

Torture, Secrecy, and Democracy: Balancing Security and Publicity in Republicanism

by

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Abstract

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Debates about the use of torture in order to protect democracy have become increasingly prevalent in the wake of September 11, 2001 and the war on terror. This thesis examines pro-torture arguments based on considerations of national security. Recently these arguments have had the most traction when advanced within the republican mode of democratic theory. I argue that torture undermines democratic legitimacy because of the secrecy it involves when used for interrogational purposes. Publicity about acts committed in the name of the *demos* is an essential aspect of democratic legitimacy. For interrogational torture to be effective, major features of its use must be kept secret. This secrecy is incompatible with classical republicanism and the theory of collective responsibility it entails because it interferes with the ability of the people to participate meaningfully in democracy, which is an essential feature of republicanism.

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Introduction

An important controversy in political philosophy today is the proper use of political violence in democratic societies. Recently, advances in technology and a growing need for intelligence have led to a revival of debates about torture as a method of intelligence-gathering. Interrogational torture refers to the intentional infliction of severe pain or suffering, physical or mental, on a person or third party for the purposes of information gathering by a state official or someone acting in that capacity.¹ Torture is generally regarded as a repellent and abusive form of treatment. Domestically, democratic states have prohibited the use of torture—state officials deal with criminal actors in ways delineated by codes of criminal justice, and information obtained as a result of abuse is usually not allowed for use in courts. This is true internationally as well, as both *jus cogens* norms and international law forbid the use of torture. However, recently this apparent consensus on the absolute prohibition of torture has been questioned in the wake of perceived existential threats to the democratic states, particularly in the context of the “War on Terror.” In an era of asymmetrical warfare, some democratic states are reconsidering the absolute nature of the torture prohibition in order to respond to terroristic threats.

The problem with this reconsideration is that torture and republican democracy are fundamentally opposed to one another. Publicity is a prominent feature of republican democracy. Torture is at odds with this feature. As a mode of intelligence-gathering, it requires that the torturers rely on a high level of secrecy about their acts. Thus, a tension arises when torture is proposed as a method of protecting democracy. Using torture as a

¹ UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85. Article 1(1)

method of protecting democracy requires agents of democratic states to act in ways incompatible with the ideals these states are founded on.

There are many good reasons for democracies not to torture. The effectiveness of torture as an interrogational technique is debatable, our ability to avoid torturing the innocent has not matched our ability to inflict pain, torture is illegal, and so on. The focus of this thesis is on the damage torture does to democratic legitimacy as conceived in republicanism. A key feature of interrogational torture programs is secrecy. This is particularly true in democratic societies, in which state officials have compelling reasons to keep the use of torture a secret for both theoretical and logistical reasons. Democratic states have good reason not to openly acknowledge their use of torture because doing so would undermine both the rule of law and the effectiveness of interrogational torture. The publicity requirement should give us pause when considering whether torture can be an appropriate response to national security threats. Proponents of pro-torture arguments must acknowledge the harm what they seek to do inflicts on democratic legitimacy. This is a compelling reason not to engage in torture, since the result would be damaging both the perceived and actual legitimacy of the state.

A state is legitimate only when "...it is morally justified in wielding political power, where to wield political power is to attempt to exercise a monopoly, within a jurisdiction, in the making, and enforcement of laws."² In addition to the objective fact of whether a given state is legitimate, the perception of the state as legitimate or not is of great importance. Citizens must believe their state is a legitimate authority in order for it to be so. In democratic societies, states must make it possible for citizens to conclude this about the state. This requires publicity about state action. Publicity is the "common

² Buchanan, Allen. "Political Legitimacy and Democracy." *Ethics* 112.4 (2002): 689-719:689.

perspective from which citizens mutually engage one another in an attempt to convince each other of what is just and unjust by the force of the better argument.”³ It requires that citizens be able to engage in public discourse with each other and with the state about public issues. In the republican account of democracy this capacity to engage in public discourse is an important aspect of democratic legitimacy. Because perceived legitimacy is an important aspect of legitimacy proper, the people must know what they are being asked to endorse when they participate in democratic institutions. Republican democracy *requires* publicity.

The conflict between publicity and torture poses a particularly difficult problem for republicans. Republicans value communities as well as individuals because they see individuals as situated within political communities. For this reason, republican political analysis often takes more account of context than its liberal counterpart. For republicans, legitimacy is conferred not only by democratic procedures, as in procedural liberalism, but also by political participation. Because republicans value the existence of the political community as a prerequisite for meaningful political life, there is a unique problem for this view when state security comes into conflict with individual rights. In republicanism the role of the state is to represent the interests and values of the society. It is obvious in the interest of a society for it to continue its existence. This seems to create space for the argument that torturing in order to save the community from imminent destruction is democratically legitimate.

The main purpose of this thesis is to assess and respond to national security-based arguments for the use of interrogational torture: to assess whether there is in fact the

³ Habermas, Jürgen. “Reconciliation Through the Public Use of Reason: Remarks on John Rawls’s Political Liberalism,” *The Journal of Philosophy* 92, no. 3 (March 1995): 124.

space for legitimating torture by appealing to society's interest in its continued existence. I argue that torture does harm to democratic legitimacy because it violates the publicity requirement for legitimacy. I consider the strongest argument for suspending the publicity requirement from a republican perspective—based on reasons of national security. I argue that the assumptions required to make this argument imply a view of collective action, Margaret Gilbert's plural subject theory, that rules out resort to torture in the name of a democratic society. Torture policy, and the secrecy it involves, is incompatible with meaningful participation in political society if this is conceived of (as republicanism seems to) as a plural subject. Pro-torture arguments fail from a republican perspective because they are inconsistent with the conditions for democratic collective action.

The theory of collective action that best captures classical republicanism is plural subject theory; this theory best accounts for the republican conception of political community. Plural subject theory leads to some interesting conclusions about collective responsibility. The most relevant is that it requires publicity about actions taken in the name of the plural subject for that action to be sustained over time. Even secret acts implicate the people in whose name they are committed, by virtue of their membership in the plural subject, and these commitments impact who the subject is and the character of the joint commitment that binds them together. Another important feature of the theory is that plural subjects can have affective responses—emotions such as pride, guilt, or remorse. The latter two of these are especially important for shaping future collective action because they provide feedback between plural subjects and their leaders. Members of plural subjects must be aware of actions committed in their name so they can have the appropriate affective responses, and adjust future collective actions accordingly; publicity

about collective action is required for meaningful political participation. As a result, proponents of the pro-torture argument must either commit themselves to a position on responsibility that is difficult for a republican to sustain, or re-evaluate the value of political participation for democracy.

The first chapter opens with an overview of recent state secrecy policy. I then argue that torture requires secrecy for three reasons—effectiveness, implications on the rule of law, and credible threat-making. The second chapter begins with a description of Jürgen Habermas’ account of publicity in democracy. I then give brief characterizations of both liberalism and republicanism, and reasons why proponents of both views should value publicity as an important aspect of state legitimacy. The chapter ends with an introduction to the particular problem that arises in republicanism from the need to balance considerations of publicity with those of security. These chapters together give good reason to think that torture is incompatible with publicity. In the third chapter, I more fully describe the republican pro-torture response to this. I argue that the alternative to an exceptionless prohibition on torture is not building an exception into the rule but making an exception to democracy. Next, I give an account of why republicans should endorse Margaret Gilbert’s holistic view of social groups. Implications of plural subject theory for the problems raised in the first two chapters are considered. I finally argue that it is inconsistent, on republican views of collective action and responsibility, to advocate for suspending publicity because it hinders meaningful political participation and makes citizens responsible for acts they do not endorse. The implications of this are that proponents of torture are forced to either reconsider their commitment to democratic republicanism, or subscribe to a contradictory view of collective responsibility.

Chapter 1: Torture and Secrecy

Republicanism is a type of political theory in which the role of the government is to represent the will of the people in order to facilitate citizens' abilities to live good lives. This is what it means for a republican democracy to be legitimate. Public officials are responsible to and representative of the political community as a whole, and not just the individuals who vote for them. They speak in the name of the people when they act in their capacity as public officials. Republicans value community as a prerequisite for meaningful political life. "In their capacity as political actors, citizens and representatives are not supposed to ask only what is in their private interest, but also what will best serve the community in general..."⁴ Typically republicans see the process of law and politics as a discursive process; citizens and states engage in a deliberative process with a discernable endpoint. Republicanism involves a particular conception of the community as a special kind of social entity and as something more than the aggregate of the individuals that make it up. Citizens participate in politics in an effort to shape the conception of the community's will so that it is representable by public officials. Political participation is of paramount importance to republicans, not only as an effort to shape the behaviour of public officials but also to help inculcate relevant political values in the community whose will is to be represented⁵.

Because republicans value community as the context in which meaningful political life takes place, they have a strong interest in protecting the community. Existential threats to the community warrant strong action, on this view. The pre-

⁴ Sunstein, Cass R. "Beyond the Republican Revival." *The Yale Law Journal* Symposium: The Republican Civic Tradition 97.8 (July 1988): 1539-590. *JSTOR*. Web.: 1550

⁵ Sunstein holds this view.

existence of the community is an essential feature of the republican account of democracy. As a result, there appears to be more space within republicanism to condone the use of types of political violence that would otherwise be prohibited. A type of political violence that has been a source of recent controversy in democracies is interrogational torture. Cass Sunstein, a prominent contemporary republican theorist, argues that democracies should ban torture, “but judges and citizens who disagree on that question should be able to agree that it ought not to be imposed without democratic authorization.”⁶ Sunstein argues that debates about torture should be public, and that it makes little sense, on a republican view, to ban torture absent the legitimation of this ban by the people. What Sunstein fails to consider in his argument, however, are the growing demands for information involved in protecting national security and the need to close off this space for the conclusion that a democracy should ban torture to be persuasive. Because republicans value community, and place great importance on its continued existence, they have a particular problem generating arguments for limiting the means permitted for protecting the community. Because of this interrogational torture perpetrated for reasons of community survival, or national security, poses a unique problem for republicans. They need a response to arguments for torturing in order to protect the community because it seems like such acts could be justified on a republican view of democracy.

1.1 State Secrets and Arguments from National Security

What makes torture so untenable in a republican democracy is the secrecy it requires. The most compelling contemporary argument for state secrecy is based on national security considerations. It is clearly in the interest both of the state and of the

⁶ Sunstein, Cass R. *Designing Democracy: What Constitutions Do*. New York: Oxford UP, 2001. Print.:9

people who comprise it to keep some information secret. Examples include the locations of troops in active duty around the world, the future battle plans of military commanders, access information for weapons caches, and so on. These are all instances of strictly confidential information, the release of which would be directly and obviously detrimental to agents of government and those whose interests they represent. This is reasonable from the perspective of both state officials and citizens. It is in everyone's interest to maintain security in this regard. The privilege that states have to keep certain information secret relates directly to discharging the duties state officials have to keep citizens safe and states secure. Despite this, "Secret decisions may have inherent deliberative and participatory deficits that preclude robust democratic legitimacy."⁷ Secrecy is *prima facie* incompatible with legitimacy, and the purpose of this section is to provide support for this conclusion. While the best rationale for secrecy is state security, proponents of suspending the publicity requirement for the sake of security must consider the detrimental effect this policy would have on democratic legitimacy.

In the context of interrogational practices employed by agents of the state, national security presents the most plausible justification for keeping information about these practices (including their existence) secret. Pozen describes it this way:

We can also see that deep secrecy may be most likely to occur, and to raise the most vexing problems, in the area of national security. National security policies often have a true target in the colloquial sense of a party against whom the government is taking adverse action. Publicizing information about these policies therefore poses a special risk of vitiating the underlying objective. National security policies also involve matters of life and death, as well as some of the most morally and legally controversial activities taken by government, and therefore raise the stakes of secrecy generally.⁸

⁷ Pozen, David. "Deep Secrecy." *Stanford Law Review* 62.2 (2010): 257-339. Print.: 287-288

⁸ Pozen: 275

There is a long legal history of courts deferring to governments when states argue that information relevant to a legal proceeding is secret⁹. In 1949, Justice Jackson of the United States Supreme Court wrote a dissenting opinion in *Terminiello v. Chicago* arguing that the Constitution is not a “suicide pact.”¹⁰ This meant that while the Constitution is a founding document which provides guidance for public officials, it cannot require them to do things inherently antithetical to the continued existence of the nation. There is an obvious lack of oversight in state secret cases; when courts affirm state invocations of privilege they are not privy to the details being kept secret. They make determinations on the basis of *prima facie* factors of the case. While the government sometimes has a legitimate claim to invoke this kind of secrecy, in reality government claims to secrecy often overreach what is necessary. They are granted more latitude when claims are couched in terms of national security—certainly no judge wants to be held responsible for forcing state officials to divulge information that might turn out to be detrimental to state security. Put simply, the “quintessential justification for state secrecy [is] to preserve the state itself.”¹¹ It is this, the most compelling justification for state secrecy that provides the best case for torturing in secret.

The Supreme Court of Canada has exemplified this in a recent trend toward deferring to the government in cases where state secrecy is invoked. In 1985, in *Re Singh v. Minister of Employment and Immigration*¹² the Court found that procedures outlined in the *Immigration Act*¹³ for adjudicating claims of refugee status under the UN Convention

⁹ See 92 U.S. 105 - *Totten Administrator v. United States*, 479 F. 3d 296 - *El-Masri v. United States J & Llc*, 345 *United States v. Reynolds et al.*

¹⁰ *Terminiello v. Chicago*, 337 U.S. 1,37 (1949) (Jackson, J., dissenting opinion)

¹¹ Pozen: 277

¹² *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177

¹³ *Immigration Act, 1976-77, c. 52, s. 1* [Canada], 1976.

relating to the Status of Refugees were in conflict with the Canadian Charter and Bill of Rights. The conflict was that the *Immigration Act* granted the power to deny appellants the right to appeal decisions about their claims to refugee status without due process. The *Act* allowed the Minister to deny appeals if it was determined by the Ministry that they had a low probability of success. The Minister was not required to share the reasons for rejecting such claims, thus denying the appellant the opportunity to respond. The appeals of *Singh et al.* were denied, which meant they would be deported to countries where they believed their rights were in danger. The Court found in favour of the appellants, and concluded that hearings are necessary for respecting the rights of those claiming refugee status. These hearings would afford the claimants the opportunity to hear why their claims were initially denied, and respond to them.

This is in contrast to the Court's opinion seventeen years later in *Suresh v. Canada*¹⁴. At issue in this case was the deportation of an appellant, who had Convention Refugee status, to a country where he was likely to be tortured because the Canadian government believed him to be a member of a terrorist organization there. *Suresh* was deemed a danger to Canadian security, and so a decision was made, again without a hearing, that he was to be deported for reasons of state security. Suresh then appealed the decision, arguing that he was not a terrorist¹⁵, that the procedure for making these types of determinations was unfair, and that said procedure violated his rights. While the Court found that Suresh deserved greater respect of his right to due process, they did not find it necessary for the Minister to grant hearings in such cases. This is distinct from the

¹⁴ *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, Canada: Supreme Court, 11 January 2002

¹⁵ More narrowly, the claim was that Suresh had given money to an organization which had then put it to use in funding terrorist activity. According to the appellant, he never directly contributed to any terrorist activity. This is a claim that the Canadian government deemed incorrect.

approach taken in the previous case, where hearings were deemed necessary. The invocation of state security privilege leads to more favourable conclusions from the perspective of the government.

The Court also further elaborated on their difference in approach to cases where the Canadian government has found that an individual poses a threat to security—

...the reviewing court should generally adopt a deferential approach to the Minister's decision on whether a refugee's presence constitutes a danger to the security of Canada...Likewise, the Minister's decision on whether a refugee faces a substantial risk of torture upon deportation should be overturned only if it is not supported on the evidence or fails to consider the appropriate factors. The court should not reweigh the factors or interfere merely because it would have come to a different conclusion.¹⁶

This is a very different attitude than the one expressed in the *Re Singh* decision. In *Suresh*, the Court found that while torture is in direct conflict with Canadian law, the will of the Canadian people, *jus cogens* norms of international law, and fundamental justice, it refused to extend an absolute prohibition on rendition. Instead, it left an opening for successful invocations of state secrecy for deporting refugees to countries where there is evidence that they will be tortured¹⁷. They concluded that

...a person facing deportation to torture under s. 53(1)(b) must be informed of the case to be met. *Subject to privilege or similar valid reasons for reduced disclosure, such as safeguarding confidential public security documents*, this means that the material on which the Minister is basing her decision must be provided to the individual...¹⁸

The Court briefly acknowledges its apparent change of heart in the *Suresh* decision as a departure from precedent, arguing that “after the year 2001, that approach is no longer valid.”¹⁹ This signals a greater willingness of the judicial branch of the Canadian government to defer to the other branches when they invoke considerations of

¹⁶ *Suresh* 6-7

¹⁷ “We conclude that to deport a refugee to face a substantial risk of torture would generally violate s. 7 of the *Charter*.” (*Suresh* 13)

¹⁸ *Suresh* 65 emphasis added

¹⁹ *Suresh* 51

national security. In *Re Sigh*, at issue were considerations of publicity and due process. The differences in *Suresh* are the invocation of national security by the government and a different political climate. This difference resulted in the Court finding that a hearing was necessary in order to respect due process in 1985, but not in 2002. In the latter decision, not only was a hearing deemed unnecessary but the Court allowed that the state may violate the fundamental principles of justice, among other considerations, in the name of national security.

