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WHY NOT PENAL TORTURE?

by

CLÉO GRIMALDI

Under the direction of Andrew J. Cohen

ABSTRACT

I argue here that the practice of penal torture is not intrinsically wrongful. A common objection against the practice of penal torture is that there is something about penal torture that makes it wrongful, while this is not the case for other modes of punishment. I call this claim the *asymmetry thesis*. One way to defend this position is to claim that penal torture is *intrinsically* wrongful. It is the claim I argue against here. I discuss and reject three versions this claim. I first address a version that is based on the idea that penal torture, unlike other modes of punishment, is intrinsically wrong because it is inhuman. I then address a version grounded on the claim that, because penal torture is an assault upon the defenseless, it is morally impermissible. Finally, I discuss a version that concerns the idea that penal torture attacks human dignity and undermine agency.

INDEX WORDS: Punishment, Torture, Cruelty, Dignity, Inhumane treatment

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CLÉO GRIMALDI

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in the College of Arts and Sciences
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2011

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CLÉO GRIMALDI

Committee Chair: Andrew J. Cohen

Committee: Andrew Altman
Christie Hartley
George Rainbolt

Electronic Version Approved:

Office of Graduate Studies
College of Arts and Sciences
Georgia State University
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INTRODUCTION

I will argue that the practice of penal torture is not intrinsically wrongful. I understand penal torture as the use of torture *qua* mode of punishment.[1] I will focus on legal punishment (to be distinguished, for example, from parental punishment) that I define as (1) the imposition of a setback of interests of an offender (or supposed offender) (2) by the state (or the executive authority), (3) *in order* to setback her interest and (4) *for the reason* that the person committed a legally prohibited act.[2]

Providing a definition of torture covering all cases (and only cases) of the phenomenon is not an easy task. I do not intend this paper to provide an exhaustive definitional account of the term. I will largely endorse the standard definition of torture published by the United Nations General Assembly in its Convention against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment. The definition reads: torture is

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the

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[1] Discussions about the permissibility of torture in the liberal state often concern whether it is permissible to torture individuals in an effort to gain information or obtain a confession. However, I am only concerned here with the permissibility of using torture as a form of punishment in the liberal state.

[2] My definition of legal punishment is largely inspired from the article on legal punishment from the *Stanford Encyclopedia of Philosophy* (Duff 2008), as well as the definitional work on the subject that David Boonin provides (Boonin 2008, 3-27). Boonin talks in terms of what he calls the "harm requirement," as a necessary condition for having punishment but Boonin's definition of harm differs from mine, which follows Feinberg's. Boonin understands "harm" only as "making [one] worse off in some way, which includes inflicting something bad on her or depriving her of something good" (Boonin 2008, 7), which is what I mean by "a setback of interest." Concerning condition (3), it might be argued that the aim of punishment is not to setback a criminal's interest but rather to promote her well-being. According to this view, putting a criminal in prison aims to help her become a better person. An example of this type of theory is what Herbert Morris calls the "paternalistic theory of punishment" (Morris 1981). However, for the purpose of this paper, I will assume (without argument) that this type of theory does not concern punitive practices but rather therapeutic ones (i.e., criminals are seen as sick and putting them in prison is supposed to help them). I believe that using the word "punishment" in these cases (i.e., in the case of therapeutic theories) is a misuse of the term.

> consent or acquiescence of a public official or other person acting in an official capacity" (The United Nations General Assembly 1984).[3]

Two thirds of this definition concern the different functions that torture has had throughout human history. Since I only aim to focus on torture as a mode of punishment, I will not discuss the question of its function (or purpose) and will focus instead on characterizing the practice itself. The UN definition of torture insists on the fact that torture is "an intentional infliction of severe physical or mental pain or suffering." This has left many philosophers unsatisfied for a variety of reasons – the main one being that the definition is clearly too narrow. Indeed, it excludes forms of torture that do not constitute pain or suffering *per se* (example: privation of sleep). However, given my focus here, this flaw is not problematic. If, as I will argue, torture, as defined by the UN, is not intrinsically wrongful *qua* punishment, neither is the privation of sleep.[4]

In addition to a definition of the term, a list of paradigmatic examples of torture can aid our understanding of the practice. Seumas Miller provides a rather satisfying one:

> Torture includes such practices as searing with hot irons, burning at the stake, electric shock treatment to the genitals, cutting out parts of the body, e.g., tongue, entrails or genitals, severe beatings, suspending by the legs with arms tied behind back, applying thumbscrews, inserting a needle under the fingernails, drilling through an unanesthetized tooth, making a person crouch for hours in the 'Z' position, waterboarding (submersion in water or dousing to produce the sensation of drowning), and denying food, water or sleep for days or weeks on end (Miller 2011).

I will argue that using these practices as modes of punishment is not *intrinsically* wrong. My aim here is to determine whether torture *qua* mode of punishment is morally problematic and

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[3] Cited by Michael Davis (2005, 3). Other mentions of it in the literature – among others: Matthews 2008, 35; Sheleff 1987, 298-299; Sussman 2006, 225; Card 2008, 7; Card 2010, 188 ; Wisnewski 2010, 4; and Miller 2011.

[4] For a developed criticism of the UN definition of torture, see Luban 2005, Davis 2005 and Wisnewski 2010, 5-7.

not to determine whether the practice of legal punishment is justified at all.[5] I will thus assume that the harm principle is the most adequate normative principle for determining the limits of the criminal law.[6] I understand this principle as Feinberg canonically puts it:

> It is always a good reason in support of penal legislation that it would probably be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) *and* there is probably no other means that is equally effective at no greater cost to other values (Feinberg 1984, 26).

This principle plays an important role in justifying the practice of legal punishment, although it does not (and is not meant to) provide all of the necessary grounds for it. Indeed, the harm principle claims that it is permissible for the state to interfere with people engaging in harmful behaviors – or behaviors for which the risk of harm is significant. Those that do harm (criminals, for example) are thus rightly interfered with. Legal punishment is a type of interference (it is, by definition, a setback of interest) and it thus may be permissible for the liberal state to practice it on criminals who committed harm to others. This principle legitimates the use of legal punishment; however, it does not provide normative grounds for understanding what mode of punishment is to be used for a particular case, what the severity of punishment should be in a particular case, or if some modes of punishments are always impermissible (e.g., capital punishment, or penal torture). It does provide, nevertheless, a framework for thinking about these issues.

Legal punishment, by definition, constitutes a setback of interest. But it does not necessarily constitute a harm - provided that criminals engaged in harmful activities. “Harm”

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[5] The question of whether legal punishment is justified at all is an open and difficult question. Some defend what is called the ‘abolitionist thesis,’ claiming that legal punishment is never justified. See: Christie 1977, 1981; Hulsman 1986, 1991; Bianchi & van Swaaningen 1986; de Haan 1990; Zehr 1990; Van Ness 1993; Bianchi 1994; Walgrave 1994; Golash 2005 and Boonin 2008.

[6] I will not attempt to defend this principle here. I will only assume that the liberal state should be committed to it.

(here and throughout the next chapters) is to be understood in a specific and technical sense: "only setbacks of interest that are wrongs, and wrongs that are setbacks to interest, are to count as harms in the appropriate sense" (Feinberg 1984, 36). This definition of harm is a useful conceptual tool for my analysis of the permissibility of penal torture.

It is quite easy to understand the distinction between hurtful actions (i.e., setbacks of interest) and harmful ones. If I punch someone in the face because I do not feel comfortable with his face, I am harming him (i.e., I am wrongfully setting back his interest) because I am not justified in doing so. If I punch someone in the face because she is trying to rob me, I am arguably not harming her. It would constitute a hurt, of course. But because I am (arguably) *justified* in interfering with her activity, my action does not constitute harm. In the same way,[7] imprisonments (or more generally, forced incarcerations) are obviously setbacks of interest. If I lock someone up even for a day, I am preventing her from accomplishing whatever goals she would pursue if free.

The typical justification for incarceration *qua* mode of punishment is that it is only a hurt, rather than a harm, for those actually deserving punishment. In the same way, according to the harm principle, if punishment sets back the interests of the criminal in a wrongful way (i.e., unjustified), then it is not permissible for the liberal state to practice it. I will use this framework for thinking about the permissibility of penal torture. More specifically, I will frame my discussion around the following question: if practicing certain modes of punishment (such as certain type of imprisonments, fines, community services, etc.) do not necessarily constitute harms, can it be the case for penal torture as well?

[7] The fact that I use an example of self-defense as the analogue is not an invitation to understand the justification of punishment as based on self-defense (as, for example, Locke partly justifies it).

In the first chapter, I will argue that some of our intuitions about punishment are consistent with the idea that practicing penal torture is not wrongful under certain circumstances. A common response to this thesis is that there is something about penal torture that makes it wrongful (and thus, harmful), while this is not the case for other modes of punishment. I call this claim the *asymmetry thesis*.

The asymmetry thesis can be defended in many different ways. One way is to claim that penal torture is *intrinsically* wrongful. Another is to raise pragmatic concerns about practicing it. Someone concerned with the moral character of the agent could also use aretaic arguments to defend it. I will only focus here on the versions of the asymmetry thesis claiming that penal torture is inherently wrong. This is not to say that the pragmatic and aretaic arguments are not interesting. On the contrary, I believe these arguments are very challenging and rather convincing. They have merits and should be taken very seriously within the penal torture debate. However, as long as people will assume, as it is the case today, that penal torture is inherently morally wrong, there will be no such debate. That is why I believe the priority is to challenge this common assumption. My goal here is not to provide arguments supporting the claim that the liberal state should practice penal torture, or that there is no significant moral reasons preventing us from doing so. I rather aim to show that it is a mistake to refuse to open the debate about the permissibility of penal torture on the ground that it is, *obviously*, morally wrong *in se*.

