*American Journal of Law & Medicine* (2024), 50: 3-4, 265–278
doi:10.1017/amj.2025.10

American Society of Law, Medicine & Ethics
Where Multidisciplinary Education Improves Practice

ARTICLE

# How Torture Became Part of Health Law

Sondra S. Crosby*

Boston University School of Public Health
Email: scrosby@bu.edu

**Abstract**

Over the past twenty-five years, the Center for Health Law, Ethics, and Human Rights (CLER) has been a leader in torture treatment, advocacy, and education. In 1998, the Boston Center for Refugee Health and Human Rights (BCRHHR) was founded to provide holistic treatment to asylum seekers who have been tortured by their governments and justifiably feared further persecution if they returned to their countries. Seeking justice is an important part of healing for survivors, and BCRHHR clinicians work closely with immigration attorneys to document clinical evidence of torture to support asylum applications. Following the September 11 attacks in 2001, it was revealed that the U.S. government tortured captives and committed other war crimes. CLER scholars examined how doctors and lawyers worked with the Central Intelligence Agency (CIA) to rationalize and sanitize torture, providing legal immunity for perpetrators. My colleagues and I at CLER assumed a national leadership role in opposing practices that constitute torture, as well as cruel, inhumane, and degrading treatment. These practices included the force-feeding of hunger strikers, the Rendition, Detention, and Interrogation (RDI) program (a covert operation involving disappearances, extrajudicial detentions, and torture of suspects in the so-called "War on Terror"), the use of lawyers and physicians to justify these actions, and U.S. policies that authorized torture. We met with military officials of the Department of Defense (DOD) and hosted a meeting with international experts to brainstorm solutions. We evaluated the devastating effects of the U.S. torture program on detainees and testified in the military commission's pretrial hearings for a detainee accused of terrorism.

Doctors and lawyers at the CLER have focused on understanding contemporary torture and the relevance of the Nuremberg Doctors' Trial which condemned Nazi doctors for torturing prisoners. The CLER continues to promote the importance of International Human Rights Law.

**Keywords:** torture; health law; human rights

## Introduction: Survivors of Torture

I remember the precise moment I met Dr. Michael Grodin in the Department of Health Law, Ethics, and Human Rights at the Boston University School of Public Health BUSPH. It was the spring of 2001 when I was a junior faculty member and primary care doctor. My colleague Dr. Alejandro Moreno introduced us when he learned I was interested in Human Rights but had not found real direction or a mentor. Within minutes of meeting Dr. Grodin, he gave me a book to read: *Health and Human Rights in a Changing World*[1] (which he had co-edited). Then he pulled a crumpled paper from his pocket containing an illegible running list of about twenty projects I could start on as soon as possible. At that moment I knew I

*Thank you to the late Dr. Michael Grodin for his mentorship and inspiration. Thank you to Professor Leonard Glantz for his critical review of this manuscript.

[1]Health and Human Rights: A Reader (Jonathan M. Mann et al. eds., 1999). The book is currently in its third edition, Health and Human Rights in a Changing World (Michael A. Grodin et al. eds., 3d ed. 2013).

had found a home. My career launched with new inspiration under the mentorship of Dr. Grodin and the Center for Health Law, Ethics, and Human Rights.

Dr. Grodin introduced me to the complexities of working with survivors of torture, which became a focus of my career. I learned how health, medicine, and law are inextricably linked and have practiced in this area over the last twenty-three years.

Torture, a horrific, degrading experience, is prohibited by international law. In 1948, Article 5 of the Universal Declaration of Human Rights proclaimed that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[2] This prohibition is repeated in Article 7 of the International Covenant on Civil and Political Rights,[3] and other legally binding human rights conventions,[4] essentially making all nations bound by international law to refrain from torture. In 2012, the International Court of Justice in The Hague affirmed the prohibition on torture as part of customary international law.[5] All nations that are bound by the 1984 U.N. Convention Against Torture (CAT) are required to make torture a crime under domestic law.[6] The U.S. signed the CAT in 1988, and the Senate ratified it in 1994 with reservations clarifying that the Convention is interpreted in line with the Fifth, Eighth, and Fourteenth Amendments of the Constitution, and does not restrict the United States from applying the death penalty.[7]

The 1984 Convention Against Torture defines it 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… ."[8]

Despite its universal prohibition, torture still occurs around the world, with evolving methods causing untold harm to individuals, communities, and societies.[9] Torture intersects with health law in many ways, and this paper will explore our work at CLER, alongside my personal experiences and reflections.

## Forced Displacement and Working with Survivors

Globally, there are over 100 million displaced persons today– the greatest number on record.[10] The term "displaced persons," includes refugees, asylum seekers, internally displaced persons, stateless persons, and others, many of whom are fleeing conflict, war, humanitarian disasters, and the effects of climate

[2]G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

[3]International Covenant on Civil and Political Rights art. 7, *adopted* Dec. 19, 1966, T.I.A.S. No. 92-908, 999 U.N.T.S. 171 (ratified by Congress June 8, 1992).

[4]Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221; Organization of American States, American Convention on Human Rights art. 5, *opened for signature* Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter Pact of San José] (signed by United States on June 1, 1977, but still not ratified); Organization of African Unity, African Charter on Human and Peoples' Rights art. 5, *adopted* June 27, 1981, 1520 U.N.T.S. 217.

[5]Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. Rep. 422, ¶ 99 (July 20).

[6]United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 4, *adopted* Dec. 10, 1984, T.I.A.S. No. 94-1120.1, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture] (ratified by Congress Oct. 21, 1994, and entered into force for the United States Nov. 20, 1994).

[7]*See* S. Treaty Doc. No. 100-20.

[8]Convention Against Torture, *supra* note 6, T.I.A.S. No. 94-1120.1 at 1–2, 1465 U.N.T.S. at 113–14.

[9]*See* Andrew Milewski et al., *Reported Methods, Distributions, and Frequencies of Torture Globally: A Systematic Review and Meta-Analysis*, 6 J. Am. Med. Ass'n Network Open art. no. e2336629 (2023).

[10]*Global Trends: Forced Displacement in 2023*, U.N. High Comm'r for Refugees (June 13, 2024), https://www.unhcr.org/us/global-trends-report-2023 [https://perma.cc/TB3Y-F5PM].

https://doi.org/10.1017/amj.2025.10 Published online by Cambridge University Press

change.[11] Many have experienced torture, trauma, and sexual and gender-based violence.[12] An increasing number of migrants are arriving in the United States.[13] Extreme suffering such as this can have long-lasting physical and psychological effects on individuals and communities, which can affect the capacity of migrants to integrate within host countries.[14] To address the need for specialized care for survivors of torture, faculty at the CLER were collaborators in founding the Boston Center for Refugee Health and Human Rights (BCRHHR) in 1998, a center established to provide integrated and coordinated services for individuals who have survived torture and refugee-related trauma.[15] BCRHHR was a collaboration among multiple schools of Boston University, including the Schools of Public Health, the School of Law, the School of Medicine, the Goldman School of Dental Medicine, and the School of Social Work. It recognized the importance of traditional healing to these populations and developed a complementary and alternative medicine clinic. Dr. Grodin himself learned acupuncture and other Eastern healing practices, transforming his office in the Center into a truly healing environment. Adorned with Tibetan singing bowls, multicultural art, photographs, and a welcoming sofa, the space provided a safe refuge that facilitated treatment and recovery.

