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David Luban

Georgetown University Law Center, luband@law.georgetown.edu

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Human Dignity, Humiliation, and Torture*

ABSTRACT. Modern human rights instruments ground human rights in the concept of human dignity, without providing an underlying theory of human dignity. This paper examines the central importance of human dignity, understood as not humiliating people, in traditional Jewish ethics. It employs this conception of human dignity to examine and criticize U.S. use of humiliation tactics and torture in the interrogation of terrorism suspects.

This paper originated as a lecture on Jewish ethics, in a series honoring the late philosopher Isaac Franck. My own writing has been almost entirely secular, and I am not a scholar of Jewish philosophy. Nevertheless, I have come to realize from the smatterings of Jewish law I have studied that my approach to many issues is very close in spirit to some central themes in Jewish ethics. This is specifically true of one of my themes in the present paper, the central ethical importance of respecting human dignity by not humiliating people—a theme, as I hope to show, that similarly occupies pride of place in rabbinic ethics. The particular context for my argument is a subject of surpassing current importance: the torture and degradation of detainees by the United States government in the “war on terror.”

ROOSEVELT’S TEA PARTY

I begin with a famous story, almost a parable, about the drafting of the Universal Declaration of Human Rights (UDHR) (1948)—the first and most influential document for the contemporary human rights movement worldwide.

* This article is based on the 2008 Isaac Franck Memorial Lecture, Georgetown University, Washington, DC. I have retained some of the spoken style of the lecture in this paper.

Eleanor Roosevelt chaired the U.N. committee charged with producing the UDHR, but the intellectual heavy lifting came from four other remarkable committee members: Rene Cassin, a French-Jewish jurist; John Humphrey, a Canadian lawyer; and two philosophy professors, P. C. Chang from China and Charles Malik, a Lebanese Christian.

Shortly after the process began, Eleanor Roosevelt hosted a tea party in her New York apartment, attended by Chang, Malik, and Humphrey. As she reports in her diary, Chang and Malik launched into a vigorous debate about the philosophical foundations of human rights. Chang favored a pluralist approach, while Malik took a more absolutist stance. Soon, the debate turned into a deep discussion of Aquinas and Confucius—and Roosevelt admits that by that point she was completely lost, and contented herself with refilling the teacups.

What Roosevelt discreetly left unsaid was how vividly the tea party demonstrated to her the importance of *not* getting bogged down in philosophical debates about human rights. As a politically wise humanitarian, Roosevelt understood that all would be lost if the delegates had to figure out who actually gets it right, Aquinas or Confucius—or Kant, or Dewey, or Marx.

Interestingly, a special UNESCO commission charged with canvassing philosophical ideas about human rights from all over the world reached a similar conclusion. Jacques Maritain, who belonged to this commission, wrote that everyone agreed about the most important human rights—provided that nobody asked them why.¹

The legal scholar Cass Sunstein (1995) has coined the phrase “incompletely theorized agreements” to describe the kind of agreement that Roosevelt thought the UDHR had to be. As Larry Solum (2008) puts the conception, “When you cannot reach agreement at the deep end of the pool of ideas, head for the shallow end!” And, above all, head *off* the deep thinkers at the pass before they insist on actually getting to the bottom of things.

The issue arose one more time in the UDHR negotiations, when several Latin American delegates proposed inserting a reference to God in the Declaration’s preamble. The majority of delegates quickly scuttled the proposal, which they were certain would simply divide nations against each other on religious grounds and make agreement impossible. Instead, the UDHR rests the idea of human rights on a different foundation: *human dignity*. Other human rights documents, like the United Nations Charter (1945) and the Charter of Human Rights of the European Union (2000),

also invoke human dignity as the core value human rights are supposed to protect. And the Helsinki Accords (1975) make an even stronger claim: human rights “derive from the inherent dignity of the human person.”

However, it should be clear from this sketchy history that in the UDHR and its successor instruments, the term “human dignity” is really a kind of placeholder—an uncontroversial, neutral-sounding term for the unknown ‘X’ that anchors human rights. Of course, “human dignity” is not entirely a culturally-neutral term that speaks in the same way to every tradition. The phrase “human dignity” has Stoic origins (in Cicero’s *De Officiis*, I.30), and the concept plays a prominent role in Christianity. Philosophically, the notion that human beings have a dignity, not merely a price, is central to Kant’s conception of rational beings as ends in themselves. It is a preeminently European term.

