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TORTURE AND RESPECT

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There are two well-worn arguments against a severe punishment like long-term incarceration: it is disproportionate *to the offender's wrongdoing and an* inefficient *use of state resources. This Article considers a third response, one which penal reformers and theorists have radically neglected, even though it is recognized in the law: the punishment is* degrading. *In considering penal degradation, this Article examines what judges and scholars have deemed the exemplar of degrading treatment—torture. What is torture, and why is it wrong to torture people? If we can answer this question, this Article maintains, then we can understand when and why certain punishments—like perhaps long-term incarceration—are impermissibly degrading, regardless of their proportionality or social utility otherwise.*

This Article develops an original theory of torture. It argues that torture is the intentional infliction of a suffusive panic *and that its central wrongness is the extreme* disrespect *it demonstrates toward a victim's capacity to realize value. Humans realize value diachronically, stitching moments together through time to construct a good life as a whole. Torture takes such a being, one with a past and a future, and via the infliction of a* make it stop right now *panic, converts her into a "shrilly squealing piglet at slaughter," in Jean Améry's words, restricting her awareness to a maximally terrible present.*

The Article then considers what this theory of torture means for our understanding of degradation more generally. It argues that punishment is impermissibly degrading, regardless of our other penal considerations, when

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it rejects an offender's status as a human. Punishment reaches this threshold by demonstrating that the offender's life-building capacity—the very basis of his humanity—is completely absent or fundamentally worthless. To so thoroughly deny someone's value, even someone who has committed a heinous crime, violates the liberal commitment to human inviolability. The Article closes by suggesting that long-term incarceration rejects an offender's status as a human, and is therefore on a par with penal torture, given that removing someone from free society for decades makes it exceedingly difficult for him to construct a good life as a whole.

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INTRODUCTION

There are two well-worn arguments against a severe punishment like long-term incarceration: it is *disproportionate* to the offender's wrongdoing and an *inefficient* use of state resources. This Article considers a third response, one which penal reformers and theorists have radically neglected, even though it is recognized in the law: the punishment is *degrading*.[1] Beyond "degrading," other relevant adjectives include, at least, "cruel," "inhuman," "inhumane,"[2] "barbaric," and "brutal." There is considerable overlap between these terms, however, and we ought to conceive of the reasons that oppose such punishments as a unified or general category.[3] *"You cannot do that to a human being"* captures the ideal in broad brush. Let us refer to this category of sentencing considerations as "degradation limitations."

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[1] *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR] (prohibiting torture and "cruel, inhuman, or degrading" treatment or punishment); European Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR] (same); International Covenant on Civil and Political Rights art. 7, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (same); American Convention on Human Rights art. 5(2), Nov. 22, 1969, 1144 U.N.T.S. 143 (same); S. AFR. CONST., 1996, ch. 2, § 12(1)(d)-(e) (same); Bundesverfassung [BV][Constitution] Apr. 18, 1999 SR 101, art. 10, para. 3 (Switz.) (same); U.S. CONST. amend. VIII (prohibiting "cruel and unusual" punishment); N.Y. CONST. art. 1, § 5 (same); Canadian Charter of Rights and Freedoms, s 12, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act 1982, c 11 (U.K.) (same); TEX. CONST. art. 1, § 13 (prohibiting "cruel *or* unusual" punishment) (emphasis added); CONSTITUIÇÃO FEDERAL [C.F.] [Constitution] art. 5 (III) (Braz.) (prohibiting torture and "inhuman or degrading" treatment); New Zealand Bill of Rights Act 1990, s 9 (N.Z.) (prohibiting torture and "cruel, degrading, or disproportionately severe" treatment or punishment.); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 16, § 1, Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85 [hereinafter CAT] ("Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined . . . ").

[2] *See* Jeremy Waldron, *Inhuman and Degrading Treatment: The Words Themselves*, 23 CAN. J. L. & JURIS. 269, 278–79 (2010) (arguing that "inhumane" treatment is distinct from and milder than "inhuman" treatment).

[3] For attempts to parse the meanings of the various terms, see Waldron, *id.* and John Vorhaus, *On Degradation. Part One: Article 3 of the European Convention on Human Rights*, 31 COMMON L. WORLD REV. 374 (2002). *But see* Ribitsch v. Austria, 33 Eur. Ct. H.R. (ser. A) 26 (1995) (making a finding of "inhuman and degrading" treatment without distinguishing between the two terms); Tomasi v. France, 241 Eur. Ct. H.R. (ser. A) 7 (1992) (same).

This Article examines penal degradation from the inside out. It looks to the exemplar of degrading treatment and punishment—torture—and considers what it might teach us about degradation more generally. What is torture, and why is it wrong to torture people? If we can answer this question, this Article maintains, then we can understand when and why certain punishments—like perhaps long-term incarceration—are impermissibly degrading, regardless of their proportionality or social utility otherwise.

Justice Brennan endorses this method in *Furman v. Georgia*.[4] He writes that the "primary principle" by which the Supreme Court assesses whether a punishment is "cruel and unusual" is whether it is "degrading to human dignity";[5] and he deems "torturous punishment" to be the "*paradigm* violation of this principle."[6] Further, prohibitions on degrading punishment are often grouped together with prohibitions on torture in resolutions, treaties, and constitutions.[7] For instance, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights both provide: "No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment."[8] Drafters and signatories seem to have understood that both prohibitions—(a) no torture and (b) no cruel, inhuman or degrading punishment—implicate the same set of considerations. With such jurisprudence in mind, Jeremy Waldron writes:

> [T]he prohibition on torture is a point of reference to which we return over and over again in articulating legally what is wrong with cruel punishment or distinguishing a punishment that is cruel from one that is not: We do not equate cruelty with torture, but we use torture to illuminate our rejection of cruelty.[9]

This Article proceeds as follows. Part I discusses the relationship between "internal" punishment limitations and degradation limitations.

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[4] Furman v. Georgia, 408 U.S. 238, 281–82 (1972) (Brennan, J., concurring).

[5] *Id.* at 281.

[6] *Id.*

[7] *See supra* note 1 (providing examples of legal texts that join prohibitions on degrading punishment and torture).

[8] UDHR, *supra* note 1, at art. 5; ICCPR, *supra* note 1, at art. 7.

[9] Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1738 (2005). Waldron argues that the prohibition on torture represents a "legal archetype": "a particular provision in a system of norms which has a significance going beyond its immediate normative content, a significance stemming from the fact that it sums up or makes vivid to us the point, purpose, principle, or policy of a whole area of law." *Id.* at 1723. David Luban extends Waldron's idea, arguing that the prohibition on torture is a *moral* as well as a legal archetype, since "the prohibition closely connects with other values that the world has come to regard as fundamental—fundamental concepts of human dignity, human equality, and the rejection of total domination of some people by others." DAVID LUBAN, TORTURE, POWER, AND LAW 125 (2014). Luban concludes that torture represents an "archetype of evil." *Id.* at 112.

Internal limitations demand that we pursue our positive penal aims, like retribution or deterrence, with "proportionality" or "parsimony." Part I demonstrates that internal and degradation limitations are relatively distinct. A punishment may be a proportional and parsimonious means of securing retribution or deterrence, while nonetheless being impermissibly degrading.

Part II examines both the legal and the most prominent philosophical conceptions of torture. It argues that the legal conception of torture—the intentional infliction of "severe pain or suffering"—is far too broad.[10] Physical assault often constitutes the intentional infliction of severe pain or suffering, for instance, but only rarely does it amount to torture. Part II then considers the work of philosophers Henry Shue and David Sussman, arguing that they, too, fail to capture what is normatively special about torture. Shue conceives of torture as "an assault upon the defenseless."[11] As such, he cannot explain the qualitative difference between shouting at or slapping someone in custody and running electricity through his body or waterboarding him. All are assaults on the defenseless, but only the latter are torture. Sussman, meanwhile, argues that torture is unique in that the victim's own body, affects, and emotions are used against him, such that he is "actively complicit in his own violation."[12] By forcing the victim to face *his own* pain, the torturer forces the victim to face himself, Sussman argues. However, if someone is complicit in this way when he responds to tortuous pain, he is also complicit when he responds to (a) non-tortuous pain, like that associated with very moderate arm-twisting and (b) certain non-painful instances of coercion, as in a blackmail case where the victim faces *his own* desire to keep his homosexuality private. Given that very moderate arm-twisting and blackmail are not torture, Sussman has not identified what is distinctive about torture.

With the ground thus cleared, Parts III and IV present an original theory of torture and degradation. I argue that *disrespect* is the metric of degradation, and that the central wrongness of torture is the egregious disrespect it demonstrates toward a victim. Joseph Raz explains that "respect" constitutes the appropriate response to the presence of value.[13] To respect something involves aiding or at least not interfering with the possibility of its exhibition of value, as well as potentially expressing or

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[10] *See, e.g.*, CAT, *supra* note 1, at art. 1, ¶ 1 ("[T]orture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as . . . ").

[11] Henry Shue, *Torture*, 7 PHIL. & PUB. AFF. 124, 130 (1978).

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

[13] JOSEPH RAZ, VALUE, RESPECT, AND ATTACHMENT 160–76 (2001).

honoring its value in a symbolic manner.[14] Following Raz's logic, we can appreciate how pouring water on a beautiful sandcastle disrespects the sandcastle's value, while pouring water on a plant, generally, respects the plant's value—with the understanding that such things have value insofar as people might engage with them meaningfully. The demands of respect thus depend on what the object of respect actually does to exhibit value, on the "mechanism" of its value exhibition, and the ways in which our actions help or hinder the working of that mechanism. To apply this logic to human beings directly—and thus to understand what respecting or disrespecting a person means—we need an understanding of what humans do, exactly, to exhibit value.

I argue that human beings exhibit value through their meta-capacity for practical reason—the combination of their capacities for autonomy, value-recognition, memory, and imagination—which enables them to stitch moments together through time to construct a good life as a whole. Humans are *diachronic* creatures with pasts and futures of their own construction to a significant degree. They live through (*dia*) time (*chronos*). They are capable not only of enjoying "momentary goods," like ice cream cones, but also of achieving "temporal goods," which require cultivation through time to be realized, things like maintaining families, careers, and friendships. While suffering, in the bare sense of an aversive or unpleasant experience, may play a role in the production of temporal goods, as with the suffering involved with certain forms of professional training, I argue that humans retain the capacity to generate *disvalue*, which constitutes merely *wanton* suffering.

With this conception of human value in mind, I conclude that torture is the archetype of disrespect for a person and her special capacities for generating value and disvalue. After examining a number of first-hand accounts of torture victims, I define torture as *the intentional infliction of a suffusive panic*. I then argue that torture, by inflicting a *make it stop right now* panic, (a) completely halts the victim's value-generating capacities, as she loses the thread of her diachronic identity and (b) maximizes her capacity for disvalue, with her consciousness saturated with suffering. Torture is thus perverse from the perspective of respecting human value. It takes a being capable of living broadly and purposefully through time and, via the infliction of a suffusive panic, converts her into a "shrilly squealing piglet at slaughter," in Jean Améry's words, restricting her awareness to a maximally terrible present.[15]

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[14] *Id.*

[15] JEAN AMÉRY, AT THE MIND'S LIMITS: CONTEMPLATIONS BY A SURVIVOR ON AUSCHWITZ AND ITS REALITIES 35 (Sidney Rosenfeld & Stella P. Rosenfeld trans., Indiana University Press 1980).

Certain forms of torture, however, are yet more disrespectful than others, depending on the degree to which they risk long-term psychological or physical damage. In this way, disrespect is on a spectrum, with torture for an eternity—*suffusive panic forever*—at the very top. Treatment can be less disrespectful than this, however, and still be impermissibly degrading. But where exactly on the spectrum of disrespect shall the dispositive line be drawn, beyond which we would say that such treatment is impermissible as a form of state punishment in the United States, regardless of the severity of the offense or of how useful it might be treat the offender in such a manner?

Given that respect involves the process of responding to something's value, disrespect for a person always embodies a rejection of her value. But there are many types of value that people purport to exhibit and there are different modes of disrespect. One might just disrespect another's value as a playwright; consider the symbolic disrespect of saying "your play is not very good." When delivered in a certain manner and degree, however, disrespect can embody a rejection of someone's value as a *human*, which is grounded on her capacity to build a good life through time. Such treatment expresses the conviction that this creature does not matter, at least not like a person does, such that we can do whatever we want with it, as if it were a mere thing or animal. We can say, more particularly, that punishment above the dispositive line rejects an offender's standing as a human; and punishment reaches this threshold by demonstrating that the offender's life-building capacity—the very basis of his humanity—is completely absent or fundamentally worthless.

Severe degradation like this will usually take the form of a non-symbolic, physical interference with someone's value-generating capacities. What better way for a punishment to affirmatively deny an offender's humanity than for it to literally *ruin* his capacity to realize diachronic, human value as a matter of physics? But certain symbolic forms of disrespect can be so extreme as to qualify. Consider "Derby's Dose," by which a slave overseer forced runaways to eat human excrement as a form of punishment.[16] To so thoroughly reject someone's worth, even someone who has committed a heinous offense, violates the liberal commitment to human inviolability.

This is an Article about torture and what it means to treat someone with inhumanity. But it has relevance beyond the Middle Ages and the immorality of punishments likes drawing and quartering. Indeed, it immediately opens up new lines of sentencing inquiry relevant for the present day. While we do not employ torture as a form of punishment anymore, I argue that we still degrade offenders. In closing, I raise the possibility that long-term

[16] *See* MALCOLM GLADWELL, OUTLIERS: THE STORY OF SUCCESS 282 (2008).

incarceration is impermissibly degrading—that it is not qualitatively different than penal torture when it comes to respecting a person's essentially human capacities—given that separating someone from free society for decades represents a severe risk of ruining his life as a whole. In sum, that the disrespect of torture is so shocking and undeniable does not mean that it stands alone on the pantheon of injuries, as something qualitatively different from any other form of aversive treatment. It can serve as a guide to degradation, and it can provide us with the conceptual tools to move beyond retributive proportionality and utilitarian efficiency when assessing the morality of punishments.

I. DEGRADATION LIMITATIONS

Degradation limitations represent the conviction that offenders do not forfeit their standing as human beings as a result of their crimes. In this role they constrain the pursuit of our positive penal objectives, like retribution or deterrence, in parallel to Robert Nozick's conception of rights as "side constraints" upon the pursuit of consequentialist policies generally.[17] Thus, as indicated above, a punishment may be a proportional or parsimonious means of realizing our penal aims, while nonetheless being impermissibly degrading. "Degradation-limiting" reasons, in this way, are relatively independent from our other penal considerations.

To make sense of this point, let us consider Antony Duff's treatment of the "rape the rapist" sentencing proposal.[18] Duff conceives of punishment as a form of rational discourse between a community and an offender.[19] The offender commits a "public" wrong, on Duff's view, and thus deserves the community's censure.[20] The community should not simply lash out at him, Duff continues, but rather ought to express its disapproval *rationally*, providing him with reasons to regret his actions and to desist from wrong in the future.[21] While Duff maintains that hard treatment is the means by which the community censures offenders, he argues that such treatment must remain within the bounds of rational communication.[22] As such, he concludes that his theory forecloses penal rape, because such a punishment "does not address [the rapist] as a rational moral agent—it simply seeks to traumatize and humiliate him."[23]

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[17] ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 28–33 (1974).

[18] R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 143–45 (2001).

[19] *Id.* at 27–30, 79–82.

[20] *Id.* at 60–64.

[21] *Id.* at 88–98.

[22] *Id.* at 143–45.

[23] *Id.* at 144.

We should recognize which reasons are doing the heavy lifting for Duff. Duff opposes penal rape here not because it is impermissibly degrading—not *because* it traumatizes and humiliates—but because, by traumatizing and humiliating, it would fail as a form of rational communication.[24] The only legitimate reason for the state to inflict penal harm, Duff believes, is to censure a moral agent for committing a public wrong; and given that penal rape would not qualify as censure or the appropriate form of censure, the state cannot inflict that form of penal harm legitimately.[25] The offender deserves a particular form of communication, and penal rape does not qualify. The fact that penal rape is extremely degrading—because it treats the offender as a non-human object with no right to bodily autonomy, among other reasons—would thus stand as an independent reason against its infliction.

Perhaps one could foreclose all impermissibly degrading punishments as a matter internal to the pursuit of her penal aims. Duff seems to believe that he can achieve this via the constraint that hard treatment remain a form of rational communication. If that were the case, however, it would not mean that degradation-limiting reasons were somehow irrelevant or non-existent. It would mean that the impermissibility of such punishments was overdetermined, as they are ruled out by the demand to pursue our positive penal aims with proportionality or parsimony, in addition to the *separate* fact that they are impermissibly degrading.[26]

In general, criminal law theorists are overeager to tie every intuitive sentencing consideration to the base of their positive theory of punishment, arguing that it is a matter of "internal" principle, flowing directly from the set of reasons that justifies the positive infliction of penal harm.[27] However,

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[24] *Id.* at 143–45.

[25] *Id.*

[26] *See* Waldron, *supra* note 2, at 277-78:

> The provisions we are considering prohibit treatment or punishment which is cruel, inhuman, or degrading, *whatever else it is.* So, for example, if someone thinks that water-boarding is *necessary* in certain circumstances to prevent terrorist attacks, that does not affect the question of whether it is inhuman, nor does it affect the consequences of its being judged inhuman. If it is inhuman, then it is prohibited by the provisions we are considering whether it is necessary for defense against terrorism or not.

Id. at 277.

> It is quite consistent to say of a punishment that it is cruel *and* that God ordains it: God may be cruel. The question of whether something is cruel or inhuman is one aspect of its overall evaluation; the question of whether God ordains it is another.

Id. at 278.

[27] *See, e.g.,* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION chs. XIV–XV (W. Harrison ed., Basil Blackwell 1948) (1789) (presenting thirteen rules for determining a proportional utilitarian sentence, including a prohibition on

we can appeal to sentencing reasons, such as degradation-limiting reasons, that do not have a very tight relationship with our justificatory penal reasons—even if, as I discuss in Part IV, they share a deeper foundation of principle in the commitment to human inviolability. For instance, if Duff is wrong that his justificatory penal reason—the imperative to censure a wrongdoer via the infliction of genuinely communicative hard treatment—rules out penal rape, then he is not thereby committed to the legitimacy of such punishment. He could appeal to the relatively independent degradation-limiting reasons to foreclose its infliction.

And, indeed, it seems that Duff *is* wrong that his theory definitely rules out penal rape. Duff writes of the communicative nature of hard treatment:

> It is a way of trying to focus [the offender's] attention on his crime. It provides a structure within which, we hope, he will be able to think about the nature and implication of his crime, face up to it more adequately than he might otherwise (being human) do, and so arrive at a more authentic repentance.[28]

But what better way to focus an offender's attention on his crime than to make him suffer the same offense? Why *not* rape the rapist? The act of penal rape *in and of itself* might not constitute the form of communication that Duff has in mind, but penal rape followed by the offender's inevitable reflection on what the state has done to him (and therefore what he has done to his victim) might indeed qualify. So long as the offender's capacity for rational reflection remained intact, it seems that Duff would have to appeal to degradation-limiting reasons to foreclose extremely degrading punishments.

To be sure, other prominent theories lack the internal resources to prevent such punishments. Benthamite deterrence theories would license any degree of harm, no matter how vicious, so long as it was a "frugal" means of reducing pain and increasing pleasure overall in society—taking into account the offender's own experience of pain as a result of his punishment.[29] Meanwhile, strict retributivists like Michael Moore endorse the unadorned conviction that wrongdoers deserve to suffer.[30] If an offender has done something absolutely heinous to multiple people, would he not deserve, following strict retributivist proportionality, to have something absolutely heinous done to him? Jeffrie Murphy, committed to the "fair play" variant

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"unfrugal" punishments, which taking into account the offender's pain as a result of the punishment, would fail to maximize utility overall).

