

Effective Legal And Regulatory Mechanisms for Reducing Torture and Custodial Abuse by Police

Mark S. Berlin

Assistant Professor of Political Science

Marquette University

mark.berlin@marquette.edu

Prepared for the National Academies of Sciences workshop on
Evidence to Advance Reform in the Global Security and Justice Sectors:
Workshop #3: Effective Policies & Practices for Police Use of Force to Promote
the Rule of Law and Protect the Population
October 20 and 22, 2021

Using law and regulations to reduce state violence

Formal laws and regulations are less effective at combatting abuses that are directed or supported by political leaders for political purposes (aka “*repressive*” abuses) and more effective for those committed by individual police officers on their own initiative for their own interests (aka “*oppressive*” abuses)

Most daily torture around the world is oppressive and occurs in all regime types

Oppressive torture is made possible by structural autonomy of police (“agency slack”)

Effective legal and regulatory mechanisms to reduce oppressive torture

All involve reducing the motive or opportunity to commit abuse:

Detention and procedural safeguards (Carver and Handley 2016; Magaloni and Rodriguez 2020)

- E.g. limits on time suspects can be detained before seeing a judge, required notification of family members of arrest, access to a lawyer, mandated videotaping of interrogations, prohibiting use of evidence gained through torture

Regulating interrogation methods (Barela et al. (eds.) 2020)

- E.g. mandating use of information-gathering approaches over accusatory approaches

Third-party monitoring (Welch 2017; Linos and Pegram 2017; Hu and Conrad 2020)

- International, national, and sub-national forms

The importance of torture criminalization:

Overview of findings

Criminalizing torture reduces torture, but only when torture laws meet the standard codified in the UN Convention against Torture (CAT)

Criminal law is more effective at deterring torture than constitutional law or treaty ratification because only criminalization targets calculus of frontline perpetrators

Criminalization does so by increasing the credible threat of material and social costs from using torture

How criminalization increases credible threat of punishment for torture

I. Strengthens legal basis and closes loopholes for prosecuting torture (aka “prosecutorial deterrence”)

- In contrast to alternative offenses, which may...
 - fail to cover some abusive conduct, e.g. mental torture
 - fail to impose liability on official actors (i.e. police)
 - be subject to short sentences or short statutes of limitations

