, but we also need to recognize how deeply embedded some icons are and should be in our moral fabric.

Icons are akin to paradigms (basic standards of judgment). Theorists of justice have difficulties agreeing on paradigms.[11] Theorists of injustice should not have the same difficulties. It would be odd indeed to publish a book on the pros and cons of genocide, a paradigm of injustice if ever there was one. Paradigms, in general, anchor interpretations but are themselves not immune to interpretation and reinterpretation.[12] Paradigms of injustice, however, are more deeply embedded than other ones.

Icons are pictorial in the way that some examples of photojournalism have become iconic. Nick Ut won a Pulitzer Prize for his photo of a screaming girl (Phan Thi Kim Púc) being burned alive from napalm during the Vietnam War.[13] There has been a longstanding dispute about the efficacy and ethics of photojournalism.[14] In an earlier work, Susan Sontag warned of the public becoming anesthetized by these images[15] but later made a much more sympathetic

8. Laura Perini, *The Truth in Pictures*, 72:1 PHIL. SCI. 262, 274 (2005).

9. *See generally*, THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (3 ed. 1962); MARY HESSE, MODELS AND ANALOGIES IN SCIENCE (1963); MICHAEL WEISBERG, SIMULATION AND SIMILARITY: USING MODELS TO UNDERSTAND THE WORLD (2013).

10. *See* HANDBOOK OF VISUAL ANALYSIS 73 (Theo van Leeuwen & Carey Jewitt eds., 2001).

11. *See* THOMAS W. SIMON, DEMOCRACY AND SOCIAL INJUSTICE: LAW, POLITICS, AND PHILOSOPHY 21 (1995).

12. RONALD DWORKIN, LAW'S EMPIRE 72 (1986).

13. DENISE CHONG, THE GIRL IN THE PICTURE: THE STORY OF KIM PHUC, THE PHOTOGRAPH, AND THE VIETNAM WAR 76 (2000).

14. Eamonn Carrabine, *Just Images: Aesthetics, Ethics, and Visual Criminology*, 52 BRIT. J. CRIMINOLOGY 463, 463 (2012).

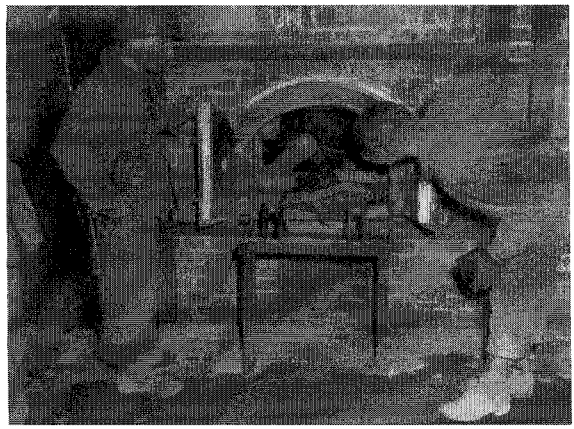
15. SUSAN SONTAG, ON PHOTOGRAPHY 20 (1977).

case for them.[16] The use of icons in law avoids these controversies since they do not involve a public display of the images but a judicial and moral use of them.

Academic debates also use images or icons. Images play a role in law.[17] These images and icons, as argued below, do and should play a determinative role in the torture debate.[18] However, anyone perusing any law or philosophy journal would have difficulty finding even a diagram to say nothing of a picture. Yet, if the commentators used pictures more often, the torture debate would have an entirely different character, especially if they carefully deployed certain icons. Icons can serve as the crucial moral models in debates over torture.

A. Iconographies of Genocide, Torture, and Execution

1. Icons of the Holocaust: Gas Ovens and Cattle Cars



Gas Ovens at Bergen-Belsen[19]

Moral models, particularly in the form of images, have played an important role in the progressive development of the law and morality. The Holocaust has served as a normative template against which to examine subsequent mass atrocities.[20] It was the Holocaust that led Raphael Lemkin, the Jewish Polish jurist who first coined the term genocide, to lobby successfully for the passage of the Genocide Convention.[21] The Holocaust does and should serve as the primary

16. SUSAN SONTAG, REGARDING THE PAIN OF OTHERS 105 (2004).

17. Adam L. Rosman, *Visualizing the Law: Using Chats, Diagrams, and Other Images to Improve Legal Briefs*, 63 J. LEGAL EDUC. 70, 70 (2013).

18. *See infra* Section III(A)(3).

19. Photo: Gas Ovens at Bergen-Belsen (on file with author with permission from the United States Marine Corps).

20. ALVIN H. ROSENFELD, THE END OF THE HOLOCAUST 167 (2011).

21. RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS 79 (2005).

reference point for any historical, sociological, legal, philosophical or any other scholarly examination of genocide.

The Holocaust has had an enormous impact on the world. Images of the Holocaust have been critical for assuring its lasting impact as a paradigm of injustice. These images have stirred deep-seated reactions of revulsion at the enormity of this injustice in every generation since. One iconic image of the Holocaust is pictures of Jews packed into cattle cars on their way to the death camps.

Pulling Jews Already Dead from a Still Traveling Train in Romania[22]

While pictures of gas ovens and cattle cars have become iconic for the Holocaust, they have not become icons of genocides in general, in part because gas killings and cattle car deportation were particular marks of the Holocaust. However, pictures of emaciated, starving Jews looking forlornly past the barbed wire enclosure, as discussed below, have become icons of the Holocaust as well as of other genocides.

22. Photo: Pulling Jews already dead from a still traveling train in Romania (Public Domain), *available at* http://en.wikipedia.org/wiki/Holocaust_train.

Young Survivors behind a Barbed Wire Fence in Buchenwald Concentration Camp[23]

These images are not simply evocative. They provide a moral template that has helped to bring similar incidents within the folds of genocide, as happened with the war in Bosnia. "The scenes of emaciated and terrified men confined to detention camps in north-western Bosnia and Herzegovina, first discovered by Western reporters in the summer of 1992, indelibly reminded the international public of images last seen in Europe during the Holocaust."[24] The reporting and pictures used by Roy Gutman and made by Patrick Robert, and others helped to mobilize a humanitarian intervention in Bosnia.[25]

Making a case for the pivotal role of these iconic images in moral and legal debates does not mean that there are no problems with these iconographies.[26] The use of every icon must be a subject of close scrutiny and vigorous critique. Some raised serious questions about the icons of the Bosnian war, including critics who accused Gutman of having staged his photograph of Bosnians behind barbed wire in order to have it published on the cover of *Time* magazine.[27] Yet there seems to be little evidence of that, especially as the images used by Gutman reflected a grim, gruesome reality that also was captured by other photographers, such as Patrick Roberts.[28]

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23. Photo: Young survivors behind a barbed wire fence in Buchenwald concentration camp (on file with author with permission from Dodge-Chrome, Inc.).

24. Christian Axboe Nielsen, *Surmounting the Myopic Focus on Genocide: The Case of War in Bosnia and Herzegovina*, 15:1 J. GENOCIDE RES. 21, 24 (2013).

25. *See* ROY GUTMAN, A WITNESS TO GENOCIDE: THE 1993 PULITZER PRIZE-WINNING DISPATCHES ON THE "ETHNIC CLEANSING" OF BOSNIA 126 (1993).

26. *See infra* Section II(A)(3).

27. Thomas Deichmann, *The Picture that Fooled the World*, 97 LM (formerly LIVING MARXISM) 24-31 (1997), *available at* http://www.slobodan-milosevic.org/fooled.htm.

28. David Campbell, *Atrocity, Memory, Photography: Imaging the Concentration Camps of Bosnia—The Case of ITN Versus Living Marxism, Part 1*, 1:1 J. HUM. RTS 1, 1 (2002).

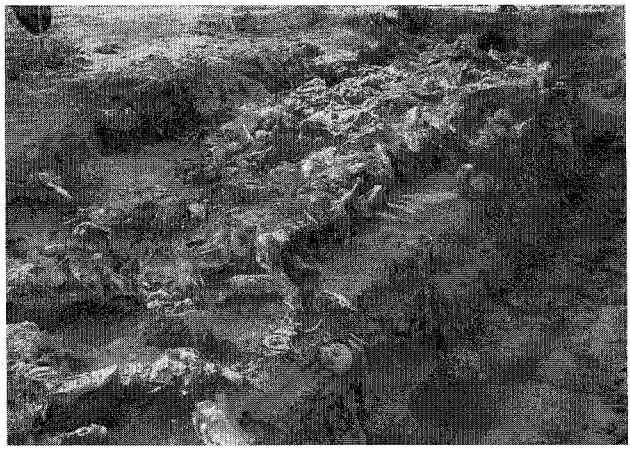
Bosniak Prisoners behind a Barbed Wire of the Manjaca Concentration Camp near Prijedor, Bosnia[29]

An even more important icon and finding for both the Holocaust and the Bosnian war were mass graves. Mass graves have proven to be a critical piece of the evidence needed to substantiate the legal charges of not only crimes against humanity, but also of genocide.

A German Policeman Shoots Individual Jewish Women who Remain Alive in the Ravine after the Mass Execution (1942, Main Commission for the Investigation of Nazi War Crimes)[30]

29. Photo: Bosnian Genocide (Patrick Robert/Corbis Sygma August 1992) (on file with author with email permission from Patrick Robert (June 18, 2014, 18:44 EDT)).

30. Photo: *A Holocaust Photo Essay*, MODERN AM. POETRY, http://www.english.illinois.edu/maps/holocaust/photoessay.htm.



Exhumation site of Bosnian Genocide victims in the Cancari Valley in eastern Bosnia near Srebrenica (International Criminal Tribunal for the Former Yugoslavia)[31]

Consider further whether the same or similar icons applied to the later war in Kosovo. One of the difficulties faced by those who wanted to justify the humanitarian intervention in Kosovo was the lack of gruesome depictions.[32] Admittedly, the massacre of forty-five civilians at Racak triggered NATO involvement.[33] However, there has been sparse evidence in the form of mass graves or other iconography.[34]

Finally, images also can serve as reminders of where horrific massacres did take place in, for example, Srebrenica during the Bosnian war. As the following images demonstrate, abandoned shoes from the Holocaust have become icon of for the mass killings in Bosnia.

31. Photo: *Photos of Srebrenica: From Mass Murder to Genocide (1992-1995)*, WE REMEMBER THE BOSNIAN GENOCIDE, 1992-95, http://bosniangenocide.wordpress.com/2012/07/02/photos-of-srebrenica-from-mass-murder-to-genocide-1992-1995 ("8,000 mean boys were lined up and executed after the fall f Srebrenica in July 1995").

32. Roland Paris, *Kosovo and the Metaphor War*, 117:3 POL. SCI. Q. 423, 423-50 (2002).

33. MARC WELLER, THE CRISIS IN KOSOVO, 1989-1999: FROM THE DISSOLUTION OF YUGOSLAVIA TO RAMBOUILLET AND THE OUTBREAK OF HOSTILITIES 333-35 (1999).

34. *Kosovo assault 'was not genocide'*, BBC NEWS (Sept. 7, 2001), http://news.bbc.co.uk/2/hi/europe/1530781.stm (The U.N. sponsored Supreme Court of Kosovo found, "[there] had been a 'systematic campaign of terror, including murders, rapes, arsons and severe maltreatments.' Crimes against humanity and war crimes did take place, it said, but 'the exactions committed by Miloševicé's regime cannot be qualified as criminal acts of genocide, since their purpose was not the destruction of the Albanian ethnic group . . . but its forceful departure from Kosovo.").

Sorting the Shoes of the Victims in Auschwits[35]

Shoes Representing the Number Massacred at Srebrenica[36]

This analysis demonstrates the use and power of iconic images in discussions and debates over international crimes. It has shown that icons do and should play an important role in the moral and legal assessment of crimes against humanity and genocide. The next section makes a case for icons to play an even stronger and more determinative role in debates over torture. One reason for the difference is, as shown below, torture has had a longer history than genocide as a widely

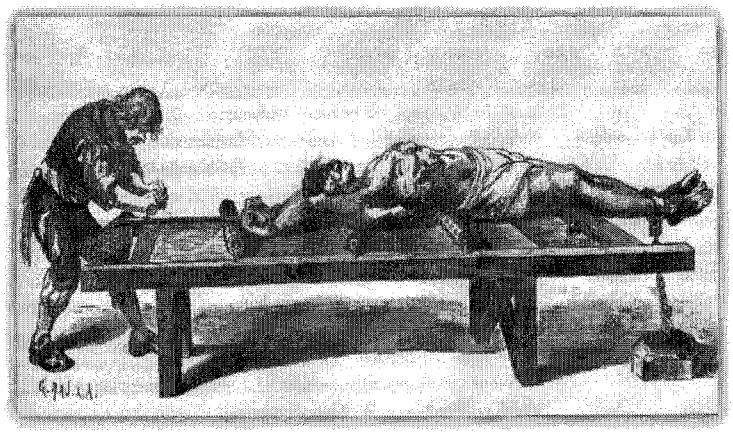
35. Photo: Sorting the Shoes of Victims in Auschwitz, The Beate Klarsfeld Foundation (on file with author with permission from Beate Klarsfeld).