European or not, it did the job that Eleanor Roosevelt hoped it would: the Universal Declaration passed the U.N.’s General Assembly with no negative votes. And it may well be that this happened in part because “human dignity” means whatever you want it to mean, which is another way of saying that it doesn’t mean very much.

To borrow a phrase from John Rawls, the world’s nations have reached an overlapping consensus on the central importance of human dignity, in which each culture and subculture may tell its own story about what human dignity is and where it comes from. In Rawls’s terminology, each has a “comprehensive doctrine” that explains human dignity (Rawls 1999, pp. 480–81). In a situation of overlapping consensus, the comprehensive doctrines disappear from view, and only the shared concept remains in the intersection of all those doctrines.

The advantage of incomplete theorization and overlapping consensus are obvious—they make agreement possible. But the disadvantage is equally obvious: once a concept has been whittled down to a mere placeholder, it does no work in helping you resolve contested questions about human rights.

One approach to this difficulty is to say “Damn the incomplete theorization, full speed ahead!” As philosophers, we should ignore politicians’ worries about getting everyone to sign on the dotted line, and forge ahead toward the intellectual showdown that Roosevelt was so eager to avoid. Let’s work out an analysis of human dignity from first principles, and jettison any comprehensive doctrines that get the wrong answer.

I am skeptical of this bold metaphysical approach, because I suspect that any first principles strong enough to yield a rich concept of human

dignity will turn out to carry a lot of cultural freight that undermines their claim to universality. But there is another approach, and that is to return to the particular traditions and hear what they have to say about human dignity. Once we do that, it may turn out that even people outside the tradition will find its ideas attractive enough to adopt. That is the approach I propose in this essay. I want to develop a characteristically Jewish notion of human dignity.

I pull two main points from the texts I consider: First, that human dignity is not a metaphysical property of individual human beings, but rather a property of relations between human beings—between, so to speak, the dignifier and the dignified. Second, that for the most part, respecting human dignity means something quite down to earth: it means not humiliating people. So the theme of this part of my discussion is to insist on the central ethical importance of nonhumiliation. My claim is that this is a lesson close to the heart of Jewish ethics.

I then turn from these general and somewhat abstract ideas to something very concrete, very sordid, and very upsetting: the issue of torture and so-called cruel, inhuman, and degrading treatment that falls short of torture—what lawyers abbreviate as “CID.”

It will be important to my argument that the United States, like every other country that tortures, accompanies torture with humiliation; indeed, that one of the defining evils of torture is the humiliation it visits on its victims. If so, then perhaps the notion of human dignity as nonhumiliation, so central to Jewish ethics, can help us understand why these practices are so deeply wrong.

IN OUR IMAGE, AFTER OUR LIKENESS

For Jews, as for Christians, the central sacred text explaining human dignity is Chapter 1, verses 26 and 27 of the Book of Genesis: “And God said, ‘Let us make man in our image, after our likeness’. . . And God created man in his image, in the image of God He created him; male and female He created them.” Humans have dignity because we are created in the image of God, the *imago Dei*.

To a certain kind of biblical literalist, these two verses show that God has something like a human body; and of course the Torah contains many references to God walking, to God’s back, and finger, and face. This kind of literalism is Maimonides’s target in the first chapter of the *Guide of the Perplexed*, where he explains that the image and likeness are intellectual, not physical. It is childish to think that God has a literal physical body

that ours resembles; in any case, our defining property is not our physical shape but our intellect.

But later in the *Guide*, Maimonides offers an even more austere argument than the rejection of God's corporeality. God is wholly unlike anything else, and Maimonides follows the logic of that proposition to several surprising and perhaps unwelcome conclusions. First, the radical dissimilarity of God and created things means that any property we ascribe to God and to ourselves—any shared property that might form the basis of likeness—is falsely or equivocally ascribed (Maimonides 1963, I, 56, pp. 130–31). So the idea that our minds resemble God's mind turns out to be just as anthropomorphic and false as the crude belief that God has broad shoulders and washboard abs.²

In fact, for Maimonides (1963, I, 57, pp. 132–33) no assertion about God can be literally and unequivocally true: the very subject-predicate form of the assertion falsely splits off God's essence from His properties. Eventually, Maimonides will push this argument to a drastic conclusion and insist on a kind of ineffabilism: our talk about God can have meaning only as allegory or parable, designed to enable the only true form of response to God, which he dramatically insists is total silence (Maimonides 1963, I, 59, p. 139).