[28] DUFF, *supra* note 18, at 108.

[29] *See* BENTHAM, *supra* note 27.

[30] *See* MICHAEL MOORE, PLACING BLAME: A THEORY OF CRIMINAL LAW 91 (1997) ("Retributivism is a very straightforward theory of punishment: We are justified in punishing because and only because offenders deserve it.").

of retributivism,[31] accepts this point, as well as the role played by degradation limitations in preventing such punishments: "Even when proportionality is satisfied, however, we shall not use a certain punishment if it is intrinsically degrading to the humanity of the criminal—e.g. we shall not torture the torturer."[32]

II. LEGAL AND PHILOSOPHICAL CONCEPTIONS OF TORTURE

While degradation limitations are both intuitively appealing and widely recognized in the law, we lack a precise understanding of their normative foundations and details. When, exactly, is state punishment impermissibly degrading, and why? As discussed in the Introduction, torture—the exemplar of degradation—is our guide to this issue. What, then, *is* torture? And what are its wrong-making features? This Part examines how the law and the philosophical literature have answered these two questions. To be sure, the two questions—the definitional and the normative—are interrelated. However one defines torture will inevitably impact her understanding and interpretation of its wrongness, and vice versa, and so it is artificial to consider them entirely separately. Even if intertwined, the two issues nonetheless involve distinct methodologies; one is linguistic, sociological, and empirical, and the other—our true target—is normative: a moral interpretation of whatever slice of reality the definition selects.

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[31] "Fair play" retributivists understand the idea that an offender deserves punishment to derive from a commitment to fairness. If we assume that an offender has benefitted from everyone else's restraint in following the law—not always a safe assumption, Murphy argues—then he has gained an unfair advantage by breaking the law and failing to restrain himself in turn; and the harm or suffering of punishment is thus deserved as a means of stripping away the offender's unfair gain. *See generally* Jeffrie G. Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFF. 217, 231–43 (1973); Herbert Morris, *Persons and Punishment*, 52 MONIST 475 (1968); Richard Dagger, *Playing Fair with Punishment*, 103 ETHICS 473 (1993); GEORGE SHER, DESERT 69–90 (1987).

[32] Jeffrie G. Murphy, *Cruel and Unusual Punishments*, *in* RETRIBUTION, JUSTICE, AND THERAPY: ESSAYS IN THE PHILOSOPHY OF LAW 223, 236 (1979). *See also* Alec Walen, *Retributive Justice*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2014), https://plato.stanford.edu/archives/win2016/entries/justice-retributive/ [https://perma.cc/4J33-L2E4] ("[P]roportionality should rule out certain punishments on the ground that they are disproportionately large. But there is no reason for retributivists not to look to other criteria, such as respect for human dignity, to prohibit those forms of punishment that seem cruel or degrading."); Youngjae Lee, *Desert and the Eighth Amendment*, 11 J. CONST. L. 101, 102 (2008) (distinguishing between the "desert model" of Eighth Amendment jurisprudence, which is concerned to prevent retributively disproportionate sentences, and the "dignity model," which is concerned to guarantee to offenders "a minimum standard of decency and humanity").

A. THE LEGAL CONCEPTION

What is the law's conception of torture and its wrong-making features? Perhaps the law can illuminate or inform our moral inquiry.[33] I believe that the law does provide such illumination, but only through its failure. As I demonstrate below, the most prominent legal sources all define torture as *the intentional infliction of severe suffering*. This definition is over-inclusive, failing to pass a broad-brush test of conceptual analysis. This *definitional* failure unsurprisingly muddies the related *moral* analysis, given the connection between the two. Apart from warping the law's relationship to morality, the definitional failure weakens the law's ability to realize its true goal of constraining and preventing state torture, as I discuss below.[34] It's not only bad moral philosophy, then; it's bad legal drafting and interpretation.

As to the broad-brush test of conceptual analysis, we can agree about the central cases of torture: running electricity through someone's body for the purpose of interrogation, pulling someone's body apart with "the rack" for the purpose of punishment, and so forth. Just the same, we can agree on what is definitely *not* torture. This includes most of the practices in the world. Someone singing a song because she wants to is not torture. It also includes many harmful practices. Moderately mocking or shoving somebody is not torture. In this way, torture represents a significantly distinct set of practices. It deserves a word of its own. And even if there are practices that fall into a vague middle between torture and not torture, any definition that encompasses practices that are definitely not torture fails as a matter of conceptual analysis.

1. Explication

The 1984 Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment and Punishment (CAT) is an international treaty with 161 parties including the United States and all of the EU states.[35] In defining torture, the CAT closely followed the 1975 UN Declaration against Torture (the Declaration), which was the first instrument to provide such a definition.[36] Here is the relevant language from the CAT:

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[33] In his work on human dignity Jeremy Waldron employs the method of looking to the law for moral insight. *See* JEREMY WALDRON, DIGNITY, RANK, AND RIGHTS 47–78 (Meir Dan-Cohen ed. 2012).

[34] *See infra* Part III.A.3.

[35] CAT, *supra* note 1.

[36] *Id.* at art. 1, ¶ 1. *See* G.A. Res. 3452 (XXX), Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Dec. 9, 1975).

> For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[37]

There are five central components: (1) severe physical or mental pain or suffering, (2) intentionally inflicted, (3) for such purposes as interrogation, punishment, intimidation, coercion, and discrimination, (4) by a state, meaning at least with the acquiescence of a person working in an official capacity, but (5) not including pain or suffering caused by lawful sanctions.

I will consider the final two components first since they are less important for the purpose of discerning torture's wrong-making features. The meaning of the fifth component (a vestige from the Declaration) is unclear. It would seem to erase the clause prohibiting penal torture, as Louis Seidman explains, so long as such torture was a "lawful sanction" derived from a public schedule of punishments.[38] The fourth component—state action or acquiescence—is complex, and not relevant at this ground floor of the inquiry. Private parties acting without the knowledge of state officials can surely inflict torture. State torture, though, may feature unique wrong-making features; it may, for instance, violate substantive Rule of Law values, as Jeremy Waldron argues, in addition to violating basic moral principles that apply to private actors.[39] Nonetheless, we need a theory of torture's wrongness as a straightforward moral matter before considering what additional wrong-making features state torture may exhibit.

The first three components of the CAT's definition have more to offer as a normative guide to torture *simpliciter*: (1) severe physical or mental pain or suffering, (2) intentionally inflicted, (3) for such purposes as interrogation, punishment, intimidation, coercion, and discrimination. The phrase "such purposes as" in the third component implies that the enumerated list of purposes is not exhaustive. David Luban argues that the drafters should have been clearer with this by ending the relevant sentence with the phrase "or any other purpose whatsoever" since "[t]hat would drive home the correct conclusion: torture is torture, regardless of its purpose."[40] Nonetheless, given

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[37] CAT, *supra* note 1, at art. 1, ¶ 1.

[38] Louis Seidman, *Torture's Truth*, 75 U. CHI. L. REV. 881, 895 (2005).

[39] *See* Waldron, *supra* note 9, at 1739–43.

[40] LUBAN, *supra* note 9, at 119; *see also* MATTHEW KRAMER, TORTURE AND MORAL INTEGRITY: A PHILOSOPHICAL ENQUIRY 31 (2014).

the open-ended nature of "such purposes as," the first two components describe the gravamen of the wrong of torture according to the CAT (and also the Declaration): the intentional infliction of severe physical or mental pain or suffering. This is the core of the definition. Given that "suffering" encompasses both physical and mental pain, we can refine the CAT's definition of torture further: *the intentional infliction of severe suffering.*

The United States statute codifying the CAT alters the definition in two places.[41] First, the statute provides that torture must be "specifically" intended, such that the *oblique* intent to torture would not qualify.[42] Second, consistent with the U.S.'s reservations upon signing the treaty,[43] the statute provides that one can only torture another "within his custody or physical control."[44] Nonetheless, the statute does not stray far from the CAT. In relevant part, it defines torture as an act "intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions)."[45]

While not bound by the CAT, the International Criminal Court (ICC) has followed its definition closely. As defined by the *Elements of Crime* of the ICC, the first requirement of both "the crime against humanity of torture" and the distinct "war crime of torture" is as follows: "The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons."[46] The "General Introduction" provides that such a material element must be committed with "intent and knowledge."[47] So, again, we have the intentional infliction of severe physical or mental pain or suffering. The differences between the two offenses concern against whom the severe pain or suffering is intentionally inflicted, and why. The crime against humanity

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[41] 18 U.S.C. § 2340(1) (2012). At the time of ratification, the U.S. determined that existing state and federal law was sufficient to implement the CAT as it related to torture on U.S. soil, but insufficient to cover torture abroad. 18 U.S.C § 2340 is meant to fill this gap. *See* U.S. DEP'T OF STATE, INITIAL REPORT OF THE UNITED STATES OF AMERICA TO THE UNITED NATIONS COMMITTEE AGAINST TORTURE ¶ 11 (1999).

[42] 18 U.S.C. § 2340(1). As to meaning of "specific intent," see United States v. Blair, 54 F.3d 639, 642 (10th Cir. 1995) (citations omitted) ("A specific intent crime is one in which an act was committed voluntarily and purposely with the specific intent to do something the law forbids"). What might qualify as torture that was not specifically intended under § 2340? Perhaps a situation where a bomb will cause severe suffering to innocent bystanders as the unintended byproduct of blowing up a munitions factory. See further discussion *infra* Part II.A.2.

[43] *See generally* 136 CONG. REC. S17, 486–S1748601 (daily ed., Oct. 27, 1990).

[44] 18 U.S.C. § 2340(1).

[45] *Id.*

[46] INTERNATIONAL CRIMINAL COURT, ELEMENTS OF CRIMES arts. 7(1)(f) and 8(2)(a)(ii)–1, at 7 and 14 (2011).

[47] *Id.* General Introduction ¶ 2, at 1.

of torture can be committed for any purpose, so long as the conduct was part of a "widespread or systematic attack directed against a civilian population."[48] The war crime, meanwhile, requires that the conduct take place in the context of an international armed conflict against persons protected under the Geneva Conventions of 1949, and "for such purposes as" those listed in the CAT.[49]

Finally, Article 3 of the European Convention on Human Rights provides: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."[50] While none of the terms are defined by the Convention itself, in *Ireland v. United Kingdom* the European Court of Human Rights considered whether the British government violated Article 3 when it employed "interrogation in depth" against suspected members and collaborators of the Irish Republican Army (IRA).[51] "Interrogation in depth" involved the five techniques of sleep deprivation, stress positions, deprivation of food and drink, subjection to noise, and hooding.[52] After holding that the treatment constituted inhuman and degrading treatment in violation of Article 3, the court then considered whether it also amounted to torture.[53]

In formulating a conception of torture, the Court envisioned a spectrum of violence, from (a) violence that is neither inhuman nor degrading to (b) inhuman or degrading violence to (c) torture.[54] It concludes that only "deliberate inhuman treatment causing very serious and cruel suffering" deserves the "special stigma" attached to the word "torture."[55]

The word "inhuman" performs less work than might be expected, given the understanding of the term offered in *Ireland.* The court found that interrogation in depth was "inhuman" within the meaning of Article 3 because it caused "intense physical and mental suffering" and "acute psychiatric disturbances."[56] While this may not have been intended as a

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[48] *Id.* at art. 7(1)(f)(4)–(5), at 7; *Id.* n.14. The article also requires that the victim was in the perpetrator's custody or control, and that the pain or suffering did not arise from lawful sanctions. *Id.* art. 7(1)(f)(2)–(3), at 7.

[49] *Id.* at art. 8(2)(a)(ii)-1, at 14.

[50] ECHR, *supra* note 1, art. 3.

[51] See Ireland v. United Kingdom, App. No. 5310/71 (1978); ECHR, *supra* note 1, at ¶ 156–58.

[52] *Id.* at ¶ 96.

[53] *Id.* at ¶ 167.

[54] *Id.*

[55] *Id.*

[56] *Id.* (emphasis added); *see also* The "Greek Case," App. Nos. 3321–3/67, 3344/67) 12 Y.B. Eur. Conv. on H.R. 186 (1969) ("The notion of inhuman treatment covers at least such

complete legal definition of "inhuman," we can see that the Court understands the term broadly.[57] And if we incorporate this definition into the key phrase—"deliberate inhuman treatment causing very serious and cruel suffering"[58]—then torture becomes "the deliberate infliction of *intense physical and mental suffering* or *acute psychiatric disturbances* causing very serious and cruel suffering." We are left just where the Declaration, the CAT, the U.S. Code, and the ICC let us off, with a conception of torture as a practice on the far end of a continuum of the intentional infliction of suffering.[59]

In applying this understanding of torture, the Court concluded that even though the five techniques, as applied in combination, "undoubtedly amounted to inhuman and degrading treatment . . . they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood."[60] Their infliction did not warrant the "special stigma" associated with torture.[61] The "special stigma" phrase is not further defined or grounded in the case law and does not seem to provide traction beyond emphasizing the extraordinary nature of torture. The Court in *Aydin v. Turkey*, by comparison, applied this sliding-scale analysis to conclude that the physical and mental injuries inflicted by Turkish forces upon a 17-year-old detainee, most importantly the fact that she was raped, deserved that "special stigma" and qualified as torture.[62]

2. Critique

At first glance, the legal definition of torture seems unimpeachable. Whatever torture is, surely it must involve the intentional infliction of severe physical or mental suffering. And indeed it must, but there are a number of worries with this definition. The most important involves the test of conceptual analysis mentioned above.[63] Given the vagueness of "severe suffering," the legal definition encompasses practices that are definitely not torture.

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treatment as deliberately causes severe suffering, mental or physical, which in the particular situation is unjustifiable.").

[57] For philosophical discussion of the meaning of "inhuman," see Waldron, *supra* note 2, at 278–81.

[58] *Ireland*, App. No. 5310/71 at ¶ 167.

[59] Indeed, the Court in *Ireland* notes the connection between its definition and that in Article 1(2) of the Declaration. *Id.* Meanwhile, the Court in Aydin v. Turkey, Eur. Ct. H.R. 75 ¶ 195 notes the connection between the definitions of torture in *Ireland* and the CAT.

[60] *Ireland*, App. No. 5310/71 at ¶ 167.

[61] *Id.*

[62] Aydin v. Turkey, 1997 Eur. Ct. H.R. ¶ 86.

[63] *See supra* Part II.A.

Consider a state dropping bombs on enemy soldiers, or requiring candidates for elite military units to undergo extreme forms of testing, looking not to train them but to weed out the weak links. Or consider a landlord evicting a tenant out of spite, knowing and indeed desiring that the tenant would have to sleep on the streets for months before she could find other housing. Or consider someone beating up another person in a bar fight. All seem to represent the intentional infliction of severe suffering, and yet none seems to qualify as torture as normally understood. Perhaps in the case of killing enemy soldiers, severe suffering is neither the intended aim nor means, assuming the state just wants to kill, and assuming that death in and of itself does not involve suffering. The question would then depend on whether the *oblique* intent to cause severe suffering qualified as torture—something the US statute forecloses[64]—given that dropping the bomb would almost certainly cause severe physical and mental suffering in some survivors and those who ultimately die.

An over-inclusive definition is a problem or weakness only if a more precise definition is available. It is not as if the law defines torture as "a harmful practice," such that it encompasses a huge array of actions. The "intentional infliction of severe suffering" narrows our gaze meaningfully. There may not be a more precise way to define the term; language has descriptive limits. However, below I will pursue the hypothesis that we can do much better and secure a definition that covers all practices that are definitely torture, and none that are definitely not torture.[65]

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[64] 18 U.S.C. § 2340(1).

[65] Waldron, very aware of the slipperiness of "severe suffering," nonetheless takes umbrage at the desire to find a more precise definition of torture. He argues that any such effort, like the work of George W. Bush's lawyers in the Office of Legal Counsel (OLC), could only be motivated by the aim to legalize conduct that would otherwise be swept up in the broad prohibition. OLC lawyers refined the legal meaning of "severe suffering" so that waterboarding did not qualify as such. *See* THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE (David Cole ed., 2009). Waldron argues, in response, that we should not be anywhere on the spectrum of the infliction of pain or suffering. Waldron, *supra* note 9, at 1698–1703.

While Waldron's argument is powerful, and represents trenchant criticism of the OLC's torture memos, for at least three reasons we ought to reject his philosophical conservatism with regard to a more precise torture definition. First, it is unclear how we can square his position with *any* intentionally inflicted suffering on the part of the state. Does his position rule out non-mild deterrent or retributive punishments? Does it entail pacifism? Second, only with a more precise definition of torture can we articulate the conviction, which Waldron must share, that torture is indeed qualitatively worse than lesser forms of aversive treatment. Relatedly, without a more precise definition, torture is not worth very much as an "archetype" and source of comparison, with the concepts of intentionally inflicted "pain" and "suffering" doing all of the work. *See* Waldron, *supra* note 9, at 1738 (arguing that torture is a "legal archetype"). Our moral understanding of injuries, at least, would then be impoverished. Third,

It would make this project easier if the hypothesis failed. If the wrong of torture was indeed the intentional infliction of severe suffering, then our definition of impermissible penal degradation would be straightforward. Any punishment that constituted the intentional infliction of severe suffering, such as long-term incarceration for the purpose of retribution or deterrence, would be impermissibly degrading. However, as a more refined conception of torture emerges below, it will become evident that such a definition is unavailable. Torture and long-term incarceration are distinct in important ways, while nonetheless sharing some fundamental wrong-making features.

B. PHILOSOPHICAL CONCEPTIONS

In pursuing a more precise understanding of torture's wrongness, I will consider the work of Henry Shue and David Sussman, who have advanced the two most prominent philosophical theories of torture.

1. Shue: Torture as an Assault on the Defenseless

In his seminal 1978 article, Shue unravels the following argument: since (a) killing is more harmful than torture and (b) killing is sometimes permissible, as in a just war, then (c) torture must sometimes be permissible.[66] Shue explains that the argument fails because killing is permissible when the victim is an active threat, while a torture victim is necessarily in custody. Given that the fight is over for the torture victim, Shue explains, torture "is indeed not analogous to the killing in battle of a healthy and well-armed foe; it is a cruel assault upon the defenseless."[67] Does this capture the central wrong-making feature of torture? Is torture wrong because it is an "assault upon the defenseless"?[68]

Shue considers the reply that the victim is not in fact defenseless, since he retains the ability to end the torture by providing the information desired by the torturer. Shue offers two responses. First, such an act of compliance is unavailable for victims of "terroristic torture," whose torture is meant to intimidate a wider group.[69] Nothing is asked of them other than to suffer; they cannot do or say anything to end the ordeal. Second, as to a victim of

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as I argue below, the vagueness of "severe suffering" represents a regulatory deficiency. A more precise definition would prove more capable at preventing torture, by providing a much higher interpretative hurdle for the torture-defending lawyers of the future. *See* discussion *infra* Part III.A.3.

[66] Henry Shue, *Torture*, 7 PHIL. & PUB. AFF. 124 (1978).

[67] *Id.* at 130; *see also* MICHAEL IGNATIEFF, THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR 137 (2004).

[68] Shue, *supra* note 66, at 130.

[69] *Id.* at 132–33.

"interrogational torture," to say that he can escape by informing is artificial, Shue argues, because it would demand of him a profound betrayal and violation of his integrity—at least for committed members of the opposition.[70] Shue writes: "An alternative which is legitimately to count as an escape must not only be preferable but also itself satisfy some minimum standard of moral acceptability. A denial of one's self does not count."[71]

There are several critiques of Shue's argument. First, as a number of theorists have explained, Shue conflates being defenseless against torture with being completely non-threatening.[72] Shue writes: "The torturer inflicts pain and damage upon another person who, by virtue of now being within his or her power, *is no longer a threat* and is entirely at the torturer's mercy."[73] Someone entirely at another's mercy, however, could still be threatening, for example, if she had the power to mitigate or prevent an attack that she had earlier engineered. If Shue wants his theory to explain the wrongness of torture in that case—as he does—he needs to say more. Torturing that type of individual would indeed be an attack on someone who was defenseless against torture. But unlike assaulting the traditional prisoner of war that Shue has in mind, it would not be an attack on someone who is completely non-threatening and powerless. It would not be an attack on someone entirely off of the battlefield. As it stands, then, Shue's conception of torture's wrongness seems to be overly narrow, covering only those who are defenseless against torture *and* non-threatening.

