

BRINGING PEOPLE DOWN: DEGRADING TREATMENT AND PUNISHMENT

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 3. European Convention on Human Rights.

1. INTRODUCTION

Cases brought before the European Court of Human Rights ('the Court') as amounting to degrading treatment and punishment under Article 3 of the European Convention on Human Rights (ECHR) include instances of interrogation, conditions of confinement, corporal punishment, strip searches and a failure to provide adequate food and health care.¹ The Court acknowledges the degradation inherent in imprisonment generally, and does not consider this to be in violation of Article 3, but it also identifies a threshold at which degradation is so severe as to render punishments that cross this threshold as impermissible. I seek to explain the nature of and wrong inherent in impermissible degradation.²

Degrading treatment and punishment is absolutely prohibited under Article 3. One reason for the prohibition - the fundamental reason - is that any such punishment is judged to represent a violation of human dignity. I offer an account of the Court's concept of degradation as a symbolic dignitary harm. The victims are treated as inferior, as if they do not possess the status owed to human beings, neither treated with dignity nor given the respect owed to dignity. Degradation is a relational concept: the victim is brought down in the eyes of others following treatment motivated by the intention to do this, or treatment which has this effect. Gross humiliation is usually a feature, but it does not by itself establish degrading

¹ For a summary of cases see Webster, 2018, pp. 23-4.

² Whilst Article 3 proscribes degrading treatment and punishment I consider treatment only in so far as this is an element of punishment. There are many examples of treatment considered by the Court as degrading and which are not also examples of punishment, including discrimination and the conditions of social care homes, and the range of cases is growing. (See Webster, 2018, pp. 23-24, 105-124 (and pp. 89-14 for a discussion of 'treatment') and Mavronicola, 2015.)

treatment; if this is what it is, it is not because the victims are grossly humiliated, but because their gross humiliation amounts to a violation of dignity and their treatment as something less than human. Degrading treatment harms people, but it also wrongs them, and the wrong is first and foremost symbolic: the symbolic wrong of treating people this way. This, so I will argue, is the best account of the concept of degradation as deployed by the Court when determining punishments as in violation of Article 3.

There are numerous objections: we do not have a coherent conception of human dignity, or, if we do, it cannot account for the view that degradation is a violation of human rights; degradation is better explained as a failure of respect; there is no status that we all have in virtue of being human, and therefore no such status that we can be lowered from – references to ‘status’ in any case resting on archaic conceptions of rank and hierarchy; and whilst symbolic harms matter, they matter less than physical harms, and it is extreme physical suffering, above all, that must be absolutely prohibited. These objections pose varying degrees of difficulty for the account of degradation offered here.

Whilst this is not an exercise in legal interpretation the law features more prominently than it would in an approach confined to a philosophical examination of dignity and its violation as found in the Aristocratic and Christian traditions, or in the work of Immanuel Kant. I will be referring to Kant, but in the context of a discussion that starts out from and is framed by a context set by the Court: how it has interpreted ‘degrading treatment and punishment’, the right not to be subjected to degrading treatment and punishment as designed to protect human dignity, and that right considered as absolute. I take a good deal of this for granted. However, whilst informed by authoritative readings of existing doctrine, the account

of degradation I present here is a product of philosophical argument rather than the constructive interpretation of the meaning and norms articulated in legal texts.³

The emphasis is on elaborating the distinguishing features of a philosophical conception of degradation, and this comes at the expense of giving attention to European Convention jurisprudence, the elements of torture and inhuman treatment included under Article 3, and all but a small sample of the body of case law that the Court takes account of in its Article 3 judgements.⁴ The hope is that what is lost in the way of omission and simplification is made up for with a clear and distinctive view of what a conception of degradation as the violation of human dignity should look like. The aim is to offer a conception that by and large remains faithful to the aims of the Court, and which at the same time stands up to philosophical scrutiny. The attempt only partially succeeds; it is hoped that the shortcomings, along with any merits, illuminate what more is to be done, and why this work is worth undertaking.

The argument proceeds as follows: in section 2 I explore the relation between humiliation and degradation, suggesting that the two concepts are further apart than the Court often takes them to be. In section 3 I begin examination of the elements that are integral to degradation, starting with human dignity and its violation, an idea elaborated on in section 4, where I also examine several related ideas which fill out a dignity-first conception of degradation. In section 5 I consider what this account of degradation implies for the status of whole life tariffs, and in section 6 I conclude with some further comments about dignity and the place of degradation in a general theory of punishment.

³ See Barak, 2005. On creative and constructive interpretation see Dworkin, 1986. For recent discussion see Webster, 2018.

⁴ For a lucid account in the context of a discussion of degrading treatment see Webster, 2018.

[Level 1 Head] 2. HUMILIATION⁵

The Court has declared that:

where treatment humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition set forth in Article 3.⁶

This influential formulation contains elements repeatedly emphasised in the Court's judgements on degrading punishment. I explore each of these, starting with humiliation, a discussion which will show up pronounced differences between several of the Court's pronouncements on this matter. These arise from the attempt to give weight to two considerations that pull in different directions: contemporary sensibilities on the one hand, and objective judgements about dignity on the other. This is a recurring tension in conceptions of degradation, one I seek to resolve. I will also suggest that, notwithstanding an impression often given by the Court, humiliation is a contingent (albeit typical) feature of degradation, in contrast to the features which I later suggest are necessary on any plausible construction of the Court's account of degradation as meriting an absolute prohibition.

The Court acknowledges that a person may be humiliated by the fact of serving a prison sentence. However, judicial punishment is not regarded as degrading within the meaning of Article 3 just in virtue of its usual element of humiliation; some further criterion is required, and Article 3, by expressly prohibiting degrading punishment, implies that there is a distinction between such punishment and punishment in general.⁷ Degrading treatment is conduct that 'grossly humiliates', the Commission indicating in the *Greek* case that "[t]reatment or punishment of an individual may be said to be degrading if it grossly

⁵ Some material in this section is revised from Vorhaus, 2003.

⁶ *Bouyid v. Belgium* [GC], no. 23380/09, ECHR 2015, paras 86-7.

⁷ *Tyrrer v. UK* Judgement [1978] 2 EHRR, para 30.

humiliates him before others . . .”⁸ In *Tyrer* the Court confirmed that “the humiliation or debasement involved must attain a particular level and must in any event be other than the usual element of humiliation [inherent in judicial punishment]”.⁹ The question for the Court remains whether a person of the applicant's sex, age, health, and so on, and of normal sensibilities would be grossly humiliated in all the circumstances of the case.

In *Campbell and Cosans* the Court held that treatment is not degrading unless someone “has undergone – either in the eyes of others or in his own eyes . . . humiliation or debasement attaining a minimum level of severity”.¹⁰ *Raninen and Finland* put the emphasis on first person experience: “it may well suffice [for degrading treatment] that the victim is humiliated in his or her own eyes, even if not in the eyes of others”.¹¹ The position, I will suggest, is this: first person experience is to be taken seriously, even more so the fact of being humiliated in the presence of others, but neither consideration is sufficient for degradation.

Why not consider first person testimony as decisive? If a prisoner sincerely declares that he has been grossly humiliated then we have a reason to take his word for it. Perhaps he is lying or exaggerating. Still, we should presume that his words are to be taken seriously unless we have decisive reasons for discounting them, and without thereby subjecting him to any testimonial injustice – giving him less credibility than otherwise owing to a prejudice towards the testimony of prisoners.¹² Even allowing for any such presumption, however, first person experience of humiliation is an unreliable guide to degradation, a point insisted on by the Court itself:

⁸ *Greek Case*, Comm Rep [1969] 12 ECHR, Yearbook 1, para 186.