Thus, in the second chapter, I will discuss and reject what I take to be the first challenging version of the asymmetry thesis. This version of the asymmetry thesis is based on the idea that penal torture, unlike other modes of punishment, is intrinsically wrong because it is inhuman.

In the third chapter, I will address a version of the asymmetry thesis that can be constructed using Henry Shue's work on torture. This version of the asymmetry thesis is grounded on the claim that, because penal torture is an assault upon the defenseless, it is morally impermissible.

In the fourth and last chapter, I will discuss what I take to be to most challenging version of the asymmetry thesis. This version concerns the idea that penal torture, unlike other modes of punishment, attacks human dignity and undermine agency. This unique characteristic, particular to penal torture, is what makes penal torture intrinsically morally wrong when other modes of punishment need not be.

CHAPTER 1: Justifying Penal Torture

As noted in the introduction, any sort of legal punishment constitutes, by definition, a hurt for the person being punished (i.e., a setback of interest). The harm principle requires a mode of punishment not be employed if it constitutes a *wrongful* hurt. A punishment must be morally justified in order for it to be justly practiced. Legal punishment should not be practiced when it is not morally justified. For example, we should not punish innocents. If an individual has not engaged in harmful behavior, then punishment of said individual constitutes not only a hurt but also a harm, because it is unjustified.[8] However, if the punishment is justified, then it does not constitute a harm (and thus is morally permissible). Feinberg rightly claims that

[8] Someone might argue that it can be justified to punish an innocent – on consequentialist grounds, for example. But, as stated in introduction, I assume that the liberal state should be committed to the harm principle *qua* normative principle for the limits of state interference. Thus, it can never be justified to use legal punishment against one who does no harm.

"justified wrongdoing is not wrongdoing at all, and without wrongdoing there is no 'harming,' however severe the harm that might have resulted" (Feinberg 1984, 109).

Life imprisonment is arguably more hurtful than the imposition of monetary fines, and this fact is meaningful so long as we are concerned with determining the appropriate amount of punishment for a given crime. Yet, this does not provide us with any helpful criteria for dealing with the issue of justifying the use of a certain mode of punishment. Indeed, the fact that one mode of punishment is more hurtful than another does not tell us anything about whether some mode of punishment is justified at all. Similarly, while penal torture is obviously hurtful (penal torture is among the most hurtful modes of punishment), this fact is conceptually insufficient to provide us with the normative support required when dealing with an issue of justification. It may help us (although not by itself) to determine that, for example, torture as a punishment for stealing an apple is unjustified, but it does not help us determining that we should never practice penal torture. In other words, the fact that torture is extremely hurtful does not support the claim that it is a harm, and therefore, does not support the claim that we should never practice it.

Determining the appropriate severity for different crimes requires normative support. For instance, we have different intuitions concerning verdicts imposing life imprisonment on a murderer and those imposing life imprisonment on a drunk driver. We usually think that the former is morally acceptable when the later is not. What explains this difference? The normative principle playing a role here seems to be the principle of proportionality. This principle states that punishment should always be proportionate in its harshness to the crime. Proportionality can be *ordinal* or *cardinal*.[9] Ordinal proportionality concerns the degree to which wrongdoers are punished relative to each other. Cardinal proportionality is not relative to other punishments but

[9] I take this terminology from Andrew Von Hirsh (1992, 75-79). See also Von Hirsch, 1983.

rather requires proportion between the general severity of the punishment and the crime. Although some people question the principle's applicability and practicality, it is often part of our intuitions concerning fairness in punishment. For example, one of the most popular and recurrent objections against the consequentialist theory of punishment is that it allows for disproportionate punishment.[10]

Being condemned to penal torture by an incorrect judicial judgment is probably one of the greatest injustices one could think of. However, it is conceptually possible that penal torture results from an accurate judicial judgment. One necessary condition for having a justified case of penal torture is obviously that the verdict should be based on a fair and accurate investigation of the crime. The person being punished must also be truly (or beyond reasonable doubt) culpable for the crime.[11] These are necessary conditions for having a case of justified penal torture (or, more generally, justified punishment at all), but they are, of course, not sufficient. Another necessary condition seems to be proportionality. That is: the use of penal torture is never justified when the crime committed constitutes a less severe setback of interest.[12]

It is important to understand that the principle of proportionality does not only set a maximum limit for punishments; it also sets a minimum. For example, if someone voluntarily breaks your arm in order to steal your bike and her punishment is to pay you ten dollars, it seems unjust because the compensation as well as the punishment are not great enough. This seeming

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[10] For an exhaustive and cogent rejection of the consequentialist theory of punishment, see Boonin 2008, 37-84. For the "disproportionate punishment objection" see more specifically pp. 54-58

[11] I will not develop the idea of responsibility here.

[12] One might argue that the principle of proportionality actually entails that the punishment can be more severe than the setback of interest that the crime constitutes. According to this interpretation, it could be the case that not only murderers or torturers deserve the death penalty or torture. Even in these cases, the severity of punishment is normatively determined accordingly to a certain interpretation of the principle of proportionality. For more, see for example Murray Rothbard, "Punishment and proportionality" in Rothbard 1998, pp.85-96.

insufficiency has often been interpreted as reflecting a requirement of proportionality in punishment. We appeal to the principle of proportionality in cases of overly harsh punishments that do not seem to fit the crime: if one steals a car for example, one should not be condemned to such a harsh punishment as the death penalty. But, it is important to recognize that the principle of proportionality prevents insufficiently lenient punishment as well.

Stephen Kershnar argues that, for certain criminals, life imprisonment is not enough;[13] the criminal deserves a more invasive setback of interest. He explains that

> in the case of a person who with full culpability commits both rape and murder, or does so several times as in the case of Robert Williams,[14] simply killing him will not be a proportional punishment. This is because while death is a proportional punishment for one murder, we still have an interest setback that is deserved for the rape (and in some cases another murder).[15] One way to achieve this additional setback to interests is to torture the wrongdoer before killing him. This will set back his interest in flourishing and his interest in not being subjected to excruciating pain (Kershnar 2001, 185).

This is potentially a case, then, where the use of penal torture seems to be justified (given our intuitions about proportionality). The evidence here is that failing to practice penal torture in this case would be a violation of a cardinal and ordinal principle of proportionality. Punishing Robert Williams to the same degree as a murderer who has committed only one murder would violate the ordinal principle of proportionality. And life imprisonment would violate the cardinal

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[13] Kershnar argues that, in some cases, the death penalty is not enough. I will only claim that life imprisonment seems to be not harsh enough and leave the death penalty debate on the side.

[14] Stephen Kershnar provides information on this case a few paragraphs before by citing Paul Hammel (Hammel 1995): "On August 11, 1977, Robert Williams raped and killed one single mother. Another woman told authorities that on that same day, Williams threatened her with a gun and repeatedly raped her. Authorities suspect that on August 12, 1977, Robert Williams raped and killed a woman who lived on a farm. On August 13, 1977, Williams kidnapped a woman in a parking lot and then shot her twice, raped her, and left her bound and bleeding in a remote field."

[15] Kershnar seems here to be advocating some sort of *lex talionis* view (which is a very controversial and very often considered implausible by scholars across-the-board). However, the principle of proportionality does not necessarily imply such a position, nor do I endorse (or need endorse it) here.

principle of proportionality since the setback of interests that the punishment constitutes would be much less severe than the setback of interest caused by a brutal crime.

One might argue that the notion of desert Kershnar relies on is highly problematic for justifying punishment. Indeed, one might say that it is not because one deserves something that we are justified in giving her what she deserves.[16] But this is a criticism against a specific justificatory theory of punishment that I am not trying to defend (i.e., Desert-based retributivism). Moreover, the principle of proportionality need not be grounded on a desert-based theory type.[17]

We see that our intuitions about the principle of proportionality could lead us to the idea that the use of penal torture might be justified in certain cases (e.g., extremely brutal and cruel crimes). This thesis is controversial and can be subject to two types of objections. The first type consists in criticizing the principle of proportionality *qua* normative principle of justice in punishment.[18] Because I believe this the principle of proportionality appeals to our sense of

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[16] For this type of objection see Dolinko 1991, 102-103. Claudia Card also rightly points out that "Even if some suspects deserve the extremities of torture and could not complain that they were treated worse than they were prepared to treat others, it does not follow that anyone is entitled to administer those deserts. Presumably, Himmler deserved at least to be starved to death or worked to death, if not beaten to death; he could hardly have complained. It does not follow that an international court would have been justified in imposing such penalties" (Card 2008, 12).

[17] Other possibilities for justification include (among others) a right forfeiture-based theory of punishment, or a fairness-based theory of punishment. For a discussion of both see Boonin 2008, 85-154.

[18] One might argue, for example, that the principle of proportionality in punishment presupposes an unrealistic aptitude to measure harm. For a discussion of this objection see, for example, Kershnar 2001, 193-195. One might also argue that the principle of proportionality in punishment actually leads, in some cases, to unjust punishments (not severe enough, for example). This could provide some reasons to believe that the principle of proportionality is a problematic normative principle. For a formulation of this objection see, for example, Boonin 2008, 112-114. One might also argue that the principle of proportionality is only based on a misleading and problematic intuition. For example, Jeff McMahan claims "Retributive torture [i.e., penal torture] also lacks any justification other than in certain intuitions, which I think we should regard as the relics of an earlier stage of moral evolution" (McMahan 2006, 242).

fairness, I will not discuss this objection here.[19] I will instead focus on a second set of objections. These objections attack my scalar understanding of modes of punishment. Indeed, one might say that although torture can be thought of as on a hurt-scale with other modes of punishment, there is something special about torture that nonetheless forbids us from using it. Unlike the first objection, does not attack the claim that the principle of proportionality plays concerning justice punishment, but claims that it has limits that can be grasped from an understanding of the nature of certain modes of punishment.