Second, victims of torture need not be defenseless, and thus attacking a defenseless person cannot be torture's essential wrong-making feature. Uwe Steinhoff, in a somewhat involved hypothetical, shows how someone could inflict tortuous agony with a laser from some distance, even though the victim was not defenseless, given that she had a gun and could shoot at the perpetrator wildly.[74] We would maintain that such an individual was tortured, even though she was not defenseless.

Third, as Kamm and Steinhoff argue, attacking the defenseless is not always impermissible. Kamm imagines that a group has fired missiles against us that are very slow to arrive.[75] She explains that even if the group was

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[70] *Id.* at 136–37.

[71] *Id.* at 136.

[72] *See* F. M. KAMM, ETHICS FOR ENEMIES: TERROR, TORTURE AND WAR 7 (2011); Sussman, *supra* note 12, at 16; KRAMER, *supra* note 40, at 37–39.

[73] Shue, *supra* note 66, at 130 (emphasis added).

[74] UWE STEINHOFF, ON THE ETHICS OF TORTURE 40–41 (2013); *see also* KAMM, *supra* note 72, at 5–9; William Twining and Barrie Paskins, *Torture and Philosophy*, 52 PROC. ARISTOTELIAN SOC'Y 143, 160 (1978).

[75] KAMM, *supra* note 72, at 6; *see also* STEINHOFF, *supra* note 74, at 94–95.

defenseless against our counterattack, they are still combatants and we can permissibly attack them to prevent their future threat; we need not wait for their missiles arrive.[76] "Attacking the defenseless" thus seems to be a poor candidate for a wrong-making feature that is purportedly beyond the pale, and the essence of degradation.

Fourth, as to Shue's point that victims of interrogational torture do not have a "legitimate alternative" to torture, it does not seem, as David Sussman argues, that we should care, or care very much, about the personal integrity of people who are forced to betray their commitments to extremely illiberal causes.[77]

Let us assume, though, that Shue could adequately respond to all these critiques. There would still be something deeply unsatisfying about his theory. He would be unable to distinguish qualitatively between different types of assaults on the defenseless. There would be nothing extraordinary about the infliction of torture. It would represent a severe type of assault on a defenseless person, among the many possible types. Shue could not account for any qualitative moral difference between shouting at, slapping, or even moderately beating a prisoner, on the one hand, and positively torturing him with electricity or a waterboard, on the other. The gravamen of the slap and of running electricity through his body would be the same: an assault on a defenseless person.[78] I share Sussman's conviction that "there is something morally special about torture that distinguishes it from most other kinds of violence, cruelty, or degrading treatment."[79] While Shue seems to agree with this, his conception of torture's wrongness as an assault on the defenseless cannot provide the underlying explanation.

2. Sussman: Torture as Self-Betrayal

In pursuit of such an explanation, Sussman distinguishes torture from coercion. "Coercion," he argues, "requires only that its victim have the capacities needed for practical reasoning and intentional action, and that he be able to recognize the expression of these powers in those who are trying to pressure him."[80] It would be possible to coerce an agent with no emotional life, like a corporation, so long as it were capable of pursuing its interests

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[76] KAMM, *supra* note 72, at 6.

[77] Sussman, *supra* note 12, at 18.

[78] Waldron seems unable to make such a distinction either, given his emphasis on the impermissibility of being *anywhere* on the spectrum of intentional pain or suffering. *See* discussion *supra* note 65.

[79] Sussman, *supra* note 12, at 3.

[80] *Id.* at 9.

rationally and of anticipating the actions of other agents.[81] Torture is different, Sussman argues: "[T]he torturer is not merely constructing a harsh set of options for the victim to navigate rationally as best he can. The felt experience of pain, fear, and uncertainty are essential elements of torture."[82] It is not the mere fact, though, that torture hurts or is frightening. What is special about torture for Sussman is that the victim's own body, affects, and emotions are used to generate pressure upon him, such that he is "actively complicit in his own violation."[83] This is what makes torture a "moral perversion" and uniquely wrong on his view:[84]

> What the torturer does is to take his victim's pain, and through it his victim's body, and make it begin to express the torturer's will. . . . My suffering is experienced as not just something the torturer inflicts on me, but as something I do to myself, as a kind of self-betrayal worked through my body and its feelings.[85]

Waterboarding victims, for example, are forced to struggle against their own desire to breathe, Sussman explains.[86]

Orthodox Kantians, Sussman continues, fail to appreciate the role of pain—specifically, of one's identification with her pain and with her affective responses to her pain—in explaining the wrongness of torture.[87] They understand the victim's lack of reasonable consent to be the gravamen of torture's wrongness.[88] That it is bodily pain that the torture victim could not reasonably consent to, rather than some other "intensely unwanted imposition," such as a blackmailer's publication of compromising photographs, is for the Kantians of no moment.[89] "[M]y blackmailer is not doing anything of a piece with torturing me," Sussman replies to the Kantians, "even though she is thwarting my will through a means to which she has no right."[90] The blackmailer's autonomy violation is purportedly not perverse like the torturer's autonomy violation, on Sussman's view, because the blackmail victim is not complicit in his own violation, as discussed further below.

Sussman considers the Kantians' response that they can appreciate the importance of pain, insofar as it "is almost impossible to reflect, deliberate,

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[81] *Id.*
[82] *Id.* at 10.
[83] *Id.* at 4.
[84] *Id.* at 4–5.
[85] *Id.* at 21.
[86] *Id.* at 23.
[87] *Id.* at 13–16.
[88] *Id.* at 14.
[89] *Id.*
[90] *Id.*

or even think straight when one is in agony," such that pain "compromises or undermines the very capacities constitutive of autonomous agency itself."[91] Sussman contends that this response, also discussed further below, fails for two reasons. First, it cannot distinguish between undermining one's agency through pain or through pleasure.[92] Second, it cannot distinguish between undermining one's agency through torture or through killing, and thus cannot capture his conviction that torture has a burden of justification even greater than that of killing.[93] Sussman thus concludes that the standard resources of the Kantian tradition cannot account for torture's wrongness, and he rests his conception of its wrongness on his theory of forced self-betrayal.[94]

There is a controversial conception of personal identity at the heart of Sussman's theory. For his argument to get off the ground, we must to some degree identify with the capacities that torture exploits, such that when one faces her pain she is (or feels that she is) facing herself. It is not clear, though, that every person has such a reaction to her pain. It would seem possible for someone who was, say, repeatedly shocked with electricity, to feel in no way complicit in her own violation, to feel no shame at all by the fact that she responded instinctively to her agony, and to put all of the blame on her perpetrator. Would Sussman conclude that such a person was not tortured, or experienced something qualitatively less wrongful? Or would he insist that she was mistaken and that, perhaps as a metaphysical matter, she was indeed facing and betraying herself when she responded to her pain?

Furthermore, even if we all do identify with our pain receptors, fight-or-flight responses, and other such capacities in the relevant manner, there is the additional point that these capacities are not obviously failing or *betraying* torture victims. They are perceiving reality correctly. The message they communicate to a victim is accurate: your body and possibly your life is in danger. Put differently, the torture victim does not want her traitorous pain receptors to switch off, so that her tormentor can destroy her body painlessly, but rather for her body not to be destroyed. It is not clear, then, how the fact that she responds to her pain makes her complicit in her own violation. Perhaps her more basic need for a functioning body makes her complicit. But, here as well, it seems that a torture victim might not—and indeed should not—feel like she has betrayed herself when the torturer exploits her need for a functioning body, as if it represented some failing on

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[91] *Id.*

[92] *Id.* at 15.

[93] *Id.* at 15–16.

[94] *Id.*

her behalf. And we would not think that someone who had the appropriate reaction, placing all of the blame on her perpetrator and feeling no shame at all, would have experienced something qualitatively less wrongful than someone who did feel a sense of complicity.

More fundamentally, even if Sussman is right that (a) torture is a forced self-betrayal and (b) that this is the central wrong-making feature of torture, it is doubtful that he has achieved his primary mission of explaining what is special or unique about torture's wrongness. In parallel to the legal conceptions of torture and to Shue's theory, Sussman's theory is over-inclusive. Coercion involves introducing an unreasonable obstacle into someone's decision-making process.[95] Sussman distinguishes coercion from torture, but given that torture must be an instance of coercion, we can understand his distinction to be between (a) coercion that introduces obstacles unrelated to bodily pain, like in his example of blackmail, and (b) coercion that introduces the obstacle of bodily pain, like in torture.

The first problem for Sussman is that he cannot distinguish between instances of the latter, similar to Shue's inability to distinguish between assaults on the defenseless. Any instance of painful coercion, no matter how minor or middling the pain, would qualify as torture on his view, as a "perverse" autonomy violation whereby one's own pain receptivity is used against herself. If someone twists my arm very moderately until I agree to tell her a secret I have not thereby been tortured, even if we accept that the reason I speak is to stop the pain and that my coercer has thereby forced me to betray myself. But Sussman's theory requires concluding otherwise. In short, while Sussman surely has severe, all-consuming pain in mind, the wrong-making features he identifies would apply to qualitatively lower degrees of pain.

The second problem for Sussman is that if the gravamen of painful coercion is forced self-betrayal, many instances of *non-painful* coercion share this feature. Sussman is somewhat aware of this possibility. He argues that, in addition to sexual desire, "[a]ny suitably intense and relentless craving, whether for food, drugs, sleep, or just quiet, could be the medium [of torture]."[96] The idea is that the victim, by identifying with the desire or craving used against her, would feel partly complicit in her own violation. While this extends the logic of self-betrayal beyond the infliction of bodily pain, Sussman nonetheless limits the extension to the realm of unthinking impulses and instincts—basic, first order desires and cravings that one has

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[95] *See* Robert Nozick, *Coercion*, *in* PHILOSOPHY, SCIENCE, AND METHOD: ESSAYS IN HONOR OF ERNEST NAGEL 440 (Sidney Morgenbesser et al. eds., 1969); NOMOS XIV: COERCION (Roland J. Pennock & John W. Chapman eds., 1972).

[96] Sussman, *supra* note 12, at 27.

limited power to amend via rational deliberation, and that in Sussman's imagining would be overwhelming.[97]

But we can extend the logic further yet to non-first order and non-overwhelming desires.[98] In the blackmail case, for instance, where someone threatens to release a compromising photograph of the victim—for example, one that reveals him to be a homosexual—the victim's desire for that information to remain private is what generates the pressure. If we can say that someone identifies with his desire to breathe, which the waterboarder exploits, then we can also say—indeed, much more confidently say—that someone identifies with the desire for his homosexuality to remain private. While the victim is ultimately worried about what *others* will think of him, this worry is uniquely his own, such that he could feel complicit in his own violation, perhaps wishing desperately that he was not so worried about such things, or that he had more courage. The blackmailer, then, seems to commit the torturer's special wrong on Sussman's view, as he uses the victim's own affects, emotions, and desires as tools for exploiting the victim.[99] But blackmail is not torture.

With this, we can conclude our analysis of the over-inclusiveness of Sussman's conception of torture. The wrong-making features he identifies cover acts that are clearly not torture—in particular (a) "minor," non-overwhelming instances of painful coercion, like very moderate arm-twisting and (b) non-overwhelming, non-painful instances of coercion, like blackmail. Sussman, in sum, has not identified what, if anything, is unique about torture's wrongness.

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[97] *See* Harry Frankfurt, *Identification and Wholeheartedness*, *in* RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 27 (Ferdinand Schoeman ed., 1987) (distinguishing first and second order desires).

[98] Kramer seems aware of this point, noting, for instance, that a salesman could exploit the feelings of a potential customer; but he nonetheless agrees with Sussman that, when coercive, exploiting someone's feelings in this way represents a central wrong-making feature of torture. KRAMER, *supra* note 40, at 175.

[99] In *R v. Valderrama-Vega* [1985] Crim. L.R. 220 (Eng.), the defendant, charged with importing drugs, pleaded duress. He claimed that the offense was the result of three pressures: (1) he was threatened with the disclosure to his wife of his homosexual tendencies, (2) there were threats of serious violence against him and his family, and (3) he was under severe financial strain. The Court of Appeal upheld the principle that only threats of death or serious injury could form the basis of a duress defense (though they need not be the only reason for the defendant's action). The threat to reveal his homosexual tendencies was, as such, irrelevant to the defense. For our purposes, however, we can understand that Valderrama-Vega, when bringing the drugs across the border, could have felt shamefully complicit in the way Sussman describes not only due to his fear of physical violence, but also due to his fear about the revelations to his wife. Any hard distinction between the two, just in terms of the victim's own feelings of complicity, seems unwarranted.

III. PANIC AND RESPECT

Given the limitations of both the legal and philosophical conceptions of torture, Parts III and IV advance a novel account of the practice. Part III considers the definitional question: what *is* torture? It argues that torture is the intentional saturation of a victim's consciousness with panic. Part IV then considers the normative question: why might it be wrong to do this to someone? It argues that torture—and degrading treatment more broadly—constitutes an extreme form of disrespect.

A. SUFFUSIVE PANIC

1. Blinding Pain

Nazi interrogators tortured Jean Améry though the method referred to as *strappado* or *corda*. His hands were shackled behind his back. A chain was hooked to the shackles. The chain lead to the top of a vaulted ceiling, where it ran into a roll. The chain was pulled upwards until Améry's arms and then body were raised off the ground, with his shoulders bearing all of his weight. "[T]here was a crackling and splintering in my shoulders that my body has not forgotten until this hour," Améry writes over two decades after the ordeal.[100] "The balls sprang from their sockets. My own body weight caused luxation; I fell into a void and now hung by my dislocated arms, which had been torn high from behind and were now twisted over my head."[101] Améry describes the consuming nature of the pain:

> Whoever is overcome by pain through torture experiences his body as never before. In self-negation, his flesh becomes a total reality. . . . [O]nly in torture does the transformation of the person into flesh become complete. Frail in the face of violence, yelling out in pain, awaiting no help, capable of no resistance, the tortured person is only a body, and nothing else beside that.[102]

During his thirty months of confinement in the late 1970s, agents of the Argentinian military junta repeatedly tortured Jacobo Timerman, who had edited a newspaper critical of the regime.[103] In describing the experience of being electrically shocked, Timerman echoes Améry's point that for the torture victim "his flesh becomes a total reality."

> It's impossible to shout—you howl . . . . What does a man feel? The only thing that comes to mind is: They're ripping apart my flesh. . . . When electric shocks are applied,

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[100] AMÉRY, *supra* note 15, at 32.

[101] *Id.*

[102] *Id.* at 33.

[103] JACOBO TIMERMAN, PRISONER WITHOUT A NAME, CELL WITHOUT A NUMBER 22-31 (Tolby Talbot trans., 1981).

> all that a man feels is that they're ripping apart his flesh. And he howls. Afterwards, he doesn't feel the blows. Nor does he feel them the next day, when there's no electricity but only blows.[104]

Timerman's distinction between "shouting" and "howling" seems to refer to the aural responses characteristic of people versus animals. The tortured person does not shout out like a person, with words, but rather howls like an animal.[105] Améry reaches a similar conclusion, replacing "howl" with "squeal":

> A slight pressure by the tool-wielding hand is enough to turn the other—along with his head, in which are perhaps stored Kant and Hegel, and all nine symphonies, and the World as Will and Representation—into a shrilly squealing piglet at slaughter.[106]

Améry's agony vitiated his personal principles, manners, memories, aesthetic and social theories, political identities, and so forth, all represented ironically in the excerpt by his knowledge of Kant, Hegel, Beethoven, and Schopenhauer.

Améry presents his book as a meditation on what it meant to be an intellectual under torture and in a concentration camp. The excerpts here encapsulate his conclusions on torture, which do not differ much from those of his time in a concentration camp. If an intellectual human being differs dramatically in his capacities and intrinsic value from a piglet, an intellectual in agony and a piglet in agony are the same "shrilly squealing" creature, Améry argues.[107] Améry was a body in pain, "and nothing else beside that."[108] Agony erased his refinement and cultivation, and his personal commitments, too, as the Nazis restricted his ken to his excruciation, with the result—the intended result—that he was ready to betray himself and the Belgian resistance in order to realize his singular desire for the pain to stop.

However, Elaine Scarry explains that the concept of "betrayal" mischaracterizes the process of confessing or informing under the duress of torture.[109]

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[104] *Id.* at 33.

[105] *See* Murphy, *supra* note 32, at 233 (arguing that a punishment is "in itself" degrading when it "treats the prisoner as an animal instead of a human being" or "perhaps even is an attempt to *reduce* him to an animal or a mere thing"). On the connection between degradation and animalization, see *infra* Part IV.B.

[106] AMÉRY, *supra* note 15, at 35.

[107] *Id.*

[108] *Id.* at 33.

[109] In so doing, she presents further reasons to doubt Sussman's conclusion that torture's essential wrong-making feature is that it brings about "a kind of self-betrayal." *See* discussion *supra* Part II.B.2.

> One cannot betray or be false to something that has ceased to exist and, in the most literal way possible, the created world of thought and feeling, all the psychological and mental content that constitutes both one's self and one's world . . . ceases to exist.[110]

Scarry demonstrates here that betrayal is not a strict liability offense. The torture victim lacks awareness of—and thus cannot in fact betray—the values or people that his impulsive utterances may impact. Of course, he has some awareness of them, or else he would not be able to say anything related to them, but he lacks awareness of their meaning and importance.

In parallel to Améry and Timerman, Scarry emphasizes the attention-fixing capacity of severe pain. "As in dying and death," she writes, "so in serious pain the claims of the body utterly nullify the claims of the world."[111] She describes the "spatial" experience of extreme pain: the universe either shrinks down to the body or the body augments to fill the entire universe.[112]

Scarry continues that intense pain is also "language-destroying": "as the content of one's world disintegrates, so the content of one's language disintegrates; as the self disintegrates, so that which would express and project the self is robbed of its source and its subject."[113] Verbal expression depends upon an awareness of, and desire to engage with, the concepts and things to which words refer, but torture restricts one's awareness and desire to her pain. And pain, Scarry explains, is itself largely inexpressible, given its lack of external referents.[114] Scarry makes the further, somewhat obscure point here that language depends upon the presence of subjectivity—of an "I" who expresses herself—and torture robs a victim of this, as the self in

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[110] ELAINE SCARRY, THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD 30 (1983).

[111] *Id.* at 33. For further discussion of torture's overwhelming nature, see Seth Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278, 296–99 (2003); KRAMER, *supra* note 40, at 161–173.

[112] SCARRY, *supra* note 110, at 35.

[113] *Id.* at 35. David Luban articulates a similar view:

> [T]orture is a microcosm, raised to the highest level of intensity, of the tyrannical political relationships that liberalism hates the most. I have said that torture isolates and privatizes. Pain forcibly severs our concentration on anything outside of us; it collapses our horizon to our own body and the damage we feel in it. . . . The world of the man or woman in great pain is a world without relationships or engagements, a world without an exterior. It is a world reduced to a point, a world that makes no sense and in which the human soul finds no home and no repose.

David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1430–31 (2005).

[114] SCARRY, *supra* note 110, at 3–11. Scarry conflates (a) being unable to express one's pain with precision and detail with (b) being unable to express the very presence of one's pain. While I accept (a), I disagree with (b), at least when it comes to extreme pain. When it comes to extreme pain, its very presence is in fact easy to communicate, as one wails involuntarily and everyone within earshot understands what is happening.

extreme pain "disintegrates."[115] Accepting that point, though, would require the conclusion that when a torture victim feels pain, she does not conceive of it as *her* pain. That seems very unlikely to be the case. We can say that a torture victim's sense of self is "severely restricted" or even "ruined" without concluding that it is positively obliterated.