Asylum seekers are vulnerable people – many have been traumatized in their home countries.[16] Many have suffered unimaginable atrocities — either inflicted by government officials or due to their governments' failure to protect them — because of their race, religion, nationality, political party, or membership in a particular social group.[17] They were frequently marginalized by their host countries and in some cases even arrested and detained.[18] Some have harrowing stories of escape and entry into the United States.[19] They often suffer further trauma upon arrival, including interpersonal violence, lack of food, housing, and medical care.[20] Asylum seekers often have left children and loved ones behind, and these separations are especially painful if those left behind face continued threats of violence.[21]

To be granted asylum, asylum seekers must demonstrate they have a "well-founded fear of persecution" in their home countries.[22] This is often difficult to prove. Providing expert advice and testimony to immigration lawyers representing asylum seekers to help prove this "well-founded fear of persecution" is central to our work. We document physical and psychological evidence of trauma and provide affidavits to support asylum applications, following the Istanbul Protocol (IP) – the international standard for documenting torture as outlined in the Manual on Effective Investigation and Documentation

[11] *See id.* at 2–11.

[12] *Id.* at 12.

[13] Mohamad Moslimani & Jeffrey S. Passel, *What the Data Says About Immigrants in the U.S.*, Pew Rsch. Ctr. (Sept. 27, 2024), https://www.pewresearch.org/short-reads/2024/09/27/key-findings-about-us-immigrants/ [https://perma.cc/234P-4Y36] (discussing increase in the immigrant share of the U.S. population from 4.7% in 1970 to 14.3% in 2023).

[14] *See* Arash Javanbakht & Lana Ruvolo Grasser, *Biological Psychiatry in Displaced Populations: What We Know, and What We Need to Begin to Learn*, 7 Biological Psychiatry: Cognitive Neurosci. & Neuroimaging 1242, 1242–43 (2022).

[15] *About Us*, Bos. Ctr. for Refugee Health & Hum. Rts., https://www.bcrhhr.com/aboutus (last visited Oct. 26, 2024).

[16] *See* Suzan Song & Sara Teichholtz, Am. Psychiatric Ass'n, Mental Health Facts on Refugees, Asylum-seekers, & Survivors of Forced Displacement 1–3 (Steven M. Weine & Sejal Patel eds., 2020), https://www.psychiatry.org/File%20Library/Psychiatrists/Cultural-Competency/Mental-Health-Disparities/Mental-Health-Facts-for-Refugees.pdf.

[17] *See id.* at 1.

[18] *See Detention*, U.N. High Comm'r for Refugees, https://www.unhcr.org/what-we-do/protect-human-rights/asylum-and-migration/detention (last visited Nov. 16, 2024).

[19] *See, e.g.*, Kelly Hill, *Seeking Asylum at the U.S. Border: Yousif's Story*, World Relief (May 29, 2024), https://worldrelief.org/blog-asylum-seeker-story-yousif/; John Washington, The Dispossessed: A Story of Asylum and the US-Mexican Border and Beyond (2020); Patricia Sutton, Asylum Seekers: Hope and Disappointment on the Border (2022)

[20] *See* Javanbakht & Grasser, *supra* note 14, at 1242.

[21] *See, e.g.*, "*I Miss My Mum So Much" – The Pain of Separated Afghan Families*, Refugee Council: Blog (Oct. 17, 2023), https://www.refugeecouncil.org.uk/latest/news/i-miss-my-mum-so-much-the-pain-of-separated-afghan-families/ [https://perma.cc/BF5E-XFS4].

[22] *See* Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42) (defining "refugee"); *id.* § 1158(b)(1)(A) (limiting eligibility for asylum to "refugee[s]").

https://doi.org/10.1017/amj.2025.10 Published online by Cambridge University Press

of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[23] Professor George Annas and I are contributing authors in the latest edition of the IP. Along with other BCRHHR colleagues, Dr. Grodin and I trained colleagues on how to create forensic documentation and testify in immigration court on behalf of asylum seekers.

Immigration legal proceedings are an adversarial and immensely stressful, often taking years to adjudicate. Some of my patients wait in limbo for nine to ten years. Ultimately, the success rate varies. In Fiscal Years 2022 and 2023, "Fifty-five percent of people seeking asylum whose cases were decided [on the merits] after a positive credible fear determination were granted asylum."[24] Worse, Black and Brown people often face significant discrimination while seeking asylum. During an immigration court hearing for an African woman who had been tortured and raped in her home country, the immigration judge, in a stunningly racist and discriminatory display of unprofessionalism, mocked her by stating "Jane, come here. Me Tarzan!" This behavior was a shocking breach of the standards expected of a public servant who had been entrusted with delivering justice. I filed an affidavit protesting the judge's behavior, which led to him being placed on leave by the Executive Office for Immigration Review, a division of the U.S. Department of Justice.[25] Thankfully, the woman was granted asylum on appeal after the judge had initially denied her claim.

## Female Genital Cutting

Female genital cutting (FGC) is an egregious practice that continues to occur around the world. The CLER has provided clinical care to survivors of FGC and submitted affidavits documenting the harms suffered by survivors in support of their asylum claims. In 2005, Ms. A-T-, a survivor of FGC, was denied protection in the United States by an immigration judge, a decision later upheld by the Board of Immigration Appeals (BIA) in the *Matter of A-T-*.[26] According to the Center for Gender and Refugee Studies, "[i]mmediately following the BIA's initial decision, women across the country who had pending claims based on past female genital cutting were denied protection."[27]

A successful bipartisan advocacy campaign followed in response, requesting the U.S. Attorney General (AG), who has the authority to review BIA decisions, to reconsider this improper denial of protection for Ms. A-T-.[28] CLER scholars submitted an amicus brief for this case detailing the enduring and substantial long-term physical and psychological harms caused by FGC.[29]

In 2008, the AG vacated the decision of the BIA denying protection to Ms. A-T-.[30] The BIA then issued a new ruling in 2009, outlining a legal framework establishing that women who have suffered

[23]*See generally* Off. of the High Comm'r for Hum. Rts., United Nations, Pro. Training Series No. 8/Rev. 2, Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2022), https://www.ohchr.org/sites/default/files/documents/publications/2022-06-29/Istanbul-Protocol_Rev2_EN.pdf.

[24]Rebecca Gendelman, *Correcting the Record: The Reality of U.S. Asylum Process and Outcomes*, Hum. Rts. First (Nov. 3, 2023), https://humanrightsfirst.org/library/correcting-the-record-the-reality-of-u-s-asylum-process-and-outcomes/.

[25]*See* Ann M. Simmons, *Some Immigrants Meet Harsh Face of Justice*, L.A. Times (Feb. 12, 2006, 3:00 AM EST), https://www.latimes.com/archives/la-xpm-2006-feb-12-na-judges12-story.html.

[26]A-T-, 24 I. & N. Dec. 296, 296 (B.I.A. 2007).

[27]*Matter of A-T-*, Ctr. for Gender & Refugee Stud., https://cgrs.uclawsf.edu/our-work/matter-t (last visited Oct. 26, 2024); *see also* Lisa Frydman & Kim Thuy Seelinger, Kasinga's *Protection Undermined? Recent Developments in Female Genital Cutting Jurisprudence*, 13 Bender's Immigr. Bull. 1073, 1073 (2008) (discussing the follow-on effects of A-T-'s case).