36. Photo: Shoes representing the number massacred at Srebrenica (Nada Dzubur/Center for Political Beauty) (on file with author with email permission from Philipp Ruch, founder of Pillar of Shame (April 17, 2014, 3:04 EDT)).

recognized evil. The international community has only relatively recently come to treat genocide as a universal wrong.[37] Torture, fortunately (conceptually) and unfortunately (historically) has had a much longer legacy.

2. Icon of Torture: The Rack and The Inquisition

The Inquisition is to torture what the Holocaust is to genocide. The Inquisition has supplied critical icons of torture, such as the rack shown below.[38]



Medieval Rack Illustration[39]

Actually, there were three inquisitions. The first, the Medieval Inquisition (1184), attacked heresies, particularly the dualist beliefs of the Cathars and the Waldensians in southern France.[40] A 1215 papal bull, *Ad Extirpanda*, issued by Pope Innocent IV, outlined the circumstances and methods for the Dominicans to extract confessions through torture.[41] The Spanish Inquisition (1478-1834), initiated by King Ferdinand II of Aragon and Queen Isabella I of Castile, began with a focus primarily on *conversos*, Jews who converted to Catholicism but who had allegedly lapsed back into their former Judaic beliefs and Jewish practices.[42]

37. WILLIAM SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIMES OF CRIMES 91 (2000).

38. *See* Alfred W. McCoy, *Beyond Susan Sontag: The Seduction Of Psychological Torture*, *in* SCREENING TORTURE: MEDIA REPRESENTATIONS OF STATE TERROR AND POLITICAL DOMINATION 109, 115 (Michael Flynn & Fabiola F. Salek eds., 2012) (stating the Inquisition also may have marked a theological shift from the life to the death of Jesus).

39. Photo: Medieval Rack (Public Domain), *available at* http://en.wikipedia.org/wiki/Torture#mediaviewer/File:Streckbett.jpg.

40. 1 HENRY CHARLES LEA, A HISTORY OF THE INQUISITION OF THE MIDDLE AGES 82 (1887).

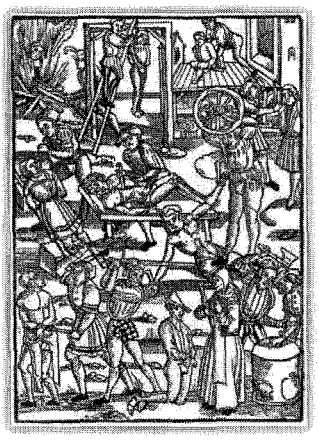
41. *Id.* at 337.

42. 2 HENRY CHARLES LEA, A HISTORY OF THE INQUISITION OF THE MIDDLE AGES 186, 288 (1901).

Finally, the Roman Inquisition, through the Congregation of the Holy Office established by Pope Paul III in 1542, targeted Protestant heretics.[43]

Historical accounts of atrocities typically go through a revisionist period, where previous accounts are criticized as exaggerated.[44] Perhaps secular authorities engaged in more brutality than the religious ones during the same period. Indeed, European secular courts carried out a brutal regiment of torture, particularly after the Church abolished trial by ordeal in 1215.[45] These and other historical revisions are important, especially since Protestants have had a stake in exaggerating the torments of the Catholic Inquisitions.[46] However, no one has challenged the barbarity of using torture devices during the Inquisition. Therefore, these revisions have not undermined the case for using devices from the Inquisition as icons of torture.

Pictures and descriptions of the torture implements used to extract confessions during the Inquisition create an almost universal reaction of disgust.



Medieval Torture Devices[47]

Three methods stand out. First, the *strappado* (pull, or *garrucha*, pulley, in Spanish), the "Queen of Torments,"[48] where the accused, with hands tied behind the back, is raised by ropes and pulleys.[49] The weights would suspend the victim

43. Benjamin D. Wicker, *Status: Inquisition in the Catholic Church*, CATHOLIC EDUCATION RESOURCE CENTER, http://www.catholiceducation.org/articles/history/world/wh0029.html.

44. CLAUDIA CARD, THE ATROCITY PARADIGM: A THEORY OF EVIL (2002).

45. JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN RÉGIME (2012).

46. HENRY KAMEN, THE SPANISH INQUISITION: A HISTORICAL REVISION (1998).

47. Photo: Medieval Torture Devices (Public Domain), *available at* http://en.wikipedia.org/wiki/Torture.

48. CULLEN MURPHY, GOD'S JURY: THE INQUISITION AND THE MAKING OF THE MODERN WORLD 90 (2012).

49. *See* Father Angelo Clareno, *A Catholic Inquisition Torture Session* (1304 A.D), http://www.corvalliscommunitypages.com/Europe/jesuits_saints_inquisition_reformation/an_inquisitio

up to five degrees of duration and severity.[50] With the *proto* (colt or rack), the torturer tied the victim's limbs to a frame, and then pulled in opposite directions until the joints became dislocated.[51] Finally, the *toca* (cloth) or *interrogation o mejorado del aqua* (otherwise known today as waterboarding) "simulates" drowning.[52] This also was called the submarine in medieval times.[53] More recently, former United States Vice President, Dick Cheney, referred to it as a "dunk in the water."[54]

Image of a Woodcut Depicting "Toca" or Waterboarding[55]

These icons, particularly the rack, have served and should continue to serve even more in the future as normative templates in judicial decisions. Images from the Inquisition provide the paradigm, exemplars, and models of what is clearly prohibited as torture. When the United States Supreme Court, to take a most notable example, has had to interpret the cruel and unusual punishment provision

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n_torture_session.htm (last visited Sept. 16, 2012) ("The torturer entered with his assistants and tied the prisoner's hands behind his back. Then he had him raised up by means of a pulley attached to the roof of the house, which was very high. After the prisoner had hung there for an hour the rope was released suddenly. The idea was that, broken by the intense pain, he would be defeated and confess that he had once been a heretic. After he had been raised and suddenly dropped many times they asked whether he would confess that he was or had been a heretic. He replied, I'm a faithful and catholic Christian, always have been, and always will be. If I said anything else to you shouldn't believe me, because I would only have said it to escape the torture. Let this be my perpetual confession to you, because it's the truth. Anything else would be a lie extorted by torture.").

50. *See* JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 43 (1993). This may have something to do with the origin of the phrase "the third degree," a euphemism for brutal police interrogation techniques.

51. MURPHY, *supra* note 48, at 93.

52. *Id.*

53. *Id.*

54. *Id.*

55. Photo: *Toca* or waterboarding (Public Domain), *available at* http://www.npr.org/templates/story/story.php?storyId=15917081.

of the Eighth Amendment, it has often invoked images of the Inquisition. In the case of *In re Kemmler*, the Court found that the Eighth Amendment prohibited Congress from allowing punishments such as "burning at the stake, crucifixion, breaking on the wheel, or the like."[56] In *Brown v. Mississippi*, the Court asserted that, "the rack and torture chamber may not be substituted for the witness stand."[57] In *Ashcraft v. Tennessee*, the Court found that, "state and federal courts, textbook writers, legal commentators, and governmental commissions consistently have applied the name of 'inquisition' to prolonged examination of suspects conducted as was the [36 hour] examination [interrogation] of Ashcraft."[58] In *Chamber v. Florida*, the Court found that, "the rack, the thumbscrew, the wheel, solitary confinement, protracted questioning and cross questioning, and other ingenious forms of entrapment of the helpless or unpopular had left their wake of mutilated bodies and shattered minds along the way to the cross, the guillotine, the stake and the hangman's noose."[59]

Invoking images of the Inquisition does not just provide vivid pictures. These images lie at the heart of the decisions to abhor torture. Most importantly, these references serve as normative templates. But they do not draw a bright line around those inflictions of pain severe enough to qualify as torture. Instead, they mark out a category that takes in anything resembling it. *Blackburn v. Alabama*, which is worth quoting at length, best exemplifies this approach:

> Since *Chambers* v. *State of Florida,* 309 U. S. 227, 60 S.Ct. 472, 84 L.Ed. 716, this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition. A number of cases have demonstrated, if demonstration were needed, that the efficiency of the rack and the thumbscrew can be matched, given the

56. In re Kemmler, 136 U.S. 436, 446 (1890).

57. Brown v. Mississippi, 297 U.S. 278, 285-86 (1936).

58. Ashcraft v. Tennessee, 332 U.S. 143, n.8 (1944) ("State and federal courts, textbook writers, legal commentators, and governmental commissions consistently have applied the name of 'inquisition' to prolonged examination of suspects conducted as was the examination of Ashcraft"). See, e.g., Pound (Cuthbert W.), *Inquisitorial Confessions*, 1 CORNELL L. Q. 77; Chambers v. Florida, 309 U. S. 227 (194); Bram v. United States, 168 U. S. 532, 544 (1897); Brown v. Walker, 161 U. S. 591, 596 (1896); Counselman v. Hitchcock, 142 U. S. 547, 573 (1892); cf. Cooper v. State, 86 Ala. 610, 611 (1889). In a case where no physical violence was inflicted or threatened, the Supreme Court of Virginia expressly approved the statement of the trial judge that the manner and methods used in obtaining the confession read 'like a chapter from the history of the inquisition of the Middle Ages.' Enoch v. Commonwealth, 126 S.E. 222, 225 (Va. 1925); and see Cross v. State, 221 S.W. 489 (Tenn. 1920). The analogy, of course, was in the fact that old inquisition practices included questioning suspects in secret places, away from friends and counsel, with notaries waiting to take down 'confessions', and with arrangements to have the suspect later affirm the truth of his confession in the presence of witnesses who took no part in the inquisition. See *Inquisition Definition,* ENCYC. BRITANNICA, http://www.britannica.com/EBchecked/topic/288915/inquisition (last visited Nov. 19, 2014). "In the more serious offenses the party suspected is arrested, he is placed on his inquisition before the chief of police, and a statement is obtained . . . . Where the office of the district attorney is in political harmony with the police system, the district attorney is generally invited to be present as an inquisitor." 2 WHARTON'S CRIMINAL EVIDENCE 1021-22 (11th ed. 1935).

59. Chambers v. Florida, 309 U.S. 227, 237-38 (1940).

> proper subject, by more sophisticated modes of 'persuasion.' A prolonged interrogation of an accused who is ignorant of his rights and who has been cut off from the moral support of friends and relatives is not infrequently an effective technique of terror. Thus the range of inquiry in this type of case must be broad, and this Court has insisted that the judgment in each instance be based upon consideration of '[t]he totality of the circumstances.' *Fikes* v. *Alabama,* 352 U. S. 191, 197.[60]

Similarly and more recently, in *Pennsylvania v. Muniz*, the Court found that the privilege against self-incrimination "was designed primarily to prevent 'a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality.'"[61] In the words of legal theorist Seth Kreimer, these modern techniques lie far too close to the Inquisition's rack and screw.[62]

This does not mean that courts should set up a continuum beginning with Inquisitorial torture and ending with torture lite.[63] The now infamous Bybee memo characterized torture as suffering "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."[64] Another Bybee memo proclaimed that waterboarding does not "inflict actual physical harm" but only "controlled acute episodes."[65] Notice, however, that the methods permitted and promoted by the Bush administration included waterboarding, one of the classic methods of Inquisitorial torture.[66] In other words, the problem is not that the icon method permits "torture creep," where the baseline moves from "never" to "rarely" to "whenever needed."[67] Rather, the difficulty lies with the Bush Administration having one and only one icon of severe physical impairment. Instead they should have started with the iconic rack, which includes the full panoply of torture methods, including waterboarding, used by the Inquisitorial. In fact, the Bush administration used most of the primary Inquisition methods:[68] Manadel al-Jamadi received the *strappado*,[69] Khalid Sheik

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60. Blackburn v. Alabama, 361 U.S. 199, 206 (1960).

61. Pennsylvania v. Muniz, 496 U.S. 582, 596 (1990) (quoting Ullmann v. United States, 350 U.S. 422, 428 (1956)).

62. Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278, 289 (2003).

63. *See* Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1703 (2005) (critiquing the analysis of torture on a continuum).

64. Memorandum from Jay S. Bybee, Assistant Attorney Gen., U.S. Dep't. of Justice, to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation under 18 U.S.C. § § 2340-2340A (Aug. 1, 2002), *reprinted* in MARK DANNER, TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR 115 (2004).