⁹ *Tyrer v UK*, para. 30.

¹⁰ *Campbell and Cosans v. UK*, judgement of 25 February 1982, Series A, no. 48, para. 28.

¹¹ *Raninen and Finland*, judgement of 16 December 1997, *Reports* 1997-V111, para. 55.

¹² See Fricker, 2007 on epistemic injustice and prejudice.

[A] threat directed to an exceptionally insensitive person may have no significant effect on him but nevertheless be incontrovertibly degrading; and conversely, an exceptionally sensitive person might be deeply affected by a threat that could be described as degrading only by a distortion of the ordinary and usual meaning of the word.¹³

In *Ireland v UK*, anticipating *Bouyid* and numerous cases in between, the Court argued that five techniques used during the interrogation of detainees were degrading “since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them”.¹⁴ This prompted Fitzmaurice, in his Separate Opinion, to remark that such feelings are “the common lot of mankind . . . Yet no one would consider himself, or regard others, as humiliated or debased because of experiencing such feelings, even though some experience them very easily and others only for greater cause”¹⁵

The feelings referred to are neither sufficient nor necessary for degradation. They are not sufficient, for they characterise the state of a neurotic inmate, for whom no conditions of imprisonment, however benign, would assuage his anxiety and suspicions. And a gang-leader, accustomed to unchecked domination, may find it intolerably demeaning having to defer to the lawful commands of prison officers. Nor are the feelings identified in *Ireland* and *Bouyid* necessary for degradation. Levi has described how it is only in retrospect that some former inmates of concentration camps were able to see their condition for what it was:

Coming out of the darkness, one suffered because of the reacquired consciousness of having been diminished . . . we had lived for months and years at an animal level: our days were encumbered from dawn to nightfall by hunger, fatigue, cold, fear and a space for reflection, reasoning, experiencing emotions was wiped out. We

¹³ *Campbell and Cosans*, para. 30. Duffy characterises the position as follows: “The position is probably that the views and reactions of the victim constitute an important consideration but that equally a State cannot be condemned for action which the victim finds degrading merely because of his own unreasonable attitudes or exceptionally sensitive nature” (Duffy, 1983, p. 319).

¹⁴ *Ireland v United Kingdom*, Judgement [1978] Ser A 25, para 167. The so-called ‘five techniques’ included: wall-standing (forcing detainees to remain for long periods in a ‘stress position’; hooding (putting a black or navy coloured bag over the detainees’ heads); subjection to noise (subjecting detainees to a continuous loud and hissing noise); deprivation of sleep (depriving detainees of sleep); deprivation of food and drink (subjecting detainees to a reduced diet).

¹⁵ *Ireland v UK*, para. 28.

endured filth, promiscuity and destitution, suffering much less than we would have suffered from such things in normal life, because our moral yardstick was changed (Levi 1988, p. 56).

There is no guarantee that degradation is absent merely because there is no emotional correlate, or because it is absent from the point of view of victims who out of necessity engage in a process of denial, self-deception or adaptive preference formation. But for one class of people none of these processes are at work. Some profoundly cognitively impaired people cannot see themselves as degraded because they cannot see their life under any descriptions that include the terms of Article 3. They may not experience feelings associated with gross humiliation, or if they do, the experience will not be one of humiliation. If it is a necessary condition of degradation that a person should be humiliated in his own eyes, then some people with profound cognitive impairments cannot be subjected to degrading treatment.

Any such implication is avoided if it is not first-person feelings that determine the humiliation required for degradation, but “the Court’s evaluation of whether the applicant had . . . “sound reasons” for feeling humiliated or degraded . . . i.e., whether the applicant was in social fact placed in a state of humiliation or degradation” (Webster, 2011, p. 76). If gross humiliation is recognised only as a ‘social fact’, then it will suffice that someone other than the victim finds good grounds for asserting humiliation, irrespective of whether this is any part of the victim’s experience. Waldron suggests that the reaction to be taken note of is not the victim’s but that of the “reasonable on-looker” (Waldron, 2010, pp. 283-4). But a reasonable on-looker may have good grounds for claiming to witness gross humiliation when what is witnessed is not degradation. Suppose a national football team, widely expected to win the World Cup tournament, returns home after the first round of games, having weakly caved in to inferior opposition. After such feeble performances, it is a natural thought that the team was humiliated, and even more so once they go before a contemptuous public and unrestrained press. But no one would think that what the footballers suffered is degradation

on the pitch, and degrading treatment afterwards. Perhaps it will be denied that this is an example of *gross* humiliation, but the following case certainly is: recall the predicament of President Clinton, who was subjected to a televised interrogation by Chief Prosecutor Kenneth Starr into every last detail of his sexual relationship with Monica Lewinsky.¹⁶ If this was not an example of gross public humiliation it is difficult to imagine what is, yet it is arguable, to say the least, whether degradation was any part of Clinton's ordeal. This is because, unlike humiliation, degradation requires a violation of human dignity, and it is implausible to suggest that Clinton suffered any such violation.

The English High Court, appealing to the authority of judgements of the Equality and Human Rights Commission, acknowledges that no awareness on the part of the victim is required, and that in its place we can appeal to the judgements of bystanders:

Treatment is capable of being 'degrading' within the meaning of article 3, whether or not there is awareness on the part of the victim. However unconscious or unaware of ill-treatment a particular patient may be, treatment which has the effect on those who witness it of degrading the individual may come within article 3. It is enough if judged by the standard of right-thinking bystanders it would be viewed as humiliating or debasing the victim, showing a lack of respect for, or diminishing, his or her human dignity.¹⁷

This judgement cannot include the requirement that the victim is humiliated in the presence of others, reasonable or otherwise. Some prisoners are left to die alone in freezing, rat-infested cells. This is degrading and inhuman treatment, although no one is present to see it. The judgement is also ambiguous as to whether humiliation amounts to lack of dignity or, rather, humiliation is one thing and diminishing dignity another. In any case, it is becoming apparent that whilst the experience or perception of gross humiliation is very likely to feature in any instance of degradation it may nevertheless prove indecisive in the case of the victim,

¹⁶ The interrogation followed a decision to impeach President Clinton, and the proceedings were broadcast to a global audience.

¹⁷ *Regina (Burke) v. General Medical Council (Official Solicitor Intervening)* [2005] Q.B. 424, para 178.

and for victims and bystanders alike treatment is degrading only on condition of a reasonable judgement that any humiliation is evidence of a lack of respect for human dignity.

[Level 1 Head] 3. HUMAN DIGNITY

Since 1945 dignity has featured prominently in international human rights instruments, the Charter of the United Nations affirming “the dignity and worth of the human person”, and the Preamble to the 1948 Universal Declaration of Human Rights recognising “the inherent dignity and . . . equal and inalienable rights of all members of the human family [as] the foundation of freedom, justice and peace in the world”.¹⁸ In a recent judgement the Court emphasised that “respect for human dignity forms part of the very essence of the Convention”, and emphasised a “particularly strong link between the concepts of ‘degrading’ treatment or punishment within the meaning of Article 3 of the Convention and respect for ‘dignity’”,¹⁹ the “prohibition of torture and inhuman or degrading treatment or punishment [being] . . . a value of civilisation closely bound up with respect for human dignity”.²⁰ The Court in *Bouyid* presents a representative sample of judgements which highlight the relation between respect for dignity and degrading treatment.²¹

The Preambles of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights both declare that human rights “derive from the inherent dignity of the human person”. Whilst there is no canonical definition of dignity in national law and international instruments (Schachter, 1983, p. 849) we can begin to get at the idea of the dignity that the Court is seeking to protect by exploring the function it serves as implied by the Covenants - that of providing a grounding for human rights.

