B.J.Pol.S. **37,** 567–570 *Copyright © 2007 Cambridge University Press*
doi:10.1017/S0007123407000294 *Printed in the United Kingdom*

Beyond Durkheim: A Comment on Steven Lukes's 'Liberal Democratic Torture'

GEOFFREY BRAHM LEVEY*

In a recent article, Steven Lukes offers a thought-provoking reflection on the apparently growing resort to torture by liberal democracies today.[1] Professor Lukes aptly asks whether 'torture is just another case of dirty hands in politics?' – that is, the idea that in order to do the right thing or achieve the best public outcome in the circumstances one cannot avoid committing a wrong, such as deceit or cruelty. His answer is that torture differs from other cases of dirty hands in that it cannot be made 'liberal-democratically accountable', thus raising the question of 'how should it be addressed in liberal democracies?' Here he suggests we can learn from the sociologist Emile Durkheim and, especially, his conception of modern societies as being held together by a 'religion of individualism'. Allowing state officials to violate basic rights of the individual thus profanes against the religion and threatens the 'moral disintegration' of society itself. Lukes argues that Durkheim's account helps us see both the folly in 'certain ways of thinking and talking about torture', such as construing it as a 'lesser evil' given the competing claims of risk and security, and the damage that liberal democracies inflict on themselves, in responding to the threat of terrorism, by so readily compromising their own principles.

There is much that is appealing in Professor Lukes's remarks. I also share his concern about the current erosion of civil liberties in liberal democracies. I wish, however, to raise some doubts about three key aspects of his argument: that torture is not susceptible to liberal-democratic accountability; that the 'Durkheimian argument' effectively precludes the practice of torture; and that we cannot rightly speak of torture as a 'lesser evil'.

Lukes observes that 'torture is doubly vicious, combining the vice of concealment and the vice of violence – specifically, against the defenceless. The first is anti-democratic, preventing us from reaching a collective judgement; the second is anti-liberal, constituting … a violation of the dignity of the person'. From this he concludes that torture differs from the usual range of dirty hands cases in that its 'practice cannot be publicly recognized without undermining both the democratic and liberal components of liberal democracy'.[2] This conclusion seems unwarranted regarding the democratic component (in Lukes's sense) of liberal democracy. Torture *can* be rendered collectively accountable. For example, it might be subject to something like Alan Dershowitz's suggestion of 'torture warrants' – a special system of judicial oversight.[3] Or incidents of torture might be publicly acknowledged after the fact, whereupon the government or the relevant minister must face the electorate. The objection to such approaches is that the practice, though now democratically accountable, remains a violation of fundamental human dignity and rights. States are moved to conceal torture not because it is inherently anti-democratic or unpopular, but because it is an affront to the *liberal* component of liberal democracy.

Indeed, the problem today is that the practice of torture appears to be only too popular and open to democratic endorsement. Lukes seems to acknowledge this much in his concluding comments.

* School of Politics and International Relations, The University of New South Wales. The author wishes to thank Gavin Kitching, Dirk Moses and Igor Primoratz for their comments on an initial version of this piece.

[1] Steven Lukes, 'Liberal Democratic Torture', *British Journal of Political Science*, 36 (2006), 1–16.

[2] Lukes, 'Liberal Democratic Torture', p. 13.

[3] Alan M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven, Conn.: Yale University Press, 2002).

https://doi.org/10.1017/S0007123407000294 Published online by Cambridge University Press

He says he would endorse Richard Posner's position of a strict prohibition on torture while trusting politicians to violate the prohibition when 'the stakes are high enough' that their illegality might be politically excused.[4] (This is akin to the second way above of making torture democratically accountable.) However, since he wishes such political excusing to be hard won, he doubts that it could work in the United States and Britain today, where it is likely to be granted all too readily. So torture is not fundamentally different from other cases of political dirty hands on the democratic front. The real challenge it poses concerns the 'liberal' side of liberal democracy, and how we should understand and respond to this problem.

Which brings us to the Durkheimian argument. Durkheim held that the 'religion of the individual' has so profoundly and irreversibly 'penetrated our institutions and our customs' that violations of individual rights weaken the very sentiments that bind us 'one to another' and hold the society together.[5] He formulated this argument, as Lukes notes, during the Dreyfus affair as a response to the anti-Dreyfusards. In this context, it was a brilliant riposte to their charges that the Dreyfusards were placing concern for the individual ahead of the integrity and security of the nation. But in dealing with our present conundrum of torture, the Durkheimian argument, it seems to me, is caught in something of a bind.

On the one hand, if the religion of the individual has penetrated our institutions and practices as thoroughly as Durkheim suggests, then sacrileges against (some persons') individual rights are not likely to damage the moral fabric of our societies, at least not quickly. Durkheim himself allows that such breaches only threaten moral disintegration where they 'rest unpunished'.[6] However, if the religion holds such sway, then even in the absence of punitive redress or, perhaps worse, where the law itself sanctions violations of liberties, the moral fabric of society is unlikely to unravel where such breaches occur in extreme circumstances or in limited fashion. Liberal democratic governments today seem to be making exactly this wager: by adopting certain security measures, including some curtailment of liberties, they are not tipping the scales so significantly that they lose hold of their liberal heritage and cannot restore the curtailed liberties when the threat has passed. Clearly, there must come a point when the accumulation or extension of violations ruins a society's moral credit (as Durkheim might say). Nevertheless, history and sociology suggest that liberal democracies enjoy far more 'moral slack' than Durkheim recognized.

