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A Child’s Life or a “Little Bit of Torture”? State-Sanctioned Violence and Dignity

DORIS SCHROEDER

Dignity consists not in possessing honors, but in the consciousness that we deserve them.

Aristotle

The Case

On September 28, 2002, 11-year-old Jakob von Metzler, a banker’s son, was abducted on the way to his parents’ house in Frankfurt. A sum of one million Euro was demanded for his release. Three days after Jakob’s disappearance, Magnus Gäfgen, a 32-year-old law student, collected the ransom from the arranged tram stop in Frankfurt during the night. While under observation by the police, he ordered a new Mercedes and booked a holiday abroad. Seventy-six hours after Jakob’s disappearance, the police arrested Gäfgen and his 16-year-old girlfriend while simultaneously searching his flat. There they found the missing ransom, but no sign of Jakob.

Upon arrival at the central police station, Gäfgen had (or feigned) a breakdown, which delayed the interview. Later, being confronted with evidence, he changed his story several times from having found the ransom by chance to being involved in the kidnapping as the money courier. Accusations he made naming others were followed up, but none proved viable. Meanwhile, the public had been informed and a 1,000-man search team had been sent to a nearby wood. None of these activities yielded any results. As a last resort, Jakob’s mother was brought to the interview room, but Gäfgen showed no reaction. “And we knew,” said one police officer, “that Jakob might be lying in a hole in the ground, dying a slow death.”¹ At 5:30 the next morning, Wolfgang Daschner, the police president, ordered his men to threaten Gäfgen with violence to force a statement. Under duress, Gäfgen confessed immediately that Jakob was most probably dead and could be found in a lake near Schlüchtern. As a result, the police dis-

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covered a child's body, and death from suffocation or drowning was established. In July 2003, the kidnapper was found guilty of abduction and murder and sentenced to life imprisonment.

The prohibition against duress or coercion is enshrined in German law based on the inviolable dignity of human beings. In February 2003, police president Gaschner was charged with duress, and in December 2004, a law court ruled that Gaschner acted unlawfully. He was found guilty, and although he could have faced five years of imprisonment, no sentence was imposed.

The case sparked a public debate of unexpected proportions. Although the treatment of prisoners in Guantánamo Bay and Abu Ghraib was considered an abhorrent and barbaric act of violating human rights and human dignity, the threat of violence in the case of Magnus Gäfgen was supported by considerable parts of the population. Well-known personalities in politics and the law supported police president Gaschner's actions, as the following two examples show.

According to Oskar Lafontaine, Ex-Chancellor Helmut Kohl's most fervent left-wing challenger, Gaschner obeyed elementary moral principles, as one cannot allow an innocent child to die in agony because of formal, constitutional articles. (As already indicated, the whereabouts and fate of Jakob von Metzler were unclear at the time of Gaschner's decision. It was, for instance, conceivable that Jakob might die from dehydration or suffocation, depending on his situation, and given the assumption that the only kidnapper was in police custody.) Although torture is prohibited, situations can arise where rigid determination to follow the law is unhelpful, said Lafontaine.² Likewise, but more unexpectedly, the then chairman of the German Judges' Association (*Deutscher Richterbund*), Geert Macken-

roth, defended Gaschner's decision. He stated in an interview that torture or the threat thereof might be allowed when a higher legal good is to be preserved. As an example, he recalled the events of September 11, 2001,³ indicating that torture would have been acceptable in order to prevent them.

On the other hand, an alliance of human rights and civil liberties groups welcomed the decision to charge Gaschner and insisted that the trial must be used to reaffirm the strictest possible prohibition of state-sanctioned violence. The erosion of legal protections for citizens and civil liberties must not be allowed.

Article 1 of the constitution affirms that the dignity of human beings is inviolable. Accordingly, the constitutional court (*Bundesverfassungsgericht*) spoke of "torture" rather than "duress" in connection with Gaschner's case and the chair insisted that "[h]uman dignity is inviolable. Nobody must be made into an object, a bundle of fear."⁴ No human being must be treated only as a carrier of knowledge—which the state wants to access. According to the judges, Gaschner lost his head under severe pressure and violated the principle of human dignity.

Interestingly, Jan Philipp Reemtsma, a millionaire's son and now professor of German literature at the University of Hamburg, who survived his own abduction in 1996, came forward strongly supporting the constitutional court. In his view, the mere discussion of torture and duress in police custody is an attack on civilization.⁵

This paper is restricted to discussion of a specific German case and the question of whether police-sanctioned violence could be justified in similar cases. However, the tension between individual liberties as enshrined in democratic constitutions and the so-called fight against terrorism will be obvious in parts.