¹⁸ For similar affirmations see *Bouyid v. Belgium*, paras 45-47.

¹⁹ *Bouyid v. Belgium*, para 90.

²⁰ *Bouyid v. Belgium*, para 81.

²¹ *Bouyid v. Belgium*, para 90.

[Level 2 Head]: DIGNITY AS STATUS

Kolnai contrasts human dignity with dignity as a quality:

“Human Dignity” is not, like "Dignity as a Quality", a matter of more or less, not a matter of virtue, accomplishment or refinement . . . "Human Dignity" can actually be impaired and destroyed, temporarily or irreversibly . . . If tomorrow I fall into the hands of Communist torturers, they cannot "eliminate" my human rights but only prevent me from exercising them; whereas they can easily make short work of my "Human Dignity," *more so* even than of such inner "Dignity as a Quality" as I may possess . . . (Kolnai, 1995, pp. 61-2).

Human dignity can be lost, yet at the same time the Court declares that it is inalienable and inheres in all human beings. How to reconcile these claims? Gilibert distinguishes between status dignity, the “normative standing in accordance to which human beings are entitled to certain obligatory treatment (which the norms state),” and condition-dignity, “the state of affairs that human beings enjoy when they are given the treatment that is owed to them (that is, when the norms are honored)” (Gilibert, 2018, p. 122). We have status dignity in acknowledgement of the capacities common to all human beings and in virtue of which we are owed respect; we have condition dignity in so far as our conditions enable us to exercise those capacities (ibid, pp. 122-125).

Suppose it is thought incoherent to claim both that no human being should be enslaved because all human beings have dignity and that when a human being is enslaved their dignity is destroyed. The reply is that there is no incoherence: ‘even when they do not have condition-dignity, slaves retain status-dignity. They ought to enjoy the former because they have the latter’ (ibid, p. 123).

Human dignity as construed by the Court is a status concept, but not everybody agrees that human dignity and its associated status applies to all human beings. Suppose that the basis of dignity comprises such distinctively human capacities as rationality and autonomy. Some human beings do not have these capacities, whilst in most adults they are more developed than they are in infants and people with advanced dementia. If the prohibition on

degradation is designed to protect dignity, and dignity is grounded in rationality and autonomy then some people will be excluded from the ambit of Article 3 on account of lack of capacity, whilst variations in psychological capacity imply a variation in the strength of the reasons for protecting the capacities threatened by degradation. Human dignity cannot be grounded in individuals' capacities if we are to avoid saying that the prohibition on degradation does not apply to everyone, and that the prohibition should be more stringent in some cases than in others.

Rawls has confronted a problem of this kind. A scalar property admits of degrees, and someone has more or less of it, as when she is more or less rational, autonomous and so on. A range property is not like this:

The property of being in the interior of the unit circle is the range property of points in the plane. All points inside this circle have this property although their co-ordinates vary within a certain range and they equally have this property, since no point interior to a circle is more or less interior to it than any other point (Rawls, 1971, p. 444).

A range property R is related to a scalar property S, such that someone has R when she falls within a range on a scale indicated by S. Perhaps R is 'moral personality'; then someone with R may fall within the range set by the scalar properties of having a conception of the good and a sense of justice (ibid, pp. 504-512). A person may have an attenuated capacity for conceiving the good and a sense of justice, but so long as she meets a minimum threshold in respect of both she qualifies for moral personhood, and anyone who possesses moral personality is owed the guarantees of justice (Rawls, 1999, p. 442). Where to set the minimum threshold? Rawls insists that his demands of a conception of moral personality are 'not at all stringent' and represent only an "essential minimum" (Rawls, 1971, p. 506). Still, they demand more than some profoundly disabled persons are capable of, and Rawls recognises this: whilst "no race or recognised group of human beings" lack moral personality

there are “scattered individuals [who] are without this capacity, or its realisation to the minimum degree” (ibid).

This is equally a problem for any conception of dignity that is grounded in individual capacity whilst also serving as a ground of human rights. If one sets the threshold as Rawls does, requiring the capacity for moral personality, or as the Court does, as for instance when requiring a capacity to develop one’s will with some degree of independence,²² then some human beings, including people with congenital and acquired profound cognitive disabilities, will fall below the minimum. In any case, the imposition of any threshold looks arbitrary – why set it at precisely one point rather than another? – and it has the implausible implication that anyone falling immediately beneath the stipulated threshold is denied the human rights enjoyed by all those who happen to fall on it or just above it. How could so consequential an effect be warranted on the basis of a slight difference in psychological capacity?

Whatever range property we choose there are interpersonal differences which will have implications for the class of human beings protected by the human right not to suffer degrading treatment, and no appeal to dignity as the designated property can get around this. The explanation for why degradation merits a universal prohibition cannot rest exclusively on the value ascribed to the capacities of individuals; not, at any rate, unless we are prepared to say that some individuals fall outside the prohibition, and that is not something the Court is prepared to countenance.

Griffin would accept that it is a human right not to be subjected to degrading treatment, but insist that in this context ‘human’ does not mean ‘member of the human species’. Human rights are grounded in personhood, and persons are normative agents:

We value our status as human beings especially highly, often more highly than even our happiness. This status centres on our being agents - deliberating, assessing, choosing, and acting to make what we see as a good life for

²² *Ireland v UK*, no 5310/71, Commission Report of 25 January 1976, Series B, no. 23, p. 402.

ourselves. Human rights can then be seen as protections of our human standing or, as I shall put it, our personhood. (Griffin, 2008, pp. 32-33; 34)

Infants, people in an irreversible coma and some profoundly cognitively impaired human beings are not agents; at any rate they are not the functioning human agents that Griffin's human rights apply to, agents with a "peculiarly human way of experiencing and conceptualising the world . . . shaped by characteristic human concerns and sense of importance" (ibid, p. 35). If human rights are grounded in personhood, and dignity derives from the value we attach to our normative agency (ibid, p. 200) it follows that some human beings are not persons, do not have dignity and do not have human rights. On this view the human right not to suffer degrading treatment is not, after all, universal, and if it is not, there is a question as to what protections are to be extended to those who fall outside the reach of human rights law. Griffin insists that we have an extensive set of moral resources – including everything contained in the language of justice and fairness – to provide all the protections that these human beings need:

Once we recover a sense of the full range of our moral vocabulary, we shall no longer feel the need to turn all important moral claims into claims of rights . . . If so much of such very great importance falls outside the domain of human rights, can infants, the severely mentally handicapped, and sufferers from advanced dementia not find the protection they deserve there? (ibid, p. 95).

We might agree that too much is loaded on human rights, too little on the array of alternative moral resources, but we might also worry that if we leave a class of human beings unprotected by human rights then this minority group, distinguished by its lacking a status common to all other human beings, will become stigmatised and discriminated against, at risk of treatment that violates some of the non-human rights that Griffin himself would want to uphold. There is, here, a consequentialist case for extending human rights to all human beings, history suggesting the likely effects of singling out a small class of exceptions and withholding from them a fundamental legal status that applies to everyone else.

