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Cruel, Inhuman, and Degrading Treatment: The Words Themselves

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Note to readers for HLS workshop, August 8, 2008: This is way too long, and still a bit rough in places. Section 3 can be skipped. The important methodological sections are section 2c, 4, and 6; the important substantive account is in section 5.

Cruel, Inhuman, and Degrading Treatment: The Words Themselves

Jeremy Waldron¹

1. Introduction1
2. Indeterminacy and Elaboration3
(2a) U.S. Reservations4
(2b) Responses to Indeterminacy7
(2c) Reasoned Elaboration8
3. The Case Law	...10
(3a) American Eighth Amendment Jurisprudence	...11
(3b) Alien Torts Statute Jurisprudence	...13
(3c) ECHR Jurisprudence	...15
4. Ordinary Language Assumptions	...21
5. The Words Themselves	...26
(5a) “cruel”	...26
(5b) “inhuman”	...29
(5c) “degrading”	...35
6. The Moral Reading	...41

1. Introduction

In some articles I wrote a year or two ago on the issue of torture,² I said very little about a set of accompanying prohibitions that we find in many of the conventions and statutes that outlaw torture: I mean the prohibitions on

¹ University Professor, NYU Law School. I am grateful to Annmarie Zell for her assistance with sources. Early versions of this paper were presented as the 2008 Annual Law and Philosophy Lecture at Columbia Law School and also at the NYU Public Law Colloquium. My thanks to Jose Alvarez, Rachel Barkow, Richard Briffault, Sarah Cleveland, Michael Dorf, Suzanne Goldberg, Jeff Gordon, Kent Greenawalt, Rick Hills, Sam Issacharoff, Richard Pildes, Cristina Rodriguez, Carol Sanger, Kendall Thomas, and Kenji Yoshino for their comments

² See Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUMBIA LAW REVIEW 1681 (2005), 1681-1750. <http://www.columbialawreview.org/pdf/Waldron-Web.pdf>. Also Jeremy Waldron, *What Can Christian Teaching Add to the Debate about Torture?* 63 THEOLOGY TODAY 330 (2006).

cruel, inhuman and degrading treatment and punishment. These prohibitions are the topic of the present paper. I want to consider the meaning of these predicates “cruel,” “inhuman,” and “degrading” and to reflect on the way in which we might approach provisions like these.

The Universal Declaration of Human Rights of 1948 (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) both provide that “[n]o one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.”³ A great many national and regional Bills of Rights say something similar. The formulation of the European Convention on Human Rights (ECHR) is very well known: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”⁴ There are similar provisions in the South African Constitution,⁵ the Constitution of Brazil,⁶ and the New Zealand Bill of Rights Act.⁷ The Canadian Charter uses the older language of “cruel and unusual” treatment or punishment,⁸ used also in the US Bill of Rights⁹ and (with slight variations) in most US state Constitutions;¹⁰ this terminology was adapted more or less word-for-word from the English Bill of Rights of 1689.¹¹

In addition to these general provisions, similar language is used in some more specific international instruments. The UN Convention against Torture (UNCAT) uses the language of cruel, inhuman and degrading treatment in one of its supplementary provisions (supplementary to its main

³ UDHR, Art. 5; ICCPR, Art. 7

⁴ ECHR, Article 3: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” The non-derogation provision—Article 15 (2)—that makes the ECHR prohibition on torture absolute also applies to the prohibition on inhuman and degrading treatment.

⁵ South African Constitution, Art 12 (1): “Everyone has the right to freedom and security of the person, which includes the right ... not to be tortured in any way; and not to be treated or punished in a cruel, inhuman or degrading way.”

⁶ Constitution of the Federal Republic of Brazil, Article 5 (III): “[N]inguém será submetido a tortura nem a tratamento desumano ou degradante.”

⁷ New Zealand Bill of Rights Act 1990, section 9: “Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.”

⁸ Canadian Charter of Rights and Freedoms, Art. 12.

⁹ US Constitution, Eighth Amendment.

¹⁰ See, e.g., New York State Constitution, Art. 1, sect. 5 (cruel *and* unusual); Constitution of the State of Texas, Art 1.13 (“cruel *or* unusual”).

¹¹ Bill of Rights, December 16, 1689: “[T]he ... lords spiritual and temporal, and commons ... do in the first place (as their ancestors in like case have usually done) for the vindicating and asserting their ancient rights and liberties, declare ... 10. That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.”

prohibition on torture).¹² Slightly different language is used in the Rome Statute of the International Criminal Court; that statute prohibits not only “torture” as a crime against humanity but also “[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.” It also prohibits as war crimes “inhuman treatment,” and “outrages upon personal dignity, in particular humiliating and degrading treatment.” Common Article 3 of the Geneva Conventions requires “humane” treatment for persons taking no active part in hostilities (including prisoners and detainees), and it contains a prohibition on “cruel treatment and torture” and on “outrages upon personal dignity, in particular, humiliating and degrading treatment.”¹³

I used to think the most important thing about these provisions was that they erected a sort of *cordon sanitaire* around the much more important prohibition on torture—a “fence around the wall,” designed not just to keep police, spies, and interrogators from crossing the torture threshold but to keep them from even approaching it.¹⁴

The present paper, however, is predicated on the assumption that “cruel,” “inhuman,” and “degrading” have work of their own to do. They are not just ancillary to the torture prohibition; indeed they apply even when there is no question of any interrogational purpose. For Americans the issues of inhuman treatment and outrages on personal dignity come up mainly in relation to the treatment of detainees in the war of terror, but elsewhere in the world the prohibition is oriented towards regular law enforcement. Article 3 of the ECHR, for example, has been mostly used to correct routine police and prison brutality in Turkey, Eastern Europe and former Soviet Union.¹⁵

2. Indeterminacy and Elaboration

If we accept that these provisions have work of their own to do, how should we go about interpreting them? What are we to say about the meaning of

¹² UNCAT, Art. 16 (1): “Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined....”

¹³ GC Common Article III.

¹⁴ On the other hand, in “Torture and Positive Law,” I also suggested that this *cordon sanitaire* function might be performed by the relative indeterminacy of the term “torture” itself rather than by these accompanying standards. See Waldron, *Torture and Positive Law*, supra note 2, at 1695-1703.

¹⁵ [Though there is a war on terror dimension in Turkey and Chechnya and, in the past, in the United Kingdom as well.] →text?

predicates like “cruel,” “inhuman,” and “degrading” in human rights law and phrases like “outrages on personal dignity”? Almost everyone agrees that these standards are contestable.¹⁶ They deploy highly charged value-terms—terms that the authors of one treatise say, “tend to be over-used in ordinary speech.”¹⁷ And many officials (including the President of the United States)¹⁸ have professed themselves alarmed and bewildered by their indeterminacy.¹⁹

(2a) U.S. Reservations

Apparently it was this concern that led the United States to enter some serious reservations when it ratified the ICCPR and the UNCAT.²⁰ Here is what was said in connection with the ratification of the UNCAT:

¹⁶ For some reflection on different kinds of indeterminacy—e.g., ambiguity, vagueness (in the technical sense), and contestability—see Jeremy Waldron, *Vagueness in Law and Language - Some Philosophical Perspectives*, 82 CALIFORNIA LAW REVIEW 509 (1994).

¹⁷ D.J. HARRIS, M. O’BOYLE, C. WARBRICK, *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 88 (1995): “The terms ‘inhuman’ and ‘degrading’ ... have no clear legal meaning and tend to be over-used in ordinary speech.”

¹⁸ President Bush said in 2006: “It’s very vague. What does that mean, ‘outrages upon human dignity’? That’s a statement that is wide open to interpretation. ... [T]he standards are so vague that our professionals won’t be able to carry forward the program, because they don’t want to be tried as war criminals. ... These are decent, honorable citizens who are on the front line of protecting the American people, and they expect our government to give them clarity about what is right and what is wrong in the law.” *Press Conference of the President*, September 15, 2006: <http://www.whitehouse.gov/news/releases/2006/09/20060915-2.html>

¹⁹ Occasionally such professions of bewilderment elicit a skeptical response. The White House Press Corps has been known to make fun of the late Tony Snow’s protestations about vagueness. See e.g. *White House Press briefing* (September 14, 2006) at <http://www.whitehouse.gov/news/releases/2006/09/20060914-8.html>

MR. SNOW: Some of the language in ... Common Article III ... is vague. In the case of Common Article III, of course, you have had some of—the “prohibitions against cruel, inhumane or degrading treatment or punishment”—that’s important to figure out what that means. As you know, in— Q: It’s vague to you? MR. SNOW: Yes, it is. Q: [You mean, cruel, inhuman, degrading? MR. SNOW: Yes, because you have to specify exactly what you mean. Q: Keep smiling. (Laughter.) MR. SNOW: Please permit me to continue.

Readers will also remember the healthy and robust derision that was directed from Capitol Hill at Attorney-General nominee Mukasey’s claim that he didn’t know whether waterboarding was torture. See Editorial, *In Arrogant Defense of Torture*, NEW YORK TIMES, December 9, 2007, p. 9: “The new attorney general, Michael Mukasey, twisted himself into knots during his confirmation hearing, refusing to say whether waterboarding was torture and therefore illegal.”

²⁰ See *infra* note 61 and accompanying text.

[T]he United States considers itself bound ... only insofar as the term “cruel, inhuman or degrading treatment or punishment” means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.²¹

The idea seemed to be that if we moved from the text of the conventions to terminology that was more familiar from our own constitutional law, we would have a better idea of where we stood. The shift is not to language that is any less evaluative or any more determinate; but at least we understand the history of its elaboration.

One other point about these reservations. In his confirmation hearings in 2005, former Attorney-General Alberto Gonzalez told the Senate that their effect was to incorporate American geographic limitations on the application of constitutional rights into our obligations under the treaty.²² Aliens “interrogated by the U.S. outside the United States enjoy no substantive rights under the Fifth, Eighth and 14th Amendment,” he said. And he said that there is therefore “no legal prohibition applying to us under the ‘Convention Against Torture’ on cruel, inhuman or degrading treatment with respect to aliens overseas.”²³ This is a mistake.²⁴ On its terms, the reservation concerns only definitions, not jurisdiction. I doubt very much whether a jurisdictional or geographic reservation would be valid.²⁵ And

²¹ <http://www2.ohchr.org/english/bodies/ratification/9.htm> Something exactly similar was said to accompany our ratification of ICCPR.

²² This account of Gonzalez’s testimony is adapted from Craig Forcese, *A New Geography of Abuse*, 94 BERKELEY JOURNAL OF INTERNATIONAL LAW 908, 908-9 (2000). <<<

²³ *Ibid.*, 909, citing *Confirmation Hearing on the Nomination of Alberto R. Gonzales To Be Attorney General of the United States: Hearings Before the S. Judiciary Comm.*, 109th Cong. 121 (2005). For a view similar to Gonzalez’s, see Andrew McCarthy, *The International-Law Trap: What Europe thinks is “cruel, inhuman, and degrading” doesn’t govern us*. NATIONAL REVIEW, December 12, 2005: “[I]t is well established that the Constitution of the United States does not apply outside U.S. territory. The Constitution’s Bill of Rights protections are unavailing for aliens who are outside our geographic jurisdiction.” <http://www.nationalreview.com/script/printpage.p?ref=/mccarthy/mccarthy200512120837.asp>

²⁴ Forcese, *supra* note 22, at ___, makes a more elaborate argument, but I think he comes up with the same conclusion.

²⁵ Some countries denounced our reservation even as it stood. For example, Sweden said of the US position, “A reservation by which a State modifies or excludes the application of the most fundamental provisions of the Covenant, or limits its responsibilities under that treaty by invoking general principles of national law, may cast doubts upon the commitment of the reserving State to the object and purpose of the Covenant.” (http://www.unhcr.ch/html/menu3/b/treaty5_asp.htm).

certainly it *would* have been invalid had it amounted to a determination not to apply the relevant provision at all in our treatment of certain categories of aliens in certain places.

In any case, no such reservation qualifies our commitments under Common Article 3 of the Geneva Conventions. When the Supreme Court established in *Hamdan*²⁶ that Common Article 3 applies to our treatment of alien detainees at Guantanamo Bay, it made the task of parsing phrases like “cruel treatment” and “outrages upon personal dignity” quite urgent.

The Detainee Treatment Act of 2005²⁷ purports to establish a statutory equivalent to the reservations associated with our ratification of the ICCPR and UNCAT. Section 1003 (a) provides that “[n]o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment,” and section 1003 (d) tells us that

In this section, the term “cruel, inhuman, or degrading treatment or punishment” means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.

Note that a statutory stipulation like this cannot have the authority of a reservation. While it is important that countries enact legislation to give domestic effect to their treaty obligations, such legislation cannot lessen their force of those obligations or alter their content as a matter of international law. All the more reason, then, to sharpen our focus on the particular language that is used in the conventions so that we can consider whether a statutory equation like

(See also Sweden’s similar objection to the US reservation in regard to UNCAT at <http://www2.ohchr.org/english/bodies/ratification/9.htm>) I believe the US reservation *would* have been invalid had it amounted to a determination not to apply the relevant provision at all in our treatment of certain categories of aliens in certain places.

²⁶ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

²⁷ This statute forms part of the Department of Defense Appropriations Act of 2006 (Title X, H.R. 2863).

“cruel treatment” and “outrages upon personal dignity, in particular humiliating and degrading treatment” = “the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States”

is plausible or whether it leaves out something important that Common Article 3 requires us to attend to.