[28]*See* William Fisher, *RIGHTS-US: Asylum Courts Mishandled Gender Violence Case*, Inter Press Serv. (Sept. 15, 2008), https://www.ipsnews.net/2008/09/rights-us-asylum-courts-mishandled-gender-violence-case/ [https://perma.cc/GF86-35CJ].

[29]*See* Brief for Amici Curiae in Support of Petitioner on behalf of Am. Coll. of Obstetricians & Gynecologists et al. at 11–21, Traore v. Mukasey, No. 07-2080 (4th Cir. Nov. 1, 2007), https://www.nesl.edu/docs/default-source/faculty-files/matter-of-a-t-final-medical-amicus-2-7-08.pdf.

[30]A-T-, 24 I. & N. Dec. 617, 617 (Att'y Gen. 2008).

https://doi.org/10.1017/amj.2025.10 Published online by Cambridge University Press

FGC may qualify for refugee protection.[31] Ms. A-T- was ultimately granted protection in the United States.[32] Although challenges persist, the victory in *Matter of A-T-* marked a pivotal moment in recognizing FGC as a basis for refugee protection. Building on the foundation established by the Matter of A-T-, we have supported numerous successful asylum cases for women and children impacted by FGC.

In 2018, a Michigan federal district court judge ruled that the Federal Female Genital Mutilation Act was unconstitutional because Congress lacked the authority to enact it.[33] This decision mobilized states to create their own laws outlawing this gruesome practice.[34] Members of the CLER testified at state senate hearings on the proposed statutes and rallied others to support the legislation. In 2020, the Massachusetts State Senate unanimously passed a law, criminalizing FGC in the state.[35]

However, law alone cannot change behaviors, and FGC is still a significant global public health and human rights issue. While we continue to provide education and community support to those impacted by FGC, global progress in eliminating FGC was slowed by the COVID-19 pandemic. The latest projections from the U.N. Population Fund indicate that the pandemic had disrupted programs preventing FGC, potentially leading to two million additional cases over the next decade that might otherwise have been avoided.[36] Much work remains to be done.

## CIA Black Sites, GTMO, and Hunger Strikes

After the horrific September 11 attacks, which took nearly 3000 lives,[37] prevention of terrorist attacks was appropriately the nation's highest priority. This, however, does not justify using unlawful methods to prevent terrorist attacks. In 2002, President George W. Bush, with the support from the Department of Justice, decided that the Geneva Conventions did not apply to "detainees" captured during the "War on Terror," and sought to narrow the federal legal definition of torture.[38] It aimed to defend the actions taken by the CIA's Rendition, Detention, and Interrogation (RDI) program, in which "waterboarding," slamming people against walls, suspending them from the ceiling with chains, confinement in boxes, extreme sleep deprivation, and so forth all became legal and acceptable methods of interrogation.[39]

[31] *See* Ctr. for Gender & Refugee Stud., *supra* note 27; A-T-, 25 I. & N. Dec. 4, 10–11 (B.I.A. 2009).

[32] *Tahirih Wins High-Profile Asylum Case for Young Woman Who Suffered FGM/C*, Tahirih Just. Ctr. (Apr. 26, 2011), https://www.tahirih.org/news/breaking-news-tahirih-wins-key-immigration-case/ [https://perma.cc/W9ET-YKT5].

[33] Pam Belluck, *Federal Ban on Female Genital Mutilation Ruled Unconstitutional by Judge*, N.Y. Times (Nov. 21, 2018), https://www.nytimes.com/2018/11/21/health/fgm-female-genital-mutilation-law.html.

[34] At the time of this 2018 federal court ruling, Anti-FGM legislation had only been enacted by 27 states. *See id.* Anti-FGM legislation has now been enacted by 41 states. *See FGM Legislation by State*, AHA Found., https://www.theahafoundation.org/female-genital-mutilation-fgm-in-the-us/fgm-legislation-by-state/ [https://perma.cc/5CWC-RHQ3] (last visited Oct. 30, 2024).

[35] An Act Relative to the Penalties for the Crime of Female Genital Mutilation, ch. 149, 2020 Mass. Acts.; *Senate Passes Bill to Criminalize Female Genital Mutilation*, Revere J. (Aug. 5, 2020), https://reverejournal.com/2020/08/05/senate-passes-bill-to-criminalize-female-genital-mutilation/ [https://perma.cc/
3BAH-6T7T].

[36] *COVID-19 Hindering Progress Against Female Genital Mutilation*, 6 Lancet Pub. Health 136 (2021).

[37] *Names on the 9/11 Memorial*, 9/11 Mem'l Museum, https://www.911memorial.org/visit/memorial/names-911-memorial [https://perma.cc/F55U-RQTU] (last visited Oct. 30, 2024).

[38] Memorandum from George W. Bush, President of the U.S., to the Vice President et al., (Feb. 7, 2002), https://www.aclu.org/legal-document/presidential-memo-feb-7-2002-humane-treatment-al-qaeda-and-taliban-detainees ("Re: Humane Treatment of al Qaeda and Taliban Detainees"); Memorandum from Jay S. Bybee, Assistant Att'y Gen., to Alberto R. Gonzalez, Couns. for the President, and William J. Haynes II, Gen. Couns. of the Dep't of Def. (Jan. 22, 2002), http://hrlibrary.umn.edu/OathBetrayed/Bybee%201-22-2002.pdf ("Re: Application of Treaties and Laws to Al-Qaeda and Taliban detainees").

[39] Memorandum from Jay S. Bybee, Assistant Att'y Gen., to John Rizzo, Acting Gen. Couns. of the CIA (Aug. 1, 2002), https://www.thetorturedatabase.org/files/foia_subsite/pdfs/DOJOLC000780.pdf (advising that these "interrogation procedures … would not violate Section 2340A [of title 18]").

https://doi.org/10.1017/amj.2025.10 Published online by Cambridge University Press

Government lawyers categorized, these actions as "enhanced interrogation techniques," rather than torture.[40]

Before disclosure of the existence of the CIA's RDI program in 2006,[41] the world was already horrified by the leaked images of tortured prisoners from the Abu-Ghraib military prison in 2004.[42] Beginning in January 2002, the detention of more than 700 "enemy combatants" and terrorist suspects at the Guantanamo Bay naval base (GTMO), along with reports of abusive treatment at the prison, drew widespread criticism from human rights advocates and legal experts.[43]

In 2004, the CLER hosted a conference at the Boston University School of Public Health that focused on the impact of torture and confinement on the mental health of detainees at GTMO and explored violations of the legal and ethical rights of the GTMO prisoners. This work continues to this day. In 2006, Dr. Grodin asked me to review medical records sent to him by attorneys representing GTMO detainees. They were concerned about the forced feeding of their client who was on a hunger strike as part of a peaceful protest against the inhumane conditions at GTMO. The attorneys asked Dr. Grodin for his expert opinion on the ethics of their client's medical treatment, which included forced feeding. I was surprised that the attorneys were able to obtain these records because GTMO was a big black hole at that time. I will never forget my amazement at the arrival of stacked FedEx boxes filled with paper records. After spending weeks reviewing every page, we were stunned and dismayed by the gross violations of medical ethics we uncovered. This marked the beginning of my involvement with the CLER in examining torture in the military detention center at Guantanamo Bay and the other CIA secret prisons. Our emphasis was on the responsibility of physicians and health personnel to protect prisoners from abusive treatment. We initially focused on challenging the force-feeding of hunger-striking detainees which had been documented in the medical records.[44] Details about the brutality of the force-feeding operation at GTMO began to appear in the press, sparking open and heated debates over the practice.[45]