Important though the consequentialist case is, there is, many will think, no need to accept that human rights do not apply to everybody. On one conception, human dignity as a status is the idea of an intrinsic value inhering in the status of being human, a value equally shared by *all* human beings, and which elevates them above all non-human animals:

The idea of human dignity is the idea of an intrinsically valuable status that merits our respect, a status grounded in the fact of being a human being. [T]o be a human being . . . is to belong to a species which is in turn characterized by the possession of a variety of features: a characteristic form of embodiment; a finite life-span of a certain rough magnitude; capacities for physical growth and reproduction; psychological capacities, such as perception, self-consciousness, and memory; and, specifically rational capacities, such as the capacities for language-use, for registering a diverse range of normative considerations (including evaluative considerations, prudential, moral, aesthetic, and others besides) and for aligning one's judgments, emotions and actions with those considerations (Tasioulas, 2013, p. 305)

Tasioulas calls this the human nature conception of human dignity: it “grounds the value of human dignity in the characteristic elements that constitute human nature” (ibid). On this conception human dignity inheres in a human being from birth until death, irrespective of their choices and condition. Since what matters is the possession of a human nature, “a human being with impaired rational capacities shares in human dignity to the same extent as one with ordinary rational capacities” (ibid.) The argument tacitly appealed to is this: all human beings are members of the human species; it is in the nature of the human species to possess capacities that provide the basis for human dignity (rationality, language-use, and so on); anyone who belongs to the class characterised by the possession of dignity-bearing capacities is herself to be treated as possessing dignity-bearing capacities. Whilst, then, some profoundly cognitively impaired human beings may not have the capacity for rationality, they belong to a species whose distinguishing norms include possession of this capacity, and they are therefore to be regarded as possessing (the basis of) human dignity in just the same way as those who *are* in possession of this and other dignity bearing capacities.

Some writers insist that the basis of respect for dignity are capacities intrinsic to individual human beings; they grant that we are required to respect all those who possess these capacities, but deny that this requirement extends to people who do not possess them just because they belong to the same species as those who do. The objection is that not all human beings possess the characteristics that make up the norm for the human species, and so not all human beings possess the characteristics that provide the basis for human dignity. People with profound impairments possess capacities that are essential to being a member of their kind, but this is not the same as possessing capacities that represent the norm for their kind (McMahan, 2005, p. 358).

We might reply that, although some human beings do not possess rationality and other dignity-bearing characteristics, they *could* have developed these characteristics, it being in the nature of their species to develop these capacities, and this counter-factual modal capacity suffices for these human beings to be treated as if they do possess them (Kagan, 2016). This is one way to make out the claim for the moral importance of species membership. There are others. The point here is that any conception of dignity as grounded in human capacities, and as itself the ground of a universal human right not to suffer degrading treatment, cannot rest on an appeal to capacities intrinsic to individuals but must instead appeal to the moral significance of norms that apply to the human species. The success of any such appeal is by no means assured.

[Level 1 Head] 4. BRINGING PEOPLE DOWN

The idea of dignity as status will be elaborated upon in the course of providing an account of degrading treatment. To degrade human beings is to bring them down. The distinguishing feature of degrading treatment is what it symbolises: a violation of human dignity, the victim as less than human. I first consider how any account of the violation of dignity should allow

for cultural variation before offering a conception of degradation as bringing people down that both acknowledges culture and meets the demand for a reasonable cross-cultural consensus.

[Level 2 Head] DEGRADATION AND CULTURE

Conceptions of dignity and degradation are not timeless. Whilst corporal punishment as a public spectacle is today widely considered as degrading, in the past it was not – if indeed degradation was any part of the conceptual repertoire prevalent at the time. There is no ahistorical sense to be made of the violation of dignity, any construction being informed by contemporary judgement and cultural sensibility. The Commission has itself observed that there is considerable variation in what people regard as the critical thresholds of suffering as this applies to degrading treatment, leading Rodley to remark:

[F]orcing a devout Muslim to fall to his knees and kiss the cross might well fall within the prohibition [under Article 3], whereas similar behaviour towards prisoners who have no profound philosophical or religious aversion to the procedure would have no comparable significance (Rodley, 1999, p. 104).

The range of acts deemed as degrading varies across societies, within the same society across time, and within the same society at the same time across sub-cultures. This raises a question whether differences between conceptions are not only irreconcilable but suggestive of some incoherence in the concept. We can resist this suggestion. The fact of historical variation and contemporary dispute is common to many concepts in moral and political discourse; there is no consensus on conceptions of liberty and equality but no one is suggesting that the concepts themselves are unserviceable. Disagreement is only to be expected. In the case of degradation, any variation is in any case less extensive than it appears. 164 nations have signed, and in many cases ratified the International Covenant on Civil and Political Rights (ICCPR), which includes a provision that condemns degrading punishment. The fact of this many signatures is noteworthy: signatories may consider the

prohibition of a piece with its own values; even if they do not, and the signature is the product of political calculation, it is significant that it is thought prudent to be seen to be acting as if the motivation were in line with the values of the ICCPR.

Acts under one description may elicit conflicting responses whilst under another they do not. A Christian may not consider the act of being forced to kiss the cross as degrading but nevertheless consider it degrading to be required to compromise profound religious convictions. The violation of profound convictions - religious, moral, political – is something many people could agree on as a feature of degradation. Forcing someone to violate their convictions may amount to inferiorising treatment, or treating someone as an object, and these are included amongst the characteristics of impermissible degradation.

Suppose someone believes that young girls should undergo female genital mutilation (FGM), and any prevention of this practice represents in his eyes a violation of a profound conviction. Prevention could not amount to impermissible degrading treatment, and this is because we believe that no one has a right forcibly to subject someone else to female genital mutilation. Dignity has been considered in this discussion as a ground of human rights; but this example suggests that an account of impermissible degradation does not go only one way, from dignity to human rights - that any account of the prohibition on degrading treatment should include a place for rights whose source is not (only) human dignity.

To avoid this conclusion we might insist that the dignity of the FGM practitioner is *not* violated when prevented from pursuing his practice: we judge that the practice of FGM is incompatible with respect for the dignity of women, and insist that the prevention of any such action cannot itself be incompatible with respect for the dignity of the practitioner, whatever he may think. In the former case we allow that prevention amounts to a violation of dignity, but deny that it is impermissible; in the present case we deny that prevention amounts to degradation because we deny that there is any violation of dignity. If we are right to deny

this, then not only are contemporary norms integral to any conception of dignity – something the Court acknowledges – but we must also explain why some norms are to be privileged in this conception whilst others are excluded. This is not simply a question of how we adjudicate between competing cultural norms; it is a question about how we provide an account of dignity that serves as a ground of a universal human right whilst also embodying norms that some people and societies profoundly reject.

Waldron suggests that the prohibition on degrading (and inhuman punishment) reflects a “shared sense among us of how one person responds as a human to another human, a shared sense of what humans should be expected to endure, a shared sense of what it is to respond appropriately to the elementary exigencies of human life” (Waldron, 2010, p. 284). An elaboration on this shared sense includes respect for the rituals and standards that mark the distinction between humans and other animals, and which regulate how humans eat, defecate, copulate, and dispose of human remains. Since cultural practices vary over time, a decision on whether any particular violation meets the threshold required under Article 3 will require some acknowledgement of contemporary cultural sensibility. The Court is right, therefore, to insist that the Convention is a living instrument, and to recognise that any judgement on whether treatment amounts to degradation under Article 3 should acknowledge the sensibilities of victims and witnesses. At the same time, there is a concept of degradation which is not itself dependent on the sensibilities of these parties, and which includes a cross cultural understanding that, when prisoners are subject to unnecessary force, or forced to flout the most elementary standards of conduct, they are subject to treatment which expressively denies their humanity.