Timerman provides support for Scarry's "language-destroying" argument. He writes that words were somehow inapposite tools for communicating his experience, for torture "is a pain without points of reference, revelatory symbols, or clues to serve as indicators."[116] If words are inherently external and social, and pain is inherently internal and personal, then the all-consuming pain of torture would indeed be an experience largely resistant to words, with only the beastly "howl" or "squeal" available as means of expression.

2. Pan's Shout

Cesare Beccaria, writing in 1764, attempts to clarify the psychological processes by which the severe pain attendant to torture consumes one's attention:

> Every act of our will is always proportional to the force of the sensory impression which gives rise to it; and the sensibility of every man is limited. Therefore, the impression made by pain may grow to such an extent that, *having filled the whole of the sensory field*, it leaves the torture victim no freedom to do anything but choose the quickest route to relieving himself of the immediate pain.[117]

Beccaria argues here that torture consumes one's attention and forces a reaction because (a) humans are creatures that respond to sense impressions and (b) torture completely saturates one's senses with pain. I doubt, though, that Beccaria's "presentist" empiricism—if we can call it that—can explain the torture victim's experience. For to make any sense of the view that our sense impressions determine our actions would require accepting what Beccaria seems to overlook: that many such acts are impelled by our *prior* sensory impressions, as Locke argues.[118] Otherwise, there would be no way to understand my desire for, say, orange juice, if I was not at that moment looking at orange juice. As such, without saying more, it is not clear why filling one's *present* sensory field would consume her attention and

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[115] *Id.* at 35.

[116] TIMERMAN, *supra* note 103, at 32.

[117] Cesare Beccaria, *On Crimes and Punishments*, *in* ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS 41 (Richard Bellamy ed., Richard Davies, Virginia Cox, and Richard Bellamy trans., 1995) (emphasis added) (quoted in KRAMER, *supra* note 40, at 165).

[118] *See* JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING Book II: Chapter X ("Of Retention"), 147–52 (ed. Roger Woolhouse ed., Penguin 1997) (1689).

determine her will. Perhaps a prior sense impression could win that moment nonetheless.

I take no position on empiricist psychology or any such issues. The general point is that we normally retain some discretion over whether the data currently streaming in through our five senses determines our actions or not. This applies, indeed, to many instances of pain. For example, a dull pain in my shoulder will not prevent me from going about my day. Another way to state the point is that in every waking moment our sensory field is saturated by whatever we see, hear, taste, touch, and smell. But these experiences do not always consume our attention and determine our will. We need to tell another story, then, about why extreme pain forces us into the moment, as it were, in the ways articulated by Améry, Timerman, and Scarry. To say that it fills one's sensory field is not enough, given that there usually is a lot of thinking going on "behind the scenes" of our sensory experience, and that this thinking often determines our decisions. To understand what extreme pain does to us, how it floods that behind the scenes action, shrinking us down in the ways described above, requires an additional concept: panic.

The word comes to English from the French *panique*, which in turn derives from the Greek *panikos*, meaning "of Pan," the ancient Greek god—half-man, half-goat—of fertility, pastures, flocks, and shepherds, among other things.[119] Normally conceived of as a peaceful, playful god, he was believed to retain a dark side affiliated with a shout that would cause flocks to stampede, fleeing in terror.[120] Pan's shout was believed to impact people, too, supposedly causing the Persians to flee in the battle of Marathon.[121] The English word is associated with this aspect of the god. From the Oxford English Dictionary: "A sudden feeling of alarm or fear of sufficient intensity or uncontrollableness as to lead to extravagant or wildly unthinking behaviour, such as that which may spread through a crowd of people; the state of experiencing such a feeling."[122] I lack the expertise to engage with the neurology of panic.[123] However, my central point requires only a basic awareness of the self-preservation instincts associated with the fight-or-flight response. When pain or suffering reaches a certain point, it can trigger these

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[119] *Panic*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/panic [https://perma.cc/D6N3-QPAV] (last visited Feb. 3, 2018).

[120] *See* ROBERT GRAVES, THE GREEK MYTHS 101 (1992).

[121] *See* W. Watkins Lloyd, "The Battle of Marathon: 490 B.C.," 2 J. HELLENIC STUD. 380, 391–92 (1881).

[122] *Panic*, OED ONLINE, http://www.oed.com/view/Entry/136852?rskey=EVMqyn&result=2 [https://perma.cc/B8F6-HPT4] (last visited Mar. 8, 2018).

[123] *See generally* John A. Wemmie, *Neurobiology of Panic and pH Chemosensation in the Brain*, 13 DIALOGUES CLINICAL NEUROSCIENCE 475 (2011).

instincts, causing the "wildly unthinking behaviour" constitutive of panic. The concept of the stampede elucidates. The victim's pain or suffering, when coupled with her self-preservation instincts, will *stampede* over the other aspects of her consciousness and identity, dominating not only her sensory experience, but also the behind the scenes deliberation in an immersive rush of *make it stop right now* panic.

In 1958 Henri Alleg, a newspaper editor like Timerman, was tortured in a variety of ways by the French Algerian authorities.[124] They wanted the names and locations of the people who were protecting him while he was in hiding.[125] Alleg, describing the first time that he was waterboarded, expresses torture's powers of determination:

> When everything was ready, he said to me: 'When you want to talk, all you have to do is move your fingers.' And he turned on the tap. The rag was soaked rapidly. Water flowed everywhere: in my mouth, in my nose, all over my face. But for a while I could still breath in some small gulps of air. I tried, by contracting my throat, to take in as little water as possible and to resist suffocation by keeping air in my lungs for as long as I could. But I couldn't hold on for more than a few moments. I had the impression of drowning, and a terribly agony, that of death itself, took possession of me. In spite of myself, all the muscles of my body struggled uselessly to save myself from suffocation. In spite of myself, the fingers of my two hands shook uncontrollably.
>
> 'That's it! He's going to talk,' said a voice.[126]

Extreme pain or suffering, in this way, does not just *hurt* more than moderate pain or suffering; it also contains within it the possibility of a stampeding panic.

Christopher Hitchens, interested in the question of whether waterboarding constituted torture, volunteered to be waterboarded by US Special Forces. His recounting echoes that of Alleg:

> In this pregnant darkness, head downward, I waited for a while until I abruptly felt a slow cascade of water going up my nose. Determined to resist if only for the honor of my navy ancestors who had so often been in peril on the sea, I held my breath for a while and then had to exhale and—as you might expect—inhale in turn. The inhalation brought the damp cloths tight against my nostrils, as if a huge, wet paw had been suddenly and annihilatingly clamped over my face. Unable to determine whether I was breathing in or out, and flooded more with sheer panic than with mere water, I triggered the pre-arranged signal and felt the unbelievable relief of being pulled upright and having the soaking and stifling layers pulled off me. I find I don't want to tell you how little time I lasted.[127]

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[124] HENRI ALLEG, THE QUESTION (John Calder trans., 1958).

[125] *Id.* at 47.

[126] *Id.* at 60-61.

[127] Christopher Hitchens, *Believe Me, It's Torture*, VANITY FAIR (Aug. 2008), https://www.vanityfair.com/news/2008/08/hitchens200808 [https://perma.cc/3P2Z-8TYR].

As to whether waterboarding constituted torture, Hitchens concluded: "I apply the Abraham Lincoln test for moral casuistry: 'If slavery is not wrong, nothing is wrong.' Well, then, if waterboarding does not constitute torture, then there is no such thing as torture."[128]

Malcolm Nance was the Master Instructor and Chief of Training at the US Navy's Survival, Evasion, Resistance and Escape School (SERE), which, among other activities, trains elite soldiers in surviving and ideally resisting torture.[129] In addition to leading, witnessing, and supervising the waterboarding of hundreds of people, he underwent the procedure himself "at its fullest."[130] He writes of the waterboard: "Unless you have been strapped down to the board, have endured the agonizing feeling of the water overpowering your gag reflex, and then feel your throat open and allow pint after pint of water to involuntarily fill your lungs, you will not know the meaning of the word."[131] He continues:

> It does not simulate drowning, as the lungs are actually filling with water. There is no way to simulate that. The victim is drowning.[132]
>
> Waterboarding is slow motion suffocation with enough time to contemplate the inevitability of black out and expiration—usually the person goes into hysterics on the board.[133]
>
> They all talk! Anyone strapped down will say anything, absolutely anything to get the torture to stop.[134]

In these excerpts, both Hitchens and Lance confirm that torture induces a *make it stop right now* panic and the centrality of this feeling in explaining the aversiveness of torture. Hitchens expresses this point succinctly when he writes that he was "flooded more with sheer panic than with mere water . . . "[135]

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[128] *Id.*

[129] Malcolm Nance, *Waterboarding is Torture . . . Period,* SMALL WARS J. (October 31, 2007), http://smallwarsjournal.com/blog/waterboarding-is-torture-period-links-updated-9 [https://perma.cc/5B2Y-2YM8].

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] Probably the most famous fictional account of this process is the climax to George Orwell's *1984*, when Winston is interrogated by O'Brien, the agent of the totalitarian regime. Winston—who has a phobia of rats—is strapped to a chair and threatened with a cage containing starving rats. The cage was configured so that it could be placed on his head like a mask. It had a wire door toward the face that could be lifted once the mask was secured, after which the rats would eat his face. For context, the character of Julia is Winston's lover and

To my knowledge, there have been no serious scientific studies of the psychological, psychiatric, or neurological experience of torture in the moment of agony. But *ex post* studies of survivors provide further evidence for the connection between torture and panic, given the prevalence of post-traumatic stress disorders and panic attacks after the fact.[136] Consider Trung,

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co-conspirator. This extract is a good demonstration, as well, of how mental torture, by resulting in a suffusive panic, belongs in the same category of injury as physical torture.

> The cage was nearer; it was closing in. Winston heard a succession of shrill cries which appeared to be occurring in the air above his head. But he fought furiously against his panic. To think, to think, even with a split second left—to think was the only hope. Suddenly the foul musty odour of the brutes struck his nostrils. There was a violent convulsion of nausea inside him, and he almost lost consciousness. Everything had gone black. For an instant he was insane, a screaming animal. Yet he came out of the blackness clutching an idea. There was one and only one way to save himself. He must interpose another human being, the body of another human being, between himself and the rats.
>
> The circle of the mask was large enough now to shut out the vision of anything else. The wire door was a couple of hand-spans from his face. The rats knew what was coming now. One of them was leaping up and down, the other, an old scaly grandfather of the sewers, stood up, with his pink hands against the bars, and fiercely sniffed the air. Winston could see the whiskers and the yellow teeth. Again the black panic took hold of him. He was blind, helpless, mindless.
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> 'It was a common punishment in Imperial China,' said O'Brien as didactically as ever.
>
> The mask was closing on his face. The wire brushed his cheek. And then—no, it was not relief, only hope, a tiny fragment of hope. Too late, perhaps too late. But he had suddenly understood that in the whole world there was just one person to whom he could transfer his punishment—one body that he could thrust between himself and the rats. And he was shouting frantically, over and over.
>
> 'Do it to Julia! Do it to Julia! Not me! Julia! I don't care what you do to her. Tear her face off, strip her to the bones. Not me! Julia! Not me!'

GEORGE ORWELL, 1984 273–74 (1949).

[136] *See, e.g.*, Brian Engdahl, et. al., *Posttraumatic Stress Disorder in a Community Group of Former Prisoners of War: A Normative Response to Severe Trauma*, 154 AM. J. PSYCHIATRY 1576 (1997); Metin Başoğlu, *Severity of Trauma as Predictor of Long-Term Psychological Status in Survivors of Torture*, 9 J. ANXIETY DISORDERS 339 (1995); Raija-Leena Punamäki, et. al., *Nature of Torture, PTSD, and Somatic Symptoms Among Political Ex-Prisoners*, 23 J. TRAUMATIC STRESS 532 (2010); Colin Bouwer & Dan Stein, *Panic Disorder Following Torture by Suffocation is Associated with Predominantly Respiratory Symptoms*, 29 PSYCHOL. MED. 233 (1999); Alejandro Moreno & Michael Peel, *Posttraumatic Seizures in Survivors of Torture: Manifestations, Diagnosis, and Treatment*, 6 J. IMMIGRANT HEALTH 179 (2004); Devon Hinton, et. al., *Panic Disorder Among Cambodian Refugees Attending a Psychiatric Clinic: Prevalence and Subtypes*, 22 GENERAL HOSP. PSYCHIATRY 437 (2000); Devon E. Hinton, et. al., *Orthostatic Panic Attacks Among Vietnamese Refugees*, 44 TRANSCULTURAL PSYCHIATRY 515 (2007); Marcello Ferrada-Noli, et. al., *Suicidal Behavior After Severe Trauma. Part 1: PTSD Diagnoses, Psychiatric Comorbidity, and Assessments*

a 61-year-old Vietnamese refugee living in Boston.[137] He had served as a high-level officer in the South Vietnamese army before he was imprisoned for 12 years by the North Vietnamese army and subjected to beatings and torture.[138] He reported "orthostatic panic attacks"—panic attacks induced by standing upright.[139] Researchers who were studying the pervasiveness of that phenomenon amongst Vietnamese refugees provided the following case study:

> Trung had not received psychiatric care before presenting at our clinic. He complained of poor energy, flashbacks, hopelessness, insomnia (just over an hour's sleep at night), and nightmares. Upon standing, he had dizziness, blurry vision, tinnitus, shortness of breath, chest tightness, sweating, palpitations, diaphoresis, and fear of death. Trung worried about a heart attack (*đau tim*) and dangerously high blood pressure. After sitting back down, these symptoms persisted for about 20 minutes. In these panic episodes, he had four different types of flashbacks. For one, as tinnitus (*ù tai*) began, he recalled his friend's screams upon being taken out of his prison cell and escorted a short distance away, then shot and killed by five guards; the sound of bullets, the screams of his friend, the anxiety-produced ear ringing, all seemed to combine in a dizzying mix. Second, he recalled being tortured by having logs placed on his chest until he lost consciousness. (He was tortured this way several times.) Third, he recalled when the interrogators kicked and stomped upon his chest until he lost consciousness—and that when he awoke, his chest ached. And fourth, he recalled one day, when feeling ill and off balance, tripping and falling down a rocky, steep slope; he hit his head half way down the slope, losing consciousness. Each of the flashbacks came into his mind like a movie, one after another, each lasting about 1 minute. The flashbacks only stopped when he was able to pull himself from the vortex of memory, most usually by turning on the television.[140]

Given that even a memory of torture can induce feelings of panic in this way, and that such an experience is relatively common amongst torture survivors, that is at least some further evidence, working backwards, that the experience of torture itself involves extreme panic.[141] We can add this *ex post* evidence to the compelling first-hand accounts provided by Améry, Timerman, Alleg, Hitchens, and Lance—as well as the intuitive evidence about what it might feel like to be tortured.

With this, we can restate the definition of torture proposed above: *Torture is the intentional infliction of a suffusive panic*. Unlike the legal

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of Suicidal Behavior, 11 J. TRAUMATIC STRESS 103 (1998); Athanase Hagengimana, et. al., *Somatic Panic-Attack Equivalents in a Community Sample of Rwandan Widows who Survived the 1994 Genocide*, 117 PSYCHIATRY RES. 1 (2003).

[137] Hinton, et. al., *supra* note 136, at 523–24.

[138] *Id.*

[139] *Id.* at 524.

[140] *Id.*

[141] Below I consider the moral implications of the long-term damage of torture. *See* discussion *infra* Part IV.A.

definition of torture (the intentional infliction of severe suffering[142]) and those proposed by Shue (an "assault upon the defenseless"[143]) and Sussman (a forced "self-betrayal"[144]), this definition passes the broad-brush test of conceptual analysis, encompassing practices that are definitely torture but leaving out practices that are definitely not torture. The definition easily encompasses mental torture—torture which operates directly through psychological mechanisms, rather than through bodily pain, as in the presence of constant light or darkness or loud noise—as long as the experience overwhelms in the way indicated above, culminating in the same phenomenology of panic.[145] But it leaves out lesser forms of painful coercion. Very moderately twisting my arm, for instance, will not induce suffusive panic. It also leaves out blackmail. A victim of blackmail will be able to reflect to some degree on how she might respond to the threat. She will not flail about hysterically and impulsively upon receipt of the blackmailer's letter, howling like an animal. It also leaves out incarceration, thus precluding the "easy" comparison between torture and long-term incarceration enabled by the legal definition of torture.[146] Whatever long-term incarceration does to someone, only very rarely does it induce feelings of utter terror and panic.[147]

3. Interpretative Constraint

This definition avoids much of the vagueness inherent to the legal definition of torture. President George W. Bush's Office of Legal Counsel

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[142] *See supra* Part II.A.

[143] Shue, *supra* note 66, at 130

[144] Sussman, *supra* note 12, at 21.

[145] For George Orwell's fictional account of mental torture, see *supra* note 135. *See* David Luban & Henry Shue, *Mental Torture: A Critique of Erasures in U.S. Law*, 100 GEO. L. J. 624 (2011) (analyzing the concept of mental suffering and arguing that US legal interpretation of anti-torture laws entails the legalization of mental torture).

[146] *See* discussion *supra* Part II.A.2.

[147] This discussion was concerned with the meaning of *human* torture. How might it relate, though, to the meaning of *animal* torture? It is not a strange question, given that torture is commonly referred to in the animal context. While I lack the space to investigate animal torture at length, I would venture that animal torture constitutes intentionally "saturating" the animal's consciousness with suffering (making the cat squeal and squirm) in the same way that human torture constitutes intentionally "saturating" the human's consciousness with suffering. However, whether or not a suffusive panic follows for the animal is ultimately unknowable, I think, and it would depend on the animal's cognitive capacities. Regardless, when defining what it means to torture a *human,* the experience of panic is a necessary ingredient. Were the person somehow to experience her physical or mental ordeal with internal calm and equanimity, I would argue that she was not in fact tortured. See related discussion concerning Henri Alleg's torture *infra* Part III.A.4. Thanks to John Goldberg and Victor Tadros for pressing me to consider animal torture, and for helpful comments on the issue.

(OLC) lawyers, in considering whether waterboarding qualified as torture, interpreted the US statute codifying the CAT—excerpted above—which defines torture, in relevant part, as an act "intended to inflict severe physical or mental pain or suffering."[148] In attempting to define "severe pain or suffering," the OLC lawyers looked to medical administration statutes, where Congress defines what an "emergency medical condition" is for the purposes of receiving health benefits.[149] These definitions only obliquely reference "severe pain." Nonetheless, the OLC lawyers argued that "severe pain" for the purposes of the CAT amounts to what Congress defined as a "emergency medical condition."[150] They thus concluded, first, that to amount to torture under the CAT, the pain must be as intense as that associated with serious physical injury, such as organ failure, impairment of bodily function, or death; and, second, they concluded that waterboarding did not inflict physical pain of such intensity, and therefore did not qualify as torture.[151] Even if the arguments of John Yoo, Jay Bybee and their colleagues were circuitous and disingenuous,[152] there is at least a patina of legality to them. And the contention here is that there would have been much less interpretative wiggle room for them to argue that waterboarding did not qualify as torture if the legal definition of torture was "the intentional infliction of *overwhelming* suffering," "the intentional infliction of panic," or, most precisely, "the intentional infliction of a suffusive panic." In this way, as indicated above, the legal definition of torture represents a failure of legal drafting, insofar as a more precise definition, capable of more effective regulation, was available.