I understand the objection as follows: there is something special about torture distinguishing it from all other acceptable types of punishment, making penal torture harmful (and not only hurtful) whatever the circumstances. If penal torture is intrinsically harmful (i.e., a wrongful hurt), this would preempt the normative role the principle of proportionality might play. Even if we believe the principle of proportionality should play a normative role, we accept that it has limits. Put simply, the harm principle would necessarily disallow penal torture since it always and necessarily constitutes a harm. In the introduction, I referred to this position as the *asymmetry thesis* since it claims we should treat penal torture differently from other modes of punishment. In the next part, I will discuss what I take to be the most powerful versions of this thesis. I will show that all of them fail to adequately prove that penal torture is always harmful.

Henry Shue (1978), David Sussman (2005), David Luban (2009 & 2005), Michael Davis (2005), Richard Matthews (2008), Leon S. Sheleff (1987) and Claudia Card (2008 & 2010), among others, have written on the morality of torture, attempting to conclusively deal with the

[19] I am aware of the fact that the principle of proportionality *qua* proportionality can be subject to many powerful objections. I will here assume that, although I won't address them, these objections are answerable.

“ticking-bomb” hypothesis. Shue provides the following paradigmatic example of the ticking-bomb formulation:

> There is a standard philosopher's example which someone always invokes: suppose a fanatic, perfectly willing to die rather than collaborate in the thwarting of his own scheme, has set a hidden nuclear device to explode in the heart of Paris. There is no time to evacuate the innocent people or even the movable art treasures-the only hope of preventing tragedy is to torture the perpetrator, find the device, and deactivate it (Shue, Torture 1978, 141).

This thought experiment concerns interrogational torture, not penal torture. The important issue is whether the prevention of large amounts of future pain could ever justify the use of torture. The case of penal torture does not involve such a scenario. Yet, the normative work on the concept of torture by these authors is still valuable for the question of justifying penal torture. It is important to keep in mind that I do not attribute the asymmetry thesis to the authors I will discuss in the next chapters. Most philosophers working on torture are only concerned with the practice of torture as an interrogatory method, and only briefly mention the practice of penal torture (if at all). I am only using their analysis of torture as a potential defense of the asymmetry thesis. In the next chapter, I will present the first conception of torture that is good candidate for grounding the asymmetry thesis.

CHAPTER 2: Penal Torture and Inhumaneness

The first way someone might argue for the asymmetry thesis typically begins by claiming that torture is intrinsically inhumane. This is, to some extent, attractive because it matches our initial reaction when thinking of torture. However, it is conceptually poor due to its ambiguity. Indeed, in order to understand the extent to which torture is inhumane when, for example,

imprisonment (of a certain kind) is not, we must first provide a definition of the concept of inhumanity and show what normative work this does concerning torture. One possibility that Kershnar considers and then quickly rejects is defining 'inhumane treatment' as "acts conflict[ing] with the demands of morality" (Kershnar 2001, 186). According to this version of the inhumane-treatment-objection, torture should be proscribed because it is an act conflicting with the demands of morality. He rightly rejects this objection by pointing out that it merely begs the question. Torture would be morally wrong (and thus harmful) because it is morally wrong.

However, Michael Davis provides a more challenging defense of understanding torture as uniquely inhumane (Davis 2005). Davis claims that a necessary condition for finding something inhumane is to find it *shocking*: "to claim that a certain way of treating people is inhumane (in a particular society) is to claim that its use shocks all or almost all (in that society)" (Davis 2005, 8). He insists on the fact that the shockingness condition is only a necessary condition and not a sufficient one – obviously, a lot of things are shocking but not inhumane.[20] A sufficient account of inhumane treatment, suggests Davis, is the following: the shockingness condition and "a) a way of treating another person, b) against her will, and c) not for her benefit" (Davis 2005, 8). Obviously, this definition of inhumane treatment is not *prima facie* satisfying. Indeed, if one fires a person from her job because she is black, the way one treats her is shocking, against her will and obviously not for her benefit. However, we would not want to qualify such an act as inhumane. Although this already shows the weakness of Davis's account, I will focus on his claim that the shockingness condition does the normative work of explaining why torture is particularly evil. Davis's analysis offers an interesting defense of the prohibition of torture as a mode of punishment (i.e., of the asymmetry thesis):

[20] For example, the practice of self-mutilation may be shocking but not inhumane.

(1) Penal torture is a way of treating another human being against her will and not for her benefit that is *shocking*.

(2) **Therefore**, penal torture is morally impermissible.

The weakness of this argument is that it is doubtful that an emotive component such as Davis's shockingness condition could ever support the conclusion. Davis acknowledges that the shockingness condition is highly subject to changes in time, culture, etc. A simple counter-example can show the obvious problem with Davis's argument. Let's imagine a liberal state within which the vast majority of people are conservative Christian. It is likely that they might find the following shocking: a mode of punishment consisting of forced community service at an abortion clinic. However, we do not want to say this form of punishment is morally impermissible.[21] Thus, it is clear that the conclusion (2) in the argument above cannot follow from premise (1).

Davis attempts to respond to this objection by pointing out the fact that "the analysis of inhumaneness offered here is not fundamentally emotivist. A formal principle, a version of Kant's categorical imperative, explains the moral status of inhumane treatment. Shock simply gives content to that principle" (Davis 2005, 169-170).

Davis's normative work seems Kantian: for example, he identifies the connection between shock and morality as his own formulation of the categorical imperative:

> If we treat someone in a way we generally find shocking, we do not treat her as a person—or, at least, we do not if we treat her that way against her will and without benefit to her. We force upon her something that does not usually happen

[21] One might argue that it actually is impermissible for the state to force a criminal to do a type of community service that goes against his religion. But, in my thought experiment, it need not be the case that the criminal being punished here is also a conservative Christian for the mode of punishment to be shocking to the community. Even if the criminal does not have any problem with abortion, it is still likely to be the case that the conservative Christian community will be *shocked* by the mode of punishment as it would promote something they think is immoral.

> to persons we know, something so bad that the sight (or perhaps even the contemplation) of it makes us uncomfortable (Davis 2005, 168).

I agree with him that a Kantian analysis of the idea of 'inhumane treatment' is a plausible way of claiming that torture has a particular moral standing (different from other modes of punishment).[22] But claiming that the shock of torture gives content to the Kantian principle involved here does not answer the "emotion" objection against Davis's position – it actually confirms it. Although Kant agrees that all actions (moral actions included) are the result of desires, he distinguishes between "object-dependent" desires and "principle-dependent" desires.[23] Moral actions, according to Kant, are only the result of principle-dependent desires. An example of object-dependent desire is the desire that I have to run away when I feel fear. My fear, as a feeling, is an object and not a principle. Conversely, moral actions are the result of purely object-independent desires. For Kant, when I act morally, the pure form of the moral law (i.e., the categorical imperative) is the only object of my desire. If the maxim of action "do not torture" is justified on the basis of the shockingness component, it cannot possibly be an action purely motivated by morality (*sensu* Kant). The shock component (and Davis does not deny this) is emotional. If I have the desire to stop my American friends from adding Coke and ice to a glass of red wine because I find it shocking, my desire is object-dependent in the sense that it depends on an emotion. Thus, even though Davis's shock version of the categorical imperative does have a Kantian flavor, it cannot have the shape of a rational principle. For this reason, Davis's interpretation of the inhumaneness of torture cannot be genuinely Kantian and thus fails to answer the "emotion" objection. It is now clear that the shockingness argument fails to provide support for the asymmetry thesis.

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[22] Although it is a plausible position, I will argue in the next chapter that it fails to support the asymmetry thesis.

[23] See Rawls 2008, 150 and Darwall 2009, 119-221

Although Davis's interpretation of the inhumaneness of torture does not satisfyingly provide support for the asymmetry thesis, there are other possibilities. A deontic interpretation of the inhumane element in torture is possible. It consists in understanding inhumaneness as an attack upon human dignity. This is probably the most popular way of rejecting torture among philosophers, so I will address it in a separate chapter. Another possibility is to argue that what makes penal torture inhumane is the fact that it is a mode of punishment involving severe pain for the person being punished.

That penal torture is painful is an undeniable fact, but it fails to support the claim that it is intrinsically wrongful. Although this position is fairly common (it is probably one of the most intuitive objections against penal torture), it is untenable and we can easily see that if we look at the structure of such an argument:

(1) X is painful

(2) **Therefore,** X is not morally permissible,

Accepting this means accepting the claim that tattoos, piercings, scarifications, as well as dentistry and child birth, are morally impermissible. No one, I believe, would claim that a dentist or a midwife *wrong* their patients on the ground that pain is a foreseeable consequence of their activity. One might argue that there is a relevant dissimilarity between penal torture and these activities that explains why we think that the former is impermissible but not the later: penal torture constitutes coercion when dentistry and child birth do not. However, I believe this dissimilarity is irrelevant when trying to determine if pain is morally problematic. It is evident that coercion morally matters, but I am only attacking the claim that pain is intrinsically evil. In other words, claiming that penal torture is harmful because coercion is wrong is a totally different argument than arguing that penal torture is harmful because pain is wrong. I believe that

my examples above show that arguing that penal torture is harmful (i.e., a wrongful setback to interests) *because pain is intrinsically wrongful* is an untenable position.