One corollary of this view, it seems to me, is a powerful epistemological humility about God—so powerful that it thins the distinction between religious belief and agnosticism almost to the vanishing point. After all, if all propositions about God are false, and human knowledge comes in propositional form, then we can *know* nothing about God's properties. As a second corollary, Maimonides rejects any form of biblical literalism. The method of interpretation must be nonliteral interpretation, *drash*. Taken together, epistemological modesty and anti-literalism powerfully open up a space for rationalist reflection on sacred texts. It is a space where Jewish ethics and secular ethics can meet and debate in a fruitful way.

What, then, should our *drash* be about human beings created in God's image and likeness? If Maimonides is right, the question "In what respect are we like God?" is simply the wrong question to ask. Searching for some metaphysical property of humans called "human dignity" is a dead end, because it requires us to know God's unknowable properties. All that we really can infer from the biblical text is that a certain relationship exists between God and man—the relationship of "creating in one's own image"—and that human dignity lies in the fact of this relationship.

A more subtle point is this: if God creates us in his image, perhaps our being created in God's image entails the human ability to engage each

other in a parallel kind of relationship—a relationship of honoring and acknowledging the other by treating him or her as a being in my own image. A well-known *midrash* implicitly takes this point of view:

R. Akiva says: “Love your fellow as yourself” (Lev. 19:18), this is the greatest principle of the Torah. . . . R. Tanhuma explained: “He made him in the likeness of God” (Gen. 5:1). (*Genesis Rabba* 24)

Rabbi Tanhuma explicitly connects the *imago Dei*, the creation of man in God’s own image, with “Love your fellow as yourself,” the classic expression of honor for the human dignity of the other. As God creates man in His likeness, men and women live up to that image by acknowledging others as likenesses of themselves.

I am suggesting that instead of thinking about “human dignity” as a metaphysical property of human beings, we should take as our basic notion the relational property of “respecting human dignity.” In Jewish ethics, that basic relation gets spelled out in this way: “Person X treats Person Y as if Y is X’s likeness,” which is a pedantic way of saying: Love your fellow as yourself.³

Think of this as the relation between the dignifier and the dignified—“the dignifier treats the dignified as if the dignified is the dignifier’s likeness.” Once we elaborate what this relation entails, we will have, in effect, an implicit definition of human dignity.

This elaboration can very likely be accomplished in more than one way. The catalogue of rights in the UDHR offers one specification of the kinds of behaviors that acknowledge other people’s likeness to myself and how I would wish to be treated. But the various comprehensive doctrines may have alternative elaborations. So the next task is to discover what practices the Jewish tradition recognizes as respecting human dignity.

THE WRONG OF HUMILIATION IN RABBINIC ETHICS

In the biblical story of Tamar, the widow Tamar sleeps with her own father-in-law, Judah, as a prostitute, and conceives a child. Because her face was covered, Judah has no idea that the prostitute he coupled with was Tamar. When he learns that Tamar, the widow of his son, has become pregnant, he orders her burned to death in a fiery furnace. But as she is being led to her execution, she asks that certain tokens Judah had given to her when she was playing the prostitute be sent to him. Seeing the tokens, he realizes that he is the father of her child, and spares Tamar (Gen. 38: 6–26).

The Talmud focuses on one detail of this revolting story: the fact that Tamar discreetly sent the tokens to Judah instead of announcing in public that he was the father of her child. What impressed the rabbis was the colossal risk she took. What if the tokens never arrived? What if Judah didn't recognize them? Or what if, recognizing them, Judah decided to do nothing? Then Tamar would have died a horrible death. Tamar was willing to run that risk rather than shame Judah in public. Rabbi Shimon ben Yochai treats Tamar's courage as an exemplar, and derives a moral from the story:

"It is better that a person should cast himself into a fiery furnace than that he should shame his fellow in public." (Babylonian Talmud [BT], *Bava Metzia* 59a)

This particular *sugya* belongs to an extended discussion of forms of harming others by shaming them. Drawing on various biblical proof-texts, the rabbis come up with several equally melodramatic formulas, like this:

"If anyone makes his friend's face turn white [from shame] in public, it is as if he had spilled his blood."

To which one rabbi replies, "What you are saying is right, because I have seen how the red coloring leaves and his face turns white" (BT, *Bava Metzia* 59a).

Or this: A man who sleeps with another man's wife must be punished, but he still has a share in the World to Come; but "one who shames his fellow person in public has no share in the World to Come!" (BT, *Bava Metzia* 59a).

Passages like these should persuade us that the nonhumiliation of others occupies a central place in Jewish ethics. Once we appreciate this, we can find the theme in many contexts unrelated to shaming someone with words.

