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Torture in Thailand at the Limits of Law

Nick Cheesman

How do courts mediate the relationship between the practice of torture and the content of law in places where torture is neither explicitly criminalized nor authorized? If torture is recounted in court, then what happens? Drawing on sixteen months of observation and documentary research in Thailand, this article outlines a jurisprudence of torture in which judges accommodate the practice by denying the facticity of narratives about torture, or accepting the narratives' facticity but denying that anyone can be held responsible, or accepting that someone might be held responsible but excusing them of responsibility in the name of duty or by holding only one or two of them, or their employer, in some way liable. Through this jurisprudence, judges in Thailand have kept torture at the limits of law: not on a boundary between the legal and illegal, but on a line between the legally ordered and unordered, which is to say, in the realm of the alegal.

INTRODUCTION

In August 2021 six counter-narcotics police officers in Nakhon Sawan, north of Bangkok, suffocated an alleged drug dealer with layers of plastic bags (Cheesman 2021b). The man died. A closed-circuit camera inside the office recorded his death. The video reached a lawyer who posted it online. Had he not done so, not only would the facts of the killing have remained unknown but it is also doubtful that the matter would have been investigated as a criminal offense. The police had reportedly already paid off the family of the dead man. They also had had the death recorded on a medical certificate as a drug overdose. They since have been charged with murder, coercion, and wrongful exercise of duty in concert.[1] The officer at the center of the torture, Police Colonel Thitisan Utthanaphol, or "Superintendent Joe," has defended himself by insisting that he was only doing his best to protect the public from narcotics. During the first hearings in the trial of him and six other accused, Thitisan admitted to suffocating the detainee, Jeerapong Thanapat, with the plastic bags but asserted that he had done it "merely to frighten" Jeerapong.[2]

The torture in Nakhon Sawan got a lot of public interest not only because it was captured on video, but also because Superintendent Joe was a playboy with a penchant for fast cars, who lived an ostentatiously luxurious lifestyle. Although the practice of torture resists quantification, it is safe to say that most acts of torture in Thailand lack the features that excited so much interest in this case—especially if the tortured person is said to be dealing in drugs. Alleged or presumed drug dealers, the reasoning goes,

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1. Criminal Code BE 2499 (1956) (amended 2003), sections 157, 288, 289(5), 309, with 83.
2. In Thai: เพียงแต่ทำให้กลัว (Thai Rath 2022).

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deserve whatever they get (Suchat 2009). But drug dealers are by no means the only members, to borrow from Graham Greene (2007, 158), of Thailand's "torturable class." Not only police officers like those in Nakhon Sawan, but also soldiers and paramilitaries in Thailand torture a variety of captives under a variety of mostly unexceptional circumstances.

Torture is not yet explicitly criminalized in Thailand—though a draft law to prohibit it was being deliberated at the time of the torture by Superintendent Joe and his team, a topic to which this article returns in conclusion.[3] Neither has it been authorized. It has occupied and occupies an ambiguous site in relation to law that makes it hard for tortured people to complain about and to seek redress. Many likely say nothing for fear of repercussions; or they say something but are silenced through inducements and threats; or they die while being tortured, or subsequently, and no one speaks up for them. Nevertheless, some do speak—in submissions they make to court and in testimony in court. Some speak through third parties, who submit petitions for their release from captivity. And those who die from torture also communicate through postmortem inquests and through friends and loved ones they leave behind.

It is with these cases, with oral and material evidence of torture in Thailand's courts, that this article is concerned. If evidence of torture is brought to court, then what happens? What, to narrow the question, do judges decide? How do they account for torture, and with what effects?

TORTURE BEYOND LEGALITY AND ILLEGALITY

The purpose of this article is to theorize the juridical status of torture beyond the binary of the legal and illegal—to open up for discussion another category or other categories with which to think about the relationship between law, violence, and political order, namely, the alegal.[4] To this end, the article outlines a jurisprudence of torture: a theory of the relation between the practice of torture and its interpretation in law courts in Thailand. This outline makes up the larger part of the article and is its main descriptive and interpretive contribution to the literature on torture's relation to law.

The outline is by way of a reply to Austin Sarat and Thomas Kearns's (1991, 253) call for critical jurisprudence that attends to how the logic of violence surpasses legal rules, that goes "beyond the space of law." Sarat and Kearns made their call partly in response to Robert Cover's (1986, 1601) seminal article on the relationship of violence to law, in which he points out that legal interpretations "constitute justifications for violence which has already occurred or which is about to occur." In Thailand, these include justifications for torture.

3. Because torture was not explicitly criminalized at time of research, this article outlines its jurisprudence in the present tense, even though, as discussed in the conclusion, the jurisprudence will recede into the past when a law criminalizing torture is passed and implemented.

4. Here I delineate one alternative category, the alegal, but do not foreclose other categories with which to think beyond the legal-illegal binary, such as Fleur Johns's (2013) conceptions of nonlegality, or nonlegalities. The point is not to insist on alegality as the exclusive answer to the conceptual problem posed by the inadequacies of the legal-illegal binary, but to insist that this traditional symmetrical opposition is unable to account for the relationship of torture to law generally, and arguably obfuscates it.

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Torture in practice sits on, or rather along, a continuum of state violence (see Parry 2010, 12–13). Legal order attempts to regulate this violence by drawing boundaries between violence that is permissible and that which is prohibited. In international law, torture is absolutely prohibited.[5] In domestic laws, the absoluteness of the prohibition in international law notwithstanding, it is not. Not all countries ban torture. Some appear to comply but in practice circumvent the ban legalistically. Others make little or no attempt to comply.

The actual relationship of law to torture is fraught because the relationship of law to state violence is too. The continuum of state violence is indispensable to law but also threatens to overwhelm it (Sarat and Kearns 1993, 229–30). Law is nowhere as steadfastly opposed to torture as the absolute prohibition makes it out to be. Their relationship is ambiguous. Efforts at prohibition are ambivalent rather than absolute. The legal-illegal binary is inadequate to the task of making sense of how the logic of torture surpasses legal rules, of how it goes beyond the space of law but also refers back to it—hence the imperative for critical jurisprudence.

Tyrell Haberkorn's (2018, 165–88) jurisprudence of impunity in Thailand serves as a model for how a jurisprudence of torture might also be outlined. That jurisprudence emerges from her reading of a series of decisions related to the disappearance of Somchai Neelaphaijit, a prominent lawyer whom police abducted and presumably killed after he spoke publicly about torture in the far south of Thailand. Haberkorn (2018, 169) shows how the jurisprudence of impunity replicates the peculiar ambiguity of disappearance by "refusing to identify [Somchai's] disappearance as a crime or even hold the perpetrators to account for a lesser crime." In the jurisprudence that follows I identify similar refusals, which pulse with impunity of the sort that runs through Haberkorn's inquiry. With Haberkorn, I see in these refusals a kind of decision making that closes off the possibility for accountability or redress for the violence of state officers.

But whereas Haberkorn reads judgments as a form of history authored by judges, I read them as a theory of how state violence might be kept at the limits of law. Haberkorn situates denial of state violence and responsibility historically; I situate it topographically, in relation to Thailand's legal order today. If Haberkorn's problem is the ambiguity in the illegal-legal binary, such that judges in Thailand can interpret facts of cases so that state officers can get away with torture, murder, and enforced disappearance (see also Feldman 2017 on immunized police violence in the United States, drawing on Dyzenhaus 2006) then for me it is how to move beyond this binary, to locate the jurisprudence that follows in a three-dimensional topography of legal ordering, rather than confining it to the two dimensions of the legal and illegal.

For this reason I outline the jurisprudence with reference to Lindahl's (2013) theory on the politics of alegality. The advantage of his theory for this inquiry is that rather than just speaking of how the jurisprudence of torture is characterized by ambiguity, it opens up possibilities to think the relation of torture to law beyond the legal-illegal binary. My argument is that the jurisprudence of torture in Thailand does not locate torture on a boundary between the legal and illegal, but presses the practice to law's limits—not all the way into the legally unordered, or extralegal, but right to the limits.