(2b) Responses to Indeterminacy

But it is not just the task of scrutinizing maneuvers like these that motivates the present study. The language of “cruel, inhuman, and degrading” treatment *is* challenging. Even with the best will in the world, it is not easy to figure out what these provisions forbid. Inasmuch as they use evaluative predicates rather than descriptive ones, they present themselves as *standards* rather than rules. I believe it is important to keep faith with this presentation. At the same time, we face the difficulty of finding a reasonable way to elaborate these standards, for the evaluative predicates they use are certainly capable of meaning different things to different people.

One response is to throw up one’s hands and refuse to deal with the provisions on the ground that they are too indeterminate to be justiciable. One might simply defer to whatever the relevant agencies have come up with. I suspect that this is largely what will happen with Common Article 3, so far as U.S. Courts are concerned. Even though *Hamdan* held that the Article is applicable to the treatment of the Guantanamo detainees, we are unlikely to see the emergence of a sophisticated body of case law applying “cruel treatment” and “outrages upon personal dignity” to water-boarding, lap-dancing, Koran-flushing, short-shackling, freezing, sleep deprivation, the use of dogs against prisoners, or any of the other admirable methods that our interrogators have been using. If the Geneva standard is to work, it is going to have to work mostly by self-application in the interrogation room, through things like the armed forces’ Field Manuals, and through military and intelligence chains of command.

Still, some courts—if not here, then elsewhere in the world—have no choice but to entertain arguments and make decisions about the application of “cruel,” “inhuman” or “degrading.” Or even if their interpretation is remitted to agencies or to the army and police forces rather than to courts, there is still the question of how *they* are to approach their task. What is a responsible approach for *anyone* to take to the meaning of these terms?

(2c) Reasoned Elaboration

Can the problem be solved by converting these provisions—these standards—into rules or by supplanting them with rules defined by the decisions of courts? It might seem so. If the courts decide that solitary confinement is inhuman, then we can take the provision prohibiting inhuman treatment to be a provision prohibiting (*inter alia*) solitary confinement. If they decide that shackling prisoners is degrading, then we take the provision prohibiting degrading treatment to prohibit shackling. As the precedents build up, we replace vague evaluative terms with lists of practices that are prohibited, practices that can then be identified descriptively rather than by evaluative reasoning. In time, the list usurps the standard; the list becomes the effective norm in our application of the provision; the list is what is referred to when an agency is trying to ensure that it is in compliance.

What I have just described is a version of “reasoned elaboration” as set out in the writings of the Legal Process School: courts and agencies take an indeterminate standard and elaborate it by developing a set of much more determinate rules (Hart and Sacks call them “subsidiary guides”), which can then be used in people’s self-application of the standard.²⁸ There is a danger, however, that an exclusive focus on the subsidiary rules might detract from the sort of thoughtfulness that the standard initially seemed to invite. The standard invites us to reflect upon and argue about whether a given practice is degrading or inhuman. But now we simply consult a list of rules. The result is a decline in the level of the moral argument—I mean the level of abstraction, but perhaps also the quality of moral argument—that the standard seemed to require.

Also, it is not clear how this approach helps when a court is confronted with an unprecedented practice alleged to be inhuman or degrading. How should a court approach the task of establishing a new precedent in this area? How should counsel in such a case frame their arguments? Should they proceed by a process of analogy with the list of practices already condemned as violations of the standard? Or should they go back to the original standard and reflect on the fundamentals of *its* application to this new set of circumstances? I believe the latter is by far the better approach to take. And it is probably inevitable anyway, given that anything other than a mechanical analogy with practices already prohibited

²⁸ Cf. the discussion of “The Reasoned Elaboration of Avowedly Determinate Directions” in HENRY M. HART AND ALBERT M SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 150-1 (William N. Eskridge and Philip P. Frickey eds., 1994).

will require us to reflect upon whether the new practice is *relevantly* similar—where “relevantly” necessarily takes us back to some understanding of the original standard itself. In effect, what I am saying is that the “list of precedents” (or list of subsidiary rules) approach can function as a useful guide only for those whose orientation to the law is primarily to predict the behavior of the courts and figure out what is necessary to keep on the right side of their decisions. But it cannot be the basis on which the courts themselves approach the matter. This is more or less the point that used to be made against Legal Realists and others who tried to define “law” in terms of predictions about what the courts would do; such a definition is of little help to a court when it is actually in the throes of deciding what to do. That task requires active argument, not the paradox of self-prediction.²⁹

So now the question is: what exactly will such active argument consist in, in regard to a provision as contestable as one that prohibits “cruel, inhuman, or degrading treatment”? In *The Legal Process*, Hart and Sacks suggested that the reasoned elaboration of a provision whose application was uncertain required two things. First, it required an effort to secure consistency with other applications of the provision (e.g. by other courts or agencies). But consistency is not enough; the decision must also be anchored in the provision that has been laid down. And so, secondly, reasoned elaboration required attention to the principle or policy underlying the provision.³⁰ It is this second element that ensures that the decision is an elaboration of *this* provision. Notice, however, what Hart and Sacks do not say. They do not say that the decision must be anchored in the *text* of the provision under consideration. They assume that the text cannot provide much in the way of assistance. Since the words—their indeterminacy or their contested character—are the problem, they cannot be part of the solution. Of course it is an open question whether the underlying principles or policies are any more determinate than the text itself. As H.L.A. Hart once observed, indeterminacy of purpose is at least as much of a contributing factor to indeterminacy as the open texture of the language.³¹ But the idea that this is the only place we can look has a very strong grip on the legal mind.

I worry, however, that this approach moves us too quickly away from a consideration of the words themselves. Just because a word or phrase is

²⁹ Cite Holmes, *The Path of the Law*, [cite] and H.L.A. Hart, response to prediction theory.

³⁰ HART AND SACKS, *supra* note 28, at 147-8.

³¹ H.L.A. HART, *THE CONCEPT OF LAW*, 128.

evaluative and hence contestable does not mean that we might not gain from reflecting upon its meaning. A single evaluative word often packs into its conventional linguistic meaning resources that can be useful for the elaboration of the provisions in which it appears.³² I will try to illustrate this with “cruel,” “inhuman,” and “degrading” in Section 5 of this paper.

Concentrating on the words themselves has an additional advantage. As I mentioned earlier, we should not wish away the fact that the provisions we are confronting have been framed using terms that are value-laden; they are presented to us as standards not rules. Constitutional, humanitarian or human rights provisions governing punishment and adverse treatment might have been framed using descriptive rather than evaluative predicates;³³ but the ones we have were not. It seems to me that the elaboration of a standard is not the same as the elaboration of a rule; nor should we assume that the elaboration of standard involves replacing it with a rule. Instead, the elaboration of a standard—at least in the first instance—should involve some movement from general evaluative ideas to more specific but still evaluative ideas. We take a term like “inhuman” and try to open up the evaluations—often the quite complex evaluations—that it involves, rather than scuttling away from the realm of evaluation altogether.

3. The Case Law

I would like to illustrate some of what I have just said by referring to the ways in which courts have actually considered these provisions. Much of what I am going to say in this section will focus critically on the interpretation of Article 3 of the ECHR as developed in the European Court of Human Rights (ECtHR). This is the most extensive jurisprudence on

³² Perhaps cite to the way philosopher Philippa Foot used to unpack the meanings of thick evaluative terms. See Philippa Foot, *Moral Arguments and Moral Beliefs* in her collection *VIRTUES AND VICIES* (1978), analyzing evaluative terms like “pride,” “harm,” “rudeness,” “justice,” etc.

³³ An example of a provision (in this ball-park) that is much more descriptive, much more rule-like is Article 18 of the Constitution of Argentina which says (in translation): “...Death penalty for political causes, any kind of tortures and whipping, are forever abolished. The prisons of the Nation shall be healthy and clean, for the security and not for the punishment of the prisoners confined therein; and any measure taken with the pretext of precaution which may lead to mortify them beyond the demands of security, shall render liable the judge who authorizes it.” There is still some indeterminacy here; but there has been a conscious effort to refer descriptively to particular practices, such as whipping and the death penalty, rather than to rely on evaluative terms like “cruel” or “inhuman.”

“inhuman and degrading.”³⁴ Before that, however, I will say just a little about the elaboration of similar provisions in the United States under the auspices of the Eighth Amendment and also the Alien Tort Statute.

(3a) American Eighth Amendment Jurisprudence

Obviously, US case law on the Eighth Amendment is relevant for any consideration of what “cruel” means in the context of a prohibition on “cruel, inhuman, and degrading” treatment. But one has to be very careful with this body of case law, for a number of reasons.

First, there is the distracting presence of “unusual” in the Eighth Amendment formulation: for a punishment to violate the Eighth Amendment, it must be both “cruel and unusual.”³⁵ Secondly, in its early years, the administration of the Eighth Amendment and its state equivalents had to be reconciled with the requirements of slavery. There might have been prohibitions on cruelty, but in slave codes those had to be read as prohibitions on “*excessive* whipping, beating, cutting or wounding” and “*unnecessary* tearing and biting with dogs.”³⁶ What Colin Dayan has called “the twisted logic of slavery” infested the jurisprudence of the Eighth Amendment.³⁷ (The persistence of corporal punishment (whipping) in

³⁴ The fact that these phrases are used in international, regional and national rights documents means that there is case law all over the world devoted to the question of their meaning. There is no space to go into this in any detail. However, for ancestral reasons, I cannot refrain from mentioning the recent decision by the Supreme Court of New Zealand in *Taunoa v Attorney-General* [2008] 1 NZLR 429. The Court had to determine some difficult questions about the application of the New Zealand Bill of Rights Act to the behavior modification regime applied in Auckland prison to prisoners whose conduct was violent or disruptive. The regime involved solitary confinement, loss of exercise and other privileges, and constant invasive searches. The question was whether the regime violated the requirement of Section 23 (5) that “[e]veryone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person,” and if so, whether it also violated the more serious prohibition in section 9 on “torture or ... cruel, degrading, or disproportionately severe treatment or punishment.” The Court held unanimously that the former provision was violated but—by a 4-1 majority (Chief Justice Sian Elias dissenting)—that the latter, more serious prohibition was not. (The Court also divided on the question of monetary remedies.) It is a long and interesting set of opinions. Not the least of its interest is the approach taken by the Court to the citation of foreign law: the New Zealand Court cited 22 American cases, 9 Canadian cases, 18 cases decided by the ECtHR, 3 South African cases, 8 UK cases (plus 6 Privy Council decisions), and 10 decisions by the UN Human Rights Commission, as well as 17 New Zealand cases.

³⁵ *Harmelin v. Michigan*, 501 U.S. 957, 967 (1991) (plurality). Contrast this with the fact that some U.S. State Constitutions prohibit “cruel *or* unusual punishments.” See *supra* note 10.

³⁶ Cites: from Dayan.

³⁷ COLIN DAYAN, *THE STORY OF CRUEL AND UNUSUAL* (2007).

prisons until well into the middle of the twentieth century, and the difficulty of using Eighth Amendment arguments against it, is just one illustration of this.)³⁸ Thirdly, in its modern manifestations, American Eighth Amendment jurisprudence has been particularly preoccupied with the death penalty, whereas this is a marginal consideration in most other advanced democracies.

Fourthly, Eighth Amendment jurisprudence, like American constitutionalism generally, has been disfigured in recent years by the work of “originalists,” who maintain that the proper approach to understanding rights provisions is to try to determine how members of the founding generation would have applied these terms two hundred or more years ago. In no other jurisdiction in the world is this methodology deployed; nowhere else in the world is it taken seriously.³⁹

A final point is that the “cruel and unusual” formulation of the Eighth Amendment is sometimes read (particularly by its liberal interpreters) as though it also conveyed a prohibition on inhuman and degrading treatment—indeed as though it was intended as a broad catch-all dignitarian restraint.⁴⁰ This is a distraction when we have modern human rights and humanitarian law provisions that explicitly use all three terms and we are considering their distinct meanings one by one.

³⁸ See *Jackson v. Bishop*, 404 F.2d 571, 577–79 (8th Cir. 1968).

³⁹ In the United States, constitutional originalism is often run together with constitutional textualism. Later I shall consider the difference between the two, and argue that the focused textualist approach that I shall be taking to the prohibitions on cruel, inhuman, and degrading treatment and punishment has nothing in common with intended-application originalism. See *infra*, text accompanying note 74. The association between the two approaches is unfortunate in my view, not least because it has fostered a sense that the only alternative to originalism is an approach with moves away from the specific meaning of the Amendment altogether in order to focus more diffusely on some such bland formulation as “the evolving standards of decency that mark the progress of a maturing society.” *Trop v. Dulles*, 356 U.S. 86, at __ (19 __).

⁴⁰ *Furman v. Georgia* 408 U.S. 238 (1972), Brennan J. concurring, at 270-3: “At bottom, then, the Cruel and Unusual Punishments Clause prohibits the infliction of uncivilized and inhuman punishments. The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is ‘cruel and unusual,’ therefore, if it does not comport with human dignity. . . . The primary principle is that a punishment must not be so severe as to be degrading to the dignity of human beings. . . . Pain, certainly, may be a factor in the judgment. . . . More than the presence of pain, however, is comprehended in the judgment that the extreme severity of a punishment makes it degrading to the dignity of human beings. . . . The true significance of these punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded. They are thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity.” (For a similar approach in Canada, see *R. v. Smith*, [1987] 1 S.C.R. 1045.) For further discussion, see text accompanying notes 89-91.

