SYMPOSIUM

Incarceration, Interrogation, and Counterterror: Do (Liberal) Democratic Institutions Constrain Leviathan?

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"No-one questions you / If I hit you, I'll be killed / If you hit me . . ."
—KRS One, *Who Protects Us from You?*

States represent a solution to an important set of economic, political, and social problems. Whether one turns to philosophers such as Hobbes or Locke or more recent work by rational institutionalists such as Douglass North, it is something of a received wisdom that powerful states play a central and vital role in fostering economic, political, and social cooperation. The other edge of that sword, of course, is that powerful states that claim a monopoly on the legitimate exercise of coercion are ideally situated to predate, using methods that include incarceration without trial and torture. The very power that makes states effective at engaging in cooperation can weaken other organizations that might deter the state from predation. While democratic theory is not necessarily focused on the question of how we might constrain a powerful state's predation, democracy is—and, more specifically, liberal democratic institutions are—widely held to be one of the most important tools at our disposal to deter predation (e.g., Staton and Reenock 2010). Democracy, of course, refers to rule by the people, and in this article, I focus on universal suffrage as the means by which those who wield state power produce rule by the people. I refer to liberal democratic institutions, by contrast, as those institutions that perform a distinct—and, one can argue, antidemocratic—function: their purpose is to distribute power among multiple state actors in an effort to address the second edge of the sword described above and limit the tyranny of majorities. This article shows how this distinction usefully assists our assessment of the Bush administration's incarceration and interrogation policies in its war on terror.

With that as background, the remainder of this article reviews what we know about the ability of both elections and liberal democratic institutions to constrain Leviathan with respect to the rights of people (i.e., human rights). Doing so injects a much needed consideration of theory- and evidence-based knowledge of relationships that tend to be misunderstood or, more often, ignored in the national discussion of these issues. Social scientists have contributed too little to the debates about the Bush administration's incarceration and interrogation policies, and although our research is relevant, it has received scant attention from those who have participated in the dialogue. I reevaluate Walzer's (1973) discussion of the Dirty Hands Problem and argue that his failure to recognize the tension between unfettered rule by the people and human rights undermines his assessment.

LEVIATHAN AND (LIBERAL) DEMOCRATIC TETHERS: WHAT WE KNOW

Elections are almost universally recognized as the best institution for producing rule by the people. They have been the primary focus of the social scientific literature examining the impact of democracy upon the repressive behavior of the state.[1] That literature can usefully be divided into two groups: the first implicitly conceptualizes states as islands isolated from the international system in which they exist, and the second focuses almost exclusively upon international law but has recently turned to domestic institutions to explain the impact of international law on states' respect for rights. I begin by examining the first, and older, of these literatures.

Two major findings emerge from that work. First, states respond to violent challenges with repression. Scholars who conduct research in this area are widely aware, yet rarely record in print, that this repression is composed of both violence that targets dissidents *and* the systematic violations of peoples' human rights (where "people" represents both dissidents and nondissidents). Democracies respond to violence with less brutal repression, and they target fewer nondissidents with repression, but even democracies repress this group in the wake of violence. Second, these studies almost universally find that *democracy* has a pacifying effect upon states' violations of peoples' human rights. I italicize democracy to underscore what Davenport (2007b,13–14, 45–74) refers to as the need to disaggregate this concept. Donnelly (2003, 191–94) makes this point even more explicitly: liberal democratic institutions place limits on rule by the people by empowering state actors to check the power of elected officials.[2] Most importantly for this discussion, liberal democratic institutions such as bills of rights and the production of veto players (e.g., courts) place limits upon rule by the people that cannot be overturned by majorities. The very concept of human rights dictates that they are inviolable—there is nothing a human being can do to cancel his or her human rights, nor is there any appeal available to the state to derogate those rights.[3] Human rights are, as such, antidemocratic: by establishing a set of practices in which states

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cannot engage—even if such practices are supported by a popular vote—they place limits on majority rule.

