SAMENESS/DIFFERENCE, INTERNATIONAL HUMAN RIGHTS LAW, AND THE POLITICAL MEANING OF TORTURE

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I. INTRODUCTION

Human rights and humanitarian law concerning torture simultaneously emphasize and de-emphasize the body in politically and theoretically interesting ways. Law offers competing accounts of the body, as something either natural or constructed, upon which legal normativity is erected. There is likewise little theoretical consistency in the range of conventional explanations of torture and in the normative basis for its condemnation. Liberal legalism seems to assume a linear relationship of bodies to persons, of natural bodies to human dignity, while other disciplines acknowledge discursively constructed bodies, bodies characterized by difference rather than sameness, bodies determined by culture, position, and subordination rather than biology. I want to make more explicit the theoretical linkage of bodily integrity to human dignity in the context of post-9/11 torture. Cosmopolitan legalism must confront the existence of other bodies, unnatural, constructed, cultured, tribal or colonized, and admit that the linear mapping of dignity onto the body is contradicted by contemporary torture practice. Torture is predicated upon dehumanizing the other, denying his/her dignity, stripping him/her of political and legal agency, and in so doing generating political meaning—for both “us” and “them.” Torture is not an exceptional case; it fits into a larger pattern of state power, including violence, racism and imperialism.

II. LAW/BODY, TORTURE/TERROR, AND US/OTHER

How do we explain the recent embrace of torture, even by liberal democratic states? Paul Kahn has argued that law and violence are always connected and that torture reinforces the sacred character of the sovereign. Both torture and terror are anti-cosmopolitan; with torture, sovereignty prevails over the cosmopolitan ideal of universal human dignity. There is a cultural logic of torture which we discern in post 9/11 counterterrorism practices. We see an opposition between sovereignty and the international legal order/human rights: paradoxically, the sovereign is both promise and threat, both the defender of rights and the greatest

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threat to those rights. Torture is war by other means; torture is sovereignty in a space beyond law. Kahn observes in torture the manifestation of a sacred violence, operationalized through the degradation of the other, the threat to our shared political imagination. This degradation through torture, disguised as intelligence gathering or even as general deterrence, creates political meaning by denying humanity to victim populations and stressing the sacred character of our quest to protect our security. The “clash of civilizations” imagery is evident, orientalism is manifest: we cast the terrorist as savage, outside civilization and therefore undeserving of the reciprocal respect normally due to other peoples. Why should we respect the humanity of those who do not respect ours? Even the reciprocity underlying international humanitarian law constructs and reinforces the “us/other” dichotomy. Violence against this other constructs political meaning—this is Kahn’s sacrificial violence. Both torture and terrorism promise martyrdom and meaning to the faithful—through violence we experience the sacred.

The body plays a twin role in law, representing both dignity and abjection. In international human rights norms, the body reflects and represents dignity. Law is ambivalent about the body—the body is both central and marginal to law. Formal equality, for example, depends upon seeing that each body is respected, yet in order to get to that universality, the particularity of any particular body must be denied or masked so as to make legal personality fungible and thus universal. Law also asks that we choose dignity or reciprocity (as underpin human rights law or humanitarian law, respectively) as our response to terror. Do we respond with law or war? Do we treat terror as a crime, a political crime, or an act of war? Clearly our torture practice has cast terrorist suspects as outside or beyond the sphere of protected human dignity. We have implicitly adopted alternative constructions of human bodies beyond the model assumed by universal human rights: these are alternatively constructed bodies, hybrids of human and savage, morally and legally subordinate to our own superior political meaning. For Elaine Scarry, the purpose of torture is not obtaining information but acknowledgment of power—the destruction of one world of meaning and replacement by another (our superior one), taking the victim to a "place before language," which is also a place outside law. That is the cultural logic of torture.