The most difficult question faced by any democratic society today with respect to the relationship between government and public opinion is the degree to which considerations of national security justify executive officials in withholding information from the public. For while it is often assumed that administrators are on the firmest of all grounds in refusing to disclose information in the area of defense and foreign affairs, the truth of the matter is that the impact of secrecy upon national security presents democratic society with some of its gravest dilemmas.²⁰

The most compelling form of this argument, as an objection to the requirement of publicity for democratic legitimacy, invokes a form of exceptionalism. Proponents of national security justifications for the use of interrogational torture may make at least two claims in support of it. The first claim is that interrogational torture may in fact be compatible with the publicity requirement; dispelling this claim is the subject of this chapter. The second claim is that there can exist some situations which are so pressing, and so necessarily tied to the continued health of the political community, that it becomes worth suspending the publicity requirement. The second situation is an exception to the

²⁰ Rourke, Francis E. *Secrecy and Publicity; Dilemmas of Democracy*. Baltimore: Johns Hopkins, 1961. Print.: 221-222

general case in which the publicity requirement is upheld. Proponents might argue that when certain requirements are met, there is an exception to the publicity principle. This would involve changing the publicity requirement to something like “Publicity is necessary for democratic legitimacy and should therefore be respected, unless situations X, Y, or Z occur, in which case publicity may be suspended.” A promising candidate for these variables is when credible existential threats against the state arise and stopping them is necessary for the continued existence of the community. This argument has especially good traction if we examine it from the perspective of a republican, who would already value the political community as a prerequisite for any attempt by citizens to live good lives.

For this argument, I will deal only with the use of torture for interrogational purposes. There are other reasons a state could have for torturing an individual²¹, but I will set these aside. Reasons for using torture have evolved. In the middle ages, torture was mostly used as a mechanism to force truth-telling or compliance. We now find torture a reason to doubt testimony produced by it, however. When torture was used as an ordeal to put those accused of crimes through, it was seen as conferring credibility on the information it elicited. This is the opposite of how we now view torture. We no longer see torture as necessary to ensure the veracity of information and we no longer use torture as a regular means of extracting information from suspected criminals; it is seen as both inhumanely cruel and of uncertain effectiveness. Instead, we rely on criminal justice procedures and forms of information extraction that are in line with the current penal code. Torture as a form of punishment has also fallen out of favour in modernity, for similar reasons. There is a commonly accepted taboo against the use of torture now that

²¹ Punishment, or to make a political statement, for example.

didn't exist centuries ago. As a result, it takes a much more robust reason to justify the contemporary use of torture.

Since the use of torture has been rejected in this way, it would take something of fundamental importance comparable to the physical integrity of the tortured to justify it. The most promising candidate for this is the protection of the physical security of the state and its inhabitants. Defenders of the use of torture may claim that when the existence of the state is imminently threatened we may violate the rules otherwise apply. This is because of the weight of citizens' interests in the state's persistence. Defended in this way, we may torture in order to save a community and its way of life, but not to secure less fundamental interests. Since the kind of torture at issue here is interrogational in nature, we need to examine situations in which information gathering may be seen as so vitally important to securing the state's persistence that its effectiveness could establish a prerogative to torture. Of course,

Even in the pursuit of security, great care must be taken lest information procedures that are designed to strengthen the nation actually endanger its safety, or alternatively, so weaken the process of public discussion as to impoverish the vitality of democracy itself.²²

This weakening of democracy is often related in ticking bomb scenarios:

It seems sensible to limit coercive interrogation in the same way deadly force is limited. The rule might be: "police may use coercive interrogation only when they are reasonably certain that an individual possesses information that could prevent an imminent crime that will kill at least n people," where n is some number that reflects the balance of gains and losses from coercive interrogation... For the consequentialist, n may be a relatively low number; for the deontologist, n might be very high, the catastrophic scenario; but otherwise, both types of thinker should approve of our rule.²³

²²Rourke 226-227

²³Posner, Eric A., and Adrian Vermeule. "Should Coercive Interrogation Be Legal?" *Michigan Law Review* 104.4 (February 2006): 671-707. *JSTOR*. Web.: 701

It would take very high stakes indeed to legitimate the use of torture. Situations where a great number of lives are at stake are the paradigm examples of when torture may be used. If an individual has information which could avert these kinds of “catastrophic scenarios,” state officials would be desperately interested in getting that information from the individual in order to save lives. The weight of the interests at stake would seem to justify the negation of the tortured’s integrity that torture entails.

A more concrete case can illustrate. The United States is currently involved in an armed conflict with Al Qaeda, a terrorist organization responsible for the attacks of September 11, 2001. As an organization, Al Qaeda has expressed a desire to perpetrate further attacks on American citizens as well as others it sees as its enemies. Members of Al Qaeda are sometimes captured by the United States. The U. S. places a high priority on getting information about Al Qaeda and its future plans from those captured in order to protect the American people from further attacks, which they have good reason to believe are imminent. If they fail to gain such information, they risk putting Americans in danger; failure to accurately predict and subsequently prevent future attacks means that Americans are less secure. It is in the interest of the American people to find out as much as they can about the plans of Al Qaeda as well as other terrorist organizations that wish to do harm to Americans. In this way, the security of the United States depends on the ability of its government agents to extract the necessary information from those they have access to. If torture is the only way to get this information, and the information is necessary to prevent extensive loss of life or disruption of the state’s capacity to operate there could be a reason for its use.

However, from a republican perspective the use of torture is harmful to state legitimacy because it is incompatible with the publicity requirement of democracy. The use of interrogational torture involves secrecy to be effective for three reasons. The first is that the specific aspects of interrogational methods (including torture) need to remain secret to prevent potential victims from knowing in advance how they will be treated. Locations of interrogational units, the information sought, the methods available (including whether torture constitutes an available method) and other factors need to remain confidential in order for interrogational torture to work. The second reason is that if torture were done publicly, in the sense that it was openly acknowledged by the state, it would be a clear and direct violation of both international and domestic law. Torture is not only wrong because it is illegal, but its manifestly illegal nature poses a problem for states. A state that openly breaks its own laws, as well as those it has assented to internationally, undermines its own moral and political authority. Political legitimacy involves moral justification for wielding political power.²⁴ If it is a state's job to uphold its own laws, then a violation of law by the state gives citizens good reason to disregard its moral authority, and the status of the rule of law. An essential aspect of this is that governments are bound by their own laws and serve as the arbiter of law. Finally, for torture to work as a means of information gathering, credible threats need to be made concerning the victim's situation. One of the most common threats made to victims is that "no one will ever hear you scream,"²⁵ in order for this to have the desired effect the

²⁴ "...an entity has political legitimacy if and only if it is morally justified in wielding political power, where to wield political power is to attempt to exercise a monopoly, within a jurisdiction, in the making, and enforcement of laws." Buchanan 689

²⁵ Cohen, Stanley. "State Crimes of Previous Regimes: Knowledge, Accountability, and the Policing of the Past." *Law and Social Inquiry* 20.1 (Winter 1995): 7-50. Print.: 19

practice of torture must be a secret from the public. Otherwise, the threat loses credibility with the tortured, and becomes ineffective.

It is also the case that empirically, when democracies have tortured, they do not do so publicly. The contemporary examples of this, as in Canada and the United States, further strengthen this claim. Neither of the governments of these countries wish for them to be seen as countries that torture. This secrecy is likely motivated by several of the points argued in the next sections. Democracies have good reason not to let their use of torture become publicly known, and this consequently gives them license to do things that would otherwise be undermined by publicity. As a result, the use of torture gives strong reason to endorse secrecy in a way which is *prima facie* incompatible with the publicity requirement of democratic legitimacy.

1.2 Publicity about Interrogational Techniques and Effectiveness

Similarly to the way certain aspects of national security policy need to remain secret, torture policy would also be kept secret for reasons of effectiveness. This is because of the possibility that political enemies who would be tortured may be able to avoid or prepare for interrogations in advance and so resist divulging the desired information. This is already the case with some aspects of police and military work. The public does not know exactly what goes on in interrogation rooms, or at military facilities, although the parameters within which these interactions are supposed to take place are the subject of public discourse. Just as it is intuitively the case that the military should not publicly discuss the exact coordinates of its troops prior to a planned attack, police or military forces should not divulge the questions they plan to ask of interrogates in advance of questioning.

A similar argument can be made for torture, which is very much a psychological as well as physical phenomenon. Part of what is necessary for it to work is a sense of disorientation; successful interrogational torture does not proceed along predictable or rational lines. Take as an example the practice of waterboarding interrogatees. The reason waterboarding is supposed to be effective is that it is a form of mock execution. Victims are repeatedly made to feel that they are about to drown. This creates the impression that death is imminent. Mock executions are a type of torture. They fit the definition— an act that causes severe pain or suffering, physical or mental, committed intentionally by a public official or other person acting in that capacity in an effort to gain information.²⁶

Waterboarding is a useful example in two ways. Since the point of waterboarding is to make the victim believe their death is imminent, victims need to truly and authentically hold this belief in order for the torture to be effective. This is the first way in which waterboarding is a good example of why secrecy is an important aspect of interrogational torture. In order to get information from victims, the point of waterboarding is to make them feel like they are about to die if they don't divulge what they (are believed to) know. While waterboarding is not supposed to be lethal, its effectiveness is based on what the victim believes about its lethality. The fear of death has to be genuine, for waterboarding to work. *If the state is public about the fact that it waterboards suspects, political enemies will be able to prepare their members for such treatment, both psychologically and physically.* If members of these organizations have been waterboarded in the past and survived, then they know that the point of waterboarding is not to cause death despite the impression one has while undergoing it. They could also infer that since waterboarding is used in an interrogational context, it's in the interest of

²⁶ CAT Article 1(1)

the torturers not to actually kill the victim. The simple truth is that dead people can't talk. The point of interrogational torture is not to kill the victims; it is to get them to divulge information. If the state is public about its practice of waterboarding, for example, potential victims can prepare themselves for the practice and so better resist it if it is ever actually performed on them.

In fact, the benefits of secrecy for efficacy of torture are presumed in certain military practices. The United States government, in the controversial Survival, Evasion, Resistance, and Escape (SERE) schools where it teaches members of its military how to deal with being captured, inflicts harsh treatment on its own soldiers in order to prepare them for the realities of being captured. "The theory behind the SERE program is that soldiers who are exposed to nightmarish treatment during training will be better equipped to deal with such terrors should they face them in the real world."²⁷ In fact, the United States military inflicts all kinds of abusive treatment on its own people in order to prepare them for enduring the same treatment at the hands of an enemy.

The agency runs the Survival, Evasion, Resistance and Escape (SERE) training program, which includes stressful mock interrogations, intended to prepare soldiers to withstand and resist abusive interrogations in the event they are ever taken prisoner. The program uses methods derived from American prisoners of war real-life experiences. The techniques include forced nudity, stress positions, exposure to extremes in weather and waterboarding, a form of simulated drowning.²⁸

This has also been used in the context of the War on Terror. Members of Al-Qaeda, the terrorist organization much of American intelligence gathering has been directed against, also trains its members to withstand mistreatment. This is evidenced by the experience of an American interrogator—"The detainee,' he explained, 'had been trained in resistance

²⁷ Mayer, Jane. "The Experiment: The Military Trains People to Withstand Interrogation. Are Those Methods Being Misused at Guantánamo?" *The New Yorker Online*. The New Yorker, 11 July 2005. Web.: 4

²⁸ Associated Press. "Officer Cites Abusive Interrogations: The AP Sees Testimony Ahead of Senate Armed Forces Committee Hearing." *MSNBC.com*. MSNBC, 25 Sept. 2008. Web.

techniques and was using them.”²⁹ Interestingly, the kinds of interrogations performed on American soldiers are mirrored in the kinds of interrogations members of Al-Qaeda are subjected to:

There are striking similarities between the reported detainee abuse at both Guantánamo and Abu Ghraib and the techniques used on soldiers going through SERE school, including forced nudity, stress positions, isolation, sleep deprivation, sexual humiliation and exhaustion from exercise. The unnamed interrogation chief from Guantánamo notes in his statement that on his watch detainees were exposed to loud music and yelling.³⁰

Both sides of this conflict use whatever information becomes public about interrogation methods, including torture, in order to better prepare their combatants for what may happen if they’re taken captive by the other side. “Students who go through SERE are taught methods to resist interrogation techniques that may be used against them; they are taught how to respond when they are on the receiving end of interrogation.”³¹ The same appears to be true of members of Al-Qaeda. This is evidence of the fact that publicizing information about interrogation techniques leads the intended targets of these techniques to use the information to prepare themselves to resist. In this way, publicizing even the more abstract aspects of interrogational torture—including the parameters within which it is supposed to take place—allows the intended victims to better prepare. This makes interrogation less effective, and would likely lead to greater and greater levels of violence as well as human rights abuses of a more grave nature in an attempt to come up with new ways of getting information from victims. Therefore, secrecy is required in order for harsh interrogation techniques like torture to be effective

²⁹ Mayer: 7

³⁰ Benjamin, Mark. "Torture Teachers: An Army Document Proves That Guantánamo Interrogators Were Taught instructors from a Military School That Trains U.S. Soldiers How to Resist Torture." *Salon.com*. Salon Media Group, Inc., 29 June 2006. Web.: 1

³¹ Mayer 4

and to limit the potential for escalation in interrogation techniques over the course of a conflict.

1.3 State Lawbreaking and Legitimacy

Part of the authority legitimate states have is a monopoly on the use of legitimate violence. This means that violence inflicted by the state is more likely to be seen as acceptable because the state acts in the interest of its people. Violence is a regrettable but sometimes necessary part of political life. Because the state enjoys this bias in favour of its use of violence, the way the state uses violence needs to be critically evaluated. This reputation of the state rests on the idea that the state is authorized to act in the interest of the community. States are scrutinized differently than individuals who use violence to achieve their goals because of the assumed legitimacy of action that is derived from the legitimacy of the state. Despite the fact that legitimate states are the arbiters of officially sanctioned violence, this does not mean that all kinds of violence are permitted. Some kinds of political violence, like torture, are specifically prohibited. Torture is defined in the Convention against Torture (CAT) as “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”³² This makes torture by definition an act of the state. One becomes a public official only when one takes on a political role, so torture is also politicized.

Part of the reason states are sometimes scrutinized less when they use violence is that they are better equipped to keep important aspects of their violent policies secret. Citizens might know that their state is engaged in a war being fought on their behalf. They may even endorse this war, and see it as a justified use of political power in their collective name. This would not mean, however, that they would also authorize whatever

³² CAT 1(1)

it takes to win that war *carte blanche*. Even if the citizens of a democracy authorize a particular type of political violence, they can't be taken to have implicitly authorized torture perpetrated in the course of an otherwise just war.

But without knowledge, how can we be said to consent? Locke suggested that the people grant to the executive a power of prerogative to act for the public good in extraordinary circumstances even if this means going beyond or against what is required by law... We grant a power of prerogative to the executive to do what is morally best, and in this way we consent to those actions *properly* taken under this authority.³³

So, we authorize our representatives to do what is required, but within limits. In

republican theories, state uses of power are subject to normative constraints. This is Sunstein's point about banning torture—the kind of democratic authorization that is the product of public debate would imbue such a ban with greater legitimacy. The state is supposed to uphold the law, and when it uses violence in ways that are inconsistent with the laws, the state is less legitimate. To override the most direct display of the will of the people, laws enacted by the legislators they elect, would undermine the legitimacy of government in important ways.

It is important to note that even a *perceived* loss of legitimacy would be detrimental to states. Even if there were a case to be made for torturing out of necessity, it would have to be weighed against the damage done to citizens' perception of the state. While the consent of the governed is not the only threshold that must be met by democratic states, it is an important one. For states to be truly legitimate, they must be able to convince their populations of it. While the legitimacy of states may be a fact, in the sense that they may fulfill their obligations to citizens or not, this fact is partly determined by the perceptions of citizens. Legitimacy ultimately requires that the people subject to a government accept it as authoritative, and the people are less likely to do this

³³ Gowans, Christopher W. *Innocence Lost: an Examination of Inescapable Moral Wrongdoing*. New York: Oxford UP, 1994. Print.: 232

if they lose faith in its moral scruples. Citizens can authorize their governments to do many things in their name³⁴, but when they discover their government is doing things in their name that they would not, and should not, authorize the resulting damage to the perceived legitimacy of the state could be irreparable.