65. Memorandum from Jay S. Bybee, Assistant Attorney Gen., U.S. Dep't of Justice, to John Rizze, Acting General Counsel of the Central Intelligence Agency, Interrogation of al Qaeda Operative (August 1, 2002).

66. ELIZABETH SWANSON GOLDBERG, BEYOND TERROR: GENDER, NARRATIVE, HUMAN RIGHTS 213 (2007).

67. MURPHY, *supra* note 48, at 87.

68. JANE MAYER, THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS 171 (2008).

Mohammad[70] and Abu Zubaydah Husayn[71] the *toca*. A condemnation of the Medieval *proto* (rack) entails an outright moral rejection of the Medieval *toca* (cloth used in waterboarding) because of the moral equivalence of the two methods. Similarly, the Bush Administration's outlawing of torture causing serious bodily harm entails, what should have been, its rejection of waterboarding.

3. Inappropriate Icons: Death by a Thousand Cuts

As noted above, the icons for torture have a history, a use subject to criticism and change. However, the choice of icons is far from arbitrary. Not all icons are created equal. The choice and use of an icon can be criticized and rejected. Consider the Chinese practice of *lingchi chusi* or death by a thousand cuts, used in the West as an icon of torture in the East.[72] Before a crowd of Beijing onlookers, a few soldiers performed *lingchi* on Wang Weiqin:

> Two soldiers brought forward the basket holding the knives that the procedure required. Others stripped the victim and bound him by his queue to a tripod in such a way that the front of his body was fully exposed to the state executioner and his assistant. The executioner began by slicing off pieces of flesh from the convict's breasts, his biceps, and his upper thighs.[73]

The Lingchi of "Pseudo-Fuzhuli"[74]

69. Jane Mayer, *A Deadly Interrogation. Can the CIA Legally Kill a Prisoner?*, NEW YORKER, Nov. 14, 2005, at 44, 44, *available at* http://www.newyorker.com/magazine/2005/11/14/a-deadly-interrogation.

70. Randall Mikkelson, *CIA Says Used Waterboarding on Three Suspects*, REUTERS (Feb. 5, 2008, 6:13 PM), http://www.reuters.com/article/2008/02/05/us-security-usa-waterboarding-idUSN0517815120080205.

71. Case of Husayn (Abu Zubaydah) v. Poland, Application No. 7511/13, Judgment, (Eur. Ct. H.R. July 24, 2014), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146047.

72. TIMOTHY BROOK ET AL., DEATH BY A THOUSAND CUTS 2 (2008).

73. *Id.* at 1.

First, note that this report, like so many by Western commentators, invariably takes practices of *lingchi* out of context.[75] Perhaps the following factors might modify reactions to the case of Wang Weiqin. *Lingchi* is misnamed "death by a thousand cuts."[76] The process did not involve one thousand cuts on a fully conscious victim.[77] After four slices, the executioner put Wang to death with a swift stab to the heart.[78] Further, this case involved multiple killings by the accused. Wang and his gang killed twelve members of another family (Li Jichang), including a three year old, in a revenge feud.[79] Only the subsequent suicide of Li's wife prompted the authorities to pursue Wang.[80] Also, at the time of the execution, Wang probably had been heavily sedated with opium, one of the strongest painkillers.[81] Finally, soon after Wang's execution, on April 24, 1905, the Chinese government abolished *lingchi* and other forms of cruelty.[82] All of these factors show the importance of context when making judgments. They do not, however, undermine the overall condemnation of the practice.

More importantly, throughout the nineteenth and twentieth century, writers used *lingchi* as an icon of Chinese cruelty and barbarity.[83] The authors of *Death by a Thousand Cuts* document the many inappropriate uses of this icon in the West.[84] For example, Western portrayals would show the victim tied to a cross.[85] The Chinese never used the Roman/Christian cross for executions.[86]

74. Photo: The Lingchi of "Pseudo-Fuzhuli" (name and date unknown), *reprinted in* GEORGES BATAILLE, LES LARMES D'EROS X (2004).

75. JAMES ELKINS, THE OBJECT STARES BACK 110 (1996).

76. BROOK ET AL, *supra* note 72, at 2.

77. ELKINS, *supra* note 75.

78. BROOK ET AL, *supra* note 72, at 1.

79. *Id.* at 2.

80. *Id.* at 3-4.

81. *Id.* at 2.

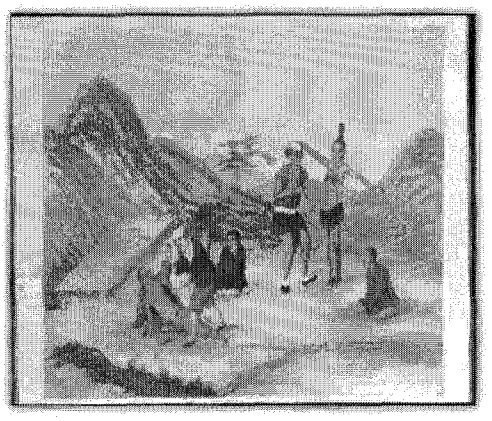
82. *Id.* at 28.

83. SIR HENRY NORMAN, THE PEOPLE AND POLITICS OF THE FAR EAST 224-25 (1895).

84. BROOK ET AL, *supra* note 72.

85. *Id.* at 204.

86. *Id.*



Lingchi illustration[87]

Archibald Little, a British onlooker, described Wang's "pieces of flesh, as cut away, being thrown to the crowd, who scrambled for the dreadful relics."[88] While these accounts bolstered the European belief in Chinese cruelty and barbarity, even Little's account, in the end based on hearsay, proved inaccurate.[89] These constructions were symptomatic of Westerners reading their own sense of execution into the Chinese context. Executions in the West, contemporaneous with the use of *lingchi*, were imbued with Christianity.[90] They inflicted suffering on the victim and stimulated a cathartic reaction in the onlookers.[91] In contrast, Chinese executions were ritualized enforcements of the law, meant to teach a lesson rather than to lead to redemption.[92]

For purposes of this analysis, the most important problem is that Westerners used *lingchi* as an icon for cruel torture, when it served no such purpose in China.[93] First, *lingchi* was a form of execution, not of torture, although no one could deny that it involved torment.[94] Second, magistrates in China could and did torture, but the law regulated the implements of torture.[95] The lawful implements consisted of only a few, namely, the baton (*xunzhang*, distinguished from the *zhang* or interrogation stick) as well as the finger (*zanzhi*) and ankle (*jiagun*) presses.[96]

87. Photo: Lingchi illustration (Bibliotheque Nationale de France), *reprinted in* BROOK ET AL., *supra* note 72 at 205.

88. BROOK ET AL., *supra* note 72 at 211.

89. *Id.*

90. *Id.* at 210.

91. *Id.* at 207.

92. *Id.* at 220.

93. *Id.* at 9.

94. *Id.* at 2.

95. *Id.* at 43.

96. *Id.*

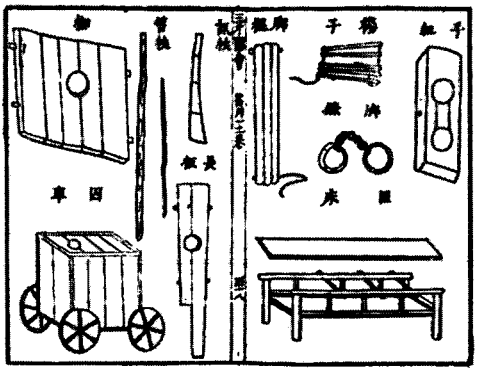


Figure 8. Selected implements of torture in the Ming dynasty, from Wang Qi (ed.), *Sancai tuhui* (illustrated compendium of heaven, earth, and human).

Ming Dynasty torture implements: wooden manacles, finger press, ankle press, fetters, "box-bed," interrogation baton, light and heavy flogging sticks, cangue, prisoner's card, restraining board.[97]

These last two were reserved for adult males accused of robbery or homicide, for which the penalty was exile or death,[98] but they could be used no more than twice without special authorization.[99] Compare the Chinese implements of torture with the following list of torture devices used during the Inquisition: "Head crushers, skull-splinters, wrist and leg irons, chain scourges, saws, hanging cages, the *guillotine*, spiked necklaces, self-mortification belts, the oral, rectal, and vaginal pear, the chastity belt, breast rippers . . . ."[100]

Yet, Western commentators avoided these cross-cultural comparative inventories. When they did undertake a single comparison, it was to the detriment of China. George Mason, author of *The Punishments of China* (1801) even mistakenly identified the Chinese ankle press with the Inquisition's rack.[101] When magistrates, in actuality, began to use something resembling the rack, that is, the box bed (*xiachuang*), Emperor Kangxi, in 1679, explicitly forbade its use.[102]

This brief excursion into Orientalism should at least demonstrate how to reject a purported icon of torture. Still, however persuasive readers might find *Death by a Thousand Cuts*, they should not suspend critical judgment. Admittedly, the authors do little in the form of explicit judgment, seeming to describe rather than prescribe. Yet, they assume judgmental inferences from their

97. Photo: Ming Dynasty torture implements: wooden manacles, finger press, ankle press, fetters, "box-bed," interrogation baton, light and heavy flogging sticks, cangue, prisoner's card, restraining board, (Wang Qi (ed), *Sancai Tuhui*), *reprinted in* BROOK ET AL., *supra* note 72, at 45.

98. BROOK ET AL., *supra* note 72, at 47.

99. *Id.*

100. Maria Antónia Lima, *The Dark Side of the Mediterranean—Expressions of Fear From the Inquisition to the Present*, BABILÓNIA NO. 8/9, 141, 143 (2010) (describing an exhibition of torture instruments presented in Evora in 1994).

101. BROOK ET AL., *supra* note 72, at 172.

102. *Id.* at 48.

readers.[103] Even a through deconstruction of Western depictions of Chinese practices should not deter a condemnation of *lingchi*, which even as a form of execution was torture.

Finally, critics may charge the portrayal of the rack as an alleged universal icon of torture with Orientalism, for it treats a Western European technique as universal. In China, until recently, cinematic representations of torture were commonplace, whereas sex was taboo.[104] Chinese torture icons, at least those appearing in films, consist mostly of chains and whips.[105] However, most Chinese would have few objections to using the rack as a universal icon, especially since it helps expose problems in the West.[106]

B. Iconographic Method: Child Abuse

1. Physical Abuse and Neglect

An analogy with child abuse will help to clarify how to use these moral icons in legal and moral disputes. Child abuse consists of distinct types of harms: physical abuse, emotional abuse, neglect, and sexual abuse.[107] The case of Mary Ellen Wilson makes an excellent candidate for the icon of child abuse. The child welfare literature places the discovery of child abuse in the United States around the 1870's.[108] The training manual for Court Appointed Special Advocates in child abuse cases begins with the case of Mary Ellen, the "discovery case."[109]

In 1866, Mary Ellen Wilson, slightly over the age of one, was indentured to Mary Connolly, who had divorced her daughter's biological father and remarried.[110] Mary Ellen's caretakers, Mary and Francis Connolly, whipped her daily and periodically maimed her with scissors.[111] Mrs. Etta Wheeler, a sweet-faced missionary, uncovered the case and, in desperation, approached Henry Bergh to help rescue Mary Ellen.[112] The history of the animal welfare movement, oddly enough, provides additional context for the case. In 1866, Henry Bergh, a member of the landed aristocracy, founded the American Society for the Prevention of

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103. *Id.* at 211-13.

104. Chris Berry, *Lust, Caution: Torture, Sex, and Passion in Chinese Cinema*, *in* SCREENING TORTURE: MEDIA REPRESENTATIONS OF STATE TERROR AND POLITICAL DOMINATION 71, 79 (Michael Flynn & Fabiola F. Salek eds., 2012).

105. *Id.* at 80-81.

106. Jérôme Bourgon, *Obscene Vignettes of Truth. Construing Photographs of Chinese Executions as Historical Documents*, *in* VISUALIZING CHINA: 1845-1965, at 39, 89-90 (Christian Henriot & Wen-hsin Yeh eds., 2013).

107. Melinda Smith & Jeanne Segal, *Child Abuse & Neglect*, HELPGUIDE.ORG, http://www.helpguide.org/mental/child_abuse_physical_emotional_sexual_neglect.htm (last updated July 2014).

108. John E.B. Myers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449, 449-50 (2008-2009).

109. CHILD WELFARE TRAINING INST., EVOLUTION OF FEDERAL CHILD WELFARE LEGISLATION (2007), *available at* http://php.ipsiconnect.org/CWTI/Law/textOnlyLaw.html.