(3b) Alien Torts Statute Jurisprudence

US federal courts have also had to address the meaning of “cruel, inhuman, and degrading treatment” in cases arising under the Alien Tort Statute (ATS).⁴¹ The ATS entitles an alien to sue a foreign tortfeasor for (among other things) violations of the law of nations. It is something of an historic anomaly, but it is about as close as we get in our system to the sort of *ius cogens* jurisdiction that some foreign courts have assumed over human rights abuses.⁴²

Now the federal courts have been very cautious in their approach to ATS litigation, especially where actions are brought against high foreign government officials.⁴³ They are also quite cautious about the “law of nations” idea” in light of the insistence of the Supreme Court in *Sosa v Alvarez-Machain* (2004), that any new claim for a violation of an individual’s human rights under the ATCS must “rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigm” of the law of nations.⁴⁴ It is generally accepted that the international norm against torture crosses this threshold.⁴⁵ But courts have divided on the question of how this plays out with regard to prohibitions on cruel, inhuman, and degrading treatment. The Eleventh Circuit in *Aldana v. Del Monte* (2005) maintained that the ATS covers only violations of customary international law; it denied that one could simply extrapolate “law of nations” standards from human rights conventions.⁴⁶ But others have done just that.⁴⁷

Some of this caution has devolved upon the question of what “cruel, inhuman and degrading” means. In a case against Argentinean officials involved in torture and disappearances, a District Court in California complained about the relativity of the “degrading” standard:

⁴¹ Citation to ATS.

⁴² Compare the assertion of universal jurisdiction in *Regina v. Bow Street Metropolitan Stipendiary Magistrate And Others, ex parte Pinochet* [2000] 1 A.C. 147.

⁴³ Cite to 2nd Circuit decision in Mugabe case: *Tachiona v. U.S.* 386 F.3d 205 C.A.2 (N.Y.), 2004. See *infra* note 66.

⁴⁴ *Sosa v. Alvarez-Machain* 542 U.S. 692 (2004), at 725.

⁴⁵ Mention *Filartiga* case: *Filartiga v. Pena-Irala* 630 F.2d 876 C.A.N.Y., 1980.

⁴⁶ *Aldana v. Del Monte Fresh Produce* 416 F.3d 1242 C.A.11 (Fla.), 2005., at 1247.

⁴⁷ See *Mehinovic v. Vuckovic*, 198 F.Supp.2d 1322, 1347 (N.D.Ga.2002)

From our necessarily global perspective, conduct ... which is humiliating or even grossly humiliating in one cultural context is of no moment in another. An international tort which appears and disappears as one travels around the world is clearly lacking in that level of common understanding necessary to create universal consensus.⁴⁸

The court concluded that in the absence of clear and categorical definitions, it had no way of knowing what conduct was actionable under a “cruel, inhuman, and degrading treatment” standard.⁴⁹ And so it refused to recognize violation of this standard as a tort.⁵⁰

More recently, however, federal judges have shown themselves willing to work with these standards even if they remain ragged around the edges.⁵¹ One district court said that “[i]t is not necessary that every aspect of ... ‘cruel, inhuman or degrading treatment’ be fully defined and universally agreed upon before a given action meriting the label is clearly proscribed under international law, any more than it is necessary to define all acts that may constitute ‘torture’ ... in order to recognize certain conduct as actionable misconduct under that rubric.”⁵²

In 2002, in a case dealing with human rights abuses in Zimbabwe, Judge Victor Marrero in the Southern District of New York made the point that federal courts have a responsibility to help remedy the definitional indeterminacy of “cruel, inhuman or degrading treatment”; they should not just cite that indeterminacy as grounds for dismissing a suit. Judge Marrero said that in an area of law “where uncertainty persists by dearth of precedent, declining to render decision that otherwise may help clarify or

⁴⁸ *Forti v. Suarez-Mason* 694 F.Supp. 707, at 712 (N.D. Cal.,1988.) But see the discussion infra at text accompanying note 140.

⁴⁹ *Idem*.

⁵⁰ *Idem*: “To be actionable under the Alien Tort Statute the proposed tort must be characterized by universal consensus in the international community. Plaintiffs’ submissions fail to establish that there is anything even remotely approaching universal consensus as to what constitutes “cruel, inhuman or degrading treatment.” Absent this consensus in the internal community as to the tort's content it is not actionable under the Alien Tort Statute.”

⁵¹ See, e.g. *Jama v. United States Immigration and Nat. Serv.*, 22 F.Supp.2d 353, 363 D.N.J. 1998); *Mehinovic*, 198 F.Supp.2d at 1347-48. etc.

⁵² *Xuncax v. Gramajo*, 886 F.Supp. 162, 186 (D. Mass. 1995). And a court in California observed that “the fact that there [is] doubt at the margins—a fact that inheres in any definition—does not negate the essence and application of that definition in clear cases.”-- *Doe v. Qi*, 349 F.Supp.2d 1258 (N.D.Cal.2004).

enlarge international practice ... creates a self-fulfilling prophecy and retards the growth of customary international law.⁵³ In that case, Judge Marrero engaged in a quite sophisticated discussion of the definitional question, including a holding that “degrading” might apply to post-mortem mistreatment of a human body.⁵⁴ Eventually, the holding of liability against Mugabe and his party ZANU-PF was reversed on grounds of diplomatic immunity.⁵⁵ But it was not reversed on the ground of indeterminacy.”

(3c) ECHR Jurisprudence

The best developed body of case law on “inhuman and degrading treatment” is from the European Court of Human Rights (ECtHR) administering Article 3 of the ECHR: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” Through its precedents the ECtHR has established a set of principles,⁵⁶ presumptions,⁵⁷ and benchmarks⁵⁸ on

⁵³ *Tachiona v. Mugabe* 234 F.Supp.2d 401 S.D.N.Y., 2002. at 437 (Victor Marrero judge).

⁵⁴ *Ibid.*, at 438: “By any measure of decency, the public dragging of a lifeless body, especially in front of the victim’s own home, for close kin and neighbors to behold the gruesome spectacle, would rank as a degradation and mean affront to human dignity.” See also text accompanying note 113 *infra*.

⁵⁵ Judge Marrero had already held that Robert Mugabe himself had something like head-of-state immunity: *Tachiona v. Mugabe* 169 F.Supp.2d 259 S.D.N.Y., 2001. And the Second Circuit held in 2004 that diplomatic immunity provided for U.N. delegations precluded service upon Mugabe as an agent for ZANU-PF. (See *Tachiona v. U.S.* 386 F.3d 205 C.A.2 (N.Y.), 2004.)

⁵⁶ The principles tend to be reiterated in virtually every case, more or less in exactly the words used in previous cases, at the beginning of substantive assessment of Article 3 complaints. The recitation goes something like this (from *Wainwright v. United Kingdom* (2007) 44 E.H.R.R. 40 at §41):

Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Art.3 of the Convention. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and health of the victim. In considering whether a treatment is "degrading" within the meaning of Art.3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Art.3. Though it may be noted that the absence of such a purpose does not conclusively rule out a finding of a violation. Furthermore, the suffering and humiliation must in any event go beyond the inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment, as in, for example, measures depriving a person of their liberty.

⁵⁷ An example of a presumption is the following: “[W]here an individual is taken into custody in good health but is found to be injured by the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused and to produce evidence casting doubt on the victim’s allegations, particularly if those allegations were corroborated by

various issues relating to the circumstances in which official action might count as inhuman and degrading.

It is a good and usable jurisprudence.⁵⁹ Maybe there are one or two instances where Americans would feel the Europeans have been over-fastidious. Some worry that Article 3 as currently interpreted would forbid even standard US police interrogation techniques.⁶⁰ The Reagan administration's concern about the language of "inhuman and degrading"—which motivated the reservation discussed at the beginning of this paper—is said to have arisen out of its knowledge of a European case in which prison authorities' failure to recognize a sex change was determined to be inhuman and degrading.⁶¹ And one might also mention a suggestion in one case—not, however, adopted by the Court—that flight paths into Heathrow airport

medical reports, failing which a clear issue arises under Art.3 of the Convention.” *Yavuz v. Turkey* (2007) 45 E.H.R.R. 16 at §38. (This is pursuant to a general principle that “[i]n respect of persons deprived of their liberty, recourse to physical force which has not been made strictly necessary by their own conduct diminishes human dignity and is in principle an infringement of the right set forth in Art.3.” *Menesheva v. Russia* (2007) 44 E.H.R.R. 56 at __.

⁵⁸ For the idea of “benchmarks”, see Rudolf Schmuck, *The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT)—Fundamentals, Structure, Objectives, Potentialities, Limits*, 1 *IJIS* 69 2002 at p. 79. The ECtHR avails itself of benchmarks set by various regional agencies: “[T]he Court recalls that the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment has set 7m 2 per prisoner as an approximate, desirable guideline for a detention cell, that is 56m² for eight inmates.” (*Kalashnikov v. Russia* (2003) 36 E.H.R.R. 34 at §97.)

⁵⁹ And it has been used here as well in some of our ATS cases. We used their work in *Xuncax v. Gramajo*, 886 F.Supp. 162, 186 and 189 (D. Mass. 1995), citing *The Greek Case*, Y.B.Eur.Conv. on H.R. 186, 461-65 (1969) and *East African Asians v. United Kingdom*, 3 Eur. H.R.Rep. 76 at §§ 207-209 (1973). Also they used the work we did in *Rochin v California*, 342 U.S. 165 (1952): see *Jalloh v. Germany* (2007) 44 E.H.R.R. 32, at §§49-52.

⁶⁰ A footnote to the notorious Bybee torture memorandum http://www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/memo_20020801_JD_%20Gonzalez.pdf#search=%22bybee%20memo%20pdf%22 (fn 9 on pp. 17-18) reads as follows: “The vagueness of ‘cruel, inhuman and degrading treatment’ enables the term to have a far-ranging reach. Article 3 of the [ECHR] similarly prohibits such treatment. The [ECtHR] has construed this phrase broadly, even assessing whether such treatment has occurred from the subjective standpoint of the victim. See Memorandum from James C. Ho, Attorney-Advisor to John C. Yoo, Deputy Assistant Attorney General, Re: Possible Interpretations of Common Article 3 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (Feb. 1, 2002) (finding that [ECtHR]’s construction of inhuman or degrading treatment ‘is broad enough to arguably forbid even standard U.S. law enforcement interrogation techniques, which endeavor to break down a detainee’s “moral resistance” to answering questions.’)”

⁶¹ This is asserted *ibid.*, at 17, citing a decision by the European Commission on Human Rights, Dec. 15, 1977, in *X v. Federal Republic of Germany* (No. 6694/74), 11 Dec. & Rep. 16).

imposed inhuman treatment on those who had to live under them.⁶² But mostly the Court has held firm to its principle that Article 3 should not be cheapened by overuse.⁶³

For all the sophistication and moderation of these precedents, there is one thing one misses in the ECtHR case law and in the text-books that summarize it. No one spends much time reflecting on the meaning of the predicates that are incorporated in the Article 3 standard—“inhuman” and “degrading”—and explaining how the Court is guided by their meanings in generating its principles, presumptions and benchmarks. The Court simply announces its finding that certain practices are inhuman or degrading while others are not. Or announces a principle that it is going to use in determining what is degrading or what is inhuman.⁶⁴ It proceeds exactly according to the approach I criticized in Section 2 of this paper.⁶⁵ Sometimes principles for the elaboration of Article 3 are necessary inferences from the place that the Article is supposed to occupy in a legal system and their explanation is more or less self-evident. For example, nobody thinks that the prohibition on degrading treatment is supposed to preclude *any* stigmatizing aspect of punishment; and so we have the principle that in order to count as degrading treatment “the suffering and humiliation must ... go beyond the inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment, as in, for example, measures depriving a person of their liberty.”⁶⁶ But other principles cry out for an explanation that would tie them more closely to an understanding of the language of the text.

Consider, for example, the cases—still distressingly common in Eastern Europe, Turkey and Russia—in which someone is made to “disappear” by the authorities and frenzied inquiries by their parents or loved ones are dismissed with callous indifference. That the Court has been

⁶² *Hatton v UK* 2003 37 EHRR 28.

⁶³ For example, it has refused to apply it to force-feeding to avoid death by hunger strike or to shackling or solitary confinement or even the death penalty *per se*. On force-feeding: see *Nevmerzhitsky v. Ukraine* (2006) 43 E.H.R.R. 32 ECHR at §94. Shackling [get cite]. Solitary confinement: *Iorgov v. Bulgaria* (2005) 40 E.H.R.R. 7 ECHR . Death penalty: Though the Parliamentary Assembly of the Council of Europe has recently “reaffirmed its beliefs that the application of the death penalty constitutes inhuman and degrading punishment,” the ECtHR has not said that death penalty is inhuman and degrading: see *Öcalan v. Turkey* (2005) 41 E.H.R.R. 45 ECHR (Grand Chamber) 163.

⁶⁴ Get cite for this principle.

⁶⁵ *Supra* text accompanying notes 28-31.