Michel Foucault distinguished between the social and the sentimental body. With the social body, punishments were public spectacles; the later sentimental body was subjected to unseen discipline. Recent torture practice may mark a return to the social body as these tortures are spectacularized through internet display. Again, “terrorist” bodies in these spectacles are presented as being without dignity. Bodies

3. Kahn, supra note 1, at 170-78.
7. CBS/AP, Cheney Defends U.S. Use of Waterboarding, (February 11, 2009), available at:
were purposefully de-humanized in the Abu Ghraib images. Dehumanization allows states to assert, to themselves and others, that they are not “torturing” a body possessing dignity. Torture is degradation not only of the victim of torture, but by extension of anyone who might share the political aspirations of the torture victim. War itself can be seen as a form of punishing otherness: witness the famous WikiLeaks video footage of US helicopter pilots in Iraq gunning down journalists and civilians, including children, with apparent indifference. Bodies are both present and absent in torture and human rights law, appearing and disappearing where convenient, e.g., the body can lose its corporeality and become characterized as a mere “liberty interest” to be balanced against society’s “security interest.”

With both Abu Ghraib torture photos and internet beheadings, the body is “spectacularized.” In these digital images, the body is a “condensed symbol of the political order.” We feel the pain through the mechanism of the “sentimental body”. We feel horror and revulsion; after all, the body is not a neutral vessel or machine, and so we have tried to develop “painless” executions in our penal system. Our modern bodies have been constructed as sympathetic bodies in pain as opposed to the absent, invisible body.

Today, torture is again aimed at societies and signals social/cultural dominance of one population over another. We have heard arcane debates over whether a practice is torture or not, “torture lite” or “enhanced interrogation,” the latter being tortures that do not mark the body and thus are favored by democracies. The history of torture is written on the body: from military conquest, regal punishments and dictatorial terror, to contemporary intelligence gathering intended to forestall future terrorist attacks. Liberals have traditionally condemned torture because of its linkage to tyranny, but today’s intelligence-driven torture is justified by some liberals as protecting freedom against tyranny: thus the “liberal ideology of torture” was born.

As previously mentioned, human rights law and humanitarian law rest, correspondingly, on the opposing pillars of dignity and reciprocity. Similarly, the body under torture has a double meaning: either the body is symbolic of social order (the pre-modern understanding of the body), or the body is private and autonomous, a body with a self in it. There is also the discursive construction of bodies to consider—bodies de-humanized in the discourse of millenarian terrorism. The body is constructed and interpreted through a barrage of constructed images, and thus torture of the body “gets at” something other than, something beyond, the body.

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8. Hersh, supra note 6.
10. Alan Hyde, BODIES OF LAW 196-199 (Princeton University Press 1997); See e.g., Winston v. Lee, 470 U.S. 753, 763-764 (1985) (discussing the reasonableness of subjecting an individual to a forced surgical procedure to remove a bullet that was evidence to a crime, characterizing the procedure as requiring a balance between the individuals privacy (or “liberty”) interest versus society’s security interest in the evidence).
11. Id. at 191.
12. Id. at 193.
13. Id. at 194.
It gets at the imagery and symbolism (such as dignity, or difference), which construct the body, and torture can either reinforce or undercut that imagery. Thus, we have seen recent interrogation/torture techniques that focus on Islamic difference\(^7\) (use of dogs, sexual humiliations, etc.)\(^8\) all to further exoticize, dehumanize, and degrade the victims. This is an orientalism that opposes Western liberalism with Islamic savagery, only to posit that the appropriate Western response must itself be savagery in the form of torture.\(^9\) This exoticization of terror suspects is rendered urgent with the rhetoric of the ticking bomb, with even liberal commentators telling us we are "morally lazy" if we do not admit that torture is justified in this circumstance.\(^10\) We ameliorate this moral contradiction by making the body disappear from the equation when necessary, using "clean" torture, "torture lite," or "enhanced interrogation," which do not mark the body and therefore are often thought not to constitute real torture. This approach fails to recognize that torture is inefficient\(^11\) and that its transaction costs are very high, i.e., the torturer cannot know at the outset if the suspect even has intelligence to obtain through torture and so torture of innocents is likely. The torture of innocents is discounted as collateral damage in a war against terror and it is justified by a seamless ideology of jihadist otherness. Against this political backdrop, international law appears naïve with its liberal cosmopolitan faith in a single, universal, dignified human body; it fails to grasp the range of cultural constructions of the body that facilitate torture and the role of the body, torture, terror, and sacrifice in creating political meaning and sovereignty.

