

CHAPTER 1

Introduction

One of the most important ways in which to pulverise revealing relationships is to isolate the event which was the point of departure from the rest of the activity which the event is a part of. In other words, it becomes important, so to speak, to cut the event out of the fabric in which it exists.

Thomas Mathiesen, *Silently Silenced*¹

THIS PASSAGE HAD NEITHER TORTURE nor law especially in mind when it was penned. Yet it speaks to much of what is to follow, to the failure to situate events in context, whether intentionally or not. In this introduction, I articulate the broader contextual contours of (and for) the anti-torture field. In setting the scene for subsequent chapters, I identify implications and complications which flow from the extent to which context is ‘let in’ to legal considerations. To be clear, I do not argue that context is wholly absent but that it is selectively present – serving particular ends. I point in directions that pack the potential to enrich ‘law and torture’ practice and research.

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Law and medicine dominate contemporary understandings of torture.² Law (especially international human rights law) gives us the words to

¹ Thomas Mathiesen, *Silently Silenced: Essays on the Creation of Acquiescence in Modern Society* (Waterside Press 2004), examines how events are downplayed in public discourse through different but interdependent devices of being individualised, isolated, exceptionalised and normalised.

² This is an observation discussed in Andrew M Jefferson, ‘Situating Perspectives on the Global Fight against Torture’ in Sarah Armstrong, Jarrett Blaustein and Alistair

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frame our notions and norms in the form of confident definitions and prohibitions on what is torture, inhuman and degrading and that it is impermissible. The law remains revered as the ‘privileged instrument for moral improvement’³ in interventions and responses to all that we find excessive in the use of state violence. The definition of torture under international law, and its conventional interpretation, has become viewed ‘as sacrosanct, often without reference to how narrow it is and instead presented as epistemological fact’.⁴ The legal definition has even won out over attempts by doctors to define the reference point for the phenomenon.⁵

Medicine (and increasingly psychology) offers tools to translate, corroborate and ‘certify’ allegations of torturous suffering in the eyes of the law, that the victim in question, indeed, suffered what they allege to have suffered. This is not altogether unexpected, as medical science is ‘positioned as the embodiment of virtue, the triumph of science over superstition where accuracy, certainty and neutrality have replaced expediency and guesswork in healing physical and psychological pain’.⁶ This is all we are expected to know. By virtue of their tasks in this effort towards eradication, law and medicine are imbued with a beneficence, that they are well tested and on the side of the well intentioned. We are encouraged to ascribe to their agendas and to trust in their respective and interlocking authorities. This leads us to assume that the broader questions have been resolved, that we have arrived at a consensus on the concept and its

Henry (eds), *Reflexivity and Criminal Justice: Intersections of Policy, Practice and Research* (Palgrave Macmillan 2017), as dominating the discourse but operating at a distance from the realities on the ground. See also Metin Başoğlu (ed), *The Definition of Torture in International Law: An Interdisciplinary Approach* (Oxford University Press 2017), ‘Introduction’, xxiv.

³ Samuel Moyn, *The Last Utopia: Human Rights in History* (2010) 211, as quoted in Tobias Kelly, *This Side of Silence: Human Rights, Torture, and the Recognition of Cruelty* (University of Pennsylvania Press 2012) 11.

⁴ Victoria Canning, *Torture and Torturous Violence: Transcending Definitions of Torture* (Bristol University Press 2023) 14.

⁵ In its 1975 *Declaration of Tokyo*, the World Medical Association defined torture ‘as the deliberate, systematic or wanton infliction of physical or mental suffering by one or more persons acting alone or on the orders of any authority, to force another person to yield information, to make a confession, or for any other reason’.

⁶ Joe Sim, *Medical Power in Prisons: The Prison Medical Service in England 1774–1989* (Open University Press 1990) ix–x.