5. G.A. Res. 39/46, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2 (December 10, 1984).

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The jurisprudence's struggle is not over how to sanction or condone what torturers do, but over how to refuse to do either: over how *not* to judge, or to judge as little as possible, by locating the practice of torture on a legal limit. This limit lies not between the legal and the illegal, a boundary that falls within legal order, nor at some location completely outside of it, but in the realm of the as-yet legally disordered that abuts the legal order, that presses and sometimes pushes against it.

To explain further, what Lindahl calls boundaries internal to legal order—akin to the borders between subnational provinces or states in a federation—differentiate the legal from the illegal. When members of legal collectives are debating the place of torture in relation to law, as in Jinee Lokaneeta's (2011) account of the jurisprudence on torture in India and the United States, they are locating the practice along these internal boundaries. Theirs is jurisprudence *on* torture because they directly address questions of torture explicitly or euphemistically as a category or categories of state violence that need to be rendered legally sensible.

Whereas debates about torture in the United States and India push ambivalently toward the legality-illegality boundary within those legal orders, the jurisprudence *of* torture in Thailand pushes the practice to the limits of law—the national boundary, so to speak—across which a legal order ceases to do the work of ordering. At these limits the alegal appears in practices that call "into question the distinction itself between legality and illegality" (Lindahl 2013, 30–31). The jurisprudence of torture in Thailand, in contrast to the jurisprudence on torture in the United States or India, keeps practices of torture at these limits: abutting legal order, but not legally ordered.

According to Lindahl, alegal practices irrupt legal order. Irruption "evokes the element of force in a-legality" (Lindahl 2013, 161), which gives it potential to break into and disrupt existing legal arrangements. At its strongest, alegality's irruptive force is too much for legal order to contain. It breaks legal order open but cannot be brought within the existing legal arrangements. Weak alegality, by contrast, is in principle orderable. Legal boundaries can be adjusted to render the alegal either legal or illegal, to bring the practice in question from the limits of legal order to the boundaries within it. It is with this latter type of alegality that the jurisprudence is concerned.

Where it is practiced and acknowledged but not addressed by a legal order—which is to say, not located on one side or another of an internal boundary, between the legal and the illegal—torture is weakly alegal. It is kept at the limits of law even though it might be brought within them. On Lindahl's account, its irruptive force still should be sufficient to press members of the legal collective to decide one way or the other on its status, so as to locate it at a boundary within the legal order. And in some legal orders, like those of India and the United States, this is what has happened. Similarly, Israeli judges respond to torture by, as Karin Loevy (2020, 319) puts it, "redrawing the lines so that what is seen as necessary violence will remain 'within the law'" (see Ballas 2020). They attempt to reconcile the continuum of state violence with the boundaries of law, to draw and redraw lines through the continuum to demarcate the permissible from the impermissible.

That is not what I observed conducting research on torture in Thailand during the late 2010s. In the next part of the article I discuss how during this research I generated the data from which the jurisprudence emerged. Thereafter I outline the jurisprudence. I conclude by restating and amplifying the argument set out here, by insisting that torture

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was in the period of research not located on a boundary between the legal and illegal in Thailand, but held at the limits of legal order. From there it penetrated Thailand's legal order not through irruption but less forcefully, via seepage. I close by looking toward a future in which torture might, finally, be relocated from the limits of Thailand's legal order to its internal boundaries.

ACCOUNTING FOR TORTURE IN THE PUBLIC TRANSCRIPT

Rather than do an accounting *of* state violence, in the manner of human rights defenders who enumerate incidents and bodies (Tate 2007; Nelson 2015), here I propose to account *for* it. Or rather, I propose to have it to account for itself, by observing and interpreting what Robin Wagner-Pacifici (2008, 465) refers to as "state self-articulation and self-documentation" of state violence. When these modes of self-articulation and documentation are expressed in courtroom interactions they enter into what James Scott (1990, 2) has labeled the "public transcript" between subordinates and those who dominate them; here, between tortured men and torturers, prosecutors, and judges.[6]

Narratives of torture that enter onto the public transcript have latent potential to threaten power relations by upsetting or querying the prerogative of state officers or their proxies to purposefully deliver torment on captives of their choosing. However, the enclosed, ritualized conditions of the courtroom prohibit open confrontation of a sort that might tear at the public transcript. Instead they work toward reinscription of state violence. Court personnel make facts about violence amenable to the official record, to "connect violent means and legitimate state ends" (Wagner-Pacifici 2008, 465). The byproducts of their work form the empirical basis for this jurisprudence.

Over sixteen months in 2018 and 2019 together with a research assistant, Pimchat Permpoon, I documented thirty-four recent cases in which judges in Thailand heard accounts of torture.[7] They constitute part of a larger body of material that I have assembled over five years in Thailand and Myanmar, which includes a wide variety of official records, personal narratives, and ephemera on the practice of torture. For this part of the research we assembled the cases by working in and among groups in Thailand that are documenting cases of torture, as well as other types of state violence, like arbitrary

6. In this article I refer to "transcripts" both in the sense of the public transcript, after Scott, and also in the juridical sense of a record of what was said. "Public" does not imply that the details of these cases or others in Thailand's courts are openly available. As Duncan McCargo (2020) points out, while in principle courts are open, in practice most of their work goes on without any kind of outside scrutiny. Even the rulings of the Supreme Court that have not been included in published volumes for the reference of subordinate courts and lawyers can be hard to obtain. For this research, the Thai assistant who went to the Office of the Supreme Court to obtain copies of rulings that had been reported in news media was asked by the duty staff why she wanted them and had to produce identification before the staff provided them.

7. Pimchat is a graduate in political science from Chulalongkorn University and at the time of the research was completing a law degree. I was introduced to her by the director of the Cross Cultural Foundation and she worked on the research part-time for twelve months as an employee of the Foundation, funded from project monies for that portion of her employment related to this research, and for other project expenses.

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detention, enforced disappearance, and extrajudicial killing.[8] All the cases were heard in court during the last decade. All concerned torture practiced after the year 2000, some during periods of elected civilian government and others under unelected military dictatorship.[9] All concerned cases in which a person was tortured to confess to some crime, some with ancillary objectives.[10] Of the thirty-four, by the end of the research period half were either ongoing or had been closed without judges deciding on anything.

This article concentrates on the remaining seventeen cases in which a total of fifty men and boys alleged torture where judges did decide on something—that is to say, where judges adjudicated, and addressed or elided facts about torture.[11] That is not to say that they decided on the question of whether or not the practice of torture is acceptable or unacceptable, legal or illegal—or on whether or not what happened was, after all, torture. However, they did decide on some aspect or another of a case in which facts about the practice of torture were put on record.

In five of the seventeen cases on which this article is based, the tortured men were appearing in court as criminal accused. In their defense they made statements that they were tortured. In two more, they appeared in court because police alleged they falsely claimed torture. Five were postmortem inquests. Three cases went to administrative courts, which hear compensation cases against state agencies. One of the postmortem cases also went on to the administrative courts.

In the two remaining cases the tortured men brought criminal charges against the police after the public prosecutor declined to do so. Under the Criminal Code, complaints can be brought against state officers for wrongful exercise of official duties in criminal cases, and, like they can be against anyone else in Thailand, for causing physical or mental injury (sections 157, 200, and 295). At the time of research the Code did

8. These organizations include the Cross Cultural Foundation and its affiliates in the far south, Duayjai, HAP, and the Muslim Attorneys Center; Human Rights Lawyers Association; Thai Lawyers for Human Rights; and United Lawyers for Rights and Liberty. Some case records we obtained directly from the Office of the Supreme Court (see note 6).

9. In this period Thailand had an elected civilian government until a coup on September 19, 2006, followed by a civilian government from February 2008 until another coup on May 22, 2014. The latter military government remained in office until March 2019. Practices of torture and responses to torture in the cases documented cut across these decades, through periods of both civilian and military governments.