### III. Present and Absent Bodies: Disappearing the Body in Torture

Foucault traces the evolution of the treatment of the body—the body as a subject of political economy, and as an element of the body politic—and explores how the state acts on the individual and how the individual represents the sovereign.\(^22\) Classical judicial torture had an investigative aspect; it was also often accompanied by a religious aspect involving some promise of forgiveness for worldly suffering, and it also made whole a sovereign injured by a crime, serving a kind of ceremonial political function.\(^23\) Under modern, liberal law, the body is a vessel containing or representing the individual actor, and in punishing the actor the

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23. See Foucault, *supra* note 5, at 41, 46, 47.
body is often manipulated but in a much less intimate manner.\textsuperscript{24}

The focus of modern punishment is the individual within or represented by the body, rather than on the body itself. The body is an “instrument or intermediary,” the denial of rights and constraint of the body is an intrusion that is simply necessary to reach and punish the individual within.\textsuperscript{25} The body is a metaphor for the liberal division of the world into public and private. Moreover, the body is also presumptively private, but social necessity sometimes requires the considerable invasions of that private entity.\textsuperscript{26} While classical torture marked the body intentionally as required by custom or religion, modern torture exists for different ends\textsuperscript{27} and attempts to pursue them with minimal visible evidence. Any scars left are merely incidental to other state goals.\textsuperscript{28} Law participates in social imaging of the body. As Alan Hyde puts it, “When law’s discourse might create an unbearable conflict in our imaging of the body, law normally employs euphemisms to make the body disappear.”\textsuperscript{29} Although it is difficult to imagine removing the body from a discourse as closely related to the body as torture, contemporary debates on torture seem to have done just that in many instances.\textsuperscript{30}

The torture debate, particularly when framed in terms of the ticking bomb scenario, usually grants some deontological regard to the body, whether in terms of sanctity of the human body or human dignity, and proceeds to balance this against society’s interest in avoiding a terrorist catastrophe in a typically utilitarian analysis. The torture debate also frequently phrases concerns about human dignity in a cryptic manner, often excluding a discussion of pain or the body’s actual experience. The torture victim and his or her physical experience are oddly absent from the torture debate, or that physical experience is mischaracterized so as to lessen the moral impact of the torture, e.g., where waterboarding is referred to as “simulated drowning.” It is, of course, not simulated at all; it is very real drowning that is controlled and repeated, albeit not to the point of actually killing the detainee (so far as we know).\textsuperscript{31}

The modern torture debate in America takes place in the context of the

\begin{itemize}
\item \textsuperscript{24} See Foucault, note 5 at 11; see also Hyde, supra note 10, at 258-59.
\item \textsuperscript{25} Foucault, supra note 5, at 11.
\item \textsuperscript{26} Hyde, supra note 9, at 59.
\item \textsuperscript{27} How different are the ends (punitive and/or proof seeking versus strictly interrogative purposes)? What of the perceived community and spiritual catastrophes which motivated public tortures and executions in the middle ages? Were these evils any less compelling than the ticking bomb scenario offered as the primary justification for torture today?
\item \textsuperscript{28} Rejali, supra note 14, at 35.
\item \textsuperscript{29} Hyde, supra note 10, at 260.
\item \textsuperscript{31} Demetri Sevastopulo, Cheney Endorses Simulated Drowning: Says Use of Water Boarding to Get Terrorist Intelligence is “No-Brainer,” MSNBC, (October 26, 2006) available at: http://www.msnbc.msn.com/id/15433467/ns/business-financial_times/v/cheney-endorses-simulated-drowning/#.ToHhS3NuEFE.
\end{itemize}
threat of jihadist terrorism and typically focuses on the torture or "coercive interrogation" of "Islamo-fascist" terrorists—"others" who are often imagined as profoundly different from us and presumptively guilty.33 Where the torture debate refers to reciprocity, for instance, it seems clear that defenders of torture do so at least partially because of their regard for their own bodies and the potential threat posed to them by the terrorist "other," and because there is no relatable construction of the body to discourage this perspective.34 Defenders of torture often seem to construct the body and individual in terms of difference—the imagined terrorist is less reachable through the usual means used during war, less reciprocal, and therefore more deserving of harsh treatment. Torture opponents, on the other hand, could be said to construct the body and individual in terms of sameness—which is concerned with slippery slopes leading to the torture of innocents and the general illiberalizing of society.