Consider, for example, Maimonides's discussion of *tzedakah*, alms giving, which is among the most famous passages in all rabbinics. Maimonides is overwhelmingly concerned that *tzedakah* not shame the recipient. In fact, he says straightforwardly that "Whoever gives *tzedakah* to a poor man ill-manneredly . . . has lost all the merit of his action even though he should give him a thousand gold pieces" (Maimonides 1972, Book 7, Ch. 10, §7, p. 136). Maimonides prefers giving too little money, but graciously, to giving an adequate amount with ill grace. He ranks giving before you are asked higher than giving after you are asked. And he praises anonymous giving because it will not shame the recipient (Maimonides

1972, §§7–14, pp. 136–37). Every value judgment in his discussion of the forms of giving manifests the central concern for sparing the poor person who receives *tzedakah* from humiliation.

The same concerns govern a series of Talmudic strictures requiring the rich to avoid ostentation during communal mourning in order to avoid shaming the poor who are also present. Wealthy people bringing gifts of food to the house of a mourner should not bring the food on fancy platters, or serve beverages in elegant glasses, because then the poor who are also bringing food to the house of mourning will be shamed. Because the poor often cover the deceased's face, which has been discolored through hard work, the rich must cover the faces of their dead as well. And the rich, like the poor, must be transported to their graves in plain coffins (BT, *Mo'ed Katan* 27a–27b).

All these examples, it appears, have to do with the ethical centrality of not humiliating or shaming people. The same ethical tradition reappears in contemporary form in Avishai Margalit's definition of a decent society as one whose institutions do not humiliate people (Margalit 1996, p. 1).

One question is whether not humiliating people is really the same as honoring human dignity. Isn't human dignity something more grandiose, more significant, than merely not being embarrassed?

Of course it may be—and in any case, some violations of human dignity have nothing directly to do with humiliation. But humiliating people is certainly a central case of violating human dignity, and the rabbis who invoked human dignity had very down-to-earth examples in mind.

Thus, Rabba asks Rabbi Hisda whether it is permissible on the Sabbath to carry stones to the outhouse to wipe yourself. Rabbi Hisda replies: "Human dignity is very important . . . and it supersedes a negative injunction of the Torah" (BT, *Shabbat* 81a–b). Two points about this example bear close consideration. First, Rabbi Hisda uses the Hebrew equivalent of "human dignity," *kvod ha-briot* [lit., 'the dignity of created things], for something that is quite humble and has to do with relatively petty embarrassment. This supports the claim I am making, which is that within the Jewish tradition respecting human dignity has as a central meaning not humiliating people. Nonhumiliation may not exhaust the concept of human dignity, but it strikes me as the paradigm of what respecting human dignity means. At worst, nonhumiliation will be a useful naturalized stand-in for the more grandiose but vaguer concept of "respecting human dignity."

Second, the principle at work in Rabbi Hisda's response is tremendously significant: he says that human dignity is so important that it can over-

ride the law. Subsequent interpretation of Rabbi Hisda's dictum limits this principle to rabbinic law, not Torah law—but even that limitation is controversial, because the rabbis also identify some Torah laws that can be overridden in the name of human dignity. So the principle that human dignity can override the law actually turns out to be a very strong one.⁴ In contemporary America, where lawyers in the Bush administration claimed the right of the President to override any statute in the lawbook, including the prohibition on torture, it is a remarkable and refreshing counterweight to discover in the Talmud a different kind of legal override—an override in the defense of human dignity rather than in attacks on it.

One important question about nonhumiliation is whether the wrong in humiliating others is purely subjective and psychological. What if the victims do not recognize that they are being humiliated? What if they belong to a culture in which a practice that *we* would find humiliating *they* regard as perfectly normal and natural? Is the notion of humiliation subjective and victim-relative, or objective and universal? If it is subjective, then people who have been beaten down so long that they no longer feel humiliated by it are not really humiliated, and their human dignity has not really been injured.

The subjectivity of humiliation poses a very hard and very deep-cutting challenge to the project of connecting human dignity with universal human rights. This is not the place for a full discussion, but I shall say a few more words about the issue. My own strong intuition is that humiliation is not merely subjective. Let me show why through a thought experiment.