[Level 2 Head] TREATING HUMANS AS OBJECTS

Degrading treatment brings people down and it expresses the fact that it brings people down. What distinguishes treatment of this kind? Someone is degraded when treated as if they do not possess the capacities characteristic of human beings. One such capacity is autonomy. A person may be degraded if they suffer punishment that is capable of breaking physical or moral resistance,²³ or if driven to act against their will or conscience, such that “[t]he will to resist or give in cannot . . . be formed with any degree of independence.”²⁴ Any such treatment is incompatible with respect for personal autonomy, as characterised by the ideals of self-rule and authorship over ones’ life (Raz, 1986).²⁵

The idea that we fail to respect someone’s dignity when we fail to respect their status as an autonomous agent is suggestive of a Kantian ethical idea, that each person has a value beyond price, a value which reflects their dignity:

Humanity itself is a dignity; for man cannot be used merely as a means by any man . . . but must always be used at the same time as an end. It is just in this that his dignity (personality) consists . . . so neither can he act contrary to the equally necessary self-esteem of others . . . he is under an obligation to acknowledge, in a practical way, the dignity of humanity in every other man (Kant, 1996, p. 209).

One way of using others as a mere means is by involving her in a scheme of action to which she could not in principle consent. If an interrogator threatens a prisoner with torture unless she reveals information about her family then the intention of the interrogator is to force the prisoner to reveal information against her will. The interrogator uses the prisoner as a mere means: the prisoner cannot truly consent to do what is demanded of her.

²³ *Ireland v UK*, para. 167.

²⁴ *Ireland v UK*. no. 5310/71, Commission Report of 25 January 1976, Series B, no. 23, p. 402.

²⁵ See Raz, 1986 and Berlin, 1969. For a view of degradation as egregious disrespect for personal autonomy see Bronsther, 2019.

But the Kantian requirement that we should never use persons merely as a means cannot explain the Court's absolute prohibition on degrading treatment and punishment. Whilst the prohibition mandated by Article 3 applies to everybody, not all human beings are Kantian agents: Kantian dignity applies to all but only those agents with a capacity for rational autonomy. And the Kantian requirement also rules out much else besides degradation; it rules out deception, as when I deceive you in order to extract information you would otherwise have withheld. The deceiver treats the deceived as an object, but the act of deception does not fall within the ambit of Article 3. As Griffin remarks, the Kantian idea of respect for persons, treating everyone as an end and never merely as a means, is used in accounts of moral obligation as a whole and "[if] we adopted this understanding, human rights would expand to fill that whole domain, which is so counter-intuitive a consequence that we must reject it" (Griffin, 2008, 201).

Degradation cannot be construed as a failure to treat persons as ends, but there is a more promising and related idea, that a person suffers degradation when treated as an object - as lacking in self-determination, having no agency, no experiences or feelings that need to be taken into account, as lacking in boundary integrity and used as a tool for the purposes of the objectifier (Nussbaum, 1995). In *Tyler* the Court considered that the birching of the applicant amounted to degrading punishment because the applicant had been treated as an "object in the power of the authorities" and this was an "unacceptable assault on precisely that which is one of the main purposes of Article 3 to protect, namely a person's dignity and physical integrity".²⁶ In *Bouyid* the Court concluded that the applicants were treated as objects in the control of the authorities, in a context in which the inequality between perpetrator and victim rendered the applicants particularly vulnerable to the police-officers' abuse of power.²⁷ The

²⁶ *Tyler v. UK*, para 33.

²⁷ *Bouyid*, paras 90-113.

infliction of force by a police officer against a vulnerable person who is under his control “objectively offends human dignity in breach of Article 3”, and this applies in particular to the “use of physical force against an individual where it is not made strictly necessary by his conduct, whatever the impact on the person in question”.²⁸ On her reading of the judgement in *Bouyid* Mavronicola suggests that “where a person is subjected to physical force not necessitated to repel her actions, she is treated as an object, without the minimum respect demanded by her humanity . . . human dignity is attacked: the respect demanded by the elevated and equal moral status of all human beings is denied” (Mavronicola, 2016, pp. 13-15).

The Court in *Bouyid* underlined the significance of the use of unnecessary force by law enforcement officials on persons under their control because it “highlights the superiority and inferiority which by definition characterise the relationship between [them]”, and that such treatment may “arouse in these persons a feeling of arbitrary treatment, injustice and powerlessness”.²⁹ The degraded victims are subjected to inferiorising treatment they would resist if they were not captives in prison, rendering them situationally vulnerable to the abuse of power by prison officers who had complete control over them. The elements of vulnerability, powerlessness and inferiority are each emphasised in this judgement, as they are in the conception of degradation I am presenting here.

[Level 2 Head] INFERIORITY

Treating someone as an inferior is integral to a concept of degradation. Prisoners are degraded when treated as inferiors, in the sense that they are treated as less than human. Human beings are brought low by acts of nature; but it is only when brought low by human

²⁸ *Bouyid*, para 101.

²⁹ *Bouyid*, para 106.

beings, whose acts are intended to bring them down and to demonstrate their inferiority, or whose acts symbolise the same, that victims are subject to the degrading punishment that Article 3 is designed to prohibit. Zellick suggests that a definition of degrading punishment might be:

punishment that is inescapably humiliating and debasing beyond the normal limits of punishment, such that it reduces the essential humanity and dignity of the victim, leaving him with a feeling not simply that he has suffered discomfort or inconvenience or worse as a result of wrongdoing but that he has been reduced in status and subjected to an indignity incompatible with the status of man (Zellick, 1978, p. 669).

Duff suggests that what matters is “the denial of moral standing or fellowship that [degrading and inhuman punishment] essentially involve” (Duff, 2005, p. 149), where the denial amounts to a reduction or lowering in moral status (Whitman, 2003, p. 8). What is denied or reduced is human dignity, understood as a status that is not equivalent to social, political or legal status, but which applies equally to people irrespective of social position (Tasioulas, 2013, p. 306). Degradation effects a reduction in this status:

To degrade is to reduce a Φ . . to, or to treat a Φ as (as if s/he were), something less or lower than a Φ . . . [for example] a ψ , given a conception of ψ s as another distinct type of being ranked lower than Φ s, whose defining characteristic make other modes of treatment appropriate or permissible (Duff, 2005, p. 151).

It might be thought that those already grossly degraded are immune to further degrading treatment: their dignity is already so reduced that it cannot be reduced any further. But the standard to which we implicitly appeal when speaking of a reduction in dignity is not found by looking at the state of the victim prior to his present suffering; a person suffers degradation not because his status is lower than before, but because he is subject to treatment incompatible with his status as a human being. This explains why an egomaniac is not degraded although he may consider himself brought down by treatment which expressively denies that he is who he thinks he is.

Degradation is a relational concept: the victim is treated as an inferior in the eyes of others.³⁰

I *see* you as an inferior if I see you under a stigmatising label, as a human being but as a severely flawed human being:

When the stigma takes over – that is, overshadows the characteristics that allow us to see the other as human to such an extent that all our attention is focussed on the fact of his being, say, a dwarf – then our seeing turns into seeing the other as subhuman (Margalit, 1998, p. 104).