4. Counter-Example

Before considering the wrong-making features of intentionally inducing a suffusive panic, let us consider a potential counter-example for this proposed definition. What about the unusual person who resists torture? Alleg may have moved his fingers when he was waterboarded the first time—"In spite of myself, the fingers of my two hands shook uncontrollably. 'That's it! He's going to talk,' said a voice"[153]—but he did not in fact talk.

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[148] *See* CAT, *supra* note 1, at art. 1(1).

[149] Memorandum from Office of the Assistant Att'y Gen. to Alberto R. Gonz Counsel to the President 5–6 (Aug. 1, 2002) (citing 8 USC § 1369 (2000); 42 USC § 1395w-22; *id.* § 1395x (2000); *id.* § 1395dd (2000); *id.* § 1396b (2000); *id.* § 1396u-2 (2000)).

[150] *Id.*

[151] *Id.*

[152] For critical discussion of their legal reasoning, see THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg & Joshua L. Dratel eds., 2005); LUBAN, *supra* note 9, at 111–36; Waldron, *supra* note 9, at 1703–09.

[153] ALLEG, *supra* note 124, at 49.

Not then, nor during any of his increasingly vicious tortures, not even when they electrically shocked his mouth and genitals.[154] He was regarded as something of a marvel by his tormentors.[155] For, as Nance, the expert waterboarder, writes, "They all talk!"[156] But does Alleg's almost superhuman composure mean that he did not experience a "suffusive panic," and thus entail that he was not tortured, according to my definition? That would surely be damaging to my proposal, given that there is absolutely no denying that Alleg was tortured.

Let us consider, though, an alternative situation. Imagine that someone was provided with a strange drug cocktail, such that she was conscious that her tormentors were tearing apart her body, but without any pain or alarm, as if she was sleepily watching a program on a distant television. That my definition rules out such an experience as torture is, I think, a point in its favor. Perhaps when she regains full consciousness, she will experience the panic of genuine torture. During the ordeal itself, however, she was grievously assaulted, but she was not tortured. This imagined scenario bears little relationship to Alleg's experience. He describes here what happened after he moved his fingers, but then refused to talk:

> 'Well, then?' I remained silent. 'He's playing games with us! Put his head under again!'
>
> This time I clenched my fists, forcing the nails into my palm. I had decided I was not going to move my fingers again. It was better to die of asphyxiation right away. I feared to undergo again that terrible moment where I felt myself losing consciousness, while at the same time fighting with all my power not to die. I did not move my hands, but three times I knew again this insupportable agony. In extremis, they let me get my breath back while I threw up the water.
>
> The last time, I lost consciousness.[157]

It is not as if Alleg experienced his violations with equanimity, as if from a distance. His torturers pushed the buttons that every human has hidden away, buttons that, when pressed in the right way, will induce "insupportable agony" and terror.[158] The right way to describe his experience is that he experienced a suffusive, instinctual panic, and so was tortured, even if he somehow *resisted* this panic, denying the authority of the body and resolving to die.

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[154] *Id.* at 69–72.

[155] *Id.* at 104.

[156] Nance, *supra* note 129.

[157] ALLEG, *supra* note 124, at 61–62.

[158] *Id.* at 62.

B. DISRESPECT

As stated above, the definitional and the normative are closely intertwined, but ultimately distinct. If this works as a definitional matter, the normative question nonetheless remains. Why, exactly, is forcing someone into a perfectly awful moment, via the infliction of a suffusive panic, wrong? Or, more specifically, what are its wrong-making features? If its wrongness is obvious, that is not helpful for the present inquiry, which is not about torture in the end.[159] We are looking to torture as a source of comparison, to see if it can provide any guidance on degradation-limiting reasons more broadly. To realize that aim, we need to explain torture's wrongness in terms of general concepts. My central conviction is that the concept of *disrespect* is crucial to this inquiry—that the fundamental wrong-making feature of torture is that it is egregiously disrespectful to victims. While not every instance of disrespect, such as gently mocking somebody, is degrading, the hypothesis is that disrespect is the metric of degradation, and that every instance of degrading treatment will be degrading because it is disrespectful.

Rather than disrespect, the concept of "human dignity" is often invoked in this context: torture is wrong because it violates the victim's human dignity.[160] Without an explanation of the underlying premises and reasons, however, there is little force to the assertion that some treatment violates someone's dignity. Respect is more basic than dignity, and more capable of elucidating the machinery of moral reasons at work in our revulsion to certain

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[159] In *Because it is Wrong*, Charles and Gregory Fried do not offer any sort of *argument* as to why torture is wrong, with conclusions following from premises. Rather, they present images of torture, such as Leon Golub's painting, "Interrogation 1," and the wrongness of treating people in those ways is seemingly meant to be obvious to any reasonable individual. This is not to say that their book is unpersuasive—far from it—but it is not of great value for our present purposes. CHARLES FRIED & GREGORY FRIED, BECAUSE IT IS WRONG: TORTURE, PRIVACY AND PRESIDENTIAL POWER IN THE AGE OF TERROR (2010).

[160] *See, e.g.*, John Vorhaus, *On Degradation - Part One: Article 3 of the European Convention on Human Rights*, 31 COMMON L. WORLD REV. 374, 388 (2002) ("The essence of degrading punishment is the violation of humanity dignity. . ."); Waldron, *supra* note 2, at 281-84 (considering "four kinds of outrage to human dignity," which he understands as equivalent to "four species of degradation": "bestialization," treatment fit for an animal, "instrumentalization," treating people as a mere means to the greater good, "infantilization," treating an adult as if she were an infant, and "demonization," treating someone "as though he were simply a vile embodiment of evil."); Kevin J. Murtagh, *Is Corporally Punishing Criminals Degrading*? 20 J. POL. PHIL. 481, 485 (2012) ("[W]ith respect to legal punishment, a degrading punishment is one that is inconsistent with the recognition of the basic dignity of the punished person."); Murphy, *supra* note 32, at 233 ("A punishment will be unjust (and thus banned on principle) if it is of such a nature as to be degrading or dehumanizing (inconsistent with human dignity)."); John Kleinig, *The Hardness of Hard Treatment*, *in* FUNDAMENTALS OF SENTENCING THEORY 273, 287 (A. Ashworth & M. Wasik eds., 1998) ("To degrade another is to detract from the other's dignity as a human being.").

forms of treatment. There are many things that deserve respect, for instance, but which do not bear dignity. We might respect someone's skills as a driver without thinking that her skills have dignity or that she has dignity as a result of this ability. But when something or someone has dignity—like the dignity of a judge—it will be grounded in our respect for that thing or person. And, indeed, the duty to uphold human dignity is commonly understood to derive from or to be synonymous with having "respect for persons," and so what follows should be understood as an attempt to understand certain aspects of human dignity.[161]

1. Respect and Value

What does it mean to "respect" something? Let us first consider Joseph Raz's theory of respect, and of respect for persons.[162] For Raz, respect is a species of responding to value and thus to reason.[163] On his view, respect has two basic components.

First, he writes, to respect things means "recognizing" them as things of value—"regarding [them] in ways consistent with their value, in one's thoughts, understood broadly to include imaginings, emotions, wishes, intentions, etc." and, insofar as language is tied to thought, perhaps expressing this value recognition with words.[164] To despise someone when he is generous and kind is to have an emotion inconsistent with his value, Raz explains, and thus is violative of this first reason of respect.[165]

Second, in light of the meta conviction that things of value are of value, respect requires that one preserve and not destroy something that she recognizes to have value.[166] If one sees a masterpiece of painting, respect does not require her to spend time contemplating it—she might not be disposed to like it—but it does require that she not spray-paint over it. That would be disrespectful. It would dishonor her belief that it was a good painting, a painting, that is, from which those who are disposed differently might derive pleasure or insight. Raz, by emphasizing both the psychological and the practical aspects of respect, is in accord with Robin Dillon, who

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[161] I discuss dignity further *infra* Part III.B.2.

[162] *See generally* RAZ, *supra* note 13.

[163] *Id.* at 160.

[164] *Id.* at 161.

[165] *Id.* at 161–62.

[166] *Id.* at 161–63.

writes, "In respecting an object, we often consider it to be making legitimate claims on our conduct as well as our thoughts and feelings . . . "[167]

On Raz's view, the point of respecting a valuable object, like the painting masterpiece, is to protect the possibility of communion between valuer (person) and value or good:

> [I]f engaging with value is the way to realise value, respecting value is the way to protect the possibility of that realisation. The basic reasons that something being of value imposes are that it should be allowed to play its proper role, that is, that it should be allowed to be realised.[168]

One does not owe respect, on this view, to the painting *qua* inanimate object. Respect is not owed to the dry paint in and of itself, but rather to the value that such paint can generate when appreciated by people. If wet paint is an *instrumental* good, something to be used as a tool to create value, then the completed painting is an *intrinsic* good, something constitutive of the good when appreciated by a person.

Either form of value, Raz explains, depends on the presence of something *of value in itself*: "a certain category of value whose existence is established by the very nature of value, that is, if anything is of value at all then something is valuable in itself."[169] Instrumental goods only have value insofar as they benefit, in the end, something that is good in itself: the water has value insofar as it nourishes the plant, which has value insofar as it grows the fruit, which has value insofar as it nourishes and provides pleasure to people, who have value in themselves.[170] Meanwhile, the value of an intrinsic good depends on the possibility that something of value in itself will engage with it. The painting—a potential source of intrinsic value in this world—would have no such value in a world without people (and without any possibility of generating people).

Razian respect is not limited to valuable objects. It applies with the same logic to people themselves, given their role in the process of value creation as beings of value in themselves.[171] The conclusion is that respect entails, as Raz writes, "stringent" general duties toward people,[172] and while he does not finish the thought entirely, these would involve a duty to recognize each person's capacity to engage with value, both in one's thoughts

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[167] Robin Dillon, *Respect*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed. 2016), https://plato.stanford.edu/archives/win2016/entries/respect/ [https://perma.cc/U9DZ-A5ZW].

[168] RAZ, *supra* note 13, at 167.

[169] *Id.* at 144–45.

[170] *See id.* at 147.

[171] *Id.* at 170.

[172] *Id.*

and possibly as a form of verbal or symbolic expression, as well as a duty to preserve each person's capacity to engage with value.[173] It is unclear whether Raz imagines these duties to be positive or negative in nature. A positive duty to preserve someone's capacity to engage with value would be very demanding, probably impossibly so given the realities of aging. But since we are concerned with injurious actions, we can sidestep this issue, as such actions implicate even a negative duty of practical respect—a duty not to purposefully harm or damage someone's capacity to engage with value.

Stephen Darwall, using different terminology, distinguishes between "recognition" and "appraisal" respect.[174] "Recognition" respect influences one's actions: one respects a speed limit by lowering her driving speed.[175] "Appraisal" respect, meanwhile, is the respect that we have for things in virtue of their excellence: one respects the quality of someone's character, or tennis skills.[176] Therefore, while recognition respect concerns our practical deliberations (what we have reason to do), appraisal respect concerns our relative estimation of things (the degree to which we believe something exhibits some positive attribute). These two forms of respect, however, are related in ways that Darwall seems to overlook. And we should resist Darwall's attempt to draw a sharp distinction between the two, in favor of Raz's view whereby practical forms of respect follow rationally from an appreciation of something's value. I believe that an actor is highly skilled (appraisal respect), and so I see her play (recognition respect). Furthermore, recognition respect *expresses* one's appraisal respect. This could be explicit, as when someone says something out loud: "She's a great actor!" Or it could be implicit in one's action; attending all of her plays impliedly expresses that you think highly of her acting skills.

2. Symbolic and Non-Symbolic Respect

If, in this way, practical responses to something's existence express one's view of that thing's value (or lack thereof), we ought to clarify the difference between symbolic and non-symbolic forms of practical respect. Symbolic respect or disrespect for a person does not, *as a matter of the laws of physics*, impact one's ability to be or to do anything. It is symbolic and therefore culturally determined. The most obvious means of symbolic respect or disrespect is, of course, language: "You're beautiful!" or "You do not matter!" But there are non-verbal means, as well. For instance, unlike

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[173] *See id.* at 170–71.

[174] *See* Stephen Darwall, *Two Kinds of Respect*, 88 ETHICS 36 (1977).

[175] *Id.* at 38.

[176] *Id.* at 41.

running electricity through someone's body, spitting on someone does not, as a matter of the laws of physics, have much of an impact. It is a non-verbal, but nonetheless symbolic means of communicating one's belief about someone's lack of worth. Non-symbolic disrespect, meanwhile, involves a physical interference with the means or mechanism by which the thing exhibits or realizes value. Burning a painting makes it physically impossible for the painting to exhibit value and therefore disrespects the painting. We should follow Raz, though, in thinking that while symbolic forms of respect are often an essential part of practical value recognition, they are generally of lesser importance than actions that physically help or hinder that thing's capacity to exhibit or realize value.[177]

To clarify this point, consider Michael Rosen's critique of Jeremy Waldron's theory of human dignity.[178] Waldron unites (a) the egalitarianism within religious definitions of dignity, wherein everyone equally exhibits the dignity of standing above the unreflective, impulsive animal kingdom, with (b) the traditional notion that dignity refers to high social status (as in the "dignity" of a king).[179] The resulting construction, which he believes is immanent within the law, creates a general human dignity, mirroring the French revolutionaries' *dignite de l'homme*, such that each person deserves a quasi-aristocratic status in society.[180] Everyone on this view, paupers included, merit the deferential, courteous, and caring treatment accorded to nobility in previous centuries. Rosen believes that while Waldron's interpretation of dignity is the right one, it means that either (a) every fundamental rights violation is essentially symbolic or (b) dignity cannot fulfill the foundational role assigned to it in basic rights documents, as it can only ensure the more symbolic forms of decent treatment.[181] Rosen takes the second view, arguing that not all rights violations are "symbolic harms": "[T]he worst of what the Nazi state did to the Jews was not the humiliation of herding them into cattle trucks and forcing them to live in conditions of unimaginable squalor; it was to murder them."[182]

While murder is surely worse than humiliation, we should be careful to see the connection between the more symbolic and the more physical, between a willingness to profoundly humiliate and a willingness to murder.

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[177] RAZ, *supra* note 13, at 167.

[178] MICHAEL ROSEN, DIGNITY: ITS HISTORY AND MEANING (2012); Michael Rosen, *Dignity Past and Present*, *in* JEREMY WALDRON, DIGNITY, RANK, AND RIGHTS 79 (Meir Dan-Cohen ed. 2012) [hereinafter "Rosen, *Dignity Past and Present*"].

[179] WALDRON, *supra* note 33.

[180] *Id.*

[181] See Rosen, *Dignity Past and Present*, *supra* note 178.

[182] *Id.* at 97.

Whether or not both are forms of indignity, both are forms of disrespect. Of course, in some cases, like herding people into cattle trucks, symbolic and non-symbolic forms of disrespect are united. To herd people into any truck against their will is a non-symbolic form of disrespect, insofar as it represents a physical interference with their ability to realize value; but to use a cattle truck adds an additional symbolic component, implying with cultural cues that they are equivalent to animals.[183] Regardless, both forms of disrespect, the more symbolic humiliation and the entirely non-symbolic murder, derive from the same denial of the victims' value. Both are ultimately forms of expression, even if murder is undoubtedly the more emphatic statement.

Avishai Margalit attempts to unite symbolic and non-symbolic forms of disrespect under a broader conception of "humiliation," which he defines as "any sort of behaviour or conditions that constitutes a sound reason for a person to consider his or her self-respect injured."[184] While his book contains great insight into the meaning of humiliation, there are at least two reasons to think that even his broader conception of the term is an insufficient guide to degradation. First, as Anthony Quinton explains, one might endure terrible treatment while nonetheless maintaining her self-respect and composure; and we should not think in such a case that she was not victimized.[185] Second, as Vorhaus argues, humiliation itself is not always indicative of degradation or impermissible treatment. He imagines a national soccer team widely expected to win the World Cup, but which returns home after a meek first round loss. Such a team will be humiliated on and off the field, he explains, but we would not say that they were degraded.[186] Thus, while we must worry about symbolic forms of disrespect—and humiliating treatment more broadly—we should not use those concepts as our singular guides to degradation.

3. Respect as an Epistemic Virtue

Respect, in sum, involves apprehending something's value and then responding appropriately—both attitudinally and practically—given (a) the

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[183] *See* John Vorhaus, *On Degradation Part Two: Degrading Treatment and Punishment*, 31 COMMON L. WORLD REV. 65, 79 (2003) ("Doubtless treatment that represents a threat to dignity often does so partly by virtue of what it causes to happen, but, however we choose to describe the nature of the threat, it is important not to lose sight of the many ways in which dignity is impinged upon by the symbolic nature of much ill-treatment."). On the connection between degradation and animalization, see *infra* Part IV.B.

[184] AVISHAI MARGALIT, THE DECENT SOCIETY 9 (1996). *See also* "The Greek Case," *supra* note 56, at 186 ("Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others . . . ").

[185] Anthony Quinton, *Humiliation*, 64 SOC. RES. 77, 79–80 (1997).

[186] *See* Vorhaus, *supra* note 183, at 68.

analytic connection between value and reason and (b) the principle that, to the extent it is in our power, we ought to think, say, and do that which is justified by reason. The reasons that ground respect on this view, to be clear, are object-generated, rather than subject-generated: it is a thing's objective value, whether instrumental or intrinsic, rather than our subjective desires, that determines the demands of respect.[187] John Rawls argues along these lines that respect involves the recognition of something "as directly determining our will without reference to what is wanted by our inclinations."[188]

This process of *seeing* the objective value in something and then responding appropriately in one's thoughts and actions is suggested by the Latin source of respect: *respicere,* meaning "to look back at" or "to look again."[189] *Willful blindness* is perhaps the essence of disrespect, then, as one refuses to truly look at or see the value in front of her. If something were incapable of recognizing value—incapable of looking back, as it were—then it would not be capable of disrespect. Consider a falling rock, an attacking shark, or someone who, in the moment of action, is legally insane or a legal automaton. All are capable of causing harm to people, but none have the capacity to disrespect the people they harm, given that they lack the capacity to perceive and then to reject the presence of their value. Along these lines, respect may be, as Dillon suggests, at least partly an *epistemic virtue* associated with the responsible pursuit of and commitment to the truth, namely, the truth of something's value.[190]

C. HUMAN VALUE

Let us take stock. We have been inquiring into the nature of degradation-limiting reasons, which operate with relative independence from

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[187] *See* Thomas H. Birch, *Moral Considerability and Universal Consideration*, 15 ENVTL. ETHICS 313 (1993) (arguing that respect involves a "deontic experience," whereby one *must* pay attention and respond appropriately); ALLAN WOOD, KANT'S ETHICAL THOUGHT 46 (1999) ("[R]espect refers us to a reason for action which is always distinct from (and prior to) any object of desire that is to result from the action."); Carl Cranor, *Toward a Theory of Respect for Persons*, 12 AM. PHIL. Q. 309, 311 (1975).

[188] JOHN RAWLS, LECTURES ON THE HISTORY OF MORAL PHILOSOPHY 153 (Barbara Herman ed. 2000).

[189] Latin source provided in Dillon, *supra* note 167.