A student drinks too much at a party and passes out. Some malicious wisecracks proceed to undress her and exhibit her naked body to everyone at the party—friends, acquaintances, dorm-mates, and strangers. Then they put her clothes back on, and when she wakes up and sobers up, nobody tells her what happened. In my view, the most natural and correct thing to say is that she has been humiliated—even if she never finds out and never has any subjective experience of humiliation. In much the same way, I believe that cultural practices of human subordination may be objectively humiliating, even though participants in the practice are so used to it that it does not cause them psychological pain.⁵

And this nonpsychological notion of humiliation is the rabbis' view as well. In the same *sugya* that declares that using an insulting nickname for someone in public is the moral equivalent of murder, the rabbis add: "Even when he is accustomed to the nickname" and therefore experiences no subjective humiliation (BT, *Bava Metzia*, 58b).

So far, I have argued for four main propositions: First, that human dignity is a property of human relationships, not a metaphysical fact about human nature. Second, that the paradigm case of violating human dignity consists in humiliating someone. Third, that humiliation is not, or not only, a matter of subjective psychological pain for the victim. And fourth, that all these ideas make up a central strand of Jewish ethics, at least as I interpret the texts I have discussed.

At this point, I shall turn away from abstract questions about human rights and human dignity and toward my principal practical topic: U.S. practices of torture and cruel, inhuman, and degrading treatment in the War on Terror.

I begin with some legal background. U.S. law on these issues derives from two major multilateral treaties to which we are parties. The first is the Convention Against Torture (CAT), which currently has 140 parties. The second is the Geneva Conventions governing the treatment of wartime captives. All the world's 192 states belong to the Geneva Conventions.

CAT offers a legal definition of torture, which I will simplify slightly: it is the intentional infliction of severe mental or physical pain or suffering.⁶ The Convention requires states to make official torture a crime, which the United States has done. It also requires states to undertake to prevent cruel, inhuman, or degrading treatment that falls short of torture, although it does not require them to criminalize CID. In 2005, the U.S. Congress implemented this clause of the treaty, over strenuous Bush Administration objections, and banned CID, without criminalizing it.

The Geneva Conventions contain an article, so-called Common Article 3, which applies to al Qaeda detainees and contains similar prohibitions. Article 3 bans torture and cruelty, and it also bans “outrages against personal dignity,” including humiliating or degrading treatment. Both treaties therefore distinguish torture from lesser forms of cruelty, which include humiliation and degradation, and both forbid both torture and outrages against personal dignity.

It is no secret that U.S. lawyers worked tirelessly for more than five years to loophole their way around these prohibitions so that the CIA can do bad things to terrorist suspects. Several of the “torture memos” became public in 2004, but others were hidden until the Obama administration released them in April 2009. These additional memos provide a detailed description of the CIA's so-called “enhanced interrogation techniques”—EITs—a bit of a euphemism for torture and humiliation. Through prodi-

gious legal sophistry, Justice Department lawyers concluded that none of the techniques amounts to torture, either singly or taken in combination, and—furthermore—that none amounts to cruel, inhuman, or degrading treatment.⁷

These conclusions are staggering, given the nature of the techniques. The best known is waterboarding: partially drowning the victim by pouring water over a cloth covering his face, interrupting the process before he dies. Waterboarding, however, is not the only technique described in the torture memos. In addition, the CIA used—and the Justice Department approved—techniques that are obviously humiliating and degrading. Detainees were stripped naked. They were fed for weeks on nothing but liquid dietary supplements. They were hosed down with cold water, grabbed and slapped in the face, and slammed into walls. They were deprived of sleep for up to a week by being shackled upright, in diapers, with manacles around their legs and manacles from their wrists to the ceiling.⁸ The torture memos make a point of insisting that during the sleep deprivation the victims were under observation 24 hours a day, supposedly as a safety measure to ensure that their diapers never overflowed and their suffering never crossed the talismanic legal threshold to “severe” (in which case it might count as torture, and the agents who performed it as serious felons). Perhaps this really was the reason; but it cannot escape our notice that being looked at round the clock in this degrading condition only adds to the humiliation.

Next consider the famous Abu Ghraib photographs, readily available on the internet. They show terrified, naked detainees warding off attack dogs with their hands; shackled to the furniture in painful stress positions with women’s underpants over their faces; led around on dog leashes; and standing naked in front of a leering female soldier. I trust that nobody will deny the obvious—that the evil depicted in these photographs is the humiliation and degradation of these detainees, the all-out assault on their human dignity.