Hunger striking is a generally non-violent form of protest where protesters attempt to draw attention to their grievances.[46] Hunger strikers are willing to place their health and lives at risk in order to be heard and to compel social change.[47] Hunger strikers in such contexts are not suicidal, have no wish to die, and have full decision-making capacity.[48]

Hunger strikes were not invented at GTMO. They have been a form of prison protest for over a century, beginning with the American women imprisoned for demonstrating for the right to vote, to the

[40]CIA, Guidelines on Interrogations Conducted Pursuant to the Presidential Memorandum of Notification of 17 September 2001, at 2 (2003), https://www.cia.gov/readingroom/collection/documents-related-former-detention-and-interrogation-program; Oona A. Hathaway, Aileen Nowlan & Julia Spiegel, *Tortured Reasoning: The Intent to Torture Under International and Domestic Law*, 52 Va. J. Int'l L. 791, 792 (2012).

[41]Remarks on the War on Terror, 42 Weekly Comp. Pres. Doc. 1569 (Sept. 6, 2006).

[42]Rebecca Leung, *Abuse of Iraqi POWs by GIs Probed*, CBS (Apr. 27, 2004, 4:37 PM), https://www.cbsnews.com/news/abuse-of-iraqi-pows-by-gis-probed/.

[43]*See, e.g.*, *Guantánamo Bay: Over 20 Years of Injustice*, Amnesty Int'l (Aug. 9, 2023, 11:40 AM), https://www.amnesty.org.uk/guantanamo-bay-human-rights [https://perma.cc/AM9M-N5DZ]; Terry D. Gill & Elies van Sliedregt, *Guantánamo Bay: A Reflection on the Legal Status and Rights of 'Unlawful Enemy Combatants*,' 1 Utrecht L. Rev. 28 (2005).

[44]For a collection of testimonies of forced feeding, see *Testimonies of Forced Feeding*, Ctr. for the Study of Hum. Rts. in the Americas, https://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/testimony-of-military-physicians/index.html (last visited Oct. 4, 2024).

[45]*See, e.g.*, Tim Golden, *The Battle for Guantánamo*, N.Y. Times Mag. (Sept. 17, 2006), https://www.nytimes.com/2006/09/17/magazine/17guantanamo.html; *More Gitmo Detainees Join Hunger Strike*, NBC (June 1, 2006, 6:42 PM), https://www.nbcnews.com/id/wbna13088365; *Bioethicist: Support Nurse Who Resisted Force-Feeding at Guantanamo*, NBC (Dec. 12, 2014, 3:00 AM), https://www.nbcnews.com/storyline/cia-torture-report/bioethicist-support-nurse-who-resisted-force-feeding-guantanamo-n266716.

[46]*See* George J. Annas, *Hunger Strikes at Guantanamo: Medical Ethics and Human Rights in a "Legal Black Hole,"* 355 New Eng. J. Med. 1377, 1378–79 (2006).

[47]*Id.*

[48]*See, e.g.*, Hernan Reyes, *Force-Feeding and Coercion: No Physician Complicity*, 9 Virtual Mentor 703, 704 (2007); Sondra Crosby, *Not Every Food Refuser is a Hunger Striker*, 14 Am. J. Bioethics 47, 47 (2014); *but see* Joseph H. Obegi, *Death by Hunger Strike: Suicide or Not?*, 31 Psychiatry Psych. & L. 121, 123 (2024).

https://doi.org/10.1017/amj.2025.10 Published online by Cambridge University Press

more recent Irish hunger strike in 1981, the South African hunger strikes in the late 1980s and hunger strikes by Turkish prisoners in 1996, and again from 2000 to 2003.[49] Since 2002, hundreds of prisoners at Guantanamo Bay have embarked on hunger strikes to protest their indefinite detention and inhumane treatment.[50] The first large-scale hunger strike at GTMO was reported in 2005.[51] In response, the GTMO medical staff were ordered to forcibly feed prisoners who refused to eat. Noncompliant hunger strikers were strapped into "feeding chairs" which restrained their arms, legs, heads, and waists.[52] Without consent, nasogastric tubes were inserted into their noses and threaded down into their stomachs, and liquid nutritional supplements were infused.[53]

The international ethics standard for physician involvement in hunger strikes is articulated by the World Medical Association (WMA) in its Declaration of Malta on Hunger Strikers.[54] The Declaration states that "[f]orcible feeding [of mentally competent hunger strikers] is never ethically acceptable. Even if intended to benefit, feeding accompanied by threats, coercion, force or use of physical restraints is a form of inhuman and degrading treatment."[55] Despite this clear ethical directive, the U.S. military disregarded it, justifying that "saving lives" was their highest priority.[56] Many however, have opined that force feeding was used to "break the hunger strikes at GTMO." The detailed management of hunger strikers laid out in the Declaration of Malta "illustrate the false choice between saving lives and force-feeding."[57]

In 2008, I traveled to GTMO for the first time to evaluate a detainee on a hunger strike at the request of his defense attorneys. I traveled with only an interpreter, and without any attorneys. It was a surreal experience. The trip began with a long bumpy flight on a tiny plane out of Florida. By the time I arrived at the hotel, I was exhausted and hungry. I was told there was a minimart nearby, so I set out to find it. Pitch darkness quickly descended, and I soon found myself lost. At that time, there was no cell phone service at GTMO, no streetlamps, and the roads were deserted. I considered sleeping on the side of the road until morning, or until I was eaten by the turkey vultures. Fortunately, a young sailor in a pickup truck passed by and gave me a ride back to my lodging. I never did find any food. That was my inauspicious introduction to GTMO.

The next morning, we boarded the ferry to cross the bay, and an escort took us from the dock to the camp. Initially, the detainee refused to meet with me, but after exchanging some letters back-and-forth, he agreed. Although the circumstances and environment were unusual and intimidating, the detainee and I quickly developed mutual respect. It was an intense and powerful week. I observed how the absurdity of GTMO impacted everyone there. Little did I know, I was to return many more times. In those early days, there was no Wi-Fi or cell phone service, which made the experience frighteningly isolating, even for a weeklong visit. Connectivity has greatly improved over the years, but I still never forget to pack food in my backpack.

---

[49]Sondra S. Crosby, Caroline M. Apovian & Michael A. Grodin, *Hunger Strikes, Force-Feeding, and Physicians' Responsibilities*, 298 J. Am. Med. Ass'n 563, 563 (2007).

[50]*Id.*; *see also* Annas, *supra* note 46, at 1378.

[51]*See, e.g.*, Neil A. Lewis, *Guantánamo Prisoners Go on Hunger Strike*, N.Y. Times (Sept. 18, 2005), https://www.nytimes.com/2005/09/18/politics/guantanamo-prisoners-go-on-hunger-strike.html.

[52]*See* Ctr. for the Study of Hum. Rts. in the Americas, *supra* note 44.

[53]Crosby, Apovian & Grodin, *supra* note 49, at 564.