[190] Dillon, *supra* note 167; *see also* Sarah Buss, *Respect for Persons*, 29 CAN. J. PHIL. 517, 548 (2013) (arguing that indifference to other people results from an "*epistemic* deficiency"). For the sake of completeness, if moral and ethical questions were non-objective, such that the "truth" of something's value was determined by a context-dependent system of meaning—one to which a society has committed itself—the demands of respect as outlined here would very likely still operate within such a system, given their rather straightforward logic (e.g. "do not destroy that which we deem valuable").

other penal considerations. We have assumed that the general reasons that oppose the infliction of torture simply are our degradation-limiting reasons (or the most fundamental ones). We defined torture as the intentional infliction of a suffusive panic. We hypothesized that the concept of disrespect is the metric of degradation, such that it can clarify torture's wrong-making features. And we have outlined the abstract framework of disrespect. Disrespect involves a failure to respond appropriately to something's capacity to realize value, most importantly by failing to "protect the possibility of that realisation," as Raz explains, as well as by failing to provide more symbolic forms of recognition.[191]

Given that respect is not purely symbolic, to apply this framework to a person—and to assess how disrespectful torture is to a person—we need at least a basic theory of the human good, of what people do to exhibit or realize value, and which capacities enable them to do this. Put differently, what is the mechanism by which humans realize value? Only by answering this question can we understand the degree to which an action disrespects a person by interfering with this mechanism, and thereby failing to protect the possibility of her realizing value. Raz's abstract and formal notion that people are of value "in themselves" does not provide an answer.[192]

1. Diachronic Human Value

I take a broadly Aristotelian line on human value. The conviction is that people's value—or their essentially *human* value—derives from their capacity to stitch moments together through time and construct good lives. Aristotle, in Book 1 of *Nichomachean Ethics*, inquires into the "human good."[193] He argues that the "characteristic activity" of humans is leading a "certain kind of life . . . in accordance with reason."[194] A characteristic activity is "accomplished well when it is accomplished in accordance with the appropriate virtue," he continues, such that the "human good" is a life lived in accordance with the human virtues, which enable one to live in accordance with reason (or are constitutive of living in accordance with reason).[195] Most importantly for our purposes, Aristotle emphasizes that the human good can only be realized "over a complete life."[196] He alludes to the migratory return of the swallows, which marks the beginning of summer:

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[191] RAZ, *supra* note 13, at 167.

[192] *Id.* at 144–45.

[193] ARISTOTLE, NICOMACHEAN ETHICS 3–22 (1094a–1103a) (Roger Crisp trans. & ed., 2000).

[194] *Id.* at 12.

[195] *Id.*

[196] *Id.* at 12–18.

"For one swallow does not make a summer, nor one day. Neither does one day or a short time make someone blessed and happy."[197] The idea is that the human good—the realization of value by a person—is a *diachronic* achievement.

Aristotle argues, for instance, that we cannot say that a child has led a "blessed" life:

> If he is called blessed, he is being described as such on account of the potential he has, since, as we have said, happiness requires complete virtue and a complete life. For there are many vicissitudes in life, all sorts of chance things happen, and even the most successful can meet with great misfortunes in old age, as the story of Priam in Trojan times. No one calls someone happy who meets with misfortunes like these and comes to a wretched end.[198]

Aristotle maintains that, since the human good is realized in the context of a life as a whole, we cannot say that a child has realized the human good. Such a judgment is premature. Aristotle implies that we cannot judge whether someone has realized the human good until his life is complete. Priam, for instance, was King of Troy at the time of its destruction by Agamemnon,[199] with the implication being that an otherwise virtuous or glorious life can end so terribly that it warps or ruins one's life as a whole. Ronald Dworkin makes a related point in the context of the debate over euthanasia: "We worry about the effect of life's last stage on the character of life as a whole, as we might worry about the effect of a play's last scene or a poem's last stanza on the entire creative work."[200]

Aristotle goes even further to suggest that the quality of one's life, viewed in this holistic manner, may be altered by *posthumous* events, such as the success or failure of one's descendants, though he admits the "oddness" of this position.[201] We need neither accept nor deny these more dramatic conclusions to appreciate Aristotle's more general point, which is that if humans enliven and exhibit value, they do so in the context of a diachronic project: the pursuit of a flourishing life *as a whole*. We can take this general point from Book 1 of *Nichomachean Ethics* without engaging with the remaining Books 2–10, which discuss the virtues that are conducive to realizing a flourishing life as a whole. That is, we can accept the notion of a diachronic, life-based human good without accepting or denying a foundation of virtue ethics.

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[197] *Id.* at 12.

[198] *Id.* at 16.

[199] *Id.* at 16 n. 6.

[200] RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 199 (1993).

[201] ARISTOTLE, *supra* note 193, at 16–17.

To clarify the diachronic nature of the human good, let us consider Dworkin's distinction between "experiential" and "critical" interests.[202] "Experiential interests" are, generally, interests in having pleasurable sensory experiences, including refined instances like playing an instrument, and in having positive emotional states, and in avoiding displeasing sensory experiences and negative emotional states.[203] "Critical interests," meanwhile, are not essentially phenomenological; they are interests in realizing one's personal values and commitments—completing a project, seeing loved ones succeed, ending one's life with dignity, and so forth.[204] The value of realizing a critical interest is, of course, connected to the value of realizing a good life as a diachronic achievement. But so is the value of realizing experiential interests, it seems. The value of pleasure, for instance, seems to depend on its connection to the broader good life, a connection that is usually, but not always secure. Consider the heroin addict who has destroyed her life due to her drug use, rejecting her personal obligations and descending into depravity and indignity. It is only with an appreciation of her as a being that constructs value through time, in the context of a life as a whole, that we can appreciate the immense disvalue of her shooting up, her temporary ecstasy notwithstanding.

Connie Rosati represents a diverse and distinguished group of contemporary theorists who have endorsed the diachronic conception of the human good when she writes:

> [A] good life seemingly involves more than a person's having many good moments or having many particular things that may be good for her; and it involves more precisely because of the peculiar capacities of persons. Persons have capacities for reason, memory, and imagination, that (most) nonhuman animals evidently lack. Persons have the capacity to reflect on themselves and their lives. Moreover, they have the capacity to be moved not only by what they may desire but by their determinations about what is worth desiring; and so they have the capacity to decide, in light of these determinations, what sort of person to be and what sort of life to lead. The ordinary exercise of these sundry capacities has the result that persons not only attend to their lives from moment to moment; they also take up a view of their lives as a whole, reflecting on themselves and their existence over time. In so doing, they also take, so to speak, a 'larger view' of themselves and their lives.[205]

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[202] DWORKIN, *supra* note 200, at 199–208.

[203] *Id.* at 201.

[204] *Id.* at 201–02.

[205] Connie S. Rosati, *The Story of a Life*, 30 SOC. PHIL. & POL'Y 21, 26–7 (2013). *See also* CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY 50–51 (1989) ("We want our lives to have meaning, or weight, or substance, or to grow toward some fulness, or however the concern is formulated . . . But this means our *whole* lives. If necessary, we want the future to 'redeem' the past, to make it part of a life story which has sense or purpose, to take it up in a meaningful unity."); ALASDAIR MACINTYRE, AFTER VIRTUE: A

It is only with such a conception of the essentially human capacities—at least reason, memory, and imagination—and of how they collectively enable the construction of a good life through time that we can understand the addict's ecstasy to be without value, since it diminishes her life as a whole.[206] If viewed as a moment standing alone, her ecstasy would be of great value, of course, since pleasure abstractly conceived has value. But that is not how humans conceive of, or ought to conceive of, their existence, as if they had no memories and were like goldfish, born in each moment anew, untethered to the past or future.[207] As C.I. Lewis writes: "The characteristic good of willing and achieving is not one found in this or that passing instant merely, nor in an aggregation of the goods thus momentarily and separately

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STUDY IN MORAL THEORY 216–19 (2d ed., 1984) (arguing that man is "essentially a story-telling animal," such that the good life is one that unfolds through time with "narrative unity"); JOHN RAWLS, A THEORY OF JUSTICE 63–64 (1971) (maintaining that a good life consists in the approximate realization of a "rational life plan"—the pursuit of one's foundational aims, which are grounded in one's reflective desires, and with the plan's details filled in over time, in the context of one's evolving circumstances); JEFF MCMAHAN, THE ETHICS OF KILLING 180 (2002) ("[W]e must also recognize that well-being is multidimensional and that some of its dimensions are relational—in particular those concerned with the meaning that a state or event has within a person's life"); MICHAEL STOCKER, PLURAL AND CONFLICTING VALUES 300–02, 323 (1990) (arguing that the value of a life is a Moorean "organic whole").

[206] But are these essentially *human* capacities? What about intelligent animals? Can they not also "build lives"? David Velleman argues that we should not maintain that, say, a cow's life considered as a holistic achievement matters, given that the cow itself (unlike a person) is incapable of understanding itself as a diachronic, life-building being:

> I assume that a cow cannot conceive of itself as a persisting individual and consequently cannot conceive of itself as enjoying different benefits at different moments during its life. What the cow cannot conceive, it cannot care about; and so a cow cannot care about which sequences of momentary goods it enjoys . . . I am not sympathetic to stronger versions of internalism, which make a thing's intrinsic value for someone contingent on his being disposed to care about it under specified or specifiable conditions; but I am inclined to think that unless a subject has the bare capacity, the equipment, to care about something under some conditions or other, it cannot be intrinsically good for him.

David Velleman, *Well-being and Time*, 72 *PAC. PHIL. Q.* 48, 68–69 (1991). If this works, it may begin to explain the moral difference between killing a person and a cow. When you kill a person, you not only deprive her of access to future pleasurable or otherwise valuable standalone moments, as you would with the cow; you may have also ruined her ability to realize a good life as a whole.

[207] Memory has been grossly undervalued as an essential human capacity. Locke is an exception:

> Memory, in an intellectual creature, is necessary in the next degree to perception. It is of so great a moment, that where it is wanting, all the rest of our faculties are in a great measure useless; and we, in our thoughts, reasonings, and knowledge, could not proceed beyond present objects, were it not for the assistance of our memories . . . .

LOCKE, *supra* note 118, at 150 (Book II, Ch. X, Sect. 8).

disclosed, but in the temporal and relational patterns of a whole of experience whose progression is cumulative and consummatory."[208] The most valuable goods that people can realize, things like maintaining families, careers, and friendships, are essentially "temporal" goods, which can only be realized through time in the context of a broader life project.

If a moment of pleasure might be devoid of value on this diachronic conception of the human good, then in the other direction, pain, stress, and suffering can sometimes have great value, insofar as they constitute *investments* toward a good life as a whole, or are analytically connected to such investments, as with the years of rigorous training required to become, say, a qualified surgeon.[209] This generates a conception of human "disvalue," which will come into play when we return to the discussion of torture. Disvalue is distinct from, and worse than, the absence of value. If human flourishing in the context of a whole life is constitutive of human value, then *wanton* human suffering—suffering that does not represent an investment into one's good life—is constitutive of human disvalue.

There are stronger and weaker versions of this theory. The stronger version—which I accept—is that something is good for a person only if it is good for her life considered as a whole. The question of whether a certain activity or experience is good for me, on this stronger version, is identical to the question of whether it is good for my life considered as a whole. This viewpoint need not be obsessively forward-looking. It has a central place for "momentary" goods, like ice-cream cones, which do not require cultivation over time, and which are realized entirely in the moment. As a matter of general tendency or personal principle, such goods are surely constitutive of a good life. That is, a life without such goods—without ice-cream cones—would be worse when considered *as a whole*.[210]

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[208] C.I. LEWIS, ANALYSIS OF KNOWLEDGE AND VALUATION 498 (1946).

[209] *See id.*:

> The goodness of pursuing and attaining is not the goodness found in striving, regardless of the end pursued, plus the goodness found in having something desired, regardless of how it is attained. It lies peculiarly in the relationship between the active intent, the conation, and the realization. The goodness of the end to be realized infuses the activity; and the goodness belonging to purposive action, and not to be found in mere good fortune, colors the realization of the end attained.

Id.

[210] Does this strictly life-based conception of the human good presuppose controversially, *contra* Derek Parfit, that I am identical with the "younger" and "older" people who have looked and who will look out to the world through "my" consciousness? *See* DEREK PARFIT, *REASONS AND PERSONS* 199–244, 307–20 (1987). How else could I be said to be working of the project of "my" good life? Charles Taylor writes perceptively on this metaphysical objection. He writes that while "there is something like an a priori unity of a human life through its whole

We might retreat to a more moderate version, however, without impacting our overall argument. The more moderate position is that while people's diachronic capacities are the fundamental basis of their value, constitutive of their ability to realize "temporal" goods like families, careers, friendships, and so forth, people can nonetheless generate "momentary" value that has nothing to do with their life project. That is, something could be good for me without being good for my life considered as a whole. Perhaps the heroin addict's pleasure has value in this way, as a momentary experience of pleasure, valuable even though it detracts from the pursuit of her good life as a whole. David Velleman takes this position, writing that "a person has two distinct sets of interests, lying along two distinct dimensions—his synchronic interests in being well off at particular moments, and his diachronic interests in having good periods of time and, in particular, a good life."[211] However, given that "momentary" goods are constitutive of

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extent," we might imagine a culture that conceives of life as split into distinct parts. TAYLOR, *supra* note 206, at 51. "Perhaps at some age, say forty, people go through a horrendous ritual passage, in which they go into ecstasy and the emerge as, say, their reincarnated ancestor. That is how they describe things and live them." *Id.* He concludes, though, that in the absence of such a cultural understanding, that is, in *our* world, "the supposition that I could be two temporally succeeding selves is either an overdramatized image, or quite false. It runs against the structural features of a self as a being who exists in a space of concerns." *Id.*

While I accept Taylor's argument, the more important point to make is that the metaphysical objection is not dispositive. If we do not share an identity with our past and future selves, that need not vitiate the conclusions from this section. The achievement of a "good life" would simply become something of a group project. That is, the teenager and the old man that he becomes could be different people, but nonetheless could be said to be living, and working on, the same life. They would be distinct and yet impossibly bonded, perhaps the purest form of family. And we could reasonably maintain that their respective capacities to work together and to honor one another, as it were, were their most essential and valuable capacities. I take no position on whether this indeed describes the metaphysical nature of our existence through time. Much more would need to be said to flesh out its details. The point is that some such view is coherent, at least, and that even a radical Parfittian metaphysics need not vitiate our moral convictions about the diachronic nature of human value.

[211] Velleman, *supra* note 207. As evidence of the independence of synchronic and diachronic well-being, Velleman introduces an interesting hypothetical. Consider two possible lives with the same total amount of synchronic, moment-to-moment well-being. One begins desperately and ends wonderfully, while the other begins wonderfully and ends desperately. Velleman argues that we believe that the former is the better life overall, and that we can make this judgment only if the narrative sequence of events matters. And, he continues, the narrative sequence of events can matter only if diachronic well-being is distinct from synchronic well-being (given that both lives have the same amount of synchronic well-being).

Velleman's argument has generated considerable attention. For our purposes, however, we can maintain that human value is centered on the pursuit of temporal goods and a good life as a whole without accepting or rejecting the proposal that the "narrative" or "story" of a life is an independent variable in making a good life. For arguments in favor of the view that a life's narrative structure matters as an independent variable, see TAYLOR, *supra* note 206, at 50–51;

a good life as a whole, as with ice-cream cones, Velleman's distinction, even if sound, is not of great analytical import. It would provide traction only for those purportedly momentary goods, like the addict's ecstasy, that are valuable in the moment but bad for one's life overall.

2. Practical Reason

In this section, we were concerned to discover the mechanism by which human beings exhibit or realize value in order to understand how an action—like torture—might interfere with that mechanism and therefore express disrespect for a person. What, then, is the relevant mechanism? It is the collection of capacities which enables one to stitch moments together and construct a meaningful life over time. Rosati mentions reason, memory, and imagination.[212] We might break reason down into at least *autonomy* and *value-recognition.* Autonomy involves the ability to consciously see multiple practical options and then to select one, while value-recognition involves the ability to see the relative objective value in such choices. I follow Donald Regan and David Enoch in thinking that the bare fact that someone has exercised her autonomy and freely chosen an option does not render that option valuable and constitutive of a good life.[213] People can freely exercise their agency—even passing a Kantian test of universalizability[214]—but nonetheless make mistakes by choosing an option that contains or entails less objective value than another. An agent could have the capacity for autonomy, in this way, but then be incapable of building

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MACINTYRE, *supra* note 206, at 216–19; Daniel Dennett, *The Self as the Center of Narrative Gravity*, *in* SELF AND CONSCIOUSNESS: MULTIPLE PERSPECTIVES (Frank S. Kessel, Pamela M. Cole, and Dale L. Johnson eds., 1992); MCMAHAN, *supra* note 206, at 175–80. For criticism of the view, see Stephen Campbell, *When the Shape of a Life Matters*, 18 ETHICAL THEORY & MORAL PRAC. 565, 571 (2015); Rosati, *supra* note 206; Galen Strawson, *Against Narrativity*, 17 RATIO 428 (2004); FRED FELDMAN, PLEASURE AND THE GOOD LIFE 124–41 (2006); Johan Brännmark, *Leading Lives: On Happiness and Narrative Meaning*, 32 PHIL. PAPERS 321 (2003).

[212] Rosati, *supra* note 206, at 27.

[213] *See* Donald Regan, *How to be a Moorean*, 113 ETHICS 651 (2003) (arguing that agents necessarily take a critical stance in relation to their desires and that they can only do so by relying on a conception of the good that is not itself reducible to their desires); Donald Regan, *The Value of Rational Nature*, 112 ETHICS 267 (2002) (arguing that rational nature cannot have value where there are no self-standing principles about good states of affairs and activities); David Enoch, *Agency, Schmagency: Why Normativity Won't Come from What Is Constitutive of Action*, 115 PHIL. REV. 169 (2006) (arguing that a complete account of action and agency is not a complete account of normativity).

[214] IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 4:421 (1785), *reprinted in* PRACTICAL PHILOSOPHY 37, 73 (Mary J. Gregor ed. & trans., 1996) ("act only in accordance with that maxim through which you can at the same time will that it become a universal law.").

a good life if she lacked the independent capacity of value-recognition. This might explain the future of artificially intelligent agents and possibly the current reality of psychopaths.

We need not reach a firm conclusion on these issues, however, to understand that some such collection of relatively distinct capacities enables humans to realize and exhibit value in a diachronic, life-building manner. Let us define this collection of capacities as a person's meta-capacity for *practical reason*.[215] In sum, the mechanism by which human beings exhibit or realize value is their capacity for practical reason, which enables them to build meaningful lives through time.[216]

IV. TORTURE AS EXTREME DISRESPECT

We can now combine the analyses of respect and human value and return to the inquiry into torture's wrong-making features (for the purpose of discerning degradation-limiting reasons more generally). If a person's value is constitutive of her capacity to stitch moments together through time and construct a good life, then torture, by forcing her ken into a terrifying, panic-stricken moment, is egregiously disrespectful of that capacity, and primarily

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[215] This would qualify a "range property" theory of human value, as it bases human value in a natural property that people exhibit unequally. People's practical reasoning capacities, understood as their ability to construct good lives, will doubtfully be precisely equal. The "range property" idea is that, regardless of such inequalities, a sufficiency of the property renders one completely within the relevant category. Jeremy Waldron explains that "being in Scotland" is a range property. While Stirling is in the center of the country and Gretna is just over the border from England, both are *equally* "in Scotland." *See* JEREMY WALDRON, ONE ANOTHER'S EQUALS: THE BASIS OF HUMAN EQUALITY 84–127, 222–23 (2017); Ian Carter, *Respect and the Basis of Equality*, 121 ETHICS 538, 552 (2011) (arguing that we ought to base human equality on (a) an understanding that each person has that "certain minimum of agential capacities" required to be a moral agent and then (b) a purposeful ignorance of any agential inequalities above that threshold). Thus, the question here is not, "How easy is it for you to build a valuable life?" but rather, "Do you have the capacity to build a valuable life?" That bare capacity renders one deserving of full and equal respect on this view. Rawls introduced the idea of a range property. RAWLS, *supra* note 206, at 506 (grounding people's worth in their moral personality and concluding that "while individuals presumably have varying capacities for a sense of justice . . . [o]nce a certain minimum is met, a person is entitled to equal liberty on a par with everyone else").

