INTERVENTION DU 4 FEVRIER 2016 – TABLE-RONDE A L'UNIVERSITE DENIS-DIDEROT AUTOUR DU LIVRE DE JAY BERNSTEIN, *TORTURE AND DIGNITY. AN ESSAY ON MORAL INJURY*

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Dear Jay,

First of all, I want to thank you very warmly for being here with us, to talk about your wonderful book. That is something I had imagined many times last year, when we tried to organize your stay here in Paris for a few months, but now it is real, and I must say I feel very honored and very moved today.

Then, Jay, I would like to tell you how exciting I have found your book. It is a real philosophical adventure to read you, because with your modest tone and your precise writing, you take your reader with you on a very important and difficult road, where many issues are at stake. And that is rare. And that is great. So thank you also for *Torture and Dignity*.

What I have particularly liked in your book, is how you show that a pure "rational" ethics is, if not a failure, at least something that is highly frustrating. With only cold rational principles to explain and describe morality, there is something missing, and what is missing is perhaps the most important part of ethics – the warmest part of it, the experience of feeling that *here there is a victim, someone who suffers in his or her flesh*.

So you express the need for a more sensitive ethics, which would put an end to this frustration that we have in front of pure rational principles. And you do that very cleverly and very movingly too – so that we *feel* it, really. You go back to Jean Amery's experience of torture as the core of moral injury – the worst, the most devastating thing that a human being can do to another human being. On this stone you try to build a new moral philosophy, of course linked with a theory of law, because there is a natural bridge between morality and law. Law, in a society, tries to put morality into a system of norms, bans, faults and sanctions. In a way, one could say that law *is the cold part of morality*. But precisely, you help us to understand this:

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morality comes from elsewhere; it is different from law because it is the origin, the foundation of law; it is the warm ground on which cold judicial norms are built. And you want to remind us of this warm ground.

That is why, it seems to me, Beccaria is so important for you. It is because he was focused on the *bodies*, on the notion of *concrete injuries*. Historically you consider that to be the real origin of both moral and legal systems. It is during the second part of 18th century that torture was banned from legal systems in Western Europe, and that was a key point: then, other principles of respect of the individual could appear in legal systems. And in the same period, moral philosophy had a new major impulse. So, if I read you correctly, everything has started with *the body*. The body and its possibility to *suffer*, and even to suffer a lot, experiencing both a physical and a moral horrible pain. That is the historical, warm and concrete origin of morality and law. But that is also the theoretical foundation of morality and law *which we are tempted to forget in moral philosophy and in philosophy of law*. So, that is what we have to remember, with you, Jay.

The consequence of this "remembering" is huge. Because here is the point: if first, before anything else, "we are bodies", this implies that we have made a complete mistake, in Western thought, building our moral philosophy on a notion of the individual subject which has so little flesh. You actually criticize the classical subject of law and of morality for lacking a body. And very consistently you go on with what is the most ambitious part of your project: you build a new subject, a new "I", for a new moral and legal philosophy. And that is a subject that is *not sovereign* at all, *not autonomous* even as a moral goal that he/she would or should try to reach. This subject is and remains, whatever he/she does, *dependent*, always lacking and searching for *recognition*. In a way, he/she is all the more moral as he/she is aware of such a dependence on other human beings. Aware, also, of the possibility of being *"devastated"* – which is the ultimate injury, something that is always at the horizon of a moral philosophy.

Such a philosophical project is huge enough to have thrown me, after reading your book, as many other readers I am sure, into a long interior reflection and interior dialogue with you, Jay. I am full of admiration. I share a lot of your philosophical desires and involvements. However, in this interior dialogue with you, as a reader, I have questions on my mind – things that I am not completely sure of, but which I would like to share with you now.

Let me raise three points, which in fact are linked together.

1. Though I am very interested in the notion of “injury” as you define it (more or less related to the notion of “trauma”), I have doubts whether we can really consider it as a new ground for a new moral and legal philosophy. Is it really possible to take “injury” – and therefore the situation of the victim, his/her suffering, and all that we feel about it – as the basis of a moral and legal philosophy?

Well, if we do that, we have to be aware of some problems. We are necessarily going to weaken some liberties – which is OK if we agree to weaken them, but I am not quite sure that we want that. In fact, there is already, in several democratic societies, a process of weakening some liberties, using the notion of “injury” and also the notion of “dignity” in relation to possible “injuries” – yes, indeed, all this is already entering the world of law, perhaps more than what you think or would like.

Let me give an example that I know a little: freedom of speech. Your constitution in the United-States has decided something that is quite unique in the world: no law can be made by Congress to restrain freedom of speech. So there can be no law protecting the individuals, *a priori*, from injuries coming from speeches. So, in America you can sue someone that has injured you by his/her speech, but *in much fewer cases than elsewhere and the result can never be a criminal penalty, only a civil one.* And that, because there is no law, *a priori*, to ban these injuries. And consequently the notion of injury itself is – in this field, “speech” – less developed and less seriously taken by law. That is really the key-point about the First Amendment: a substantial part of injury by speeches is *possible*, and *allowed*. Listen for example what the judges of the Supreme Court said in the *Texas vs. Johnson* case in 1989: "[i]f there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself *offensive* or *disagreeable*."

This is a big difference with systems like France, where freedom of speech is recognized inside limits, which are determined by the law – and a law which can change, and, why not, become more and more difficult. In fact, our 1881 French law has softened some bans and penalties concerning speech, but it has also added and hardened other ones, like speeches which imply discrimination based on race, sex, religion, including speeches which, for example, put a doubt on the existence or on the scale of the Holocaust. If you speak like that, you can receive a criminal penalty in France. The result of this situation is an inflation of categories of discrimination, categories which limit freedom of speech. And the political context related to

this judicial situation is a horrible competition between victims to have their injuries recognized in the law. Their *injuries*, Jay! And as we know, there are many injuries in human history… So the result is: a growing frustration for "victims" who are in fact more and more numerous, and at the same time, a growing ban on the freedom of speech. In America, you have "political correctness" in habits, in private spaces, in social pressures, but not in the law. We have it in the law.