⁶⁶ Cite.

receptive to these claims is to its great credit; it has dealt with them carefully and sensitively. But the manner in which it articulates a relation between the text of Article 3 and the principles it lays down for dealing with such cases leaves a lot to be desired. In the earliest cases, the reasoning went like this:

The court notes that ill-treatment must attain a minimum level of severity if it is to fall within the scope of art 3 [*citation omitted*]. It recalls in this respect that the applicant approached the public prosecutor in the days following his disappearance in the definite belief that he had been taken into custody. ... However, the public prosecutor gave no serious consideration to her complaint.... As a result, she has been left with the anguish of knowing that her son had been detained and that there is a complete absence of official information as to his subsequent fate. This anguish has endured over a prolonged period of time. Having regard to the circumstances described above as well as to the fact that the complainant was the mother of the victim of a human rights violation and herself the victim of the authorities' complacency in the face of her anguish and distress, the court finds that the respondent state is in breach of art 3 in respect of the applicant.⁶⁷

What is happening here is that there is a finding of anguish and distress caused by the authorities' indifference, and an announcement that this rises to the level of severity required for a violation of Article 3. Nothing more. In later cases, additional principles are introduced:

Whether a family member of a “disappeared person” is a victim of treatment contrary to Art.3 will depend on the existence of special factors which give the suffering of the relative a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of serious violations of human rights. Relevant elements will include the proximity of the family tie, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family members in the attempts to obtain

⁶⁷ *Kurt v Turkey* (15/1997/799/1002), ECtHR, 5 BHRC 1, 25 May 1998 at §§133-4.

information about the disappeared person and the way in which the authorities responded to those enquiries.⁶⁸

But again these subsidiary principles are simply announced, not explained. There is no sense that it might be worth discussing *why* the word “inhuman” or the word “degrading” apply to these recurrent dismissals of parental inquiries. Is it *degrading* inasmuch as the parent is treated as though her anxiety amounted to nothing, as though she had no right to make such an inquiry, or as though officials could treat an inquiry from someone like her as beneath contempt? The subsidiary principle that requires us to look at “the way in which the authorities responded to [the] enquiries” suggests something along these lines, but it is not spelled out. Is the conduct *inhuman*, inasmuch as any decent human being would understand a mother’s need to find out what had happened to her son, and would have to be particularly hard-hearted to ignore her distress? Is it inhuman because it predictably leads to a level of suffering that no human can reasonably be expected to endure? The subsidiary principle that requires us to look at “the proximity of the family tie” suggests something along these lines, but again there is no attempt to spell it out.

The scholars don’t attempt any analysis either. The principles and precedents are simply listed in the treatises and commentaries; the chapters on Article 3 in these textbooks consist of nothing but a succession of such citations—sentence plus footnote, sentence plus footnote.⁶⁹ The impression they convey is that a lawyer working in this area does not need to understand the elaborative relation between the principles and precedents and the text of the Article.

I don’t want to exaggerate. The ECtHR analysis is better now than it has been. For a while it looked as though the Court would treat “inhuman or degrading” as a single predicate in much the same way as the UN Human Rights Committee (UNHRC) treated “cruel, inhuman, and degrading” as a

⁶⁸ *Gongadze v. Ukraine* (2006) 43 E.H.R.R. 44 at §184, citing *Orhan v Turkey* [2002] ECHR 25656/94 18 JUNE 2002

⁶⁹ See e.g. HARRIS AT AL. *supra* note 17, at __; DONNA GOMIEN, DAVID HARRIS AND LEO ZWAAK *LAW AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN SOCIAL CHARTER* 108-118 (1996); ALASTAIR MOWBRAY, *CASES AND MATERIALS ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 172-227 (Second edition, 2007); CLAIRE OVEY AND ROBIN C.A. WHITE, JACOBS AND WHITE: *EUROPEAN CONVENTION ON HUMAN RIGHTS* 58-66 (Third edition, 2002).

single predicate—“CID”—with no differentiation between the terms of the acronym.⁷⁰

There was a stage, too, at which the ECtHR and the attendant scholarship distinguished between the terms but only in a crude quantitative way, marked by differences in the intensity of the suffering that was inflicted.⁷¹ Degrading treatment is painful, painful enough to get over the minimum threshold of Article 3, but not as painful as inhuman treatment; inhuman treatment is very painful, but not as painful as torture; torture is the most painful of all and so needs a special stigma attached to it; etc.⁷² The only qualitative distinction toyed with at this stage was that the basis of the distinction between torture and inhuman treatment might be the purposive element in torture.⁷³ (Maybe it is thought that the special stigma has to do

⁷⁰ Get ECHR non-distinguishing precedents. Refer to UNHRC, General Comment No 20/44 (2 April 1992), cited by MALCOLM D. EVANS AND ROD MORGAN, PREVENTING TORTURE: A STUDY OF THE EUROPEAN CONVENTION FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 76 (1998). The UNHRC has said that it does not consider it necessary “to establish sharp distinctions between the different kinds of punishment or treatment.” Get cite for this phrase.

⁷¹ Bernhard Schlink, *The Problem with “Torture Lite”* CARDOZO LAW REVIEW October, 2007 p. 86: “Whatever the wording, the distinction between torture and cruel, inhuman and degrading treatment is one of intensity.” Of course these measures of inherent suffering might be complicated in a sort of Benthamite way by “duration” etc.” Jamie Meyerfield, *Playing by our own Rules: How U.S. Marginalization of International Human Rights Law Led to Torture* 20 HARVARD HUMAN RIGHTS JOURNAL 89 (2007), p. 93: “One might even argue that there are circumstances in which cruel, inhuman, or degrading treatment not rising to the level of torture is worse than torture. Some forms of torture, such as waterboarding, last only for seconds. When ill treatment less severe than torture is extended for months and years, one could argue that such treatment is worse than very brief torture.” For the quantitative dimensions of Jeremy Bentham’s felicific calculus, see **Error! Main Document Only.** JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J.H. Burns and H.L.A. Hart eds., 1970), __.

⁷² The ECtHR famously said in the 1970s in *Ireland v. United Kingdom* [cite], “[I]t appears . . . that it was the intention that the Convention, with its distinction between ‘torture’ and ‘inhuman or degrading treatment,’ should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.” At least one scholar has suggested that the nature of the prohibition should be responsive to the lesser intensity of inhuman and degrading treatment. Yuval Shany, *The Prohibition against Torture and Cruel, Inhuman, and Degrading Treatment and Punishment: Can the Absolute be Relativized under Existing International Law?* 56 CATHOLIC UNIVERSITY LAW REVIEW 837 (2007), writes that: “policy considerations might support the proposition that the absolute bar against torture should not necessarily carry over to less severe forms of cruel, inhuman, or degrading punishment and treatment prohibited by international law.”

⁷³ Cite to *The Greek case*: EVANS AND MORGAN, supra note 70, at 78. See Christian M. De Vos, *Mind the Gap: Purpose, Pain and the Difference between Torture and Inhuman Treatment*,

with the special instrumentalization of the person in torture cases, even when the level of suffering inflicted is the same.)

Elements of this quantitative approach still persist.⁷⁴ As we saw in the disappearances case, the only reason the ECtHR adduced for saying that a mother's anguish at the rebuff of her inquiries after the disappearance of her son qualified under Article 3 was that it rose above the notional threshold required to invoke Article 3 at all. More generally, however, what has emerged is a jurisprudence whose detail seems qualitative⁷⁵—with various principles and presumptions—but which doesn't involve any thoughtful analysis of the standards which the Court is supposed to be applying.

4. Ordinary Language Assumptions

In Section 5 of this paper, I will try to show what a qualitative elaboration of these predicates “cruel,” “inhuman,” and “degrading” might involve.⁷⁶

My approach is textualist though, as I have already said, I want to eschew the connection commonly made between textualism and originalism, particularly intended-application originalism. Originalists believe that the provisions of a statute, treaty, or constitution should be understood now in the way that it was understood by those who framed, signed, voted for, or

<http://www.wcl.american.edu/hrbrief/14/2devos.pdf?rd=1> at p. 7, for a view of the ECtHR which continues to emphasize this.

⁷⁴ Scholars still routinely refer to the prohibition on “degrading” treatment as “the lowest form of an absolute right on the graded scale of ill-treatment under Article 3” — see e.g. MOWBRAY 227, citing Yutaka Arai-Takahashi, *Grading Scale of Degradation: Identifying the Threshold of Degrading Treatment or Punishment under Article 3 ECHR*, 21 *Netherlands Quarterly of Human Rights* 385 at 420 (2003). For an indication of how far this is from any serious qualitative approach, consider the following comment by Arai-Takahashi (*ibid.*, pp. 42-0-1, quoted by MOWBRAY at 227): “[I]n view of its low-intensity requirement, degrading treatment or punishment allows the Court to address multiple issues in diverse fields, some of which may never be condemned as worthy of a stigma with the inkling of torture. ... [A]n extensive coverage of issues under the rubric of degrading treatment can be undertaken without compromising the non-derogable nature of Article 3.”

⁷⁵ Arai-Yokoi, *Grading Scale of Degradation: Identifying the Threshold of Degrading Treatment or Punishment Under Article 3 ECHR*, 21 *NETH. Q. HUM. RTS.* 385 (2003). (Abstract): Arai-Yokoi: ECtHR has “capitalised on the graduating scale of degrading treatment so as to diversify the protective scope of Article 3, in a continued search for progressive European public order,” in effect supplying “to individual victims a horizon of possible arguments.”

⁷⁶ I am not particularly concerned in this paper with the bottom line: e.g., is waterboarding inhuman? is lap-dancing by a female interrogator degrading treatment? My questions in this paper are about how we get to the bottom line. I don't want to denigrate bottom-line concerns or detract from their urgency; but there needs to be some division of labor. While some scholars and advocates make the case that (e.g.) water-boarding is inhuman treatment, others are engaged in reflecting upon the meaning of “inhuman” and the proper methodology for its application.

ratified it. If this involves attention to the original word-meaning, well and good. But some originalists believe that this methodology involves attending to what the original framers did with the text or would have done with it so far as its application to various practices is concerned.⁷⁷ That is what I mean by intended-application originalism. The trouble with that form of originalism is that it does not take seriously the meaning of the words used in the relevant provisions, because it treats the same language—the same text—differently depending on who counts as the relevant class of framers and what they were inclined to do or approve. And it does this even if there is no independent evidence that the word-meaning has changed from context to another.

So, for example, a jurist taking this approach is going to interpret the same phrase “cruel ... punishment” one way as it occurs in the English Bill of Rights of 1689, another way as it occurs in the Texas Constitution of 1876, and a third way in the Canadian Charter of 1982. In each case, he will be looking at the judgments about cruelty that the framers were inclined to make. The Canadian framers probably took it for granted that capital punishment was out of the question; the British framers probably had the opposite assumption. Now there is no independent to suppose that the word-meaning of “cruel” has changed significantly over this four hundred year period—certainly the dictionary records no such change. What has changed are people’s views about cruelty not the meaning of the word. But intended-application originalists are not interested in word-meaning.

In any case, if we were to adopt an originalist methodology, we would not get very far with “inhuman and degrading.” No one knows why these terms were chosen or what the people who chose them had in mind. It just seemed obvious that standards like these needed to be set up. No one knows why “cruel” was present in Article 7 of the ICCPR but absent in Article 3 of the ECHR.⁷⁸

My approach is resolute in its focus on word-meaning. It is going to involve what for many scholars will seem a distressing and perhaps annoying deference to the dictionary. But I do want to focus on the complications and components of word-meaning that it is exactly the

⁷⁷ This is an approach no self-respecting textualist would ever take to a statute; and the puzzling thing is why certain American textualists give up that inhibition when it comes to constitutional provisions.

⁷⁸ For example, omission of “cruel” in ECHR and addition of “degrading” to earlier drafts was not seen as particularly significant. EVANS AND MORGAN, *supra* note 70, at 72 (no particular debate in the *travaux préparatoires* on significance of the particular terms).

function of a good dictionary to record. I am well aware that words do many things in law besides conveying their dictionary definitions. Attention to word-meaning is not the be-all or end-all. But still it can be illuminating. It's like what J.L. Austin said in his defense of ordinary language analysis: "[O]rdinary language is not the last word: in principle it can everywhere be supplemented and improved upon and superseded. Only remember, it is the *first* word."⁷⁹ I worry sometimes that in our rush to the bottom line we miss some of the nuance and illumination that ordinary language can provide in helping us appreciate the standards that are being invoked here.

In following this approach, I shall proceed on the basis of six assumptions.

(i) Evaluative language. The terms we are considering are patently evaluative. As I said in Section 2 of this paper, we should not lose sight of this, and we should not approach the interpretation of the relevant provisions thinking that this is some sort of mistake or failure of nerve on the part of the drafters. We should not use the opportunity that interpretation presents to correct this and convert what is presented to us as a standard into a rule or set of rules.

(ii) Particular, not all-purpose, evaluations. I shall assume that provisions prohibiting cruel, inhuman and degrading treatment invite us to make particular, rather than all-purpose evaluations. "Cruel," "inhuman," and "degrading" don't just mean "bad."⁸⁰ As one scholar puts it, "inhuman or degrading treatment" is not a "catch-all concept that encapsulates almost every conceivable manifestation of unbecoming conduct."⁸¹ We are invited to look for a particular sort of badness or inappropriateness and it is the

⁷⁹ J.L. Austin, *A Plea for Excuses*, [1956-7] PROCEEDINGS OF THE ARISTOTELIAN SOCIETY, available at <http://sammel.punkt.philo.at:8080/1309/1/plea.html> : "[O]ur common stock of words embodies all the distinctions men have found worth drawing, and the connections they have found worth marking, in the lifetimes of many generations: these surely are likely to be more numerous, more sound, since they have stood up to the long test of the survival of the fittest, and more subtle, at least in all ordinary and reasonably practical matters, than any that you or I are likely to think up in our arm-chairs of an afternoon -- the most favoured alternative method. ... Certainly, then, ordinary language is not the last word: in principle it can everywhere be supplemented and improved upon and superseded. Only remember, it is the *first* word."