Torture is illegal in democracies under international law, and under domestic laws in many. The Convention against Torture, the Geneva Conventions, the Universal Declaration of Human Rights³⁵, are all examples of international law that forbid torture in all states, including democracies. The CAT also requires that states make torture illegal domestically; this is the case in both the United States and Canada. Despite the loopholes in the American interpretation of the relevant domestic laws³⁶, this gives states good *prima facie* political reason not to torture. Aside from the strong moral case to be made for not using interrogational torture, the fact that it is manifestly illegal makes the public engagement in torture a politically infeasible policy. The damage that would be done to perceived legitimacy as a result of this violation of the rule of law to democratic legitimacy could be irreparable. A key feature of the rule of law is that it requires states to abide by the same legal principles they apply to citizens. In addition to legitimacy, democratic states also need to follow the rule of law. This is a prerequisite to a state being able to further attempts of citizens to live good lives. As torture is illegal both

³⁴ Though not everything. Whether citizens could explicitly authorize their governments to torture, via a referendum for example, is an interesting but separate problem.

³⁵ As are many others.

³⁶ The Torture Memos reveal that the United States government under President George W. Bush interpreted the phrase “cruel and unusual punishment” as having the same meaning as it does in the Eighth Amendment of the United States Constitution. Because it is a domestic document, the U.S. Constitution only applies within the United States. As a result of this, the Bush Administration inferred that the domestic laws forbidding torture only applied within the United States as well. This completely undermines the anti-torture laws and by doing so the Bush Administration gave itself licence to mistreat political prisoners anywhere outside of the United States without it falling under the law and therefore not qualifying as torture. This interpretation obviously violates the spirit of both the CAT and the domestic laws which implement it.

domestically and internationally, public awareness of state engagement in torture would give the impression that the state follows and uses laws only when it serves the state's purposes. This would undermine the state's roles as lawmaker and law enforcer, a crucial component of the function of states.

The state is also prevented from breaking its own laws because of the nature of democracy. The reason the United States has a Constitution³⁷ and Canada has a Charter is to entrench the values and procedures which are essential to a well-functioning democracy. As a type of governance, democracy requires the rule of law. Considerations of the rule of law include prospective as opposed to retrospective lawmaking, stability of law, and so on. Most relevant here is that the law applies to everyone equally, including governments. The state is supposed to be the arbiter of democracy; public officials take oaths in which they swear to uphold the values of democracy. Even if they sometimes think themselves justified in passing laws or undertaking actions that are *prima facie* contradictory to democracy³⁸, they would most likely not want the details of such policies to become public.

Torture is almost unique in its fundamental incompatibility with key elements of the rule of law, including due process and equal standing. One reason for this is that torture lacks an antecedent guilt-determination procedure (AGP). It's impossible to know in advance whether a suspect actually has the given knowledge or not. Torture is unlike other uses of state violence both in its particular type of violence and because there is no procedure to ensure that only the guilty are subjected to it. Other punishments

³⁷ The U.S. Constitution mentions secrecy only once, and says that it's an allowable derogation from the norm of publicity for Congress to omit necessarily secret parts of their proceedings from journals.

³⁸ This would most likely happen in cases where national security is threatened, or if other competing values (which may or may not be democratic in nature) are granted higher priority in a given situation.

democracies use include imprisonment, fines, or loss of privilege. None of these, however, are (ideally) used unless and until the victim has had an opportunity to assess the case against her and respond to it. This is not possible with torture—there is no way to determine whether the suspect actually knows what officials suspect that he does in advance. The torture performs the functions of both guilt-determination and punishment³⁹.

This point is supported by Henry Shue's discussion of the argument⁴⁰ in which he refutes the justification for torture that victims can end the torture at any time by capitulating, and so have a measure of control over the process. According to Shue, there are three basic types of people who could be tortured. The first is someone who has the information in question and is not sufficiently allied with the cause to keep them from divulging it. This type of victim has the genuine possibility of defending themselves, or escaping the torture, by giving up the information required of them. This exemplifies the way proponents of torture think it would work. Unfortunately, this is not so for the other two types. The second type is someone who is in actuality an innocent bystander, who is believed to have information they do not in fact have. There is no possibility of escape for them (unless they fabricate information) because they can't divulge information they don't have. The third type is someone who has the information but is sufficiently committed to the cause to refuse to divulge it even under torture. The reactions of victims of both the second and the third type are indistinguishable from the point of view of the torturer. Thus, those most likely to be tortured are either the wholly ignorant or the wholly informed. The distinction in treatment between the wholly uninformed and the

³⁹ The punishment here is that which is specifically in response to a failure to divulge information.

⁴⁰ Shue, Henry. "Torture." *Torture: a Collection*. Ed. Sanford Levinson. Oxford UP, 2004. 14-60. Print.: 51

person who refuses to divulge information depends on the ability of the victims to persuade torturers that they cannot comply further because they don't have the information. However, convincing torturers that further compliance is not possible is unlikely to succeed and is of no comfort to victims. This feature is uniquely problematic for interrogational torture, making the possibility of torturing someone who is in fact innocent much higher than the possibility of mistakenly applying other forms of coercion.

The impossibility of determining whether subjects of torture even have the information for which they are tortured makes it difficult both antecedently and consequently to see how torture could be analogous to other forms of punishment imposed and regulated by the state. With other types of punishment, we use courts and trial procedures⁴¹ to determine guilt before punishing someone who has committed a crime. Even if such a process were put in place for torture⁴², when the point of torture is the collection of information, torture is always perpetrated in a significant degree of ignorance. In an important sense, the torturer plays the role of prosecutor, judge, and jury, with nothing analogous to a defense. The same act is supposed to determine whether a victim knows something and compel them to share that knowledge. While legal procedures are not infallible, they do serve a truth-seeking function regarding the legitimacy of a person's candidacy for coercion that is missing in cases of torture. People are generally charged with crimes they are believed to have committed as a first step to determining whether this is true. Criminal charges are usually limited to after the crime is believed to have been committed, out of considerations of fairness, and this makes

⁴¹ These function as AGPs in normal domestic criminal justice administration.

⁴² Alan Dershowitz makes an argument for such a juridification of torture. His argument fails for reasons that won't be taken up here, but is largely due to his erroneous assumption that legalizing a politically and morally problematic act makes it not only less problematic but also less likely to occur.

evidence gathering a more reliable process. Interrogational torture involves punishing people for (possibly) knowing something—not for doing something. That a person knows may or may not be discernible by appeal to concrete facts. The point of interrogational torture is forward-looking—if it is effective, suspects will divulge what they know. This is inherently problematic because of the absence of mechanisms for weeding out the innocent. Torture lacks AGPs. Victims of torture have no way to convey their innocence to torturers, and in this way it doesn't matter whether or not they are innocent. Once a person has been designated to be a victim of torture, the process of determining their guilt or innocence is over in an important sense.

In this way, victims have no control over whether they are tortured or not, or for how long they are subject to torture. Denials of knowledge under torture are seen as attempts to lie or mislead⁴³. Victims are also often unaware of what kind of information they are expected to have, and so cannot respond to accusations. Law is not supposed to be arbitrary. People cannot be held responsible for proving themselves innocent of acts (or of having knowledge of things) they couldn't have done (or known). The fact that there is no way for victims to escape torture is similar to the situation criminals would be in if charged under laws applied retroactively. These people could not have avoided breaking the law, as the relevant law did not yet exist when the acts in question were committed. Torture victims cannot avoid being tortured and punished for knowledge they may or may not have. This is not acceptable under the rule of law, and neither should the use of torture as an interrogational technique. As much care as may be taken to avoid

⁴³ This is particularly troubling because denials under torture are necessary as ways for victims to capitulate in the view Shue responds to. Because denials serve as evidence both for and against the victim having the relevant knowledge, victims are denied the ability to escape torture and torturers are denied the ability to discern the innocent from the guilty.

torturing innocent people, one cannot reach any level of reasonable certainty about (1) whether the victim actually knows what they're suspected of knowing, and (2) whether torture would actually make them divulge it if they knew.

Another important way in which torture is in direct opposition to the requirements of republican democracy is that it is predicated on inequality. Torture only works if there is an at least perceived discrepancy in power between torturer and victim. The notion of rights as applied to the torture victim doesn't make sense in this context. The victim does not have the opportunity to exercise any of their rights; this is a fundamental prerequisite to effective torture. Torturers need to create the impression that they are in complete control of the victim's life, at least during the torture. This requires the appearance of the torturer being free from constraints, and no available defense for the victim to invoke. Interrogational torture requires that victims be denied their rights at least during the period of interrogation and be made to believe they are at the mercy of torturers.

Torture is an act performed by individuals in their capacity as representatives of the state: *torture is an act by the state*. When people act in the capacity of public officials they have a different or additional set of obligations to fulfill related to how those actions make use of and are activities of the state's apparatus. When a person takes on the role of a public official, they are no longer acting in the same capacity they do as a private citizen. As a representative of the state, they are supposed to uphold the features of democracy that ground that state. This is the first duty of any person acting on behalf of the state. They must first support the structure in which the state exists, the rule of law. The special capacity of public officials to act in this way bears directly on considerations of legitimacy. Because they are in special positions to validate the state and its legitimacy

by acting in accordance with the rule of law, public officials are also uniquely positioned to invalidate it.

The CAT definition of torture requires that the act be sanctioned, in some sense, by a public official. This lends an added layer of incompatibility to torturing in the name of democracy—in order for something to be called torture, it must be acquiesced to by the very category of person who is the most strictly required to uphold democracy. Ironically, interrogational torture requires the permission of the kind of person who should be most opposed to torture based on its fundamental incompatibility with democracy.

In this way, torture conflicts with the way public officials are expected to act. Not only is the practice of torture illegal for states to engage in, it's also counter to an important aspect of democracy—publicity. Open engagement in torture in by democratic states would undermine legitimacy because it involves an illegitimate use of violence by the state, it undermines the state's role in upholding the rule of law, and it corrodes positions of public office. This harms the very nature of democracy in the state. Thus, the use of interrogational torture would need to be kept secret to avoid harming both the status of the state as a democracy and the status of the state as lawmaker.

1.4 Credible Threats

The third reason interrogational torture is incompatible with publicity is pragmatic in nature. In order for torture to be effective, in the sense that the desired information is divulged, threats made to victims concerning both their status and the status of other

relevant information⁴⁴ need to be credible. For reasons outlined above, open engagement in the practice of torture is not feasible in democracies because of the harm it would do to state legitimacy *via* the opinion of the people regarding the state. Any victim who is at all aware of this fact will know that, under normal circumstances, these states would not be engaging in torture. Potential torture victims in democracies have good reason to believe that these states do not torture because of their democratic nature⁴⁵. Torture is antithetical to democracy in multiple ways. It can be assumed that potential informants are aware of this. Democracies also tend to pride themselves on respecting human rights, so much so that scholars sometimes argue that democracy represents the best option for protecting human rights. As a result, victims are justified in expecting that they will be treated in certain ways when they are in the hands of a democratic state, even if that state sees them as political enemies. There are procedures in place for dealing with cases in which public officials fail to live up to democratic ideals. Under normal circumstances, a public official who, it becomes known, has condoned torture would be subject to both institutional and legal consequences. The act would be denounced on behalf of the state and steps would be taken to prevent similar aberrations from occurring in the future⁴⁶. Under normal circumstances, torture by democratic states is outside of the realm of what is to be expected of them.

It can be assumed that political enemies in the hands of the state are aware of this.

This may be based on whatever relevant experience they may have, either as citizens of

⁴⁴ Such as when torturers (and even other agents of the state who may use more acceptable means of gathering information) lie to victims and tell them that they have some incontrovertible evidence that the victims are liable or about what other informants may have divulged.

⁴⁵ Since it would be safe to assume that democratic states generally act in ways compatible with democracy.

⁴⁶ This is clearly an idealized version of a situation, but an ideal version is all that is needed here. The point is about what people (citizens of democracies or not) would reasonably expect from a democratic state, not whether or not anyone has ever gotten away with abusing their position as a public official.

democratic nations or citizens of nondemocratic nations who are simply aware of what democracy generally looks like. So, people interrogated by democratic nations are generally not going to be inclined to believe, at first glance, that they will be tortured. Interrogational torture is manifestly illegal both internationally and domestically. In order for threats of torture⁴⁷ to be effective, the interrogatee must be convinced that they are inhabiting a space beyond the reach of regular law. The most important thing that torturers say to victims is that no one knows that the torture is taking place, where it is taking place, or who is being subjected to it. Spaces like these are risky for the state to set up, given the consequences for legitimacy if they are found. As a result, the secret detention centers, anonymized lists of interrogatees and other necessary aspects of interrogational torture are only likely to come into being when there is a perceived threat so great as to warrant taking the risk. An existential threat to the state is one kind of problem which might meet these standards.

For interrogational torture to be effective, victims must truly believe themselves at the complete mercy of torturers. They must believe that the normal rules and regulations limiting the power of state agents do not apply. They need to believe that the only way to end the torture is to capitulate. But they must believe that they will never be found, and that they could be killed without anyone ever finding out the details—the who, the where, the why, and so on. It is for this reason that the most common thing said to victims by their torturers is “Scream all you like...No one will ever know.”⁴⁸ This is a necessary part of making interrogational torture work. Without it, victims could rely on the evidence

⁴⁷ Or of further torture once the interrogation is already under way.

⁴⁸ Cohen 19

they already have about how these states treat prisoners and infer that their mistreatment will be detected and dealt with accordingly.

Waterboarding is also a useful example in this respect because the type of harm it involves is psychological and these psychological harms are supposed to be a key part of what makes the technique work. In fact, one of the reasons waterboarding has become popular in recent times is because it leaves no physical evidence on the victim, making it more difficult to prove that the torture actually occurred. As a form of mock execution, the near-death experience that waterboarding is supposed to simulate is disorienting and psychologically harmful. These are key features of the practice. Without them, the torture is unsuccessful, from the torturer's point of view. This is made clearer by a common justification for using waterboarding as a form of interrogation; that it does no lasting physical harm to victims. If we grant this point, the harm done to victims by waterboarding is entirely psychological. Justifications for its use rely on an antiquated notion that psychological harm is of low importance in relation to considerations of torture and human rights. The fact is that it is exactly the psychologically harmful disorientation and terror that waterboarding causes that are what make it useful to torturers. Without the psychological aspect, waterboarding doesn't work.

1.5 Implications

There are three ways in which interrogational torture requires secrecy in order to be effective. The first is logistic in nature. If the locations, techniques, or the identities of the torturers themselves were to become public knowledge, potential victims would be able to prepare themselves to either avoid capture by the state and its agencies or to withstand torture. This is evidenced by the ways in which parts of both sides of the conflict in the war on terror have used torture on their own members with the hope that

they will be better able to avoid divulging important information should they be captured and tortured.

Torture also requires secrecy for political reasons. It would irreparably damage democratic legitimacy if states were to openly engage in torture. The democratic mode of governance is more than majority rule; it involves upholding particular conceptions of both citizens and the state. The public use of torture would make it obvious that the state has failed to do its job as lawmaker, and that public officials have failed to do their job of acting in accordance with the requirements of democracy.

Finally, torture is pragmatically incompatible with publicity. This is a similar but distinct point to the logistical one. Torture will simply not be an effective method of information gathering if it is done in ways theoretically compatible with the publicity requirement. With publicity comes the consequences of public outcry. Under normal circumstances, torture is not a viable method to pursue information in a democratic society. Torture victims must be convinced that they are beyond the reach of regular politics and law: that they do not have access to the kind of recourse that accused do under regular conditions; that they are not going to be found. They also have to believe that they are completely at the mercy of the torturer, and not subject to normal rules and laws. This necessitates secrecy in that these threats have to be credibly made in order to create the atmosphere for these necessary beliefs to take hold.

At issue here is whether the act *could* be publicized in a manner consistent with the desired outcome of said action. It is not whether it *in fact does* become known publicly. Despite the fact that it seems impossible to use torture for interrogational purposes without also requiring vast amounts of secrecy, even if this did happen and the

information was successfully kept secret it would still be problematic. This debate turns on whether the actions are publicizable, not whether they actually do become public.

Whether or not a state's practices actually do become public, the practices must be compatible with the (at least hypothetical) effects of becoming public. Torture is not, for the reasons given in this chapter.