The body of the prisoner and the corporal experience of pain are rarely the primary focus of the modern torture debate.35 And even where physical pain is addressed, it usually arises in light of concerns about the result of social "inhumanity" or how the practice of torture reflects on society as a whole. Simultaneously, however, with the de-emphasis of the effect of torture on an individual's body, or the experience of pain, these concerns are tacitly emphasized by limitations on what is considered acceptable in modern techniques. Alan Dershowitz, for example, limits his defense of torture to nonlethal methods, and proposes that we authorize techniques that cause excruciating pain without maiming the body, such as inserting sterilized needles underneath the fingernails.36 In his study of the proliferation of "clean torture," Darius Rejali describes some of the reasons the citizens of modern states are "less likely to complain about violence committed by stealth," leading to a premium placed on methods of torture that cause pain, suffering, and degradation without scars or outward evidence of the cruelty that has been suffered (and inflicted).37 The state is at once distant from the body and concerned with its integrity, perhaps pretending that an intact body represents an intact individual.

IV. UTILITY VERSUS DEONTOLOGY

The common justification for torture in academic and political debates, the "ticking bomb" scenario, also de-emphasizes the individual victim of torture and his or her bodily experience. Defenders of the practice who base their arguments in this scenario marginalize the suspect and focus on the torturer as a savior who prevents a certain and catastrophic terrorist attack. Stephen Holmes points out that the ticking bomb narrative focuses on the "quiet heroism" of torturers willing to "sacrifice their scruples for the greater good."38 David Luban, likewise, observes that the only

33. See Parry, supra note 30.
34. Id.
35. See Parry, supra note 30; see van der Vyver, supra note 30.
36. Alan Dershowitz, WHY TERRORISM WORKS 144, 148 (Yale University Press 2002).
rationale for torture acceptable to liberalism is coercive interrogation for the purpose of gathering intelligence crucial to defusing the theoretical “ticking time bomb,” as opposed to other “illiberal” motivations, such as victor’s pleasure, terror, punishment, and extracting confessions. There are reasons that liberals find torture peculiarly abhorrent to their political outlook—but also reasons why liberal revulsion toward torture may be only skin deep. Liberals categorically oppose torture which serves tyranny but may embrace torture which serves security. This consequentialist defense of torture de-emphasizes the subject of torture and his or her experience by focusing on the goal of collecting information that could save some significant number of imminently threatened lives, and emphasizes the interrogator as “public servant” or an otherwise heroic figure.

Critics of torture believe that it is possible to obtain better information by means other than torture. Some express concern about the effect of torture on American moral and political sensibilities (seeming to emphasize the social body) and about the mixed message our use of torture sends to the world as America seeks to “spread liberty,” not to mention the effects of torture on the victim, the degradation, the experience of intolerable pain, and the presumable diminution of both torturer’s and victim’s capacity for human compassion and sympathy. Torture is designed to “destroy the dignity and dismantle the personalities of possibly innocent prisoners.” The logic of reciprocity and retribution colors our judgment. Stephen Holmes warns against “mirror-imaging,” the tendency to justify or even applaud the lawlessness of torture as the only adequate and appropriate tactic to counter lawless terrorists.