10. Ancillary objectives might include to receive payment or have the accused cooperate in a sting operation or in some other undertaking. That none of the tortured whose cases are included in this study, including those in the far south, were tortured to extract information is consistent with what is known today about the prevalence of torture worldwide. According to a former United Nations special rapporteur on torture, over 90 percent of the tortured persons he interviewed during the six years he held the role had been tortured to confess by police officials (Nowak and Monina 2020). Torture in Thailand today is characteristic of the practice across Asia and beyond—not spectacular but banal (see Celermajer 2018), and more prevalent than the types of interrogational and retributive torture (real and imagined) on which much of the debate post-9/11 has turned.

11. In all of the cases documented, both torturers and tortured were gendered male. Additionally, most people in Thailand who have publicly alleged torture have been gendered male. For this reason, rather than use gender-neutral nouns and pronouns when referring to the tortured individually or in general, as "they" or "persons," throughout this article I use masculine nouns and pronouns, "he" and "men," notwithstanding that a few of the tortured were, as already noted, teenagers. By way of one noteworthy exception, after fleeing abroad, a woman whom the military held captive after the 2014 coup said she was beaten, suffocated with a plastic bag, and kept blindfolded and restrained for a week in an army camp (Prachatai 2014).

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not refer to these acts as "torture."[12] Nor did those sections delineating offenses for causing injury address public officers' roles in such violence specifically. No other law did either. As such, in none of the cases discussed was torture an offense as denoted in international law: a criminal act comprising certain elements, among them that it pertain specifically and exclusively to the deeds of public office (Nowak 2006). The Code did use the term "torture" to denote aggravated violence and cruelty in cases of murder like the one involving the police in Nakhon Sawan, kidnapping for ransom, and gang robbery (sections 289, 313, 340, and 340A). This is a completely different meaning from the one that the term has in international law. Thus, in contradistinction to international law, at the time of research torture in Thailand was a legally undefined category of extraordinary, general violence, not a defined category of specific violence by or at the behest of public officers.

Nine of the cases pertain to the violent conflict in the country's far south, adjacent the border of Malaysia. There, soldiers, police, and paramilitaries have since 2004 tortured captives held in counterinsurgency operations, under the terms of martial law—and from 2005, emergency regulations (Amnesty International 2009; Cross Cultural Foundation et al. 2016). This is the area of Thailand where on human rights defenders' accounts torture is practiced routinely.[13] It is heavily militarized, and policed by joint military, paramilitary, and police forces (McCargo 2008). But if there is a big divide between the far south and the rest of the country in terms of the types and extent of torture practiced, it is not a radical one. State officers practice torture in a range of different conditions and types of cases in other parts of Thailand as well.[14] Of the other eight cases, four are from the country's central provinces, three from the near and mid south, and one from the northeast.[15] The numbers of cases from each region are indicative of the reach of the organizations in collaboration with whom I worked while doing the research on which the article is based. They are not indicative of the prevalence of torture in one region of Thailand or another.

12. For this reason, the criminal court cases discussed here do not use the designation *kanthoraman* (การทรมาน) or torture, but instead refer to bodily injury. The three constitutions of Thailand that pertain to the period in which the research was conducted (1997, 2007, 2017) all stipulated that torture of a detainee was not permitted, but wanted for an enabling law or amendments to existing law to be criminally enforceable. Administrative court judges in cases discussed here used *kanthoraman* when issuing rulings for damages, citing the constitutional stipulation, as their jurisdiction differs. Judges in criminal cases, on the other hand, adopted whatever usages were in the sections of criminal law pertaining to the cases they were hearing.

13. One human rights defender from the far south, himself formerly tortured, estimated in conversation that among over 200 former captives there with whom he had worked between 2016 and early 2018, soldiers, police, and paramilitaries had tortured around 170 (Cross Cultural Foundation office, Bangkok, March 27, 2018, pers. comm.).

14. Of the thirty-four cases documented, sixteen are from the area of counterinsurgency in the far south, twelve from the central regions, in and around Bangkok, and six from other parts of the country.

15. Though conditions in the far south and in the other parts of Thailand are significantly different, I do not speak or write of two jurisprudences, one for the south and another for the rest. The courts in the far south where cases involving torture are heard are part of the same national structure of courts. They are not operating autonomously like, for instance, the military courts in the Israeli occupied territories (Hajjar 2005) or the Guantanamo military commissions (Human Rights Watch 2020). Additionally, the emergency regulations used in the south can and have had effect in other parts of the country where state officers have tortured detainees.

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Though they are not indicative, each of the cases is revealing of the work of Thailand's courts after the fact of state violence. Each is not just "a case" of some*thing*. It is a site in which the layered complexities of state violence and its refusals reveal themselves. These are not cases as single observations, in a quantified social scientific sense, but sites that are full of "large-n data points" (Yanow 2003, 10). That is to say, they are sites within which multitudinous observations can be made about how torture is reported, recorded, and received—about how torturers speak and what they do, and where and why; about how the ways they speak and act are understood and interpreted by administrators and lawyers, journalists, and judges. For the seventeen cases, these points are scattered across some 3,500 pages of court, police, and administrative records selected from lawyers' and organizations' files, and video footage and photographs taken by police officers presented to court. Supplementary sources include lawyers' case summaries; online, print, and television news reports; notes taken from conversations with lawyers and parties to cases; and notes on courtroom visits, both by myself and the research assistant. Most of the material is in Thai. Translations are my own.

Ethical dilemmas and responsibilities pertain to the writing out of all social scientific research (Fujii 2012), but are unusually fraught when writing about torture, because of the long-term effects of this type of violence on the tortured and their families (Başoğlu 1992).[16] How much or how little to say about acts of torture? Whether to identify participants or not? Which facts are necessary to outline the jurisprudence that follows? Which can or must be omitted? These questions weigh heavily on this article. In answer to them, at risk of flattening out some of narratives that follow I come down on the side of saying less rather than more, of removing identifying details rather than risk revealing things that ought not be revealed. Where tortured men and their families, or the families of deceased, have sought to make publicly known what happened to them, where they have participated in campaigns against torture or have spoken out about the practice, I have identified the cases by name. Where they have not, I have removed identifying details. These include some cases that were reported in the news media but where the tortured or their families have not demonstrably consented to this reportage. They are identified parenthetically by codes where the first letter or letters identify the region of the country where the torture occurred (C for Central, FS for Far South, NE for North East, S for South); the numbers that follow, the year in which it occurred (14 for 2014, and so on); the alphabetical notation thereafter for the source; and lastly, by a unique case number in a series starting at number one for each source.

From the preceding it will be obvious that my methodological stance is toward inquiry into the actual experience of state violence and law's response to it among people in a particular time and place. With Didier Fassin (2012, 12–13), I believe that in-depth study of specific objects and sites is more illuminating than exhaustive analysis or a general overview of a phenomenon. That is why, rather than start with principles and work toward practices, with why torture must be prohibited (Matthews 2008), or regulated (Dershowitz 2002, ch. 4), I proceed from observation of situated practices toward an account of how legal order relates to torture so as to grasp at principles of justice and logics of judgment that are otherwise obscured by general or formal accounts of the work law does.

16. The project design addressed these and other questions in its institutional review approval process.

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As an exercise in interpretive empirical political theory,[17] the jurisprudence proceeds from the particulars of specific cases and recounted torture situations toward other specific cases and recounted torture situations. It contains no schema of the courts or narrative of their design or history. Nor does it go into the backgrounds, training, or particulars of the judges and other personnel who work in them. Readers keen to learn about who judges are, and the relationship between judges, politicians, and Thailand's "network monarchy" (McCargo 2005) should consult Duncan McCargo's (2019) book-length study of judicial politics during the 2000s and 2010s. Those with interests in legal history should see Andrew Harding and Munin Pongsapan's (2021) edited volume, and those in the history of police and policing in Thailand, Craig Reynolds's (2019) study of the career of a southern police officer and state formation in the mid-twentieth century. Sanchai Polchai (2012) provides a conventional overview of courts, trials, appeals procedures, and record keeping in Thailand, while Samson Lim (2016) discusses how knowledge about crime was historically produced there through forensic science and the print media, and David and Jaruwan Engel (2010) have written on perceptions of state law and justice among personal injury complainants.