⁸⁰ I follow ECtHR judge Gerald Fitzmaurice in *Tyrrer v UK*, sep. opinion, para. 14. (quoted by EVANS AND MORGAN, supra note 84, at 89), in saying that "[t]he fact that a certain practice is felt to be distasteful, undesirable or morally wrong ... is not sufficient ground in itself for holding it to [be inhuman or degrading]."

⁸¹ Johan D. van der Vyver, *Torture as a Crime under International Law*, 67 ALBANY L. REV. 427 (2003). 448

purpose of the word-meanings of “cruel” and “inhuman” and “degrading” to indicate to us what that particular sort of badness is supposed to be

(iii) Unpacking evaluations. Not all evaluations are simple. Some are complex combinations of description and evaluation tangled together and not readily separable; we sometimes call these “thick” moral predicates (as opposed to thin ones like “good” and “right”). Some evaluations nest inside one another, directing our evaluative attention at each level to some particular aspect of a situation. With patience and a bit of analytical skill, I believe it is possible to unpack some complex evaluative predicates, and that is what I shall try and do in Section 5.

(iv) The path not chosen. We should be attentive to the fact that a particular set of words has been chosen and others have not been chosen. On their terms, the relevant norms do not prohibit “unjust” treatment, for example, or “inefficient” punishment. Our evaluative language is very rich: and these provisions draw on some of these riches and not others.

(v) Different terms mean different things. I shall assume that the use of more than one term is supposed to indicate more than one meaning. As I mentioned earlier, the UNHRC is on record as saying that it is not necessary “to establish sharp distinctions between the different kinds of punishment or treatment.”⁸² But I shall not follow them in that. I will not say, with Lord Bingham, that “[d]espite the semantic difference between the expressions ‘cruel and unusual treatment or punishment’ ... and ‘inhuman or degrading treatment or punishment’ (as in the European Convention), it seems clear that the essential thrust of these provisions, however expressed, is the same, and their meaning has been assimilated.”⁸³ We may find a certain measure of overlap; but that is something for us to uncover in our analysis, not to assume *ex ante*.

(vi) No distractions. The provisions we are considering prohibit treatment or punishment which is cruel, inhuman or degrading, *whatever else it is*. So, for example, if someone thinks that water-boarding is *necessary* in certain circumstances to prevent terrorist attacks, that does not affect the question of whether it is inhuman, nor does it affect the consequences of its being judged inhuman. If it is inhuman, then it is prohibited by the provisions we are considering whether it is thought necessary for defense against terrorism or not. The logic of these provisions is clear: [X is cruel *or* inhuman *or* degrading] → [X is prohibited]. There is

⁸² HRC, General Comment No 20/44 (2 April 1992), cited by EVANS AND MORGAN, *supra* note 70, at 76.

⁸³ Cite. [quoted, I think, by Elias CJ in *Taunooa*.]

no room in the antecedent of this conditional to consider anything like necessity or any other aspects of X's desirability. (This point is sustained partly by the categorical language of the articles and partly by the explicit statement in the ICCPR and the ECHR that no derogation is to be made from these provisions in time of emergency.⁸⁴

So we are not permitted to follow the reverse logic, a realist logic proceeding on the basis of *modus tollens*: (1) If X is inhuman then X is prohibited; (2) But because X is necessary, it is unthinkable that X should be prohibited; therefore, (3) X cannot be regarded as inhuman. I assume that the meaning of "inhuman" generates independent input into the syllogism, so that we cannot manipulate the term to reach the result we think is necessary.⁸⁵

I don't mean that attendant circumstances can never be relevant to a determination of whether treatment is inhuman or degrading. For example, ECtHR doctrine holds that shackling a prisoner is degrading unless the shackling is necessary to stop the prisoner from harming others.⁸⁶ Someone might ask: what is the difference between *this* invocation of an attendant possibility of harm to others, to justify what would otherwise be degrading, and (say) the invocation of the danger of terrorist attack to justify what would otherwise be degrading treatment during interrogation?⁸⁷ The question is a fair one, but I think it can be answered. In the shackling case, what is degrading is the use of chains without any valid justification. Once the justification is clear, the element of degradation evaporates. But in the interrogation case, we choose treatment that is inherently degrading because we think that it is precisely the *degradation* that will get the detainee to talk. In other words, the purpose of avoiding future attacks is not a way of undermining the claim that the interrogation technique is degrading; it is a way of justifying the selection of a degrading technique. And as such it is prohibited by the provisions we are considering.⁸⁸

⁸⁴ ICCPR, Article 4 (2) and ECHR Article 15 (2).

⁸⁵ But notice there is something of that logic in the ECtHR approach to "degrading," with reference to punishment. We say: it can't have been the intention of the ECHR to abolish ordinary criminal punishment; but punishment is inherently stigmatizing; therefore there must be an element of stigma that doesn't count as "degrading" for the purposes of Article 3.

⁸⁶ Cite.

⁸⁷ I am grateful to Rachel Barkow and Cristina Rodriguez for pressing this point.

⁸⁸ I recently came across a novel way of trying to undermine this point. In a letter dated December 2007 (facsimile on file with author), Brian Benczkowski, a Principal Deputy Assistant Attorney-General in the Office of Legal Counsel in the Justice Department considered whether the identity

5. The Words Themselves

Finally, after all this throat clearing, let us turn to the particular predicates that are used in these provisions: “cruel,” “inhuman,” and “degrading.”

(5a) “cruel”

“Cruel,” obviously, is a term of condemnation. The *Oxford English Dictionary*’s definition of “cruel” indicates a range of attitudes towards others’ distress or suffering that are properly regarded as wrong or seriously inappropriate.

Of persons (also *transf.* and *fig.* of things): Disposed to inflict suffering; indifferent to or taking pleasure in another's pain or distress; destitute of kindness or compassion; merciless, pitiless, hard-hearted. ... Of actions, etc.: Proceeding from or showing indifference to or pleasure in another's distress.⁸⁹

Distress and suffering normally excite concern and aversion; except in pathological cases, they are not the subject of pleasure or satisfaction in an observer. The disposition to inflict suffering, for its own sake, and taking

of a detainee or the information he was thought to possess might affect our interpretation of Common Article 3 safeguards. Mr. Benczkowski thought the answer was probably “no,” but he noted this possible exception:

[S]ome prohibitions under Common Article 3, such as the prohibition on “outrages upon personal dignity,” do invite consideration of the circumstances surrounding the action. ... [A] general policy to shave detainees for hygienic and security purposes would not be an “outrage upon personal dignity,” but the targeted decision to shave the beard of a devout Sikh for the purpose of humiliation and abuse would present a much more serious issue. In such an example, the identity of the detainee and the purpose underlying the act would clearly be relevant. Similarly, the fact that an act is undertaken to prevent a threatened terrorist attack, rather than for the purpose of humiliation and abuse, would be relevant to a reasonable observer in measuring the outrageousness of the act.

Mr. Benczkowski’s analysis depends on moving from the quite specific phrase “outrage upon personal dignity” to the more general standard of “outrageousness.” Obviously whether an action is outrageous or not depends, among other things, on whether we are trying to achieve something important—such as averting a terrorist attack—by its means. But that does not affect the question of whether it is an outrage upon personal dignity. The fact that the word “outrage” is used in the latter phrase does not entitle us to assume that what is deployed here is a general standard of outrageousness.

Also, Benczkowski’s analysis suggests assuming that if the purpose of an action like shaving a Sikh’s beard is to elicit valuable information from him, then the purpose cannot be humiliation. But this is a mistake. The purpose is to elicit the information *by humiliating him*: the humiliation is intended as a means and the eliciting of information is intended as an end.

⁸⁹ Cite.

pleasure in another's pain or distress are usually regarded as paradigms of wrongness. But, as the dictionary indicates, it is not only the conscious and active attitudes towards suffering that the term "cruelty" captures; it also hard-heartedness or indifference towards suffering. In between deliberate sadism and cold-hearted indifference, "cruel" also connotes the absence of attitudes that are appropriate when suffering is inflicted or otherwise going on: it connotes the absence of compassion or pity or mercy.

What makes a certain attitude towards suffering or distress appropriate or inappropriate? Sometimes the answer is to be found in the background norms of a certain institution. In old-fashioned family law, "cruelty" as a matrimonial offense is understood relative to the love and mutual support generally reckoned among the conditions of a decent marriage.⁹⁰ But it is not always so relative. The very idea of "cruelty" supposes, I think, that there are certain attitudes which are *inherently* appropriate when there is a question of suffering or distress: compassion, pity, concern, etc. And there are certain attitudes inherently *inappropriate*: pleasure in another's suffering, unconcern, or indifference.

Though many of the rights provisions we are considering talk very generally about "cruel treatment," the term takes on a particular flavor in the context of punishment. It does so because punishment seems to involve a reversal of ordinary attitudes towards suffering: it seems that we deliberately choose sanctions that will cause suffering to those upon whom they are imposed. Some say this is part of the definition of punishment: H.L.A. Hart, for example, defines punishment in terms of "pain or other consequences normally considered unpleasant."⁹¹ I think it is part of the meaning of punishment that the sanction is imposed because it is (thought to be) undesired by the victim; it is something he would prefer to avoid. But it need not involve pain or suffering: fines are punishments, and so is imprisonment, even when it consists (as it should) of nothing more than the unwanted deprivation of liberty. Even in cases where we do set out to impose as punishment a sanction that will cause distress, we think it appropriate that the imposition of distress be measured and that there should be a strong aversion to imposing more distress than is merited or than is necessary. The condemnatory implications of "cruel" are rightly applied to anyone who takes advantage of the opportunities afforded by lawful punishment to inflict

⁹⁰ Cites on matrimonial offense of cruelty.

⁹¹ H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 4 (1963).

greater suffering than is appropriate, or to inflict suffering without the appropriate attention to necessity and proportion.

The dictionary suggests that “cruel” is a word to be applied primarily to the agents whose attitudes to suffering or distress are revealed in their action or inaction. That is the primary meaning. Its application to the condition of the victim—the person experiencing the distress or suffering—is secondary, an extension of that. (So the dictionary also says that “cruel” can be used “[o]f conditions, circumstances, etc.: Causing or characterized by great suffering; extremely painful or distressing; *colloq.* = severe, hard.”) Mediating the two uses—“cruel person” and “cruel condition”—is of course “cruel action,” though I reckon that partakes more of the agent-oriented sense than the victim-oriented sense. And I would put “cruel treatment” and “cruel punishment” in that category too. They characterize actions or events in terms of the presence of inappropriate attitudes towards suffering or the absence of appropriate attitudes towards suffering.

In the American jurisprudence on “cruel and unusual punishment,” it is sometimes said that underlying the Eighth Amendment is a broader principle of human dignity. So, for example, according to Justice Brennan:

A punishment is “cruel and unusual” ... if it does not comport with human dignity. The primary principle is that a punishment must not be so severe as to be degrading to the dignity of human beings. ... The true significance of these punishments [*sc. those prohibited by the Eighth Amendment*] is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded. They are thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity.⁹²

I suspect that something about human dignity is conveyed whenever these terms— “cruel,” “inhuman,” and “degrading”—are used.⁹³ We have already

⁹² *Furman v Georgia*, 408 U.S. 238 (1972), at pp. 271-3.

⁹³ In “Torture and Positive Law,” *supra* note 2, I argued that the prohibition on torture is the archetype of an extraordinarily important principle in our law, the principle of non-brutality, and I think the same is true of the prohibitions on cruel, inhuman and degrading treatment. I tried to capture this principle in the following terms (*ibid.*, 1726-7): “Law is not brutal in its operation. Law is not savage. Law does not rule through abject fear and terror, or by breaking the will of those whom it confronts. If law is forceful or coercive, it gets its way by non-brutal methods which respect rather than mutilate the dignity and agency of those who are its subjects. The idea is that even where law has to operate forcefully, there will not be the connection that has existed

noted, however, that at the same time as Justice Brennan reads the prohibition on cruel punishments as conveying a dignitarian standard, he tends to read “cruel” as also connoting “inhuman” and “degrading.” (As I said earlier,⁹⁴ it is as though he wished our framers had used the language of ICCPR, Article 7.) But, in fact, out of the three predicates we are considering, “cruel” seems to be the one that is the least dignitarian in its connotations. Degradation is obviously a dignitarian idea, and so is inhumanity, at least if it is used in a victim-oriented as opposed to an agent-oriented way. (We shall consider this in more detail in subsection (5b) below.) But “cruel” seems to focus on pain and distress, which is something suffered by animals as well as humans. We talk easily and I think non-figuratively about cruelty to animals. In that case, the term has more or less exactly the same use as it does in the case of cruelty to humans: it refers to an inappropriate attitude towards suffering or distress. I think, therefore, that if we are trying to capture the distinct meaning that “cruel” is supposed to convey in a provision like Article 7 of the ICCPR—“No one shall be subjected ... to cruel, inhuman, or degrading treatment or punishment”—we should not say that what it conveys is a distinctive standard of human dignity.

(5b) “inhuman”

The first thing to note about “inhuman” is that it does not mean the same as “inhumane.” The confusion is very common. On February 17, 2008, a fine op-ed piece by an Air Force Colonel and former Guantanamo prosecutor on the use of waterboarding was subbed by the *New York Times* with the internal headline “Waterboarding is Inhumane”—which is *not* what the author said in his article. He said it was inhuman.⁹⁵ In fact, both terms are

in other times or places between law and brutality. People may fear and be deterred by legal sanctions; they may dread lawsuits; they may even on occasion be forced by legal means or legally empowered officials to do things or go places against their will. But even when this happens, they 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. Instead, there will be an enduring connection between the spirit of law and respect for human dignity—respect for human dignity even in extremis, where law is at its most forceful and its subjects at their most vulnerable.”