Chapter 2: The Publicity Requirement for Democratic Legitimacy

2.1 Habermas on Publicity

Publicity is valuable for different views of democratic legitimacy. Habermas is a good example for framing the way publicity could work in an idealized version of such legitimacy. “*Publicity* is the common perspective from which the citizens mutually engage one another in an attempt to convince each other of what is just and unjust by the force of the better argument.”⁴⁹ Democracies are just to the extent that they contain “fair institutions operating in [citizens’] interest;” democracies are legitimate to the extent that citizens freely and equally participate in these institutions.⁵⁰ The procedures through which citizens participate in these institutions imbue them with meaning. Democracy is instantiated through political discourse, which takes place publicly and appeals to the reason of citizens. Through discourse, we aim to arrive at a coherent conception of the state and methods for furthering citizens’ interests. The aims of discourse are to (1) come to an understanding of the collectivity of citizens in a state, (2) to identify the goals of the collectivity, and (3) to realize ways to make (1) and (2) compatible. Publicity is a necessary part of this because citizens need a common understanding of ways to evaluate arguments, how to act in response to arguments, and how to engage each other under fair conditions. Citizens should engage in public discourse with each other, and the state must be able to justify its use of force to the citizens through the use of public reason. Otherwise, state actions lack legitimacy.

In this way, both state and citizens must engage in the public use of reason.

Democracy and public reason are importantly predicated on free participation under

⁴⁹ Habermas “Reconciliation”: 124

⁵⁰ Chambers, Simone. *Reasonable Democracy: Jürgen Habermas and the Politics of Discourse*. Ithaca, NY: Cornell UP, 1996. Print:144

conditions of equality. Citizens cannot effectively achieve this in relation to institutions unless they are aware of the aims and actions of these institutions. Without transparency in state actions, the people will not know what they are being asked to endorse, and cannot access the reasons behind decisions that affect them. According to Habermas, real, meaningful democracy cannot take place without publicity.

Publicity requires successful processes of public opinion-formation. Procedures of arriving at public opinions are distinct from those for forming individual opinions. Discourse is the procedure for validating public opinions, and for coming to just and legitimate conclusions. It is a necessary condition of meaningful consent. Discourse is an idealized form of communication in which argumentative positions must be justified to others. For Habermasians, discourse itself has inherent moral value. This particular method of coming to conclusions imbues them with authority. The procedure of discourse confers a special kind of validity on the outcomes it produces. Conclusions that emerge from public discourse are legitimate in a basic way. Because of this, public discourse must be taken seriously in public policy decision-making; “deliberation must inform and underpin decisions taken in the political arena”⁵¹ in order for those decisions to represent legitimate governance.

Citizens constitute normative communities, in which they may play any of three roles at a given time — speaker, hearer, or audience. Speakers direct their speech to both hearers and audiences. Hearers listen to speakers against the backdrop of the audience. The audience observes the interactions between speakers and hearers and can choose to treat the interaction as successful or not. Successful communication requires certain responses from the hearers, audiences, and speakers which all indicate that the message

⁵¹ Chambers 197

was heard and approved of. When we address others in the public sphere, we must imagine ourselves in each role in turn. Communicative interactions produce legitimate outcomes if those involved are convinced to treat the message as an instance of successful communication, and thus treat the outcome as normative. This grants an important kind of agency to those engaged in public discourse, even when they are not functioning as speakers. Government officials must direct their speech (or communicative acts) to citizens in the roles of both hearers and audience. Without citizens playing the supporting roles, the government cannot effectively communicate. Citizens are persuaded to treat communicative acts as normative by arguments making use of public reason and a shared conception of the role of government.

The use of public reason is central to successful democratic discourse. To treat another as a rational equal means to justify a position to them on the basis of reasons they can accept⁵². Habermas argues that a state that deployed force and coercion in the absence of reasonable justification would fail to be legitimate. Instead, citizens must have access to the reasons behind policies, and state decisions must be justifiable to citizens. Proposals are just if publicly acceptable reasons can be offered to defend them. Thus, public reasonableness depends on our hypothetical ability to persuade others, as opposed to using force or coercion.

...A regulation may claim legitimacy only if all those possibly affected by it could consent to it after participating in rational discourses...the presumption of reasonability, which the democratic procedure is supposed to ground, ultimately rests on an elaborate communicative arrangement...⁵³

This is a high standard for legitimacy, but it is important to note that it only requires that all those affected *could* consent, not that they actually do every time. Communicative

⁵² Chambers 86

⁵³Habermas, Jürgen, Ciaran Cronin, and Greiff Pablo. De. *The Inclusion of the Other: Studies in Political Theory*. Cambridge, Mass: MIT, 1998. Print: 259

action is a necessary condition for reasonableness. Proposals which cannot even hypothetically reach this standard are self-defeating. Consequently, the public use of reason is an important element of public discourse.

By virtue of their power to legitimate (or not) claims made by other citizens as well as by the state, citizens take part in discourse as agents. The socially and politically situated perspectives of citizens affect the discourse in important ways. The Habermasian proceduralist account is Kantian to the extent that it requires participants in discourse to treat each other as equal moral and political agents possessing incommensurable human dignity which must be respected. As agents, individuals are ultimately responsible for determining what they find reasonable and what is in their own interest. Feminism is a good example of a movement which “rightly insists that the appropriate interpretation of needs and criteria be a matter of public debate in the political public sphere.”⁵⁴ Since specific citizens are uniquely situated to have knowledge of their own needs, they are best suited to determining which policies or political decisions they should endorse. Discourse validates the autonomy of citizens as political agents, which is necessary for law to be legitimate.⁵⁵ Individuals and their specific experiences serve as a basis for procedural discourse which allows us to use reason to come to normative conclusions. These conclusions gain their force from the process itself. “In the mode of validity that attaches to law, the facticity of the state’s legal enforcement is intermeshed with the legitimating force of a legislative procedure that claims to be rational...”⁵⁶ Legislative procedures which individual citizens could not find persuasive are not legitimate acts of state.

⁵⁴ Habermas *Inclusion of the Other*: 263

⁵⁵ Habermas *Inclusion of the Other*: 254

⁵⁶ Habermas *Inclusion of the Other*: 255

2.2 Liberals and Republicans on Habermasian Publicity

Habermas' account of publicity is compelling even for those who do not adopt the rest of his view wholesale. The Habermasian view is presented as a middle road between two major streams of political thought: liberalism and republicanism⁵⁷. Republicans and liberals hold different views of what makes states legitimate and how citizens should participate in legitimate democratic processes. Habermas finds each of them problematic. However, even if Habermas is wrong in his criticisms, both republicans and liberals have reason to accept the central role that Habermas gives publicity in legitimating state actions, if for different reasons.

For liberals, state power is subject to normative constraints, and states must respect the individual rights of citizens. The use of political power is legitimate if it corresponds to outcomes of democratic processes. Through democratic processes, citizens express their respective wills and interests; interest groups compete to persuade a sufficient number of people to support them to win elections. Public officials may use political power legitimately if they came to have that power through fair and democratic processes, and use it in ways consistent with the ideals underlying these processes. Citizens both authorize their governments to use political power and grant legitimacy to states. In order for this to be meaningful, however, citizens must know what it is that they are legitimating or authorizing. Otherwise, consent is hollow, and cannot grant real legitimacy to the state.

⁵⁷ I use this terminology as Habermas does, but my argument does not stand or fall based on the accuracy of Habermas' terminology. The salient feature among the versions of liberalism referred to here is their emphasis on the procedural aspect of legitimacy. There are, in reality, many versions of liberalism espoused by different theorists which differ from one another in many ways. The term 'liberal' here could be used interchangeably with proceduralist or contractualist. The relevant distinction between these views and republicanism is the interest-group based model of political competition that is an important part of liberalism. The salient feature of republican views is their digression from the proceduralist account and emphasis on the collective nature of political societies.

Processes of will formation grant legitimacy in that they ensure that conclusions are arrived at through procedures of compromise that are agreeable and fair to all. Citizens can deal with electoral and political outcomes that are not according to their individual preferences as long as they feel that they had a fair chance to be heard and participate in the process productively. In order for this to happen, citizens need to be informed about what their options are. This means they should know what their current government officials are doing or have done, and should also be able to question potential public officials about what they are likely to do. The legitimization of governments depends on people consenting to them through a series of institutionalized processes, including voting. In this way publicity is important for liberals similarly to the way Habermas describes it as important for his view. The fairness and authority of these procedures depends on the ability of citizens to make informed decisions. The relevant information must be available for legitimizing methods of will formation to work. Citizens cannot disapprove of something they don't know exists, but their lack of approval—or knowledge— keeps such policies and information from being legitimate acts of the state. Liberals should place similar importance on publicity to Habermasians, as it ensures that the democratic procedures and their outcomes, which constitute legitimacy on both views, are meaningful.

Republicans should also incorporate a publicity requirement into their accounts of legitimacy for reasons similar to yet distinct from those of liberals. On republican views, procedures of will formation are important because the political participation they represent constitutes democratic legitimacy. Values of community are more important for republicans than for liberals, and this leads to different conceptions of the state. For

republicans, the role of the state is to represent the interests and needs of the political group itself. Meaningful political participation is key for public officials to be able to do this well. Publicity allows for greater accuracy about the community's needs, allowing public officials to better assess the needs of the community and the best ways to meet them. Acts performed in secret will likely not accurately reflect the needs of the community, and are also less forceful since the relationship underlying republican claims to political power is the ability to speak in the name of the people. Since the people are in the best position to know which claims they would like to make, political action uninformed by public discourse is, at best, a less authoritative expression of the communal will. If the community members, as the final arbiters of what the community's needs are, remain unaware of these acts then they cannot take action to fix this problem. Since members of the communities are best situated to know what the needs of the community are, they are an important mechanism for ensuring that policy decisions accurately represent those needs. Secrecy undermines this mechanism because it prevents the community from assessing the relationship between acts committed in their name and what needs to be done in their name. Publicity also helps to ensure that what is done in the name of the community, and the citizens who comprise it, actually corresponds to the community itself.

A key difference between liberals and republicans is that public officials, on a liberal view, represent interest groups which "win" in the market-centered conception of ideas. Citizens who are not members of the winning groups should still see the state as legitimate because they participated in fair and equal processes of will formation. Republicans, on the other hand, see public officials as representing the community,

wholesale. Instead of the individualism of liberals, republicans focus on the political community as a special kind of entity enabling citizens to act as one and whose interests are simultaneously individual and one with the community of which they are a part. No one loses on this view, even if their preferred candidates don't win elections, because the role of public officials is to represent and further the interests of the entire community, not just of individuals.

Liberals have stressed the "liberties of the moderns": liberty of belief and conscience, the protection of life, personal liberty, and property-in sum, the core of subjective private rights. Republicanism, by contrast, has defended the "liberties of the ancients": the political rights of participation and communication that make possible the citizens' exercise of self-determination.⁵⁸

In order for republican self-determination to be meaningful, the "self" at work, the society, will need to be able to determine policy made in its name. Once again, since community members are in the best position possible to know what the community's needs are, they need to be aware of what is being done to gauge it against what they know. Realistically, publicity is a necessary part of this. Otherwise, the society fails to meaningfully constitute a community which can provide the context for citizens to live good lives.

2.3 Discussion of Publicity from a Procedural Liberal Perspective

Further explication of the reasons liberals have for valuing publicity is useful for the purpose of contrasting it with the reasons of republicans. In liberalism, the state is meant to be a mechanism of public administration, serving the interests of citizens while respecting individual rights. A major function of the state is to further the freedom and equality of citizens. In one very common model of liberal politics, the composition of this public administration is the result of fair competition between interest groups under

⁵⁸ Habermas, "Reconciliation":127

conditions of procedural equality. When exercised within these constraints political power is supposed to serve the interests of citizens and yet still be subject to normative constraints. Liberal governments cannot further the interests of their constituents to an extent that jeopardizes individual rights. So, the exercise of power must correspond to democratic processes of will formation⁵⁹ so that “what is just is defined by the outcome of the procedure itself...”⁶⁰ Public officials may use political power legitimately if they both come into it through legitimate means and use it in ways consistent with liberal principles. Citizens authorize their governments to use political power through democratic processes, and this grants legitimacy to states.

Liberals often incorporate publicity as a requirement for state legitimacy. One of the major tenets of liberalism is that “political societies must be justified to constituents in order to be legitimate,”⁶¹ and the justification must make use of reason. This much is common to all strands of liberalism. There is debate over the exact nature of public reason⁶², but its importance remains constant across liberalism generally. By publicly justifying policy decisions to citizens, the state respects their autonomy and ability to reason, and thus treats them as effective agents. “Liberal principles, or norms, involve an appreciation of the legitimate rights of all individuals. Connecting these principles to public policy requires publicity.”⁶³ In order for this to work, however, citizens must know what it is that they are legitimating, or authorizing. “Domestically, publicity helps ensure that the officials of republics act according to the principles they profess to be just and

⁵⁹ This is Habermas’ term, but it remains useful in discussing other views as well.

⁶⁰ Rawls “Kantian Constructivism in Moral Theory” *Journal of Philosophy* 77(1980): 523

⁶¹ Hampton, Jean. *Political Philosophy*. Boulder, CO: Westview, 1996. Print.:178

⁶² Kant, Rawls, utilitarians, rational choice theorists, and so on all have different conceptions of what is means to be reasonable.

⁶³ Doyle, Michael C. "Three Pillars of the Liberal Peace." *The American Political Science Review* 99.3 (August 2005): 463-66. Print.: 464

according to the interests of the electors they claim to represent.”⁶⁴ Citizens cannot be said to have truly and meaningfully legitimated political acts and entities unless they are aware, in an appropriate level of detail, of what they are authorizing

There is a problem, then, when states do not publicly explain and justify their acts to the citizens. While it is unrealistic to require states to justify and get advance approval for every action they pursue, they should at least have approval for types or categories of action. There are also some acts in particular for which it is important to ensure specific approval. This would include acts which may violate the rights of particular groups, acts which may be inconsistent with liberal values, and other *prima facie* problematic uses of political power.

Torture, whether it is directed at domestic citizens or foreigners abroad, is an act of this nature, requiring specific approval. In addition to the fact that torture is illegal for many democratic states under both international and domestic law, and citizens should rightfully be concerned when their states commit illegal acts. However, there is something else about torture policy that makes publicity important. Torture is fundamentally different from other types of harsh treatment used in democracies in that it lacks the safeguards normally in place to protect the innocent. The effectiveness of torture requires a substantial imbalance of power in the relationship between torturer and tortured in which the tortured has no opportunity to make the case that they are innocent. This feature makes it especially important that states be public about who they will torture, how they will torture, and for what purposes. Transparency is important so that citizens can be aware of what it is that they are being asked to legitimate — otherwise, consent is partial. Proponents of policies not publicly justified to citizens must remain

⁶⁴ Doyle: 463-466

agnostic at best about their legitimacy unless and until the public is given access to the nature of the policy and the reasons behind it. Therefore, unless torture policy is made public, it cannot be a candidate for a legitimate act of the state.

Indeed, incorporation of a publicity requirement reflects a historical tradition within liberalism. Kant argued that “If publicizing my maxim would undercut my legitimacy, it is probably because my maxim is wrong.”⁶⁵ He supplemented this with the further argument that

[A maxim] which cannot be publicly acknowledged without thereby inevitably arousing the resistance of everyone to my plans, can only have stirred up this necessary and general (hence *a priori* foreseeable) opposition against me because it is itself unjust and thus constitutes a threat to everyone.⁶⁶

David Luban further elaborates on this with a slightly different formulation: “All actions relating to the right of other human beings are wrong if publicizing their maxim would lead to self-frustration by undercutting the legitimacy of the public institutions authorizing those actions.”⁶⁷ In other words, if a state cannot perform a given act in a way that is compatible with the publicity requirement— and therefore with legitimacy—the state should not perform the act. Publicity is a necessary, yet not sufficient, component of legitimate state action.

Post-enlightenment liberals largely agree with and improve upon Kant’s conception of publicity. John Rawls argues that publicity is important for legitimacy. For him, part of a state’s legitimacy is grounded in what he calls ‘fair terms of cooperation’—“On matters of constitutional essentials and basic justice, the basic structure and its public policies are

⁶⁵ “The Publicity Principle,” David Luban, in *The Theory of Institutional Design*, ed. Robert E. Goodin, Cambridge UP, 1996: 195

⁶⁶ Kant, Immanuel. “Perpetual Peace.” *Kant: Political Writings*. Ed. H. S. Reiss. Trans. H. B. Nisbet. 2nd ed. Cambridge UP, 1991. 93-115. Print. 216

⁶⁷ Luban: 192

to be justifiable to all citizens.”⁶⁸ Just principles must be agreeable to citizens, who consent to them under fair conditions; otherwise they do not count as just. The citizens need to know what it is they are consenting to, and they must consent freely in absence of coercion or discrimination in order for their consent to be meaningful. Political principles must be vindicated through a fair process of deliberation for them to be legitimate. The deliberative method Rawls endorses for coming to conclusions about political issues is public reason. There are limits on what kinds of reasons are acceptable in public discourse. These are largely practical; they aid the public in coming to conclusions which are agreeable to a maximum number of people. “Justifications are to appeal only to accepted general beliefs and forms of reasoning found in common sense, and the methods and conclusions of science when these are not controversial.”⁶⁹ For Rawls, publicity is important because it is a necessary aspect of public reason, the form of political dialogue that Rawls considers central to legitimacy.