Dignity

The ruling by the German constitutional court emphasized the concept of “dignity” in their judgment, and it is notable that dignity has made an increased appearance in national constitutions and ethical guidelines. *Die Würde des Menschen ist unantastbar*⁶ (human dignity is inviolable), starts the German constitution, and the Universal Declaration of Human Rights begins with the sentence⁷

[The] recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

But imagine a dignified person. Whom do you see? Perhaps Nelson Mandela who kept his poise and self-respect during 26 years of imprisonment? Or Othello, who is said to have greater inherent nobility and self-control than any other Shakespearian character? Possibly Nobel Peace Laureate Aung San Suu Kyi, who spent 9 of the past 15 years in some form of detention in Burma without losing her serenity? Or Antigone, daughter of Oedipus, who combined heroic courage with gentle care for father and brother? Whomever you see, it is unlikely that it is a mass murderer, a cowardly torturer, a rapist, or a pedophile. In general, one associates dignity with certain character dispositions that prevent evil behavior, for instance, rational self-control, composure, and calmness, but also the power of self-assertion and belief in one’s own worth.

Is not dignity a quality that generates *respect* and even *awe* among those who observe it?⁸ But if it is, how does it apply to a convicted child murderer, as in the above case? The German constitutional court did not convict the police president of violating the suspect’s dignity because of his vir-

tues but because of his inherent worth and nobility. Hence, there must be different types of dignity, and we shall look at the main three in reverse order:

1. intrinsic worth and nobility
2. the quality of being worthy of esteem
3. the honor associated with a high office or rank.

Honor Associated with High Office or Rank

Most Western and Northern European expressions for dignity go back to the Latin *dignitas* (*dignité, dignità, dignidade, dignidad, dignity*⁹) or the Old German *wirdi* (*Würde, Waardigheid, Världighet*¹⁰). Both are etymologically related to the term *worth*, which initially described the rank, honor, or standing of a person. When one talked about dignity in premodern times, one referred to stratified societies in which some people were valued higher than others. The German word *Würdenträger* (carrier of dignity) is a clear indication of such traditions. Carriers of dignity were invested with secular or religious positions of high rank and they behaved dignified if they acted in accordance with this position. Thus, dignity was restricted to an infinitesimally small number of human beings and strongly associated with a position.

Quality of Being Worthy of Esteem

During the Enlightenment, privileging autonomous action guided by reason over faith in authorities shifted the meaning of dignity from an association with rank to a focus on individual action. The term *meritorious dignity* (*Leistungswürde*¹¹) best describes this concept. Dignity has to be earned, merited, through individual action; it cannot be bestowed by rank only. The

people mentioned at the outset of this paper *merit* the term *dignified*; their lives exemplify dignified action. But what exactly characterizes a “dignified being”; when is one deserving of other people’s esteem due to one’s dignity?

Dignity could be called the keynote of all virtues. To illustrate this claim, it is necessary first to agree on a definition of *virtue*. According to Aristotle, *a virtue is a disposition to behave in a certain way*.¹² If someone has the virtue of courage, she has the disposition to face up to dangers in a manner that is neither cowardly nor reckless or rash. When Antigone buried her brother against her uncle Kreon’s wish, she was aware that she would probably die as a result (and not a pleasant death). But her integrity and love for her dead brother demanded a certain action, and having the right character disposition, a disposition toward courage, allowed her to sacrifice her own life for her beliefs.

If somebody has the virtue of magnificence, he has a disposition to give to others in a manner that neither greedily holds on to resources nor squanders them unnecessarily. If somebody has the virtue of temperance, he has the disposition to resist harmful temptations arising from desires without leading a passionless, lethargic life (*verhaltene Leidenschaft*).

Those who always behave virtuously live life as it ought to be, according to Aristotle, and will enjoy happiness, *eudaimonia*.¹³ Could not a virtuous life be synonymous with a dignified life? Could dignity not be another word for having all the virtues, almost a tautology? If the answer to these questions were “yes,” we would not be able to find a virtue that is unnecessary for a dignified being. (Or we would need to find a characteristic of “being dignified” that is not a virtue.)

In a brief tour de force, let us look at the four cardinal virtues, under which all other virtues can be subsumed, according to Aristotle: wisdom, justice, temperance, and courage.¹⁴ It is perfectly plausible for somebody to be courageous, but immodest, conceited, and self-indulgent (signs of nontemperance) or for somebody to be just and impartial in their judgment but cowardly and weak when faced with danger. Hence, the virtues are separate characteristics, which can be displayed independently from each other, with one exception. The cardinal virtue of wisdom (seeing the truth through perfect reason) is considered the mother of all other virtues. Wisdom is required to inform justice, temperance, and courage.¹⁵ For instance, the first and foremost principle of justice is to treat like cases alike.¹⁶ To do so, one needs empirical knowledge about the cases, but also wisdom in judging their similarities and dissimilarities. Or, to distinguish a courageous from a rash action one needs to be able to judge the situation, one’s own powers, and the difference one can make by acting in which way. Wisdom is, hence, required to inform courage. And finally, wisdom is required to inform self-discipline or temperance. Somebody who naturally (perhaps due to illness or lethargy) refrains from desire-driven behavior is not virtuous. Only when wisdom informs an action, in other words only if one refrains from certain behaviors *because* reason contradicts them, can one meaningfully speak of temperance.