In his study of torture employed by democracies, Rejali addresses Elaine Scarry’s approach to the body and pain, finding that extreme pain is destructive and brings the subject to a pre-linguistic silence, but refines the role of pain in the context of “clean” torture. The significant “gap” is that between the victim of torture and his or her community, rather than the “gap between the brain and the tongue” emphasized by Scarry. While the evidence of classical, scarring torture could bridge cultural divides by conveying the experience of pain through the imagery of a visibly damaged body, modern clean torture makes it difficult for others to understand the experience of pain or to be certain that the torture was committed, leaving victims and their communities shrouded in “doubts, uncertainties, and

40. Id. at 1426.
41. Id. at 1443. Luban compares the heroic interrogator to the iconic imagery of heroic firefighters and police officers during 9/11.
42. Holmes, supra note 38, at 123.
43. Id. at 124.
44. Id.
45. Id. at 125–26. Holmes also discusses Beccaria’s “principle moral concern:” the possibility that innocent persons could be tortured. This perspective does not appear to claim that torture is inherently immoral, as opposed to Andrew McCarthy’s phrasing of the basic moral question surrounding torture, for instance. McCarthy, who supports the use of torture warrants, asked whether torture is “ever permissible,” framing the reasonable objection to torture in “the dignity of human life, even when that life belongs to a captured terrorist.” Andrew C. McCarthy, Torture: Thinking About the Unthinkable, in THE TORTURE DEBATE IN AMERICA 98, 99 (Karen J. Greenberg, ed., Cambridge University Press 2006).
46. Holmes, supra note 38, at 130.
47. Rejali, supra note 14, at 441.
illusions.” Rejali challenges Scarry’s conception of torture pain as “world-destroying,” claiming that physical pain is neither necessary nor sufficient to destroy a prisoner’s sense of reality. In important ways, purely psychological distress can be world-destroying for its subject, while the experience of physical pain through torture can sometimes sustain a prisoner and strengthen his or her resolve; pain can be world-creating in that sense, creating a “shared political arena” and enhancing a prisoner’s sense of agency and community.

Acknowledging physical pain has taken legal discourse on torture in some curious directions. Dershowitz, in advancing a system of “torture warrants” to be granted by federal judges under certain circumstances, claims that in terms of public attitude, death is underrated while pain is overrated. Dershowitz points out the visceral revulsion expressed in reaction to some proposed methods of painful but nonlethal torture, such as placing needles under the fingernails or drilling into an unanaesthetized tooth, as opposed to the typical, relatively blasé reaction to the use of lethal force or even execution. He calls the distinction in attitudes toward quick death versus protracted excruciating pain “irrational.” Rejali also acknowledges the importance of communities’ reactions to visible evidence of pain. “To know one’s pain is to be able to describe it to oneself and others . . . communities treat victims that have marks of violence upon their bodies entirely differently from those who have no marks to show.” This community reaction is also involved in Rejali’s hypothesis that the public monitoring of human rights, rather than a genuine commitment to democracy, explains the tendency of modern democratic states to prefer “clean” methods of torture that leave little or no visible evidence of violence upon the subject’s body. It can be seen, therefore, that clean torture is an attempt to remove the body from torture discourse.

Perhaps as a direct result of modern revulsion toward state infliction of excruciating pain, debate regarding the practice of torture generally centers around the argument that torture is already practiced—and the importance of subjecting it to the rule of law or, alternatively, of preserving the norm prohibiting torture—or the controversy as to whether torture actually evinces reliable information.

Critics of the torture warrant approach argue that it is important to retain the clear illegality of torture rather than to legitimize it in any context. Jean Bethke Elshtain, for example, argues torture should not be normalized by incorporating it into rules and political leaders cannot and should not be insulated from the kinds of moral dilemmas presented by a preventable catastrophe. Elshtain explains this position as a form of Christian moral “neighbor-regard” rather than either a purely deontological or purely “consequentialist” approach. Under this approach torture