In “Theoretical Foundations of Liberalism,” Jeremy Waldron argues that there is ...a view I believe most liberals do share: that the social order must be one that can be justified to the people who have to live under it... Society should be a transparent order, in the sense that its workings and principles should be well-known and available for public apprehension and scrutiny. People should know and understand the reasons for the basic distribution of wealth, power, authority and freedom. Society should not be shrouded in mystery, and its workings should not have to depend on mythology, mystification, or a "noble lie".⁷⁰ There has been much academic debate among liberals on the nature of publicity in government, but a consensus seems to exist regarding its importance in democratic societies. Not only is this a generally accepted aspect of liberal legitimacy, it has been a

⁶⁸ Rawls, John. *A Theory of Justice*. Cambridge: Belknap, 1971. Print.: 224

⁶⁹ Rawls *Theory of Justice*: 224

⁷⁰ Waldron, Jeremy. "Theoretical Foundations of Liberalism." *The Philosophical Quarterly* 37.147 (April 1987): 127-50. Print.: 146

topic of ongoing discussion and debate among liberals. While there are many different approaches to publicity from different liberal theorists, most agree that it is at least important enough for legitimacy to continue to address and debate the role of publicity in liberalism.

2.4 Discussion of Publicity from a Republican Perspective

The same is not true among republicans. While some do mention publicity as a requirement for legitimacy, there is less discussion about it even among those who hold this view. Amitai Etzioni includes a “high level of transparency”⁷¹ in his list of necessary features of democracies. Consequently, Cass Sunstein says that “on the salutary effects of publicity, republicanism and liberalism are as one.”⁷² Yet although the importance of publicity in democracy has been acknowledged by many republicans, they do not spend as much time fleshing out how publicity would work on a republican scheme.

This may be indicative of a weaker commitment to publicity among republicans; it could also be a result of the extended discussion of the subject among liberals. Perhaps republicans find much of the liberal reasoning about publicity persuasive, and so do not find reason to engage in more of it. Sunstein seems to be in this vein. In an article about the revival of republicanism in the last few decades he acknowledges procedural liberal arguments for publicity as compelling and then never mentions publicity again. Regardless of the reasons behind the absence, more discussion is needed from republicans on the nature of publicity and how it applies to republican societies.

⁷¹ Etzioni, Amitai. *Security First: for a Muscular, Moral Foreign Policy*. New Haven: Yale UP, 2007. Print.: 43

⁷² Sunstein, "Beyond the Republican Revival." :1568

Fortunately, a simple and persuasive account of what republicans should value about publicity can be reconstructed from a careful exposition of republicanism's basic tenets.

Community is of greater importance to republicans than to liberals. While liberals emphasize the rights and needs of individuals in separation from one another, republicans value rights and needs that individuals collectively have by virtue of being members in a political community⁷³. These rights and needs include a common political culture⁷⁴, communal and political stability, the maintenance of communal bonds, and communal and political security. The state's role includes securing these values and making policy that helps citizens achieve their conceptions of good lives. Justice, rights, and politics all take place within the context of the political community, or society. As a result, the continued existence of that community is of utmost importance for republicans, as it is a precondition for citizens to use the community as a vehicle for pursuing and realizing good lives.

Republicans see citizens as situated members of their respective societies. In communitarian versions, the liberal characterization of citizens as isolable agents operating independently of and uninfluenced by their surroundings is rejected. However, even liberal versions of republicanism insist on the importance of the specific political community through which a citizen acts. This involves developing a common understanding among citizens of what political community is for and what citizens seek to achieve by it. The idea of objectivity that is often central to liberal proceduralist thought is problematic from a republican perspective. This is because of the universalized nature of requirements in democracy envisioned by liberals. According to republicans,

⁷³ Some only see community values as more important *in comparison to liberals*, but it is a general feature of republicanism that community takes precedence and less emphasis is placed on individual rights.

⁷⁴ A common understanding of the purpose and operating conditions of political life.

this vision fails to address how the functions of a political community depend on the set of people who make it up and what binds them together as a collective. One result of this is that republicans are less invested in the ideal of ‘objective,’ or procedurally neutral, reasoning. Liberal proceduralists often deploy a concept of public reason that is independent of the immediate cultural, social, or political context in which we engage in deliberation. According to republicans, this is unrealistic. Processes of discourse and deliberation take place within a social and political situation that is relevant to what ought to count as good reasoning.

Republicans also differ in their conceptions of rights. On the understanding of many republicans, liberal proceduralists mistakenly see rights as protecting a sphere of action which is outside of the public realm. Part of the aim of protecting rights is to preserve or expand citizens’ ability to lead their lives according to their own conceptions of the good, about which the state must remain neutral. Republicans, on the other hand, see rights more as ways of facilitating citizens’ ability to act both within and outside of political communities. Republican conceptions of the good life involve a contextualized idea of our roles within and relationships to the political community. Etzioni, for example, repeatedly argues for limiting individualistic rights which are becoming more and more prevalent. He sees the burgeoning rights discourse as counter-productive to protection of the legitimate rights individuals have, which are fewer and more basic on his view. While this is not typical of all republicans, it illustrates a more extreme version of the different ways rights may operate within discourse. Republicans find it difficult to conceptualize what rights would be like outside of the context of a community.

Which rights citizens have depends on the purposes the political community is supposed to serve. The right to vote, and political participation more generally, are prime examples of what republicans value. Participation partly constitutes the inclusive process of will formation that is supposed to allow the community's government to adequately represent the views of the people. Political participation is necessary for the government to function the way it is intended to, as representative of the people. What republicans add to the pared down conception of rights is a list of duties citizens owes their states and communities. They also limit rights in situations where the existence of the political community is at stake.

This means that it makes more sense for citizens to be asked, on a republican scheme, to make sacrifices for the sake of the community. Republicanism depends on a different conception of the role of the state in an individual's pursuit and realization of her good. Thus, citizens are required to occasionally put their private interests aside for the sake of the community and others in it⁷⁵. When this occurs it is more obviously consistent on a republican view than a procedural liberal one. On the latter, the most that could be required of citizens is for them to set aside individual interests for the sake of the legitimacy conferred by democratic procedures. The interest groups that gain the most popularity (and remain consistent with the values of liberalism) are the legitimate arbiters of future policies. This is not true for republicans. On their view, citizens are to act alternately as selves connected to the community and as selves that are not. On the occasions when people are asked to sacrifice their own interests for the community's, citizens should be united in the sense that they are all part of the same community and so

⁷⁵ This may not always be out of the question for liberals, but they do not make it as basic a requirement as republicans do.

share at least some interests. Republicans depend more on the ability of citizens to act according to non-individual interests. They also place the processes of will formation less in the realm of market-esque competition and more in a discursive, deliberative conversation with a discernable end point. Regardless of what gets counted as a right from the republican perspective, the existence of the political community is a prerequisite for the successful realization of any rights that citizens may have.

The point of politics, for republicans, is to realize self-determination for citizens. Politics is less a competition than an attempt to identify the will of the people and refine their understanding of it until it can be represented adequately by public officials. Through democratic processes of will formation, the needs of the community are determined, and the best public officials and state governments are those who accurately understand, address, and fulfill these needs. There is a lot of emphasis in republicanism on the process of determining what the people's will is. This involves a view of "the people," or "the state," as an entity distinct from an aggregate of individual wills⁷⁶. For the state to work as it should within the republican conception there must be a comprehensible articulation of the community's interest available. It is this articulation that public officials are supposed to represent when they speak in the name of the people as public officials.

Legitimacy is construed differently on the republican view, as governments are seen as responsible to society, instead of to individuals, for acting in ways that further social interest. Decisions of state need to correspond to collective will. Republicans see the political community as a prerequisite for individuals to be able to pursue good lives. Governments are supposed to make policy which corresponds to the needs of the entire

⁷⁶ For more on this, see Chapter 3.

society, and not only to the interest groups who “win” the competition. This, of course, assumes that there is a way to make policy that is responsive to the needs of the entire community. While there are still individual rights, on the republican view, they are linked to the life of the larger political society. In some versions of republicanism, this is expressed by attributing rights to the community that are afforded equal (or even treated as prior to) individual rights. In other versions it is expressed by conceiving of individual rights relationally or by tying status as a right-holder to communal membership. Governments which continually make policy decisions that are counterproductive for the community are illegitimate.

In this, publicity is as important a part of legitimacy for republicans as it is for procedural liberals. Publicity is important because of the way it informs public decision-making, and contributes to the democratic nature of will formation procedures integral to both republican and liberal conceptions of state legitimacy.

Publicity is important because of the way it informs public decision-making, and contributes to the democratic nature of will formation procedures integral to both republican and liberal conceptions of state legitimacy. For liberals, citizens need to know what they are being asked to legitimize by their consent. For republicans, the people need to know what is being done in their name so that they can decide whether it accurately reflects them. Because of the way republicans conceive of the role of public officials, citizens are responsible for the acts done in their names—public officials speak with the voice of the community. This is less of a problem for liberals because they subscribe to a more individualistic conception of “community” as an aggregate of individuals, and they recognize that there will almost always be dissidents within communities as a result of

the way public officials are chosen. Republicans need public officials to be able to represent society generally. As a result, republicanism makes citizens responsible for the acts of their officials in a way that liberalism does not.

It could be argued that as long as public officials are sufficiently good at their jobs and aware of the public will they could operate in ways consistent with the will of the community without publicizing their actions. However, in order for the people to know whether or not officials are representing them adequately, they need to know what is being done to represent them—what is done in their name. Even if what serves the interests of the community is an objective fact, the truth value of which is independent of the will of the community, members of the community are the ones empowered to make ultimate determinations of whether their representatives are doing their jobs well. As a Habermasian would argue, the fact that a conclusion is arrived at through a procedure of public discourse injects it with greater normative validity and legitimacy than if the same conclusion were arrived at in a different way. As was shown earlier, this is an aspect of the Habermasian view that is consistent with republicanism. So even if it is not necessary for representation itself, publicity will be important as a mechanism of accountability.

Republicans should also value publicity as an important aspect of informed consent, which citizens are asked to give when they willingly obey laws and decisions of their governments. While republicans put less emphasis on consent than liberals, they still find it important and should value publicity in ensuring that citizens are fully informed. Publicity is also important for transparency; in order for citizens to make good decisions about who they elect to represent them, they need to know what kinds of actions and decisions the candidates would endorse on their behalf. Publicity legitimates the electoral

process, entrenches accountability for public officials, keeps citizens aware of what kinds of acts and decisions they will be held responsible for, and helps respect the autonomy of citizens as originators of democracy. While publicity appears to have a weaker stronghold in republican theory than in liberal theory, republicans should still embrace it as a requirement for legitimacy.

2.5 Problems for Republicans with respect to Publicity

Interestingly, republicanism also provides the strongest grounds for objections to the publicity requirement. While republicans generally do not advocate the use of torture, there is greater vulnerability in the republican view to arguments endorsing torture. Since republicans value community almost equally as much as they value individual rights, there is an argument, from the republican perspective, for emphasizing the security and continued existence of the community at the expense of individual rights.

Since manipulation, lies, and many sorts of secrets corrode the principle of publicity on which deliberative democracy depends, these strategies can be justified only when there is precious little, democratically speaking, to lose (when formal political mandates lack legitimate jurisdiction and legitimate reasoning and democratic value) or, perhaps, when there is much democratically to gain (when very important matters of democratic justice hang in the balance).⁷⁷

Therefore, publicity becomes violable only when the very nature of democracy and of the community is at stake. Since the existence of the political community is a necessary prerequisite for citizens being able to live good lives for republicans, there is a stronger case than in liberalism for violating norms in order to preserve it. While both liberals and republicans need to consider this problem, the republican version is particularly interesting because of this increased emphasis on the pre-existence of the community.

⁷⁷ Applbaum, Arthur I. "Democratic Legitimacy and Official Discretion." *Philosophy and Public Affairs* 21.3 (Summer 1992): 240-74. *JSTOR*. Web.: 270

While republicans do value individual rights, they also argue that these rights depend on the prior existence of a robust political community. Recall that part of the republican conception of the citizen involves potentially asking citizens to make sacrifices for the good of the community. These sacrifices may include temporarily restricting or even giving up rights, or affording additional powers of oversight to their governments that would normally violate the publicity condition. The strongest case for this is when violation of the publicity condition is deemed necessary for the continued health, or even survival, of the community. If the government is convinced that suspension of normal conditions is necessary for the continued existence of the political community and for democracy itself to be viable, they might thereby gain permission to engage in acts that would otherwise be unacceptable. The link from publicity to legitimacy is absent when the people are uninformed or misinformed about the acts committed in their name. In order for public officials to commit acts which violate democratic norms, they need explicit authorization from those they represent in order to legitimate the practice. For public officials to be allowed to commit acts which would otherwise be prohibited in a democracy, a condition of publicity must be met about what these acts are and why they're necessary.

Recently, the most salient arguments for suspending the publicity requirement have been based on considerations of national security. Arguments of this type make the case that overstepping regular lines and regulations for political action is sometimes necessary in order to protect the community from existential threats. If the very existence of the community is at stake, a difficult problem arises for republicans, since they are forced to choose between individual rights and the community that makes those rights

possible. This is the strongest case for suspending the publicity requirement, and is particularly problematic for republicans. It is less difficult for liberals, who ground individual rights independently, so that threats to “the community” can be made less pertinent than threats to individual citizens⁷⁸. There are still problems for liberals concerning the balance between the need for secrecy for the sake of national security and the need for publicity for the sake of democratic legitimacy, but there are resources available within liberalism to address them. Also, historically, liberalism has been seen as incompatible with secrecy. While there may be situations in which liberals might also suspend publicity, these situations are likely to be more obviously problematic from the perspective of citizens, and therefore more easily criticizable. Justifications from national security are increasingly prevalent in the wake of September 11th and the “war on terror.” This makes it not only a theoretical problem for republicans, but a real one whose resolution is necessary.

2.6 The Republican Torturer: Ticking Bombs and Dirty Hands

The reason publicity is so important for republican democracy is that it prevents governments from engaging in acts directly contrary to the will or ideals of the people. An absence of publicity in the wake of issues of national security provides fertile ground for abuses of state power resulting in anti-democratic violations of rights that both liberals and republicans value. Torture is one of these acts. If states engage in torture and keep this fact a secret from citizens, it constitutes an abuse of state power and an act (at least possibly) contrary to the will of the people. Publicity is important in that it acts as a safeguard against these kinds of abuses. If the suspension of publicity is a prerequisite for

⁷⁸ Such as torture victims.

states to effectively engage in torture for interrogational purposes, which is the subject of the next chapter, an interesting problem exists for both republicans and liberals.

Republicans like Etzioni believe that there is a right not to be tortured, calling it “one of the most basic rights.”⁷⁹ This is likely indicative of republicanism generally. Most republicans should and do see torture as an abhorrent violation of individual rights, and as harmful to the political and ethical community for which it would take place. In a seminal article, Michael Walzer, another prominent republican, calls torture “wrong, indeed abominable, not just sometimes, but always.”⁸⁰ He also thinks it is something that no one can deserve⁸¹. However, the context in which Walzer discusses this is a situation where a political leader is forced to make a choice between torturing a terrorist suspect for the sake of saving the community or refusing to engage in torture to the detriment of innocent citizens. This is the infamous ticking time bomb hypothetical. A thought experiment, it asks the reader to choose between torturing a suspected terrorist in order to determine the location of a bomb that is set to go off somewhere in a city full of innocent civilians in order to save those people or allowing the bomb to go off and kill them for the sake of upholding an absolute prohibition on torture. The stakes are raised as the numbers become more and more lopsided; if we would not torture a suspect to save one hundred, perhaps we would torture in order to save one thousand, or one hundred thousand, and so on⁸². Walzer’s conclusion is that a political leader faced with this

⁷⁹ Etzioni: 5

⁸⁰ Walzer, Michael. "Political Action: The Problem of Dirty Hands." *Philosophy and Public Affairs* 2.2 (1973): 160-80. *JSTOR*. Web. 6 June 2010. <<http://www.jstor.org/stable/2265139>>. Pg. 167

⁸¹ *Ibid.* footnote 8

⁸² This is not meant to suggest that it is a purely utilitarian calculus that should be used to determine whether torture is acceptable. The idea is that, at a certain point, the numbers become overwhelming in favour of saving the innocent civilians.

dilemma should in fact order the suspect to be tortured, but should not do so with impunity and should be held accountable for decision after the fact⁸³.