Prisoners are often seen as little more than just that - (ex) prisoners, offenders, ‘cons’ - a label they will struggle to remove long after their release; ‘scum’ and ‘lowlife’ are the preferred epithets in UK tabloid newspapers; and prison regimes frequently make systematic efforts to encourage a perception of prisoners as less than human - the use of prison numbers, uniforms, shackles, shaving prisoners’ hair. Margalit explores the relation between how we fail to see people as human - seeing them as nonhuman, sub-human, stigmatised - and how we treat them (Margalit, 1998). Here I explore one illustrative type of case of inferiorising treatment, in which the prisoner is denied opacity respect. This includes a perceptual aspect, but one which is distinct from Margalit’s emphasis on a failure to see the person – seeing only the label, overlooking her, withholding attention – and which, rather, is a case of seeing too much: seeing what the prisoner would choose to conceal or keep to herself, and so treating her as if her inner life is anyone’s business.

The relational aspect of degrading treatment includes the fact that it is typically witnessed and intended to be witnessed by others. The demonstration may take the form of depriving the victim of control over how or when she is exposed in the eyes of strangers, so that concealment is not an option. She is denied opacity respect, respect which requires

³⁰ Can a relational account allow for the possibility of degrading oneself – treating oneself as an inferior? Someone’s behaviour may fall so far short of self-imposed standards that she judges herself as an inferior, and we conceive this relationally, as a judgement of her aspiring self over her present self (see Callard, 2018). Or she is responsible for behaviour that brings her down in the eyes of others who need not be present physically but whose verdicts are delivered in her imagination. Kiel Brennan-Marquez (personal correspondence) is right to insist on this important kind of case, which I cannot do justice to here.

restraint and a refusal to intrude into a person's inner life. The idea is that 'in order to respect persons we need to treat them as 'opaque', paying attention only to their outward features as agents' (Carter, 2011). This is respect that recognises that a person should have control over the division between her inner and outer life, over her body and how she appears to others in public. Nagel writes that the "boundary between what we reveal and what we do not, and some control over that boundary, is among the most important attributes of our humanity" (Nagel, 2002, p. 4), since our freedom to enjoy an inner life would be impossible without it:

The mere sense that the gaze of others, and their explicit reactions, are conventionally discouraged from penetrating this surface, in spite of their unstated awareness of much that lies beneath it, allows a sense of freedom to lead one's inner life as if it were invisible, even though it is not. It is enough that it is firmly excluded from direct public view, and that only what one puts out into the public domain is a legitimate object of explicit response from others (ibid, pp. 7-8).

Degrading punishment exposes the victim to public view; she no longer merits the restraint that opacity respect demands. As a prisoner she is anyway exposed to the gaze of prison staff, but she may also be forced to undergo a punishing interrogation, submit to a fully body strip search, or defecate without a protective screen in the presence of other prisoners. What the victim is deprived of is control over how she presents herself, over what she chooses to reveal to others. Perhaps she suffers alone, as when a prisoner is held in solitary confinement or is left to die unseen in a prison cell. Even here, the prisoner has no idea when she will next be brought out before others or peered at through the bars of her cell door.

Pupils in classrooms, residents in care homes, employees in workplaces tend to have no control over whether they are seen by others, and they are not thereby degraded. The suggestion is not that someone is degraded because she is being watched, nor because she has no control over whether she is watched, nor even that she cannot remove herself from the place in which she has no control over whether she is watched. She is denied opacity respect,

but this is a feature of degradation only when a person is made to appear before others in a state that symbolises her inferiority and her status as less than human. If overcome with “feelings of fear, anguish or inferiority”, her “moral and physical resistance” broken,³¹ then the forcible exposure of her condition before onlookers is itself a feature of her degradation. Her humiliation is revealed before others’ unrelenting eyes (Sangiovanni, 2017, p. 89), and the exposure is testament to her status as an inferior. She is prevented from concealing her humiliation from the gaze of captors who have brought her to this state; she is brought down by others and is seen to be brought down by them.³²

Degraded prisoners are treated as inferior, but not all inferiorising treatment is degrading: a student is made to feel small in front of her patronising professor; a company boss treats his employees like lackeys; young cadets are humiliated on parade. These are not examples of degradation, although cadets can suffer degradation if they are bound by the commands of a cruel and contemptuous instructor, and a similar point applies, *mutatis mutandis*, to extreme variants of the other cases. The claim is not that all inferiorising treatment is degrading, but only inferiorising treatment whose aim or effect is to demonstrate the status of the victim as someone who is less than human, and which symbolises the same.

[Level 2 Head] DIGNITY HARM AS A SYMBOLIC WRONG

Degrading punishment is typically carried out with the intent of rendering the victim as an inferior, and it is always characterised by acts that symbolise their inferiority. In the usual case degrading punishment will symbolise the fact that humans are treated as non-human because that is what is intended, as it is that their captives should understand that. Rarely,

³¹ See *Pretty v. UK*, no. 2346/02, ECHR 2002-111, para 52; *Ireland v UK*, para 167.

³² Of course, there are many conditions answering to this description that are not the effect of state sanctioned punishment, including some conditions found in schools, care homes and workplaces, as recognised by the Court (Webster, 2018, pp. 23-4). I am not suggesting that the absence of opacity respect as a feature of degrading treatment is unique to state punishment, and more should be written about the degradation present in institutions other than prisons.

intent is absent: if the conditions of captivity, through neglect and accident, leave prisoners lying in filth, in overcrowded cells, without adequate nutrition and exposed to extreme temperatures, then conditions such as these, which are not fit for any human being, symbolise their inferiority: this is treatment which is incompatible with respect for our status as human beings.³³ Or the captors' intent is present but (partially) unfulfilled: a prisoner may suffer degradation, but, like Primo Levi, cannot be made to feel inferior because his self-worth will not be shaken, and he will fight for his dignity to the last. It is nevertheless the aim of degrading punishment that he should be made to feel inferior, and, irrespective of how he feels, that this is how he is to be seen in the eyes of others. In all cases, the symbolic wrong takes the form of a dignitary harm, a failure to respect the dignity of the person and his status as a human being.

What is this idea of dignitary harm as a symbolic wrong? Just as being dignified is something that one can show, in one's demeanour and bearing, so there is a corresponding idea that a person should be *treated* with dignity, and that to treat someone with dignity is to *respect* his dignity:

To respect someone's dignity by treating them with dignity requires that one *shows* them respect, either positively, by acting toward them in a way that gives expression to one's respect, or, at least, by refraining from behaviour that would show disrespect (Rosen, 2012, pp. 57-58).

This is dignity in the sense of a requirement that people should be treated respectfully – that they should have a right to be treated 'with dignity'. If we think of dignity as revealed in Levi's resistance to Nazi atrocity, then not everyone can be dignified. But even those who lack Levi's moral courage should be treated with dignity and respect, or, in other words, not be treated disrespectfully by being degraded. Dignitary harm is a symbolic harm, a failure to

³³ The actions of an individual or institution can express the disrespect characteristic of degradation irrespective of the presence of intent, and irrespective of whether the victim understands or responds to her treatment as degrading; cf. Anderson and Pildes, 2000.

express respect for our status as human beings. In failing to treat human beings with dignity there is a failure to respect our elevated status; our status as human beings with dignity is not acknowledged (see Rosen, 2012, pp. 60-2; Rosen, 2015, pp. 95-6).