110. *Id.*

111. CHILD WELFARE TRAINING INST., *supra* note 109.

112. Myers, *supra* note 108, at 451.

Cruelty to Animals ("ASPCA"), the first organization of its kind anywhere.[113] Although reluctant to divert resources away from animal welfare, Bergh eventually became convinced to intervene on behalf of Mary Ellen, whom he reportedly acknowledged as a "little animal, surely," and he allowed his staff to undertake an investigation.[114] Elbridge T. Gerry, grandson of James Madison's vice-president and counsel for ASPCA, filed a petition on Mary Ellen's behalf.[115]

Judge Abraham Lawrence of the New York Supreme Court was involved in sentencing Mary Connolly to one year of hard labor for criminal assault and battery, a lesser crime than the felonious assault charge in the initial indictment.[116] He gave custody of Mary Ellen to The Sheltering Arms, an institution for dependent children.[117] Elbridge T. Gerry went on to help organize the New York Society for the Prevention of Cruelty to Children ("NYSPCC"), incorporated in 1875.[118] The NYSPCC's board included some of America's wealthiest men (having excluded women until 1921).[119] Bergh also played a pivotal role in the founding of the child welfare movement.[120]

Making physical abuse the paradigm of child abuse does not privilege that form of abuse. Rather, it helps to resolve disputes over other forms of child abuse. While sexual abuse receives the most newspaper coverage in the US,[121] neglect far outstrips the other forms of child abuse.[122] Rates and incidences of physical and sexual abuse have decreased dramatically throughout the United States.[123] Neglect may have declined but not as rapidly or significantly as physical and sexual abuse.[124]

Before examining similarities between assessments of child abuse and torture, it is important to address, however briefly, a critical dissimilarity between the two forms of injustice. Recently, the Center for Constitutional Rights took the Holy See to task for failing to mention, in its Initial Report to the Committee Against

113. CHILD WELFARE TRAINING INST., *supra* note 109.

114. JOHN E.B. MYERS, CHILD PROTECTION IN AMERICA: PAST, PRESENT, AND FUTURE 30 (2006).

115. *Id.*

116. *Id.* at 33.

117. *Id.*

118. *Id.* at 35.

119. *Id.*

120. Myers, *supra* note 108, at 452.

121. Thomas Hove, Hye-Jin Paek, Thomas Isaacson & Richard T. Cole, *Newspaper Portrayals of Child Abuse: Frequency of Coverage and Frames of the Issue* 16 MASS COMMC'N & SOC'Y 89, 91 (2013).

122. U.S. DEP'T OF HEALTH AND HUMAN SERV. CHILDREN'S BUREAU, CHILD MALTREATMENT 2012 xi (2013), *available at* http://www.acf.hhs.gov/sites/default/files/cb/cm2012.pdf;
National Child Abuse Statistics, Child Abuse in America, CHILDHELP.ORG, tlb. Types of Child Abuse in 2012, http://www.childhelp.org/pages/statistics (last visited July 29, 2014) (stating the year 2012 saw 78.3% neglect, 18.3% physical abuse, and 9.3% sexual abuse).

123. David Finkelhor, Lisa Jones, Ann Shattuck & Kei Saito, UPDATED TRENDS IN CHILD MALTREATMENT, 2012, at 2 (2013).

124. National Academy of Sciences, *Rates of Physical and Sexual Abuse Have Declined, But Not Child Neglect*, SCI. DAILY (Sept. 12, 2013), http://www.sciencedaily.com/releases/2013/09/130912143940.htm.

Torture[125], the sexual abuse inflicted by its priests.[126] The Center then contended that sexual abuse is torture, which is in keeping with the position previously adopted by the Committee Against Torture.[127]

Contrary to the Center and the Committee, an implication of the analysis of this Article, set forth more fully below,[128] is that generally speaking, sexual abuse, however egregious, is not torture. First of all, the sexual abuse engaged in by priests did not fulfill the purpose requirement under the Torture Convention.[129] Other than their own sexual satisfaction, it is doubtful whether priests had any other institutional purposes when carrying out their morally reprehensible acts. The Shadow Report tried to dodge this objection by noting that, unlike torture, the charge of cruel, inhuman, and degrading treatment does not require proof of a purpose.[130] But the Report cannot have it both ways, for then it has admitted that sexual abuse is not torture. More importantly, and, again, as argued more fully below, pain lies at the core of torture,[131] whereas sexual abuse may not involve any pain whatsoever.[132] This is not to condone any form of sexual abuse. Conflating sexual abuse and torture does not bolster the perceived harm status of either one. Rather, it diminishes the likely perceived impact of both.

It would take a separate book to unravel the complexities of child abuse.[133] However, returning now to the similarities, child abuse presents some of the same

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125. *See* Comm. against Torture, Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Initial Reports of States Parties Due in 2003, The Holy See, U.N. Doc.CAT/C/VAT/1 (Dec. 7, 2012).

126. CTR. FOR CONSTITUTIONAL RIGHTS, SHADOW REPORT 2 (Apr. 2014) [hereinafter THE SHADOW REPORT] (prepared for the 52nd Session of the United Nations Committee Against Torture in Connection with its Review of the Holy See).

127. Comm. Against Torture, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment 2, ¶ 22, UN Doc. CAT/C/GC/2 (Jan. 24, 2008).

128. *See infra* Section III.

129. *See* Torture Convention, *supra* note 3 ("[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person *for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind* . . . ." (emphasis added)).

130. In addition, this Article attempts to conflate torture with cruel, inhuman, and degrading treatment. *See infra* Section III(A)(3)(a).

131. *See infra* Section III(A)(1)(b).

132. Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 688 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998), http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf, *adopted in* Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment, ¶¶ 478-79 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998), http://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf. The Trial Chamber in the Akayesu case (the first to successfully prosecute an individual for rape) defined sexual violence as "any act of a sexual nature which [sic] is committed on a person under circumstances which [sic] are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which [sic] do not involve penetration or even physical contact." *Id.*

133. *See* David Pimentel, *Criminal Child Neglect and the 'Free Range Kid': Is Overprotective Parenting the New Standard of Care?*, 2012 UTAH L. REV. 947 (2012). Unfortunately, Pimentel concludes an otherwise insightful article with lame recommendations to have the law provide guiding factors for parents in raising their children.

difficulties as torture. Most importantly, it is amenable to the same iconography approach advocated in this Article. Physical abuse, as represented by the icon of Mary Ellen Wilson, serves as the paradigm, the normative template for child abuse.

Mary Ellen McCormack[134]

When neglect can be shown to resemble physical abuse, then, if criminal prosecution is justified for physical abuse, it should be equally justified for similar cases of neglect as it would be for the following case:

> One of the most severe child abuse cases of the last few years comes out of Plant City, Florida, where in 2005 Plant City Police entered into a child abuse investigation and found a "feral" child. The girl, 7-year-old Danielle, was found naked in a dark closet. Her hair was matted and covered with lice and she was lying on a moldy mattress surrounded by bugs. She had sores, rashes, and bug bites covering her skin.
>
> She was wearing a diaper that was full of urine and feces and dirty diapers covered the floor of the trailer in which the family lived. Feces covered the walls of the trailer and cockroaches were everywhere. The girl weighed only 48 pounds and was unable to eat solid food. She spent a great deal of time recovering in the hospital.[135]

Similarly, when examining torture, courts (and analysts) should compare the image of Inquisition torture with that of the current practice being called into question. The presumption should be that the practice looks like Inquisition torture. The burden then falls on the alleged perpetrator to show that the practice is

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134. Photo: Mary Ellen McCormack, (Public Domain), *available at* http://en.wikipedia.org/wiki/Mary_Ellen_Wilson.

135. *Make Sure You Know the Cases of Child Abuse*, LAWS.COM, http://children-laws.laws.com/child-abuse/cases-of-child-abuse (last visited Sept. 29, 2014).

nothing like those practices conducted during the Inquisition, that is, that it more closely resembles *de minimis* harm. The Court in *McKune v. Lile* adopted this strategy: "Determining what constitutes unconstitutional compulsion involves a question of judgment: Courts must decide whether the consequences of an inmate's choice to remain silent are closer to the physical torture against which the Constitution clearly protects or the *de minimis* harms against which it does not."[136]

Child Abuse—Real Neglect[137]

Child neglect statutes are notoriously vague, giving room for the prosecution of *de minimis* harm for neglect.[138] The courts have adjudicated a number of questionable cases of neglect. For example, Dr. Bobbie Sweitzer, an anesthesiologist at Massachusetts General Hospital, left her one and four year-old daughters in her Porsche after cracking the car window and activating the alarm system.[139] She ran into Sam's Club to drop off some film, leaving her girls out of her sight for 20 to 30 seconds.[140] She returned home to find that she had been

136. McKune v. Lile, 536 U.S. 24, 41 (2002).

137. Photo: Child Abuse—Real Neglect (Santa Rosa County Florida Sheriff's Office), *available at* http://www.northescambia.com/2012/01/child-neglect-arrest-photos-released-of-filth-in-jay-home.

138. *See also* 705 ILL. COMP. STAT. 405/2-3(1)(d)(2013) (Illinois law defines a neglected minor, in part, as "any minor under the age of 14 years whose parent or other person responsible for the minor's welfare leaves the minor without supervision for an unreasonable period of time without regard for the mental or physical health, safety, or welfare of that minor."). *See also MD. CODE ANN., FAM. LAW*§ 5-801(a) (LexisNexis 2014) ("A person who is charged with the care of a child under the age of 8 years may not allow the child to be locked or confined in a dwelling, building, enclosure, or motor vehicle while the person charged is absent and the dwelling, building, enclosure, or motor vehicle is out of the sight of the person charged unless the person charged provides a reliable person at least 13 years old to remain with the child to protect the child.").

139. Robin Estrin, *Don't Let Sleeping Tots Lie, Parent Learns*, LOS ANGELES TIMES (Apr. 6, 1997), http://articles.latimes.com/1997-04-06/news/mn-45952_1_parent-learns.

140. *Id.*

reported to the Department of Social Services for child abuse.[141] It took eight months and $15,000 in fees to "clear" her name.[142] In another case, parents in Indiana were convicted for loosely tapping their children's arms and legs while playing a hostage game with their children.[143] Bridget Kevane, a literature professor at Montana State University, was charged with neglect for leaving her three children and their two friends (ranging in age from 3 to 12) at the mall for a few hours.[144]

Sheridan Small in Car Seat[145]

These cases of alleged neglect look nothing like the physical abuse suffered by the likes of Mary Ellen, and therefore, the courts should have dismissed them as constituting *de minimis* harm.[146]

The same type of analysis, recommended here for child neglect cases, should guide determinations of what constitutes torture. In *Wilson v. Seiter*, an inmate claimed that the following constituted cruel and unusual punishment: "overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, unclean and inadequate restrooms,

141. *Id.*

142. *Id.*

143. Gross v. State, 817 N.E.2d 306, 307 (Ind. Ct. App. 2004).

144. Judith Warner, *Dangerous Resentment*, N.Y. TIMES (July 9, 2009, 9:00 PM), http://opinionator.blogs.nytimes.com/2009/07/09/dont-hate-her-because-shes-educated/?_php=true&_type=blogs&_r=0.

145. Photo: Sheridan Small in car seat (Dr. Bobbie Sweitzer) (on file with author with Email Permission from Dr. Bobbie Sweitzer (April 25, 2014, 09:21 EDT)).

146. Admittedly, recent cases of children dying in locked cars have come to light, but, on closer examination, these cases look like the case of Mary Ellen. *See* Deborah Hastings, *22 Month-Old Georgia Boy Left to Die in Hot Car had Scratches on Face and Head*, N.Y. DAILY NEWS (July 5, 2014, 12:00 PM), http://www.nydailynews.com/news/national/22-month-old-ga-boy-died-hot-car-scratches-head-article-1.1855937 (explaining how Cooper Harris, who died of hypothermia after his father locked him in the car, had abrasions over his body).

unsanitary dining facilities and food preparation, and housing with mentally and physically ill inmates."[147] While the Justices disagreed over the majority's intent requirement in prison conditions cases, they concurred, in effect, finding that these conditions constituted only *de minimis* harms.[148]

With torture, the strategy is similar to that in child abuse cases. First, start with those acts such as the intentional infliction of pain that almost everyone would agree constitutes torture. Then, evaluate other acts such as waterboarding according to how closely they resemble the core act of torture. Following this method, there would be little doubt that practices such as waterboarding qualify as torture.

III. ELEMENTS OF TORTURE

A. Actus Reus

1. Core Acts

Crimes consist of a criminal or guilty act (*actus reus*) carried out by a criminal or guilty mind (*mens rea*). Statutes in national criminal law systems categorize different crimes and list the elements that prosecutors need prove for each crime.[149] The crime of murder may include the following: killing with intent to kill, killing with intent to cause grievous bodily harm, killing recklessly, and killing in the course of committing a felony (the felony murder rule).[150] Each category of murder involves killing. There are greater and lesser instances of the same act, that is, of killing.