[54]World Med. Ass'n, *WMA Declaration of Malta on Hunger Strikers* (Dec. 5, 2022), https://www.wma.net/policies-post/wma-declaration-of-malta-on-hunger-strikers/ (originally adopted by the 43d World Medical Assembly in 1991 and most recently revised by the 68th WMA General Assembly in 2017).

[55]*Id.* at ¶ 23.

[56]*See* Jason Leopold, *The Military Admitted Force-Feeding Gitmo Detainees Violates International Law and Medical Ethics*, VICE (Jan. 29, 2015, 1:40 PM), https://www.vice.com/en/article/how-a-military-memo-could-save-the-nurse-who-refused-to-force-feed-guantanamo-detainees/ [https://perma.cc/EEP3-T5MM] (discussing the June 2013 document "Legal Authority and Policy for Enteral Feeding at JTF-GTMO").

[57]*See See Closing Guantanamo: The National Security, Fiscal, and Human Rights Implications: Hearing Before the Subcomm. on the Const., C.R., and Hum. Rts. of the Comm. on the Judiciary*, 113th Cong. 10 (2013) (statement of Stephen N. Xenakis, M.D., Brigadier General (Retired), U.S. Army) (arguing that the appropriate clinical responses to hunger strikes laid out in the Declaration of Malta "illustrate[] the false choice between saving lives and force-feeding").

https://doi.org/10.1017/amj.2025.10 Published online by Cambridge University Press

Alongside my colleague, Dr. Stephen Xenakis, I evaluated another hunger striker at GTMO at the request of his defense attorneys and later testified at his trial. This detainee, Mr. Abu Wa'el Dhiab, became the first to challenge his force-feeding in federal court in 2014. Ultimately, the judge ruled that Dhiab "failed to satisfy the 'deliberate indifference' standard of proof," which is the threshold required to establish a prisoner's allegations of cruel and unusual punishment under the Eighth Amendment of the Constitution.[58] Despite the unfavorable ruling, the hearing provided unprecedented transparency into the plight of hunger strikers at GTMO.[59]

Although Mr. Dhiab was on a hunger strike, he was willing to accept nourishment without the need for harsh feedings (we even ate with him). I learned that hunger strikes exist on a continuum: some may take vitamins or minimal nourishment, which may prolong but not necessarily negate the effects of malnutrition, allowing more time for negotiation. Mr. Dhiab described his hunger strike as a peaceful protest and that he had no desire to die. Although partially paralyzed, medical records documented that Mr. Dhiab was denied access to a wheelchair and crutches. The judge, while not granting relief, felt compelled to comment on Mr. Dhiab's treatment in GTMO custody:

> "[T]he Court feels constrained to make certain comments about the Government's treatment of Mr. Dhiab. It is very hard to understand why the Government refused to give Mr. Dhiab access to the wheelchair and/or crutches that he needed in order to walk to the room for enteral feedings. Had that simple step been taken, numerous painful and humiliating forced cell extractions could have been avoided… By the same token, the Government refused Mr. Dhiab's request to provide him with an additional mattress. What could be more reasonable than providing an additional mattress to a man with back pain so severe that he was given morphine to alleviate it? Mr. Dhiab is clearly a very sick, depressed, and desperate man. It is hard for those of us in the United States to fully understand his situation and the atmosphere at Guantanamo Bay."[60]

Professors Annas, Grodin, and I became actively involved with the Assistant Secretary of Defense for Health Affairs, Dr. Jonathan Woodson, as well as the Defense Health Board Subcommittee on Medical Ethics, on consultation of military prison medical practices, including the force-feeding of hunger strikers. Along with colleagues from human rights organizations, including the Constitution Project and Physicians for Human Rights, we hosted a meeting of international experts, including military members, to consider solutions to the thorny issue of force-feeding, along with broader medical ethics issues within the military.

The CLER faculty were members of a national task force, supported by the Institute on Medicine as a Profession and Open Society Foundation, which published a report in 2013 concluding that military medical personnel were involved in practices that inflicted harm on detainees, including the force-feeding of hunger strikers.[61] Collectively, the CLER faculty have published numerous scholarly papers calling for change to the U.S. government policies that authorize the force-feeding of hunger strikers.[62]

Navigating the Department of Defense — an immense bureaucratic organization — was both thought-provoking and discouraging. It never became clear who had the authority to enact change in the hunger strike policy. This has been further shrouded by GTMO placing a media blackout on hunger strikers, leaving us unable to determine if force-feeding is currently being used on detainees.[63]

[58]Dhiab v. Obama, 74 F. Supp. 3d 16, 29 (D.D.C. 2014).

[59]Sondra S. Crosby, Stephen N. Xenakis & Leonard H. Glantz, *Force Feeding at Guantanamo in First Case Brought to US Federal Court*, 350 BMJ 1270 (2015).

[60]*Dhiab*, 74 F. Supp. 3d at 29–30.

[61]Inst. on Med. as a Pro., Ethics Abandoned: Medical Professionalism and Detainee Abuse in the War on Terror, at xxxiii (2013).

[62]Crosby, Apovian & Grodin, *supra* note 49; Annas, *supra* note 46; George J. Annas & Sondra Crosby, *US Military Medical Ethics in the War on Terror*, 165 BMJ Mil. Health 303 (2019).

[63]*See* Jason Leopold, *Gitmo Media Blackout Hopes to Undermine Hunger Strikers*, Al Jazeera Am. (Dec. 11, 2013, 1:30 PM), http://america.aljazeera.com/articles/2013/12/11/gitmo-media-blackouthopestounderminehungerstrikers.html [https://perma.cc/G5DY-7LZV].

https://doi.org/10.1017/amj.2025.10 Published online by Cambridge University Press

Ultimately, we did not convince the military to revise the U.S. hunger strike policy to comply with international ethics standards. The human rights road can be very, very long, and it is difficult to not get discouraged along the way.

Having clinically evaluated many hunger strikers over time, I have learned an important lesson: the care of hunger strikers is nuanced and rarely straightforward. Real life is often vastly different from academic directives. I have observed physicians actively punishing hunger strikers in cruel ways, and I have also observed physicians quietly doing the right thing by allowing hunger strikers to maintain their protest without force-feeding. I greatly admire those military physicians and other health professionals who remain largely out of sight, and quietly withstand criticism by human rights organizations. I have witnessed a hunger striker insert his own nasogastric tube. I have seen a severely depressed man who was labeled as a hunger striker — but was not — tragically die of starvation and dehydration.

The CLER faculty have also provided analyses on how doctors and lawyers facilitated the torturous treatment in the now-shuttered RDI program.[64] RDI used the euphemism of "enhanced interrogation methods" to disguise torture and cruel, inhumane, and degrading treatment, the details of which have slowly become available to the public.[65] In 2009, the Obama Administration released the Office of Legal Counsel memoranda, the so-called "Torture Memos," written during the Bush Administration, that elucidated the role of health professionals in the RDI program.[66] Physicians and health personnel assured the DOD that the proposed interrogation methods would not cause long-lasting harm, justifying the Department of Justice lawyers' conclusion that the proposed "enhanced interrogation" methods did not constitute torture.[67] In return for these assurances, the DOD lawyers promised the health professionals immunity from future prosecution.[68] In fact, without the participation of these doctors and lawyers, the torture would not have occurred. The "Torture Memos" provided documentation that health professionals were actively involved in the program, including certifying detainees "fit" for interrogation, monitoring interrogation, and actively participating in "enhanced interrogations."[69] In December 2014, the 600-page executive summary of the U.S. Senate Select Committee on Intelligence Report on Torture was released– it is the most comprehensive account to date of RDI and provides even further chilling details on the role of medical professionals in the program.[70]

The medical professionals' opinion that the torture program would not cause lasting damage, was either a lie or willful ignorance. The profound, long-lasting damage that detainees continue to suffer was a completely predictable result of the torture program. I have witnessed how some of the men who were harmed in CIA and military detention continue to suffer from the long-lasting physical and psychological harms of torture. I have investigated allegations of torture made by men held in CIA custody during the War on Terror, both for prisoners who have been released, and as one of the few civilian doctors permitted to independently evaluate detainees at the GTMO prison.