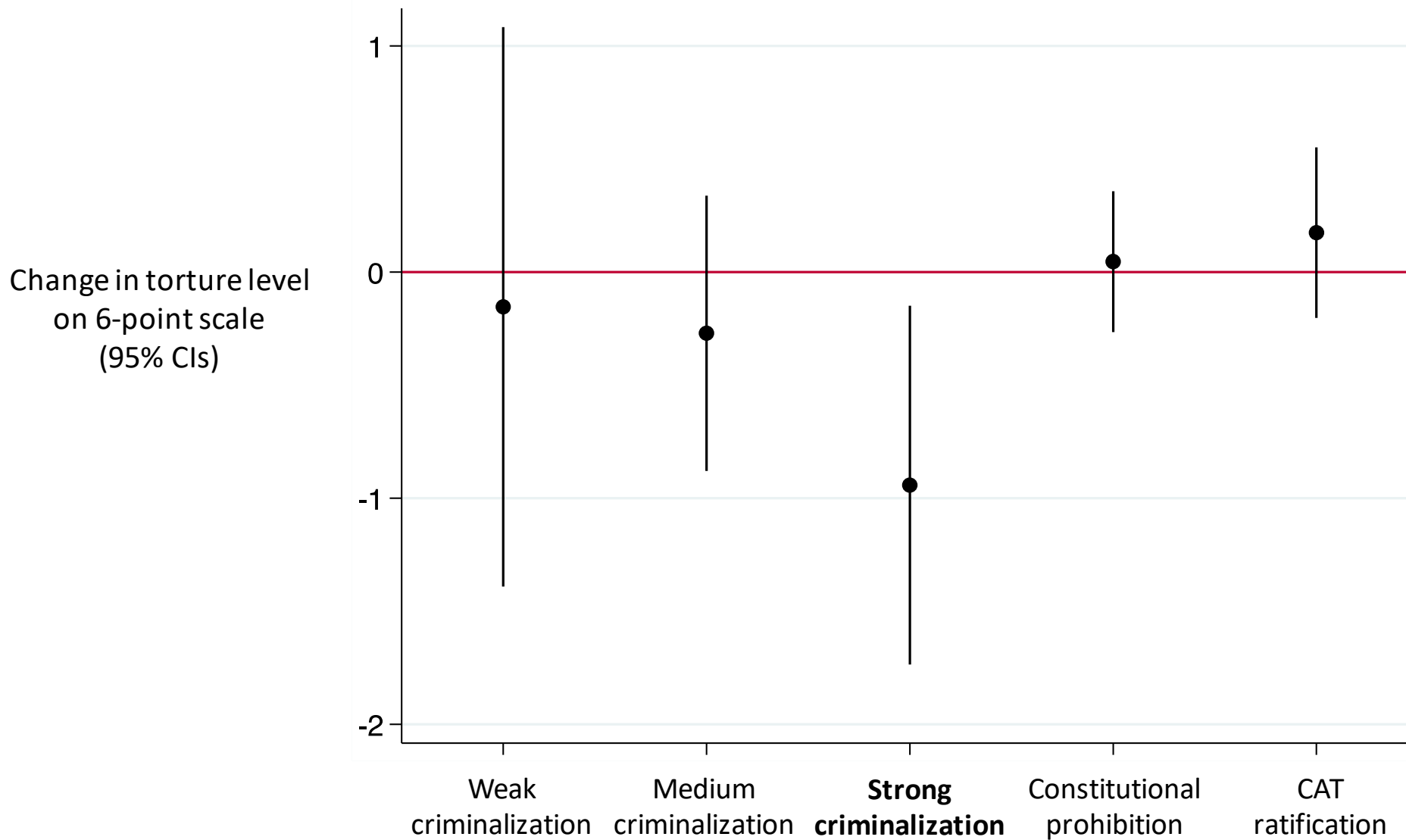
II. Increases stigma around torture (aka “social deterrence”)

- Individual level: criminalization alters beliefs of moral status of torture
- Collective level: criminalization alters what officers believe others believe

Importance of criminalization beyond deterrence

Can provide a basis for data collection on complaints, investigations, prosecutions, etc., that can inform design of more effective interventions.

Effects of legal prohibitions on police torture levels



Source: Berlin AJPS, forthcoming

The CAT standard for torture criminalization: 5 central elements

“...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.”

The CAT standard for torture criminalization: 5 central elements

1. **Description of treatment**
2. Mental torture
3. Enumerated purposes
4. Open-ended purpose criterion
5. Official liability

“...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.”

The CAT standard for torture criminalization: 5 central elements

1. Description of treatment
2. **Mental torture**
3. Enumerated purposes
4. Open-ended purpose criterion
5. Official liability

“...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.”

The CAT standard for torture criminalization: 5 central elements

1. Description of treatment
2. Mental torture
3. **Enumerated purposes**
4. Open-ended purpose criterion
5. Official liability

“...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.”

The CAT standard for torture criminalization: 5 central elements

1. Description of treatment
2. Mental torture
3. Enumerated purposes
4. **Open-ended purpose criterion**
5. Official liability

“...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.”

The CAT standard for torture criminalization: 5 central elements

1. Description of treatment
2. Mental torture
3. Enumerated purposes
4. Open-ended purpose criterion
5. **Official liability**

“...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.”

Torture criminalization today

By 2017, 61% of countries had criminalized torture

Of those laws, only 55% meet the strong CAT standard

Summary and recommendations

Evidence suggests that countries that criminalize torture in line with CAT standard experience reduction in police torture

US efforts should promote criminalization of torture and strengthening of existing torture laws

US efforts should promote ratification of CAT and participation in its reporting process, which appears to help promote criminalization