International criminal law has similarities and dissimilarities to national criminal law. Compare the crimes of genocide in international law[151] and murder in national law.[152] Both include acts of killing. However, a national law on murder distinguishes between various kinds of killing[153] whereas the Rome Statute does not distinguish types of killings under the crime of genocide.[154] This Section begins with an analysis of the core act of genocide before demonstrating that the crime of torture also has a core type of act, namely, the infliction of pain. If a case can be made that the crime of genocide has a core *actus reus*, then that should

147. Wilson v. Seiter, 501 U.S. 294, 296 (1991).

148. *Id.* at 306.

149. *See generally* PHILIP E. CARLAN ET. AL., AN INTRODUCTION TO CRIMINAL LAW 5 (2011) (explaining in New York State, First Degree Grand Larceny is the stealing of property that exceeds one million dollars and carries a sentence not to exceed twenty-five years, whereas Fourth Degree Grand Larceny consists of stealing property that exceeds one thousand dollars with a sentence not to exceed four years imprisonment).

150. AN INTRODUCTION TO CRIMINAL LAW, *supra* note 149, at 77.

151. *See* Rome Statute of the International Criminal Court art. 6, *opened for signature* July 17,1988, 2187 U.N.T.S. 3 (entered into force July 1, 2002) [hereinafter Rome Statute].

152. *See* CARLAN ET. AL., *supra* note 149 at 77.

153. Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 120-21(2004) (giving the example that only some common law jurisdictions such as California recognize the felony murder rule, making participants in a felony liable for murder even if unintentional).

154. Rome Statute, *supra* note 151 at art. 6(a).

make it easier to accept the claim that torture has a core *actus reus*. However, before proceeding, it is important to note a difference between analyses of genocide and of torture.

While killing is the core *actus reus* of genocide, it is not the sole *actus reus*. Genocide is the killings of "national, ethnical, racial, or religious groups."[155] In other words, for killings to qualify as genocide, the prosecutor must not only establish that killings occurred, but also that the victims came from certain types of groups. This is why iconography has a limited utility in depicting the *actus reus* in genocide cases. An icon will not provide a complete depiction of the *actus reus* since it generally does not readily identify the victim group. In contrast, a single icon such as the Inquisitorial rack does fully capture the *actus reus* of torture. With respect to the *actus reus*, a prosecutor in a torture case does have to prove anything about the nature of the victim, only the infliction of pain. Nevertheless, despite this dissimilarity, genocide and torture each have core acts. As argued below, the core wrong of genocide is killings. Analogously, the core wrong of torture is inflicting pain.

a. Genocide: Killing

The two major international treaties on genocide agree on the five types of acts that constitute genocide. Article II of the Genocide Convention (1948) specifies five types of acts (a-e) that constitute genocide:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.[156]

Article 6 of The International Criminal Court repeats the acts listed in the earlier Genocide Convention:

(a) Genocide by killing.
(b) Genocide by causing serious bodily or mental harm.
(c) Genocide by deliberately inflicting conditions of life calculated to bring about physical destruction.
(d) Genocide by imposing measures intended to prevent births.
(e) Genocide by forcibly transferring children.[157]

This may seem like a further difference between the crime of genocide and torture. The *actus reus* of genocide seems to come in a variety of types of acts,

155. Convention on the Prevention and Punishment of the Crime of Genocide art. II, *adopted* Dec. 9, 1948, S. TREATY DOC. No. 81-15, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention].

156. *Id.*

157. Rome Statute, *supra* note 151.

ranging from killings to sterilizations. Within the Torture Convention or other laws on torture, the most plausible interpretation would not find a comparable range of acts, only a single type, namely, the infliction of pain.[158] However, as agued below, this turns out not to be a difference at all. Genoicde, like torture, has a single prototypical *actus reus*, namely, killings, even if the laws do (mistakenly!) recognize variations on that *actus reus*.[159]

Since there are five acts listed, a key question is whether each act independently would qualify as an act of genocide, as some commentators contend,[160] or whether one of these acts is more important than the other acts, as maintained by this Article. For example, is "killing members of the group" and "imposing measures intended to prevent births within a group" both equally genocide acts? In short, are killing and sterilization legally and morally on par? The way to answer these questions is first to note that the acts (a) through (e) appear in a particular order, an order that is legally and morally relevant. "Genocide by killing" appears first on these lists and on all national codifications because it alone constitutes the core ingredient of genocide.

Notice that, among the five listed acts, (a) is the only lethal, physical act. All of the others are non-lethal acts. That priority ranking reflects the judgment that, in general, lethal acts are worse than non-lethal ones. Otherwise, the lethal act of killing would be legally and morally comparable to any one of the other four non-lethal acts. This would lead to the bizarre conclusions that the Nazis' sterilization campaign against the "mentally defective' should rank on the same level of severity and gravity as the Holocaust killings.

If we have successfully argued for demanding that the crime of genocide minimally and centrally include acts of killing, we will have accomplished a great deal. Rather than extending the notion of genocide to include cultural genocide and other non-lethal acts, as many have proposed, this narrow definitional interpretation places killing as the core act of genocide.[161] The other non-lethal acts listed in Article II of the Genocide Convention and in the ICC's Articles occur on the list along with the lethal act of killing because they often occur in concert with these killings.[162] More importantly, for purposes of this Article, we now have a precedent for arguing that torture has a core *actus reus*, namely, the infliction of pain.

b. Torture: Inflicting Pain

The infliction of pain lies at the heart of torture. What is the wrong in torture? To some, the quest to find the wrong in torture would seem easy. The proverbial

158. Torture Convention, *supra* note 3.

159. Etymology provides a further important clue for finding the basics of a genocide act. Given the word's derivation from the Latin *caedere* ("to kill"), whatever else genocide encompasses, it should include the act of killing. ADAM JONES, GENOCIDE: A COMPREHENSIVE INTRODUCTION 8 (2006).

160. GENOCIDE IN INTERNATIONAL LAW: THE CRIMES OF CRIMES, *supra* note 8, at 452 (2000).

161. *See* Alison Palmer,*Ethnocide in*, GENOCIDE IN OUR TIME 1 (Michael N. Dobkowski & Isidor Walliman eds., 1992).

162. THOMAS W. SIMON, THE LAWS OF GENOCIDE: PRESCRIPTION FOR A JUST WORLD 56 (2007).

common person might start by noting, first of all, that torture hurts. The Inquisition rack icon captures the underlying phenomenology of torture, namely, the inflicting of pain. As argued throughout this Article, that simple and insightful claim seems to have eluded jurists and philosophers.

Opponents of torture find any number of things wrong with torture, over and above the infliction of pain. Surprisingly, few torture opponents seem content with finding that the wrong of torture lies in inflicting pain. They think that something more than pain must be a stake in torture. Parry, for example, sees torture in terms of asymmetrical power relations.[163] Most opponents of torture see it as a violation of the individual's autonomy or agency—in short, torture undermines the very identity that makes the individual human. According to Wisnewski, "[r]ather than being inflicted on the body, torture comes to be directed first and foremost at the agency of the victim."[164] For Shue torture not only undermines agency, it turns such agency against itself.[165] Davis sees torture as some sort of endurance test: "torture is the intentional testing of a sentient, helpless being's ability to bear physical suffering against that being's will and indifferent to its welfare."[166] Sussman takes these philosophical/psychological harms to an existential extreme when he proclaims that "torture turns out to be not just an extreme form of cruelty, but the pre-eminent instance of a kind of forced self-betrayal [colluding against oneself], more akin to rape than other kinds of violence characteristic of warfare or police actions."[167]

Yet, just as physical pain does not accompany every instance of torture, autonomy or agency also are not always lost through torture. In fact, many torture victims not only come through the horror as fully intact human beings, but many report never succumbing to a point where they entirely abandoned their autonomy or agency.[168] In a recent article, Luban and Shue unwittingly admit this: "Allowing the state to use severe mental pain or suffering is allowing them to employ an inherently awful tool . . . —the experience of severe mental pain or suffering—that is capable *sometimes* of attaining an awful goal: destroying the psychological identity of its target."[169] So, is torture only wrong when it destroys human identity, which it only does sometimes? The wrong of torture is the intentional (and actual) infliction of pain on a person within a political and legal context.

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163. John T. Parry, *What Is Torture, Are We Doing It, and What If We Are?*, 64 U. PITT. L. REV. 237, 249 (2003) (for Parry torture occurs "against a background of total control and potential escalation that asserts the state's dominance and unsettles or destroys the victim's normative world").

164. J. JEREMY WISNEWSKI, UNDERSTANDING TORTURE 10 (2010).

165. Henry Shue, *Torture*, 7 PHIL. & PUB. AFF. 124 (1978).

166. Michael Davis, *The Moral Justifiability of Torture and Other Cruel, Inhuman, or Degrading Treatment*, 19 INT'L J. APPLIED PHIL. 161, 167 (2005).

167. David Sussman, *What's Wrong with Torture?*, 33 PHIL. & PUB. AFF. 1, 4 (2005).

168. Harvey M. Weinstein, *Victims, Transitional Justice and Social Reconstruction: Who is Setting the Agenda?*, *in* JUSTICE FOR VICTIMS: PERSPECTIVES ON RIGHTS, TRANSITION AND RECONCILIATION 161, 169 (Inge Vanfraechem, Antony Pemberton & Felix Mukwiza Ndahinda eds., 2014).

169. David Luban & Henry Shue, *Mental Torture: A Critique of Erasures in U.S. Law*, 100 GEO. L.J. 823, 860 (2012) (emphasis added).

These characterizations of torture highlight something often inadvertently overlooked in discussions of torture. Most analysts focus on the victim and not on the perpetrator.[170] They zero in on what torture does to the victim. Obviously, any moral assessment must ultimately include what torture does to the victim. However, it should be just as obvious that law and morality should point their accusing fingers at the perpetrator. A perpetrator-centered analysis initially avoids a problem that can easily get the victim-oriented approach off the track. The former delays a debate over whether to subjectively or objectively assess a victim's pain and suffering. Initially, we do not need to care about whether the victim just happens to have an extreme tolerance for pain. What matters is that the perpetrator *intended* to inflict the pain.

3. Icons and Distinctions

a. Cruel, Inhumane, or Degrading Treatment

Statutes[171] and courts[172] distinguish torture from cruel, inhuman, or degrading treatment. Jeremy Waldron has attempted further to distinguish inhuman from degrading treatment.[173] A victim-oriented sense of the former is "treatment which cannot be endured in a way that enables the person suffering it to continue the basic elements of human functioning."[174] Degrading treatment includes four kinds of outrages to human dignity: bestialization, instrumentalization, infantilization, and demonization.[175] Indeed, these might differ from each other in significant ways. Yet, it is important not to see them as less severe than physical pain.[176] The important thing is to see how they connect to the icon of torture, the infliction of pain in ways similar to the use of the rack in the Inquisition.

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170. *See, e.g.*, Anthony Cullen, *Defining Torture in International Law: A Critique of the Concept Employed by The European Court of Human Rights* 34 CAL. W. INT'L L.J. 29, 33 (2003) ("The experience of the victim is of primary consideration in determining acts that constitute torture.").

171. Torture Convention, *supra* note 3, art. 16, ¶ 1, at 116 ("Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined."); Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Nov. 4, 1950, 513 U.N.T.S. 222 ("No one shall be subject to torture or to inhuman or degrading treatment or punishment"); S. AFR. CONST., § 12(1), 1996 ("Everyone has a right to freedom and security of the person, which includes the right . . . not to be tortured in any way; and . . . not to be treated or punished in a cruel, inhuman or degrading way."); New Zealand Bill of Rights Act 1990, cl. 9 ("Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.").

172. *See, e.g.*, Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A), at 110-11, 111 n.12 (1978).

173. Jeremy Waldron, The Coxford Lecture, *Inhuman and Degrading Treatment: The Words Themselves*, 23 CAN. J. L. & JURIS. 269 (2010).

174. *Id.* at 280.

175. *Id.* at 282. (citing a case where degrading treatment is found even where the victim is not aware of it); *see also* R v. Gen. Med. Council, [2004] EWHC (Admin) 1879, [2005] Q.B. 424, at ¶ 178.

176. *Cf.* Bernhard Schlink, *The Problem with Torture Lite*, 29 CARDOZA L. REV. 85, 86 (2007) ("Whatever the wording, the distinction between torture and cruel, inhuman and degrading treatment is one of intensity. Intensity is also the crucial factor in the book's second distinction, the one between cruel, inhuman, and degrading treatment or treatment that shocks the conscience, and highly coercive interrogation techniques deemed acceptable . . . .").