One might argue that there is a relevant dissimilarity between the practices mentioned above (i.e., tattoos, etc.) and torture because the latter *intends* to cause the pain when it is not the case for the other practices. Torture would be morally impermissible because torture is intentionally painful. However, this conclusion does not follow from the truth of its premise. Jeremy Wisnewski, in his book *Understanding Torture* (2010), provides clear examples of practices that intend to cause pain but that we think are morally permissible and should be tolerated within the liberal state: Sado-masochistic practices as well as some religious practices (e.g., extreme forms of asceticism) constitute intentional and willfully inflicted pain. This, I believe, shows that saying that penal torture is an extremely painful and intentional hurt fails to support the claim that it is morally impermissible.

At this point, one might argue that although inflicting pain is not always morally problematic, doing so upon an unwilling other is necessarily problematic. However, it should be clear that the fact that penal torture is inflicted on an unwilling other cannot possibly support the asymmetry thesis. Indeed, legal punishment is necessarily coercive. This means that, because coercion can be justified (since some modes of punishments are morally justified), it does not necessarily constitute wrongdoing. And, as I have just argued, neither does pain. Thus, if one wants to argue that inflicting pain on an unwilling other is necessarily morally wrong when coercion and pain, by themselves, are not, one needs to provide an argument for why the conjunction of the two turns into something always wrongful. One way to defend this position is to claim that this conjunction is morally problematic because it results in an act of cruelty,[24] and

[24] As we will see, the idea of intentionally inflicting pain on an unwilling other is very close to Judith Shklar's definition of cruelty (which I will discuss in this chapter).

we take cruelty to be highly morally condemnable. This, I believe, constitutes the basis for what I take to be one of the most challenging versions of the asymmetry thesis: Penal torture is intrinsically wrong because it is cruel. Indeed, it is not a coincidence that the well-known UN definition of torture was written in the context of the Convention against Torture and Other *Cruel*, Inhuman, or Degrading Treatment or Punishment.

Cruelty in punishment is often characterized in terms of excess in punishment.[25] In his article "Punishing Cruelly: Punishment, Cruelty and Mercy," Paulo Barrozo claims that "[i]n the context of the prohibition of torture and other cruel punishment … the idea of cruelty seeks to mark and check the *behavior of the agents* of punishment in cases in which it was unreasonably instituted, disproportionately applied, or excessively enforced" (Barrozo 2008, 69). But, as I argued in the first chapter, it is possible to think of cases of penal torture respecting cardinal and ordinal proportionality. Now, punishing cruelly might also refer to punishing in the wrong way. This is an objection against the kind of punishment being used (e.g., penal torture). I will now discuss this objection against penal torture.

In order for this position (i.e., penal torture is cruel) to successfully support the asymmetry thesis, one must provide a definition of cruelty such that (a) if *x* is an instance of penal torture then *x* is cruel **and** (b) if *y* is an instance of permissible punishment then *y* is not cruel. Condition (a) corresponds to the idea that the definition must make the claim "penal torture is cruel" true. Condition (b) rather concerns the support of this claim for the asymmetry thesis. Although these conditions might not be *sufficient* for a good definition of cruelty, they are *necessary*. Indeed, the asymmetry thesis says that we should treat penal torture differently from other modes of punishment. If cruelty is what justifies treating penal torture differently than

[25] Seneca's *De Clementia*, for example, offers such a conception of cruel punishment.

other penal practices, it must be the case (i.e., it is necessary) that penal torture is cruel (i.e., condition (a)) when other accepted modes of punishments are not (i.e., condition (b)). I will now discuss a few candidates for a definition of cruelty and show that they fail to provide good grounds for the asymmetry thesis. It is important to keep in mind that I do not attribute the asymmetry thesis to any of the authors I will discuss below. I will only use their definitional work in an attempt to make this version of the asymmetry thesis as powerful as possible.

Philip Hallie provides a definition of cruelty that seems to constitute a good first candidate. In *The Paradox of Cruelty*, he claims "cruelty is the activity of hurting sentient beings" (Hallie 1969, 14). This definition is *prima facie* attractive because it corresponds to some of our original thoughts when thinking of cruelty, and covers cases of torturing animals. This definition also clearly satisfies the condition (a). Indeed, penal torture is *necessarily*, and by definition, a setback to interest (i.e., a hurt). All instances of penal torture involve the activity of hurting a sentient being. However, the scope of this first definition is much too broad in order to satisfy condition (b) (i.e., if *x* is an instance of permissible punishment, then *x* is not cruel). All modes of punishment (permissible modes of punishment included) involve, by definition, a setback to interests (i.e., a hurt). Thus, any legal punishment, by definition, is an "activity of hurting sentient beings" (i.e., Hallie's definition of cruelty). It follows that if we accept Hallie's definition of cruelty, the claim that penal torture is cruel fails to support the asymmetry thesis. If using monetary fines is said to be cruel as well, one cannot claim that it is morally permissible when penal torture is not – on the ground that penal torture is cruel.

A second and more challenging definition of cruelty, provided by Judith Shklar, states that cruelty "is the deliberate infliction of physical, and secondarily emotional, pain upon a weaker person or group by stronger ones in order to achieve some end, tangible or intangible, of

the latter" (Shklar 1984, 29). This definition is an improvement over the previous one since it narrows down the scope of setbacks to interests to the painful ones. The strong-over-weak proviso might seem a little surprising and unsatisfying for some.[26] This definition surely satisfies condition (a) (i.e., if *x* is an instance of penal torture then *x* is cruel). It is undeniable that penal torture is extremely painful. Nevertheless, Shklar's definition fails to satisfy condition (b). Indeed, endorsing this definition implies that a lot of morally permissible behaviors are also cruel. John Kekes nicely formulates this objection as follows: "[Shklar's definition] also has the fatal consequence of making surgeons, dentists, physical fitness instructors, people fighting in self-defense, and *judges imprisoning criminals all cruel*"[27] (Kekes 1996, 836). Indeed, penal imprisonment causes emotional pain for criminal, since being deprived of the contact with others – including one's loved ones, is a form of emotional pain.[28] It is important to keep in mind that, in legal punishment, the setback to interests has to be intentional (as Shklar's definition of cruelty requires). Indeed, in order to have legal punishment, the setback of interest should be intended – this is condition (3) of the definition I provided in the introduction. This proviso is what allows us to distinguish legal punishment from, for example, a fee for processing a marriage license. David Boonin explains that "when the state charges a fee for processing a marriage license, it understands that the cost imposes a [setback of interests[29]] on those getting

[26] John Kekes, for example, in "Cruelty and Liberalism," rejects this proviso by pointing out the fact that a weaker person could torture a stronger one (Kekes 1996, 836).

[27] Emphasis mine

[28] One might argue that what penal imprisonment aims for is *only* deterrence of future crimes and not the setback to interests *per se*. This type of justification is rather problematic (pure deterrence-based theories of punishment are close to indefensible). But if one is willing to claim that deterrence is the real and only aim of penal imprisonment (i.e., that the state does not punish *because* it will setback the interest of the criminal), then it can be argued that it is also the case for penal torture. This means that if we want to say that the emotional pain penal imprisonment constitutes should not be taken into account, we should treat the physical pain penal torture constitutes the same way (i.e., it should not be taken into account).

[29] Boonin here uses the term "harm" instead of setback of interest. But, as I mentioned in footnote 2, he uses the term harm in the way that I use the term hurt (i.e., setback to interests).

married, but this is not its intention" (Boonin 2008, 13). Rejecting condition (3) of my definition of legal punishment would thus commit us to the claim that a fee for processing a marriage license is a form of legal punishment (since it satisfies all the other criteria of my definition). Keeping condition (3) in mind, we see that if intending to cause (some sort of) pain is what makes an action cruel then some morally permissible punishments must be considered cruel. Thus, Shklar's definition fails to satisfy condition (b) (i.e., if *x* is an instance of permissible punishment then *x* is not cruel).

One might object that the suffering and pain that penal imprisonment (and other accepted modes of punishment) involves are not *directly intended*. Indeed, the fact that punishment is by definition an intentional setback of interests that often has the foreseen consequence of producing suffering for the person being punished does not mean that the suffering was intended.[30] With penal torture, on the other hand, the suffering is necessarily part of the intention of the punisher. Because of this dissimilarity between penal torture and other morally acceptable modes of punishment, condition (a) would still be satisfied by Shklar's definition of cruelty. Indeed, the definition would not imply that accepted modes of punishments are cruel (because they do not *intentionally* inflict pain upon criminals). Thus, this definition of cruelty would still be a good candidate for the cruelty version of the asymmetry thesis.