OUTLINE OF A JURISPRUDENCE OF TORTURE IN THAILAND

The jurisprudence of torture outlined here consists of two orders of interpretation and observation. The first concerns how judges have received and documented accounts of torture so as to be able to decide on whatever question or questions of law have come before them. The second concerns what I inferred of how judges in Thailand created and organized knowledge about the practice of torture from observation of cases in which facts about torture went onto the court record and were among the subjects of judges' deliberations. In most of the cases discussed, the judges did not describe the actions in question as torture, and none of them addressed the practice of torture as a jurisprudential problem. The rubric, then, is mine, not theirs, even though its particulars rest upon a reading of the judges' reception and documentation of accounts of torture, as recorded in official paperwork and notes from court observation.

Structurally, the jurisprudence bears a resemblance to Stanley Cohen's elementary forms of official denial, which Lokaneeta (2011, 42) adapts in her discussion of how police in the United States have denied torture: "literal denial (no torture), interpretive denial (something happened but not torture), and implicatory denial (it happened but was necessary)." But while Cohen (2001, 107) is right to say that "powerful forms of interpretive denial come from the language of legality," here I want to differentiate interpretive denial through legal idioms from the legalism with which Cohen associates it, as well as from the kind of "formal legalism" (Dressel 2010, 685) that is sometimes

17. Here I have in mind empirical political theory as outlined by Monroe (1997), to which I add "interpretive" to be methodologically explicit that "data are legitimated in their word form as they are derived from (participant-) observation, conversational interviewing, and texts, rather than translated into measures" (Yanow 2003, 12). The jurisprudence in fact sits at the nexus of political and legal theory, inasmuch as it is concerned with both political and legal order—with the making and keeping of order in the polity and with the adjudication of general rules that make and keep it so.

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ascribed to the work of Thailand's courts. The jurisprudence of torture in Thailand expresses a form of knowledge through the legal idiom that seems to exceed law; knowledge that is within law while being discontinuous with it (Shimabuku 2019, 1). It is expressed through law's idioms but escapes its reason. Holding torture at the limits of law, the jurisprudence keeps torture unstably but more or less consistently alegal.

Substantively, the jurisprudence carries with it the weight of a "hierarchy of credibility" (Becker 1967, 242), which mediates facts about torture and classes them as incredible or credible, unacceptable or acceptable, and inactionable or actionable. The hierarchy rests on a number of principles. Taken together, these are that an allegation of torture calls for evidence of physical bodily injury for which no alternative explanation exists, and that if proven then torture can be excused in the name of duty, or elements of the torture situation can be subtracted from the case so as to reduce its significance. Put crudely, the questions that arise when torture is narrated in Thailand's courts are: Does the body bear marks? Could these marks only have been inflicted deliberately? Are there extenuating circumstances, such as that the responsible state officers were performing their duty? And, what elements can be subtracted from the torture situation to diminish complicity and liability?

By following these principles judges in Thailand hearing accounts of torture can either deny their facticity; or accept their facticity but deny that anyone can be held responsible; or accept that someone might be held responsible, but excuse them of responsibility or hold some artificial legal person financially liable, and, in two of the seventeen cases, natural persons criminally liable.

The principles are not operationalized mechanically. It is not as if judges move through a checklist of items, from physical injury, to questions of duty, to the subtraction of elements, at each point adopting if-then logics. As McCargo's (2020) ethnographic vignettes of hearings in Thailand's lower courts show, though criminal procedure in Thailand is in some ways predictable and systematic, in practice hearings are often disorganized and raise many more questions than they attempt to answer. No positivistic clockwork is ticking away in the background. Nevertheless, I opt for this manner of organizing the materials, mimicking if-then logics, because it is convenient for the presentation of the materials, and broadly consistent with patterns observed in the data generated.

Torture Allegation Needs Physical Bodily Injury as Proof

The first principle of the jurisprudence is that *physical bodily injury is necessary to allege torture*. This principle aligns with Darius Rejali's (2007, xviii) hypothesis that "public monitoring leads institutions that favor painful coercion to use clean torture to evade detection." By "clean" torture Rejali does not mean torture that is not physically injurious, but rather, torture that does not today purposefully leave obvious marks of an older sort inflicted as the manifestation of sovereign power on the body of the subject (Foucault 1977; Kahn 2008). That is to say, torture can be "clean" in Rejali's sense but still leave marks that may or may not amount to physical bodily injury sufficient to prove that something happened or was done to the body bearing them.

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Cases of torture in Thailand support this hypothesis and align with Rejali's class of clean tortures. Torturers there do tend to use clean techniques—they suffocate with plastic bags, or beat with PVC pipes (rather than metal ones.) Where they use techniques that do leave marks, these generally are imprecise, and liable to fade or heal relatively quickly. That is to say, if the line that Rejali draws between clean and dirty torture lies not between the body that has some marks and the body that does not but rather is determined by the intentions of the torturers, then the legal question that follows of whether or not physical bodily injury is discernible for the purposes of the work of a court is, in Thailand at least, not so straightforward a matter as to point to a bruise or open wound.

To have physical bodily injury recorded as evidence of torture in Thailand calls for promptitude and the involvement of professionals who can medically verify wounds and legally validate claims that physical bodily injury actually exists, or existed. Put another way, the fact of physical bodily injury is necessary but not sufficient (as further discussed in the next section) to constitute proof that something has happened or was done to the body. Bodily injury is not only ephemeral and therefore at risk of being lost for the purposes of judicial inquiry. It stands, in every case, in need of medical verification for the actual fact of its existence to become legal fact. The injury that is not on a court's file does not exist.

Among the cases examined for this article, two stand out as examples of how a failure to torture cleanly can result in allegations of torture penetrating the legal order with enough force as to compel a response. In one from 2002 that ended up in court for over a decade, judges in Ranong, on Thailand's southern peninsula, instructed that a doctor examine one of two men, Viroj Suvannee, who said that police had tortured the pair to confess to murdering a local political rival. The judges were prompted by a medical checkup on admission to jail that had revealed fresh bruises, abrasions, and injuries on Viroj's genitals and penis. The doctor saw what appeared to be some ten burn marks on Viroj's genitalia and another on his tongue. Not only were these marks clearly visible but they also could only have been caused deliberately and with specific techniques. With the evidence of torture showing clearly on their flesh, the accused were able to bring a criminal case against the police, even though the judges had in the meantime sentenced them and a third accused to prison for murder.[18]

The other noteworthy case was in Prachinburi, east of Bangkok. There, in 2009, police beat eighteen-year-old Ritthirong "Chopper" Chuanjit, the son of a small-town trader, and—in the manner of the police officers in Nakhon Sawan—suffocated him with layered plastic bags repeatedly to have him confess to theft.[19] When he did not, the police let him go. He returned home with bruising on his abdomen, face, neck, and spine and contusions on his wrists. Chopper's father photographed his son and hurried him to a hospital where a doctor issued a medical certificate that verified the injuries in the photographs and recorded the cause as "assault by bodily force."[20] After the public prosecutor refused to bring a case against the police, Chopper himself lodged a

18. Supreme Court, No. 1031/2560, October 18, 2017.

19. This case and the decade-long struggle for justice that accompanied it have recently been made the subject of a book published by the Cross Cultural Foundation (2021).

20. In English in the original document, issued January 29, 2009, at Baan Sang Hospital.

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criminal complaint, in 2015. It was on the basis of the medical certificate and photographs that provincial court judges the following year agreed that there were grounds for the police involved to be tried for wrongful exercise of authority, bodily harm, and deprivation of liberty.[21]

In these two examples, torturers failed to keep marks off the body of their captives that would implicate them. The lesson, again, is that torture needs to be clean, and managed such that it cannot be medically verified or legally validated, such that there is physical bodily injury to support an allegation. But torturers need not be scrupulously clean. They need only be clean *enough*. Torture does not have to be spotless. It just has to ensure that judges can overlook, literally, bodily injuries that are insufficiently impressive to compel them to act, injuries that are not documented immediately or that appear superficial. In the abovementioned cases they could not. In one they could not because of the specificity of the injuries, in the other, because of the proximity between the time when the doctor recorded that the injuries had been caused by an assault and the time when the tortured man was in custody. But where the physical evidence of bodily injury is weak or imprecise, or where a complaint is made some time later, judges need not bother to register the fact that they have heard stories of torture, let alone ask after its possibility.

