Terror, emergencies, drastic conditions and democratic constitutionalism

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Constitutions establish governmental powers, but they do not in themselves confer legitimacy, let alone constitute the body politic that alone can grant legitimacy. Nevertheless, democratic constitutions do not just organize the machinery of government and define the relations of the parts of the machinery to each other, but the relation of government to the individuals it governs, and they can enhance or corrupt the relations of citizens to one another, too. Constitutions are democratic in so far as the government is ultimately and effectively responsible and *responsive* to the people it governs as the source of sovereign legitimacy. In the words of Lincoln's Gettysburg Address, it is government of the people, by the people and for the people. It is a liberal democratic constitution in so far it respects individuals not only in their authority to choose who shall govern them, but individuals as distinct actors with claims and interests that may not be unduly subordinated, not only to government in general but also to the interests of any other individual or group of individuals. This what is meant by the necessarily vague concept of individual sovereignty, even as an element of popular sovereignty. Many modern constitutions, certainly those of Western Europe and the Americas are of this sort.

Liberal democratic constitutions institute respect for individuals in different ways, but some lines are firmly and almost universally drawn. The penalty of death for the most serious crimes is seen in many but not all liberal democracies — e.g. not in Japan or the United States — as crossing the outermost limits of what government may do to the individual in order to assure the safety and good order of society as a whole. Torture and mutilation, however, are almost universally condemned in properly liberal societies. But when government, betraying its own duly constituted role as agent of society, turns to torture as a tool to inquire into, protect against and punish even the severest threats to itself and to individual persons, it runs up against an absolute limit of morality, decency, respect for the human person. We can dispute what exactly counts as torture. Is the death penalty an extreme form of mutilation? Are long terms of imprisonment torture, even under humane conditions? While these are conceptual questions worth asking in any decent society's effort to determine the limits of legitimate state power, what is essential is that we in principle hold the line against torture.

But invasions of privacy, temporary restrictions on liberty of movement or of communication cannot be subject to such categorical limits. That is because these concepts are at their core controversial and subject to customary or legislated regulation. Nonetheless they are not so variable as to be empty restraints. Quite the contrary: because they are variable relative to a people's customs, history and changing circumstances, it is important that their contours be made precise through general rules, announced beforehand and even-handedly administered. This is the essence of the constitutional values gathered under the rubric of the rule of law in liberal democracy. Those constitutional values, in turn, depend upon a body politic committed to the respect for human personhood as foundation of political legitimacy. Torture threatens that commitment.

Torture as the Self-Destruction of Democratic Legitimacy

In *Because It Is Wrong: Torture, Privacy, and Presidential Power in the Age of Terror*, we — father and son as co-authors, a law professor and a philosophy professor — argued that even in the face of terror and terrible

threats, torture must remain taboo as an absolute wrong. We are willing to admit that there might be cases when we might forgive a lapse when individual actors face overwhelming pressure and trauma. But forgiveness is not *ex post facto* affirmation. What is at stake is that respect for personhood, even if embodied by the worst of persons, that serves as a fundamental philosophical tenet of liberal democracy and constitutional order. That is because torture violates personhood to the ultimate extreme, by reducing the person entirely to a body as a thing to be manipulated as the by-product of terrible agony. Even to defend against genuine threats, such as terror, that themselves go beyond the pale of humanity, torture must be forbidden to governments, because a government that institutionalizes torture as a feature of policy corrupts its own legitimating constitutionalism. To institutionalize torture, even in secret, means to create and implement the governmental departments, the military, intelligence, and even the medical units, as well as the training for these agencies — all dedicated to torture. To embark on such a project is not just to abrogate a philosophical principle of respect for persons, it is to inject the opposite principle, the degradation of persons, into the affective lives of hundreds, and then thousands, of government functionaries, and this corruption will then radiate outward to all other spheres of governmental, civic, and private life. This self-inflicted corruption, as a misguided defense against terror that some have called the auto-immune disorder of democracies, will ultimately erode the pre-constitutional principles and the enacted constitutional norms that legitimize liberal democracies.

This is why we also argued that the Bush administration deserved absolute condemnation for its torture regime following the attacks of 9/11. This is not just because torture violates US and international law, which it categorically did in the way that the interrogation regime under the Bush administration operated, and not just because torture is a moral evil. It is also because torture corrupts the relation of state to individual by undermining the respect for persons and creating institutions that will promulgate a fundamental disrespect for persons in civic and private life. It is as persons that the people collectively provide the legitimizing ground for governmental power, and any government that denies the integrity of persons, claims the right to torture as constitutionally lawful, and trains its officers of the law to act on this policy, has in principle abolished the grounds for its own legitimacy and will go on to do so as a matter of fact in due course.

Torture as Harbinger of Tyranny

Recent events have proven this worry correct. In our book, published in 2010, father and son disagreed about whether members of the Bush administration should be prosecuted, not just condemned, for violating the laws against torture. The father thought that such prosecution would destabilize constitutional democracy by introducing a cycle of tit-for-tat revenge against outgoing presidents that would end up delegitimizing the three branches of government in the eyes of the people and polarizing the nation. The son thought that without some legal consequences for such an egregious violation of both laws and foundational political norms, future leaders would only be emboldened to enlarge their powers in defiance of constitutional governance and the principles of liberal democracy.

When Donald Trump first ran for president, he declared his faith in torture as an effective policy and the willingness to use it as an emblem of strength. His own language, personal behavior, and immigration policy promulgated the notion that brutality is strength. He has inspired millions of followers. After his election, hate crimes and racial attacks spiked, epitomized by the Unite the Right rally in Charlottesville, Virginia, where neo-Nazis and kindred extremists marched shoulder to shoulder and a counter-protester lost her life. The attack on Congress by a Trump mob on January 6, 2021, egged on by Trump's lies of a stolen election, together with his own attack on the constitution by attempting to reverse the electoral results on that day, were the crowning events of Trump's tenure in office. In four short years, and in order to consolidate his own power as a leader unbound by constitutional and democratic norms, he

had so exacerbated the polarization of the country that the sinews uniting the body politic almost snapped.

The failure to mark the torture regime instituted by the Bush administration as categorically wrong, whether by prosecution or some other means, set a precedent. Respect for human personhood might no longer be a fundamental tenet of constitutional legitimacy and governmental authority; instead, dehumanization and violence would constitute political strength and solidarity. If this trend continues to its logical end, the attackers of 9/11 will have succeeded in using terror, both as a weapon of war and as an enduring trauma of the victim, as the acid to dissolve the legitimizing norms of classical liberal democracy. Absent a fundamental respect for human personhood, constitutional government will be cast adrift to seek shelter in some other legitimation, such as the ethno-nationalism running rampant across the world today, most obviously against Ukraine. But that alternative legitimation of constitutional structures will only corrode the rule of law and elevate the violence of a leader able to consolidate power on the basis of ethno-national, rather than human identity. If it teaches us anything, Putin's invasion of Ukraine should alert us to how dangerous capitulating to the civic, personal, and governmental pathologies introduced by terror can be — and that now is the time to stand firm and reject this slide into new forms of authoritarianism, or to call it by a more forthright name, neo-fascism.

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