This objection is challenging. However, it seems dubious to say that the suffering involved in penal imprisonment is not intended at all. It is true that being imprisoned does not necessarily involve suffering. But I believe that when we punish particularly serious crimes with life imprisonment, we often want and even expect the criminal to suffer from being deprived of the freedom to live her life as she wants (e.g., the suffering caused by not seeing the people she

[30] I owe this objection to Dr. Andrew J. Cohen, personal correspondence, October 22nd 2011.

cares for, etc.). This claim is difficult to verify and some might thus find my response unsatisfying. However, I will show that even if we assume that this objection stands, Shklar's definition of cruelty is still problematic and fails to provide good grounds for the asymmetry thesis. Indeed, even if this definition could actually satisfy both conditions (a) and (b) (i.e., (a) if *x* is an instance of penal torture then *x* is cruel and (b) if *y* is an instance of permissible punishment then *y* is not cruel), it would not justify the asymmetry thesis. As mentioned above, conditions (a) and (b) are only *necessary* conditions (and not sufficient ones) for having a good definition of cruelty (i.e., a definition providing support for the asymmetry thesis). I believe the following example shows that Shklar's definition is still problematic even if we assume that it satisfies (a) and (b): Imagine that Jon finds his best-friend, Brian, passionately kissing Jon's fiancée. Jon is very unhappy about this, and he charges toward Brian and punches him in the face. In this case, it is clear that Jon deliberately and intentionally inflicted physical pain upon Brian. And although we might want to say that Jon's behavior is morally questionable, we surely do not want to say that it is cruel. Yet, Shklar's definition implies that Jon acted with cruelty. This example reveals a problem with this definition of cruelty. The fact that its extension includes the Jon-punches-Brian case (when it should not) implies that the scope of the definition is too broad. Being cruel means more than just intentionally inflicting pain on an unwilling other – otherwise we would have to say that Jon was being cruel when he punched Brian. In other words, there is another feature that *x* must have in order for "*x* is cruel" to be true. Thus, this definition cannot be used to prove that penal torture is cruel and, consequently, it fails to provide support for the cruelty version of the asymmetry thesis.

Although the two previous candidates were unsatisfying, there is a third and more challenging definition of cruelty that I will now discuss. In his paper "Cruelty and Liberalism,"

Jonh Kekes points out that the main problem with the two previous definitions is that they do not take into account the *agent's state of mind*:

> If the agent's state of mind is ignored, then it becomes impossible to distinguish between cruelty and justified punishment, painful therapy, physically demanding training, telling hurtful truths, and similar benevolently motivated inflictions of pain. Surely, a definition of cruelty should allow that there is a moral difference between emergency amputation in the field without anesthesia and severing a limb by chain saw in order to extract information (Kekes 1996, 840).

We see that, according to Kekes, a good definition of cruelty must include a condition concerning the agent's state of mind. Thus, Kekes defends the following definition: "in its primary sense, cruelty is the disposition of human agents to take delight in or be indifferent to the serious and unjustified suffering their actions cause to their victims" (Kekes 1996, 838).

This definition constitutes a significant improvement over the two previous: the agent-state-of-mind condition allows this definition to finally satisfy condition (b) (i.e., if *x* is an instance of permissible punishment then *x* is not cruel)—because the state would not take delight in the act, it would not be cruel. Indeed, I think that a reasonable understanding of the practice of legal punishment is that it is something the state *tolerates*[31] and does not "take delight in." It would also be uncharitable to say that the state (and individuals within the state) is indifferent to the fact that legal punishment constitutes a serious setback to the interests of the criminals. Thus, this definition is better than Hallie's and Shklar's since it does not end up including permissible punishments in the extension of the term "cruel." However, his definition still does not help to prove that the cruelty-based version of the asymmetry thesis works.

If we endorse Kekes' definition, the conditional "if *x* is an instance of penal torture then *x* is cruel" is not necessarily true, and thus condition (a) is not satisfied. The main evidence for this

[31] Here, I endorse Andrew J. Cohen's definition of toleration which reads: "an act of toleration is (1) an agent's (2) intentional and (3) principled (4) refraining from interfering with (5) an opposed (6) other (or their behavior, etc.) (7) in situations of diversity, where (8) the agent believes she has the power to interfere" (Cohen 2004, 78).

claim is that, as it was the case for other permissible forms of punishment, it is possible (and likely to be the case) that if the state were to practice penal torture, it would do so without taking delight in it. We can conceive a state having a strong revulsion toward penal torture but also recognizing that, since it is a requirement of justice in punishment, it ought to practice penal torture. It is of course possible to think about a case of penal torture in which the torturer (or the punitive authority) does enjoy the suffering of its victim. Such an instance of penal torture would then be cruel and thus be morally problematic (even though it is independently justified). But it is surely not the case that all instances of penal torture are cruel, if we accept Keke's understanding of "cruel." Since this definition of cruelty fails to satisfy condition (a), it is not a viable candidate for supporting the version of the asymmetry thesis I discussed in this chapter (i.e., penal torture is morally impermissible because it is cruel).

I have shown that what I take to be the best candidates for a definition of cruelty all fail to support the cruelty-based version of the asymmetry thesis. I believe this provide strong evidence for the claim that we should reject this version of the asymmetry thesis. In the next chapter, I will discuss and criticize a second challenging way to support the asymmetry thesis which claims that because penal torture is an assault upon the defenseless, it is morally impermissible. This version of the asymmetry thesis can be constructed using Henry Shue's work on torture.

CHAPTER 3: Penal Torture and Defenselessness

In the previous chapter, I have shown that an understanding of torture stating that it is inhuman fails to support the claim that penal torture is not morally permissible while other mode

of punishment can be. I will now discuss a different version of the asymmetry thesis that claims that torture is morally problematic because the torture subject is totally defenseless.

In his paper "Torture," Henry Shue claims that the characteristic making torture morally problematic is that, most of the time, it violates the "primitive moral prohibition against assault upon the defenseless" (Shue 1978, 125). He does not think that this characteristic is intrinsic to the act of torture; rather, his argument is based on the fact that we *can* identify morally permissible cases of torture because they do *not* constitute assaults upon the defenseless.[32] Nor does he claim that this feature does the normative work *all by itself*; in other words, he does not claim that if a case of torture does not constitute an assault upon the defenseless, then torture is justified. He rather claims that the concept of defenselessness plays a *primary* normative role. Indeed, respecting the moral prohibition against assault upon the defenseless seems to stand as a necessary condition for having the chance of a justified form of torture.

The claim that assaults upon the defenseless are morally condemnable seems to constitute a solid ground for a defense of the asymmetry thesis. Indeed, penal torture is always an assault upon the defenseless. Contrary to interrogational torture (i.e., torturing in order to obtain information),[33] the subject of penal torture does not have any means whatsoever to end the torture. She could possibly know when the torture will end, but she has no means to end it. Michael Davis also points out that the tortured is physically and intellectually helpless (Davis

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[32] In a more recent article, Shue revises this position:

> So I now take the most moderate position on torture, the position nearest to the middle of the road, feasible in the real world: never again. Never, ever, exactly as international law indisputably requires. If the perfect time for torture comes, and we are not prepared to prevent a terroristic catastrophe, we will at least know that we have not sold our souls and we have not brutalized the civilization (Shue 2006, 238-239).

The considerations that seem to have made him change his thoughts on the questions are interesting but they are not relevant to this chapter and do not affect the heart of the argument he presented in his 1978 paper.

[33] The claim that this case might be a case where the tortured is not defenseless is Shue's, not mine.

2005, 164), and this fact seems inseparable from the idea of penal torture. David Sussman phrases it in terms of "passivity" (Sussman 2006, 227). Once the verdict is rendered, the criminal condemned to torture would have absolutely no means of avoiding it. Thus, if it is the case that when torture is an assault upon the defenseless, it is impermissible, then penal torture could never be permissible and this would support the asymmetry thesis. In other words, because assaults upon the defenseless constitute not only a hurt but a harm, penal torture would be morally impermissible. I will propose a few lines of criticism one could take against this idea in order to reject Shue's claim that the feature of being an assault upon the defenseless plays a primary normative work in the case of torture. I will first detail Shue's argument as found in his paper "Torture."

Shue's analysis is placed in the context of a reflection on warfare. In order to illustrate his view on torture, he makes the following remarks: in warfare, attacking noncombatants is morally problematic because it is a form of assault upon the defenseless (Shue 1978, 125). Shue claims the essential distinction between combatant and noncombatants is that combatants who might get killed "had a reasonable chance to survive by killing instead" (Shue 1978, 129). If noncombatants are killed, we find it unjust because they do not have this reasonable chance. Shue claims that the defenseless condition of the noncombatants being assaulted does the normative work in the previous case, explaining why we find it unjust. In the same way, the torture subject, once sentenced, is also defenseless. This is what he thinks plays a primary normative role in the issue of torture. The evidence for this claim, Shue claims, is that the victim of morally less objectionable cases of torture is not completely defenseless. Indeed, according to Shue, the subject of torture is not defenseless as long as she is able to surrender. If she is subject to interrogative torture and possesses information desired by the torturer, and if she knows the

torturer will end all torture as soon as she talks, then she has an escape from further torture. Shue explains what constitutes a case of torture lacking the problematic characteristic of being an assault upon the defenseless, and why it is morally less problematic:

> Accordingly, the constraint on the torture that would, on this view, make it less objectionable would be this: the victim of torture must have available an act of compliance which, if performed, will end the torture. In other words, the purpose of the torture must be known to the victim, the purpose must be the performance of some action within the victim's power to perform, and the victim's performance of the desired action must produce the permanent cessation of the torture. I shall refer to torture that provides for such an act of compliance as torture that satisfies the constraint of possible compliance (Shue 1978, 131).[34]

One might disagree that possessing information desired by the torturer makes the victim of torture less defenseless (in practice and/or in principle). But I will not question this claim and will rather attempt to show that the defenselessness condition cannot do the normative work in the case of the asymmetry thesis.