Alternatively, judges can register the fact that they have received testimony of torture, but refuse to comment on it. This is what two judges of a provincial court in the southern province of Trat did when three men and the wife of one told how soldiers tortured the men to confess to a fatal blast that ripped through a marketplace in May 2014, just a few days after the military coup of that year (S14T-06). The three men testified that soldiers hooded and drove them long distances to an army camp in Chonburi. They told how their captors repeatedly suffocated them—again like the anti-narcotics unit in Nakhon Sawan—with layered plastic bags, beat them with various instruments, threatened to kill them by pushing them from moving cars and drowning, electrocuted one, pushed the head of another underwater, and held his wife hostage and told her she was never going to see her husband again and was surely going to die. Most of the techniques left no marks, but the beatings and handcuffing did. These injuries are captured indistinctly in photographs taken some time after the torture occurred.

The judges in Trat heard lengthy and graphic accounts of torture in the course of the trial, and renarrated them onto the record.[22] They summarized details in their verdict, but said nothing of them because they had other grounds on which to decide. They stressed that no eyewitnesses or material evidence linked the accused to the crime.

21. Criminal Code sections 157, 200, 295, 296, 309, and 310 with 83.

22. In Thailand courtroom testimonies are not taken down verbatim. One of the panel of judges renarrates the testimony into a recording device. They pass the recordings at intervals to a clerk sitting adjacent to the bench who types what the judge has narrated while the hearing continues. After the hearing, the parties get printed copies to read and sign. Lawyers sometimes annotate these records and if the judges are still in the courtroom ask for corrections. From observation these are usually minor. Judges do not record the questions asked by prosecutors, lawyers, or themselves, only the answers of the person testifying. These appear as an unbroken narrative, marked by subheadings indicating cross-examination and reexamination. In taking down what is said judges are guided to record only legally relevant statements. Sanchai Polchai (2012, 63) notes that because appellate court judges generally rely on the written record to form their opinions, judges in the courts of first instance have to "recreate the answers in a manner that also indicates the question for the appellate court to understand what was spoken by all parties."

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Soldiers who had investigated and detained the men didn't bother to come to testify. The judges acquitted the men because the prosecution case was shabby. The question of whether or not the confession of one accused was obtained by torture, as he said it was, went unanswered. The judges did not seem to think the confession was invalid, only that it was inadequate, even though a confession of this sort is formally inadmissible evidence.[23]

Under section 295 of Thailand's Penal Code "bodily harm" can be either physical or mental. In three cases documented where lawyers brought evidence of mental bodily harm caused by state officers' torture, in one, criminal court judges disregarded it, and in two administrative court judges acknowledged it, having accepted the complainants' versions of events because of accompanying evidence of physical bodily injury caused by sustained violence.[24] That is to say, the claim of mental bodily harm alone is insufficient to sustain an allegation.

The first was the case in Prachinburi, where a clinical psychologist from the Ministry of Public Health opined that Chopper was suffering posttraumatic stress disorder. Because judges at the provincial court attempted to have the complainant settle the matter through a court-facilitated mediation procedure, in the course of which they received and reviewed documentation on the case, when the procedure failed and the case came into trial court the judges said that they already had all the information they needed in order to decide, and rushed to wrap the trial up without hearing from the psychologist.[25] Nor did they mention the psychologist's report in their ruling.[26] They did, on the other hand, refer to the examining doctor's report. They also received testimony from her so as to verify that she had observed the physical injuries, and had heard from Chopper as she had recorded.

In two other cases, these in the far south, doctors from the International Rehabilitation Council for Torture Victims made the assessments. One was of a

23. Confession was excluded from admissible evidence under section 84 of the Criminal Procedure Code (as amended in 2004). Duncan McCargo (2020, 3) points out that nevertheless in practice "the primary *modus operandi* is to identify a suspect and persuade the suspect to confess." Siriphon Kusonsinwut (2008, 57) estimated that around four in five criminal cases in Thailand rely on confession. See Paveena (2008) for discussion of case law.

24. A civilian legislature established administrative courts in 1999 on the back of strong public demands for more accountability from government offices, following decades of debate and incremental progress toward their establishment (Bishop 2011). They began work in 2001. Special emphasis on their institutional independence, and that of their personnel, has made them a source of hope for civil society organizations fighting vested interests. Barring the year of the 2014 military coup, which saw a sharp dip in litigation, numbers of cases before these courts have steadily risen (Munger et al. 2019). For lawyers working on certain categories of cases, like environmental litigation, and consumer rights (Munger 2014), as well as torture and other injurious actions by police and soldiers, the administrative courts hold the best chance to get financial remedies, other than via direct settlement with the responsible officials.

25. Trial observation notes, June 4, July 3–4 2018, by research assistant. I attended the failed mediation session at the Prachinburi courthouse on May 23, 2018, which is described in Cross Cultural Foundation (2021, 122–30). For a short account in English of another court-mediated dispute see McCargo (2020, 17–18). An amendment in 1999 to the Civil Procedure Code introduced court-mediated settlement in civil disputes in Thailand (Vichai 2002). However, the Regulations of the Judicial Administration Commission on Mediation BE 2544 (2001) rather imprecisely state in their article 3 that a case subject to mediation can be "a civil case or any other case in which a dispute can be settled by a mutual agreement between the disputing parties" (คดีแพ่ง หรือคดีอื่นใดที่อาจระงับพิพาทได้ด้วยการตกลงกันของคู่ความ), opening the door to police officers or influential parties in criminal cases to press complainants like Chopper to drop their complaints in exchange for apologies and money.

26. Prachinburi Provincial Court, Black Case No. 925/2558, September 28, 2018.

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man among a group of men tortured with Imam Yapa, whose case I discuss in the next section. The other was of one among nine university students who said that soldiers and paramilitaries at an outpost in Yala during 2008 wrapped a meter-long hard object in fabric prior to hitting them to have them confess to possessing computer equipment on which soldiers said they found files about military tactics, police weaponry, and explosives (FS08C-14). The soldiers later took their captives to the military jail inside the Ingkayuthborihan Camp in Pattani, where according to the students they hosed at least two of them down in their compound, and took one after another to a freezing cold air-conditioned room and interrogated them while soaking wet. They forced one into an upright fetal position and while a torturer sat in a chair astride the student's back another wrapped a bicycle inner tube tight around his throat and pulled it upward over his head so as to suffocate him.

When released after some days the students were able to visit a doctor and have some injuries recorded, but the doctor did not note anything about their conditions that would unambiguously support allegations of torture, like the burn marks on Viroj in Ranong. Over a month later, the specialists from abroad opined that one of the two who said they were seriously tortured was experiencing trauma consistent with his account. The administrative court judges acknowledged though did not comment on the specialists' report. Notwithstanding this, they awarded damages for bodily and mental injury to the two who brought the case, in view of the physical and circumstantial evidence received. Judges of the Supreme Administrative Court upheld the ruling.[27]

Torture Proven Only If Absent Any Other Explanation

To iterate, if torture is clean enough then judges in Thailand refuse to judge since the bodily injuries are insufficiently impressive as to press them to do so. Where physical bodily injuries are excessive, and sometimes fatal, then the second principle of the jurisprudence activates, which is *that physical bodily injury is not proof of torture unless no alternative explanation for the injury exists*. Absent alternative explanations, judges are forced to infer that the injury is the result of torture. They then search for other explanations with which to hold torture at the limits of law.

This principle puts the onus on the captive, or their family or friends or a lawyer or journalist or human rights defender, to record physical bodily injuries as quickly and as thoroughly as possible, and as soon as possible after torture. It depends on being able to do just that. In the case in Prachinburi, the police let Chopper go home after torturing him. His father took photographs of his body and took him to hospital. The next day he and his father made a complaint at another police station. The accused police said the recorded injuries were nothing to do with them, but as the father and a doctor recorded the injuries very soon after the young man left captivity, the judges said the police's version of events was implausible. They advised the police that they had missed

27. Supreme Administrative Court, Black Case No. 55-56/2555, June 28, 2016. The court kept the total quantum of damages payable, 505,000 Thai baht with interest, the same as the court of first instance, but changed the allocation of damages to each of the complainants.