This is a classic case of what is called a “dirty hands” problem in politics. The name was coined by John Paul Sartre in a play of the same name⁸⁴. It refers to situations in which political leaders must do things that are generally accepted to be morally wrong in order to do things that are morally desirable on a larger scale. The example in this case is a leader who must torture in order to save the community and then go on to govern in ways that are consistent with the values of the community. There are many who argue that this resort to torture is required of good political leaders⁸⁵. Richard Posner argues that “if the stakes are high enough, torture is permissible. No one who doubts that this is the case should be in a position of responsibility.”⁸⁶ This is somewhat Machiavellian.

...there are two ways to fight: one while abiding by the rules, the other by using force. The first approach is unique to Man; the second is that of beasts. But because in many cases the first method will not suffice, one must be prepared to resort to force. This is why a ruler needs to know how to conduct himself in the manner of a beast as well as that of a man.⁸⁷

These views are compatible with republican national security arguments as representative of the special situations in which the existence of the community is at stake. It would be unfair to attribute to republicans a willingness to violate the right not to be tortured whenever it suits a particular political need they have, but there is a greater potential

⁸³ There are various practical problems associated with this thought experiment that have been pointed out by David Luban, among others. These include issues like how we would ever know for sure if the suspect in custody really does have the knowledge we think they do, whether we have an established method of torturing that is effective, whether we can distinguish between forced truth-telling and lies to avoid pain, and so on. I will largely set aside these critiques which, while worthwhile, are separate from the issue of what one should do if the hypothetical could be realized.

⁸⁴ "I have dirty hands right up to the elbows. I've plunged them in filth and blood. Do you think you can govern innocently?" Sartre, Jean-Paul. *No Exit, and Three Other Plays*. New York: Vintage, 1973. Print.

⁸⁵ But not of decent human beings, which could potentially form a group distinct from those who are political leaders.

⁸⁶ Posner, Richard A. "The Best Offence." *The New Republic* 2 Sept. 2002: 28. Web.

⁸⁷ Qtd. in Calhoun, Laurie. "The Problem of "dirty Hands" and Corrupt Leadership." *Independent Review* 1 Jan. 2004: 363-85. Print.: 363

within republicanism to see such a violation as justified if it is put into the perspective of community survival. This vulnerability of republican views to arguments for torture needs to be addressed.

2.7 Conclusion

For conceptions of democratic legitimacy to be meaningful, they must involve a publicity condition. This is true for all three of the views discussed here—Habermasian, procedural liberal, and republican. While the Habermasian view of publicity as necessary for legitimacy serves as a good introduction to the way publicity functions in democracy, it is not necessary to subscribe to this view to agree that publicity is important. Both procedural liberals and republicans should value publicity similarly. There is evidence, both historically and contemporarily, that liberals often do incorporate such a requirement. From a republican perspective, a coherent account of the way publicity informs democratic legitimacy can be constructed using resources within republicanism. For reasons outlined in this section, republicans should value publicity similarly to the other views discussed as an important aspect of legitimacy.

Despite this, there is an additional problem for republicans with respect to publicity that is not as prominent in the other views. This is due to the particular nature of the republican conception of contextualized and situated selves which inhabit political communities. Because of the way republicans see meaningful political life as rooted in political communities, there is an added controversy for those subscribing to this view. This is the way that political communities are a necessary precondition for citizens to be able to pursue good lives. Since these lives are instantiated within communities, the continued existence of the community is of paramount importance for republicans. As a result they may see certain acts, such as torturing in order to obtain information important

for national security, as justified when committed for the purpose of saving the political community from credible existential threats. Political leaders may sometimes have to commit acts which wrong individuals for the purpose of saving the community. These issues of national security comprise the most forceful case for suspending the publicity requirement in order to engage in acts, like torture, which would otherwise be prohibited.

The upshot of these arguments is that the use of interrogational torture in democratic societies requires secrecy and a policy of torture would have to be kept secret. Torture is difficult to impossible to effectively use as a method of gathering information and intelligence without invoking a level of state secrecy that makes adhering to the publicity requirement impossible. Publicity, however, is a necessary prerequisite for democratic legitimacy. It is impermissible for states to engage in activities in the name of the people which could not be made public without undermining the purpose of these activities. Torture seems to violate the publicity requirement.

Chapter 3: Implications of Secrecy for Republican Democracy

The best and strongest response to the claim that torture is incompatible with democracy, especially the requirements of publicity and the rule of law, is that an exception can be built into the rule to address existential crises. That is, we may make an exception to those values and the institutions which protect them in cases where the survival of the society is at stake. This would appear to resolve the tension between publicity and torture by making clear how publicity and other values of democracy cannot exist without the prior existence of the state. When the state's existence is questioned, we may temporarily suspend publicity and engage in torture for the express purpose of maintaining the state's existence. This amounts to suspending democracy in order to protect it.

If torture were used publicly, it would be to the detriment of democracy in the nation. Actions that violate both human rights and the publicity requirement are abuses of political power. For this to be justified on grounds that democracy itself requires it, something of similar importance must be at stake. The most promising candidate for this is the continued survival of the political community. Necessity for continued survival doesn't entirely mitigate other moral factors; "Even the murders called necessary must be similarly described; it doubles the crime to look away, for then we are not able to fix the limits of necessity, or remember the victims, or make our own (awkward) judgments of the people who kill in our name."⁸⁸ That there might be a compelling reason to violate human rights or norms of publicity does not negate their normativity. However there does seem to be a compelling case for using torture when the persistence of the community is

⁸⁸ Walzer, Michael. *Just and Unjust Wars: a Moral Argument with Historical Illustrations*. New York: Basic, 1977. Print.: 326

at stake. In such cases we seem to be justified in balancing the community's obligation to respect human rights and treat people as equal and free against the obligation to ensure that there continues to be a community at all. While this may seem like a solution, there are several important problems with using it to condone the use of torture.

An important point to note is how a policy of torture could as a practical matter deflect an existential threat to a state. "If we are to adopt or defend the adoption of extreme measures, the danger must be of an unusual and horrifying kind."⁸⁹ It's difficult to imagine an isolated, individual case where torturing one person will save an entire community from destruction. Torture in response to terrorism is the most contemporary and pressing way in which this type of scenario could occur. Acts of terrorism are directed at people in their capacity as political agents. However, not every terrorist act constitutes a threat to the continued existence of the state. There may be a threshold that must be reached in order to constitute a threat to the community as a whole; a single terrorist act may not have an impact on a large enough scale to satisfy this requirement. For terrorism to reach the magnitude required to constitute an existential threat to a state, it must be widespread and of great impact. However, the problem posed by terrorism is not limited to the immediate effects of the attacks themselves. The reason terrorism is effective is that it's a method employed by nonstate actors to intimidate a population, often in order to force them to compel their leaders to give in to terrorists' demands. Terrorism is a strategy to instil terror, and torture is a strategy for combatting it.

If terrorism is an act perpetrated by an individual against a state, torture is an act perpetrated in the name of a state against an individual. Existential threats to the state posed by single actors are reflected by existential threats to an individual made by the

⁸⁹ Walzer *Just and Unjust Wars*: 253

state. While one of these acts may be in response to the other, they remain reprehensible. Entrenching the potential, if conditional, use of torture in public law, would create a policy of torture. Moreover, terrorist activity far-reaching enough to constitute an existential threat would require a similarly widespread response. Terrorism is by its nature dynamic and unpredictable. Torture policy meant to keep up with and respond to terrorism would require a great degree of secrecy in order for it to be effective. Laws would also have to allow for a lot of leeway in determining who is designated to be tortured and why, given the amorphous nature of terrorist organizations. As a result, even well-intentioned officials are liable to face situations where torture is used inappropriately. In reality, other methods of intelligence-gathering are fallible and it is difficult to get information about terroristic activity that meets a high epistemic standard.

Even if the practice of torture were legislated into the public policy of a democracy, and even if it were successfully used to protect the state against terroristic threats, it would not be without serious sacrifices. It is true that before the political community can do anything for citizens, the community must first exist. However, enacting torture policy would change the nature of the community being saved. Becoming a nation that tortures requires a grave departure from democracy in two ways. First, because the scheme of representation in republican democracy⁹⁰ leads to a particular theory of collective responsibility, it is difficult for citizens to distance themselves from immoral acts committed in their name. This is true whether or not they

⁹⁰ While it could be argued that there is also a compelling reason for liberals to torture in order to save the state, although with a different rationale than for republicans, the problem for republicans is particularly interesting because of the implications it has on collective responsibility. Liberals also need a theory of collective responsibility, which they must keep in mind when making policy decisions about responding to existential threats to the state, they do not have the same problem that republicans do. It is the republican problem that will be the focus of this section.

actually explicitly endorse these acts. Effective interrogational torture requires a basic level of secrecy, but it also requires a basic level of undemocratic behaviour that is too great a departure from the principles of democracy for public officials to undertake without the explicit consent of the people⁹¹. However, even when public officials act without this consent, they speak with the proverbial voice of the people when they act in their capacities as public officials. Therefore, using torture as a policy without first securing public approval is an illegitimate use of political power. The way the use of political power operates on a republican scheme doesn't account for the problem of how citizens are supposed to be responsible for acts they have not endorsed.⁹² What would happen if the public were to endorse torture is a separate question. Public officials need to seek the approval of the people because without it they make the people responsible for acts they would not approve of.

The second way in which enacting torture policy would undermine the democracy in the surviving community is that torture is inherently in opposition to democratic ideals. There is simply no consistent way to treat people as both democratic citizens and potential objects of torture. Legislating torture would require the state to view everyone as a person who may be tortured, given the right circumstances. This would change the nature of interaction between states and citizens. In normal situations, it makes sense for citizens to view their governments as authorized to use force against outsiders in order to protect citizens. This is less so for state use of force against citizens themselves. If all

⁹¹ The people of any democratic nation should have a *prima facie* aversion to the use of torture in their name and, under normal circumstances, not condone it. Since torture is such a departure from normal democratic policy, it should be presumed that the people of a democracy would be against its use, not for it. Another way to put this is that in a state which is minimally just, torture will not seem like an option for responding to normal criminal activity.

⁹² In the sense that the actions of public officials are supposed to be representative of the community as a whole.

citizens become potential torture victims, they are also all potential enemies of the state.

This altered relationship between state and citizen is no longer of a democratic nature.

Even if the tortured are outsiders, and not citizens of the democratic state torturing them, they should still be treated democratically. The Canadian Charter affords fundamental freedoms to everyone⁹³, the US Constitution refers to “the people,”⁹⁴ not only to citizens. All democratic states are under a similar obligation to treat people in ways consistent with democracy, regardless of whether or not the person in question is a citizen of the state. Also, many democratic states have ratified international law documents agreeing, at least in some circumstances, to treat foreigners similarly to citizens in regards to the most basic guarantees such as physical security and due process⁹⁵. Democratic societies are historically very good at upholding human rights. This is likely because the principles of democracy—freedom, political equality, the ability to pursue good lives—often overlap with the principles of human rights discourse. Such a manifest violation of democratic principles changes the nature of democracy, even when done in the name of preserving democracy. A state that tortures is not a state that fulfills its obligation to act according to democratic norms. Because torture is in such fundamental opposition to democratic norms, it is especially problematic, even in comparison to other departures from the requirements of republican democracy.

⁹³ These include: “(a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly; and (d) freedom of association.” (Part 1(2))

⁹⁴ US Constitution Article I, *ibid.*

⁹⁵ This is based on a view of these documents as indicative of an underlying commitment to the principles of democracy rather than contingent features of rule-making. The democratic nature of a society is not wholly determined by the documents on which they base governance, but these documents can provide evidence of an already existing commitment to democracy. The fact that Canada and the United States are functioning democracies gives us good reason to see their founding documents as evidence of normative principles.

3.1 Clarifying the Objection

Before responding to the objection, more explanation of the nature of the objection is helpful. If the arguments of earlier sections are true, then publicity is a necessary aspect of democracy and of the legitimacy of democratic states especially. There is good reason to believe that torture is incompatible with publicity generally. Public torture by democratic states is not politically feasible for both practical and theoretical reasons. The conclusion of these two premises together is that the practice of torture harms democratic legitimacy by undermining an important aspect of legitimacy—publicity. More simply,

1. Legitimacy requires publicity
2. Torture involves secrecy (which is incompatible with publicity)

Therefore,

3. Legitimacy requires ~torture.

This is a valid argument, so to dispute it would require objecting to one of the premises. Premise 1 is vulnerable to the objection that there are situations in which the publicity requirement may be suspended in order to protect more fundamental interests than legitimacy. The competing interest in this situation is basic existence. The objection is that it may be worth (temporarily) suspending the publicity requirement in order to do what's necessary to protect the community from destruction.⁹⁶

Very few people would advocate completely legalizing torture in a broad sense. The act of torture is morally abhorrent.⁹⁷ A response to objections arguing that torture should be a permissible way of dealing with political dissent would be like attacking a

⁹⁶ Premise 2 could be vulnerable to an objection that it may be possible to torture publicly, but this would be practically infeasible in addition to being counter to democratic legitimacy. As shown earlier, policies of torture would require at least a base level of secrecy in order to be effective for intelligence-gathering purposes. The kind of secrecy involved in such a policy would directly undermine the state of democracy in the state.

⁹⁷ One could argue that this is not so for sadists, psychopaths, and the like, but that is a different problem from the one addressed here.

straw man. At issue is not the general rule prohibiting torture but the absolute nature of the rule. The most promising way to incorporate the security needs of a community with the general prohibition on torture is to allow for exceptions to the prohibition. These would be cases in which there was a similarly compelling reason for torturing as there is for not torturing. Something of similar moral and political weight to democratic principles would be necessary to justify torture. For republicans, who argue that the concept of human rights only makes sense within a political context of a society or community, the best candidate is the existence of the community itself. The information sought must be so important as to be worth such a departure from democratic norms. If citizens of a democracy can agree on what constitutes cases like this, they could theoretically license their public officials to torture.

3.2 Attempting to Reconcile Torture and Publicity⁹⁸

A response available to proponents of making an exception to the absolute prohibition on torture is that the exception could be publicized. The new rule would read something like “we will never use torture in this democracy, except when we find that doing so is necessary to save our community from utter destruction.” There are a few things to note about this formulation. The likelihood of this scenario ever coming to fruition is quite small, as the threshold for knowledge is quite high. This leaves open the possibility that one could be against torture as a rule not on principle but because of the epistemic limitations of human beings: because we can never know for sure whether the person designated to be torture is the right one until we have already tortured them⁹⁹. This

⁹⁸ And a defense of premise 2.

⁹⁹ See the discussion of AGPs in Chapter 2.

is true, but still leaves the central issue, which is whether it is ever consistent to torture in the name of democracy, to be examined.

There is also the difference made by changing the rule itself. “Torture that is resorted to as an emergency measure frequently becomes a permanent feature of a regime of terrorization for its actual and potential victims, an education in brutality for its perpetrators, and a corrosive that progressively dissolves the rule of law.”¹⁰⁰ Entrenching the idea of the exception into the rule legitimates the exceptional case. Reforming the law to fit an exception has bad consequences for the rule itself. Much of this depends on who is given the job of determining when the exceptional case occurs, and thus when torture becomes an option. Because situations where national security is threatened operate in real-time, and require quick and decisive action from state officials, there is often not enough time to fully flesh out the potential consequences of categorizing an atypical situation as exceptional. Since the stakes are so high, it makes most sense for public officials to err on the side of security, and not on the side of respecting human rights. In the thick of an existential threat, it may seem like a better option to potentially over-respond and violate the rights of one individual than to underestimate the extent of the threat and allow the existence of the community to be threatened. As a result, building an exception into the rule will lead to a wider and wider array of situations to be categorized as exceptional. This could be mitigated by appointing someone to oversee the decision-making process, but there would likely not be enough time in reality. Judicial oversight would be a candidate for this, except courts tend to be slow-moving, largely because of the emphasis on due process. In an actual existential threat situation, there would not be enough time. The lack of a cogent method for overseeing decisions about exceptional

¹⁰⁰Sussman, David, 2005, “What’s Wrong with Torture?”, *Philosophy and Public Affairs*, 33: 1–33.: 12

cases leaves the rule against torturing susceptible to an ever-widening gap between human rights and security policy¹⁰¹.

Key to the arguments about torture is the idea that torture takes place in the politics of the exception. The kind of situation where torture becomes an option, when the existence of the community it at stake, is not a normal scenario. In cases like this, citizens may need to put “existence before justice.”¹⁰² Moreover, because it is not a normal scenario, there is a decisive break between the circumstances in which torture may take place and the day-to-day circumstances under which democracy operates. This decisive break serves as an important bulwark against the potential that torture will erode democratic rights.