The U.S. government insists that these abuses were completely unauthorized. The specific instances on the Abu Ghraib night shift may well have lacked authorization. But according to the Schmidt Report (2005), the Army’s official report on abuses at Guantanamo, every one of the four techniques I have just mentioned was authorized at least once at Guantanamo, in the interrogation of “Detainee 063”—a man named Mohammed Al Qahtani.⁹ In the case of threatening him with military working dogs, the report tells us that the technique was authorized by

SECDEF himself—Secretary of Defense Donald Rumsfeld (Schmidt Report 2005, p. 14). Significantly, the Abu Ghraib abuses occurred soon after the Guantanamo commandant was sent to Iraq in order to “Gitmoize” Abu Ghraib. These were not frat boy pranks—they were policies approved at the highest levels of government. As for the CIA’s techniques, the Senate Intelligence Committee reports that they were discussed and approved at “Principals’ Meetings” attended by “the Vice President, the National Security Adviser, the Attorney General, the Acting Assistant Attorney General for the Office of Legal Counsel, a Deputy Assistant Attorney General, the Counsel to the President, and the Legal Adviser to the National Security Council” (OLC Opinions 2009, p. 7; see also, Greenburg, Rosenberg, and De Vogue 2008).

The four Guantanamo techniques I have mentioned are by no means the only humiliations in the Abu Ghraib photos. The more lurid photos depict naked men piled in pyramids, or smeared from head to toe in feces, or forced to urinate in each other’s mouths. None of these tactics were approved by the U.S. government, but it should come as no surprise that once you have begun to dehumanize and degrade people in your control the very idea of limits quickly disappears.

Furthermore, the four techniques were not the only humiliations visited on Al Qahtani. Schmidt also reports that interrogators taunted him that he was homosexual, and that other detainees knew it; they forced him to dance with a male interrogator; they told him that his mother and sister were whores; and a female interrogator straddled him and whispered to him about the deaths of fellow Al Qaeda members. Female soldiers took off their battle-dress tops and ran their hands through other detainees’ hair, whispering that resistance is futile. According to Schmidt, all these techniques were authorized (Schmidt Report 2005, pp. 8, 16, 19).

The torture lawyers devoted their energies to showing that although these techniques may have been deeply unpleasant, they were not “torture,” and therefore not crimes. But there is something deeply wrong, not to mention perverse, about the entire enterprise of trying to draw fine lines between torture and lesser abuses. An essential continuity exists between them, because all have the degradation of their victim as their core. The truth embodied in CAT and the Geneva Conventions is that torture and humiliation without torture belong together as forms of abuse; the falsehood comes when we imagine that there is a sharp distinction between them just because they are banned by different clauses of the treaties. Indeed, a recent medical study found absolutely no difference between the

traumatic psychological after-effects of physical torture and humiliation (Baçoglu et al. 2007).

THE CONNECTION BETWEEN TORTURE AND HUMILIATION

Why did U.S. interrogators use humiliation tactics like these? Several reports indicate that they were briefed using a book by anthropologist Raphael Patai called *The Arab Mind*, which devotes a chapter to the theme that Arab men are sexually modest and particularly sensitive to sexual humiliation (Mayer 2008, p. 168). And Schmidt informs us that these were “Ego Down” and “Futility” tactics—the Army’s names for tactics designed to break the detainees by making them feel worthless and filling them with despair. It is hard to come up with a better description of assaulting human dignity. As I now wish to argue, in physical torture too a central defining feature of torture is the victim’s humiliation.

Let me begin with what may seem like a peculiar question: what, specifically, characterizes the evil of torture?¹⁰

The answer may seem obvious: it’s the pain, stupid! No experience is more horrible than severe pain; and, one might think, nothing more needs to be said. But that is untrue. The pain of childbirth is undoubtedly comparable to or even worse than many tortures, including severe ones. Yet millions of women who no-one would call irrational have preferred natural childbirth to anesthesia. The connection of birth pangs to a joyful or even ecstatic event changes the sensations’ character without diminishing their painfulness.

In the case of torture, the connection is with terrifying and “breaking” the victim. Fear is perhaps the most important evil-maker connected with the pain of torture. The torture victim never knows whether his torturer will do even worse things, regardless of any legal restrictions; the uncertainty is perpetual.

And terror itself is closely connected with humiliation, especially when someone else sets about terrifying us. Terror makes us whimper and beg; it makes us lose control of our bowel and bladder. The Abu Ghraib dog-handlers had contests to see who could make a detainee foul himself first. The strategic use of terror is one way that torture and humiliation are tightly bound together. But that is not all.