⁹⁴ *Supra*, text accompanying notes 47-49.

⁹⁵ Morris Davis, *Unforgivable Behavior, Inadmissible Evidence*, NEW YORK TIMES, Feb 17, 2008, Opinion page 12. In the same issue of the NEW YORK TIMES, a news story on John McCain said that legislation that he helped sponsor in 2005 “already prohibits the C.I.A. from ‘cruel, inhumane or degrading treatment.’” It is not clear whether the quotation marks here are supposed to indicate what McCain said or whether it is just the reporter’s ignorance that the relevant legislation prohibits inhuman treatment not inhumane treatment. (Michael Cooper,

used in the human rights and humanitarian law provisions we are considering. Article 7 of the ICCPR prohibits inhuman treatment, while Article 10(1) of that Covenant also requires that “[a]ll persons deprived of their liberty shall be treated with humanity.” Common Article III of the Geneva Conventions does not use “inhuman.” Instead it says that “[p]ersons taking no active part in hostilities ... shall in all circumstances be treated humanely....” According to the *Oxford English Dictionary*, “inhumane” in its modern use is “a word of milder meaning than *inhuman*.”⁹⁶ Accordingly a prohibition on “inhumane conduct” is much more demanding than a prohibition on “inhuman conduct.”⁹⁷ (So, if one wants to discredit an accusation of “inhuman” treatment” as invoking a standard which is

McCain Draws Criticism on Torture Bill, NEW YORK TIMES, Sunday, Feb 17, p. A27.) Both the *New York Times* and the *Wall Street Journal* said that McCain’s legislation prohibited inhumane treatment when it was passed into law. David Rogers, *Bush Accepts McCain's Torture-Ban Amendment*, *The Wall Street Journal*, December 16, 2005, p. A6. Elisabeth Bumiller, *For President, Final Say on a Bill Sometimes Comes After the Signing*, NEW YORK TIMES, January 16, 2006, p. A1. Also the “inhumane” version is used over and over again in Richard W. Stevenson and Joel Brinkley, *More Questions As Rice Asserts Detainee Policy*, NEW YORK TIMES December 8, 2005, p. A1.

⁹⁶ The OED says there was a time when the two expressions meant the same thing and were used interchangeably, but it notes that by the nineteenth century, “inhumane” had become an obsolete variant of inhuman. And the dictionary says that “*inhumane* in current use has been formed afresh on *humane*, in order to provide an exact negative to the latter, and [is] thus a word of milder meaning than *inhuman*.” The dictionary defines “inhumane” as “destitute of compassion for misery or suffering in men or animals.”

⁹⁷ There is an excellent discussion of “inhuman” and “inhumane” in the opinion of Elias CJ in *Taunoa v Attorney-General* [2008] 1 NZLR 429, at §79. Considering that section 23 (5) of the New Zealand Bill of Rights Act requires that “Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person” in addition to the broader section 9 prohibition on “cruel, degrading, or disproportionately severe treatment or punishment,” the Chief Justice said this:

A requirement to treat people with humanity and respect for the inherent dignity of the person imposes a requirement of humane treatment. That seems to me to be the natural and contextual effect of the words "with humanity". A principal meaning of "humanity" relates to "humane". In the context of the New Zealand Bill of Rights Act, the words "with humanity" are I think properly to be contrasted with the concept of "inhuman treatment", which underlies s 9 and its equivalent statements in other comparable instruments. On this view, s 23(5) is concerned to ensure that prisoners are treated "humanely" while s 9 is concerned with the prevention of treatment properly characterised as "inhuman". The concepts are not the same, although they overlap because inhuman treatment will always be inhumane. Inhuman treatment is however different in quality. It amounts to denial of humanity. That is I think consistent with modern usage which contrasts "inhuman" with "inhumane".

This is exactly the kind of discussion whose absence I was lamenting in my account of the ECtHR jurisprudence in section 3 above.

excessively demanding, one rewrites it as an accusation of “inhumane treatment.” I believe this happens often in the American debate). In the rest of the discussion in this sub-section, I shall focus on the meaning of “inhuman,” the term used in Article 7 of the ICCPR.

The term “inhuman” seems to refer to the absence of something to do with our common humanity or the presence of something at odds with it. There is something about being human that makes particularly problematic either (a) the act of inflicting of the treatment referred to as inhuman or (b) the suffering of the treatment referred to as inhuman. The dictionary seems to favor (a). According to the *Oxford English Dictionary*, “inhuman,” as applied to persons, means “[n]ot having the qualities proper or natural to a human being; esp. destitute of natural kindness or pity; brutal, unfeeling, cruel.” And as applied to actions or conduct, it means “[b]rutal, savage, barbarous, cruel.” As in the case of “cruel,” these definitions apply the predicate to the person meting out the treatment. It is the person meting out the treatment who is inhuman, who does not have “the qualities proper or natural to a human being.” The term picks out what David Hume called “the vice of inhumanity.”⁹⁸

In the case of “cruel,” the application of the word to the suffering itself, as opposed to the inflictor’s attitude to the suffering, seems obviously figurative. But in the case of “inhuman” I am not so sure. Milton used the phrase “inhuman suffering” in the last book of *Paradise Lost*,⁹⁹ and we might give that a quite distinct meaning, along the following lines. Suffering might be described as inhuman if it were thought that no human could or should have to put up with it, rather than inhuman because, in some normative sense, no human could or should be able to inflict it.¹⁰⁰ Relying now on my own linguistic intuitions rather than the dictionary, I believe that this independent victim-centered meaning of “inhuman” may well be involved in our best understanding of the term in the human rights

⁹⁸ DAVID HUME, A TREATISE ON HUMAN NATURE, Bk. III, ___ : my emphasis.

⁹⁹ “Can thus / Th' Image of God in man created once / So goodly and erect, though faultie since, / To such unsightly sufferings be debas't / Under inhuman pains?” (x, 507-11)

¹⁰⁰ William Twining, *Torture and Philosophy*, 52 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY, SUPPLEMENT 143 at ___ (1978) thinks it is obvious that the terms are victim-centered: “words like inhuman and degrading, and, more important, the kinds of concern that lie behind them, refer directly to the situation, and the rights, of the victim rather than to the blameworthiness of the behaviour of the agent.”

provisions we are considering. I shall explore it shortly.¹⁰¹ But first I want to give the agent-centered approach its due.

(i) Inhumanity on the part of the agent

The agent-centered approach might include inhuman treatment of an animal: recall Cordelia's expostulation in *King Lear* when she hears of the storm her father was exposed to by her sisters: "Mine enemy's dog, / Though he had bit me, should have stood that night / Against my fire."¹⁰² The idea would be that, in the circumstances, no human could treat a dog in this way—maybe on account of what Jean-Jacques Rousseau called our "innate repugnance at seeing a fellow-creature suffer."¹⁰³ But it would be odd to describe the dog's suffering as, in itself, inhuman.

Judge Fitzmaurice in his separate opinion in the European Court on British maltreatment of detainees in Northern Ireland in the 1970s said that

the concept of 'inhuman treatment' should be confined to kinds of treatment that ... no member of the human species ought to inflict on another, or could so inflict without doing grave violence to the human, as opposed to animal, element in his or her make-up.¹⁰⁴

That is an agent-centered emphasis—treatment that would do "grave violence to the human, as opposed to animal, element in [the agent's] make-up." But it is also relational in the sense of referring to treatment that no member of the human species ought to inflict *on another member of the human species*, as opposed to treatment that Cordelia would not apply to her enemy's dog. There are certain things that humans cannot or should not be able to do to other humans (whatever they can do to dogs).¹⁰⁵ This relationality might be explained by sympathy. David Hume observed that "[a]ll human creatures are related to us by resemblance. Their persons, therefore, their interests, their passions, their pains and pleasures must strike upon us in a lively manner, and produce an emotion similar to the original

¹⁰¹ See *infra* text accompanying notes 105-8.

¹⁰² KING LEAR, Act 4, sc 7.

¹⁰³ Rousseau described this "force of natural compassion" as a "pure emotion of nature, prior to all kinds of reflection." ROUSSEAU: DISCOURSE ON INEQUALITY, Part One.

¹⁰⁴ Sep opinion in *Ireland v UK*, para 26, quoted by EVANS AND MORGAN, *supra* note 70, at, at ___, who observe that this view has not prevailed.

¹⁰⁵ Refer to Kant on significance of moral prohibitions on cruelty to animals. [Cite from my paper responding to Julian Franklin.]

one.”¹⁰⁶ The idea is that the suffering of another human resonates with us—we know what it is like to be a human in pain—and it might be thought that there is an extent of human suffering whose resonance in the person inflicting it would normally excite such sympathetic anguish as would lead him to pity his victim and desist.

Now this certainly will not work as a psychological hypothesis. There are sadists who enjoy the infliction of suffering that those who talk of “inhumanity” say no human could tolerate inflicting, and these sadists are and remain members of the human species. There are torturers who, even if they do not derive pleasure from inflicting such suffering, are nevertheless willing to do so for what they regard as good purposes—and they too remain members of our species. Humans can be brutal, savage, cruel, and pitiless in the suffering they are prepared to inflict. We may want to label them inhuman, yet they remain human beings. The inhuman, as Levinas put it, comes to us through the human.¹⁰⁷

The term “inhuman” is evidently a normative, not a descriptive one; but it is not simply a term of condemnation. The substance of the claim is that persons who behave in this way are being in some sense *untrue* to their undoubted humanity. Maybe we can resolve this with talk of pathology: a sense of normal human moral development that places limits on what one can bear in the way of this fellow feeling, and then a pathology defined by contrast with that pattern of normal development. So someone’s ability to inflict this suffering leads us to classify him as a monster, a pervert, or as sick or damaged. But we have to conjoin this with an acknowledgement that many people of whom we say this remain unconcerned and cheerfully steadfast in their brutality.

(ii) Inhumanity in regard to the victim.

Earlier I suggested that “inhuman” might have a distinct victim-centered meaning: something that no human can endure or perhaps that no human can be expected to endure.¹⁰⁸ This is a different sort of invocation of our human qualities than we saw in the agent-centred approach. It looks to the

¹⁰⁶ DAVID HUME, A TREATISE ON HUMAN NATURE, Bk. II, on compassion:

¹⁰⁷ Levinas, *Sur L’esprit de Genève*, p. 164.

¹⁰⁸ That certain forms of treatment can’t be endured by humans is no doubt of immense interest to torturers. They have (or think they have) reason for inflicting treatment of exactly that kind. But of course the prohibition on inhuman treatment is supposed to operate in an environment where the specific interest in torture is already forbidden.

limitations of our nature: the weight we can bear, the pain we can endure, the loneliness we can put up with, and so on.¹⁰⁹

It is not easy to parse this meaning of “inhuman.” What does it mean for a person not to be able, as a human, to put up with something or to endure it? Does that predict what will happen—death, physical collapse, nervous collapse, madness—if he tries? We may say, for example, that the human capacity for bearing pain is limited: but what are we saying will happen if the threshold is exceeded? We saw in the case of the agent-centered meaning of inhuman that the implicit claim may be normative rather than descriptive. The same may be true of the victim-oriented sense. Perhaps we should talk not about suffering that no human can endure, but about suffering that no human should reasonably be expected to endure. But if we adopt such a formulation, we should treat it carefully: it doesn’t mean the same as “suffering that it is not reasonable to impose on a human being.” We are looking to a value-laden notion of human endurance as a way of interpreting a provision that limits the treatment we are entitled to impose. We are not jumping directly to a judgment about what treatment is permissible and what is not. Inhuman treatment is supposed to be a ground of impermissibility, not equivalent to impermissibility. I think that “inhuman treatment” in the victim-oriented sense refers to treatment which cannot be endured in a way that enables the person suffering it to continue the basic elements of human functioning. These are elements like self-control, rational thought, care of self, ability to speak and converse, and so on. Any such list will reflect what we value about elementary human functioning, and so of course it will be contestable. But we have now focused the evaluative contestability on this particular issue, rather than leaving it at the more general level of contestation about what it is permissible to do to people.

I believe these ideas are particularly important in the context of punishment. Inasmuch as they regulate the types and conditions of punishment, provisions like ICCPR Article 7 and ECHR Article 3 impose a requirement that any punishment inflicted should be bearable—should be something that a person can endure, without abandoning his elementary human functioning. One ought to be able to do one’s time, take one’s licks.

¹⁰⁹ We sometimes talk about a task being inhumanly demanding. As far as I can tell, the only time when moral philosophers dwell on the term “inhuman” is when they worry that utilitarianism might be inhuman in the moral demands that it imposes on us. [Cite: Bernard Williams? Who else? Nagel? Henry Shue on “yuppie ethics”: ethical requirements must leave room for our personal “projects.”] Also: the idea of inhuman values, Isaiah Berlin (?) as discussed by Vinit Haksar, *Aristotle and the Punishment of Psychopaths*, 39 *PHILOSOPHY* 323 (1964).