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corroboration, free of values (except that torture is morally unacceptable). Our means and modes of determining torture (as inhuman and degrading) are thus ‘cut out’ and abstracted from their social and political contexts, which are largely left out of our view and purview.⁷

With an interest in advancing the identification and eradication of torture through medico-legal means, advocates, academics and adjudicators alike (to have come before me) have devoted and exerted their precious energies and resources to primarily developing legal doctrine. These actors have been given ‘the right to define’ the categories with which we work.⁸ Their authority has been used to promote law as inherently good, devoid of doing wrong when strictly followed – encouraging the celebration of law’s by which I primarily mean international human rights law’s supposed beneficence in the face of its failings.⁹ Many of the arguments directed at the international stand to be amplified against national criminal law, through which the prohibition of torture finds its direct force.¹⁰

From their liberal standpoint, that is, torture’s prohibition has come to represent ‘a legal archetype – a provision which is emblematic of our larger commitment to nonbrutality in the legal system [and] our determination to sever the link between law and brutality, between law and terror, and between law and the enterprise of trying to break person’s will’.¹¹ Law, in this schema, remains a benevolent, malleable

⁷ I primarily pitch my arguments against the law and peripherally against medicine, but I view the anti-torture field as much wider. A multitude of relevant individual actors populate the field: victim-survivors, police, prison officers, prosecutors, advocates, academics, adjudicators, activists, journalists, therapists, diplomats, detention monitors, ombudspersons, rapporteurs and documentation specialists. These actors normally collaborate, working in institutions as universities, civil society organisations and coalitions, international non-governmental organisations, courts and committees, forensic institutions, national, regional and international preventive mechanisms, ministries (of interior, health and foreign affairs), national human rights institutions and rehabilitation clinics.

⁸ David Garland and Peter Young (eds), *The Power to Punish: Contemporary Penalty and Social Analysis* (Heinemann 1983) 4.

⁹ Lutz Oette, *The Transformation of the Prohibition of Torture in International Law* (Oxford University Press 2024) 141, has also recognised that ‘lawyers and others working in the anti-torture movement risk being professionally prone to celebrating the role of law and international standards’.

¹⁰ I am indebted to Mattia Pinto for his invaluable scholarship on this point.

¹¹ Jeremy Waldron, ‘Torture and Positive Law: Jurisprudence for the White House’ (2005) 105 *Columbia Law Review* 1681.

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and perfectible institution. There is an entrenched assumption in law, as in international law, that it *naturally*, *necessarily* and *progressively* opposes violence. It is this assumption, based on the ‘idea that juridification is automatically associated with progress’,¹² that sees precious energies directed towards regulation and litigation. That law represents the negation of violence (with torture only occurring upon the suspension of proper legal precautions) is the predominant view amongst legal practitioners (a position somewhat oblivious to the reality that law aids in both the infliction and inhibition of violence). Why else would we see a perennial proliferation of legal standards, if not because of a fervent belief in law’s beneficence?

Such belief in principles and processes is central to the reproduction of any field. In anti-torture work, as more broadly in human rights work, practitioners find it incumbent to espouse the law’s more aspirational and remedial qualities in providing for prevention and redress. Accepting this inherited origin story (that which renders law a beneficent bulwark against violence) gives rise to profound implications in how practitioners work in the anti-torture field: ceaselessly seeking to inform norm-setting processes with empirical data; compiling expert evidence on individual victims to submit before courts for full recognition of harms and capacitating colleagues elsewhere to do the same.¹³ If only more evidence is brought before the court, if only the judge is made to understand in good faith and be faithful to the letter of the law as strictly as possible, as dictated by rules of interpretation, and so on. This has seen a great energy spent on sharpening and supplementing evidentiary technologies of documentation like the *Istanbul Protocol*.¹⁴ Should a legal regime facilitate torture and impunity, more self-assured legal corrections are prescribed and deployed in terms of definitional tweaks or

¹² Tilmann Altwicker and Oliver Diggelmann, ‘How Is Progress Constructed in International Legal Scholarship?’ (2014) 25 (2) *European Journal of International Law* 439.

¹³ UN Special Rapporteur on Torture (SRT), Report (2020) A/HRC/43/49 [38]: emphasised the ‘practical importance of continuing to clarify the fault lines between lawful non-coercive investigative techniques and prohibited coercive interrogation’.

¹⁴ UN Office of the High Commissioner for Human Rights, *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (‘Istanbul Protocol’) (2022).