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opportunities to strengthen their case by not, for instance, inviting the doctor who had examined the tortured man to state that the injuries were likely not caused by physical abuse.

When convicting one out of the seven accused, Police Lieutenant Colonel Vachiraphan Pothirat, the judges in Prachinburi made no reference to torture where unsupported by clear evidence of physical bodily injury. They did not mention the police's use of a plastic bag to suffocate the teenager or their alleged threats to kill him and dump his body on a nearby mountainside—even though a police officer who had seen the torture and had done nothing to stop it had, so as to get out of responsibility himself, produced an affidavit verifying the young man's version of events.[28] Physical bodily injury alone counted as evidence worthy of the judges' consideration.

In a contrasting case (S15X-01), back in Ranong, four young Burmese migrant workers all testified at length that the police during 2015 tortured them to confess to murder. They said the police punched and elbowed them in their throats and heads, punched and kneed them in their chests and stomachs, strangulated them with hands and ropes, kicked and stomped on their genitalia, hit the ears of one and suffocated him with a plastic bag until he fell unconscious, poured hot coffee onto the head of another and hit his arm with a rattan stick, and put guns to their heads and threatened to shoot them and their relatives in Thailand and dump their bodies in the ocean. The judges were unpersuaded by any of these allegations. On the other hand, they were impressed by video footage of the young men admitting their guilt inside a police station. They concluded that the young men's struggle with the victim, not torture, must have been the cause of injuries to their bodies. This alternative explanation not only aligned with the judges' preferred outcome in the case but also brushed aside the young men's claims to have been tortured.

Similarly, in the case of three young men accused in 2016 of assaulting and robbing two foreign tourists in the seaside district of Samroiyod, Prachuap Khiri Khan, south of Bangkok, the judges dismissed the allegations of two—Natthawat Thanatthikanchana and Adisak Silamud—that they had been tortured to confess since according to a medical certificate that the police obtained from the Pranburi hospital the pair's injuries were likely the result of a melee with the tourists.[29] The bruises and lacerations the men's bodies bore were imprecise because the police officers had, other than hitting and kicking them, used clean techniques: suffocation with plastic bags, standing on hands, and beating with PVC pipes, as well as culturally humiliating techniques like pushing their feet into their captives' faces. Nor were the judges persuaded by the testimony of a witness that she had heard one of the defendants crying out and had seen a police offsider bringing in plastic bags—in the manner of Superintendent Joe's men in the video from Nakhon Sawan—with which to suffocate him.

28. This is the only case in Thailand I am aware of where police officers have given evidence in the form of an affidavit and in-court testimony in support of a torture claim made against other policemen.

29. Hua Hin Provincial Court, Black Case No. TorOr.2/2560, September 19, 2018. Lawyers for the three succeeded in having their conviction overturned on appeal. Without commenting on the alleged torture the higher court judges cast doubt on the veracity of the confession and poked holes through the flimsy material evidence that the police had fabricated against the three. Court of Appeal Region 7, Black Case No. 796/2562, September 12, 2019.

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Where someone dies due to torture while in custody, the extent and character of physical bodily injuries are put on medical and sometimes postmortem records. But if too much time passes between torture and death then judges can cast doubt on the relation between one and the other. A man in his midthirties whom police brought to prison in Yala in 2009 complained of pain in his chest and stomach, as well as difficulty hearing and seeing due to repeated bodily assaults over two days of captivity, first in a joint forces base and then at a district police station (FS09C-11). According to him, early one morning unidentified men took him from his house to the base, where around ten of them beat him up while he was handcuffed, before sending him on to a district police station the next day. There, another four or five men, none in uniform, slapped and boxed him around the face repeatedly, kicked him in his midriff, stomped on his stomach and chest, and hit his eardrums simultaneously so as to have him confess to a state security crime that he didn't understand—since like many people in Thailand's far south, who speak a Malay dialect, he was not proficient in Thai. They took him to a vacant plot at the rear of the station and assaulted him further there until he lost consciousness.

The prison record corroborated the man's account. It shows that on arrival he had fresh bruises and scars that looked to have been caused by bodily assault. Photographs show him with a swollen, black eye and abrasions to his stomach. His jailers transferred him to the prison hospital. Almost a month after he was admitted, the doctor in charge was sufficiently concerned about his condition to request that the inmate be treated at an external hospital. In his request he recorded that the inmate "had been assaulted outside" the jail and that he had since been suffering from "multiple contusions on his back, feverish sleeplessness and stomach aches [and] uncomfortable constricted, painful breathing [such that] he could lie only on his side."[30] The detainee was admitted to the Yala hospital where doctors operated on him for internal abdominal bleeding. Back in prison he told other inmates and his family on visits that the chest pains continued. He died the following year, after transfer from prison to hospital. The doctor who completed the death certificate recorded the cause of death as cardiopulmonary arrest. The man's mother insisted that he had been fit and healthy before his arrest and that assault in custody had left him with chronic ailments that contributed to his death. Two judges of the Yala Provincial Court rejected this explanation, concluding that too much time had passed between the assault and death to say that the former was a cause of the latter.

Even where deaths occur shortly after torture, judges and doctors can elide evidence of bodily harm and refuse allegations of torture by insisting that some other factor might explain the death. They prepare records and issue orders that, as Haberkorn (2015, 56) argues, at once assign and refuse to assign responsibility. The doctor who completed the death certificate for a man in his thirties whom police during 2015 held in captivity in the northeastern city of Nakhon Ratchasima on a drug charge recorded the primary cause of death as severe blood leakage into the brain caused by "blunt head injury" (NE16C-02). The certificate contains six categories of death: natural, accidental, suicidal, otherwise inflicted, under investigation, indeterminable. In this instance, the doctor ticked the box for accidental death, even though the postmortem revealed fresh bruises and cuts

30. In Thai: ถูกทำร้ายร่างกายมาจากภายนอก มีรอยฟกช้ำหลายแห่งบริเวณหลัง มีไข้นอนไม่หลับและปวดบริเวณท้อง เจ็บแน่นหน้าอกหายใจไม่สะดวก นอนตะแคงได้อย่างเดียว

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over literally every part of his body. The doctor testified in court that in addition to the fatal head injury the deceased appeared to have received multiple blows to the head that could not have been caused by a fall and hitting his head on a hard surface. He had an injury to the back of an ear that was certainly not the result of an accident. The provincial court judges concluded that the deceased *had* been assaulted while kept overnight in the lockup and that whatever had happened inside the police station had contributed to his death. Nevertheless they concurred with the doctor that the specific cause of death was that he had hit his head while attempting to evade seizure. "It is not apparent who caused the injuries" to the rest of his body, they concluded.[31]

Back in the far south, two judges in Yala worked less hard than their counterparts in Nakhon Ratchasima to efface state officers' responsibility for the death of a man in custody there in 2007, but still stopped short of holding any of them directly responsible (FS07C-19). Police and soldiers detained the twenty-five-year-old and some nine others while searching for hidden weapons. According to the postmortem records, they took them to a shed and forced them to lie facedown. While interrogating them the officers stomped on their backs and heads. Two among those who testified at the postmortem inquest said they saw the man bleeding from his mouth and that after about three hours he was unable to breathe. The officers then carried him to a pickup truck, took him and the others to a district police station, and left him there while they took the others on to the Ingkayuthborihan Camp.

The soldiers did not take the man to the camp until evening time, and then to the camp hospital where the doctor on duty sent him immediately to the public hospital in Pattani, whose staff sent him on to the general hospital in Yala because they had no brain scanner; the staff of that hospital in turn took him to a private hospital with the necessary equipment, where a scan revealed cranial bleeding. He died while awaiting treatment. The examining doctor identified two head injuries and multiple injuries to his chest as the cause of death. The judges concluded that "the deceased was held by duty officers from the military and by police personnel and there was bodily abuse of the deceased, which was the cause of injuries [on account of which he] was sent to the Ingkayuthborihan Camp Hospital, the Pattani Hospital and the Yala Central Hospital before passing away."[32] While they decided that someone had caused the man's death, the inquest judges made no attempt to identify them by name, despite their responsibility under section 150 of the Criminal Procedure Code BE 2499 (1956) (as amended in 1999), to specify names of likely perpetrators if they can.[33]

31. In Thai: ไม่ปรากฏว่าใครทำร้าย The deceased in this case had five years earlier lodged complaints to the national police headquarters, attorney general's office, and the National Human Rights Commission of Thailand that members of the same police station had suffocated him with a plastic bag and pummeled him to have him confess to a drug offense. The torture in that instance left him hospitalized with "blunt abdominal injury" resulting in "acute blood loss" and "visceral organ rupture" (NE11C-02, quotes from the medical certificate in this case in English in the original).