When it comes to dignity, *all* four virtues are required. A dignified being cannot be unwise, unjust, willful, or cowardly.

Wisdom. A being who does not display wisdom can be ignorant, foolish, silly, thoughtless, imprudent, irrational, or a bad judge of character, to name just a few possibilities. None of

these are compatible with dignity. When Socrates famously said that the only thing he knows with certainty is that he knows nothing,¹⁷ he did not display ignorance, but acute awareness of human limitations, another instance of wisdom. Wisdom, the attempt to always seek the truth and act through reason, which includes judgment of one's limitations, seems to be an integral part of dignity. Otherwise it would have to be possible to imagine a silly or imprudent action, for example, that is compatible with dignity.

And wisdom has another side to it: a sense of one's own worth. A sense of self-respect is essential to dignity, but must not lead to brutish noisiness, self-complacency, self-pity, exhibitionism, arrogance, and the like. Dignified beings take themselves seriously, but not too seriously. According to this understanding of dignity, servility and self-deprecation are moral defects. To be servile means to have an attitude toward one's rightful place in the community of human beings that is inappropriate.¹⁸ This error of judgment signifies a failure to understand one's rights and a failure of wisdom.

Justice. To be fair- and open-minded, unbiased, truthful, honorable, and just seem to be essential characteristics of dignified beings. Would Antigone enjoy our respect to the same extent if she had cheated—for example, if she had lied to her uncle to avoid death while surreptitiously burying her brother? Those who do not show justice in their actions can be revengeful, prejudiced, intolerant, opinionated, fanatical, disrespectful, and sleazy, to again name just some possibilities. None of these are compatible with dignity.

Temperance is probably the cardinal virtue most strongly associated with dignity, although one has to bear in mind that it always combines with wisdom. Rational self-control is an

integral part of dignity, as are self-possession, poise, and passions controlled without being negated.¹⁹ Tempered beings limit their excesses and respond appropriately in difficult situations. Rage, annoyance, bad moods, gluttony, overindulgence, immodesty, greed, hedonism, or insatiability are all instances of failed temperance. On the other hand, a tempered person does not have to be calm and austere all the time. When faced with a serious injustice, controlled self-discipline requires righteous indignation, which could easily take the form of anger, but not of malicious revenge. Again, it becomes clear that temperance is required for dignity, as are wisdom and justice.

Courage. Cowardice is unfailingly undignified, but so is rashness in the face of danger. Although the latter might look heroic at first sight, it can easily turn out to be careless, irrational, and foolish—in other words, undignified. An event in Dortmund might illustrate this point.²⁰ On March 11, 2002, Rolf Fritz dug a 4.5-meter-deep ditch with machinery, which required finishing off by hand. When he had almost completed his work in the ditch, the walls tumbled in and within minutes he was covered in heavy sand. He immediately developed breathing difficulties, as only his head emerged from the sand. A colleague shouted for help and Paolo Colella (31), who worked in a nearby pizzeria, rushed to the accident. He carefully climbed into the ditch and continued removing sand with his hands until the fire services arrived. Together with three firemen, Colella managed to free Fritz. This is clearly a case of heroic courage. On the other hand, if Colella had acted too rashly, the walls would have collapsed further, burying him together with Fritz and potentially even the firemen. Thereby, he would not only have potentially lost his own life,

but almost certainly created Fritz's death. (Easy to say with hindsight, of course.)

It was already indicated above that wisdom is required to display all other cardinal virtues and this example illustrates the point with regard to courage. Men and women with heroic dispositions will risk their lives and welfare for others, without knowing the outcome; otherwise they would not need courage. But to achieve a beneficial result, they often need good judgment, a judgment that aligns one's power with the challenge one faces. That is why virtue theorists, particularly scholastic thinkers, believed that wisdom is the core virtue, upon which all others were dependent.

The characteristics associated with the cardinal virtues can all be subsumed under dignity. A dignified being cannot be unwise, unjust, willful, or cowardly, as we have seen.²¹ Returning to the term *Leistungswürde*—dignity one has to earn through action—we can emphasize three issues:

1. Dignified action can be described as virtuous action in the Aristotelian sense implying that perfectly dignified beings will display *all* the virtues including a good sense of self-worth.
2. Dignity thus understood, cannot possibly be a characteristic of *all* human beings. In fact, it will be a characteristic of a diminishingly small number of human beings. *Leistungswürde* paints a picture of human ideals whose standard will cause almost everybody to fail daily on several accounts.
3. Dignified beings are led by wisdom, the guiding light for all other virtues, the light of reason. *Bonum hominis est secundum rationem esse*; the good or the virtuous lies in living/being aligned with reason.