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otherwise foreclosing the possibility of defences or derogations, to name but a few stock responses. Upon this schema, the dominant duopoly is imbued with the power to autonomously mark an act with a stigma in the face of state interests. The culmination of these efforts is relied on to proceed to eradication – however incrementally. It is this dominant paradigm, which has evaded meaningful scrutiny, to which I speak in this book.

Questions, nevertheless, abound for the curious: How does one make sense of the prevalence of torture despite its near-universal prohibition and condemnation? How are we to see and make sense of law's failings? Thus left out of this medico-legal duopoly is the question of how law and medicine have come to know what they claim to know. Also left out is an account for the exclusions and failings produced through this nexus. The exceptions, rare though powerful, are presented towards reflecting on received stories circulating in the field. In his recent book, for example, prominent practitioner-academic Malcolm Evans observed that UN 'treaty bodies often end up making utterances that are either devoid of context, content or both ... some are pitched at so high a level of generality that it is almost impossible to know what they really mean or what their recipients are really meant to do to achieve them'.¹⁵ Elite reflections do not get more damning.

I admit to painting with broad strokes so far. I will come to argue that the medico-legal duopoly, with its exceptions, has not been a harmonious one. There remains a dialectic tension in the anti-torture field,¹⁶ particularly between law and medicine, which continue to struggle for (or contest) the legal construction (interpretation or qualification) of torture. Legal professionals remain key in shaping the selection, complexion and disposition of cases. The judgments and decisions handed down are not always, with the exception of dissents, explicit or reflective about the consternations amongst legal actors. Legal professionals amongst themselves contest narrow and expansive interpretations and resist the demands of non-legal expertise. Health professionals bemoan and begrudge the reductivity espoused by legal professionals.

¹⁵ Malcolm Evans, *Tackling Torture: Prevention in Practice* (Bristol University Press 2023) 8.

¹⁶ In short, the conception of the field foregrounds notions of contestation over interpretive domination and, in turn, the concealment of that contestation through linguistic and symbolic strategies.

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Fuelled by the failings of the law to address its blind spots and deliver on its key promises, my own drive led me in the opposite direction – not of *correction* but of *critique*, not to see its further doctrinal development but to urge its disavowal and distrust – towards doing things differently. In understanding how violence is named (and my co-optation in that practice of naming), commitment to critique urged me to ‘first settle the question of which framework is naming violence, through what erasures, and for what purpose’.¹⁷ Frames, I too had failed to see, did not neutrally ‘exhibit reality, but actively participate[d] in a strategy of containment, selectively producing and enforcing what will count as reality ... always keeping something out’.¹⁸ In other words, by being asked to argue and assess state-sanctioned violence by the state’s own abstractions,¹⁹ my received frames were left unquestioned unreflectingly. Better understanding my operative frames has unavoidably led me to the humanities and social sciences. In addition to drawing on a wide array of ideas from scholars from those traditions, I have relied heavily on my own experiences and observations as a practitioner-academic. However fraught it might have been to do so, this book has been written partly out of disillusionment, disappointment and despair, and to extend hope to those there now.

Getting a better grip on the everyday objects of ‘law and torture’, in its conceptual and practical modes, has required a wider (and richer) discourse – with the aid of critical scholarship, which already exists (and in some cases has existed for decades). Prison studies, sociology and anthropology of state-sanctioned violence, law and emotion, state crime scholarship, phenomenological and feminist approaches to violence, histories and medical anthropologies of pain all stand ready to be connected. With a view to this broader scholarship and experience, this book anticipates an additional litany of questions: What explains the conceptual indeterminacies over torture’s definition – rendering its evolving interpretation as less than linear? What explains the resistance of state authorities and human rights courts alike to ascribe full value

¹⁷ Judith Butler, *Frames of War* (Verso 2009) 26.

¹⁸ Ibid xiii.

¹⁹ International human rights law is state-centric in its substance and practice.

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to scientific evidence of torture's harms? Why are some forms of state violence accepted as inherent and lawful and others not? How equipped are we really to gauge certain suffering, given its supposed unknowability as supposed by theory? For those curious or critically oriented, these are not idle or moot questions.