The argument at issue is for an exception to the rule about torture, not for making torture the rule. Proponents argue that torture takes place in the realm of the exceptional:

...order is the product of general norms expressed in and through law. These norms bind government actors and protect individuals from each other. Every individual can appeal to a judge to protect his or her legal rights. This mode of legality, when linked to the democratic production of norms, is the source of legitimacy in the normal situation.¹⁰³

In this sense, torture occurs in a different political realm from other acts. It is less the case that torture is illegal; instead torture is extralegal. Torture takes place beyond law, in the existential political realm that is necessary for law to operate. In a sense, the legal and the extralegal are defined by each other.

Neither of the two argumentative options on the table (suspending the publicity requirement nor the absolute nature of the prohibition) require denial that torture is an essentially morally problematic act. Instead they both require an argument that in the

¹⁰¹ This in itself is a good reason not to torture.

¹⁰² Kahn, Paul W. *Political Theology: Four New Chapters on the Concept of Sovereignty*. New York: Columbia UP, 2011. Print.: 37

¹⁰³ Kahn 32

exceptional case necessity constitutes sufficient grounds for accepting or undertaking a morally problematic act. There is a good chance that adding exceptions to these rules opens the door for greater and greater abuses of state violence, however – that the exceptionality of the circumstances does not provide a bulwark against torture’s potential to erode democratic rights.

The idea of the exception was first coined by Carl Schmitt in *Political Theology*. Schmitt argues that “sovereign is he who defines the exception.”¹⁰⁴ The sovereign in a community is the one who decides when to suspend the normal rules. For example, in our case the decision to suspend either the publicity condition or the absolute prohibition on torture would be an act of sovereignty. While Schmitt was largely an opponent of liberalism¹⁰⁵, his concept of sovereignty is nonetheless an interesting one to consider for community oriented republicans because he also sees a compelling rationale for temporarily suspending normalcy in order to deal with particular threats. He makes a similar argument, *mutatis mutandi*, about granting exceptional powers to the executive in order to allow her to do what is necessary to save the state itself. This is especially so because Schmitt was also considering the use of political violence, albeit of a different sort, as a goal of suspension.

Schmitt’s linking of exceptionality to sovereignty points to a problem in the argument for incorporating the exception into the rule. As Schmitt explains the concept of exception, incorporating exceptions into a rule that governing authorities are supposed to treat as binding does not actually establish a situation as extralegal. According to

¹⁰⁴ Schmitt, Carl. *Political Theology*. Chicago: University of Chicago, 1985. Print.: 1

¹⁰⁵ Schmitt also held many other problematic positions, each of which involves more in depth consideration than is possible here. One certainly does not need to buy into the rest of Schmitt’s views to find his definition an interesting starting point.

Schmitt the alternative to an exceptionless rule is not a rule with exceptions built in; it is no rule at all. For example, allowing existential politics a place in the torture debate would not mean amending the rule on torture to include exceptions; it would mean amending the legal system so that the sovereign has the ability to suspend the rules. This would involve giving the sovereign¹⁰⁶ complete discretion over both the decision that a particular situation is in fact exceptional and over the conduct of the state during the exceptional case, an expansion of executive power that is at odds with traditional democracy.

Publicly allowing state officials to torture in some cases is a direct affront to democracy and opens the rule up to violation because the area of the exception in the rule will necessarily be at the discretion of state officials. This is unlike other situations in which public officials use discretion when making political decisions. Decisions about what counts as an exceptional case would have to be left to these officials because the decision to suspend normal law cannot be determined through normal legal procedure. There is no procedure internal to our system of law for determining when the system itself does not apply. The problem for republicans is that the only way for this to work without doing irreparable damage to the state of the rule of law is to demarcate clearly the realms of the normal and exceptional situations. It is unclear, however, how this would work. Using normal political institutions to operate in exceptional cases would suggest that the situation is not truly exceptional. As an alternative, we could come up with ways to deal with such cases normally. Truly exceptional situations must operate outside of regular political institutions. The decision to categorize a particular situation as exceptional must also take place outside of normal legal institutions and processes. This

¹⁰⁶ Or the executive, in a democracy.

speaks especially to the issue of how to make a clear break between the normal and the exceptional. In this way, both the institutions involved in the exception and the decision to categorize a case as exceptional must transcend normal legal procedure. Whether the rule allows for exceptions in a given situation must be determined by somehow, and there is a very real possibility that those who are empowered by exceptionality will push for more and more situations to be seen as ones in which the rule allows exceptions.

In reality existential politics are under the control of the sovereign. In democracies, the sovereign is the people. In theory, exceptional politics in a democracy would revert back to some kind of simplistic majority rule. However, as a practical matter exceptional politics usually involves either a concentration of power in elected officials or a suspension of democracy¹⁰⁷. That is, treating existential threats as a justified basis for exceptions involves either giving public officials license to “do what it takes” or temporarily suspending democratic institutions. Both of these are problematic.

Giving elected public officials license to “do what it takes” to ensure state security is one potential response to existential threats. The consent of the people, as expressed when officials won the elections that got them their positions, would need to extend in some way to acts committed by these officers. However the fact that a majority of the people who voted in a given election chose one person does not confer blanket legitimacy on any and all acts that person performs. There is a kind of tacit consent public officials operate with in democracies in that decisions they make or acts they perform in their capacity as public officials are presumed to be endorsed by their constituents even though these have not and could not be subject to immediate review. This works because the acts they are committing are assumed to be part of the general

¹⁰⁷ Or both of these alternatives could occur together.

course of actions required in running a democratic state. We allow public officials leeway to debate laws, fulfill administrative duties, make public appearances, and so on because these are all part of their jobs as public officials.

There is obviously a great potential for abuse here. We would be surprised and dismayed to later find out that public officials were using this leeway to commit acts that undermine democracy¹⁰⁸ or at cross-purposes with it. Giving public officials free reign to protect citizens undermines the basis for this tacit consent in two ways. The first is that lack of oversight would allow officials to use their expanded power in unscrupulous ways, and lead to the second option for entering into a state of exception in democracy, to which we turn in a moment. It would require a huge leap of faith for citizens to allow their public officials the freedom to do what they deem necessary parts of their jobs without oversight on the assumption that they will stay within established boundaries. This is a compelling reason to restrict the extent of discretionary decision-making in the case of decisions about torture.

The second way tacit consent is undermined is that the exceptional case is not analogous to the normal situation. Under normal circumstances, the reason we can empower public officials to act without constant oversight is that we are confident that they will be acting in the normal course of their jobs. The exceptional case is not comparable because it is, by definition, a break from the normal course. A key feature of exceptional cases¹⁰⁹ is that we cannot know in advance what we would be empowering our public officials to do. The difference is between consenting to actions taken in the regular course of running a state and consenting to give up one's capacity as a decision-

¹⁰⁸ Including the values and principles it is based on.

¹⁰⁹ In the technical, Schmittian sense.

maker. Tacit consent in the exceptional case is analogous to an individual appointing a medical decision-maker for periods of incapacitation. By designating someone to make decisions on their behalf, they are not consenting to whatever the outcome will be of these decisions are. They're temporarily giving up their position of decision-maker within a particular context, which is defined by a specific realm of possibilities. Giving medical consent generally empowers another person to make decisions within a reasonably foreseeable framework. Even in life-threatening situations, the person who is incapacitated can still limit the power of medical professionals or their appointed decision-maker. Patients may¹¹⁰ authorize these professionals in advance to do whatever is necessary in order to keep them alive. However, the authorization to perform medical procedures that may so change or harm a patient as to irreparably damage or change them is not always assumed. Even if there is a presumption in favour of life-saving procedures in the medical profession, there is still an explicit authorization involved. There is nothing analogous to this in the case of communities. It may be the case that such a departure from democratic norms requires a similarly explicit authorization by citizens.¹¹¹ This is why public officials in democracies cannot count on tacit consent in exceptional cases.

The second option is a temporary suspension of democracy until the perceived existential threat has passed. All democracies allow a degree of discretion to their leaders in matters of security, and are also probably comfortable with a certain level of secrecy about these procedures. However, granting ultimate discretion to political leaders is

¹¹⁰ Or they may not. Either way, this is an at least theoretically coherent choice.

¹¹¹ Whether or not citizens would or should do this is a separate, yet interesting question. While there isn't room to do it justice here, there is a good argument to be made for why citizens of democracies should not authorize their governments to torture. Many of the arguments given here are also applicable as reasons not to authorize torture.

counter to the point of democracy. There is something very contradictory about suspending democracy for the sake of protecting it. The Weimar Republic attempted this¹¹², and this was the context in which Schmitt theorized. The Republic essentially allowed political leaders to take control of the country in the name of responding to threats, and these leaders were later very reluctant to relinquish their extended power. It is difficult to see how a state could manage a transition back to the normal (democratic) situation after such a suspension. It also defeats the purpose of responding to the existential threat in any particular way, if the nation is no longer democratic. There would still be a case for providing security for citizens, but basic security is different from preventing the destruction of a democratically organized political community.¹¹³

3.3 Advantages to the PS Theory of collective action for Republicans

The argument that torture is sometimes necessary to protect the existence of the state seems to presuppose a particular view of social groups: ontological holism. This view contrasts with ontological individualism. Ontological individualism involves accepting both of the following premises:

First, the concept of an individual person with his own goals, and so on, does not require for *its* analysis a concept of a collectivity itself unanalyzable in terms of persons and their noncollectivity-involving properties.¹¹⁴

[Second,] the claim that explication of the notion of a collectivity will not involve essential reference to *intentional states* the proper description of whose content involves concepts unanalyzable in terms of individual persons, their goals, and so on.¹¹⁵

Essentially, ontological individualists hold that describing and analysing collectivities

and their attributes involves nothing over and above the concepts we use to describe

individuals and their attributes. A proponent of this view is Raimo Tuomela. He defines

¹¹² Referred to as Article 48 in the Weimar Constitution

¹¹³ Which is not to say that democratic societies are more worth saving than other kinds of societies. Instead, the point is that this is *particularly problematic* for democratic societies because they are based on values so opposed to torture in the normal situation.

¹¹⁴ Gilbert, Margaret. *On Social Facts*. London: Routledge, 1989. Print.: 435

¹¹⁵ *Ibid*

intentions as simply “commitments to action.”¹¹⁶ When we intend something, we commit ourselves to acting in ways that will bring about that state of affairs. For Tuomela and other ontological individualists,

If some agents jointly (in the “proper” sense) intentionally perform X, then they have formed a joint intention (or, as we might also say, a joint plan) to perform X...such that the formation of this joint intention (we-intention) involves their explicitly or implicitly making an agreement to perform X together...¹¹⁷

This requires a conduct plan, entered into by all parties of a joint intention. The conduct plan is like the premises of a practical syllogism¹¹⁸, or the steps that the parties agree are required to realize their joint intention. In for order the joint intention to be successful, the parties to it must also jointly intend the conduct plan. As will be discussed below, republican views of democracy are better characterized as ontologically holistic.

However there are also good collective action reasons within ontological individualism to reject secrecy.

Within an ontologically individualistic view the individuals which constitute the group have the joint intention *ex hypothesi*. Because of this they are committed to following through whichever steps are involved in realizing the object of their intention.

They must intend to do their parts:

- i) We will bring about E
- ii) We consider that unless we do X we cannot bring about E
- iii) Therefore, we will do X¹¹⁹

In this way, parties to the joint intention also need to intend the steps necessary for realizing their goals, or the premises of the syllogism.

¹¹⁶Tuomela, Raimo. "Intentional Single and Joint Action." *Philosophical Studies* 62.3 (June 1991): 235-62. Print.: 235

¹¹⁷ Tuomela, Raimo. *The Importance of Us: a Philosophical Study of Basic Social Notions*. Stanford, CA: Stanford UP, 1995. Print.: 80-81

¹¹⁸ Tuomela *Importance of Us*: 54

¹¹⁹Tuomela *Importance of Us*: 84

This has two implications on the issue of secrecy. The first is that the conduct plans must be known to those involved in them; otherwise the intent is not really meaningful. Individuals do not truly intend any steps necessary to achieve their goals unless they do so explicitly. This means that in the case of public officials and the state, officials cannot take the fact that citizens enjoy the security provided them by the state as authorization to do whatever the state's agents think is necessary to maintain that security, *carte blanche*. In technical terms, they cannot be said to intend a conduct plan of which they remain ignorant. For joint intentions to be meaningful, "this activity in general requires public exchange of information between them [parties to the intention] if it is to lead to mutually known (and not only mutually believed) unconditional participation intentions."¹²⁰

There is also an argument within ontological individualism against the notion that citizens can *tacitly* consent to the use of torture by virtue of being a part of a group. Proponents of an ontologically individualistic account of collective action may characterize a certain critical mass as necessary to achieve authorization for any so-called "group action." However, members of a group cannot be taken to have tacitly consented to things in direct opposition to their stated intentions. Therefore, if a community has stated goals that are in direct opposition to torture it cannot be assumed that they would be committed to the use of torture in order to preserve their democratic state. Torture is so far outside the normal realm of democracy and in such obvious contrast to many of a democracy's stated goals that tacit consent to it cannot be assumed.

The second implication of state secrecy for ontologically holistic views bears more specifically on collective responsibility. When members of a collective, like

¹²⁰ Tuomela "We-Intentions Revisited": 335

citizens of a state, jointly intend something, they must also jointly intend the steps necessary to reach their intended goal. This works in a backward fashion in that, if the people intended explicitly that their representatives should protect them *at all costs*¹²¹, they would also be morally responsible for torture committed on their behalf. In these explicit cases, collective responsibility of a sort would exist. Tuomela builds this into his theory:

For a person A_i to we-intend to do something X is in part to commit himself to X ... so as to thereby commit himself to take partial responsibility for their having performed X together and to take responsibility for his having participated in the performance of X ...¹²²

This is called the Joint Responsibility Condition. This is not the same kind of rich collective responsibility as the one ontological holism will provide (it is still an individualistic account), and it only applies in cases of true commitment to the we-intention where the conduct plan is known of and endorsed by those we-intending.

These considerations taken together lead to the conclusion that “joint intentions [are based] on a publicly shared plan of joint action and thereby emphasizes the epistemic publicity (the public availability of relevant information) of full-blown joint intention, as will be seen.”¹²³ In other words, meaningful joint intentions necessitate conduct plans that are not only consistent with publicity, but are in fact made public to those who we-intend. Thus, there is good reason on individualistic views to reject secrecy as a way of avoiding the apparent conflict between publicity and torture. Using secrecy as a method of dealing with this issue leaves the citizens of the democracy unable to fully participate in the joint intention that is their nation. Epistemically strong joint intention requires publicity¹²⁴ and

¹²¹ Assuming they know that this will involve an authorization of torture as an interrogation method.

¹²² Tuomela “We-Intentions Revisited”: 354

¹²³ Tuomela “We-Intentions Revisited”: 336

¹²⁴ *Ibid* 339

inherently undemocratic acts like torture require explicit authorization from citizens in order to be legitimate exercises of political power.

Consequently, ontological individualism provides good reasons to reject state secrecy. However, as an approach to collective action, it is also in tension with republican schemes of representation. This is because the same case cannot be made for the importance of community on an individualistic view. For individualists, “political society” consists of the individuals who live in a particular geographical area, share certain cultural practices, and so on. They do not see the society as an entity different in kind from groups of individuals. It would be difficult to make a case for the fundamental pre-existence of the community on an individualistic account. Because individualists argue that strategies for analyzing individual action are the only ones needed for analyzing collective action, they are more likely to value individual rights, which are relatable to individuals, than communities. If communities are aggregates of individuals, then they cannot exist without prior existence of individuals. This is very different from the republican interpretation of community. For republicans, citizens cannot attempt to achieve good lives without the prior existence of the political community. For ontological individualists, the opposite is true—it does not make sense to talk about a political community other than in terms of the individuals who comprise it.

As a result, the reasons for rejecting torture given by ontologically individualistic approaches to collective action are not decisive for republican approaches to democracy. Ontological individualism gives procedural liberals good reasons to reject state secrecy; but republican views of democracy typically presuppose an ontologically holistic account of collective action.

3.3 Republicanism and Plural Subject Theory

To the extent that republicanism is more community-oriented than liberalism, it also presupposes a more communal view of the nature of social groups and collective responsibility; ontological holism. Holism shares its first premise with ontological individualism:

First, the concept of an individual person with his own goals, and so on, does not require for *its* analysis a concept of a collectivity itself unanalyzable in terms of persons and their noncollectivity-involving properties.¹²⁵

Holism diverges on individualism's second premise:

the claim that explication of the notion of a collectivity will not involve essential reference to *intentional states* the proper description of whose content involves concepts unanalyzable in terms of individual persons, their goals, and so on.¹²⁶

Ontological holists argue that explaining collectivities involves concepts distinct from those we normally use to understand individual actions, responsibilities, and states. On this view, social entities are something different in kind than aggregates of individuals.