Intrinsic Worth and Nobility

With Kant's appearance on the European philosophy scene, the concept of dignity changed a second time during the Enlightenment. This is not the place to describe how Kant moved from the statement that nothing can be considered good without limitation, except a good will²² to intrinsic worth and nobility. Let us therefore start with Kant's belief that the ability to separate good and bad depends on the human faculty of reason. Only because human beings are rational is it possible for them to be moral, to decide between right and wrong. And now comes Kant's move to human dignity! Every individual rational being sees him- or herself as an end in itself, somebody with life plans and ideas to realize. Such a being cannot be bought by others as commercial goods can be and used for their own purposes. Human beings have worth, not a price for which they can be acquired.²³ As Thomas E. Hill Jr. put it, explaining the Kantian position²⁴: Human beings have unconditional and incomparable worth that unlike prices admits of no equivalence.

As an unconditional value, dignity does not depend on the contingent fact that something is useful, desired or even liked. By contrast, things with mere "price", or conditional value, have a value that is dependent upon utility ("market value") or at least upon individual sentiments ("fancy value"). Anything with mere price has a value that "admits of equivalents" and so is subject to calculated trade-offs; however great its value, there can in principle be something else that could compensate for its loss and justify its sacrifice. Material goods, reputation, and pleasures as such have mere price, and so even great amounts of these things may at times be reasonably sacrificed for other things with the same value. By contrast, dignity is "above

all price" and so one can never act contrary to the dignity of someone for the sake of things with mere price, no matter how great the price.

Why do human beings have absolute worth, an inner value—in other words, dignity? Because of their reasoning faculties, which enable them to distinguish moral from immoral actions. Because every rational human being is identical in this regard, something that appears to be subjective to each one of them, namely that they are ends in themselves, becomes an objective principle.²⁵ Every human being has an absolute worth, intrinsic dignity, and nobility, and must not be used as a means only. One human being must not instrumentalize another human being or, in Kant's own, rather more obscure, words:

Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.²⁶

This demand is also known as the second categorical imperative. If we previously talked about *Leistungswürde*, dignity one has to earn, we can now talk about *Mitgiftwürde*²⁷ (dowry dignity), dignity one has intrinsically, without ever being able to lose it or give it up. In this regard, the people we mentioned at the beginning of the paper do not have more dignity than mass murderers, torturers, rapists, or pedophiles. They all have dignity as a member of the human species, *zōon logon*, *animale rationale*, the thinking animal.

A Child's Life or a "Little Bit of Torture"?

The German constitutional court applied the third understanding of dignity, the Kantian one, in their ruling on the police president's case. As

quoted earlier, their judgment included the statement: "Human dignity is inviolable. Nobody must be made into an object, a bundle of fear." No human being must be treated only as a carrier of knowledge—which the state wants to access. The convicted child murderer was neither associated with high rank or office nor with all the virtues, as would be required for the other two senses of dignity.

However, prominent politicians and judges, as well as a significant part of the German population, supported the police president. Did they subscribe to an understanding of dignity that is related to the virtues? And if so, could this be defensible from a moral point of view? Do only those who lead a virtuous life have dignity and hence qualify to have their dignity protected? Let us look at the kidnapper first (at the time of the police president's actions, it was not yet clear that he had already murdered his victim). A man who kidnaps a child to extract money from the parents is not virtuous. His actions fail at least on the accounts of justice and wisdom. Even if one did not make him responsible for his deeds by pledging insanity, the virtue of wisdom and therefore dignity would be lost.

Perhaps lack of virtue could be the justificatory approach taken by those who approved of the police president's decision. This would lead to the rather radical claim that only the virtuous have dignity, which must be protected. The kidnapper did not have dignity and therefore the actions of the police were justified. In this case, an alignment with moral common sense might seem plausible. Whereas it seems morally unacceptable to assume that only those with high rank or office deserve protection, some people might reasonably maintain that one can lose one's dignity by immoral action and thereby one's right to protection. It is

not hard to imagine a considerable number of people, for example, parents of small children, who would endorse “a little bit of torture”²⁸ to save a child’s life. For them, one might assume, the perpetrator lost his dignity by his own deeds and is therefore responsible for the calamity that befalls him later. Let us try to apply this approach more broadly.

Could the second sense of dignity yield reliable moral norms, aligned with moral common sense? If so, the concept could be very valuable when judging moral dilemmas. Although some of us might be satisfied with the above moral verdict, it remains to be shown whether it could be applied beyond one individual case. In other words, would we be happy if state-sanctioned violence in police custody were—under certain circumstances—considered morally justifiable? To answer this question, we need to consider two further questions. First, is our conclusion compatible with virtuous behavior? We cannot base the solution for our moral dilemma on lack of virtue in the kidnapper and then allow the same lack of virtue in the behavior of state officials. Second, can one move from defending an action in a special case to the generation of norms for more general application? Let us deal with these questions in sequence.