[216] Margalit outlines three strategies for defending the ideal that each person deserves respect: a "positive" one that appeals to a particular human trait; a "skeptical" one based on the empirical and cultural fact that in our way of life we respect each other; and a "negative" one that fails to justify the ideal, but forecloses disrespect (which Margalit understands as "humiliation") because it is an instance of mental cruelty. MARGALIT, *supra* note 184, at 57-112. The argument presented here would fall under the "positive" strategy, following Aristotle and others in finding the essentially human trait to be the capacity for practical reason (as defined above). Note, as well, that since Margalit focuses only on disrespect as humiliation, he fails to see how disrespect can involve physical as well as mental cruelty.

in a non-symbolic or physical manner. If the value creation and exhibition machine that is a person depends on the proper functioning of its practical reasoning capacities (at least autonomy, value recognition, imagination, and memory), then torture obliterates that machine—at least temporarily and while risking permanent damage, as I discuss further below. To force the torture victim into *this maximally horrible moment* is to force her outside of the pursuit of her good life and outside of time, as it were, as she loses awareness of where she came from and where she is going, of who she is and what she values, as "[her] flesh becomes a total reality."[217]

When Scarry writes that the torture victim is incapable of betrayal, given her lack of awareness of the commitments or values that she may betray by confessing or informing, she demonstrates torture's non-symbolic disrespect for a victim's capacities of memory and value recognition.[218] The demands of the past and the future lose their stringency, as the victim's instinctual and utter panic collapses her sense of self and conception of value into a terrifying present, and she is prepared to do or say anything to end the ordeal. At least that is the torturer's intention.

Torture, by inducing such panic, is similarly disrespectful in the non-symbolic sense of one's capacity for autonomy. It effectively ruins this capacity (again, at least temporarily). It is not just that genuine deliberation is impossible under the throes of panic, as it would be when experiencing extreme pleasure or, indeed, when sleeping. Panic takes a further step by actively hijacking one's powers of deliberation and decision-making, as one's mental apparatus is concentrated fully toward the singular aim of ending or escaping from the source of one's terror. If suffusive pleasure tends to transfix, perhaps rendering action impossible, suffusive panic absolutely animates, demanding action—wild, unthinking action—even if that just means desperately flailing about. Overwhelming pain, containing within it the likelihood of such panic, is thus generally a greater autonomy violation than overwhelming pleasure, *contra* Sussman.[219] But should extreme pleasure somehow generate this experience, then there would be no difference between the two with regard to their impact on autonomy.

The disrespect of torture goes a step beyond preventing a person from generating value, as would death or forcing someone to sleep for the rest of her life. Torture also forces the victim into a locus of *disvalue.* It is not just that the victim loses the thread of her life and so fails to exhibit or create value, but that her new existence, as it were, is necessarily horrible for

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[217] AMÉRY, *supra* note 15, at 33.

[218] SCARRY, *supra* note 110, at 30.

[219] Sussman, *supra* note 12, at 15.

however long it may last. As argued above, disvalue constitutes wanton suffering, suffering that does not represent an investment into one's flourishing life as a whole. If respect involves the duty to maintain the possibility of something's engagement with value, it entails as a corollary the duty not to use that thing to generate disvalue.[220]

Torture does involve a "perversity," then, as Sussman argues, but it is not the forced self-betrayal that he articulates.[221] The perversity involves taking a creature capable of engaging with value in such a profound and interesting way, and then converting it into a site of pure disvalue, of suffering and nothing else. We can return here to Beccaria's point about how torture saturates the victim with suffering.[222] The physics of the human brain are such that we can experience only a certain amount of suffering. If we imagine torture via running electricity though someone's body, above a certain voltage the victim will experience the same maximum amount of pain and anxiety. The aim of torture is just to trigger the experience of panic which pushes someone over that threshold. The torture victim, suffused with suffering, is thus maxing out her capacity for disvalue. Whether the torture is meant to punish, to interrogate, to terrorize a populace, etc., the intended experience for the victim is the same, at least when viewed from this perspective on value. In sum, torture is the exemplar of disrespect. With regard to (a) the duty to enable or at least not to destroy a person's capacity to generate value and (b) the correlated duty not to turn a person into a locus of disvalue, torture is the most disrespectful thing that you can do to someone, for as long as it lasts: it completely halts the victim's value-generating capacities and completely maximizes her disvalue-generating capacities.[223]

Are there any purely symbolic forms of disrespect involved with torture? An element of symbolic humiliation inheres undeniably in converting someone from an upright, dignified being into a "shrilly squealing

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[220] This corollary duty would only apply to conscious creatures, which are capable of generating disvalue in the form of wanton suffering. By comparison, while it is possible to disrespect a painting by, say, burning it, it is not possible to make the painting itself a locus of disvalue, given that the painting cannot experience suffering.

[221] Sussman, *supra* note 12, at 4.

[222] Beccaria, *supra* note 117, at 41.

[223] There are very unusual cases where someone inflicts a suffusive panic as a means or byproduct of *helping* the "victim." Such actions would affirm rather than reject the individual's essentially human value. Consider, for instance, emergency battlefield surgery without anesthesia, as well as Christopher Hitchens' torture. *See* discussion *supra* Part III.A.2. By waterboarding Hitchens with his consent, Hitchens's torturers were in fact aiding his realization of the good, a process which for him involved participatory journalism and engagement with foreign policy debates. We might excise these very unusual cases from the word "torture," such that neither the battlefield patient nor Hitchens were really "tortured," even though they experienced the phenomenology of torture.

piglet," given that all human cultures seem to value maintaining one's composure in the presence of others.[224] There is also the symbolically meaningful fact that torture converts a person into a squealing animal, as it were, as I discuss further below. It may also depend on the means of torture. To torture someone in public, for instance, as was the case with historic penal tortures, would add an additional layer of symbolic disrespect and humiliation.[225] Certain forms of torture, furthermore, may be more culturally-specific, using symbolic disrespect as a tool of bringing about a suffusive panic, such as forcing a religious person to violate a spiritual commitment in an extreme manner. In general, though, we should think that in most cases of genuine torture, any *purely* symbolic disrespect would be drowned out by the non-symbolic, physical impact of a suffusive panic, consistent with the above conclusions regarding the "language-destroying" nature of torture, whereby torture effectively takes the victim outside of his linguistic and cultural setting, in which symbolic forms of expression have meaning.

A. THE SPECTRUM OF DISRESPECT

Is all torture equally disrespectful? This conclusion is tempting, but it is not true. First, there seems to be a qualitative difference between very brief tortures, like breaking a single finger without any threat of further harm, and longer tortures, like those experienced by Améry, Timerman, Alleg, and Trung. We might think, in the former case, that the panic does not have an opportunity to sink in, as it were, and obliterate the victim's personality. We ought to remove the former cases from the term torture, I think, their brutality and cruelty notwithstanding. Let us move forward with the understanding that when we use the term torture, we are referring to experiences on a par with Améry, Timerman, Alleg, and Trung's.

Second, and more importantly, torture is traumatic and contains within it a serious risk of long-term damage, as seen with Trung, who experiences debilitating panic attacks decades after his ordeals. As Améry writes, "Whoever was tortured stays tortured. Torture is ineradicably burned into him . . . "[226] Ian Thomson, Primo Levi's biographer, argued that, in addition to Levi's responsibility for his elderly mother and mother-in-law, traumatic memories of his time in Auschwitz caused his depression and ultimate

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[224] AMÉRY, *supra* note 15, at 35.

[225] For a critical explication of historic public tortures, in particular that of Robert-François Damiens in 1757, see MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 3–72 (2d ed., Alan Sheridan trans., 1995).

[226] AMÉRY, *supra* note 15, at 34.

suicide.[227] Elie Wiesel was more succinct: "Primo Levi died at Auschwitz forty years later."[228] In many instances, torture entails the risk of long-term *physical* damage as well. A willingness to inflict or to seriously risk long-term damage, psychological and physical, is absolutely a component of the disrespect of torture (as well as other potentially degrading forms of punishment, such as long-term incarceration). We should not think, however, that all tortures pose the exact same long-term risks to a victim's capacity to build a good life. Those that pose more of a risk are yet more disrespectful than those that pose less of a risk. To torture someone by cutting off his fingers and toes seems yet more disrespectful than, say, waterboarding him, assuming he is ultimately released back into society. The reason is that building a good life is much more difficult without one's fingers and toes, even if both forms of torture contain the risk of long-term psychological damage. But does this variation in the disrespectfulness of torture matter for the purposes of discerning when degradation limitations apply?

There is a spectrum from maximum respect to maximum disrespect for an individual human being and her capacity for practical reason. This Article clarifies the nature of maximum disrespect. I concluded that torture is the most disrespectful thing that you can do to someone *for as long as it lasts.* As such, torturing someone *for an eternity*—somehow rendering her immortal and placing her under non-stop torture—is the most disrespectful treatment imaginable.[229] It does not merely risk long-term damage; it guarantees the worst possible long-term outcome: suffusive panic forever. As we work our way down the spectrum, we will see other forms of torture, with those entailing a greater risk of long-term damage higher up on the ladder than those that entail less of such risk.

This idea of a spectrum of disrespect is key to understanding the concept of a dispositive degradation limitation. A form of punishment need not be the singularly most disrespectful thing imaginable to surpass such a limit. That is, assuming such limitations exist, they will rule out more than penal torture for an eternity. Even if certain forms of torture are yet more

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[227] IAN THOMSON, PRIMO LEVI: A LIFE 508–33 (2003).

[228] Diego Gambetta, *Primo Levi's Last Moments*, BOSTON REV. (June 1, 1999), http://bostonreview.net/diego-gambetta-primo-levi-last-moments [https://perma.cc/3FCP-VYB8].

[229] James Joyce, in a fictional sermon, offers a searing description of Hell as torture for an eternity. JAMES JOYCE, A PORTRAIT OF THE ARTIST AS A YOUNG MAN 128–43 (Penguin 2000, 1915).

disrespectful than others, all forms of penal torture can still surpass a dispositive degradation limitation.[230]

But where exactly on the spectrum of disrespect shall the dispositive line be drawn, beyond which we would say not merely that such treatment is degrading, but that it is absolutely impermissibly degrading, such that you simply cannot do that to a human being as a form of state punishment in the United States, no matter the stringency of the other reasons pushing in favor of such treatment? We cannot determine this with precision. The central idea, however, is something like this: the treatment is so disrespectful that it embodies a rejection of the offender's standing as a human being. This is a vague (and familiar[231]) formulation, but it gains definition when understood in the context of the above analyses into respect and respect for persons.

Given that respect involves the process of responding to something's value, disrespect for a person always embodies a rejection, to some degree, of her value. But, as we have seen, there are different modes of disrespect. One might just disrespect another's value as, say, a musician. But when delivered in a certain manner and degree, disrespect can embody a rejection of someone's value as a *human*, which is grounded on her essentially human capacity to construct value through time. Such treatment demonstrates the conviction—the false conviction, the lie—that this creature does not matter, at least not like a normal human being does, such that we can *ruin* it or do whatever we want with it, without regard for its practical reasoning capacity or its capacity to suffer, as if it were a mere thing or animal.[232] We can say,

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[230] We can appeal to the concept of a "range property" here, as well, with idea being that all forms of treatment above the line are impermissibly disrespectful, even if some are yet more disrespectful than others. *See* discussion of range properties *supra* note 216.

[231] *See, e.g.*, MARGALIT, *supra* note 184, at 143 ("Rejecting a human being by humiliating her means rejecting the way she expresses herself as a human. It is precisely this fact that gives content to the abstract concept of humiliation (i.e. degradation) as the rejection of human beings as human."); Murphy, *supra* note 32, at 233 ("Sending painful voltage through a man's testicles to which electrodes have been attached, or boiling him in oil, or eviscerating him, or gouging out his eyes—these are not *human* ways of relating to another person.").

[232] This "mere thing or animal" language dovetails with Kantian themes. Kant writes:

> In the kingdom of ends everything has either a *price* or a *dignity*. What has a price can be replaced by something else as its *equivalent*; what on the other hand is above all price and therefore admits of no equivalent has a dignity . . . Now, morality is the condition under which a rational being can be an end in itself, since only through this is it possible to be a lawgiving member in the kingdom of ends. Hence morality, and humanity insofar as it is capable of morality, is that which alone has dignity.

IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 4:434–35 (1785), *reprinted in* PRACTICAL PHILOSOPHY 37, 42 (Mary J. Gregor ed. & trans., 1996). Nonetheless, we should not think that the conclusions presented here flow straightforwardly from Kant's complex system, with its focus *inter alia* on people's moral capacities and the universalizability of their maxims.

more particularly, that punishment above the "dispositive" line rejects an offender's standing as a human; and punishment rejects an offender's standing as a human when it embodies the conviction that his life-building capacity—the very basis of his humanity—is either completely absent or fundamentally worthless.[233] The phrase "inhuman" illuminates. Above the line, treatment is "inhuman" because it denies the presence or worth of one's essentially human capacity.

Mens rea matters. To determine whether A has impermissibly degraded B, we need to know A's mental state. Did A injure B purposefully, knowingly, recklessly, negligently, or non-negligently? In most cases of extreme degradation, like the tortures considered above, this variable is not complex, as A *purposefully* injures B in a vicious manner. By comparison, if A were to injure B entirely accidentally and non-negligently, we could not say that A affirmatively denied B's humanity through her actions. Nonetheless, one could impermissibly degrade another with a degree of *mens rea* lesser than full-blown purpose. If A, charged with B's care, lets B starve to death, we could determine that A affirmatively denied B's humanity without intentionally harming B. A's actions—or rather inaction—embody the conviction that B's value-generating capacities simply do not matter. I discuss the relevance of mental state further below, in the context of long-term incarceration.

B. SYMBOLIC DEGRADATION

As suggested above, non-symbolic means of disrespect are much more likely to surpass the threshold of impermissible degradation. The most straightforward way that a punishment can deny an offender's humanity is for it to ruin his capacity to realize diachronic value as a non-symbolic matter of physics. But it seems that more symbolic forms of disrespect could be so extreme as to reside above the "dispositive" line. Of course, merely saying a phrase like, "You're worthless – you should be tortured to death!" would not qualify. But some non-linguistic, yet still symbolic forms of disrespect are inherently more serious and meaningful.

Consider "Derby's Dose," a horrible punishment invented by the slave overseer Thomas Thistlewood in the mid-18th Century for runaway slaves.[234] In addition to beating the runaway and rubbing salt pickle, bird pepper, and

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[233] We can see here the connection between extreme disrespect and the dictionary definition of "degrade": "To reduce from a higher to a lower rank, to depose from . . . a position of honour or estimation." OED ONLINE (April 4, 2018), www.oed.com/view/Entry/49100 [https://perma.cc/94T9-WTHZ]. Impermissibly degrading treatment involves denying someone the "rank" of human and granting them the rank of some lesser creature or thing.

[234] GLADWELL, *supra* note 16, at 282.

lime juice into his or her wounds, what made it "Derby's Dose" was that another slave would defecate into the runaway's mouth, after which he or she would be gagged for four or five hours.[235] Let us consider the process of forcing someone to eat human excrement, ignoring the beatings and the gagging. This need not, as a matter of physics, vitiate her ability to realize value, but it seems to be based on the same type of reasoning and to embody the same fundamental message as something that does. A willingness to inflict that component of Derby's Dose, like a willingness to torture, genuinely expresses the conviction that the victim does not matter—in the most direct sense that her capacities to generate human value and disvalue do not matter—and that no form of treatment is beyond the pale morally.

The concept of "disgust" seems to be involved with such symbolic forms of extreme degradation. Martha Nussbaum argues that "disgust embodies a shrinking from contamination that is associated with the human desire to be nonanimal . . . "[236] By forcing the runaway to do something utterly disgusting, and thereby "contaminating" herself like an animal, Thistlewood acts to reject her humanity and standing as a nonanimal person. This connects with the position that people's diachronic capacities are their "essentially human" capacities. As far as we know, animals—unlike people—do not purposefully construct good lives, as Velleman explains; they are *synchronic* creatures that live moment-to-moment.[237] To force a person symbolically to become what we conceive of as an animal is thus to deny her humanity, by denying the presence or worth of her diachronic capacities. It is to express the conviction that she *is* a synchronic animal and therefore *not* a diachronic person.[238] The same can be said, of course, about the process of torturing someone and *non-symbolically* converting them into howling beast for a period of time.[239]

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[235] *Id.*

[236] MARTHA NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 74 (2006). *See also* Paul Rozin & April E. Fallon, *A Perspective on Disgust*, 96 PSYCHOL. REV. 23 (1987) (arguing that anything that reminds us that we are animals elicits disgust).

[237] *See* discussion *supra* note 207.

[238] *See* Waldron, *supra* note 2, at 282 ("The 'higher than the animals' sense of human dignity gives us a natural sense of 'degrading treatment': it is treatment that is more fit for an animal than for a human, treatment of a person as though he were an animal."); Murphy, *supra* note 32, at 233 (arguing that a punishment is "in itself" degrading when it "treats the prisoner as an animal instead of a human being" or "perhaps even is an attempt to *reduce* him to an animal or a mere thing").

[239] I am grateful to John Goldberg and Peter Ramsay for pressing me to explore the connection between degradation and animalization.

C. DEGREES OF DEGRADATION

While I am concerned with punishments above the dispositive line of disrespect, those that affirmatively deny an offender's humanity, not all forms of degradation are so extreme. The distinction is vague, but nonetheless important. Degradation is a subset of the category of "harm." Degrading treatment is not merely "harmful" in Joel Feinberg's sense of being a "setback to interest."[240] It also to some degree denies one's standing as a *bearer* of interests or at least of distinctly human interests. But treatment can be degrading in this way—treating someone to *some degree* as a non-human—without affirmatively denying one's standing as a person.

Consider sentencing someone to a dirty, but otherwise decent prison for a week. That the prison is dirty is degrading. It treats the offender as a non-human in part because of the symbolic disrespect of forcing him to live like an unclean animal. But we should not think that sentencing someone to such a prison for a week, in and of itself, represents an affirmative denial of his humanity on a par with torture or rape. We ought not send offenders to dirty prisons. Doing so is wrong in part because it is degrading. Nonetheless, there is a qualitative difference between sending an offender to a dirty prison for a week and torturing or raping him as a form of punishment. Only the latter affirmatively denies his standing as a human.

Degradation-limiting reasons are in competition with reasons of offense-punishment proportionality and social utility, as discussed in Part I. In this competition, the reasons that oppose penal torture and rape are an order of magnitude stronger than those that oppose dirty prisons, though they all reside within the same category of penal considerations. I can imagine a situation in which a judge permissibly sends someone to a dirty prison for a week, say, the offender is a demonstrable security risk and the cleaning staff is on strike. I cannot imagine a situation in which a judge permissibly sentences someone to be tortured or raped as a form of punishment.[241]

D. INVIOLABILITY AND DEGRADATION

Punishments like torture and rape conflict with the liberal commitment to the separateness of persons, whereby each individual is deemed inviolate or sacred—somehow, a universe of value unto herself.[242] This is a central

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[240] JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW, VOLUME 1: HARM TO OTHERS 31 (1987).

[241] I discuss the "ticking time bomb" scenario *infra* at Part IV.E.

[242] *See* RAWLS, *supra* note 206, at 3–4 ("Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others."); NOZICK, *supra* note 17 at 32–33:

point. We must remember, however, that we are concerned here with genuine offenders in a reasonably just society, not blameless runaway slaves as in the case of Derby's Dose. We are concerned, furthermore, with otherwise proportional forms of punishments. That is, we are assuming that the punishments in question are proportional means of realizing our legitimate penal aims: inflicting suffering or censure commensurate with the offender's wrongdoing,[243] forcing the offender to fulfill a duty of repair toward his victim,[244] forcing the offender to fulfill a duty of repair toward society as a whole, [245] or whatever it may be. The idea of a dispositive degradation limitation is that even if a form of treatment above the line is proportional in accordance with such "internal" penal reasons, it is impermissible given that its degree of disrespect embodies a denial of the offender's basic humanity or worth. It does not matter that the offender is culpable; we cannot reject or destroy his human value—ruining him or breaking him—as a tool for realizing our social aims.