Responding to these frustrations, the aims of this book will be three-fold: (i) to initially identify the doctrinal 'brackets' (limits) of dominant legal scholarship on torture, inhuman and degrading treatment; (ii) to then identify the extra-legal dynamics that are often placed outside these brackets and, therefore, anti-torture practice and research; and (iii) to advance a reflexive and context-sensitive means of practising and researching 'law and torture'. In doing so, this book does not aim to entirely de-centre the law but rather de-centre the privileged judge-centric,²⁰ liberal-legal and state-deferential positions, which naturalise torture as whatever it is *legally* qualified to be – to politicise the depoliticised.²¹ Neither is the aim to de-centre the negative moral value of torture but rather to emphasise its continuity with other harmful state practices born out of police and prisons and beyond (currently shielded but which should be equally and radically scrutinised in anti-torture discourse).

In all, I argue that conventional (medico-legal) constructions of torture, inhuman and degrading treatment, in practice as in research, have evaded serious interdisciplinary engagement and socio-legal examination due to disciplinary bracketing. This is not to say that the figure of the societal is dismissed outright by doctrine: torture is oft-described as 'shocking the conscience' or as causing 'moral outrage' as informed by present social attitudes and structures. Much is left unreflected in the wake of such phrases and adages. What we are left unclear about is whose conscience (is it collective?) and how is that to be constituted and quantified? What can be said with any degree of precision here – theoretically or empirically? Does the legal imagination remain a black box of entangled

²⁰ For a broader critique on judge-centricity, see Fuad Zarbiyev, 'On the Judge Centredness of the International Legal Self' (2021) 32 (4) *European Journal of International Law* 1139.

²¹ In the tradition of Judith Shklar, *Legalism: Law, Morals, and Political Trials* (Harvard University Press 1986).

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reasoning and dynamics impervious to clarity and predictability? The ‘law and torture’ research raising and addressing such questions is fringe and too few. In any case, these are unavoidable entry points for the critically and socio-legally minded.

Through holding ‘context as key’, I aim to identify vanishing points in what I call ‘law and torture’ practice and research. I am driven to pushing the field, which stands as my central professional care and concern, from doctrinal to critical considerations. As in previous work, I want to introduce readers to what lies beyond the comforting ‘brackets’ towards overlooked entry points and resources. Whilst critical scholars have cleared the ground to ‘widen the apertures’ in important ways,²² I aim to revisit and revamp the connections made in that work for the newly arrived, resource-poor, *legally* oriented practitioner or researcher. As such, this book offers solace and solidarity to the curious and critically oriented, towards reflexivity and rupture.

1.2 QUANTIFYING LAW’S CONTEXT

To begin to answer these questions entails putting pain into cultural context, where the experience of the person in pain relates to socially instituted and culturally embedded systems of inclusion and exclusion, along lines of gender, age, class, race and species. ... Pain is only pain where it accords with tacit rules for the acceptable expression or the experience of pain. And to this end, the question of whose pain is authentic is a question of power.²³

To be sure, torture is more than pain (or, interchangeably, suffering²⁴). Pain, however, is a good starting point to explore ‘extra-legal’²⁵ dynamics in this terrain. Those who have previously tended to the nexus of ‘law and torture’ with adequate curiosity or scepticism will have noted that questions already invoked have been treated with minimal reflection.

²² The subtitle (‘widening the apertures’) originates from a recurring phrase in Danielle Celermajer, *The Prevention of Torture: An Ecological Approach* (Cambridge University Press 2018), which articulated to me a rigorous and relevant logic at a time of need.

²³ Rob Boddice, *Pain and Emotion in Modern History* (Palgrave 2014) 5, 14.

²⁴ Broadly, alternatively: ‘harm’, ‘injury’ or ‘violence’.

²⁵ The dichotomy between legal and extra-legal is fraught but used as a pedagogical shortcut.

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An early triplet already at reading the universal definition of torture might be as follows:²⁶ What is severe pain? How should we understand its gradations? How much of it ought to legitimately figure in state practices? In answering these as other foundational concerns, context becomes key. Context²⁷ helps define and, as we'll come to reflect, to distort and deny our experiences and understandings of pain, torturous or otherwise, with our experience also coming to define context. Textual, conceptual and experiential registers (our words, thoughts and feelings), for instance, dictate the expressibility and communicability of pain. This is a dialectical interplay – implicating and intertwining individual, institutional and sociopolitical (micro, meso and macro) processes pertaining to the production of knowledge. I will explain what I mean.