Is Coercion in Our Case Compatible with Virtuous Behavior?

We worked from the premise that only those who are virtuous are dignified. However, this does not mean that one would be allowed to do whatever one wanted to those who are not, for instance, coerce them into making a statement. If we base our argument on virtuousness, we need to ensure that the actions of state officials are virtuous too. In the context of state-sanctioned violence, there are five obvious possi-

bilities for non-virtuousness: (1) crime against morality, (2) potential innocence of detainee, (3) preemptive action, 4) rescue, and (5) alternatives.²⁹

Crime against morality. State violence behind closed doors is one of the most detrimental actions to human flourishing and well-being one can imagine and an insult to justice. One only needs to mention one harrowing example to illustrate the point. Stephen Bantu Biko (1946–1977), a South African antiapartheid activist, was detained in September 1977 under antiterrorism legislation. During his interrogation in Port Elizabeth, he sustained a head injury, after which he acted strangely. “The doctors who examined him (naked, lying on a mat, and manacled to a metal grille) initially disregarded overt signs of neurological injury.”³⁰ However, after he slipped into a semi-conscious state, he was transported to Pretoria (a distance of 1,200 km) lying naked in the back of a Land Rover. On September 12, Biko died from brain damage on the floor of a prison cell, still naked. In 1997, the South African Truth and Reconciliation Committee found that “the death in detention of Mr Stephen Bantu Biko on 12 September 1977 was a gross human rights violation [and] the probabilities are that he died as a result of injuries sustained during his detention.”³¹

Biko fought for freedom from oppression, and his enormous courage and sense of justice has to be praised. However, the police who are likely to have fatally injured Biko could have maintained that he was guilty of a crime. He was a terrorist and enemy of the state, after all! Hence, the question arises for *which crimes* one loses one’s dignity and thereby one’s right to protection. And in addition, one needs to ask what one can rightfully do to a human being who has lost or never had dignity. It becomes clear

that the mere allegation of a “crime” is not sufficient to legitimize duress. If we allow state-sanctioned violence against those who have lost their dignity, who defines which actions qualify under this heading and which do not? I return to this problem below when I ask whether one can move from defending action in a special case to the generation of moral norms for more general application. For now, let us establish that child kidnapping to extract money from the parents is probably one of the few actions that would be considered a crime, an offence against morality, on a universal basis. At the same time, we have to note that it can be a considerable injustice, which shows serious lack of wisdom, to define a crime according to one’s needs, for example, to keep an oppressive regime in place.

Potential innocence of detainee. Potential innocence of detainees is one of the strongest arguments against duress and other state-sanctioned violence one can think of. The mere chance that a small proportion of detainees could be innocent might call for blanket restrictions on state violence in police custody. To make the innocent suffer is one of the most unjust and therefore nonvirtuous actions possible. Human knowledge is limited and errors of justice occur regularly. For instance, in the United States, 117 prisoners on death row had their charges dismissed in appeal cases between 1973 and 2004. The average time between being sentenced to death and exoneration was 9 years.³² This shows why potential innocence is a factor of enormous moral significance. It also leads to a problem for our case.

The protection of the innocent is necessary because many cases remain in the gray area between “clearly guilty” and “clearly innocent.” Protection does *not* have to be given because

we can *never* know when somebody is guilty, but because we cannot be certain at all times. According to the evidence collected by investigating officers, Gäfgen’s involvement in the kidnapping was established beyond any doubt. He was apprehended after picking up the ransom from the specified location, driving around in an uncoordinated manner to shake off potential followers, ordering a 70,000 Euro Mercedes car the following day, and booking a holiday abroad. In police custody, he could not give any explanations for this behavior and, hence, his culpability was as clear as it could be (the only remaining doubt was whether he had accomplices). So, for now, let us establish that with regard to potential innocence, the Gäfgen case might not have given rise to concern.

Preemptive action. At first sight, it is unsurprising that parallels to 9/11 were drawn. According to the then chair of the German Judges’ Association, duress in police custody would have been acceptable to prevent the attack on the Twin Towers.³³ Let us assume that he had the following in mind when he compared our case with the terrorist attacks on September 11. In advance of the date, we have in our custody one of the terrorists, a person who would have flown one of the planes, or an accomplice with full knowledge of the details. We only have inadequate knowledge of the planned attacks, but we are sure of the detainee’s involvement and of the attack’s seriousness and imminence. If the detainee is put under duress, we hope that he will give us full details and that—as a consequence—we will be able to avoid an unspeakable tragedy. The chair of the Judges’ Association must have assumed that the parallels in the two cases are striking and that the threat of violence should be allowed in both. This is not the case! While