I believe that looking at morally accepted modes of punishment can show that claiming that the torture subject is defenseless cannot support that penal torture is intrinsically wrong when other modes of punishment need not be. Indeed, a criminal condemned to imprisonment (assuming the verdict is just and the criminal responsible) is defenseless against the hurt that penal imprisonment constitutes. Once sentenced, she cannot defend herself against the state

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[34] Shue also provides an example of what such "less morally unacceptable" torture would look like:

> The proposed victim of our torture is not someone we suspect of planting the device: he is the perpetrator. He is not some pitiful psychotic making one last play for attention: he did plant the device. The wiring is not backwards, the mechanism is not jammed: the device will destroy the city if not deactivated.… The torture will not be conducted in the basement of a small-town jail in the provinces by local thugs popping pills; the prime minister and chief justice are being kept informed; and a priest and a doctor are present. The victim will not be raped or forced to eat excrement and will not collapse with a heart attack or become deranged before talking; while avoiding irreparable damage, the antiseptic pain will carefully be increased only up to the point at which the necessary information is divulged, and the doctor will then immediately administer an antibiotic and a tranquilizer. The torture is purely interrogational. Most important, such incidents do not continue to happen. There are not so many people with grievances against this government that the torture is becoming necessary more often, and in the smaller cities, and for slightly lesser threats, and with a little less care, and so on. (Shue 1978, 142)

imposition of this setback of her interests. Most people even agree that she *should not* be able to. Yet, the hurt of imprisonment does not become a harm in this case even though she is defenseless against it. This is the case for any mode of punishment because it is part of the practice of punishment: the criminal cannot and should not be able to defend herself against the imposition of a just punishment. This shows that the fact that penal torture is an assault against the defenseless does not itself provide support for the asymmetry thesis.

One might argue that criminals do have a right to defend themselves (with lawyers, for example) in court before being punished and that there is no reason to limit my analysis of punishment to the time after a person is found guilty.[35] Indeed, the infliction of a setback of interest is justified in the case of punishment only if the person had a fair trial – i.e., a chance to defend herself. However, this counter objection does not affect my claim that the defenseless condition of the tortured fails to justify the asymmetry thesis (i.e., the claim that we should treat penal torture differently from other modes of punishment). Indeed, there could be a case of penal torture where the presumed criminal's right to a fair trial is being perfectly respected. And if any instance of punishment that is preceded by the respect of such a right is a case of punishment where the criminal is not defenseless, then it means that we can have cases of penal torture that are not assaults against the defenseless. This means that one would need to appeal to a different concept (other than the defenseless condition of the tortured) in order to justify the idea that penal torture can never be justified.

I have shown that the fact that the subject of penal torture is defenseless does not justify the asymmetry thesis. However, a defender of Shue's analysis could readily modify his original claim and say that the fact that the tortured is defenseless supports the asymmetry thesis *because*

[35] I owe this objection to Dr. Andrew J. Cohen, personal correspondence, January 25th 2011.

the practice of penal torture consists in *taking advantage* of the torture subject's defenselessness, whereas other forms of punishment do not. I will show that this version of Shue's analysis also fails to justify the asymmetry thesis.

Richard Matthews insists that, in any case of torture "[t]he torturers exploit the powerlessness and ignorance of the victim for a range of purpose" (Matthews 2008, 45). David Sussman also notes that in torture "the most intimate and private parts of a victim's life and body become publicly available tools for the torturer to exploit as he will" (Sussman 2005, 7). It is true that in the case of penal imprisonment, the defenselessness of the criminal is not exploited when the punishment is imposed. But it *is* the case for other accepted forms of punishment. For example, community services do exploit criminal defenselessness in the same sense: her body (i.e., her labor) becomes a tool available to exploit as the punishing authority wishes (within certain legal constraints). This shows that the fact that penal torture takes advantage of the defenselessness of the tortured does not justify the asymmetry thesis. Of course, the exploitation that torture constitutes is, on a scale, surely much more physically invasive. Thus, at this point, the question becomes: what does justify why punishment must not go further than exploitation of labor on the exploitation scale? One might say that it is because torture is not only more invasive than any other type of punishment, but is a complete exploitation of the tortured defenselessness. In other words, the subject of torture is treated merely as a means and is no longer considered as an end in herself. In Kantian terms, torture would exploit the helplessness of the tortured in a way leading to the destruction of her autonomy. This is the version of the asymmetry thesis I will discuss in the next chapter.

CHAPTER 4: Penal Torture and Dignity

In this chapter, I will discuss a defense of the asymmetry thesis arguing that penal torture is morally impermissible because it constitutes a violation of the dignity of the person being punished. Jean Hampton (Hampton and Murphy 1998), Richard Matthew (2008), David Luban (2009), and David Sussman (2005) endorse this type of position.

The notion of dignity is usually associated with the deontological tradition of ethics (e.g., Kantianism). Every human being is entitled to be treated with dignity and the list of punishments that are morally permissible should only be limited to the ones that do not violate that dictum. A Kantian analysis of torture would thus locate the wrongness of torture (i.e., of any type of torture) in the lack of respect for the dignity of the torture subject.

In order for this deontological claim to justify the idea that penal torture is morally impermissible when other modes of punishment need not be (i.e., the asymmetry thesis), our understanding of the concept of dignity must be such that (a) if *x* is an instance of penal torture then *x* violates dignity **and** (b) if *y* is an instance of permissible punishment then *y* does not violate dignity.

I will claim that the idea of violations of dignity, as understood in the deontological tradition, fails to show that there is something especially wrong with penal torture. I take the Kantian understanding of the concept of dignity to be the best candidate for supporting the asymmetry thesis. For Kantianism, anytime an agent's act fails to respect someone as an end in herself (i.e., as a being pursuing her own ends), it constitutes a violation of her dignity. Stephen Darwall, at the beginning of his book *The Second-Person Standpoint*, writes:

> A central claim of this book, for instance, is that what is called the inviolable value or *dignity* of persons has an irreducibly second-personal element, which

> includes the authority to demand certain treatment of each other, like not stepping on one another's feet (Darwall 2009, 13).

Here, we see that voluntarily stepping on someone else's foot is an action that already constitutes a violation of dignity (as it is understood in the Kantian tradition[36]). More generally, treating a rational being[37] in any way against her will seems to be a violation of dignity and would be morally impermissible. Indeed, the second formulation of the categorical imperative states that an action is moral if and only if the agent does not treat any other as a mere means.[38] When I fail to treat another person as an end in herself, capable of choosing her own ends, I fail to respect her dignity and my action is thus morally impermissible. Richard Matthews endorses this position and condemns political torture (e.g., interrogational torture) on this ground:

> Being essentially coercive, [political torture] involves the deliberate and systematic violation of the will, desires, and choice of the torture victim. Everyone will concede that political suspects are not tortured consensually. Hence anyone in the Kantian tradition will already be opposed to torture on this ground alone. As a dignity and will violation, torture cannot possibly be justified to the person on whom it is inflicted (Matthews 2008, 47).

At this point, an obvious question comes about: if any action performed against the will of someone constitutes a violation of the person's dignity and violating a person's dignity is what makes an action morally impermissible, can any mode of punishment (e.g., penal imprisonment, monetary fines or community services) be morally permissible at all? As Matthews points out about political torture, it is a given that criminals are not being punished consensually, and this is the case for all modes of punishment. Thus, if any way of treating someone against her will is a violation of dignity, then the claim that penal torture violates the dignity of the criminal cannot

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[36] I take Darwall's conception of dignity to be representative of the Kantian tradition.

[37] Children, mentally ill or deficient adult do not fall under this category for Kant.

[38] Kant (1785, 30): "Act in such a way that you treat humanity, whether in your own person or in the person of any other, never merely as a means to an end, but always at the same time as an end."

possibly support the asymmetry thesis. Indeed, condition (b) mentioned above would not be satisfied since morally permissible modes of punishment would also violate the criminals' dignity.

However, it is important to understand that, for the Kantian doctrine, holding people responsible for what they do through punishment is actually a way of respecting them as ends in themselves—that is, respecting their dignity. Human beings are rational agents and have the capacity to set ends for themselves and act for reasons. Respecting human beings as persons (i.e., respecting their dignity) means holding them responsible for what they do. Thus, punishing criminals is actually a way to respect their dignity. Kant explains that punishment does not constitute a violation of dignity as long as the punishment conforms with the universal law the person being punished would chose for herself if she was free from her phenomenal self (i.e., if her will was purely rational and autonomous):

> When ... I enact a penal law against myself as a criminal it is the pure juridical legislative reason (homo noumenon) in me that submits myself to the penal law as one capable of committing a crime, that is, as another Person (homo phaenomenon) (Kant 1797, 42).

In other words, even if criminals seem not to give consent for the punishment, their pure rational self does, and thus punishment is not morally impermissible (because there is some sort of consent from the criminal). Herbert Morris makes a similar observation (although not quite equivalent) in his excellent article "Persons and Punishment:"

> [B]ecause the primary rules are designed to benefit all and because the punishments prescribed for their violation are publicized and the defenses respected, there is some plausibility in the exaggerated claim that in choosing to do an act violative of the rules an individual has chosen to be punished (Morris 1968, 479).

We see that for Morris and Kant, punishing the criminals means respecting their autonomy (or dignity).[39] However, this approach, although it successfully counters my previous objection (i.e., a Kantian understanding of dignity leads to the claim that all punishments are violations of dignity) still fails, in its current form, to support the asymmetry thesis. Indeed, if punishing criminals means respecting their dignity, it seems that penal torture will have no problem doing so, since it is a mode of punishment. In order words, the Kantian understanding of punishment would fail to satisfy the condition (a) I mentioned above (i.e., if *x* is an instance of penal torture then *x* violates dignity).