In a study of survivors of the Bosnian war, the researchers noted that, "physical pain per se is not the most important traumatic stressor in survivors of torture."[177] Jessica Wolfendale makes a strong case that so-called "torture lite" methods can be even crueler than direct physical torture techniques, since the former provides a moral distance between perpetrator and subject, thereby allowing the victim to feel more responsible and the perpetrator less responsible.[178] However, in keeping with the analysis presented in this Article, we can conclude that she wrongly accepts the suggestion that the distinction between torture and torture lite depends on an understanding of violence as primarily physical. Torture as paradigmatically physical does not provide more distance—rather, it provides a critical connection.

Thus, arguing for the centrality of physical pain for the act of torture does not entail claiming physical pain as a necessary element of the act of torture. Whatever distinctions made among these experiences, it is critical to note not so much how they differ from physical pain but how closely connected they are to physical pain. Metaphors prove telling in this debate. Waldron partially captures my position of erecting "a sort of *cordon sanitaire* around the much more important prohibition on torture—a 'fence around the wall,' designed not just to keep police, spies, and interrogators from crossing the torture threshold but to keep them from even approaching it."[179]

British forces subjected Irish Republican Army suspects to five methods: protracted standing, hooding, subjection to loud noises, sleep deprivation, and food and drink restrictions.[180] While the European Commission on Human Rights found that these practices amounted to torture,[181] the European Court of Human Rights disagreed but found that they were inhuman and degrading.[182] The Supreme Court of Israel found similar Israeli interrogation techniques—shaking, waiting in Shabach position,[183] tightening of handcuffs, sleep deprivations—

177. Metin Başoğlu, et al., *Torture vs Other Cruel, Inhuman, and Degrading Treatment: Is the Distinction Real or Apparent?*, 64 ARCH. GEN. PSYCHOL. 277, 284 (2007) ("[A]lthough there is evidence that torture leads to PTSD in some cases, many people survive extremely severe torture in relatively good psychological health and never develop PTSD. Conversely, some survivors develop PTSD after ostensibly milder forms of ill treatment or psychological stressors that do not involve physical torture.").

178. Jessica Wolfendale, *The Myth of "Torture Lite"*, 23 ETHICS & INT'L AFF. 47, 56 (2009).

179. JEREMY WALDRON, TORTURE, TERROR, AND TRADE-OFFS: PHILOSOPHY FOR THE WHITE HOUSE 277, 278 (2010).

180. Andrew Mumford, *Minimum Force Meets Brutality: Detention, Interrogation and Torture in British Counter-Insurgency Campaigns*, 11 J. MIL. ETHICS 10, 17 (2012).

181. Ireland v. United Kingdom, App. No. 5310/71, 512 Y.B. Eur. Conv. On H.R., 378 (Eur. Comm'n on H.R.).

182. Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) ¶ 165 (1978). Recently, however, the European Court of Human Rights found that waterboarding constituted torture. *See* Case of Husayn v. Poland, App. No. 7511/13, EUR. CT. H.R. (July 24, 2014), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146047.

183. Joseph Lelyveld, *Interrogating Ourselves*, N.Y. TIMES, June 12, 2005, http://www.nytimes.com/2005/06/12/magazine/12TORTURE.html?pagewanted=all&_r=0 ("[I]n which the detainee was hooded and placed on a low chair with a seat tilting down, pitching him forward while

unnecessary and unlawful, but refused to label them as torture.[184] As argued above, the key move to have these techniques qualified as torture is to show that these diverse techniques are very much like being subjected to the medieval rack.[185]

b. Mental Suffering

Those who participate in the torture debate could use a basic course in neuroscience. The discussions suffer, if I can use that word advisedly, from a focus on only a narrow piece of the neurophysiology of pain. Many analysts become stymied after they provide an initial exposition of what they call "physical pain." Pustilnik, for example, notes that victims of waterboarding report that it was not physical pain that they felt.[186] What the victims are reporting is that waterboarding is not the same type of pain as they receive when their skin nociceptors respond to intense mechanical stimulation.[187] That does mean that it is not painful.

Luban and Shue claim "[b]ombarding prisoners with earsplitting, culturally repugnant rock music for hours on end" would certainly count as mental suffering although some might discount it as constituting physical pain."[188] Contra Pustilnik, these prisoners might not report their experiences of loud noise as the same as their experience of pain from physical stimuli, but they would still label them as painful.[189] Expectations also affect hearing pain.[190]

As examples of experiences that are physical suffering but not pain, Luban and Shue list "freezing cold, unbearable heat, itching, nausea, paralysis," aching all over, inability to breathe.[191] If commentators stay focused on monomodal nociceptors, then they miss the richness of the neurophysiology of pain.[192] There

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his arms were tightly handcuffed behind him in an unnatural, contorted way so that they had to support his weight, for two or three hours at a stretch.").

184. HCJ 5100/94 The Public Committee Against Torture in Israel v. The Government of Israel, 53(4) P.D. 817 (1999).

185. *See supra* Section II(A)(2).

186. Amanda C. Pustilnik, *Pain as Fact and Heuristic: How Pain Neuroimaging Illuminates Moral Dimensions of Law*, 97 CORNELL L. REV. 801, 825 (2012).

187. Dan Jones, *Beyond Waterboarding: The Science of Interrogation*, 205 NEW SCIENTIST 40 (2010).

188. Luban & Shue, *supra* note 169, at 829.

189. *Contra* Pustilnik, *supra* note 186, at 825 n.93 (citing John T. Parry, *Escalation and Necessity: Defining Torture at Home and Abroad in* TORTURE: A COLLECTION 145, 147-48 (Sanford Levinson ed., 2004). *See* Aage R. Møller, *Similarities Between Chronic Pain and Tinnitus*, 18 AM. J. OTOLOGY 577-88 (1997).

190. *See* Alan Lockwood et al., *Tinnitus*, 347 N. ENG. J. MED. 904 (2002).

191. Luban & Shue, *supra* note 169, at 828.

192. *Pain Receptor*, PSYCHOLOGYCS, http://www.psychologycs.com/pain-receptor.htm (last visited Sept. 19, 2014) ("Any of the free nerve endings located throughout the body that function as sensory receptors, transmitting sensations of pain in response to noxious stimulation, one type (the monomodal nocireceptor) being a thinly myelinated delta fibre that responds to severe mechanical deformation, the other (the polymodal nocireceptor) being a C fibre that responds to mechanical deformation, excessive heat or cold, and irritant chemical stimulation, and is responsible for the axon reflex.").

are different kinds of nociceptors, including skin and visceral ones.[193] The neurophysiology of painfully cold sensations is complicated. It involves a molecular thermoreceptor called transient receptor potential melastatin 8 ("TRPM8"), which "express markers of nociceptors as well as non-nociceptors and have axonal properties indicative of both Aδ- and C- fibers."[194] A singular focus on simplified pain pathways can prevent recognizing the rich array of pain experiences and the similarities among these.

There is an iconography of pain at work here. Almost every discussion of pain uses the image of pain originating from something like a hammer causing injury to the hand.[195] If that is the sole image or primary icon, then other pathways are either ignored or treated as problematic. Whereas diagrams of sensory pain beginning in the hand abound, it is difficult to find any diagrams of pain stemming from loud noises or excessive cold.[196] A person's report of pain stemming from a hammer blow to the hand will differ from reports of pain from excessive noise or cold. Those differences, however, do not create different, and thereby problematic, categories of pain. Their neural circuitries are similar enough, especially in the context of the torture debate.

B. Mens Rea

The Inquisition rack icon captures the *actus reus* of torture. Yet, its use does not give a full account of torture, which also includes a mental element not captured by the icon. However, there is a distinct time advantage to using icons if only for determining the *actus reus*. Judges and juries would not take a great deal of time to compare the icon of torture to an incident under examination. Similarly, an iconographic approach should short-circuit the plentiful academic debates over the acts of torture. The attention, then, should shift away from the now readily recognized act of torture to the perpetrator. That is where the legal and academic focus should be.

All of the characterizations of torture considered so far highlight something often inadvertently overlooked in discussions of torture. Most analysts focus on the victim and not on the perpetrator.[197] They myopically set their sights on what torture does to the victim. Obviously, any moral assessment must ultimately include what it does to the victim.[198] However, it should be just as obvious that law and morality should point the accusing fingers at the perpetrator. What seems

193. *Id.*

194. Yoshio Takashima et al., *Diversity in the Neural Circuitry of Cold Sensing Revealed by Genetic Axonal Labeling of Transient Receptor Potential Melastatin 8 Neurons*, 27 J. NEUROSCIENCE 14147, 14148 (2007).

195. A Google search for images of pain pathways will yield countless numbers of diagrams of simple physical pain pathways.

196. *See* Møller, *supra* note 189, at 118, 199 (showing an example of the diagrams).

197. Cullen, *supra* note 170 ("The experience of the victim is of primary consideration in determining acts that constitute torture.").

198. Amnesty Int'l, *Amnesty International Report 1984*, at 286, AI Index POL 10/004/1984 (May 1,1984) (the 1984 Second Amnesty Report (at 10) was and remains one of the few that describes the training of torturers in Greece).

to matter the most for legal and moral analyses is that the perpetrator intended to inflict the pain. Yet, as shown below, once again, nuanced distinctions about the perpetrator's intent have clouded the torture debate.

1. Intent

a. Specific Intent

The United States issued an Understanding to the Torture Convention ("U.S. Understanding"), specifying that "intentionally inflicted" meant, "specifically intended."[199] An analysis of a recent attempt to defend this illustrates the extent to which these efforts and the position of the United States are misguided. In an article ironically entitled "Tortured Reasoning," the authors set out to show that a torture conviction requires that the accused inflicted pain or suffering for a purpose prohibited by the Convention.[200]

Indeed, Article 1 of the Torture Convention states,

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[201]

First, the article's authors confuse intent and motive, specific intent and special intent. The crime of genocide requires a special intent or motive.[202] Similarly, the Torture Convention lists a series of plausible institutional purposes or motives.[203] The phrase "for such purposes" indicates examples to follow for illustrative purposes. Interestingly, the purposes listed are activities and functions

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199. CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT, S. EXEC. REP. 101-30, at 9 (1990) (the Convention Against Torture ("CAT") was adopted into U.S. law through the Foreign Affairs Reform and Restructuring Act, Pub. L. No. 105-277, § 2242, 112 Stat. 2681. The implementing regulations are at 8 C.F.R. §§ 208.16-208.18 (2014)).

200. Oona Hathaway, et al., *Tortured Reasoning: The Intent to Torture Under International and Domestic Law*, 52 VA. J. INT'L L. 791, 795 (2012).

201. Torture Convention, *supra* note 3, art. 1, at 114.

202. Alexander K. A. Greenwald, Note, *Rethinking Genocidal Intent: The Case for Knowledge-Based Interpretation*, 99 COLUM. L. Rev. 2259, 2264 (1999).

203. *See* Torture Convention, *supra* note 3, art. 1, ¶ 1, at 114 ("[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person *for such purposes* as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind." (emphasis added)).

typically carried out by a state.[204] Therefore, it is a misreading of the plain language to attribute a requirement of specific purposes enumerated in the Convention.

Second, another plausible reading of the intent requirement is to distinguish deliberate from accidental acts. In a deportation case, the U.S. Third Circuit Court of Appeals read the intent requirement contained in the implementing regulations promulgated pursuant to the Torture Convention, not as a specific intent requirement but as simply excluding "severe pain and suffering that is the unintended consequence of an intentional act."[205] The Court concluded that the intent requirement "distinguishes between the suffering that is the accidental result of an intended act, and suffering that is purposefully inflicted or the foreseeable consequence of deliberate conduct."[206]

Third, the U.S. Understanding is either misleading or effectively empty. Regarding the former, the U.S. Understanding is a backhanded way of getting in a narrower interpretation of torture under the guise of special intent. According to State Department testimony, "the original [transmittal] package proposed an understanding to the effect that, in order to constitute 'torture,' 'an act must be a deliberate and calculated act of an extremely cruel and inhuman nature, specifically intended to inflict excruciating and agonizing physical or mental pain or suffering.'"[207] It was this severe sense of torture that the U.S. lobbied for during the drafting of the Torture Convention, a sense rejected by Convention.[208] Alternatively, the Senate Executive Report explained, "[b]ecause specific intent is required, an act that results in unanticipated and unintended severity of pain and suffering is not torture for the purposes of this Convention."[209] This only rules out unanticipated or unintended acts, and the notion of special intent is not needed for that.[210]

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204. *See id.* ("[W]hen such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a *public official* or other person acting in an *official capacity*." (emphasis added)).

205. Zubeda v. Ashcroft, 333 F.3d 463, 473 (3rd Cir. 2003).

206. *Id.*

207. *Convention Against Torture: Hearing Before the S. Comm. on Foreign Relations*, 101st Cong. 9 (1990) (Prepared Statement of Abraham D. Sofaer, Legal Adviser, Department of State).