32. In Thai: ผู้ตายถูกเจ้าหน้าที่ฝ่ายทหารและเจ้าพนักงานตำรวจควบคุมตัว และมีการทำร้ายร่างกายผู้ตายเป็นเหตุให้ผู้ตายได้รับบาดเจ็บถูกส่งตัวไปที่โรงพยาบาลค่ายอิงคยุทธบริหาร โรงพยาบาลปัตตานี และโรงพยาบาลศูนย์ยะลา แล้วถึงแก่ความตาย

33. Section 150 reads in part that the inquest shall "if the death is due to assault, state, to the extent it can be known, who was the offender." (ถ้าตายโดยคนทำร้ายให้กล่าวว่าใครเป็นผู้กระทำร้ายเท่าที่จะทราบได้)

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Torture Excusable in the Name of Duty

When lawyers for tortured men submit their complaints they express their clients' grievances as breaches of individual rights in domestic law. Sometimes they cite Thailand's obligations under the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which the country acceded in 2007, and under the International Covenant on Civil and Political Rights, to which it did the same in 1996 (see Vitit 2016). When judges who hear these cases write up their decisions they draw on different lexical resources. They speak to different ideas about the relationship between the bodies of the accused and law. First and foremost they situate the matters before them as affairs to be considered in the context of duties performed—duties of the civil service, duties in the name of justice—and only thereafter as offenses against the body and liberty of a person. This manner of foregrounding duty goes to the third principle in the jurisprudence, which is that where physical bodily injury is proof of torture and no alternative explanation for the injury exists other than that a captive was tortured, then *torture should be excused in the name of duty, or elements of the torture situation should be subtracted from the case so as to reduce its significance*.

Haberkorn (2015) has offered the keenest interpretation of how this principle works in torture cases in Thailand, through her reading of the files on Imam Yapa, who died in a police truck parked at a military post in the compound of a Buddhist temple in Yala during 2008. Although the imam did not survive, the experiences and observations of others in the group of six held for over two days in the truck with him tell us something of what he went through in his last days. One told investigators that after a team of police and soldiers came to his house they loaded him into the fatal truck, in which he saw another captive who looked as if he had already been assaulted (FS08C-08). The truck gathered up four others, including Imam Yapa and two of his sons. While the truck was parked at the army encampment, the former captive said, soldiers and paramilitaries assaulted him all over his body; suffocated him repeatedly with plastic bags; pushed a needle under his fingernails, into his penis, and into an eyelid; squeezed his testicles and rubbed ground fresh chilies into his face and eyes while suspending him half-naked upside down; tied him to a tree and beat him; and threatened to cut off his fingers and to kill him. Throughout this time he saw soldiers take the imam away repeatedly. At one point he saw some drunken soldiers beat the imam with a metal bowl and drag him along by a rope tied around his neck. He was with the imam when the elder man died in the truck. He said that although he and the others inside cried and pleaded for help, their captors ignored them.

In her reading of the court order from the postmortem inquest, Haberkorn points out that while recognizing that the man had died in military custody of fractured ribs and a punctured lung caused by assault of unspecified on-duty soldiers, judges in the Narathiwat Provincial Court repeatedly emphasized that the officers were performing state duties. In this way they effectively inverted the international legal prohibition of torture. A necessary element of that crime is that the offender be a public official or someone acting on their behalf. Furthermore, the crime can never be justified. Yet on Haberkorn's interpretation, the judges in Thailand examining the imam's death excused torture precisely *because* the torturers were state officers who were doing their duty.

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Imam Yapa's wife tried to bring a criminal case against five soldiers and a police officer. Judges in the same provincial court said they had no authority to hear the case against the soldiers. That was a matter for a military court. They dismissed the complaint against the policeman because, among other things, the death had happened "while the government had declared use of Martial Law in all districts of Narathiwat Province, such that army personnel had authority over civilian personnel in matters pertaining to maintenance of law and order."[34] The policemen were just doing what was required of them under martial law and they could hardly be blamed for what happened to detainees after they handed their captives over to the army, the judges said. An appeal court concurred.[35]

Where physical bodily injury is evidence of torture and no alternative explanation for the injury exists other than that a captive was tortured, then, in the cases documented for this article, the judges reduced the numbers of state officers and institutions responsible, and with them, narrowed the scope of liability. This method is not peculiar to cases of torture. Similar methods apply in other cases where judges want to lower liability or ameliorate penalties. However, because torture is not any kind of wrongdoing but a category of state violence that in international law attracts exceptional sanctions—one from which no derogation is permitted—if judges in Thailand had a shared concern to punish all those accused of torture within the terms of the positive law available to them then they might be expected to issue deterrent sentences to as many accused as legally possible. That is not what they do. Instead, the jurisprudential logic at work in cases of torture narrows rather than widens responsibility for the offense.

Take the Prachinburi case. Lawyers for Chopper initially brought charges against seven policemen. By the time the case was heard in the trial court only two, both of whom had been involved in the failed court-facilitated mediation process, remained accused. Of the other five, the judges said there were no grounds for the charges against three.[36] Chopper withdrew his complaint against two more after they admitted to having seen the torture, in exchange for their written admissions—and a documented cash payment from one who also testified for Chopper. Even though the torture occurred, as it did in Nakhon Sawan, inside a police station, during office hours, with many policemen, detainees, and others passing through or near the room where the police tortured Chopper, even though witnesses who saw policemen going in and out overheard Chopper's cries, this real-life torture involving many people in a specific institutional time and place was in court reduced to a parody, in which a single momentarily wayward officer let the compulsion to use violence get the better of him. The judges issued Vachiraphan a two-year sentence, reduced by a third, taking into consideration, they

34. Narathiwat Provincial Court, Criminal Case, Black No. 1611/2552, September 2, 2010, 7–8. In Thai: ขณะเกิดเหตุรัฐบาลประกาศให้ใช้กฎอัยการศึกในเขตพื้นที่จังหวัดนราธิวาสทุกอำเภอ เจ้าหน้าที่ฝ่ายทหารจึงมีอำนาจเหนือเจ้าหน้าที่ฝ่ายพลเรือนในส่วนเกี่ยวกับการรักษาความสงบเรียบร้อย

35. Court of Appeal Region 9, Black Case No. 120/2554, March 24, 2011.

36. One was the arresting officer and another the duty officer at the station, neither of whom were directly involved in the work of the investigating unit. The third, Police Sergeant Major Atikhom Sriputtho, drove with Chopper and another to a location where Chopper had said the stolen goods were, in order to stop the torture. Chopper said that the sergeant major had hit him on the head but the court dropped the charges against him because of a lack of evidence. Chopper's lawyers tried unsuccessfully to get the charges against all three reinstated.

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said, his cooperative testimony. They then suspended the sentence for two years on account of his prior clean record and employment history—which is to say, by way of acknowledgement that he bears duties on behalf of the state. The policeman unsuccessfully appealed his conviction and suspended sentence. He has continued working in the police force.