In 2008, I was part of an investigative team for Physicians for Human Rights (PHR). We traveled to Istanbul and evaluated the impact of the U.S. interrogation program on eleven men who had been detained and released from United States Government (USG) custody without charges. This PHR report, "Broken Laws, Broken Lives" is the first document that details the profound psychological, physical, and

[64]George J. Annas & Sondra S. Crosby, *Post-9/11 Torture at CIA "Black Sites" — Physicians and Lawyers Working Together*, 372 New Eng. J. Med. 2279 (2015).

[65]*Id.* at 2280; sources cited *supra* note 32.

[66]*See* Ewen MacAskill, *Obama Releases Bush Torture Memos*, Guardian (Apr. 16, 2009, 6:05 PM), https://www.theguardian.com/world/2009/apr/16/torture-memos-bush-administration [https://perma.cc/TJV5-SQAV]. For a guide with access to the memos, see Neil A. Lewis, *A Guide to the Memos on Torture*, N.Y. Times, https://archive.nytimes.com/www.nytimes.com/ref/international/24MEMO-GUIDE.html (last visited Oct. 4, 2024).

[67]Annas & Crosby, *supra* note 64, at 2280.

[68]*Id.*

[69]Sarah Dougherty & Christine Mehta, Physicians for Hum. Rts., Truth Matters: Accountability for CIA Psychological Torture 3–4, 14 (2015).

[70]*See generally* S. Select Comm. on Intel., Committee Study of the Central Intelligence Agency's Detention and Interrogation Program, S. Rep. No. 113-288 (2014) [hereinafter S. Comm. Study of the CIA]

https://doi.org/10.1017/amj.2025.10 Published online by Cambridge University Press

social harms of the U.S. torture program on men released from different USG theatres.[71] This report effectively debunked the "few bad apples" excuse and demonstrated that abuse was widespread and systemic.

In 2017, I served as an expert witness in *Salim v. Mitchell*, a case brought by the ACLU against two CIA contract psychologists, James Elmer Mitchell and John Bruce Jessen, for lasting harms inflicted on three detainees during their time in CIA secret prisons;[72] one of which likely died from hypothermia.[73] Mr. Salim was held in secret CIA prisons for five years and was released without charges.[74] The case ultimately settled out of court[75] and remains the only successful case brought by a former detainee against CIA psychologists who designed and actively participated in the torture program. Traveling to Tanzania for the evaluation of Mr. Salim was a profound experience, which I have detailed in another reflective essay.[76]

I continue to work as a court-approved, medical expert on torture in the protracted, ongoing pretrial hearings in *United States v. al-Nashiri*.[77] Mr. al-Nashiri has been detained in GTMO since 2006 and has been charged for his alleged role in the USS Cole attacks.[78] Before his transfer to GTMO, Mr. al-Nashiri had been confined in multiple CIA prisons and subjected to "enhanced interrogation techniques."[79] My testimony in 2014 marked the first time a medical expert exposed the CIA's systemic torture program in open court.[80]

My latest testimony in the *al-Nashiri* case was in February 2023 at a pretrial hearing where I testified about the lasting effects of a particularly barbaric method of torture and its consequences on Mr. al-Nashiri. Under the guise of medical treatment, medical officers inserted an endotracheal tube into Mr. al-Nashiri's anus and infused a nutritional supplement. This is not a medical procedure as nutrients are not absorbed through the rectum but rather, is an act that meets the definition of rape under U.S. law.[81] I testified that Mr. al-Nashiri experienced the "rectal feeding" as a "distressing, painful, shameful stigmatizing event. He experienced it as a violent rape…."[82]

While the DOJ Torture Memos were withdrawn during the Obama Administration, it did not investigate torture in the RDI program or hold anyone accountable.[83] As of January 6, 2025, fifteen men continue to be held in GTMO.[84]

---

[71]Farnoosh Hashemian et al., Physicians for Hum. Rts., Broken Laws, Broken Lives: Medical Evidence of Torture by US Personnel and Its Impact (2008).

[72]Salim v. Mitchell, 268 F. Supp. 3d 1132, 1136–38 (E.D. Wash. 2017).

[73]*Id.* at 1144.

[74]Complaint at ¶¶ 73, 112, Salim v. Mitchell, 268 F. Supp. 3d 1132 (E.D. Wash. 2017) (No. 2:15-CV-286), https://www.aclu.org/sites/default/files/field_document/salim_v._mitchell_-_complaint_10-13-15.pdf.

[75]*Salim v. Mitchell – Lawsuit Against Psychologists Behind CIA Torture Program*, ACLU (Aug. 17, 2017), https://www.aclu.org/cases/salim-v-mitchell-lawsuit-against-psychologists-behind-cia-torture-program.

[76]Sondra S. Crosby, *A Doctor's Response to Torture*, 156 Annals Internal Med. 471 (2012).

[77]The case is currently awaiting trial before the Military Commissions Trial Judiciary of Guantanamo Bay. The docket is available through the Office of Military Commissions Website, *Office of Military Commissions Cases*, Off. of Mil. Comm'ns, https://www.mc.mil/Cases/MC-Cases (last visited Nov. 17, 2024) (navigate to the case *USS Cole: Abd al-Rahim Hussein Muhammed Abdu Al-Nashiri (2)*).

[78]Amnesty Int'l, *USA: 'Heads I Win, Tails You Lose,'* AI Index AMR 51/090/2011, at 1 (Nov. 8, 2011).

[79]S. Comm. Study of the CIA, *supra* note 70, at 66–73.

[80]Carol Rosenberg, *Expert Testifies Accused USS Cole Bomber Was Tortured*, Mia. Herald (Aug. 5, 2014, 6:48 AM), https://www.miamiherald.com/news/nation-world/world/americas/article1963350.html.

[81]*See* 10 U.S.C. § 920(a), (g)(1)(c).

[82]Carol Rosenberg, *Doctor Describes and Denounces C.I.A. Practice of 'Rectal Feeding' of Prisoners*, N.Y. Times (Feb. 23, 2024), https://www.nytimes.com/2023/02/24/us/politics/cia-torture-guantanamo-nashiri-doctor.html; Sondra S. Crosby & Leonard H. Glantz, *"Rectal Feeding"-Unethical Medical Officer Participation at CIA Secret Interrogation Facilities*, 331 J. Am. Med. Ass'n 103 (2024).

[83]*See* MacAskill, *supra* note 66.