the detainee suspected of planning terrorist attacks is in custody, he is still innocent. He might have *planned* an attack on the World Trade Center, but he has not yet committed it. This is a striking difference when it comes to the concept of dignity under consideration! In the latter case, we would be using state-sanctioned violence on an as-yet-innocent person. He could still change his mind about the attacks (or he could be run over by a bus). The reason we considered a blanket ban on state-sanctioned violence in the last section is because of potentially innocent detainees. When it comes to preemptive state action, those potentially put under duress are—by definition—innocent. And we have already seen that violence or the threat of violence against the innocent is unjust. Hence, we have just identified a third point of moral significance in the Gäfgen case. The crime had already been committed, and on the day Gäfgen was put under duress he was already guilty.

Rescue. Our last but one point of moral significance is probably the most important one, namely saving the innocent from suffering. Let us assume the following (which is partly fictional). At the time of his arrest, Gäfgen's 16-year-old girlfriend was also arrested and questioned by the police (this is not fictional). Assuming she had seen the murder of Jakob and convinced the police she did (this is fictional), would they have been justified in putting Gäfgen under duress, for instance, to learn the location of the body? The evidence for his involvement in the kidnapping would still have been overwhelming and the crime would already have been committed. But would this have been enough to justify coercion? I believe not. The strongest reason for coercing Gäfgen into making a statement was the potential rescue of an innocent

child's life. A just and wise person would not threaten torture unless a higher moral command would demand it. One such command could be *to save the innocent victims of a crime from dying*.

By the time Gäfgen was arrested, almost five days had passed since Jakob's disappearance. If he had still been alive in an unknown hiding place and if Gäfgen was the only kidnapper, Jakob could be dying miserably from lack of water, food, or even air. This meant that additional pressure built up due to the time constraints. By putting Gäfgen under duress, the police were not only threatening a person who lost his dignity, according to the second sense of the word, by undoubtedly committing a serious crime. They were threatening a person whose victim might still be rescued from the results of the crime under investigation.

Alternatives. If we accept with those who supported the police president that the rescue of innocent human beings from suffering can—under certain circumstances—justify the use of violence, we still need to add one proviso. All alternative means to achieve the beneficial results intended will have to have been exhausted. In our case, the police president saw no further way to extract information from Gäfgen. Upon arrival at the central police station, he had a breakdown, which delayed the interview. Being confronted with more and more evidence, he kept changing his story from having found the ransom by chance to being involved in the kidnapping as the money courier. Accusations he made naming others were all checked, but none proved viable. Meanwhile, the public had been informed and a 1,000-people search team had been sent to a nearby wood. None of these activities yielded any results. As a last resort, Jakob's mother was brought to

the interview room, but Gäfgen showed no reaction. One can justifiably agree with the police president that he had exhausted all alternative means.

To Conclude on Whether Coercion Is Principally Compatible with Our Case

The kidnapper has lost his dignity and thereby his right for protection, according to the understanding of dignity that connects the concept with virtue. The question, which occupied us for most of this section, was whether the police president's actions were compatible with virtue. It would have been contradictory to assume virtue as the basis for our understanding of dignity and then allow nonvirtuous action toward the nondignified. But given the above, we established that if all of our conditions were fulfilled, the use of duress or coercion could be morally defended. The crime under consideration will have to be universally accepted as a crime. The guilt of the detainee has to have been established beyond any doubt. The crime must already have taken place. An innocent victim of the crime can still be rescued and no nonviolent means to achieve the same end are available. Virtue is not synonymous with passive peacefulness. Righteous indignation and concern for the innocent might require nonpeaceful action. Gaschner's actions were illegal under German law, but if one disregards the law as we did in this section, his action could be considered moral. Let us see whether our second question in this section throws doubt on this preliminary conclusion.

Can One Move from Defending an Action in a Special Case to the Generation of Moral Norms for More General Application?

Can we formulate morally legitimate public policies that would allow state-

sanctioned violence in police custody? Looking at the case in isolation from the law, we preliminarily concluded that the kidnapper has lost his dignity and thereby his right for protection under clearly defined circumstances and that the police president's actions were compatible with virtuous behavior. Does this mean that coercion in police custody could be allowed under the very restrictive circumstances outlined above? It is needless to emphasize that our five conditions will hardly ever coincide in police and secret service work. Particularly, the fact that a crime has to have been committed while its victim can still be rescued applies only to a minute number of cases, namely, certain kidnappings and hostage takings. Still, would those who support the second sense of dignity favor a public policy allowing state-sanctioned violence under these circumstances? It is one thing to sanction—with hindsight—Gaschner's actions. But it might be another to use the second sense of dignity to formulate public policies.