Is it good, as a situation? I am not sure. So if "injury" is the major ground for a legal system, you see what can happen.

Now let me add something else, illustrating the same idea. Let us consider, this time, acts and not speeches. Here, very often in legal systems, injury is taken very seriously. And that is why you consider that the whole legal system, in fact, comes from the notion of injury, and that we should remember this origin even more. But you know what? There are cases where *injury is not the point*, and I must say: I like that. For example, in this country, you can sue someone for rape even if you have no obvious awareness of having been raped – which implies that the injury is not obvious, is not conscious, perhaps is not even there. I you have been given an anaesthetic at the hospital, and if during your sleep someone, in order to make a joke or to experiment something, puts a finger in your vagina or your rectum when this has nothing to do with the surgery you are supposed to receive, if you learn about that afterwards, you can sue these persons for rape or at least for sexual aggression. Even if you have no memory, no symptom of any trauma. Because the problem is not only what you feel about it. It is what society thinks of people having this kind of behavior towards the body of someone who is not conscious. Especially in a hospital.

So injury is not the first problem to characterize a crime. And my question is: isn't that rather wise?

2. This leads to my point 2. If injury cannot always be the basis of moral or legal reflection, I am afraid it is also because our instruments of measure, to seize injury, are not very relevant nor stable. Here I am referring to feelings or emotions, which seem obvious "measures" – evaluations and expressions – of injury. But one of the well-known characteristics of trauma is that, when it happens, emotions are often blocked, nothing is felt. So with this notion we enter into a complicated world. And it is the same for the feelings that one can have *towards someone else's injury* – I am here talking about *empathy*. In fact, your project of developing a more

sensitive morality and legal appreciation, directly connected with injury, will lead to give a key-position to empathy. And that raises new doubts in me, because empathy is extremely fragile, and also because empathy, with its own sicknesses or crazynesses, is part of the problems of which it is supposed to be the solution or at least the measurement.

Political killers lose empathy, which helps them to kill – and often the killing of empathy in individuals is the first goal of an authoritarian power. The loss of empathy is one of the implications of Hannah Arendt's notion of the" banality of evil". This can happen on a large scale, to killers in offices like Eichmann but also to killers on the ground. Christopher Browning has studied the "no-feelings" attitude of the Wehrmacht soldiers shooting thousands of people in Russia. In the My Lai massacre in Vietnam in 1968, we observe the same attitude in the soldiers: a complete "loss of empathy" – which perhaps is itself, sometimes, a sort of trauma on the side of the killers. Sometimes, some killers lose their own "loss of empathy" – suddenly, during the massacre itself, and then they cannot kill anymore: there is one example in Browning's study, when a killer talks with some Jews and realizes that they are relatives of his own neighbors. But this can also happen later, when testifying : then, telling their story in a court of justice or in the face of a journalist, another face of the past can appear to them, though confusingly and in general without leading them to a real guilt. There are examples of this in Seymour Hersh's interviews with the G.I.s who participated in the My Lay massacre, or in Jean Hatzfeld's conversations with the killers in Rwanda.

So, how can empathy be the instrument of measure in ethics and in law if empathy is something that very normal people can lose or gain? And moreover, if one of the problems we have to deal with, in order to judge a situation, is precisely the loss of empathy that has been created in this situation? That would suppose that our empathy "works", is never ill, so that we are allowed to judge situations in which empathy was ill. But how can we be sure that our empathy is not ill at the moment we judge? Feelings cannot be completely on their own in the moral and legal cases we want to judge. Don't you think so?

3. Which leads to my third point. So, here we have a big problem. We do not want cold rational principles only. But perhaps we do not want feelings only. Sometimes I wonder if the big deal now in contemporary philosophy (since Hegel in fact, but beyond him now) is not about finding the right links between reason and sensitiveness (between classicism and romanticism?) in order to build norms in ethics that come from both. OK. But this is awfully difficult! So what can we

do? I do not have a lot to say here, except one thing, one "idea". There is a field where "feelings" and "reasons" are already mixed up all the time, and this is *politics*: political action, political thinking. Politics, here considered as a separate field from morality and from law (though connected with them, but not completely absorbed by them). No truth, no permanent norms, no absolutely stable feelings: in politics every point of view has to be built and rebuilt again, each time the situation changes. So, perhaps in philosophy of law and in moral philosophy, I mean in the way they deal with political issues, there is a necessary failure in finding *the* ground, *the* basis, *because only a political thinking can deal with all the elements which are involved* (i.e. with the fragility both of reasons and feelings, with the permanent *change*, etc.). And it is striking to notice that, in fact, political thinking *is* the kind of thinking that experiences exactly what you talk about: *dependence* (on changes, on other points of view, etc.), and the desire and the problem to be *recognized*. It is in political thinking that we all are in the situation you are talking about. And that, in a way, is *lost* when this political thinking transforms itself into a moral or a legal logic – because these logics are specific, and that is why political thinking often feels betrayed by law and by morals.

Yes, indeed I fight against the reduction of politics to law or to morals. I believe there is a specific field (in minds, and in behaviors) which is politics and which is often insufficiently taken into account in its own nature and its own fragility. And I wonder I you fight enough for this... In a way, perhaps your own concepts in the end ask you to consider more this issue…

Well, let us say this is just a thought… I do not know how you will react to that.

But really, thank you, Jay, for all these problems you have raised and the concepts you have built.