In the Ranong political murder, torture was the only available explanation for the burn marks on the genitals of Viroj. The question was not whether the police had tortured him but who and how many among them had done it. Judges in the provincial court refused to assign blame, but their superiors decided that this position was untenable. Instead Supreme Court judges held that the commanders of the units responsible for abducting the two men who were tortured, Police Colonels Ronnapong Saikaew and Anuchon Chamat, had "in concert with others abused plaintiffs 1 and 2."[37] The judges recorded and acknowledged that numerous police working in teams from at least two different stations and the regional command had participated in bodily abuse of the captives, but they also concluded that they could not firmly identify any of the other fourteen police officers accused. The fact that the officers' names were on the police records as investigators, the judges said, was not proof that they were among whoever had abused the men. They subtracted them from the total number of responsible officers, to go from an initial number, prior to trial, of more than twenty involved to the two commanding officers alone. They did not, however, subtract from the fifteen-year penalty imposed on each police officer (out of a maximum twenty years), agreeing with an appeal court that this was appropriate, given the multitudinous offenses that the police whom these officers were overseeing had committed.[38]

In addition to trying to bring criminal cases, complainants also turn to civil complaints, and compensation claims in administrative courts, where cases are brought against state agencies rather than the torturers themselves. In cases from the far south, lawyers have brought claims to the administrative courts for wrongful captivity and bodily abuse of captives against the army and police force, as well as the defense ministry, prime minister's office—which oversees formally declared states of emergency—and the Internal Security Operations Command, a revivified anticommunist agency that today coordinates at all levels in matters concerning enemies internal to Thailand's territory or population (Puangthong 2017). These offices have denied liability for the bodily abuse of captives on grounds that in a declared emergency situation their actions are exempted from the purview of the administrative courts (FS09C-05). But judges in these courts have insisted that complainants can bring cases under section 17 of the 2005 Emergency Decree, under which victims of unlawful activities by government agencies during a declared emergency can seek compensation.[39]

37. Supreme Court, No. 1031/2560, October 18, 2017, 39, in Thai: ร่วมกับพวกทำร้ายโจทก์ที่ ๑ และที่ ๒

38. The ruling recounts a litany of crimes the police committed, including abducting their captives from moving vehicles, forcing one to crash his motorbike before taking him to an unknown location for the purposes of torture. This is the sole case among those discussed here, and among those of which I am aware in Thailand to the end of the research period, in which judges sentenced police officers to imprisonment over the torture of captives—and in which the police were reportedly in fact imprisoned.

39. Section 17 of the Emergency Decree BE 2548 (2005) reads in unofficial English translation by the Office of the Council of State: "A competent official and a person having identical powers and duties as a competent official under this Emergency Decree shall not be subject to civil, criminal or disciplinary liabilities arising from the performance of functions for the termination or prevention of an illegal act if such act

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Lawyers for the armed and police forces have also argued that where a state officer commits violence on a captive of his own volition and inconsistent with his duties then these offices are not vicariously liable—analogous to the "frolic of his own" idea in the common law (FS08C-08).[40] Contra that position, judges in the Songkhla Administrative Court in 2012 said that state officers in those places nevertheless perform their duties by virtue of the legal authority vested in them through the state, and its emergency regulations and martial law, and therefore judges are entitled to decide on matters pertaining to these instruments (FS09C-05). That is to say, in the obverse situation to "when torture is a duty" (Haberkorn 2015), even when torture is not a duty, the duty officer is still on duty and his office legally liable for his actions—at least insofar as questions of compensation go.

So judges in administrative courts have left their doors partway open to tortured men or families of deceased persons to seek financial redress as the best and most likely form of restitution for the wrongs of torture in Thailand. But in deciding who pays, instead of holding a gamut of institutions responsible they have again adopted a method of reduction, aiming to identify the one agency where the buck stops—financial redress being all that the administrative courts have to offer in cases of torture. And, they have concluded that in emergencies the relevant agency is the Office of the Prime Minister, which activates the Emergency Decree, and to which the Internal Security Operations Command is on paper answerable (FS07C-19, FS08C-08). That is to say, if police, paramilitary, or military personnel commit torture in an emergency, then it is not the police force, paramilitaries, or army that have to pay up, but the civilian institution that on paper has declared it.

CONCLUSION

The jurisprudence of torture in Thailand acknowledges and retroactively queries facts about acts of torture without challenging the practice or threatening the agencies responsible for it. Facts about torture heard in Thailand's courts do not irrupt into its legal order. Rather, they seep into it. Judges fashion these facts into idioms and forms that accommodate, to paraphrase Lindahl (2013, 163), the incompatibility between what legal order makes possible and what certain situations (purportedly) demand. They acknowledge certain facts about specific torture situations but generally resist efforts by complainants and their supporters to bring them to boundaries within legal order, holding them instead at the limits of law.

The jurisprudence contains scant evidence of a compulsion of legality to justify, as David Dyzenhaus (2008, 34) puts it, "all acts of state as having a legal warrant." It is this compulsion that Loevy (2020) identifies as contributing to the jurisprudence on torture in Israel. Similarly, on Lokaneeta's (2011, 106–07) reading of responses to torture in the United States after 9/11, the constant redrawing of the boundaries between permissible and impermissible state violence, including the use of torture, speaks to the peculiar

was performed in good faith, [was] non-discriminatory, and was not unreasonable in the circumstances or exceed the extent of necessity, but this does not preclude the right of a victim to seek compensation from a government agency under the law on liability for wrongful act of officials."

40. I am grateful to Sarah Bishop for making this connection.

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anxieties of the liberal state (see also Feldman 2017). Whereas liberal legalism rests on the binding of conduct through rules (Shklar 1964), the jurisprudence of torture in Thailand appears to be animated by refusal to bind the conduct of state officers too tightly, and an accompanying willingness to conditionally and informally permit state officers to transgress legal limits when torturing in the name of duty (Haberkorn 2015). It communicates this refusal not by clarifying for state officers the relationship of torture to other types of state violence on the continuum of practices that law attempts to order, but by denying accounts of torture and holding the practice, albeit unstably, at the limits of legal order.

Haberkorn (2018, 185–86) ends her jurisprudence of impunity by dwelling on a draft law against enforced disappearance and torture in Thailand, one that has in the time that I researched and wrote this article inched very close to passing through the legislature. She does this so as to think the possibility of a jurisprudence *against* impunity in Thailand and ask, counterfactually, what the judicial response to the abduction and killing of Somchai Neelaphaijit might have been had the draft law already been in effect. She concludes hopefully that the jurisprudence might have rendered facts about the case unambiguous, which would "transform the version of history that judges write in their decisions."

I might be less hopeful than Haberkorn. The elimination of ambiguity was the great hubristic dream of the legal positivists who wrote or influenced the writing of the codes in India, which—as Lokaneeta has shown—have done little to resolve the tension between state violence and state law there (Cheesman 2021a). To the extent that the jurisprudence on torture in India has been a jurisprudence *against* torture it is largely despite the work of colonial law makers, not because of them. However, a law to prohibit torture would at least have the effect of relocating torture from the limits of Thailand's legal order to boundaries within it, making for a different jurisprudence from the one outlined here.

In the wake of the public scandal caused by the video of the police in Nakhon Sawan, Thailand came closer to realizing the possibility of a new jurisprudence when in September 2021 the long-awaited draft law to criminalize torture and enforced disappearance passed its first reading in the national legislature (AFP 2021). This was an important milestone. The draft, some seven years in the making, was revised in December and passed the lower house in February 2022 (AFP 2022). In its definition of torture the December draft adopts most of the elements found in the UN Convention against Torture.[41] It also contains provisions for command responsibility, though it has none that make confessions obtained via torture inadmissible as evidence.

Whatever its final amendments, its strengths and deficiencies, when passed the law will render torture an explicit category of criminal offense, at last bringing it, on paper, to a boundary within Thailand's legal order. And while judges there will persist in using methods of denial and refusal to reject or defer or diminish the claims of torture survivors and their advocates, when cases are at last brought under a law designed explicitly to criminalize and prohibit torture by public officers then Thailand's courts will no longer be able to treat it as a category of state violence that is legally disordered. As in India, Israel, the United States, and other countries where debates about torture track

41. ร่างพระราชบัญญัติป้องกันและปราบปรามการทรมาน และการกระทำให้บุคคลสูญหาย (Draft Prevention and Suppression of Torture and Enforced Disappearances Act) 14 December BE 2564 (2021).

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ambivalently across the legality-illegality boundary within the legal order, the jurisprudence on torture in Thailand to come may or may not prevent or suppress the practice, but it will no longer be able to hold it at law's limits.

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