[84]Carol Rosenberg, *Pentagon Repatriates Malaysian Prisoners Who Pleaded Guilty to War Crimes*, N.Y. Times, (Dec. 18, 2024), https://www.nytimes.com/2024/12/18/us/politics/malaysian-prisoners-repatriated-gitmo.html.

https://doi.org/10.1017/amj.2025.10 Published online by Cambridge University Press

## State Sponsored Executions

CLER faculty have studied the death penalty or state-sponsored executions as a human rights violation. In October 2023, the U.N. called for universal abolition of the death penalty: "Although international law permits the death penalty in very limited circumstances, in practice it is almost impossible for States to impose the death penalty while complying with human rights obligations, including the absolute and universal prohibition of torture."[85] We believe this is true as illustrated by the following examples.

In the United States, application of the death penalty often entails a form of "mock execution" — a recognized form of torture — where repeated death warrants are issued but not carried out resulting in severe psychological suffering that can rise to the level of cruel, inhuman, and degrading treatment. A case in point is that of Gerald Pizzuto who is on death row in Idaho and has been issued five death warrants. With each warrant, he is forced to repeat the process of being transferred to the solitary "death cell", say goodbye to loved ones, give away his belongings, and answer questions about disposal of his remains. I am heartened that the judge in this case made the morally correct decision:

"Idaho U.S. District Judge B. Lynn Winmill has ruled in favor of death row prisoner Gerald Pizzuto, indefinitely pausing his March 2023 execution date, and granting him a hearing in his claim that the state of Idaho violates his Constitutional right against cruel and unusual punishment by repeatedly scheduling execution dates while knowing the state does not have the means to carry it out. 'As Pizzuto describes it,' Judge Winmill wrote, 'defendants' repeated rescheduling of his execution is like dry firing in a mock execution or a game of Russian roulette… . With each new death warrant comes another spin of the revolver's cylinder, restarting the 30-day countdown until the trigger pulls. Not knowing whether a round is chambered, Pizzuto must relive his last days in a delirium of uncertainty until the click sounds and the cylinder spins again.'"[86]

Since the U.S. Supreme Court's first authorization of the death penalty in 1976,[87] about 1600 people have been executed.[88] While both Oklahoma and Texas adopted lethal injection as the method of execution, Texas was the first to use lethal injections in 1982.[89] Since then, 1420 executions have been by lethal injection which has now replaced all previous forms of execution.[90]

In the United States, "botched executions" are common, and more than a third of execution attempts in 2022 were mishandled.[91] Black people and older people face an increased likelihood of a botched execution,[92] and many of these cases rise to the level of torture and cruel, inhumane and degrading treatment due to the prolonged, agonizing suffering experienced. While there is little known about the details and identification of health professionals participating in these executions, Professor Leonard Glantz and I have advocated for increased transparency to the public and to the profession.

The 2014 botched execution of Clayton Lockett in Oklahoma provided an opportunity to expose the central role physicians play in executions. Because the fiasco was widely publicized, the Governor of Oklahoma, Mary Fallin, asked the Director of the Oklahoma Department of Corrections, Robert Patton,

[85] *UN Experts Call for Universal Abolition of the Death Penalty*, Off. of the U.N. High Comm'r for Hum. Rts. (Oct. 9, 2023), https://www.ohchr.org/en/press-releases/2023/10/un-experts-call-universal-abolition-death-penalty.

[86] *Judge Orders Hearing for Idaho Prisoner Who Faced 5 Execution Dates, Claims of Repeated 'Psychological Torture,'* Death Penalty Info. Ctr. (Sept. 25, 2024), https://deathpenaltyinfo.org/judge-orders-hearing-for-idaho-prisoner-who-faced-5-execution-dates-claims-of-repeated-psychological-torture [https://perma.cc/CM22-MAVN].

[87] Gregg v. Georgia, 428 U.S. 153 (1976).

[88] *Facts About the Death Penalty*, Death Penalty Info. Ctr. 3, https://dpic-cdn.org/production/documents/pdf/FactSheet.pdf (last updated Nov. 4, 2024).

[89] Deborah W. Denno, *Lethal Injection*, Britannica, https://www.britannica.com/topic/lethal-injection (last updated Oct. 30, 2024).

[90] Death Penalty Info. Ctr., *supra* note 88, at 3.

[91] Nicholas Bogel-Burroughs, *Death Penalty Researchers Call 2022 'Year of the Botched Execution,'* N.Y. Times (Dec. 16, 2022), https://www.nytimes.com/2022/12/16/us/death-penalty-botched-executions.html.

[92] Reprieve, Lethal Injection in the Modern Era: Cruel, Unusual and Racist 8–9 (2024).

https://doi.org/10.1017/amj.2025.10 Published online by Cambridge University Press

to investigate what went wrong.[93] The letter from Patton to Governor Fallin documents an almost minute-by-minute account of the direct and essential role a physician played in the execution process. The letter states that a phlebotomist was not able to locate a "viable insertion point" for the intravenous catheter to inject the poisons so "the doctor then examined the offender's neck and then went to the groin area."[94] After the execution began "[the] [d]octor checked Offender Lockett for consciousness; [the] offender was still conscious."[95] Later on the "[d]octor checked Offender Lockett for consciousness; offender was unconscious."[96] This determination enabled the administration of the poisons designed to terminate Lockett's respiration and heartbeat. While Lockett remained alive and was clearly suffering after the attempted injection of the poisons, "The doctor checked the IV and reported the blood vein had collapsed, and the drugs had either absorbed into tissue, leaked out or both."[97] At that point, Director Patton asked the doctor if a sufficient amount of drugs remained on-hand to complete Lockett's execution and still have enough for the execution that was to immediately follow Lockett's. The doctor responded "no" to both questions.[98] Although the execution was halted, Lockett died forty-three minutes after being sedated.[99]

In February 2024, seventy-three year-old Thomas Creech's execution was halted after the secret "execution team" failed to place an intravenous line after about an hour of repeated attempts.[100] Mr. Creech described his experience to the New York Times: "He said he has had nightmares ever since that day. In one, he is watching helplessly as his wife is put on the execution table instead of him. In another, he is brought back to the execution chamber and strapped down for a second attempt."[101]

There is no longer a need to discuss if physicians who participate in state executions violate the ethical norms of the profession. They undoubtedly do. The difference between a poison and a "drug" or a "medication" is the motive and desired outcome of their use. It is not hard to conclude that physicians who poison people at the state's behest are no different from physicians who would behead people at the state's behest. There is no ethical difference between the syringe and the axe. Indeed, physician participation in state-authorized executions is a medical gloss on a barbaric practice.

Shortly after Oklahoma and Texas enacted lethal injections statutes in 1980, Curran and Casscells published a seminal essay which firmly established that physicians could not ethically participate in the state killing of criminals.[102] Innumerable articles have expanded on this and the major physician, nurse and public health organizations, have found that physician participation violates medical ethics.[103]

It is very difficult to determine the identity of these executioner-physicians. However, Gawande was able to locate a handful of physicians who would talk to him anonymously about their participation in executions.[104] One was described as a sixty year-old board-certified internist who practiced in his community for thirty years and was respected in the community.[105] He was unaware that the American

[93]Letter from Robert Patton, Dir. Dep't of Corr., to Mary Fallin, Governor of Okla. (May 1, 2014), https://www.documentcloud.org/documents/1151378-5-1-14-doc-letter-re-clayton-lockett.html [https://perma.cc/7MH9-PKNT].