Kuch identifies the symbolic aspects of degradation inherent in the positions that victims are often forced to adopt, as when kneeling down or assuming the posture of a dog, “highly coded positions [which] designate, above all, humiliation” (Kuch, 2011, pp 52). Actions, too, symbolise dignitary harm, as when victims are forced to eat or live among faeces in the course of what Des Pres has called ‘excremental assault’. He records the aim as setting out to “destroy our human dignity, to efface every vestige of humanity, to fill us with horror and contempt toward ourselves and our fellows” (Des Pres, 1976, pp. 62-3). Silver, Conte, Miceli and Poggi (1986) see victims who are forced to live in excrement as people who are reduced in their status as human beings, who are treated as less than human:

To stink of excrement, to be unable to clean oneself, to be unable to protect one’s beloved, to lack the powers of any normal human being, proclaims that we are not really human beings, that we are something less, something less upsetting to kill. In so far as your history, your status, even your being a woman or a man offers you some point of pride, of comfort, and especially a source of standards for what you ought to do, what you must resist, persistent humiliation robs you of the vantage for rebellion. If you do not have even the most minimal abilities of a human being then how can you stand on your humanity? (ibid., p. 280).

One feature of the predicament described here is powerlessness, also a feature of torture, which Kuch has described as a “spectacle of power” (Kuch, 2011, p. 53). The victim is powerless, her powerlessness exposed before her tormentor, and the torture demonstrates both the absolute power of the tormentor and the powerlessness of the victim:

[t]o be exposed in one’s absolute powerlessness implies, precisely its symbolic dimension, a radical loss of recognition. Autonomy, freedom, or agency are of central importance in our cultural values, and their loss may be a reason for far-reaching devaluation; that is, an extreme loss of recognition (ibid, 53).

The victim is to understand that she counts for nothing, that nothing she values and identifies with matters any more. We have a need of recognition, a desire to be recognised and addressed by others, to be treated as subjects, not objects, as somebody and not a thing. It is because we must live our lives in the eyes of others, and cannot always prevent the withdrawal, denial and loss of recognition, that we are vulnerable to the symbolic violation of dignity inherent in degradation (Kuchs, 2011; Honneth, 1995).

I am discussing the symbolic aspect of degradation as a dignitary harm. But it will be urged that harms to dignity are not the worst harms that human beings can suffer: ‘there is no real ill in life except severe bodily pain: everything else is the child of the imagination’ (Marie de Sevigne). Rosen writes that, however humiliating it may have been for Jewish people to be herded into cattle trucks and forced to live in squalor, the worst thing the Nazi state did to the Jews was to murder them (Rosen, 2015, pp. 97). If de Sevigne and Rosen are right it follows that dignitary harm cannot serve as the basis for a human right not to suffer all of the worst forms of ill-treatment. Does it suffice to serve as the basis of a human right not to suffer degrading treatment? It does.

Dignitary harm is not always secondary to bodily harm. Some people will do whatever it takes to avoid dignitary harm even when enduring the vilest conditions, so important is it to them that dignity is not lost sight of. Levi, for example, writing of his time in a Nazi concentration camp:

[P]recisely because the Lager was a great machine to reduce us to beasts, we must not become beasts; that even in this place one can survive . . . So we must certainly wash our faces without soap in dirty water and dry ourselves on our jackets. We must polish our shoes, not because the regulation states it, but for dignity and propriety (Levi, 1987, p. 47).

If, on the other hand, all dignity is lost then this is for some people a fate equivalent to death. Dilma Rousseff, a former President of Brazil, reflecting on her experience of torture:

Torture is something that messes with the deepest part that makes you . . . Pain is always a death threat, when it comes to torture . . . And all of us are terrified of feeling pain. And it's a terrible thing, that makes people lose their dignity . . . They want you to lose your dignity, make you betray your convictions, make you let go of what you think . . . This process of destroying someone makes people become living dead. What will a person do after they betray what they think, betray themselves? They wander around, dead (Rousseff, 2020).

Whilst such testimony is not decisive, and a victim may mis-represent her condition, these words are to be taken seriously. What is reported here as included in the process of being destroyed is not only hideous physical pain but also the loss of human dignity, of being forced to betray oneself.

Writers are liable to be especially sensitive to symbolic harms, but even so it should not be assumed that symbolic dignitary harm is generally of secondary importance. Whilst almost everyone would seek to be rid of extreme physical pain before anything else, the longer term effects of symbolic harm, the memory of what one was reduced to (“a shrilly squealing piglet at slaughter” (Amery, 1999, p. 35)) can leave scars and burdens which spoil a life; they may prove impossible to live with.

In any case symbolic and physical harms often go together. Degradation is a composite: the physical harm of having been subjected to a public lashing is connected to the gross humiliation of being helpless and flogged in front of strangers. The physical pain may take precedence at the time (‘make it stop!’), but the experience of self-betrayal and humiliation is seared into memory, and the physical and psychological aspects are then both included as features of degrading treatment. The physical harms are not unique to degradation - what is unique to degradation is the symbolic harm of being treated as less than human - but the *wrong* of degradation, the wrong which Article 3 is designed to prevent, comprises both these symbolic and physical harms.

Whilst the symbolic and material aspects of violated dignity are often conjoined there is an additional connection: protecting people from dignitary harm serves as a bulwark

against subsequent physical violation. It can be of great importance that we act in ways that express acknowledgement of the fact that someone is entitled to be treated with respect.

Glover suggests that human beings are able to engage more easily in horrifying behaviour if at the same time they expressively deny the humanity of their victims. One of the features that characterises gross human abuses is symbolic degradation. Symbolic denials of dignity – including the use of de-humanising language - may help psychologically to remove barriers in the way of any disposition to engage in acts of torture and inhuman treatment (Glover, 1999, pp. 35-38). Such treatment might follow a period of humiliation, as victims are first marginalised and forced to wear stigmatising symbols (as Jews were forced to wear a yellow star), before becoming in their captors' eyes no more than animals and slaves (ibid, p. 36). Argentinian torturers would humiliate their prisoners by making them run around shouting “My mother’s a whore . . . The whore who gave birth to me”. Gross humiliation prepared the way for worse:

The normal attitude of the torturers and guards towards us was to consider us less than slaves. We were objects. And useless, troublesome objects at that. They would say: “You’re dirt” (ibid).

There are fewer psychological barriers in the way of torturing human beings if they are first stripped of their dignity.

Dignitary harm, then, serves as a ground for the human right not to be degraded: it constitutes a grave wrong in its own right; it is intimately related to material harms which we should be protected against; and in serving to protect us against symbolic harms we are protecting vulnerable prisoners, who are otherwise rendered as less than human, against the most violent and destructive acts that people in positions of power and authority can commit against the powerless. In this sense the right not to be degraded serves as a defence of our humanity.³⁴

³⁴ See Rosen, 2015, p. 97.

[Level 1 Head] 5. WHOLE LIFE SENTENCES

Some conditions of imprisonment are uncontroversially degrading, and the Court has identified what many of these are. There is a separate question whether any sentence of imprisonment is, as such, degrading. Mavronicola has remarked that dignity is attacked when a person is imprisoned for life “without a fragment of concretely realisable hope of release” (Mavronicola, 2016, p. 14). Is it degrading to receive a sentence of life imprisonment without any prospect of release?