208. Manfred Nowak, *What Practices Constitute Torture?: US and UN Standards*, 28 HUM. RTS. Q. 809, 821 (2006).

209. S. EXEC. REP. 101-30, *supra* note 199, at 14.

210. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Human Rights Council, ¶ 34, U.N. Doc. A/HRC/13/39/Add.5 (Feb. 5, 2010) (by Manfred Nowak) [hereinafter Special Rapporteur Report] (this would indeed exclude the following hypothetical case offered by the U. N. Special Rapporteur: "A detainee who is forgotten by the prison officials and suffers from severe pain due to the lack of food is without doubt the victim of a severe human rights violation. However, this treatment does not amount to torture given the lack of intent by the authorities.").

Fourth, the notion of specific intent has proven problematic even in U.S. criminal law. It was dropped completely in the 1981 Model Penal Code.[211]

Fifth, the idea of special intent lends itself to narrow interpretations. U.S. immigration courts, whose decisions the authors (Hathaway, Nowlan, and Spiegel) cite approvingly, have used this narrow reading in its removal cases.[212] However, this sense of special intent is not the same as the sense of special intent defended by the authors. It is yet another problematic sense, namely that in removal cases the petitioner needs to prove that he or she has been specifically targeted for torture upon return to his or her country.

The specific intent reading should be rejected. However, that rejection should not result in shifting the focus back to the victim.[213] Replacing the specific intent requirement with some other such as foreseeability will not resolve the problem.[214] The solution is to recognize the ambiguous role that intent plays in the Torture Convention, both designed to capture the mental state of individual state agents as well as the goals and policies of the state.

b. Institutional Intent

People are more likely to escape prosecution in international law for killing a thousand individuals than they would in national (municipal) law for killing one individual.[215] The justifications for this odd situation lie within the notion of criminal intent. An analysis of intent also will help clarify another paradox in international law. Individuals who directly carry out mass killings are less likely to face prosecution in an international criminal court than are officials far removed from the actual killings.[216] Resolving these paradoxes, however, depends upon a radical rethinking of the idea of intent in international criminal law. The need for this reassessment becomes apparent upon thinking about another troubling feature of international criminal law. To appreciate the problem, consider the following hypothetical questions. How would prosecutors have charged Adolf Hitler under the current genocide statute that requires proof of intent? Would they have to prove that Hitler had nearly six million intentional states of mind that led to the killing of nearly six million Jews? Something is wrong here. Obviously, there is a need to reevaluate the notion of intent in international law. As we shall see criminal intent in international law, unlike its counterpart in national law, has little to do with individual minds and a great deal to do with organizational policies.

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211. *See generally* Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681 (1983) (discussing the changes between common law criminal elements and the 1981 Model Penal Code).

212. *Matter of J-E-*, 23 I&N Dec. 291, 300-01 (B.I.A. 2002).

213. Mary Holper, *Specific Intent and the Purposeful Narrowing of Victim Protection Under the Convention Against Torture*, 88 OR. L. REV. 777, 779 (2009) (noting the U.S. reservation "shifted the focus in [Torture Convention] protection cases off the victim and onto the alleged torturer." (alteration in original)).

214. *Id.*

215. Hitomi Takemura, *Big Fish and Small Fish Debate: An Examination of Prosecutorial Discretion*, 7 INT'L. CRIM. L. REV. 677, 680 (2007).

216. THE LAWS OF GENOCIDE: PRESCRIPTION FOR A JUST WORLD, *supra* note 162, at 62.

Before proposing a new sense of intent for international criminal law, we need to show why the International Criminal Court should retain any sense of intent. The case for keeping an intent requirement begins with acknowledging the inevitable comparative judgments about the seriousness of crimes in any criminal justice system. No matter how distasteful it might seem, jurists and non-jurists judge some injustices as worse than other wrongs. We might say, for example, that we condemn all killings. However, we do not hesitate to judge the brutal slaying of a child as worse than the compassionate hastening of a cancer patient's death. These often unexamined, comparative judgments—particularly when seriously made in legal and moral debates—have important consequences for social policy. For many of the reasons set forth throughout our investigation, we regard intentional crimes as worse than non-intentional ones. If we rely on (often without debate) these comparative assessments, then we are more likely to approve of devoting more resources to the prosecution of those accused of committing intentional killings.

For murder convictions, national criminal laws require not only that defendants committed a criminal act but also that they had a "criminal mind."[217] To convict someone of murder under national criminal law, prosecutors must prove that the accused intentionally committed the act.[218] To convict someone of genocide, should international criminal law requires prosecutors to meet the same intent standard or, given the extreme nature of the crime of genocide, should it abolish the intent requirement altogether?.[219] Adopting the latter, strict liability approach would be a serious mistake. Stripping the element of intent from the crime of genocide would deflate the extreme moral condemnation that the crime of genocide warrants. However, if we keep the intent requirement for genocide, we can only do so if we accept a radically different sense of intent than the one used in national criminal law systems.

The idea of criminal intent in international law should not mirror the sense of intent that is so central to national criminal law. In the latter, a murder conviction requires that the accused individual had intent to commit the crime.[220] Cases of genocide involve more than one individual who commits the crime. It might seem appropriate, then, to require proof of intent for each one of these individuals. Yet, this move would seriously distort the nature of genocide. Genocide is not simply killings carried out by many individuals. Genocide is far more insidious than mass killing. It takes far more than the combined intents of a number of individuals to accomplish genocide. Genocide requires considerable organization. Genocide requires institutionalized organization. Acts of genocide involve institutions and organizations, typically governmental institutions and state organizations.[221] To capture the underlying horror of the crime of genocide, international criminal law needs to adopt a more institutionalized sense of intent, which we can label as

217. PHILIP L. REICHEL, COMPARATIVE CRIMINAL JUSTICE SYSTEMS 72 (1994).

218. *Id.*

219. THE LAWS OF GENOCIDE: PRESCRIPTION FOR A JUST WORLD, *supra* note 162, at 68.

220. REICHEL, *supra* note 217, at 72.

221. THE LAWS OF GENOCIDE: PRESCRIPTION FOR A JUST WORLD, *supra* note 162, at 63-64.

institutional intent. As we shall see this institutional sense of intent makes more sense when interpreted not as a state of mind but as an organizational policy.

When we interpret criminal intent as organizational policy, we resolve many of the oddities created by appropriating the idea of individual intent from national criminal law into international criminal law. Most importantly, if convictions for acts of genocide require prosecutors to prove individual intent, then prosecutors will have a difficult time separating the little fish from the big ones.[222] A small town café owner who suddenly mutated into a militant Bosnian Serb (Tadic) should not have the same degree of criminal responsibility for the acts, however vicious, that he committed as should the leaders of the militant factions that directly encouraged and guided the commission of them (Karadzic).[223] Otherwise, if prosecutors persistently and fully applied the idea of individual intent in these cases, then they would have to call for harsher punishment of the little fish than for the big fish since it is more difficult to establish individual intent for the big ones than for the little ones. In contrast, if prosecutors sought proof of institutional intent, then they would have to make the big fish the primary targets of their indictments.

Admittedly, the choice of institutional over individual intent also has disadvantages. It would lead to situations where prosecutors might let the little fish escape criminal responsibility entirely. In other words, the individuals closest to the criminal acts, that is, the little fish who actually carried out the horrifying deeds of slaughtering massive numbers of people, would most likely not face prosecution under international law. This dilemma warrants serious attention, which must await some further discussion. At this stage, suffice it to say, that we resolve the problem within the analysis of the appropriate punishments for the crime of genocide.

For international humanitarian crimes, individual intent and collective structure merge in the following way. The intent element for genocide applies to individuals in their capacity within authoritative structures.[224] The placement of intent within an authoritative structure moves the international crime of genocide away from the common understanding of crimes in national systems. States commonly construct relevant authoritative structures embedded within organizations.[225] The idea of authoritative structure helps to de-individualize the crime of genocide. In national criminal law, individuals have responsibility for murder in their capacities as individuals with a particular mental state.[226] In international law, individuals should have responsibility for genocide in their capacities as leaders and members of organizations.[227] Legal suits against organizations serve as a good analogue in state criminal systems. A suit against a

222. Takemura, *supra* note 215, at 684.

223. THE LAWS OF GENOCIDE: PRESCRIPTION FOR A JUST WORLD, *supra* note 162, at 64.

224. Thomas. W. Simon, *Defining Genocide*, 15 WIS. INT'L. L.J. 243, 248 (1996).

225. NINA H.B. JORGENSEN, THE RESPONSIBILITY OF STATES FOR INTERNATIONAL CRIMES 112 (2000).

226. REICHEL, *supra* note 217, at 72.

227. THE LAWS OF GENOCIDE: PRESCRIPTION FOR A JUST WORLD, *supra* note 162, at 136.

corporation might include a named individual both in the person's individual capacity and in her or his role within the organization.

For the crime of genocide, the "perpetrator" must have the requisite *mens rea*, but this mental state differs from the mental state required for individual criminal responsibility in state criminal law systems. The *mens rea* for individual responsibility has a relatively direct connection to the criminal act. A national criminal court wants to determine whether the accused thought about the act. The *mens rea* for genocide has a less direct, more mediated connection to the criminal act. An international criminal court should focus on determining not just whether the accused thought about the criminal act but whether the accused planned or knowledgeably acted according to a preconceived plan developed within an (often state sponsored) organization.[228]

The *mens rea* for genocide includes a knowledge test.[229] The defendants must have had the requisite intent in the sense that they had or should have had knowledge of the alleged crime.[230] The jurisprudence on intent for the crime of genocide has taken some odd turns on the knowledge issue. In *Akayesu*, the Tribunal for Rwanda made a questionable distinction between knowledge and intent.[231] Supposedly, under the Court's interpretation, individuals could know that their acts contributed to the destruction of a group and yet not have the intent or specific goal of destroying the group.[232] The intent requirement for the crime of genocide goes beyond a determination of an individual's actual or imputed knowledge. Courts should assess the individual's knowledge according to how the individual functioned within an organizational structure.[233] The structure consists of policies formulated according to procedures set forth in an organization. For example, presumptions about an individual's knowledge would vary according to the individual's formal and actual role in the organization.

Earlier we called this different kind of intent that underlies genocide's *institutional intent* to distinguish it from individual criminal intent and other forms of intent. An alternative idea of *structural intent* proves inadequate for a number of reasons. The term "structure" in the phrase "structural violence" refers to causal factors found in society.[234] Although the idea of structure meshes well with the emphasis on organizations, it does not adequately convey the necessary sense of agency. In fact, under some interpretations, use of the concept of structural intent would permit the complete abandonment of the ideas of agency and individual

228. William A. Schabas, *State Policy as an Element of International Crimes*, 98 J. CRIM. L. & CRIMINOLOGY 953, 966-67 (2008).

229. Alexander K. A. Greenawalt, *Rethinking Genocidal Intent: The Case for a Knowledge Based Interpretation*, 99 COLUM. L. REV. 2259, 2283 n.118, 2284-88 (1999).

230. *Id.*

231. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 520 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998), http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf.

232. *Id.* ¶ 541.

233. THE LAWS OF GENOCIDE: PRESCRIPTION FOR A JUST WORLD, *supra* note 162, at 73.

234. Paul Farmer, *On Suffering and Structural Violence: A View from Below*, 125 DAEDALUS 261, 261-62 (1996).

responsibility.[235] Similarly, the concept of collective intent is too diffuse and does not capture the highly structured forms of organization at work in genocide cases.

Scholars should pay closer attention to how to make sense of intent in cases of crimes like genocide. The laws of genocide require intent for a conviction.[236] The intent in question does not reduce to an individual intent or to the intent of a specified number of individuals. A determination of the intents of individual perpetrators, although relevant, does not determine the prosecution of individuals for the crime of genocide. A successful prosecution of an individual for the crime of genocide must prove the individual's complicity in the forming something more akin to a collective intent.[237]

Institutional intent for genocide forms roughly in the following way. First, consider that what makes a heinous act particularly reprehensible is it stemming from a well-formed but loathsome viewpoint and judgment about groups. This perception then begins to gel into an irrational disdain and completely unfounded hatred towards a group. The developing belief-system starts to combine with less spiteful but related past negative judgments about the targeted group.[238] When isolated harmful acts against members of the targeted group begin to recur with increasing frequency, an institutional intent may start to become evident. At first, the perpetrators appear to act independent of an external direction. However, it soon becomes clear that state-sponsored organizations are fomenting, directing, and solidifying the focus and structure of this hate. To summarize, we propose adopting the idea of corporate intent into international criminal law.

It might seem odd to devote so much space to a discussion of genocide in an Article on torture. However, one goal of this Article is to move the legal analysis of torture closer to that of genocide.