This distinction between democracy qua elections and liberal democratic institutions that limit majority tyranny has largely been missed in this first group of literature, although Davenport's (2007b) distinction between Voice (elections) and Veto begins to empirically make that distinction. The distinction has also failed to gain attention in the literature that explores the impact of international law on states' rights performance. Statistical inquiry on this topic began with documentation of how human rights treaties do not constrain states (e.g., Hathaway 2002; Hafner-Burton and Tsutsui 2005), but quickly moved to arguments that domestic institutions influence the likelihood that states will honor rights treaty commitments (e.g., Hathaway 2005; Landman 2005; Powell and Staton 2009). Simmons (2009) represents the most comprehensive effort in this line of inquiry. Like the literature that focuses on state coercion in the absence of international law, the literature on human rights treaties produces a rock-solid finding that holds across virtually all studies: rights treaties on their own do not constrain Leviathan. The precise mechanisms by which treaties and domestic institutions interact remain to be fully sorted out, though several scholars argue—and produce evidence consistent with the argument—that the power of domestic courts plays an influential role. Does democracy matter? Yes, democracies are more likely to honor the human rights treaties they sign, and hence are less likely to sign rights treaties with which they are unwilling to comply, whereas autocratic states are, ceteris paribus, likely to sign rights treaties they do not intend to honor. Yet, as in the first literature group, Simmons's discussion of democracy also fails to distinguish elections from liberal democratic institutions, much less note the tension between majority rule and checks and balances on that rule.

To briefly summarize, three broadly uncontested findings emerge from these two literatures: states respond to violent challenges with repression; democracy is negatively associated with states' violations of human rights; and when democratic states sign human rights treaties, they are more likely to observe the treaties' requirements than are nondemocratic states. These three findings inform two studies that bear directly upon the topic of this article: states' respect for rights of freedom from arbitrary detention and freedom from ill treatment and torture. I briefly describe each in turn.

Davenport, Moore, and Armstrong (2007) show that the probability that a state will violate the right to freedom from torture shifts from roughly 0.8 among states that do not face a violent dissident challenge to nearly 1.0 among states that are faced with violent dissent during a given year. When we restrict our analysis to states that not only face violent dissent but also had used torture in the previous year, none of the measures of (liberal) democracy influence the likelihood that the state will engage in torture. Conrad and Moore (2010) build on that work and evaluate whether (liberal) democratic institutions influence the likelihood of terminating a torture spell once violent dissent has ceased. We find that states with elections and states with the liberal institution of freedom of expression are more likely to terminate the torture spell than are states without those institutions. Our other liberal institution, veto players, behaves as hypothesized by Tsebelis (2002): it is negatively associated with termination, which is to say that greater numbers of veto players are associated with maintenance of the status quo.

What can we take as known from this body of research? Although various measures of elections and liberal democratic institutions are negatively associated with the violation of human rights, the literature is only beginning to distinguish among elections, which produce rule by the people, and the various liberal democratic institutions that might constrain Leviathan. An exciting new literature is developing that establishes that the impact of treaties on states' violation of rights is mediated by democratic institutions. We also know that states respond to violent challenges with repression (i.e., predation), and, furthermore, when we focus attention more narrowly on torture, we encounter both theory and evidence that neither elections nor liberal democratic institutions such as freedom of expression or veto players influence the likelihood that states torture detainees in their control. However, both elections and freedom of expression reduce the duration of torture spells once violent dissent stops, and veto players extend the spells. With these ideas established, I now turn to a consideration of how, if at all, this knowledge can inform contemporary discussion about the nation's response to the Bush administration's enhanced interrogation program.

REVISITING THE DIRTY HANDS PROBLEM

In 1973, Walzer presented an innovative argument about the executive's role in "doing the dirty work" when a country's security is threatened. One can argue that Vice President Dick Cheney's famous proclamations about the Bush administration's need to embrace the dark side and work in the shadows echoes Walzer's argument, although that is only partially correct. Walzer asks whether democracy is undermined if an executive violates the rule of law in pursuit of defeating an enemy who threatens national security. To put the issue starkly, he specifically explores the use of torture as a means to obtain information from detainees who are believed to harbor information about dissident plots. The central dilemma that motivates Walzer's argument is his assertion that sometimes a lesser wrong is required in pursuit of a greater good (e.g., torturing a suspect to obtain information that foils an attack, thus sparing the lives of citizens). He argues that democracy is a form of government that seeks to pursue the greater good and explores whether such a democracy is possible, given the necessity of sometimes engaging in illegal or unethical behavior in pursuit of a greater good such as national security.