48. Id. at 443.
49. Id. at 442.
50. Id.
51. Dershowitz, supra note 36, at 149.
52. Id. at 149-50.
53. Id. at 155.
55. Id. at 8-9.
57. Id. at 78-79.
should remain taboo but individual actors should “pay the price” and “incur moral
guilt when the lives of others are at stake.” According to this view, there is a
meaningful distinction between gruesome corporeal methods of torture and “torture
lite” methods of coercive interrogation that some have argued the Geneva
Convention does not take into account. This distinction again rests on the absence
of lasting physical damage and suggests that coercive tactics falling short of this
degree of torture are not properly categorized as torture—Elshtain argues that those
who call these methods “torture” are perpetrators of “code fetishism” and “do a
disservice to the complexity of the matter.” Here we see the paradox at the core of
“torture lite”: that the body is made central as the method of identifying and
punishing difference, and yet simultaneously hidden or denied wherever the
maltreatment does not leave permanent injury. The body serves as a shifting marker
of political meaning.

V. HUMAN IN/DIGNITY AND ABJECTION

The Torture Convention, in addition to prohibiting torture, requires states
to prevent cruel, inhuman, and degrading treatment that does not amount to torture,
and international tribunals have explored which interrogation method falls into
which category, finding that some combinations constitute “torture and cruel and
inhuman treatment.” The European Commission on Human Rights has, however,
held that the difference between torture and inhuman treatment “derives principally
from a difference in the intensity of the suffering inflicted” and that forced standing,
hooding, the use of loud noises, sleep, water and food deprivation did not constitute
torture. The UN Torture Committee, however, has held similar actions, with the
addition of shaking tactics, do constitute torture, but the European Commission
denied that they rose to that level. Torture has been held to include the combination
of forced standing for days at a time, beatings, withholding food; beatings and being
buried alive; rape; threats of physical mutilation; severe beatings that leave no marks,
among other methods. Torture practitioners seek to use the distinction between
torture and lesser forms of ill treatment to get around the absolute prohibition against
torture under the Convention Against Torture. The importance of the distinction
between torture and other forms of ill treatment lies in the fact that there is an
absolute prohibition against torture under the Convention Against Torture. The
Geneva Conventions are more specific than the Convention Against Torture but are
also status-specific, applying to prisoners of war or civilians during some conflicts.

Some critics of torture, such as John Parry, advocate expanding the

58. Id. at 88.
59. Id. at 85.
60. Id. at 86.
61. U.N. Charter, Convention Against Torture: and Other Cruel, Inhuman or Degrading
62. John T. Pary, Escalation and Necessity: Defining Torture at Home and Abroad, in
63. Id. at 148.
64. Id. at 149.
65. Id. at 147.
66. Id. at 149.
67. Id.
definition of torture to reflect Elaine Scarry's characterization of pain and torture as "world-destroying."68 The critics also reject the concept of consent to torture, where it is sometimes argued that once torture has commenced the victim consents by failing to divulge information.69 Parry and others would define torture not only as the infliction of severe pain to gather information or punish, but also as "the infliction of potentially escalating pain for purposes that include dominating [and dehumanizing] the victim and ascribing responsibility to the victim for the pain incurred."71 Parry also recognizes the potential for exceptions to a categorical prohibition of torture but highlights the difficulty of adhering to "principled torture," if such a thing exists.72

Contemporary defenders of torture avoid likening the average citizen to the torture victim by minimizing discussion of the body and pain, focusing instead on the juxtaposition of political images: the centralized sovereign and democratic state versus diffuse, lawless and unpredictable terrorists. One important thread in this discourse is the purported absence of reciprocity between state bodies and terrorist organizations, thus placing suspected terrorists outside the framework of international legal protections and making torture easier to justify. As outlined above, the Geneva Convention and other international laws against torture are based on reciprocal respect between nations, but terrorist behavior does not respect and cannot fit within this model of sovereign reciprocity. While the conventions were based on reciprocity, i.e. on commitments not to harm civilians and that soldiers be identifiable and openly armed, terrorists "flout every civilized norm animating the conventions."73 This is a game changer for many. Andrew McCarthy, for example, characterizes the war on terror as one "almost entirely about intelligence" and calls for a centralized system of limited torture warrants.74 McCarthy hedges this, however, by acknowledging that the torture debate requires the balancing of national security against the "dignity of human life, even when that life belongs to a captured terrorist."75