Even going to one's execution is something that a human can do; and to the extent that these provisions affect the death penalty, there is an implicit requirement that it be administered in a way that enables the persons to whom it is applied to function as human beings up until the point at which their lives are extinguished.¹¹⁰

Is inhuman treatment just about the infliction of suffering? I think a lot of what we have said might be applied to other aspects of human experience as well. Treatment may be described as inhuman if it fails in sensitivity to the most basic needs and rhythms of a human life:¹¹¹ the need to sleep, to defecate or urinate, the need for daylight and exercise, and perhaps even the need for human company. We can imagine what it is like not to be allowed to use a toilet; we can imagine what it is like to be deprived of sleep. This commonality of human experience seems to be what is being appealed to in some shape or form with this standard.

Above all, we should remember the context. These standards are supposed to operate in regard to situations like detention, incarceration, captivity: situations of more or less comprehensive vulnerability of a person; and total control by others of a person's living situation. I think the provisions we are considering require those in total control of another's living situation to think about the conditions that are being imposed, and whether they are conditions minimally fit for a human, with characteristic human needs, life-rhythms etc.

(5c) “degrading”

“Degrading” might be thought to have the same duality as we noticed with “inhuman”: in the context of torture, we sometimes talk of treatment that degrades the torturer as well as the victim of torture. But I think it is clear that in the human rights context, “degrading” is mostly a victim-impact term.

The *Oxford English Dictionary* defines “degrade” rather formalistically as meaning “[t]o reduce from a higher to a lower rank, to depose from ... a position of honour or estimation.”¹¹² The connection with rank is an important one. But it needs to be understood against the

¹¹⁰ This, then, might be the ground on which the “death row phenomenon” is seen as inhuman. [Add more]

¹¹¹ One of the meanings that the Merriam-Webster dictionary gives to “inhuman” is “not worthy of or conforming to the needs of human beings.”

¹¹² The OED also notes that it has a specialized meaning referring to the formal deposition of a person “from his degree, rank, or position of honour as an act of punishment, [e.g.] as [in] degrad[ing] ... a military officer, [or] a graduate of a university.”

background of the way in which ideas about human dignity have evolved in our moral vocabulary. Rank is in the first instance a hierarchical idea, and the formal sense of degradation seems to involve taking someone down a notch or two in the hierarchy.

Someone is degraded if he is treated in a way that corresponds to a lower rank than he actually has: treating a queen like an ordinary lady is degrading or treating a professor like a graduate student. This use of degrading can certainly be relevant to the treatment of detainees in time of war. Fans of the David Lean movie, *The Bridge on the River Kwai*¹¹³ will remember the long sequence in which Colonel Nicholson, played by Alec Guinness, insists to the Japanese commander of a prisoner-of-war camp that he and his officers are exempt by the laws of war from manual labor, even though the private soldiers under his command may legitimately be forced to work. Nicholson clearly believes that forcing the officers to work would be degrading, and he suffers a great deal as a result of the Japanese reaction to his refusal to accept this degrading treatment. However, it is pretty clear that the reference to degrading treatment in the modern Geneva Conventions is not about insensitivity to military rank. It depends on an idea of dignity that is more egalitarian than that.

The word “dignity” *has* traditionally had a hierarchical reference: one talked, for example, about the dignity of a king or the dignity of a general.¹¹⁴ I have argued elsewhere that the modern notion of *human* dignity does not cut loose from the idea of rank; instead it involves an upwards equalization of rank, so that we now try to accord to every human being something of the dignity, rank, and expectation of respect that was formerly accorded to nobility.¹¹⁵ (I got this idea from Gregory Vlastos,¹¹⁶ and Jim Whitman has

¹¹³ [Cite to movie and date] The movie was based on PIERRE BOULLE, *THE BRIDGE OVER THE RIVER KWAI* (19__). Boulle received an Oscar for the adapted screenplay, because the real adaptors were on the Hollywood blacklist and the producers did not want to reveal their role in making the movie)

¹¹⁴ Consider this OED citation from the statute taking the crown away from Richard II—“1399 Rolls Parl. III. 424/1 Ye renounced and cessed of the State of Kyng, and of Lordshipp and of all the Dignite and Wirsshipp that longed therto.”

¹¹⁵ Jeremy Waldron, *Dignity and Rank*, 48 ARCHIVES EUROPÉENNES DE SOCIOLOGIE 201 (2007).

¹¹⁶ Gregory Vlastos, *Justice and Equality* in THEORIES OF RIGHTS 41 (Jeremy Waldron ed., 1984).

also pursued in his work the idea of “an extension of formerly high-status treatment to all sectors of the population.”¹¹⁷

Vlastos’s idea is a constructive one: this is what we have decided to do. But there are also more ontological theories about the *inherent* dignity and high rank of every human person. One idea is that the human species has a rank that is much higher than any other natural species—higher than the animals, a little lower than the angels—by virtue of our reason and our moral powers. A connected idea is that each human has a high rank by virtue of being created in the image of God. Associated with both of these is an insistence that this ontological dignity is the birthright of every human, and that, for example, racial discrimination is to be condemned as degrading treatment precisely because it involves the denial of this notion of the dignity of human beings as such.

The idea of an “outrage” on human dignity is a particularly interesting one. “Outrage” is a complaint one makes in high dudgeon about one’s disrespectful treatment, but it also conveys that the slight to dignity is serious not trivial. [Add more]

Consider now four kinds of outrage to dignity, four species of degradation: (α) bestialization; (β) instrumentalization; (γ) infantilization; (δ) demonization.¹¹⁸

(α) Bestialization. The “higher than the animals” sense of human dignity gives us a natural sense of “degrading treatment”: it is treatment that is more fit for an animal than for a human, treatment of a person as though he were an animal, as though he were reduced from the high equal status of human to mere animality. It can be treatment that is insufficiently sensitive to the differences between humans and animals, the differences in virtue of which humans are supposed to have special status. So for example a human is degraded by being bred like an animal, used as a beast of burden, beaten like an animal, herded like an animal, treated as though he did not have language, reason or understanding,¹¹⁹ or any power of self-control. Or it

¹¹⁷ Whitman 2005 [get proper cite], p. 97 argues arguing that “[t]he core idea of ‘human dignity’ in Continental Europe is that old forms of low-status treatment are no longer acceptable. ... ‘Human dignity,’ as we find it on the Continent today, has been formed by a pattern of leveling up, by an extension of formerly high-status treatment to all sectors of the population.”

¹¹⁸ The account that I give is similar to that found in AVISHAI MARGALIT, *THE DECENT SOCIETY* (1996), though his account is about humiliation, not degradation. (Margalit’s book is more or less the only work of modern moral philosophy I know of that addresses any of this.)

¹¹⁹ Bentham on dog law in OLG.

could include treating a person as though he did not have any religious life or sense of religious obligation, or as though the human (or *this* human) were one of those animals who are indifferent to separation from offspring or mate. It might also include cases of post-mortem ill-treatment: eating human flesh, for example, or failing to properly bury a human, or dragging a corpse.¹²⁰

(β) Instrumentalization. We exploit animals as though they were mere means, objects to be manipulated for our purposes. This can generate a broader sense of degrading treatment associated with the Kantian meaning of indignity—being used as a mere means, being used in a way that is not sufficiently respectful of humanity as an end in itself.¹²¹ This sense of degradation may be particularly important with regard to *sexual* abuse.¹²²

(γ) Infantilization. A third type of “degradation” might have to do with the special dignity associated with human adulthood: an adult has achieved full human status and is capably of standing upright on his or her own account, in a way that (say) an infant is not. So it is degrading to treat an adult human as though he or she were an infant or in ways appropriate to treating an infant.¹²³ This is particularly important with elementary issues about care of self, including taking care of urination and defecation. A number of the European cases have dealt with treatment that involves a person “being forced to relieve bodily functions in [one's] clothing.”¹²⁴ And we know to our shame that this has been an issue in some recent forms of American mistreatment as well.¹²⁵ Again, remember the context: we are dealing with vulnerable people in total institutions, with very limited powers to control their own self-presentation. **[add more]**

(δ) Demonization.¹²⁶ The prohibition on inhuman and degrading treatment has particular importance in the way we treat our enemies or terrorists or criminals, those we have most reason to fear and despise. And

¹²⁰ Refer back to *Tachiona v. Mugabe*: supra, text accompanying note 54.

¹²¹ Kant, Groundwork cite.

¹²² There is strong line of cases coming out of ITFY on sex crimes: [cite case: *Kunarac*?].

¹²³ Torture and regression.

¹²⁴ *Hurtado v. Switzerland*

¹²⁵ [Cites]

¹²⁶ This is Margalit's term.

obviously one of the functions of the “degrading treatment” standard is to limit the extent to which we can treat someone who is bad or hostile as though he were simply a vile embodiment of evil. There are specific prohibitions in the Geneva Conventions against putting prisoners on display. And we might also mention in this connection the ancient biblical injunction in Deuteronomy 25:2-3, on the number of stripes that may be used if someone is sentenced to be beaten: “Forty stripes may be given him, but not more, lest ... your brother be degraded in your sight.”¹²⁷

I have said that “degrading” is an impact word. How important is it that the degradation be experienced subjectively as humiliating?¹²⁸ Some ECHR commentators suggest that the connection is definitional,¹²⁹ but this is not so, at least not in my dictionary.¹³⁰ However it is very common in the case law to emphasize the subjective element almost to the exclusion of everything else. Treatment is degrading, we are told, if it arouses in its victim “feelings of fear, anguish and inferiority capable of humiliating and debasing them”¹³¹ (And it is worth bearing in mind that the Common Article 3 of the Geneva Conventions does also use the word “humiliating”.)

It is an interesting question whether treatment can be “degrading” if the person subject to it is unaware of it. In a recent English decision, the English High Court grappled with this, drawing upon considerable European (ECtHR) authority, and concluded:

¹²⁷ ESV. See also Martin Luther’s observation that the purpose is “so that your brother and his humanity should not be made contemptible ... in your presence.” LW 9:248 “Lectures on Deuteronomy”

¹²⁸ The fact that it is a victim-term doesn’t mean that it is a term necessarily referring to subjective experience (in the way that the term “humiliating” clearly does). Nor does it settle the matter of specific intention. In ECHR jurisprudence, a relevant factor in considering whether treatment was “degrading” is whether its object was to humiliate the person concerned. But the absence of such a purpose does not conclusively rule out a finding of violation of Article 3.

¹²⁹ HARRIS ET AL., *supra* note 17, at 80.

¹³⁰ Not in OED; also not in Webster: 1 a: to lower in grade, rank, or status : demote b: to strip of rank or honors c: to lower to an inferior or less effective level <degrade the image quality> d: to scale down in desirability or salability 2 a: to bring to low esteem or into disrepute.

¹³¹ *Tysiaogonc v. Poland* (2007) 45 E.H.R.R. 42 ECHR Paragraph 67, citing *Ireland v United Kingdom* (A/25) (1979-80) 2 E.H.R.R. 25 at [167].] Also the International Criminal Tribunal for Rwanda defined degrading and humiliating treatment as “[s]ubjecting victims to treatment designed to subvert their self-regard.” [*Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgment and Sentence, §285 (Jan. 27, 2000). But also in some contexts it is left open; the ITFY defined this offense as requiring: “an act or an omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity.” *Prosecutor v. Kunarac, Kovac, & Vokovic*, Case No. IT-96-23 and IT-96-23/1 (Appeals Chamber), Judgment, 161 (June 12, 2002)

Treatment is capable of being ‘degrading’ within the meaning of article 3, whether or not there is awareness on the part of the victim. However unconscious or unaware of ill-treatment a particular patient may be, treatment which has the effect on those who witness it of degrading the individual may come within article 3. It is enough if judged by the standard of right-thinking bystanders it would be viewed as humiliating or debasing the victim, showing a lack of respect for, or diminishing, his or her human dignity.¹³²

I think this is right. Often when the European treatise writers consider a distinction between objective and subjective here, they have in mind a distinction between what the particular victim actually felt and what would be felt by a reasonable victim.¹³³ But what I have been talking about with categories of bestial, instrumental, infantile, and demonic degradation focuses in the first instance on what objectively happens to the person in relation to some objective standard of dignity. If anyone’s conscious reaction is emphasized it is the reasonable on-looker, not the victim.

But of course we do need to add that human degradation, even in an objective sense, is usually accompanied by a serious decline in self-regard. A term that is sometimes used is “debasement.” Now we say that coinage can be debased, but a silver dollar does not know that it is being debased when it is alloyed or clipped. Human dignity does have a conscious component, if only because our dignity is thought to be based on conscious aspects of our being such as reason, understanding, autonomy, free will and so on. And often too human dignity is associated with an element of normative self-regard. So, in the case of humans, debasement may not be possible without some conscious impact, though whether that is subjectively experienced as humiliation nor anguish is a further question.

¹³² *Regina (Burke) v General Medical Council* (Official Solicitor intervening) [2005] QB 424, at §178.

¹³³ Thomas F. Berndt *Ghost Detainees: Does the Isolation and Interrogation of Detainees Violate Common Article 3 of the Geneva Conventions?* 33 WILLIAM MITCHELL LAW REVIEW 1717 (2007): “In analyzing behavior under this standard, the ICTY looked to both a subjective factor-- whether or not the victim had experienced an outrage on personal dignity—as well as an objective factor—whether humiliation was so intense that a reasonable person would be outraged. The humiliation must be real and serious.”