The experience of acute pain is itself degrading because it collapses our world and reduces us to mere prisoners of our bodies.¹¹ Pain forcibly severs our focus on anything outside of us; it shrinks our horizon to our own body. This is degrading in itself, but when it happens in front of

spectators, the experience is doubly shameful and humiliating. I vividly recall a visit to some old friends when my back went out. The pain was bad enough that for a few minutes I couldn't move; but at the same time I felt perfectly, miserably ashamed to be seen in this ridiculous helpless state by my friends and family. It did not even matter that they were sympathetic; obviously, however, it would be infinitely worse if the spectator is an enemy who inflicts the suffering and laughs at you.

Perhaps most significantly, the relation between the torturer and the victim is one of absolute domination and absolute subordination. The torturer, as Jean Améry remarks, "has control of the other's scream of pain and death; he is master over flesh and spirit, life and death." Améry (1980, p. 35)—who was tortured by the Gestapo—elaborates:

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. When it has happened and the torturer has expanded into the body of his fellow man and extinguished what was his spirit, he himself can then smoke a cigarette or sit down to breakfast or, if he has the desire, have a look in at the World as Will and Representation.

In recent years, a number of writers have followed Améry in trying to identify what makes torture so uniquely evil. David Sussman (2005b, pp. 25–26) locates the evil of torture in the fact "that the only thing that matters to [the torture victim] is pleasing this other person who appears infinitely distant, important, inscrutable, powerful, and free."¹² Henry Shue (1978) focuses on the sheer defenselessness of the torture victim. Louis Michael Seidman (2005, p. 907) points to the destruction of the victim's will. Although these diagnoses of torture's evil have significant points of difference, they all call attention to the degrading relational character of torture, in addition to the pain and the fear. They leave the victim in a state of abject humiliation. The victim counts as nothing, the torturer as everything. Nothing could be worse, from the standpoint of Jewish ethics, on the interpretation offered here. The denial of human dignity is close to total.

FRAUDULENT NECESSITY

I now come to an unpleasant fact. Many people approve of torture. A 2009 Pew poll (Pew Forum 2009) showed that about half of surveyed Americans believe that torture against "suspected terrorists" can often or sometimes be justified, and the number is up since a similar poll in 2005.

Not even terrorists—merely *suspected* terrorists. In an earlier BBC poll (2006) of 27,000 people in 25 countries, the United States placed ninth in pro-torture sentiment, after China, Indonesia, Iraq, Kenya, Nigeria, the Philippines, and Russia, not exactly the human rights honor roll. I am sorry to report that Israel topped the list, with 43 percent of those surveyed favoring some torture.

Oftentimes, supporters of torture appeal to a kind of military necessity, based on the intuition that if torture is the only way to find out where a ticking bomb is hidden, the need to save innocent lives outweighs the moral prohibition against torture.

I have argued elsewhere that the ticking bomb scenario is an intellectual fraud (Luban, in press; 2005). A moment's thought will show how many unlikely assumptions go into the scenario. You know the bomb is out there, you know the time is short, you know you have the right captive, you know that he knows where the bomb is hidden, you can't find the bomb any other way, evacuating people is impossible, nothing short of torture will make him talk, he can't stall or mislead you for the few hours before the bomb detonates, you know how to torture him without accidentally killing him or making him lose consciousness—and despite being a trained torturer you haven't become a sadist or a sociopath. Each of these is improbable; to suppose that all will occur together verges on the preposterous.

And indeed, the United States government has never identified a genuine ticking bomb scenario, even though leaking the details would have been to the immense advantage of the Bush administration. The newly-released torture memos assert several times that the CIA reserved its “enhanced” techniques to situations of last resort. In fact, however, the CIA's protocols gave detainees only one chance to “provide information on actionable threats and location information on High-Value Targets at large” before beginning “enhanced” interrogation as early as the first day (Memorandum 2005b, pp. 7, 8). One of the memos notes that “it is difficult to determine conclusively whether interrogations have provided information critical to interdicting specific imminent attacks” (Memorandum 2005b, p. 10).

Yet we swallow the fiction of ticking bombs. The danger in the ticking bomb conversation is that the real source of our pro-torture intuitions is not intelligence gathering, but rage. Consciously or unconsciously, we approve of the torture of terrorists for punitive reasons, and we deceive ourselves into repackaging rage as rationality. We want to see him beg for mercy; we want to humiliate.

If so, this shows how desperately fragile the ethics of respect for human dignity is. When the enemy, or suspected enemy, is in our hands, it is hard to view him as our likeness. The temptation to degrade him just because he is the enemy seems overwhelming. Yet resisting the temptation comes close to the core of ethics as I have described it here.