Nevertheless, Kant himself insists on the fact that saying that punishing criminals respects their dignity does not entail by any means that all modes of punishments are morally acceptable. For one thing, Kant believed that disproportionate punishments were morally reprehensible. The reason for that is that disproportionate punishments are something that the *homo noumenon* of the criminal would never consent to it. It is important to understand that it is not inconsistent for Kant to say that, although punishing criminals respects their dignity, using certain modes of punishment violate of dignity. Thus, at this point, a Kantian defender of the asymmetry thesis needs to provide us with an answer to the following question: why do some modes of punishment not constitute a violation of dignity (and are actually a way to respect the dignity of criminals) when penal torture does? I will now discuss potential and challenging answers to this question.

[39] They both also make a stronger claim: by not punishing criminals, we actually fail to respect their dignity. Indeed, according to them, by not punishing the criminals, we fail to hold them responsible for their action; we would be treating them as we treat people who are not "rational beings" (*sensus* Kant) - e.g., children, mentally ill or deficient adults.

David Sussman offers a first answer that many other philosophers have endorsed. He explains that, torture is special in the sense that it "undermines the very capacities constitutive of autonomous agency itself" (Sussman 2005, 14). Sussman points out that torture involves intense pain, which radically disrupts all rational self-authority. Anyone that had experienced an intense toothache would agree that pain interrupts rational reasoning. This is not the case for other morally permissible modes of punishment. Here, Sussman does not claim that torture constitutes the permanent destruction of agency as, for example, murder does. Indeed, torture need not be so extreme that it makes the person being tortured incapable of exercising her autonomy in the future. The claim is only that penal torture disrupts agency – and not that it destructs it. I will now show that this analysis of torture fails support the asymmetry thesis.

There are, I believe, two ways someone could use the claim that penal torture disrupts rational self-authority (i.e., undermining agency) *qua* support for the asymmetry thesis. The first approach consists in claiming that anything that undermines rational agency is morally impermissible:

(1) Penal torture undermines the agency of the person being tortured.

(2) If *x* undermines agency, then *x* is morally impermissible.

(3) **Therefore**, penal torture is morally impermissible.

The problem with this argument is that the second premise is clearly false. If the mere fact that something undermines agency (as Sussman understands it) is a sufficient condition for making it morally impermissible, then we are committed to the claim that extremely pleasurable treatments, occasional uses of drugs,[40] getting an anesthesia, or even going to sleep, are things

[40] Sussman points out this problem with pleasurable treatment and use of drugs, and thus rejects this argument.

that are morally impermissible as well. They all make rational self-authority temporarily impossible as penal torture does. Without this key premise (2) being true, the conclusion that penal torture is morally impermissible does not follow.

The main problem with the previous argument is that it does not insist on the fact that, although undermining agency in the few cases mentioned above is morally permissible, it can never be permissible when it concerns a mode of punishment. But, one could fix this problem and significantly improve the previous argument by including Kant and Morris's understanding of punishment (i.e., punishing criminals means respecting their dignity). Such an argument would be the following:

(1) Penal torture undermines the agency of the person being tortured.

(2) Punishing criminals means respecting their dignity.

(3) Undermining the agency of someone is the denial of respect for the dignity of the person.

(4) **Therefore**, torture *qua* mode of punishment is morally impermissible.

Although this approach is more challenging than the previous one, it still fails to provide a sound argument for the asymmetry thesis. The main problem is an equivocation in premises (2) and (3). Indeed, when Kant and Morris defend the claim that punishing criminals means respecting their dignity, they mean two particular things: (i) *holding them responsible* for their actions (here, crimes) and (ii) *giving them the treatment they consented to* (by their *homo noumenon* giving consent to the punishment). However, if this is how we are to understand the notion of respect for dignity in premise (3), then this premise is far from being obviously true. Indeed, penal torture clearly respects dignity in sense (i). Now, it is important to point out that if the *homo noumenon* of the criminal can consent to penal imprisonment, it is unclear why it could not consent to penal torture. At this point, the defender of the asymmetry thesis needs to provide us

with an answer to the following question: why does our *homo noumenon* can consent to certain modes of punishment when it cannot possibly consent to penal torture?

A Kantian response might be that the reason why our *homo noumenon* will not consent to physical pain as punishment is that it undermines agency, and being an agent is a necessary condition for human dignity.[41] But as we saw in the previous argument, this claim needs to be narrowed down to be accurate – it would otherwise imply that our *homo noumenon* cannot possibly consent to a disruption of agency such as going to sleep, experiencing pleasure, etc. We thus need a criterion allowing us to distinguish between a case of a disruption of agency that the *homo noumenon* can consent to (e.g., going to sleep) and a case of something undermining agency that the *homo noumenon* cannot possibly consent to. Sussman offers an interesting way to do so that I will now discuss.

Sussman proposes (what he qualifies as) an "extension" of the Kantian idea that torture fails to respect the autonomy, or dignity, of its subject. What is characteristic of torture, claims Sussman, is that it "involves a deliberate perversion of [the] value [of dignity], turning our dignity against itself in a way that must be especially offensive to any morality that honors it" (Sussman 2005, 19). His idea is that there is something about torture that forces us to use our rationality against itself, and that it is what makes torture intrinsically wrongful (and thus harmful).[42] What torture achieves is a "special" way of undermining agency (i.e., different from unproblematic cases of disruption of agency discussed above), which uses dignity to attack itself, and that is why the *homo noumenon* cannot possibly consent to it. Because other modes of punishment do not have this feature (i.e., dignity attacking itself), whereas penal torture does,

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[41] I owe this point to Dr. George W. Rainbolt, personal correspondence, November 11th 2011.

[42] Sussman also makes this point in his 2006 article "Defining Torture."

Sussman's analysis would seem to provide a solid ground for the dignity version of the asymmetry thesis. I will now present Sussman's position in more detail and then show that it fails to do so.

Sussman's interesting understanding of torture is based on a sort of 'linguistic' understanding of pain. He begins by pointing out the fact that pain does not have the same "self-referential demandingness" (Sussman 2005, 21) as pleasure (or the use of drugs). He explains: "I might ignore or disregard my pain, but to do so I must counter some motivational and evaluative 'protocommitments' that have already begun to engage my will by the time I can actively confront the question of how to respond" (Sussman 2005, 21). This means that, although pleasure might be describable as a part of the 'language' of the body, it does not have the same command-structure as pain has. Pleasure does not ask our attention as pain does, Sussman explains. Experiencing pleasure does not ask for a response, or a reaction. Pain, though, does; Sussman states that pain is the "primitive language of bodily commands" (Sussman 2005, 21). The effect pain has on us is the same as a command addressed to us would have. Christine Korsgaard's understanding of pain is very similar to Sussman:

> If the painfulness of pain rested in the character of the sensations rather than in our tendency to revolt against them, our belief that physical pain has something in common with grief, rage and disappointment would be inexplicable (Korsgaard 1996, 148).

Here we see that experiencing pain implies a reaction of revolt against the pain. Elaine Scarry (who Sussman cites) describes this revolt as a revolt against our own body: "my body hurts me" (Scarry 1985, 47).

However, it is doubtful that what Sussman means by "turning the torture victim's *agency* against *itself* (emphasis mine)" (Sussman 2005, 30) is the simple fact that when I feel pain, my bodily sensations 'act' against my rational self. Indeed, when experiencing pain, we experience

how it disrupts our self-governance; in Kantian terms: we experience how our phenomenal-self takes precedence over our rational-self. And our reaction against it constitutes the expression of our will to *regain self-governance* (and not, to be clear, losing self-governance). So, the painfulness of torture, even conceived as an attack of the body against the mind, does not show that torture turns our dignity against itself, as Sussman claims.[43]

Sussman provides a second argument for the claim that penal torture is a form of agency turning against itself. He argues that because torture is such a painful treatment, it makes the tortured subject wish for death. According to him, the wish for death is the wish of the total destruction of the will. Sussman quotes Jean Améry:

> Amazed, the tortured person experienced that in this world there can be other as absolute sovereign... Astonishment at the existence of the other, as he boundlessly asserts himself through torture, and astonishment at what one can become oneself: flesh and death. The tortured person never ceases to be amazed that all those things one may, according to inclination, call his soul, or his mind, or his consciousness, or his identity, are destroyed when there is that cracking and splintering in the shoulder joints. That life is fragile is a truism he has always known... But only through torture did he learn that a living person can be transformed so thoroughly into flesh and by that, *while still alive*, be partly made into a prey of death (Améry 1995, 136).[44]

Because the tortured person wishes to die, wishes the destruction of her own rational-self, penal torture turns dignity against itself in a way that other modes of punishment do not.

However, I still fail to see how wishing for death is the expression of an agency turning against itself. As mentioned before, the fact that when feeling pain, we revolt ourselves against

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[43]The case of interrogational torture is surely different. Indeed, Sussman mentions that many forms of interrogational torture are practically structured in such a way that the tortured participates in the abuse against his own body. Indeed, the tortured has the (false or accurate) belief that what she says or does can have an impact on what the torturer decides to do. In seems that we could see this form of torture as arguably turning one's dignity against itself. But penal torture is not structured as such; the torture subject faces the reality that he has to endure the suffering, and has no means to end it. This, I believe, is evidence for the claim that penal torture does not actually turn one's dignity against itself. In the case of penal torture, the physical pain might undermine all self-governance, but it is clearly not a case where one's agency attacks itself.