Unsurprisingly, there are problems when moving from the judgment of an individual case ("What would I have done had I been Gaschner?") to the formulation of public policies. These problems occur in several areas, namely (1) the establishment of a person's loss of dignity and (2) the assessment that our five criteria have been fulfilled, (3) the assurance that the policy cannot be abused and (4) the usual suspect, the slippery slope argument. Let us start with the first one.

Dignity is only possessed (according to the second sense of the word) by the virtuous. As long as they are virtuous, they deserve protection, that is, they must not be put under duress in police custody. Our public policy on state-sanctioned violence would therefore need to define (a) when a

person loses his or her dignity, (b) *how* this loss can be assessed, and (c) *who* decides that this loss has taken place.

Loss of dignity? Our definition of dignified persons required them to be wise, just, tempered, and courageous. As a foundation for public policies involving state-sanctioned violence, this seems excessive. These criteria might be suitable for the Vatican when it is considering sainthoods, but they are too restrictive to distribute rights of protection accordingly. It would allow violence to be used against a wise, just, and self-disciplined man who turns out to be a coward or a young, brave, just, and wise woman who has no self-discipline. Neither of them might have done any harm to others. It seems unintuitive to establish whether a person is dignified or not by looking at the presence of all virtues. Instead, it might be more promising to look for signs of the opposite and not to restrict oneself to minor offences. One could, for instance, determine a list of crimes that result in a loss of dignity. Murder, kidnapping, hostage taking, rape, and pedophile attacks could be on the list. But immediately a new question arises: Who is going to decide which crimes will be on the list? For instance, some might argue that pedophile attacks and rape are not crimes but signs of disease. Others might argue that murder can only be added to the list with certain provisos (e.g., outside the war situation). Agreement on the list might never be reached. But let us assume, for the sake of argument, that we had such a list. How would we establish whether a specified individual had committed a crime from the list or not, without involving a court of law in a very lengthy procedure? (It is obvious that cases for state-sanctioned violence of the type relevant to this discussion will need rapid action.) And, similarly, who would make

such a decision? A single public official (e.g., a police president?) or a group of officials? It becomes clear that it would be impossible to formulate a policy for state-sanctioned violence based on the assumption that certain vicious behaviors can be comprehensively defined and reliably detected at short notice.

Satisfaction of the five exemption criteria. Independent of the perpetrator's loss of dignity, we listed five criteria with which the state official has to comply in order to remain virtuous with regard to the case handling. The crime under consideration will have to be universally accepted as a crime. The guilt of the detainee has to have been established beyond any doubt. The crime must already have taken place. An innocent victim of the crime can still be rescued, and no nonviolent means to achieve the same end are available.

The first point (the crime under consideration will have to be universally accepted as a crime) raises a problem we have already mentioned. Which crimes would be included on a list of such serious offences that the perpetrators would lose their dignity and who determines this? Difficult question. Likewise, if one wanted to formulate a public policy that allowed state-sanctioned violence *only* for the guilty, one would have to find a quick and safe way to establish guilt. Although this might be possible on occasions, this will present a major obstacle for the implementation of the policy. Provisos three and four are less difficult to satisfy. The investigating officers either have the knowledge of a crime and can make reasonable assumptions about potential victims or they cannot. And likewise, it might be possible to judge whether all reasonable alternative means have been exhausted or not, proviso five.

Even on an optimistic note, this still leaves us with serious problems. Who

will define when human beings lose their dignity? How will this loss of dignity be established and by whom? And how would guilt be ascertained? We can already see that human abilities to agree on moral questions and human knowledge to establish empirical facts will not be sufficient to proceed in this manner. But two further serious issues need to be added: abuse of such a policy and the slippery slope such a policy could lead us onto.

Abuse. Policies can be abused, and those in whom the state invests certain powers and citizens subsequently invest their trust can fall very short of virtuous behavior. Doctors kill patients³⁴; police surgeons rape young girls,³⁵ police fabricate evidence,³⁶ and so forth. Can one ever be sure that a policy that allows state-sanctioned violence in police custody will not be abused? No. Hence, if one wants to protect the innocent, the best way forward seems to be a blanket ban in line with the Kantian understanding of dignity.

Slippery slope. And lastly, where could a policy of state-sanctioned violence in police custody, restricted to very specific cases, lead? Gäfgen did confess immediately, without any violence being carried out. What if he had not? What if he had suffered injuries? What if they had been as severe as in Steve Biko's case? What if he had died? Would this still fall under the same policy? Or would one have to ask legal experts to devise a list of duress means that could be acceptable?