NOTES

1. The story of Roosevelt's tea party, and of the UNESCO commission and Maritain's comment, are both told in Mary Ann Glendon (2001).
2. "The reasons that led those who believe in the existence of attributes belonging to the Creator to this belief are akin to those that led those who believe in the doctrine of His corporeality to that belief. . . . The people in question have, as it were, divested God of corporeality but not of the modes of corporeality, namely, the accidents—I mean the aptitudes of the soul, all of which are qualities" (Maimonides 1963, I, 53, pp. 119–20). Isaac Franck (1988), in whose honor this lecture was composed, wrote illuminatingly about Maimonides's "negative theology," and its relation to Aquinas.
3. I will make no effort here to reconcile this way of thinking with Emanuel Levinas's ethics, in which our infinite responsibility to the other is connected not with the other's likeness to us, but rather to the other's radical otherness. For a clear discussion of this point, see Hilary Putnam (2008, pp. 70–71, 80–83).
4. In this discussion, I am drawing on Rabbi Melissa Weintraub (2005).
5. My view here accords with that of Jon Elster (1985) in the title essay of *Sour Grapes: Studies in the Subversion of Rationality*. There, Elster defines the notion of "adaptive preference formation," a term that refers to unconscious modification of one's own preferences to accommodate low expectations of what kind of treatment one can realistically hope for.
6. CAT limits its definition to torture carried out by government officials or under color of governmental authority, and also to torture undertaken for certain specific purposes, such as interrogation, punishment, intimidation, or discrimination. For purposes of this discussion, I set these limitations to one side.
7. The new memos are available on the Federalist Society website, by following the links at <http://www.fed-soc.org/debates/dbtid.27/default.asp> (accessed 22 July 2009). Elsewhere I have explained in detail why the memos are legal sophistry (Luban 2007; 2009). (The 2009 document is written testimony, which will appear in the Congressional Record, and is an expansion of oral testimony delivered to the Senate Judiciary; I am happy to provide the expanded testimony to interested readers.) Shortly before the memos were

released, journalist Mark Danner obtained and published the International Committee of the Red Cross's (ICRC 2007) confidential report to the U.S. government about CIA torture, based on interviews with Guantanamo detainees who had not yet had any opportunity to coordinate their stories. The ICRC report indicates that in execution the CIA's procedures went beyond the techniques described in the memos.

8. Even in the ancient world, sleep deprivation was understood to be a horrible torture. Cicero (*De Officiis* III.xxvii.100) characterizes the execution of Regulus by the Carthaginians through "enforced wakefulness" (*vigilando*) as "exquisite torture" (*exquisita supplicia*).

The bureaucratic prose of the torture memo deserves full quotation: "The primary method of sleep deprivation involves the use of shackling to keep the detainee awake. In this method, the detainee is standing and is handcuffed, and the handcuffs are attached by a length of chain to the ceiling. The detainee's hands are shackled in front of his body. . . . The detainee's feet are shackled to a bolt in the floor. . . . All of the detainee's weight is borne by his legs and feet during standing sleep deprivation. You have informed us that the detainee is not allowed to hang from or support his body weight with the shackles. . . . If the detainee is clothed, he wears an adult diaper under his pants. Detainees subject to sleep deprivation who are also subject to nudity as a separate interrogation technique will at times be nude and wearing a diaper You have informed us that to date no detainee has experienced any skin problems resulting from use of diapers. The maximum allowable duration for sleep deprivation authorized by the CIA is 180 hours, after which the detainee must be permitted to sleep for at least eight hours. You have informed us that to date, more than a dozen detainees have been subjected to sleep deprivation of more than 48 hours, and three detainees have been subjected to sleep deprivation of more than 96 hours; the longest period of time for which any detainee has been deprived of sleep by the CIA is 180 hours" (Memorandum 2005a, pp. 10–13).

9. The interrogation of Qahtani is discussed in the Schmidt Report (2005, pp. 13–21). For a detailed discussion of this interrogation, see Philippe Sands (2008).
10. The following paragraphs draw on a more extensive discussion in my paper "Unthinking the Ticking Bomb" (Luban, in press).
11. This is one of the themes of Elaine Scarry's powerful book *The Body in Pain: The Making and Unmaking of the World* (Oxford University Press, 1987).
12. Sussman (2005a, pp. 227–30) offers a slightly different explanation in "Defining Torture," where he describes the distinctive evil of torture as forced passivity.

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