2. The State as Perpetrator

The analysis should focus not on an individual torturer but on the state as a torturer. William Schabas has made a compelling case for substituting state policy for the intent, *mens rea* requirement for the crime of genocide.[239] The Torture Convention occupies a middle position between individual and state criminal responsibility in that it make states indirectly responsible by holding its agents

235. THE LAWS OF GENOCIDE: PRESCRIPTION FOR A JUST WORLD, *supra* note 162, at 73.

236. Kai Ambos, *What Does "Intent to Destroy" in Genocide Mean?* 91 INT'L REV. RED CROSS 833, 834-35 (2009).

237. THE LAWS OF GENOCIDE: PRESCRIPTION FOR A JUST WORLD, *supra* note 162, at 73-74.

238. Robert J. Sternberg, *A Duplex Theory of Hate: Development and Application to Terrorism, Massacres, and Genocide*, 7 REV. GEN. PSYCHOL. 299 (2003).

239. *State Policy as an Element of International Crimes*, *supra* note 228, at 971 ("[If] there exists a State policy . . . then the inquiry shifts to the individual, with the central question being not the individual's intent, but rather the individual's knowledge of the policy. Individual intent arises, in any event, because the specific acts of genocide, such as killing, have their own mental element, but as far as the plan or policy is concerned, knowledge is the key to criminality.")

individually responsible.[240] Unfortunately, international law does not yet have mechanisms for state criminal responsibility.[241]

The torture debate is about states and about the law. There are many troubling things about the torture debate. Most analysts focus on the victim and not on the perpetrator.[242] Obviously, any legal and moral assessment must ultimately include what it does to the victim. However, it should be just as obvious that law and morality should point their accusing fingers at the perpetrator (the *mens rea*). But who is the perpetrator? What really matters, legally and morally, is not even that an individual perpetrator intended to inflict pain, but that a state perpetrator implemented a policy to carry out acts that constitute universal prohibitions in international law. In short, as an international crime, torture has close affinities to genocide. It is that analogy that should redirect the torture debate.

IV. UNIVERSAL WRONGS

Where an issue appears in an argument—its argument-place—affects the analysis of an issue. If an article begins with an assessment of the various arguments presented by those who deny the Holocaust, then the presenter has elevated the status of Holocaust denial. If, however, the presenter first provides a detailed, well-documented account of the litany of Holocaust horrors, then a footnote on Holocaust denial towards the end of the piece gives denial little credence. Similarly, the torture debate has become skewed by giving prominent argument-place to those who try to justify torture.[243] This observation, of course, does not excuse authors from the challenging task of demonstrating that torture constitutes a universal wrong. It merely highlights the difficulty readers should have in giving credence to torture justifications after having been persuaded by the iconography of torture.

A. Torture as a Peremptory Norm[244]

240. The Coxford Lecture, *supra* note 173, at 270 n.6.

241. *See* Aditi Bagchi, *Intention, Torture, and the Concept of State Crime*, 114 PENN. ST. L. REV. 1, 4 (2009) (advocating to abandon the intent requirement altogether for holding states responsible for the crime of torture).

242. Lisa Yarwood, *Defining Torture: The Potential for Abuse*, 2008 J. INST. JUST. INT'L STUD. 324, 328 (2008).

243. MATTHEW H. KRAMER, TORTURE AND MORAL INTEGRITY: A PHILOSOPHICAL ENQUIRY 243 (2014).

244. *See* Universal Declaration of Human Rights, art. 5, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug 12, 1949, 75 U.N.T.S. 135; European Convention on Human Rights, art. 3, Nov. 4, 1950, 213 U.N.T.S. 222; International Covenant on Civil and Political Rights, art. 7, Dec. 16, 1966, 999 U.N.T.S. 171; Inter-American Convention on Human Rights, art. 5, Nov. 22, 1969, 1144 U.N.T.S. 123; African Charter on Human and People's Rights, art. 5, Jun. 27, 1981, 1520 U.N.T.S. 217; Committee on Civil and Political Rights, General Comment 20, ¶ 3, U.N. Doc HRI/GEN/1/Rev. 1 at 30 (1992); First U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Standard Minimum Rules for the Treatment of Prisoners, art. 31-34, 1955.

What did the drafters of the Torture Convention have in mind?[245] The immediate impetus for moving forward with the Torture Convention came from the efforts of Amnesty International. In its 1973 Report, it clearly recognized the gravity of torture in that there was no act that was "more a contradiction of our humanity than the deliberate infliction of pain by one human being on another, the deliberate attempt over a period of time to kill a man without his dying."[246] Article 2 of the Torture Convention states unequivocally that, "[n]o exceptional circumstances whatsoever . . . may be invoked as a justification of torture."[247] This absolute prohibition remained throughout the drafting stage of the Torture Convention.[248]

"Why, then, given the rhetorical, moral, and legal status of this prohibition, is torture being debated?"[249] Why, indeed?[250] Even the most jaded pessimist (I hope!) would have difficulty imaging a newly emerging, widespread debate among scholars and the public over whether emergency conditions justify genocide. In a disagreement with Mother Teresa, who contended that abortion was genocide, Elie Weisel quipped that at least abortion was debatable.[251]

The Torture Convention prohibits torture absolutely: "No exceptional circumstances whatsoever, whether a state of war or threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture."[252] However, the "no exceptional circumstances" provision does not apply within the Torture Convention to cruel, inhuman, or degrading treatment.[253] Yet, the absolute ban on both practices remains intact if the Torture Convention is read in conjunction with the International Covenant on Political and Civil Rights because under Article 4 of the Covenant, neither torture nor cruel, inhuman, or degrading treatment can be justified by a public emergency.[254]

B. Justifications: Unjustifiable and Unjustified Acts

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245. *See generally* Mathew Lippman, *The Development and Drafting of the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, 17 B. C. INT'L & COMP. L. REV 275 (1994) (unfortunately, not a very revealing piece).

246. Amnesty Int'l, *Report on Torture*, at 21, AI Index ACT 40/001/1973 (Jan. 1, 1973).

247. Torture Convention, *supra* note 3, art. 2.

248. Iveta Cherneva, *The Drafting History of Article 2 of the Convention Against Torture*, 9 ESSEX HUM. RTS. REV. 1, 7-8 (2012).

249. Rosemary Foot, *Torture: The Struggle over a Peremptory Norm*, 20 INT'L. REL. 131, 132 (2008).

250. *See* Omer Ze'ev Bekerman, *Torture: The Absolute Prohibition of a Relative Term: Does Anyone Know What is in Room 101?*, 53 AM. J. COMP. L. 743 (2005).

251. Elie Wiesel & Merle Hoffman, *I am against Fanatics*, *in* ON PREJUDICE: A GLOBAL PERSPECTIVE 546, 549-50 (Daniela Gioseffi ed., 1993).

252. Torture Convention, *supra* note 3, art. 2, ¶ 2, at 114.

253. Torture Convention, *supra* note 3, art. 16, ¶1, at 116 ("Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.").

254. *See* J. HERMAN BURGERS & HANS DANELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE 124 (1988).

Genocide and torture do differ, but not in a way that undermines the universal prohibition, the preemptory norm status of torture. Some acts are unjustifiable while others are unjustified. An act is *unjustifiable* if there is no coherent possible world where someone could or would defend the act in terms of some rationally defensible moral theory.[255] An act is *unjustified* if there are no actual circumstances under which that acts would be justified within some defensible moral theory.[256] Genocide is unjustifiable. There are not any hypothetical circumstances that provide an exception to the universal prohibition against genocide. Unlike almost any other crime, genocide is an irrevocable status crime.[257] In an act of genocide, people are killed for what (whom) they are perceived to be, that is, for their group membership and not for any act that they have allegedly committed or are about to commit. This makes genocide unjustifiable.

Torture comes very close to genocide in that it is difficult to conceive of actual circumstances where it would be justified. However, torture is not unjustifiable. As the Ticking Bomb scenario[258] indicates, there are hypothetical circumstances that might justify torture. However, torture is unjustified; that is, there are no actual circumstances that would constitute exceptions to the universal ban on torture.[259]

Take the following theoretically plausible examples of morally reprehensible acts. First, newborn babies could be strapped to car bumpers to reduce traffic accidents and fatalities. Second, the twin experiments, conducted by Dr. Mengele, the Nazi physician, during World War II yield life-saving results.[260] Third, Wang Weiqin's killings of the Li family members stopped the cycle of revenge killings.[261] These acts might constitute acceptable exceptions in some possible world, but they should not qualify as exceptions in this world. These acts, like some situations with torture, constitute hypothetical circumstances that should be legally excluded if there are any hopes of making this a moral world.

Genocide is unjustifiable in that it does not admit any exceptions, even hypothetical ones. Torture is unjustified in that it does not admit any practical

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255. Thomas W. Simon, *Genocide, Evil, and Injustice: Competing Hells*, *in* GENOCIDE AND HUMAN RIGHTS, A PHILOSOPHICAL GUIDE 65 (John K. Roth ed., 2005).

256. *Id.*

257. *See* THE LAWS OF GENOCIDE: PRESCRIPTION FOR A JUST WORLD, *supra* note 162, at 84.

258. *Defusing the Ticking Bomb Scenario: Why we must say No to torture, Always*, ASS'N FOR PREVENTION TORTURE (2007), http://www.apt.ch/content/files_res/tickingbombscenario.pdf ("Suppose that a perpetrator of an imminent terrorist attack, that will kill many people, is in the hands of the authorities and that he will disclose the information needed to prevent the attack only if he is tortured. Should he be tortured?").

259. Henry Shue, *Torture in Dreamland: Disposing of the Ticking Bomb*, 37 CASE W. RES. J. INT'L L. 231, 231 (2006).

260. LUCETTE. M. LAGNADO, CHILDREN OF THE FLAMES: DR. JOSEF MENGEL AND THE UNTOLD STORY OF THE TWINS OF AUSCHWITZ (1992) (explaining Mengele would perform massive blood transfusions from one twin to another).

261. BROOK ET AL., *supra* note 72, at 249.

exceptions. The Ticking Bomb scenario mistakenly treats torture as an act that includes hypothetical exceptions.

To justify torture involves finding situations where torture becomes permissible. The Ticking Bomb has become an icon in the torture debate.[262] The issue of justifications appears at the end of this Article, which is exactly where it should appear overall in the torture debate. Questions of justification have a far lesser impact when they appear after the iconography of torture has done its work. Permitting the Ticking Bomb scenario to sit at the table will result in, what one commentator describes as perpetrators hearing ticking bombs everywhere.[263]

V. CONCLUSION

"Law is not brutal in its operation. Law is not savage. Law does not rule through abject fear and terror, or by breaking the will of those whom it confronts. If law is forceful or coercive, it gets its way by non-brutal methods, which respect rather than mutilate the dignity and agency of those who are its subjects."[264]

There are many troubling things about the torture debate. Most analysts focus on the victim and not on the perpetrator. Obviously, any legal/moral assessment must ultimately include what it does to the victim. However, it should be just as obvious that law and morality should point their accusing fingers at the perpetrator (the *mens rea*). But who is the perpetrator? What really matters, legally and morally, is not even that an individual perpetrator intended to inflict pain, but that a state perpetrator implemented a policy to carry out acts that constitute universal prohibitions in international law. In short, as an international crime, torture has close affinities to genocide. It is that analogy that should redirect the torture debate.

Iconography provides a way to reorient the torture debate to its original, saner grounds. The rack has served, serves, and should serve more prominently as the icon of torture. It clearly highlights the central wrong of torture—an institutional or state agent inflicting physical (in a broad sense) pain on a helpless individual. A prosecutor or judge needs only to compare pictures of water boarding or other ingenious devices to the rack icon to determine their obvious similarity. Torture is not a matter of subtle definitional distinctions. Torture is a blatant, odious scourge that is easy to recognize with open eyes, unobscured by conceptual nuances.

The circle of international crimes has an affinity with the circle of rights. In recent centuries, the circle of rights has expanded dramatically. For many past centuries, a narrowly circumscribed circle of rights excluded certain groups, including slaves and women. That circle has expanded to include these and other groups. Some continue to advocate for expanding the circle even farther to include animals. International law continues to expand the circle of universal, exceptionless prohibitions, beginning with genocide and reaching out to torture.

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262. Michael Dorf, *Renouncing Torture*, *in* THE TORTURE DEBATE IN AMERICA 247, 250 (Karen J. Greenberg ed., 2006).

263. *Id.*

264. *Torture and Positive Law: Jurisprudence for the White House*, *supra* note 63, at 1726.

Unfortunately, the current debates over torture represent a backlash against this expansion. Indeed, one very troubling thing about the torture debate is that it is still being debated.