As one scholar on pain has written, 'there is no suffering that does not entail a social appraisal and, by extension, a form of expression linked to cultural guidelines and expectations'.²⁸ Cultural context is deemed key to ascribing meaning to any experience, yet alone one that entails suffering. Whether we call any form of violence 'torture', 'inhuman' or 'degrading' treatment readily indicates an interplay between the law and its sociocultural, scientific and political aspects. This has led another scholar to observe these categories to 'essentially reflect subjective judgements that are inevitably determined to a significant extent by culturally shaped perceptions of what constitutes severe mental pain or suffering'.²⁹ Context, cultural as others, remains inescapable. It informs what we come to understand to be legitimate pain and punishment – and, by extension, what lies beyond in what is considered 'torturous'. The law here is entrusted as the proxy for capturing and consolidating these sociocultural and political positions.

How law's actors (namely, its advocates, academics and adjudicators) conceive of torture as informed by those contexts is hazy in reality. Legal actors busy themselves making sense of this context – which most often

²⁶ UN *Convention against Torture* (1984), article 1.

²⁷ Lois Presser, *Unsaid: Analyzing Harmful Silences* (University of California Press 2023) 145, takes context to mean the 'circumstances surrounding and impinging on events, actions, and experiences'.

²⁸ Javier Moscoso, *Pain: A Cultural History* (Palgrave 2012) 56.

²⁹ Başoğlu (2017) 11.

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is left inadequately examined on the face of legal decisions. These actors have primarily drawn on legal standards and medico-legal expertise to make sense of the allegations before them – in assessing the gravity and veracity of suffering as well as to situate that in its extra-legal context. Precedents are dusted off and repeated, standards are identified and similar cases are compared and differentiated. These actors, therefore, have turned the task into something technical – concerned with blinkered assessments of elements such as severe pain, purpose, intent, necessity and officiality. Medico-legal evidence, that which is accepted as ‘objective’, is an accepted albeit subsidiary aid. This aid, as I will argue, has not convincingly handled this context. At its most impoverished, the law ‘pretends to have no history and no context’, particularly of its original and operational relationship to violence.³⁰ Legal instruments, their interpretations, as animated by expert evidence, albeit abundant, have brought us only so far.

Although not always the case nationally³¹ or internationally,³² adjudicators have come to formulaically claim to have examined the relevant context or the ‘totality of the circumstances’,³³ but this is never as exhaustive as presented. It is selective, and that selection, although it is given the impression of ‘totality’, magnifies the weight attributed to a normally predetermined finding.³⁴ There are, in fact, four significant assumptions directing and delimiting the contextual intake of a conventional legal approach: ‘1) that torture is an issue of detention and interrogation; 2) that political or security detainees are archetypal victims

³⁰ Bryan S. Turner, *The Body and Society* (3rd ed, SAGE 2008) 2–3.

³¹ See *Hutto v. Finney* (1978) 437 U.S. 678, where the USSC first advanced assessing Eighth Amendment cases in the ‘totality of conditions’.

³² Antonio Cassese, ‘Can the Notion of Inhuman and Degrading Treatment Be Applied to Socio-Economic Conditions?’ (1991) 2 *European Journal of International Law* 143.

³³ References to ‘the totality of the acts of aggression and the conditions in which the State deliberately put the inmates’ as per *Cantoral-Benavides* [96] and *Castillo-Petruzzi* [197]; ‘on the totality of evidence and material’, ‘having regard to the entire circumstances of the case’ per *Ireland v. UK* [1978] ECtHR 5856/72 [167].

³⁴ A version of this is what Mariana Valverde, ‘Theoretical and Methodological Issues in the Study of Legal Knowledge Practices’ in Austin Sarat et al (eds), *How Law Knows* (Stanford 2007) 85–86, calls ‘exemplary excerpting’, the selective appropriation of broader material elsewhere and presented as being representative, with ‘a bit that is cut and pasted automatically becomes exemplary’.