Long-term imprisonment can wreck lives: separating prisoners from loved ones (parents from children, mothers from babies); removing prisoners from their communities; ending any prospects of meaningful employment; eroding the ability to lead an autonomous life following routinized, subordinating and institutionalising confinement over many years.³⁵ Nevertheless, it is not degradation that prisoners suffer from unless the sentence amounts to a failure to respect their status as human beings. Some long sentences appear to amount to just that: Liebling found evidence of an “existential crisis” amongst prisoners entering a maximum security prison, brought on by the effects of long and indeterminate sentences (Liebling, 2011); a 30-year sentence can strike a prisoner as “completely unmanageable” (ibid, p. 536). Still, what is decisive is not whether it has this effect, but whether it is an example of captivity that symbolises less than human status. And to determine this status we cannot appeal only to how a prisoner experiences his captivity, nor to what captivity has done to him in the way of stunting capacity and depriving him of the good things in his life. Degradation is inherently relational: the degraded prisoner is made out as an inferior, which is the aim or effect of the actions of his captors. Hence it is not correct to say that degradation is an impact word (Waldron, 2010, p. 283), if by ‘impact’ we are to understand that we should look only at the effects of treatment on the victim. Accounts of ill treatment may be

³⁵ See Bronshter (2019) for an account of what he calls ‘slow degradation’.

agent centred, looking at what the punisher is doing to the victim, or victim centred, looking at what has been done to the victim. The concept of degradation requires us to look in both directions, at the actions and aims of captors and the effects and status of the captive.

For the Court, the fact of there being no prospect of release is not *in itself* incompatible with human dignity. No issue arises under Article 3 if a prisoner meets with a refusal to be considered for release on the grounds that he continues to pose a danger to society, although an issue does arise if the sole ground for refusal is ‘pure punishment’ or retribution. If the question whether an issue arises under Article 3 is dependent on the purposes of punishment then we need to know what these are, in addition to what we know about the length of sentence and any possibility of release, before we can determine whether the punishment is degrading. The symbolic wrong of degrading punishment includes the idea that prisoners are made to feel or to become inferior as a result of what other people have imposed on them. The imposition is a product not only of the length of imprisonment, but also what the punishment expresses about their status, the message it sends to prisoners (whether or not they hear it). We cannot determine punishment as degrading until we know what message the punishment expresses, and we cannot know what it expresses until we know what the agents of the punishment intended, purposed or were otherwise responsible for conveying by imposing the sentence they decided upon.

Why think that the message of lifelong imprisonment with no option of review is incompatible with human dignity? In the case of *Vinter* the applicants had received mandatory life sentences along with a whole life order.³⁶ Judge Power-Forde, in a separate opinion, stated that even if the “applicants remained behind bars for the duration of their lives they ought to retain the right to hope that one day they may have atoned for their wrongs”

³⁶ *Vinter and others v United Kingdom*, nos. 66069/09, 130/10 and 3896/10, Grand Chamber Judgement of 9 July 2013.

(quoted in Mavronicola, 2014, p. 300). This was in line with the Court’s view, which was not that the prisoner should necessarily be released one day, but that he should be given the opportunity to have his case considered. The denial of any prospect of review led to a risk that a prisoner “can never atone for his offence . . . however exceptional his progress towards rehabilitation”; ‘Life sentences under Article 3 must therefore be interpreted as requiring reducibility’ [ie., the possibility of a reduction] and where there is no possibility of a review a whole life sentence will not measure up to the standards of Article 3 of the Convention.’³⁷

If the prospect of any *review* is permanently denied the message to the convicted person is: there is no hope for you, nothing that you can do to rehabilitate yourself, nothing to be done to atone for your crime. A message of this kind belongs to the category of inferiorising treatment that is a feature of degrading punishment. To deny someone any chance of showing that anything he might do could ever amount to evidence of his rehabilitation is to deny a fundamental feature of a human being – the ability to learn from the past and to change one’s life.

A lifelong sentence without any prospect of *release* does not, as such, amount to degrading punishment. Nevertheless, if the grounds of its imposition are purely retributivist then this is what it is: aside from any retributivist message, it carries the same message as when the prospect of review is permanently denied. If, on the other hand, the justification is public protection, then the sentence is not degrading for the reason of the sentence alone.

Degradation might be the effect of a life spent behind bars, subordination to bullying officers, frequent and gross humiliation, and subjection to an endlessly confining and mind-numbing routine. If so, degradation is the product not of the sentence alone but of the sentence together with the de-humanizing conditions the prisoner has to put up with. This is not, of course, to deny that a life-long sentence without the prospect of release is not a

³⁷ *Vinter and others v UK*, paras 111, 120, 121.

disaster for a prisoner, whatever the grounds of its imposition. But the symbolic aspect which is integral to degradation is always a matter of more than the length of sentence imposed and its effect on prisoners, and includes the purpose of punishment and the message it conveys.

[Level 1 Head] 6. DIGNITY, DEGRADATION AND A THEORY OF PUNISHMENT

I have offered an account of degradation as a violation of dignity, bringing people down. Degrading punishment is distinguished by its expressive aspect and its symbolism. The message of the degrader is: you are less than human, and the symbolic significance of the inferiorising message is to deny the humanity of the victims. I have drawn attention to some of the challenges facing any such account, and I conclude with some unresolved thoughts about human dignity and a statement of how any account of degradation would need to be developed as part of a theory of punishment.

Do we, after all, need a concept of human dignity in order to provide an account of degradation suited to the demands of Article 3 and similar provisions in international human rights law? The European Court of Human Rights and Courts around the world proclaim that we do, and dignity, therefore, occupies centre stage in the argument presented here.

Moreover, the testimony of countless victims of torture, inhuman and degrading treatment speaks of the loss and violation of dignity. Their testimony commands respect. We are not obliged to take their word for it but if we insist that these victims are mis-describing their experience we should be able to offer an alternative account that does them no epistemic injustice. On the one hand it seems that we rightly think of dignity as a status of human beings that degrading punishment threatens. On the other hand we may be able to say everything we need to say about the nature and importance of degrading punishment without calling upon a concept which, whilst widely used by lawyers, victims of ill treatment and publics around the world, continues to prompt sceptics to claim that what we have is no more

than a relic from religions, and is anyway incoherent, and is redundant in any account of why we have the human rights we do.³⁸ We already have to hand, the sceptics insist, an adequate supply of serviceable concepts – inferiorisation, objectification, de-humanisation, instrumentalization – which enable us to give an account of degradation without any need for an appeal to human dignity.³⁹ This challenge has not been fully met, here, or anywhere else.

Whatever the role for human dignity, some punishments, so the Court contends, and I agree, are impermissibly degrading. The case needs to be elaborated, as part of a theory of punishment, so as to show, as against retributivists, that no one deserves to suffer extreme degradation; as against advocates of deterrence, that the prospect of degradation should not be countenanced in service of the aim of deterring people from committing dreadful crimes; as against impoverished governments, that severely degrading conditions should not be tolerated even though intolerance is expensive; and as against the view that, in committing an appalling crime, the prisoner has already degraded herself to the point that she has forfeited her rights not to be degraded. The argument will introduce considerations that I have not begun to discuss, and it will have to make good the deontological claim that severe degradation is not to be permitted, full stop. I do not know whether any such argument can succeed. But if it is to succeed, it will likely build on the position presented here, that severe degradation amounts to treating human beings as if they are less than human, and no state sanctioned punishment should treat anyone like that.⁴⁰

³⁸ For well-known attacks see Macklin (2003) and Pinker (2008). Pinker writes that ‘dignity’ is a “squishy, subjective notion, hardly up to the heavyweight moral demands assigned to it”. See also McMahan (2017).

³⁹ See Sangiovanni (2017) for a systematic account of this sceptical kind.

⁴⁰ I should like to thank Kiel Brennan-Marquez, Jacob Bronsther, Vincent Chiao, Lee Kovarsky, Antje du Bois-Pedain and Will Thomas for insightful discussion and commentary on an earlier draft.

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