[94]*Id.*

[95]*Id.* at 2 (timestamp of 1830).

[96]*Id.* at 3 (timestamp of 1833).

[97]*Id.* (timestamp of 1844–1856).

[98]*Id.*

[99]*Id.* (death occurred at timestamp of 1906, after administration of Midazolam at 1823).

[100]Nicholas Bogel-Burroughs, *A Death Row Prisoner Tells of Living Through a Botched Execution*, N.Y. Times (June 6, 2024), https://www.nytimes.com/2024/06/06/us/thomas-creech-idaho-botched-execution.html.

[101]*Id.*

[102]William J. Curran & Ward Casscells, *The Ethics of Medical Participation in Capital Punishment by Intravenous Drug Injection*, 302 New Eng. J. Med. 226 (1980).

[103]*See, e.g.*, Tanya Albert Henry, *AMA to Supreme Court: Doctor Participation in Executions Unethical*, Am. Med. Ass'n (Aug. 22, 2018), https://www.ama-assn.org/delivering-care/ethics/ama-supreme-court-doctor-participation-executions-unethical.

[104]Atul Gawande, *When Law and Ethics Collide — Why Physicians Participate in Executions*, 354 New Eng. J. Med. 1221 (2006).

[105]*Id.* at 1223.

https://doi.org/10.1017/amj.2025.10 Published online by Cambridge University Press

Medical Association (AMA) deemed doctor participation in executions to be unethical.[106] A second physician with a private practice had participated in over thirty executions.[107] Another physician was not an employee of the prison but contracted with the prison to provide both health care and participate in executions for which his company received $18,000 per execution.[108]

We believe the profession should adopt policies to require physician-executioners to be identified. This could be achieved through the hospital credentialing process or through state licensure. For example, after learning that a Massachusetts physician was consulting on lethal injection protocols in another state, we unsuccessfully lobbied Boston Medical Center to ask about prior participation in executions as part of the credentialing process. This needs to be revisited.

State licensing boards have either refused to act against physician-executioners for their violation of medical ethics or have been prevented from doing so by state courts and legislatures. Legislatures have even enacted laws that make the names of physician-executioners "state secrets" so that that they cannot be required to be revealed under state freedom of information statutes.[109] We believe medical licensing boards should ask new and continuing applicants for medical licensure whether they have participated in executions. If the answer is in the affirmative, they should be denied the license because of their purposeful violation of medical ethics. These actions alone will not end physician execution, but it will be the strongest statement the profession can make to demonstrate that medical ethics matter —it seems obvious that physicians and health professionals who are sworn to preserve life and alleviate suffering — should not participate in torture, cruel, inhumane, and degrading treatment.

There needs to be further litigation attacking state statutes making physician-executioner identities undiscoverable state secrets. The plaintiffs in these cases have largely been the person to be executed or a news organization.[110] But those with equally vital interests in the identities of physician-executioners are patients, potential patients and referring physicians. Patients have tremendous trust in their physicians, enough trust to allow their physicians to prescribe and administer potentially deadly drugs. The patients choose their physicians because they know they will use their expertise to cure illnesses and alleviate suffering. Patients and referring physicians have a right to know if a doctor whom they are seeking care from has participated in executions.

## Shackling in Hospitals

The Center has also addressed human rights issues close to home. In 2021, Professor Annas and I served as mentors to three medical students for a project that ultimately changed policy and clinical practice for shackling incarcerated patients at Boston Medical Center (BMC) where I practice. In U.S. hospitals, shackling of incarcerated patients with restraints, such as handcuffs, is routine and widespread — except for perinatal patients — regardless of clinical status, including at BMC.[111] The students developed a petition describing the issue and advocating for the adoption of an individualized approach that required the removal of shackles from incarcerated patients who met certain criteria including unconsciousness,

[106] *Id.* at 1225.

[107] *Id.*

[108] *Id.* at 1228.

[109] *State-by-State Execution Protocols*, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/executions/methods-of-execution/state-by-state-execution-protocols [https://perma.cc/83DB-AEZX] (last visited Oct. 4, 2024); *see also* Nathaniel A.W. Crider, *What You Don't Know Will Kill You: A First Amendment Challenge to Lethal Injection Secrecy*, 48 Colum. J.L. & Soc. Probs. 1, 21 (2014).

[110] Kelly A. Mennemeier, *A Right to Know How You'll Die: A First Amendment Challenge to State Secrecy Statutes Regarding Lethal Injection Drugs*, 107 J. Crim. L. & Criminology 443, 485–86 (2017).

[111] Neil Singh Bedi, Nisha Mathur & Judy Wang et al., *Human Rights in Hospitals: An End to Routine Shackling*, 39 J. Gen. Internal Med. 1048 (2024); *see also* Lawrence A. Haber, Lisa A. Pratt, Hans P. Erickson & Brie A. Williams, *Shackling in the Hospital*, 37 J. Gen. Internal Med. 1258 (2022).

https://doi.org/10.1017/amj.2025.10 Published online by Cambridge University Press

critical illness, immobility, or end-of-life care.[112] This petition amassed close to 800 signatures.[113] The students and the CLER faculty engaged hospital administrators, nursing and medical leadership, and met with hospital executives to propose changes to the existing policy to allow for the unshackling of incarcerated patients who met the specific criteria at the request of the treating physician.[114] Surprisingly, our proposal survived a complex bureaucratic process, and a modified policy was successfully implemented in February 2023.[115] This project was a major undertaking, requiring parsing patient and physician rights, overcoming entrenched clinical practices, addressing the stigma about prisoners, and identifying and engaging stakeholders across a wide range of disciplines.[116]

Neither the American public nor hospitals prioritize the rights of prisoners. The passion and fierce dedication of medical students to address this issue of human rights and humane care was both surprising and encouraging. This project demonstrated that medical schools and health care institutions can be a place where students and practitioners can identify and address human rights issues to better ensure the humane treatment of all patients.

## Conclusion

I have now been documenting torture and treating survivors for close to twenty-five years. I have learned and evolved during my time at the CLER. I have seen unimaginable forms of torture. I have met survivors from every walk of life– each with a personal and powerful story to which I am privileged to bear witness. I am humbled daily by the resilience of these survivors. Racism plays a monumental role in justifying and perpetuating torture– dehumanization of Black and Brown bodies to maintain White supremacy is a recurring theme in the United States from slavery to mass incarceration and capital punishment to treatment of refugees. It is a fact that human rights work is exhausting, slow, and takes grinding perseverance. The problem of torture is a behemoth one, yet should not be written off as too difficult to deal with or someone else's responsibility. Even if you cannot make things right, it is possible to make things better, in small, incremental steps.

[112] *Our Movement*, Stop Shackling Patients, https://stopshacklingpatients.org/our-movement/ [https://perma.cc/KME5-H8LF] (last updated Jan. 2024).

[113] *Id.*

[114] Bedi, Mathur & Wang et al., *supra* note 111, at 1049.

[115] Stop Shackling Patients, *supra* note 112.

[116] Bedi, Mathur & Wang et al., *supra* note 111, at 1051.

**Cite this article:** Crosby, S.S. (2024), 'How Torture Became Part of Health Law', *American Journal of Law & Medicine*, **50**, pp. 265–278. https://doi.org/10.1017/amj.2025.10