Walzer argues that in a democracy, the public is what a political economist would call a *principal* who hires what political economists would call an *agent* to, among other tasks, protect national security. He further contends that there is an implicit pact between principal and agent: the agent is free to break the law (and violate ethical norms) as long as he or she can plausibly deny that she has done so. In other words, according to Walzer, citizens in a democracy demand an ethical and legal façade and are willing to look the other way in matters of national security as long as the politician acting on their behalf

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does not openly acknowledge that he or she has dirtied his or her hands to protect the country. Democracy functions, according to Walzer, as long as the public punishes politicians who are caught breaking the law or engaging in wantonly unethical behavior. Democracy fails, according to Walzer, if a politician brazenly breaks the law or engages in unethical behavior and the public fails to punish him or her by removal from office. Put another way, democracy remains whole as long as the politician who dirties his or her hands is held accountable by the citizenry. Yet, he implicitly assumes that elections, not liberal democratic institutions, will perform this function.

Walzer's argument permits us to observe an important difference in Vice President Cheney's and President Bush's public statements about his administration's enhanced interrogation program. In a number of statements made to reporters, Cheney argued explicitly for the necessity of the administration to dirty its hands in the war on terror. Further, when the details about the administration's enhanced interrogation program began to leak out, Cheney aggressively defended the program as legal, necessary, and effective. He criticized the appellate court decisions that struck down aspects of the program and, since leaving office, has become the administration's chief spokesperson in defense of the program, going as far as to argue that without it, the country is at grave risk. By contrast, President Bush steadfastly avoided using language that might be construed as an acknowledgment of dirty hands, and when he publicly defended the program, he not only consistently argued that it is legal, but also behaved in a way that Walzer would recommend: he consistently denied that the program was either illegal or unethical, emphasizing with passion that the United States has taken the high road in its treatment of detainees in the war on terror. One imagines that Walzer would laud the president for preserving democracy while the administration dirtied its hands, but would chastise the vice president for undermining democracy through his acknowledgment of the dirtying.

This brief review allows us to consider whether the tension noted by Donnelly between democracy and liberal democratic institutions that attempt to constrain Leviathan provides us with additional insight into the Dirty Hands Problem. I submit that it does. Walzer's position requires us to either implicitly assume that a majority of citizens in a democracy would reject the statements made by the vice president,[4] or to argue that, in the absence of such a majority evaluation, the democracy is broken. At least one difficulty with Walzer's position, I contend, is that it fails to engage with the tension between democracy as rule by the people and liberal democratic institutions that might deter or limit state predation. This tension is critical if one is to assess democratic performance with respect to the Dirty Hands problem, yet I am unaware of work that has made that distinction.[5]

How does recognition of this tension change the terms of debate? Walzer's analysis focuses on the maintenance of democracy as a political institution that aids the production of a good society, and he poses a dilemma of how a democratic society can remain whole given the need to sometimes commit lesser evils in pursuit of a greater good. Yet, Walzer fails to recognize the state's privileged position to predate. He implicitly assumes that the majority will constrain the state from predation, but it only stands to reason that elections will not necessarily protect members of the minority from predation. Walzer makes this error because he ignores the problem recognized by the authors of *The Federalist* and more recently reemphasized by North and Weingast (1989). This is a considerable shortcoming. To put it pointedly: an analysis of democratic performance that fails to recognize the predation problem and address the tension between majority rule and inviolable limits on state behavior is inherently flawed and is inadequate for the discourse.