Human inviolability, in sum, requires that agents incorporate into their reasoning a certain profoundly high valuation of each person, as well as a commitment to the separateness of persons, such that we do not view individuals as mere things or animals, or as merely fungible components of a wider social good. And it thus rules out actions, like the tortures considered above, and like Derby's Dose, that could only be carried out if one rejected such a valuation and commitment. Put differently: respect ultimately concerns the reasons that one acts upon; *liberal* respect demands that one incorporate the ideal of human inviolability into her reasoning; and liberal respect thus rules out extremely degrading punishments.

In this way, human inviolability, which forecloses sacrificing offenders to mitigate harms or threats for which they lack responsibility,[246] also

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> Why not . . . hold that some persons have to bear some costs that benefit other persons more, for the sake of overall social good? But there is no *social entity* with a good that undergoes some sacrifice for its own good. There are only individual people, different individual people, with their own individual lives. Using one of these people for the benefit of others, uses him and benefits the others. Nothing more. What happens is that something is done to him for the sake of others. Talk of an overall social good covers this up.

Id.

[243] *See* DUFF, *supra* note 18; LARRY ALEXANDER, KIMBERLY KESSLER FERZAN & STEPHEN MORSE, CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW (2009).

[244] *See* VICTOR TADROS, THE ENDS OF HARM: THE MORAL FOUNDATIONS OF CRIMINAL LAW (2011).

[245] *See* Jacob Bronsther, *Two Theories of Deterrent Punishment*, 53 TULSA L. REV. 461 (2018).

[246] *Id.* at 462.

constrains the means by which we can force people to repair those harms or threats for which they *are* responsible. Deontology thus pushes and pulls. The individual offender, conceived of in the liberal mode as a responsible agent, is deemed to have a duty to repair the wrongs that he has committed against other inviolable individuals,[247] but then his *own* inviolability entails that there are methods that we cannot employ to force him to fulfill his duty, even if it goes unfulfilled as a result.

All of this is not without cost. There may be, say, significantly more criminality in society as a result of our refusal to thoroughly degrade offenders. That might not be true as an empirical matter, of course. But if it were true—if our refusal to, say, inflict penal rape meant that rapists could not fulfill their duties of repair, such that there was significantly more rape in society—it would not impact our conclusion. We should not lose sight of this fact, though—that degradation-limiting penal reasons can have genuine costs, genuine *moral* costs. The prospect of such costs, though, is analytic to all deontological constraints.

E. TICKING TIME BOMB

Finally, we should consider the possibility that otherwise dispositive degradation-limiting reasons could be overwhelmed when the costs were above a certain threshold or when the offender's duty was above a certain threshold of stringency, such that he effectively forfeits his standing as a human being and we can do anything to him permissibly (torture, rape, mutilation, etc.).[248]

If such a threshold exists, it seems far more likely to be passed by a forward-looking duty of prevention than a backward-looking duty of rectification,[249] when, say, the offender is responsible for an imminent threat of sufficiently great magnitude, we are sufficiently sure of this fact, for some reason the only way to force him to prevent the threat involves extreme degradation, and there are no non-degrading means of forcing him to fulfill a lesser, but still significant portion of his duty. I take no position here on

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[247] *See id.* at 476–80; TADROS, *supra* note 244 at 275–79.

[248] This is Matthew Kramer's position with regard to "act-impelling" torture, by which the state tortures someone so that she performs a specific action, like informing the state as to location of her comrades. He writes that such torture is "always and everywhere wrong," but nonetheless "morally optimal" in rare cases. *See* KRAMER, *supra* note 40, at 115, 188–89, 194, 197, 201.

[249] Victor Tadros considers why "the transition from self-defense to punishment may not be entirely smooth," such that it may be permissible to inflict greater harms on someone (a) to force him to eliminate a threat for which he is responsible than (b) to force him to rectify a prior wrong. TADROS, *supra* note 244, at 347–48.

the moral coherency of such a threshold,[250] nor on whether, if such a threshold does exist, the potential for abuse means that we ought to rule it out as a legal matter.[251] I will make two points, however, on the issue.

First, if such a threshold exists, it need not vitiate the idea that degradation-limiting reasons represent relatively free-standing considerations, considerations which are overwhelmed in those very unusual cases, but which can be dispositive elsewhere. That is, those cases would involve a tragedy. The conclusion would not be that we simply harmed the wrongdoer to a proportional degree, akin to fining him $10, *without any moral remainder*; the conclusion would be that we harmed the wrongdoer to a proportional degree and, as a result, by denying his basic worth or standing as a human being, we enacted an abomination.

Second, if such a threshold exists, there is little reason to believe that it is relevant in criminal courts in the United States, where judges are concerned to sentence offenders with regard to their backward-looking duties or liabilities, possibly in addition to their non-imminent forward-looking looking duties of prevention. It may be proven that an offender is a danger to people moving forward, insofar as he is unreasonably unreliable with regard to upholding the criminal law's prohibitions on violence, but very doubtfully will it be proven that he is imminently about to murder a great number of people. Thus, even if torture is permissible above the threshold, let us move forward with the conclusion that *penal* torture, at least, is absolutely impermissible in the United States, and for degradation-limiting reasons derived from the liberal conception of the inviolable individual.

F. LONG-TERM INCARCERATION

This analysis immediately opens up new lines of sentencing inquiry. While we do not torture people anymore as a form of punishment, that does not mean that we do not degrade offenders. Consider long-term incarceration. Where on the spectrum of disrespect does a decades-long prison sentence reside? Is it so disrespectful that, like penal torture or Derby's Dose, it embodies a rejection of the offender's standing as a human? While this is a question to consider in depth elsewhere, I will conclude this section by outlining the structure of such an investigation, to demonstrate the general applicability of the above argument.

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[250] For clear discussion of threshold deontology, see EYAL ZAMIR & BARAK MEDINA, LAW, ECONOMICS, AND MORALITY 41–56 (2010).

[251] *See generally* Jeff McMahan, *Torture in Principle and in Practice*, 22 PUB. AFF. Q. 111 (2008) (arguing that torture could be justified as a means of self-defense, but that it ought to be categorically outlawed due to its potential for abuse). *But see* STEINHOFF, *supra* note 74, at 53–60.

1. Associational Deprivations

To determine whether long-term incarceration is permissible, we must first understand what it means to incarcerate someone. If a punishment, by definition, deprives an offender of something, what does the state deprive an offender of when it sends him to prison?[252] The standard view, that incarceration is "the deprivation of liberty," is inadequate.[253] A fine deprives someone of the liberty to spend his money as he wishes, for instance, but a fine is not incarceration. "Liberty" is a famously slippery concept[254] and rather than trying to "sharpen"[255] the term in the prison context, we ought to consider a more direct question, derived from Martha Nussbaum and Amartya Sen's "capability approach."[256] What valuable activities or states of being does incarceration limit an inmate's access to, and to what degree?

There is a great diversity in prison quality, from a prison where thousands of inmates are packed in against one another without space even to sit down,[257] to a quiet penal island with beaches, bicycles, and flocks of sheep.[258] This diversity means that incarceration for any period of time can entail a wide array of possible deprivations. There is, however, one

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[252] *See* Hugo Adam Bedau & Erin Kelly, *Punishment*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2017), https://plato.stanford.edu/archives/win2017/entries/punishment/ [https://perma.cc/EJ3C-JKEP] ("Punishment . . . is *the authorized imposition of deprivations* . . . ").

[253] *See, e.g.*, Victor L. Shammas, *Pains of Imprisonment*, *in* THE ENCYCLOPEDIA OF CORRECTIONS 1, 2 (Kent R. Kerley ed., 2017) ("The fundamental premise of prisons is to remove or restrict liberty.").

[254] *See generally* LIBERTY (David Miller ed., 1991).

[255] On the process of "sharpening" vague terms, see generally Kit Fine, *Vagueness, Truth, and Logic*, 30 SYNTHESE 265 (1975).

[256] *See generally* MARTHA NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* (2000); MARTHA NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH (2011); Amartya Sen, *Equality of What?*, *in TANNER LECTURES ON HUMAN VALUES* (*Sterling M. McMurrin* ed., 1980); AMARTYA SEN, COMMODITIES AND CAPABILITIES (1985); Amartya Sen, *Capabilities, Lists and Public Reasons: Continuing the Conversation*, 10 *FEMINIST ECON.* 77 (2004).

[257] David Orr, *Hutus Held in 'Worst Prison in the World': 7,000 Suspects of Rwanda Massacre are Kept in a Jail Built for 400*, THE INDEPENDENT (July 15, 1995), http://www.independent.co.uk/news/world/hutus-held-in-worst-prison-in-world-1591700.html [https://perma.cc/26U7-8KNR]; *Diagnosing the State of Prisoner Health: The Gitarama Example*, MÉDECINS SANS FRONTIÈRES (Mar. 1995) (reporting that 1 in 8 inmates in the Gitarama prison died over a 9-month period), http://speakingout.msf.org/en/node/643 [https://perma.cc/9ES7-6TYP].

[258] Erwin James, *The Norwegian Prison Where Inmates are Treated Like People*, THE GUARDIAN (Feb. 25, 2013), https://www.theguardian.com/society/2013/feb/25/norwegian-prison-inmates-treated-like-people [https://perma.cc/T9KC-CZTR]; John Sutter, *Welcome to the World's Nicest Prison*, CNN (May 24, 2012), http://edition.cnn.com/2012/05/24/world/europe/norway-prison-bastoy-nicest/index.html [https://perma.cc/4REX-8LRR].

deprivation inherent to all prisons: inmates will be unable to associate freely with other people in society. This denial of the "freedom of general association," I believe, is the deprivational core of incarceration. What unites the many types of prisons is their remove from the broader community. They each represent a form of quarantine or banishment, by severely depriving inmates of the ability to associate with other individuals.

We can now add the variable of sentence length to the analysis. The denial of the freedom of general association becomes a grave injury as time passes, regardless of the prison's quality. Long-term confinement away from society inhibits the realization of certain associational goods that one can only realize over time. Some of these goods are *intrinsically* associational, as with the maintenance of a romantic partnership, family, or friendship; that is, the good itself just is a special form of association. Others are *instrumentally* associational, in the sense that associating with other people is the means by which one realizes the good, as with the development of most types of professional expertise. In either form, such goods are foundational to almost all conceptions of the good life. Long-term incarceration, in sum, is a slow-forming injury to one's life project. Indeed, we can say that long-term incarceration severely risks ruining an inmate's life as a whole.

2. Slow Degradation

As indicated above, *mens rea* matters. When examining whether A has impermissibly degraded B—whether A has treated B with *inhumanity*—we consider both (1) what A caused to happen to B and (2) A's *mens rea* in bringing about that outcome. Did A injure B purposefully, knowingly, recklessly, negligently, or non-negligently? If long-term incarceration represents a severe risk of ruining an inmate's life as a whole, there remains the question of what the state's intentions are when it inflicts such punishment. The answer depends on the underlying theory of punishment: retribution, deterrence, or incapacitation.[259]

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[259] What about rehabilitation? Given that prison is not the ideal environment for rehabilitation, any argument that incarceration, long-term or otherwise, can be justified purely on rehabilitative grounds is immediately suspect. At best, rehabilitation in the prison context is a component of *penal parsimony*, as successful rehabilitation might limit the costs, both to the offender and to society, of pursuing whatever aim in fact justifies his confinement. *See* John Pratt, *Scandinavian Exceptionalism in an Era of Penal Excess. Part 1: The Nature and Roots of Scandinavian Exceptionalism*, 48 BRIT. J. CRIMINOLOGY 119, 123 (2008) ("Of course, one must recognize that however relaxed a prison regime, whatever material comforts are provided, prisoners are still prisoners. There are rules, levels of surveillance, record-keeping, denials of choices, deprivations and sanctions that will differentiate any prisoner from free people.").

I. *Retribution and Deterrence*—Retributivist and deterrent theorists intend to *harm* offenders, using a broad understanding of harm as anything which is aversive or which negatively affects one's interests. To realize their penal aims they require punishment to be harmful. Retributivists generally see this harm as an end in itself, as the *intrinsic* good of deserved suffering or censure; though, Antony Duff, for one, sees retributive penal harm as having instrumental value, as well, insofar as it enables the offender's reformation and social reintegration.[260] Deterrence theorists, meanwhile, see penal harm as a thoroughly *instrumental* good, as a tool for threatening would-be future offenders. If punishment were not harmful, then it would fail as a deterrent.

Therefore, when the state inflicts retributive or deterrent long-term incarceration, it *purposefully* harms an offender in a manner that foreseeably and severely risks ruining his life as a whole. It sees injuring him in this manner as *a reason for action*. The conviction expressed by the state in this context is clear. It is the torturer's conviction: your essentially human capacity to build a good life does not matter. Such a punishment is impermissibly degrading, and it has no place in a liberal society. Given that a liberal society is committed to the inviolability of each individual, and given that each individual's value is grounded on his life-building capacity, a liberal state cannot intentionally ruin an offender's life, nor can it intentionally create a severe risk of ruining his life, regardless of how heinous his offense or how useful it might be to do so, just as it cannot sentence him to penal torture.

Compare a 20-year retributive or deterrent sentence in even a mild prison to 20 waterboarding sessions. They act in very different ways: whereas torture is immediate and urgent, long-term incarceration is gradual and subtle; torture explodes a person; long-term incarceration erodes a person. In the end, though, the question is the same: To what degree does the practice interfere with or symbolically dishonor the offender's capacity to exhibit and construct value? Long-term incarceration, by severely limiting an offender's access to certain associational goods, which are fundamental to the pursuit of a good life as a whole, interferes with his value-generating capacity in a direct and profoundly damaging manner. If torture removes someone, entirely, from his diachronic process of value generation, long-term incarceration acts to ensure—or at least to severely risk—that this process fails. Both work to erase one's existence as a human, as someone who builds value through time.

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[260] *See* DUFF, *supra* note 18, at 88–98.

II. *Incapacitation*—When the state acts for the sole reason of incapacitation, it need not be motivated to harm the offender. It would prefer, for instance, that the offender was somehow immediately rehabilitated and then released upon his first day in prison. The costs of incarceration, in that case, can be unintended side-effects of the state's aim of preventing the offender from committing very serious offenses. As such, long-term incapacitation can be legitimate if, against odds, the state meets at least three strict conditions. These conditions ensure that the state is not merely throwing away the life of someone who is potentially dangerous out of convenience, hatred, or fear.

First, the incarceration must be proportional to an established threat of very serious future crime posed by the offender. This is, undoubtedly, an enormous evidential question rife with the possibility of abuse with regard to the presumption of innocence and the broader prohibition on merely sacrificing individuals toward the greater good of crime prevention.[261] Second, the state must provide the offender with significant rehabilitative and therapeutic resources in a non-punitive facility. Third, the state must provide the offender with regular opportunities to demonstrate his rehabilitation, with the state bearing the burden on each occasion to prove that he is sufficiently likely to commit very serious offenses in the future.[262] The logic of long-term incapacitatory incarceration depends upon the offender maintaining a set of normative commitments that involves denying the authority of the law and the rights of other people as an ongoing matter. Once that set of commitments changes sufficiently, such that the evidential requirements for incapacitation are not met, then *at that moment* further incarceration becomes disproportional. As Andrew Ashworth and Lucia Zedner write, "the absence of periodic review and impossibility of release suggests that the preventive element is subsidiary to the punitive."[263]

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[261] *See* PETER RAMSAY, THE INSECURITY STATE: VULNERABLE AUTONOMY AND THE RIGHT TO SECURITY IN THE CRIMINAL LAW (2012); BERNARD HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE (2007).

[262] *See* Carol Steiker, *Proportionality as a Limit on Preventive Justice: Promises and Pitfalls,* in PREVENTION AND THE LIMITS OF THE CRIMINAL LAW 194, 198, 203-04 (Andrew Ashworth, Lucia Zedner, & Patrick Tomlin eds., 2013); Rinat Kitai-Sangero, *The Limits of Preventive Detention*, 40 MCGEORGE L. REV. 903, 928 (2016). California's "Sexually Violent Predator" law requires an application for extension every two years, at which point it must be determined at trial beyond a reasonable doubt that the offender fulfils the criteria for confinement. James Vess, *Preventive Detention versus Civil Confinement: Alternative Policies for Protection in New Zealand and California*, 12 PSYCHIATRY, PSYCHOL. & L. 357, 360–62 (2005).

[263] ANDREW ASHWORTH & LUCIA ZEDNER, PREVENTIVE JUSTICE 156 (2014).

If these conditions hold, then I would venture that the offender's long-term incarceration need not deny the existence or worth of his capacity to build a good life. At no point would the state declare, as it does when it long-term incarcerates for reasons of retribution and deterrence: "Go away from free society for 20 or 30 years." It says: "Come back to court in 6 to 12 months." There is thus not the same process, or the same moment, of seeing the offender's life as a whole and then deciding to effectively erase a large portion. Indeed, given the opportunities for rehabilitation and review, such a sentence would only be *potentially* long-term.

There is much more to say. This was a mere introduction to the question of what long-term incarceration is, and whether it is impermissibly degrading. But, in sum, that the disrespect of torture is so extreme does not mean that torture is qualitatively different than all other forms of aversive treatment. It can serve as a guide to degradation, I have argued, and it can provide us with the conceptual tools to move beyond retributive proportionality and utilitarian efficiency when assessing the morality of punishments.

CONCLUSION

This was not an attempt to provide a knock-down argument for the existence of dispositive degradation limitations. Our understanding of the grounds of deontology is too limited for that, and not just in the extra complicated penal context, where we are dealing with culpable individuals.[264] We do not have anything close to a clean justification for even the easiest cases for deontology, say, the idea that it is wrong to harvest the organs of one innocent person to save five people's lives.[265] As such, the most honest thing to do might be to restate the conclusion in a conditional manner. That is, we have been interested to discern the bases and contours

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[264] Even Rawls and Nozick do not attempt to ground or justify their deontological commitments, and present them essentially as assumptions in the first few pages of their seminal works. *See* RAWLS, *supra* note 160, at 3-4 ("Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override."); NOZICK, *supra* note 17, at ix ("Individuals have rights, and there are things no person or may do to them (without violating their rights)."); *id.* at xiv ("This book does not present a *precise theory of the moral basis of individual rights* . . . ").

[265] For attempts to ground deontological constraints, see, e.g., Frances Kamm, *Inviolability*, 20 MIDWEST STUD. PHIL. 165 (1995); FRANCES KAMM, INTRICATE ETHICS 227-236 (2007); Thomas Nagel, *The Value of Inviolability, in* MORALITY AND SELF-INTEREST (Paul Bloomfield ed., 2007). For relevant discussion, see, e.g., John M. Taurek, *Should the Numbers Count?* 6 PHIL. & PUB. AFF. 293 (1977); Michael Otsuka, *Saving Lives and the Claims of Individuals*, 34 PHIL. & PUB. AFF. 109 (2006), Kasper Lippert-Rasmussen, *Kamm on Inviolability and Agent-Relative Restriction*, 15 RES PUBLICA 165 (2009).

of degradation limitations, *assuming they exist.* Of course, such an assumption is relatively uncontroversial. Most people have the strong conviction not only that deontological limits exist with regard to innocent people, but also that they generate dispositive degradation limitations with regard to the culpable. Most people would oppose penal rape, I think, even when proportional by reference to their favored positive theory of punishment. Moreover—as further evidence of the plausibility of degradation limitations—many legal systems have incorporated such limitations, as indicated above.[266] We can restate our general conclusion, then, as follows. *Assuming that dispositive degradation limitations exist*, then following the inquiry into torture, we ought to understand the metric of degradation to be disrespect for a person's essentially human capacity to build a good life through time, with dispositive degradation limitations emerging above a certain point on the spectrum of disrespect, above which the punishment embodies a denial of the offender's standing as a human by demonstrating the absence or worthlessness of his life-building capacity.

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[266] *See supra* note 1.