Opponents of torture of course rely upon the core value of universal human dignity, which is ostensibly offended by the infliction of torture and pain upon the body, but they do not necessarily succeed in describing what human dignity is or how it relates to the body. Jeremy Waldron, for example, argues that the prohibition on torture is archetypal and emblematic of the general commitment to human dignity and non-brutality in the legal system.76 The prohibition of torture represents the essence of the liberal relationship between law and force: the fact that the force of law is not brutal, that it does not operate by the "savage breaking of the will" of its

68. Parry, supra note 62, at 153.
69. Id.
70. See generally Parry, supra note 17, at 6-11.
71. Parry, supra note 17, at 154.
72. Id. at 160.
75. Id. at 99.
subject, distinguishes it from extralegal measures. The prohibition of torture supports a “connection between the law and human dignity” while also maintaining the force of law. Waldron points out that “[i]t is also important to remember that the most powerful objections (moral and legal) to torture may have nothing to do with liberty and nothing to do with security: they are direct objections based on its extreme inhumanity.” Waldron does not define with precision what is meant by “human dignity” or “inhumanity,” but they are often discussed in connection with an empathetic relation between the individual and society as a whole, such as the reasonable limits on the force of law to compel or punish individual behavior. It is perhaps most accurate to characterize human dignity as a relational concept rather than a deontological quality of human beings: “human dignity is not a metaphysical property of individual humans, but rather a property of relationships between humans—between, so to speak, the “dignifier” and the dignified. To put it another way, human dignity designates a way of being human, not a property of being human.” While this relational understanding of dignity is attractive on the one hand and informs much liberal cosmopolitanism in human rights law, it also has demonstrated a perverse corollary: it has facilitated the definition of categories of persons as “other” and beyond the scope and thus outside the moral and legal protections that accompany human dignity. Liberal reliance on universal dignity inadequately theorizes the political meaning invited and generated by the prospect of dehumanizing a class of political others.

VI. CONCLUSION

How our society came so abruptly to tolerate, if not embrace, torture after 9/11 is a vexing question that has confounded and contradicted the human rights universalism central to liberal accounts of law and society. The underlying supposition of this approach has been that we are compelled by humanity’s common vulnerability to physical pain to recognize the dignity which inheres in each person in his or her own body. Empathy and solidarity should be the glue that binds a commitment to human rights universalism, and the anti-torture norm should be an inviolable, bedrock principle of our human commitments to one another. The realization that these assumptions have once again proven so brittle and impermanent has sent shockwaves through the international human rights movement. My argument here has been that most of the assumptions underlying our faith in a universal disavowal of torture exhibit the same flaws as do most legal approaches: a misplaced trust in the capacity of legal rules to encompass and confine human irrationality. The power of state sovereignty and potent symbols of political vulnerability or ascendance combine to somewhat easily defeat rational legalism

77. Id. at 1727.
78. Id. at 1726-27, 1739.
80. See Jeremy Waldron, Torture and Positive Law: Jurisprudence for the White House, 105 Colum. L. Rev. 1681, 1726-27 (2005) (“But even when this [the exercise of the force of law through criminal and civil sanctions] happens, they [humans] will not be herded like cattle or broken like horses; they will not be beaten like dumb animals or treated as bodies to be manipulated.”). See also Jeremy Waldron, TERROR, TERROR, AND TRADE-OFFS (Oxford University Press 2010).
when it comes to such inflammatory matters as personal security. For better or worse, our society has demonstrated that it will quickly abandon liberal cosmopolitanism in favor of tribal solidarity. Torture flourishes because it is a central component in the creation of political meaning during times of real or imagined insecurity. Ultimately, this is not to call for an abandonment of human rights universalism, but rather to call for recognition of our paradoxical situation and for collective struggle to contain the political forces that nurture our impulse to dehumanize others in order to define ourselves.