PARTING THOUGHTS

It has become *de rigeur* in an article such as this to reference Jack Bauer, the character played by Keifer Sutherland in the television show *24*. Yet those discussions focus on one obvious narrative while ignoring its mirror twin, as portrayed, for example, by Colonel Nathan Jessep, Jack Nicholson's character in the movie *A Few Good Men*. Bauer and Jessep are the same character, but the narratives are radically different: Bauer inhabits a country of people who will get the job done, regardless of bureaucratic red tape; Jessep exists in a country of laws that curtails the abuse of power. Bauer's disruption of terror plots represents Walzer's Dirty Hands agent, whereas the successful prosecution of Jessep might represent Walzer's punishment of the rogue politician who keeps us safe. Note, however, that elections play no role in *A Few Good Men*. Indeed, a liberal democratic institution (the courts) constrains Leviathan.

A Few Good Men and *24* are, of course, fiction, and I do not discuss them as evidence, but rather as illustrations. I contend that the national debate about what should be done in the wake of Bush's enhanced interrogation program has failed to recognize this central tension between democracy as rule by the people and liberal democratic institutions, especially the rights to freedom from detention without trial and freedom from ill treatment and torture. States respond to violent challenges with repression, including the derogation of the rights of nondissidents. It is difficult to imagine that during the weeks following September 11, any researchers studying state repression questioned whether the Bush administration would engage in such activity. Of course it would, and it did. And a Gore administration would have done so, as would a Kerry administration. Note further the Obama administration's slow progress on its campaign promises to repudiate the Bush administration's incarceration without trial policies (e.g., Fiss 2009). Partisanship is not at issue here. Although democracies respond with less brutal forms of repression and target nondissidents less broadly, neither democracy qua elections nor liberal democratic institutions deter Leviathan from a repressive response.

I conclude with the observation that we have contributed too little to public debate on these policies (although note Davenport 2007c). This article makes one such contribution. First, when states with (liberal) democratic institutions are targeted by groups that use terror as a tactic, those states will respond with repression, and that repression will target not only members of the group committing acts of terror and their supporters, but also others that the state mistakenly believes to be members or supporters of such groups. It is difficult to

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understand how majoritarian institutions such as elections might constrain the state, and evidence shows that while elections temper the severity and breadth of the repression, they do not prevent it. Nor do liberal democratic institutions such as veto players and freedom of expression deter repression. It should not be a surprise, then, to learn that in the wake of terror attacks, the United Kingdom, Israel, and the United States have all detained people without trial and resorted to ill treatment and torture when interrogating them. Whether such behavior is a lesser evil in pursuit of a greater good I leave for another forum. We can report with confidence that (liberal) democratic institutions are not a panacea: they are not able to prevent Leviathan from violating peoples' human rights. The best evidence available suggests, however, that the liberal democratic institution of freedom of expression does reduce the likelihood of ill treatment and torture, and, further, that once the violent dissent is stopped, both freedom of expression and elections hasten the transition away from the ill treatment and torture of detainees. This seems to suggest, then, that activists interested in protecting the rights of future human beings detained during campaigns of violence targeting the United States would do well to pressure the Obama administration to roll back the secrecy that the Bush administration expanded. The Freedom of Information Act might be an underappreciated liberal democratic tool for tethering Leviathan. ■

NOTES

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1. For a review of this literature, see Davenport (2007a). Note that the focus on constraining Leviathan renders the literature on democracy and civil war mute (see Gleditsch et al. 2009, for a review), because that work examines the impact of democracy on the onset, severity, and duration of annual killings above a given threshold and fails to distinguish meaningfully between dissidents and states as actors.
2. For similar arguments with respect to democracy and the rule of law, see Hutchinson and Monahan (1987) and Eskridge and Ferejohn (1994).
3. Not all human rights are inviolable in the strong sense described here (see Meron (1986) for a discussion). The right to freedom from torture, however, which is the subject of this essay, is inviolable in this strong sense, and for ease of exposition I limit my discussion to those rights.
4. Gronke and Rejali (2010) demonstrate that during the Bush years, a majority of Americans were opposed to torture, although the Bush administration argued that the 2004 election was a plebiscite on its war on terror, which included those policies.
5. For recent efforts to assess this issue within the context of the Bush administration's enhanced interrogation program, see Lukes (2005), Levey (2007), and Ignatieff (2004).

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