[44] Sussman's emphasis; cited by Sussman (Sussman 2005, 33).

the pain, is an expression of our agency turning against the body, and not against our dignity (or agency). Thus, what Sussman is describing about torture is not a special type (i.e., especially morally problematic) of attack against dignity. Rather, it is not an attack against dignity at all. It is important to understand that revolting ourselves against pain is not inhumane but instead very human: we seek to regain control of the mind over the body (and not the opposite). Wishing to be dead may also be wishing to regain control over the body and is not, in this sense, an attack against dignity. Hence, Sussman's understanding of torture here fails to provide a good reason to believe that our *homo noumenon* would not consent to penal torture (when it would consent to getting an anesthesia before surgery, for example).

At this point, one could respond that the Kantian idea of *homo noumenon* is too unclear to make sense of (*ii*) "*giving criminals the treatment they consented to*" as a way to respect their dignity by punishing them. Another way to give meaning to (*ii*) would be to talk about what a *rational* being could consent or not consent to, instead of the consent of our *homo noumenon*. One might argue that because no one in his or her right state of mind could *really* consent to being tortured, penal torture cannot possibly be a way of "giving criminals the treatment they consented to" (i.e., (*ii*)). This argument does not stand on the obscure Kantian notion of *homo noumenon*, but rather on determining what type of treatments our phenomenal self can rationally consent to. The relevant concept here is of course not just *any* kind of consent but more specifically *valid* consent (i.e., "really" consenting). What an insane person could consent to is irrelevant to our discussion since just punishment requires full responsibility. If it is the case that no one could ever give valid consent to being tortured, then it is impossible for penal torture to be a way of giving criminals what they consented to (i.e., to respect their dignity). I shall now show that this argument is unsound and thus fails to provide support for the asymmetry thesis.

The key concept in this argument is of course *valid* consent. In order for this argument to support the asymmetry thesis, it needs to be the case that our idea of what validates consent is not too broad (such that it can exclude torture) and not too narrow (such that it can include imprisonment, community services, etc.). Joel Feinberg provides a helpful list of necessary conditions for having *valid* consent: “a person’s consent is fully voluntary only when he is a competent and unimpaired adult who has not been threatened, misled, or lied to about relevant facts, not manipulated by subtle forms of conditioning” (Feinberg 1926, 116). I will now offer what I take to be good evidences for the claim that it is possible to give valid consent to being tortured.

The work of Marina Abramović, I believe, can testify of the fact that one can give valid consent to treatments very similar to what we would call torture. Indeed, many of her performances involve experiencing intense pain for a long period of time, or even letting people do painful things to her. Judith Thurman explains:

> Pain is the constant in [Marina Abramović’s] art.... She has screamed until she lost her voice, danced until she collapsed, and brushed her hair until her scalp bled. In an early piece, she ingested anti-psychotic drugs that caused temporary catatonia. She and Ulay [her ex-husband and collaborator] traded hard slaps, hurled themselves at solid walls, and passed a breath back and forth, with locked lips, until they fainted. He pointed an arrow at her heart as she tensed the bow (Thurman, 2010, 26).

Thurman also relates that, in 1974, in a piece called “Rhythm 0,” the artist

> invited an audience in Naples to probe, soil, bind, tease, disrobe, penetrated, or mark her body, "as desired," for six hours, using any of seventy-two implements arrayed on a table. They included nails, lipstick, matches, paints, a saw, chains, alcohol, a bullet, and a gun that was, at one point, aimed at her head. "I am the object," she declared in her program notes (Thurman, 2010, 28)

This, I believe, provides some empirical evidence for the claim that it is possible for a rational being to give valid consent to treatments which may very well be classified as torturous. One

might argue that the case of Marina Abramović does not satisfy Feinberg's criterion of competence for having valid consent. The idea here, I take it, is that there must be something wrong with the artist for her to voluntarily submit herself to such treatments. Of course, the idea supporting this claim cannot be that if someone "consents" to torture, then this person is incompetent. This would beg the question (i.e., no one can give consent to being tortured because no one can validly consent to being tortured). One would rather need empirical evidence about Marina Abramović's mental state. Such data is not available to us. However, it seems that, given the thought that Abramović puts into her performances, and given the way she is able to talk about and analyze them afterwards (e.g., in her interview with Judith Thurman (2010)), claiming that Marina Abramović does not *rationally* consent seems inaccurate and disrespectful.

At this point, one might argue that even if we grant that Abramović fully consented to the treatments Judith Thurman describes in her article, it does not follow that she fully consented to torture. Although her performances involve pain, this is not comparable to electric shock treatment to the genitals, severe beatings, inserting a needle under the fingernails or any other paradigmatic torture cases. Thus, even if we have some evidence that it is possible to give valid consent to painful treatments, we still lack evidence for the claim that someone can fully consent to being tortured.

However, I believe that, although we might not have empirical evidence of someone validly consenting to torture, it is possible to think about a hypothetical case of that. Consider the following thought experiment:

> Susan is nineteen and has recently lost her two legs in a tragic car accident. She and her family (including her twenty-seven year old brother, Joseph) spent the past few months seeing numerous surgeons in order to find a way for Susan to walk again and have the normal life every nineteen year old girl deserves. After many unsuccessful attempts, Joseph finally finds a doctor offering him a possible solution. He goes and sees the doctor by himself, as the rest of the family lost

> hope. The surgeon tells him that she knows an engineer who can create a pair of mechanic legs for Susan which, after a short adaptation period, will feel like real legs and look exactly like real legs. There is no risk of transplant rejection or of any sort of infection. Joseph is very enthusiastic about the idea but the surgeon immediately warns him: this engineer is unconventional (that is why his product is not more available) and will only provide the mechanic legs if Joseph consents to be tortured (by the engineer) for exactly two hours. The torture will consist in four sessions (thirty minutes each) of (1) waterboarding, (2) electric shock treatment to the genitals, (3) suspending by the legs with arms tied behind back, and (4) inserting a needle under the fingernails. The torture will be exactly as described (in time and nature). Joseph will receive medical assistance immediately after the end of the torture. The torture will leave no physical trace. No one will know that Joseph had to be tortured in order to obtain the legs for his sister – unless he wants people to know. If Joseph decides to decline the offer, no one will ever know that he was once offered the possibility for his sister to have new legs. The surgeon will also give a pill to Joseph such that he will forget about the fact that he once had this opportunity. His sister will not die or live a totally miserable life if Joseph refuses the torture. On the other hand, if Joseph decides to be tortured, her happiness will significantly improve, as she will be able to live a normal adult life. The surgeon requires Joseph to take three weeks to think about the two options. After the end of the three weeks period, Joseph tells the surgeon that he accepts the deal.

I believe this thought experiment shows that it is not conceptually impossible for someone to give valid consent to being tortured. I do not think it is implausible that someone in Joseph's position can accept to be tortured. At this point the question is the following: in the thought experiment described above, did Joseph rationally consent to the torture? I believe that, in this case, we want to answer that he did give fully voluntary consent to it. Indeed, we want to say that Susan has new legs *thanks to* Joseph (i.e., we want to say that Joseph was responsible for his action). Now, to say that Joseph gave valid consent means that we are committed to the claim that it is not impossible for someone to fully consent to being tortured.

One might bite the bullet and argue that Joseph did not fully consent to the torture. Indeed, refusing the torture would lead to the undesirable consequence of his sister living a difficult life. Because of this circumstance, Joseph was not fully free of constraint when he

consented to the torture. Neither Joseph, nor anyone in their right state of mind, would consent to torture if such a constraining circumstance was out of the picture.

However, the problem with this argument is that it is incompatible with the asymmetry thesis. Indeed, the version of the asymmetry thesis discussed in this chapter claims that penal torture cannot possibly respect the dignity of the criminal (which would mean giving to the criminals what they consented to) when other acceptable modes of punishment can. The idea is that since no one can give valid consent to torture then penal torture cannot be a way to give the criminals what they consented to (i.e., respecting their dignity). Now, if one is committed to a conception of what invalidates consent so thick that, in the thought experiment above, Joseph did not fully consent (because of the constraining circumstance), then one is also committed to the claim that no one would consent to imprisonment. Indeed, if someone had to choose (only) between option (a) "a year of imprisonment" and option (b) "no imprisonment at all" where there is no undesirable consequence accompanying option (b) at all, then she would never give valid consent to option (a). No one in his or her right state of mind would pick option (a) over option (b), all things being equal. Thus, the position claiming that penal torture fails to respect the dignity of the criminal because torture is something that is not possible to give valid consent to fails to support the asymmetry thesis.

In this chapter, I have showed that the argument claiming that penal torture is morally impermissible because it constitutes a violation of the dignity of the person being punished fails to support the asymmetry thesis, as the previous versions of it did.

CONCLUSION

I believe I have shown that the claim that penal torture is intrinsically harmful is a bad assumption to make since the most common and powerful arguments defending it fail. Thus, it is a shame that the vast majority of philosophers interested in punishment have neglected to critically examine it. I do not claim to have provided arguments showing that the liberal state *should* practice penal torture, or that there *are no* significant moral reasons against us doing so. As mentioned in introduction, I believe there are powerful and convincing arguments (pragmatic and aretaic, among others) for the claim that the liberal state should not use penal torture. However, it does not mean that the penal torture debate should be shelved. I believe the structure of my arguments (i.e., the fact that I have argued against the asymmetry thesis) also invites us to take more seriously the abolitionist debate: if we strongly believe that there *is* something intrinsically wrong about penal torture, and that (as I have shown) believing this is inconsistent with believing that other modes of punishment can be justified (i.e., are not necessarily wrongful), could it be that there is something wrong with the practice of punishment in the first place? As I have showed, we need to challenge our assumptions about the practice of legal punishment even if doing so forces us to re-examine our other beliefs.

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