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Torture and Liberal Democracy: Response to Levey

STEVEN LUKES*

I am really grateful to Geoffrey Brahm Levey for his critical comments,¹ which push me to try to make clear, first, why I claim that torture is not susceptible of democratic accountability in liberal democracies; secondly, where I believe the residue of deep insight in the Durkheimian argument lies; and thirdly, why I think we cannot rightly speak, or even whisper, of torture as a lesser evil.²

Torture and democratic accountability. Levey argues that torture can be rendered collectively accountable and that it is not different from other cases of political dirty hands on the democratic front. It could be subject to judicial oversight, for example, by ‘torture warrants’ in the manner of Dershowitz, or by the government or relevant minister being held accountable after the fact. He adds that states do not conceal torture because it is ‘inherently anti-democratic or unpopular’; on the contrary, today it appears ‘only too popular and open to democratic endorsement’.

But I do not mean to equate democracy and popularity. Democracy is not simply majority rule; majorities can tyrannize over minorities and individuals, who need protection on democratic grounds. ‘Democracy’ names an ideal and we could either, like Schumpeter, revise the ideal in a ‘realistic’ direction or, like Dahl, while retaining the ideal as background, characterize real political systems as approximations to it, using other terms, such as ‘polyarchy’. Either way, one of the things which makes a modern state more rather than less democratic is the extent to which it incorporates institutional arrangements and mechanisms that secure a range of basic rights, protecting all, especially the most vulnerable, from arbitrary abuses of power. Among the most basic of those rights is the right not to be tortured and among the most vulnerable are those who are most marginal and those who are most despised or hated or feared at any given time. The public recognition and continuing protection of these rights provides a secure framework for all those within reach of and by the state – all citizens and residents – freely to express their beliefs, to have some access to power and some opportunity to exercise it. So a general argument is that the public recognition of torturing prisoners or terrorist suspects, in either of Levey’s suggested ways, is likely to undermine democracy because such recognition is likely to weaken such protections.

But there is a more specific case for viewing torture as distinctive, which rests on two facts about it. Torturing in modern societies is, first, practised in secret, hidden from the public view and, secondly, to the extent that the practice is exposed, it is declared by the authorities to be a necessary response to emergency and crisis. These two facts render democratically problematic both the prospective and the retrospective ways Levey suggests of rendering torture collectively accountable. The secrecy means that the public has to trust that the judges and the politicians both know and tell the truth about the facts which the former prospectively authorize and the latter retrospectively defend. And the atmosphere of emergency and crisis will make the judges fearful of making mistakes and so bias them against rights protection, and it will give the politicians an incentive to benefit from heightening the atmosphere of fear. As Levey writes in a different context, that is ‘precisely the point where we have arrived today’.

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¹ Geoffrey Brahm Levey, ‘Beyond Durkheim: A Comment on Steven Lukes’s ‘Liberal Democratic Torture’, *British Journal of Political Science*, 37 (2007), 567–70.

² Steven Lukes, ‘Liberal Democratic Torture’, *British Journal of Political Science*, 36 (2006), 1–16.

The Durkheimian argument. Levey argues that this argument exaggerates the dangers of allowing some violations of our liberal-democratic core beliefs. Liberal democracies manifest ‘moral slack’ and the religion of individualism can be subject to ‘reform’ and so can accommodate being less liberal when faced by the rise of global terror. Moreover, he argues, the argument ties the protection of individuals against torture to ‘the character and functioning of society’ and so ‘makes individuals hostage to societal fortune’. But the Durkheimian argument, as I read it and seek to deploy it here, maintains that some violations, if unpunished and especially if sanctioned by law, are more decisive than others because, to use Levey’s own helpful words, they cause ‘the moral fabric of society’ to ‘unravel’. The ‘moral fabric’ in question is not, however, ‘the character and functioning of society’ as a whole (whatever that might mean) but its liberal-democratic character and ways of functioning.³ And it is of course an empirical claim that such unravelling is caused by the unpunished and legally-sanctioned violations in question. I fear that this is, at least partly, true.

Levey claims that the residue of deep insight in Durkheim is ‘his sense that individualism has attained, for us, a certain *transcendental status*’. I have, I think, no quarrel with this, except to add that Durkheim saw that recognition of this status requires the legal protection of certain rights and that these must be viewed as sacred: that is, as set apart from the consequentialist calculations of the rest of life, so that they are not subject to ‘trade-offs’ and their violation is treated as taboo.

Torture as a lesser evil. Levey asserts that ‘the problem of dirty hands entails ... some exercise in weighing or ranking’ because ‘we can scarcely say that a certain course of action is the “right or best one in the circumstances” without *some* weighing or ranking of the alternatives.’ My counter-claim is that not torturing prisoners or suspects is the right course of action in all circumstances, not because it is weighed as heavier or ranked as higher than torturing them, but because it is seen, in a Durkheimian way, as respecting and protecting what is ‘sacred’ and so set apart from such weighing and ranking.

Levey claims that I am ‘willing to endorse Posner’s deference to officials to decide when the stakes are “high enough” to resort to it, and where there is some genuine reckoning for their illegality’ and that I thereby concede that torture may be a case of dirty hands and even sometimes ‘the lesser evil’. But that is not what I wrote. I agreed with Posner that the prohibition of torture should be ‘strict’. I take this to mean that absolute, or exceptionless, prohibition of torture is needed to sustain the inhibitions that we need to sustain. If and when this prohibition is violated, then the officials in question are certainly not to be deferred to, though they can, to use Posner’s word, seek ‘absolution’ (and I noted the religious vocabulary). The problem here is how, if the perpetrators should be absolved, to find a way of preserving the sense that an uncanceled wrong has been committed.

³ Thus, in claiming that Durkheim was over-optimistic in holding that the religion of individualism had profoundly and irreversibly penetrated our institutions and customs, I meant that his idea was that a modern industrial society could only function well when such a religion penetrated its institutions and customs, and that such a society was increasingly coming into existence. He was obviously not unaware of the continuing, even dominant, presence of the anachronistic religion and accompanying authoritarian political morality of the past, as exemplified by the Anti-Dreyfusards.