6. The Moral Reading

In Section 2 of this paper, I emphasized that the provisions we have been reflecting upon are *standards*, not rules; they use evaluative rather than descriptive predicates. As I said then, one approach to standards is to view them as inchoate rules, formulated in half-baked fashion by the lawmaker, and awaiting determinate elaboration and reconstruction by the courts. I said that I prefer an approach which takes more seriously the normative significance of the evaluative terminology that is used. The evaluative terms are not just blanks to be filled in. They require us to make evaluations of a certain sort and it is our task to figure specifically what kinds of evaluations these are. As we have just seen, this is a daunting but—I hope you will agree—an enriching task.

But excavating the meaning and resonance of these evaluative terms can detain us only so long. We do have to figure out whether we are supposed to be evaluating something the agent did or something the victim suffered; we have to figure out whether the evaluation required is predicated upon or conditioned by any other idea (such as a notion of elementary human functioning); we have to figure out whether there is any factual component in the judgement we are invited to make (e.g. a judgment about the victim's subjective consciousness of the treatment alleged to be degrading). All this has to be addressed. But when it is, then the value-judgments that we have homed in on actually have to be made. Is there anything more we can say about that stage of the process?

Ronald Dworkin has used the term “the moral reading” to refer to an approach to provisions like these which accepts the challenge to actually make the value-judgement that their word-meaning indicates and make it in one's own voice (rather than as a ventriloquist for the framers).¹³⁴ Taking the evaluative character of these predicates seriously, Dworkin reads them as instructions to the norm-applier—an official in the first instance, a court in the final analysis—to go ahead and actually make a value-judgment, i.e. to think about and try to the best of one's ability to make the judgment that is indicated by the evaluative terminology. Depending on one's moral self-confidence, this can be a lonely, a vertiginous, or an exhilarating responsibility.

True, the norm-applier is not entirely on his own. The provision does already indicate a certain value judgement by the norm-framer which binds us all: namely, if something *is* cruel, inhuman or degrading then it is utterly

¹³⁴ DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE CONSTITUTION __ (19__).

forbidden. That we have no control over; that is given to us in the text as written. But the provision instructs the norm-applier to determine what *is* cruel, inhuman and degrading and to make that value judgment in reference to the particular case under discussion. I have argued that we can unpack each of these evaluative predicates a little bit, without losing sight of the evaluative element. So Dworkin's approach—together with my analysis in section 5—would suggest that each norm-applier should ask himself as honestly as he can and in as objective a spirit as he can muster, certain quite specific evaluative questions. "What attitudes towards suffering really are seriously inappropriate? (What really is cruel?) What forms of treatment really are such that no human should reasonably be expected to endure them? (What really is inhuman?) What is the special dignity that all humans have, and what counts as a derogation from it? (What really is degrading or an outrage on human dignity?)"

On Dworkin's approach, the norm-applier is to ask these questions as complicated moral questions, and to try to get to the objective right answer—that is, to the moral truth about cruelty, inhumanity, and degradation and about the other moral issues that they embed. Any sensible person will recognize of course that as with all objective inquiries, what you get is the speaker's best opinion, and opinions will differ. But the formation of the opinion is supposed to be governed by the discipline of presenting the question and the answer in an objective spirit.

I should say that I am not entirely comfortable with this. On Dworkin's account, the norm-applier engages his or her own critical views on what counts as inhuman and degrading. But I think a better way to understand these provisions is that they purport to elicit some shared sense of positive morality, some "common conscience" we already share,¹³⁵ some code that already exists or resonates among us. I believe that these provisions, these standards, make an appeal to social facts and not just to individual moral judgment; they evoke positive morality not critical morality or the philosophers "moral reality."¹³⁶ They appeal to what is supposed to be a more-or-less shared sense among us of how one person responds as a human to another human, a more-or-less shared sense of what humans can and should be expected to endure, a more or less shared sense of basic

¹³⁵ Sandy Levinson in an essay, *In Quest Of A "Common Conscience": Reflections On The Current Debate About Torture* 1 JOURNAL OF NATIONAL SECURITY LAW & POLICY 231 (2005), p. 243: "[I]s there some meaningful test of conscience which rests, ultimately, on the belief (or hope) that there is what might be called a 'common conscience'?"

¹³⁶ For this distinction, see Hart, COL.

human dignity, a more-or-less shared sense of what it is to respond appropriately to the elementary exigencies of human life. The provisions we have been studying remind us that we share such a sense (if we do), they bring it to the forefront of our attention, and they require us to apply it in these circumstances. We sometimes think of these standards as prohibiting conduct that “shocks the conscience.”¹³⁷ Again, I prefer to think of that not as an appeal to the moral sensibility of the solitary individual, but to some sort of shared conscience, (“con-science” in the etymological sense of “knowing together”). Of course this is a massive act of faith in social morality, but it seems to me more satisfactory to view these provisions in this social and positive light than to see them simply invitations to make our own individual moral judgements.

Some may say that this talk of shared standards and common conscience works perhaps for a single society, but that it is much more problematic in the case of human rights standards that supposedly govern all or almost all the nations of the earth. Given the massive moral differences that exist between peoples and cultures, how can the provisions we have been studying possibly be read as credible invocations of a common positive morality?

We have to be careful how we understand the impact of cultural relativity on the operation of these provisions. Sometimes the relativity of cultural and religious standards is referenced specifically in our understanding of the provisions. It is commonly observed that something that is experienced as “degrading” in one culture may not be experienced as degrading in another. For a Muslim man it might seem degrading to be shaved or forced into close proximity with a scantily clad woman, whereas this would not necessarily be degrading to an American. At another level of abstraction, however, the meaning of degradation remains constant here: it connotes (or includes) something like being forced to violate one’s fundamental norms of chastity, modesty or piety. The meaning is the same, but different norms are referenced in the two cases. I think the court in *Forti v. Suarez-Mason* made a silly mistake when it complained about the relativity of the “degrading” standard.¹³⁸ In every culture, it is degrading to

¹³⁷ See also use of this phrase in Eighth Amendment jurisprudence; get cites. E.g. *Chavez v. Martinez*, 538 U.S. 760 (2003).

¹³⁸ See supra text accompanying notes 48-50. *Forti v. Suarez-Mason* 694 F.Supp. 707, at 712 (N.D. Cal.,1988.): “Noting that “conduct ... which is ... grossly humiliating in one cultural context is of no moment in another,” it concluded that “an international tort which appears and disappears as one travels around the world is clearly lacking in that level of common understanding necessary to create universal consensus.” (Analogously religious persecution in

be forced to violate one's own deeply held principles of modesty. The principles may vary from context to context but the standard which prohibits degradation remains the same.

That's a positive example of a standard like Article 7 of the ICCPR referencing moral relativity. There are also negative examples. Some scholars have argued that a prohibition on (say) cruel punishment is going to work differently in a society which believes that God mandates amputation for theft and stoning for adultery.¹³⁹ But that need not be true. It is quite consistent to say of a punishment that it is cruel *and* that God ordains it: God may be cruel.¹⁴⁰ The question of whether something is cruel or inhuman is one aspect of its overall evaluation; the question of whether God ordains it is another. The position of the ICCPR is that cruel punishment is prohibited absolutely *whether God is thought to have ordained it or not*. Of course someone who thinks that God *has* ordained cruel punishment may be reluctant to sign up for the ICCPR prohibition. That just shows that human rights are demanding; indeed, it is a measure of how demanding they are.

This leads to a larger point. Whatever the relativists think, the fact is that 164 nations have signed (and most of those have ratified) the ICCPR, which includes the provision condemning cruel, inhuman and degrading treatment and punishment. No doubt some governments have done this for the most opportunistic and hypocritical of reasons. Still we are entitled to ask of the various nations that signed it in good faith: what—given the well-known facts about variations in peoples' views about cruelty, inhumanity and degradation—should we suppose they were committing themselves to?

one country may prevent someone from following Jewish ritual on a Saturday, and religious persecution in another country may prevent someone from practicing Catholic ritual on a Sunday. But it would be silly to say that a right which changes from Saturday to Sunday can't be a universal right!)

¹³⁹ See e.g. the discussion in Abdullahi A. An-Na'im, *Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment* in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS 19, at 33 (Abdullahi A. An-Na'im ed., 1992). See also Talal Asad, *On Torture, or Cruel, Inhuman, and Degrading Treatment*, in HUMAN RIGHTS, CULTURE AND CONTEXT: ANTHROPOLOGICAL PERSPECTIVES (Richard Wilson ed., 1997), 111, at ____.

¹⁴⁰ Cf. Isaiah 13: 9: "Behold, the day of the Lord comes, cruel, with both wrath and fierce anger, to lay the land desolate; and He will destroy its sinners from it" and also Jeremiah 30: 14: "I have wounded you with the wound of an enemy, with the chastisement of a cruel one, for the multitude of your iniquities." (Both KJV.)

One possibility is that each nation thought itself entitled to read Article 7 in accordance with its own moral traditions. (This seems to have been the American attitude, as expressed in its reservations.)¹⁴¹

Another possibility is that the representatives of the nations of the earth took themselves to be aspiring to standards that they thought did or could transcend the particularity of cultures and moral traditions. Terms like “humanity” and “inhumanity” for example seem to express such an aspiration: they seem to suggest that, for all the moral differences that there are among peoples, still there are standards that define the way in which any human being should respond to the predicament of others or define extremities that no human being should be expected to endure. I believe it is a common feature of all moral cultures in the modern world that they have such an idea (which of course does not mean that the idea amounts to the same thing in every society). I am not resting anything here on the existence of moral universals; but I am suggesting that every moral culture in the modern world contains materials which are oriented in a universalistic direction. So it may be that there are enough universalistically-oriented materials in the morality of every society to make intelligible a public and international commitment by the government of that society to play its role in nurturing and upholding common standards and aspirations in the world.

As the United States has found to its cost and shame over the past seven years, a commitment to standards like Article 7 of the ICCPR or Common Article 3 of the Geneva Convention commits us to privileging some elements over other elements in our moral and cultural repertoire. We like to swagger around and blow things up; we like movies and TV shows in which the hero breaks people’s arms in order to elicit vital information.¹⁴² But our culture is also riddled with powerful universalistic humanitarian and dignitarian ideas about the proper and respectful treatment due to every human being. Our commitments to these conventions require us to privilege the latter over the former. It is not a matter of submitting to funny foreign

¹⁴¹ See supra, text accompanying notes __.

¹⁴² **Get reference to “24” from torture article.** See Teresa Wiltz, *Torture’s Tortured Cultural Roots*, WASHINGTON POST, May 3, 2005, at C1 (“If you’re addicted to Fox’s ‘24,’ you probably cheered on Jack Bauer when, in a recent episode, he snapped the fingers of a suspect who was, shall we say, reluctant to talk. . . . Torture’s a no-brainer here. Jack’s got to save us all from imminent thermonuclear annihilation.”). For an example of the use of Fox’s 24 to elicit support for the torture of terrorist suspects by United States interrogators, see Cal Thomas, *Restrictions Won’t Win War on Terror for US*, SOUTH FLORIDA SUN-SENTINEL, May 4, 2005, at 25A.

standards; it is about privileging some of our own (that we share with others). I think something similar—though no doubt with somewhat different content—is true of every society.

One final point, in further qualification of Dworkin’s moral reading. Whether we imagine ourselves asking an objective moral question at the level of critical morality or a social question about common conscience at the level of positive morality, different people (even in the same culture) are inevitably going to have their own takes on the matter; they will disagree, even when they think of themselves as asking and answering the same question, even when they take themselves to be invoking standards that they think are shared. We should not panic at the prospect of these disagreements. The provisions we have been dealing with seem to invite them: they invite us to state and argue about our different views about what is cruel, what is inhuman, and what is degrading. There is a mentality afflicting some lawyers which sees things as spinning out of control when norms are deployed whose meanings people disagree about. It is a mentality that cannot see any difference between contestation, on the one hand, and, on the other hand, a situation that leaves each norm-applier at liberty to apply his or her own subjective preferences.

I think this mentality is misguided and deplorable. At worst it lays the ground for a sort of studied disingenuous moral obtuseness, as though one had never heard of the terms “inhuman” and “degrading” before—“Who knows what these words mean?”—and a cynical opportunism which sees their contestedness as a chance to muddy the waters and undermine the operation of any standards at all in this area.¹⁴³

I said that we should keep faith with the fact that standards, not rules, have been laid down in this area.¹⁴⁴ That means adopting a positive rather than a pusillanimous view of the possibilities of argumentation. Those who framed and promoted these standards were intelligent men; even an originalist must acknowledge that. They didn’t doubt for a moment that these provisions would be contestable. But they figured that in a world where people were locked up and interrogated and in general made vulnerable to the sharp end of official action, it was better to have such practices shadowed by a debate about cruelty, inhumanity and degradation—

¹⁴³ This mentality was put to work in the Department of Justice in 2002-2005 on the meaning of “torture”; and the work that it produced is now being investigated—quite properly—in the Justice Department by the Office of Professional Responsibility.

¹⁴⁴ Following paragraph adapted from Waldron on law in OXFORD HANDBOOK OF ANALYTIC PHILOSOPHY.

a debate sponsored and focused by the law—than to leave these practices unregulated. And it seems clear to me that the application of standards of this kind, contested and indeterminate though their outcomes might be, differs quite considerably from a system where there is no provision at all for substantive assessment of such practices; and it differs too from a system which operates with nothing but determinate rules in this regard (such as "No sleep deprivation" "No capital punishment") without sponsoring any opportunity to debate these at a more abstract level. That's the spirit in which I have approached these provisions, and I hope that, in section 5, I have been able to indicate how complex and textured that debate can be and how it can be structured by a sensitive unpacking of the evaluative predicates used in the law.