To Conclude on Whether One Could Generate a Policy from Our Particular Case

Even those who supported the police president in his actions in one individual case would probably not want to

move to a general policy on state-sanctioned violence in police custody. With the exception of a few very clear-cut cases (as ours and with the benefit of hindsight), it is beyond human powers to establish who has lost his or her dignity and whether the five exclusion criteria are justified (the crime under consideration will have to be universally accepted as a crime; the guilt of the detainee has to have been established beyond any doubt; the crime must already have taken place; an innocent victim of the crime can still be rescued; and no nonviolent means to achieve the same end are available). In addition, a policy developed from the Gäfgen/Gaschner case would be very open to abuse and potentially lead to instances of duress/torture, which those involved in this case would not support.

A policy on state-sanctioned violence in police custody is an attack on civilization (but the mere discussion of it is not).

Notes

1. Spiegel. Prozess um Folterdrohung beginnt. *Spiegel online*, at: <http://www.spiegel.de/panorama/0,1518,328346,00.html> (accessed January 14, 2005).
2. Sooderso. Folter und Wolfgang Gaschner. At: <http://badkleinen.sooderso.net/texte/folter.htm> (accessed January 11, 2005).
3. See note 2, Sooderso.
4. Rückert S. Straflös schuldig. *Die Zeit* 2004; 59(53):1 (my translation).
5. See note 4, Rückert 2004.
6. Grundgesetz für die Bundesrepublik Deutschland (German Constitution). At: http://www.datenschutz-berlin.de/recht/de/gg/gg1_de.htm#art1 (accessed January 10, 2005).
7. Universal Declaration of Human Rights. At: <http://www.un.org/Overview/rights.html> (accessed January 10, 2005).
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9. French, Italian, Portuguese, Spanish, English.
10. German, Dutch, Swedish.
11. Höffe O. *Medizin ohne Ethik?* Frankfurt: Edition Suhrkamp; 2002:67.

12. Aristotle. *Nikomachische Ethik*, Hamburg: Felix Meiner Verlag; 1985:33f (1106a–b).
13. See note 12, Aristotle:4–21 (1095a–1101b).
14. Aristotle. *Politik*. Hamburg: Felix Meiner Verlag; 1981:272 (1334a).
15. Pieper J. *Über die Tugenden*. München: Kösel Verlag; 2004:21.
16. See note 12, Aristotle.
17. Plato. *Platon Sämtliche Dialoge—Band II*, Hamburg: Felix Meiner Verlag; 1993:41 (St. 235).
18. Hill TE. Servility and self-respect. In: Dillon RS, ed. *Dignity, Character and Self-Respect*. London: Routledge; 1995:76–92.
19. See note 8, Kolnai 1976.
20. Innenministerium des Landes Nordrhein-Westfalen. Innenminister. Dr. Behrens zeichnet 24 Lebensretter mit NRW-Rettungsmedaille aus. Internet NRW. At: http://www.im.nrw.de/pe/pm2001/news_1306.htm (accessed January 10, 2005).
21. It could be argued that this is not the case. All we have seen is that dignity is not compatible with the opposite of the virtues. We did not show that it is incompatible with neutral behavior. Although cowardice is undignified, those who display neither cowardice nor courage could be dignified. In this case, courage would not be needed for dignity. I believe that this argument fails to see that neutral behavior is hardly ever an option and can therefore be disregarded. Constantly, human beings have to make decisions about moral issues. They have to commit! If one tries to think of a situation that requires courage or temperance, where a neutral position would be possible, it becomes clear that this is almost impossible. Either one's action is courageous (to whatever degree) or it is cowardly (to whatever degree). Hence, by showing that dignity is incompatible with being unwise, unjust, unself-disciplined, and cowardly, one shows that all the virtues are required, in their positive sense, for dignity.
22. Kant I. *Groundwork of the Metaphysics of Morals*. Cambridge: Cambridge University Press; 1997:5 (4:392).
23. See note 22, Kant 1997:42 (4:435).
24. Hill TE Jr. *Dignity and Practical Reason in Kant's Moral Theory*. Ithaca, N.Y.: Cornell University Press; 1992:202–3.
25. This, of course, is a reasoning fallacy. Because every single being of a group subjectively believes in principle x , x does not become a universal principle, but this is not the place to criticize or defend Kant in detail.
26. See note 22, Kant 1997:38 (4:429).
27. See note 11, Höffe 2002.
28. Jenkins P. Police trial divides Germany over state-sanctioned violence. *Financial Times* 2004 Nov 19:4.
29. I am talking about state officials acting on behalf of a democratically elected government and parliament. If not, a further condition of legitimacy of official would have to be added.
30. *Truth and Reconciliation Commission of South Africa Report*. London: Macmillan; 1999.
31. See note 30, *Truth and Reconciliation Commission* 1999.
32. Innocence and the Death Penalty, at: <http://www.deathpenaltyinfo.org/article.php?scid=6&did=110> (accessed January 14, 2004).
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36. Genoa police "admit fabrication." *BBC NEWS online*, January 7, 2003, at: <http://news.bbc.co.uk/2/hi/europe/2636647.stm> (accessed May 9, 2005).