Ontological holism about social groups is well suited to republican schemes of representation and seems to be presupposed by them. For republicans, public officials represent the state as an entity, which leads them to espouse particular views and values for the sake of their political communities. This is distinct from liberal schemes of representation, in which public officials represent interest groups made up of individuals whose views and values are given precedence as a result of the outcomes of fair democratic processes. On republican views, the state can act as an entity, can intend as an entity, and so on, in ways distinct from individuals. This is one of the features that make republicanism a more persuasive basis for arguments permitting torture in the face of existential threats. The view of collective action that mostly closely fits this

¹²⁵ Gilbert On Social Facts 435

¹²⁶ *Ibid*

understanding of states as actors is Margaret Gilbert's plural subject theory, in which collectivities can in some instances constitute 'plural subjects' (PSs) capable of acting in ways parallel to yet distinct from action by the ways individuals do.

On Gilbert's holistic view, "a joint commitment is created when... each of the parties has expressed his or her personal willingness to be party to it in conditions of common knowledge."¹²⁷ Joint commitments (JCs) may be characterized as plans we make with other people that we cannot alter without their consent. You and I may make a joint commitment to have lunch together; if I decide to cancel without telling you, and so do not show up, you may be annoyed (with good reason). I cannot unilaterally rescind a joint plan. This is called the permission criterion, and entails that members of the collectivity may not change the conduct plan without publicly notifying other members. Citizens of states are party to JCs; "a joint commitment to uphold as a body a certain set of political institutions, for instance, would constitute a "political society" and a country in that sense."¹²⁸ Beyond upholding political institutions, I argue that being a party to a state also involves a commitment to upholding certain values and policies which underlie these institutions. This means that citizens should endorse acts committed in their name which are consistent with these values, and condemn those which are not. These institutions, policies, and values are constitutive of the JC that renders members of the political community part of a plural subject.

For an action to be considered a group action it must be undertaken by members of a certain population who constitute a JC, and be consistent with achieving the goal(s)

¹²⁷ Gilbert, Margaret. *Sociality and Responsibility: New Essays in Plural Subject Theory*. Lanham, MD: Rowman & Littlefield, 2000. Print.: 40

¹²⁸ Gilbert *Sociality and Responsibility*: 109

of the JC.¹²⁹ On the holistic view, PSs can act despite ignorance of the act on an individual level. Members may agree to select certain other members to fulfill planning and leadership roles. They may act in the name of the PS, which would include everyone still party to what Gilbert calls a “ground level joint commitment.”¹³⁰ This allows group representatives to act in the name of the collectivity without explicitly involving the other members. Thus, all of the members who take part in the ground level JC can take responsibility for a group act. An interesting implication of this is that “those who can say “we did it” include not only members who were ignorant of the action or simply failed to participate in its implementation but also those who knew of the action and protested against it.”¹³¹ This commits all members of the collectivity to responsibility for all of its acts, as long as they continue to participate in the ground level JC. This leads to an odd conclusion in the case of nations, where it is considerably harder to opt out of the ground level JC than in other cases. Many people cannot viably move to other nations, and it’s hard to see how they could opt out of being a part of a nation while still living in it. People are also usually more loyal to their homelands (natural or adopted) than this, and would not want to abandon them in disapproval of state acts. By virtue of being a member of the collectivity that is their nation, citizens are implicated in the acts committed in their name, on the PS view.

In order for members of a plural subject to be committed to upholding specific values, we need an account of what it means for a PS to believe and feel. “There is a collective belief that p if some persons are jointly committed to believe as a body that p . These people can then accurately say of themselves that “we (collectively) believe that

¹²⁹ Gilbert *Sociality and Responsibility*: 149

¹³⁰ *ibid*

¹³¹ Gilbert *Sociality and Responsibility*: 49

*p.*¹³² Beyond this, another indication of collective belief is that the members of a collective (including those elected to make decisions on its behalf) should act in ways consistent with the group belief. The individual and collective actions of group members should be appropriate in reference to the beliefs of the collective. It is important to note that members of collectives empowered to make decisions, outline plans, and act in the name of the group are not exempt from this requirement. They are in positions of leadership only because they are simultaneously members of the collective, not the other way around. Their power is rooted in their status as members of the collectivity. To argue otherwise—that leaders of collectivities or states are empowered to act in ways directly antithetical to the stated beliefs of the collective—would be to treat the collectivity¹³³ in terms other than that of a plural subject.

To depart from a PS model of leadership creates a problem for republicans because other views do not capture the way leaders can act in the name of the PS without explicit authorization from group members, which is an important part of republican schemes of representation. Abandoning the PS approach would likely require republicans to abandon particular salient features of their scheme of representation. These features would most likely be the ability of leaders to speak for collectives as such, or the way membership in a collectivity functions. An important part of republican representation is that public officials be able to speak for the people as a whole; PS theory incorporates this in that it recognizes the additional powers and responsibilities of leaders of PSs based on the fact that they remain party to the ground-level JC. Leaders are simultaneously members of the collective and representatives of it. This allows them to speak for the PS.

¹³²Gilbert *Sociality and Responsibility*: 39

¹³³ Which constitutes the grounds on which their actions are supposed to count and in whose name they act.

The second problem raised by non-PS accounts of leadership is that they cannot account for the way membership occurs. For republicans, members of a state are in the same communicative relationship with their representatives whether or not they voted for them in elections. As members of the society, they are represented by particular leaders. The PS approach captures this because it stipulates that members of a PS remain members as long as they are party to the ground-level JC. Citizens that are unaware of or in opposition to actions taken in their names do not escape responsibility for it, *qua* group members. More individualistic approaches would not allow for the same concept of group membership.

In addition to the ability to believe, PSs can also react to actions and reflect on relevant beliefs. This allows PSs to have emotions. For example, when someone empowered to act in the name of a plural subject acts in a way inconsistent with the stated beliefs of the PS, the group may feel remorse or guilt. On Gilbert's account, "A group *G* feels remorse over an act *A* if and only if the members of *G* are jointly committed to feeling remorse as a body over act *A*."¹³⁴ Guilt can attach to a PS independently of whether the members realize their culpability *qua* group members, but PSs can also react collectively to such realizations and when they do we can describe these reactions as the PS having an affective response – an emotion. Remorse is similar to guilt but also requires recognition of the act as morally wrong. In this way, it is distinct from mere regret, and also from guilt. For a PS to have these emotions is distinct from the individual experience of them because it involves a JC among those who feel them. This means they must have remorse or guilt as a body and not only as an aggregate of individuals.

¹³⁴ Gilbert *Sociality and Responsibility*: 127

The ability of PSs to have affective responses is an important aspect of PS theory. Collective remorse and guilt function as ways to keep both group members' and group leaders' acts in line with the beliefs of the ground-level JC and to guide future acts and policies.

A group that is guilty may be capable of a change in character. If this is what is needed to improve its actions, it will be well if its members are able to come to grips with its character and to work for the necessary changes. It will be useful, as a prompt to this, if both individual members and the group itself are able to acknowledge with remorse that the group has indeed acted culpably.¹³⁵

Collective remorse and recognition of guilt are ways of changing collective and individual behaviour and may also lead to refinement of the beliefs and views of the PS. These collective emotions serve an important function in regulating group behaviour; their absence impedes the ability of a collective to revise its acts and beliefs. Collective guilt and remorse are an important aspect of PS theory. They serve as a kind of feedback mechanism, allowing members of the PS to monitor how closely their leaders are keeping to collective values and beliefs. Remorse and guilt are key to the ability of PSs to revise behaviour in light of moral wrongdoing. If one is a republican, it is likely that they will be persuaded by the PS view of collectivities; collective emotions are necessary for authentic JCs.

This is important because it further explains the way societies work on republican views. The ability to use affective responses to guide further action is important for republicans because it allows state officials to make sure their actions are within their capacities as public officials and that they accord with the values and beliefs of the society. This is advantageous for republicans because it helps to maintain appropriate relationships between citizens and public officials. The latter need to know what the

¹³⁵ Gilbert *Sociality and Responsibility*: 152

beliefs, desires, and interests of the society are in order to act on them. The people best situated to know these things are the members of the society themselves¹³⁶. Collective emotions serve as a way for public officials to gauge their actions taken in the name of the society in order to make sure they are appropriate and authentic representations of the society. Faced with arguments for the use of torture in exceptional situations republicans must be invested in maintaining this type of feedback; perhaps even more so than ordinarily given the contentious nature of torture debates and the potential damage that can be done to the state of democracy when used inappropriately.

3.4 Problems raised from Chapters 1 & 2 for PS Theory

Gilbert presents her view as a descriptive and not normative account of PSs.

While she does not explicitly describe the implications of her view for political societies, they can be reconstructed from features of the theory itself. If group members are responsible for the actions of the collectives of which they are part even if they disagree with or are ignorant of them, this has important implications for the torture debate.

Secrecy about acts committed in the name of the collectivity prevents the PS from having the collective responses necessary to guide collective action and legitimate acts through endorsement at the ground level JC. Acts performed in secret, in the name of the people but without their explicit consent, are still acts of the people. Because the PS view leads us to attribute responsibility to members of the PS even if they are ignorant of these acts, there is room for inauthentic expressions of the will of the people. The members of the PS must have the opportunity to reflect on what is being done in their name in order for them to respond to it. Because affective responses of PSs serve the important functions of both providing feedback on actions already taken and guiding future actions, it is a vitally

¹³⁶ See the feminism example in Chapter 1.

important aspect of PS theory. Secrecy about acts committed in the name of the PS prevents it from having appropriate responses, and so interferes with its ability to guide future behaviour. In this way, secrecy impedes the ability of a collectivity to regulate its actions in order to maintain moral consistency between its beliefs and the acts committed in its name, either by individual delegates or the PS.

Also, if the PS view is correct, group leaders implicate members in actions whether or not members are aware of these actions. For example in the case of public officials acting with authority derived from the political societies they represent, they are able to act in the name of the society by shared participation in a PS whose JCs involve authorization to act for the PS. This means that public officials need not actually garner support from citizens for actions in their official capacity in order for these to count as actions of the entire group. Thus, if political leaders¹³⁷ authorize the use of interrogational torture the people have authorized the use of interrogational torture, whether or not this has been previously discussed or would emerge as the collectively endorsed action should it be taken up by the group as a whole. If citizens of states take part in a JC that constitutes their political society, they should only authorize their governments to act in ways consistent with the beliefs of the ground level JC. This means that citizens should not, explicitly or implicitly, authorize their governments to do things directly in conflict with their beliefs about democracy which underlie the JC. The beliefs of the people about their democracy would ideally correspond to the values of democracy. By becoming part of a JC, citizens authorize elected officials to represent them, and speak with their collective voice. By doing so, they also take on responsibility for actions done in their name.

¹³⁷ or public officials

There are two ways to avoid this problem. The first is to deny membership in a PS. This is not an option, however, because the tacit consent discussed earlier constitutes the ground-level JC necessary for society to constitute a PS. To the extent that citizens authorize public officials to act for them, they participate in a PS. The second option for denying responsibility for acts carried out by public officials is to argue that the actions in question were not within the officials' capacity. The conclusion of this is that public officials cannot torture while also acting in accordance with the ground-level JC—a democratic society. The two are incompatible. Torture is so fundamentally contrary to the ideals of democracy and the beliefs about those ideals necessary to constitute a JC to be a democratic society that authorizing it would change the nature of the ground level JC. The state would become a democratic society that tortures, or that is democratic only when it's in its interest¹³⁸ instead of an otherwise legitimately democratic society.

The consequence of this is that republicans who adhere to PS theory have good reason to reject state claims to maintain secrecy about torture because of the harm it does to the JC. Secrecy is incompatible with PS theory because it prevents necessary reflection on collective acts by the collectivity, and is also problematic because it attributes collective responsibility to members in a way that fails to accurately reflect reality. It is unfair to hold members of a nation morally culpable for acts committed in their name that they are unaware of. I have argued that there is good reason to think that secrecy negates the voice of the group as expressed by its leaders, rendering it inauthentic. Gilbert herself doesn't address this, and doesn't appear to build publicity into her view. In fact, she allows for actions of which the PS members are ignorant to still be legitimate acts of the

¹³⁸ This is a problem in reference to the rule of law, which requires that laws apply and be enforced non-arbitrarily and without prejudice.

PS. Perhaps this means that PS theorists should be against secrecy but still acknowledge that it does not exempt them from responsibility. Gilbert builds mechanisms for alleviating culpability into the theory, which are guilt and remorse, but even these are denied to the collectivity when the morally bad act is done in secret.

The analogy with torture here is that citizens of an otherwise democratic state would be responsible for torture perpetrated (ostensibly) in order to protect national security. The torture committed in their collective name would still be attributable to them, even if they are unaware it is taking place or are strongly opposed to it. The morally appropriate reaction¹³⁹, upon finding out this has occurred, is remorse. Aside from the political aspect, citizens of democratic nations that employ torture should feel moral remorse about it. Perhaps if they fail to do so on an individual level, they are more culpable in a collective sense. The secrecy that often accompanies torture insulates the public from being able to deal with their remorse, and also is an inauthentic expression of nationalism. Citizens are unable to check whether torture is consistent with their values, or whether it's necessary for national security, when they are ignorant of it. Even though Gilbert did not include it, it would make sense for PS theorists to incorporate a publicity requirement of their own into the theory to avoid these problems. As it stands, PS theory would hold too many people to too high a degree of responsibility for acts they may be ignorant of or oppose outright.

¹³⁹ Assuming the PS is capable of the kind of empathy required to feel this way. Rationalizations for bad acts like torture usually involve dehumanizing the victims. If this occurs, it can be an impediment to guilt and remorse. As a result, it may take effort to get the PS to see torture victims as human and thus empathize with their condition.

3.5 Back to the Objection

Republicanism lends itself to a particular view of collective responsibility with two relevant conclusions for arguments defending interrogational torture. The first is that the kind of widespread secrecy necessary for a program of torture prevents members of the state from authentically participating in it. The second is that torture is so fundamentally incompatible with the underlying ground level JC of democratic nations—which includes such concepts as human rights, equality, and liberty, among others—that engaging in it requires explicit authorization from the members of the nation (the PS) to legitimate it¹⁴⁰. Notice that if this were to happen, it would necessarily involve changing the very nature of the PS—the democratic state becomes a state that tortures. These two descriptors may so be opposed as to be incoherent; perhaps a state that commits acts of torture can no longer claim to be a democracy¹⁴¹. Torture for the sake of protecting republican democracy would then be oxymoronic.

¹⁴⁰ Which, ideally, they would not give.

¹⁴¹ An interesting question that I will set aside here.

Conclusion

The use of interrogational torture is incompatible with republican democracy because the secrecy involved in torturing in a democratic society is irreconcilable with the publicity required for democratic legitimacy. At first there may appear to be space for pro-torture arguments within republicanism on grounds of national security. However, these arguments rest on an inconsistency which, when resolved, forces proponents to make claims that are contrary to republican democracy. This becomes clear when pro-torture arguments are examined from a collective action perspective. In order for pro-torture arguments to have purchase within republicanism, proponents must argue either that citizens are morally responsible for actions committed in their name of which they are unaware, or that meaningful political participation is expendable. Citizens must be kept informed about the actions committed in their name in order for them to have the appropriate affective responses required to guide future collective action. Such knowledge is an important part of meaningful political participation, which is the basis of democratic legitimacy on republican views.

The first major premise of the argument is that interrogational torture involves an unacceptably high level of secrecy rendering it incompatible with the robust publicity required in a democracy. Torture requires secrecy about tactics, the extralegal status of the tortured, and in order to prevent harm to the rule of law that public state law-breaking would cause. The second major premise is that publicity is a requirement for democratic legitimacy. Publicity is important for not only procedural liberal but also republican views. The intermediate conclusion from these two premises is that torture is incompatible with republican democracy because it violates the publicity requirement. There is a potential argument within republicanism that democracies may sometimes

legitimacy suspend the publicity requirement to protect national security. However, the republican perspective presupposes a particular approach to collective actors, ontological holism, and republican accounts of representation are best captured by a particular theory of collective action, Margaret Gilbert's plural subject theory, both of which make it problematic to suspend publicity in defense of republican democracy. After elaborating the details of Gilbert's theory, I showed that secrecy is incompatible with a republican understanding of the plural subject in a democracy because it leads to two conclusions: that citizens are morally responsible for acts they did not participate in or know about, and that we may legitimately impede the society from having appropriate affective responses necessary to inform further political participation. Since this participation is a cornerstone of the republican conception of legitimacy, these conclusions are untenable for republicans.

The implications of this thesis are that pro-torture arguments based on considerations of national security have less purchase than is commonly thought. In order to make them work, proponents must either endorse a flawed view of collective responsibility or undermine their own commitments to the importance of consent and participation in democracy. Neither of these options is attractive, especially for republican approaches to democracy. Those who wish to argue for the use of torture in response to existential threats to the state must either subscribe to a needlessly complicated and awkward take on responsibility or make serious concessions about the value of democratic legitimacy.

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