Lukes anticipates this challenge by claiming that the penetration of individualism is 'far more precarious and reversible than Durkheim, writing in the late nineteenth century, can have imagined'.[7] But if so, then, on the other hand, individualism would seem to lack the pervasive functional and normative significance with which Durkheim wanted to invest it. As Lukes notes elsewhere, the Durkheimian argument relies for much of its force on a posited affinity between the ideology of individualism and the development of modern societies.[8] To say that individualism presides precariously – which may well be true – is to undercut much of Durkheimian sociology.

This is assuming the worst and that the religion is forsaken, where violations of individual rights are no longer considered violations or troubling. Yet why suppose that the religion of individualism is or should be immutable? As Durkheim, a keen student of religion and scion of a family of rabbis, well knew, even religious orthodoxies undergo occasional, and often contradictory, reform. Again, the point emerges in our current debate over the appropriate response to the rise of global terror. 'Religious reform' is heard when people say that the world changed with the 2001 attacks on the World Trade Center, that we no longer can afford to be *so* liberal in our approach to governance. Clearly, this is not apostasy. Of course, this reaction might well be an over-reaction – as

[4] Richard Posner quoted in Lukes, 'Liberal Democratic Torture', p. 15.

[5] Durkheim quoted in Lukes, 'Liberal Democratic Torture', p. 14. Lukes is drawing on Durkheim's essay 'Individualism and the Intellectuals' (1898), translated by S. and J. Lukes, *Political Studies*, 17 (1969), 19–29.

[6] Durkheim quoted in Lukes, 'Liberal Democratic Torture', p. 14.

[7] Lukes, 'Liberal Democratic Torture', p. 14.

[8] Steven Lukes, 'Durkheim's "Individualism and the Intellectuals" ', *Political Studies*, 17 (1969), 14–30, p. 15.

https://doi.org/10.1017/S0007123407000294 Published online by Cambridge University Press

Lukes contends and I believe – but we can make this case effectively without the Durkheimian argument.

Durkheim's 'sociological conception of individualism as a set of operative ideals'[9] does not, then, offer adequate grounds for condemning particular violations of individual rights, including torture. On the contrary, tying the protection of individual rights to the character and functioning of the society makes individuals hostage to societal fortune. Which, indeed, is precisely the point where we have arrived today. Durkheimian worries that allowing some violations of core beliefs compromises both our faith in these beliefs and the society built on them are vulnerable to an equally sharp, sociological retort: this concern overstates the social consequences of such violations no less than liberal democracies overstate the threat from terrorism.

If there is a 'residue of deep insight' in Durkheim's argument concerning the problem of torture, as Lukes maintains, then it is not the insistence on the historically and socially 'irreversible penetration of the "cult of man" '.[10] Professor Lukes himself warns that that is reversible. Rather, Durkheim's insight, I submit, lies in his sense that individualism has attained, for us, a certain *transcendental* status, captured by his characterization of it as a religion and, ambiguously and problematically, by his concept of the sacred. As he says in criticizing Kant and Rousseau, the individual 'receives from society even the moral beliefs which deify him'.[11] Extending this thought beyond Durkheim's 'extreme social determinism',[12] we might say that this deification transcends the social conditions that bequeathed it. The sacredness of the individual is ultimately set apart from concerns about society. Even when social conditions change for the worst, and our leaders and countrymen begin losing (or changing) their scruples, it is this transcendental dimension of the valorization of the individual that still affords us the moral purchase to condemn torture.

Finally, Lukes contends that Durkheim's 'sacredness of the individual' helps us see the mistake in thinking about torture as a 'lesser evil', as if wrongs involving fundamental human rights could be 'weighed or ranked or balanced, according to some overall scale of value'.[13] Whether or not Durkheim's argument carries this lesson, the point I make here is that the problem of dirty hands entails just some exercise in weighing or ranking. The competing values involved may be incommensurable (for example, an individual's rights versus urgent public security) but, in so far as we feel the tug of both deontological and consequentialist considerations, we can scarcely say that a certain course of action is the 'right or best one in the circumstances' without *some* weighing or ranking of the alternatives.

If we could not choose a right or best course of action in the circumstances, then we would call the dilemma a case of 'tragic choices' rather than of 'dirty hands', such as many medical administrators face in allocating scarce life-sustaining resources to too many needy patients. In tragic choices, there is 'no apparently right or best alternative' or 'consolation … that one did the right or best thing overall'.[14] As I read him, Professor Lukes wants to say that it is a mistake to think we can compare and rank incommensurable values, and that the trick is in learning to live with this sometimes tragic, always human condition.[15] Certainly, he contends that torture differs from other

[9] Lukes, 'Durkheim's "Individualism and the Intellectuals" ', p. 15.

[10] Lukes, 'Liberal Democratic Torture', p. 14.

[11] Durkheim quoted in Lukes, 'Durkheim's "Individualism and the Intellectuals" ', p. 19.

[12] Steven Lukes, *Emile Durkheim: His Life and Work* (Harmondsworth, Midx: Penguin, 1975), p. 23.

[13] Lukes, 'Liberal Democratic Torture', p. 4. Lukes is referring, in particular, to Michael Ignatieff's *The Lesser Evil: Political Ethics in an Age of Terror* (Princeton, N.J.: Princeton University Press, 2004). By the 'lesser evil', Ignatieff means not a consequentialist calculation of the 'greater good', where even small differences are decisive, but rather an acceptance of the *vying* moral commitments often involved in political decision making, and where a morality of consequences may sometimes overwhelm a morality of dignity. Ignatieff holds that torture should not be countenanced in any circumstances.

[14] Lukes, 'Liberal Democratic Torture', p. 2.

[15] See Steven Lukes, 'Making Sense of Moral Conflict', in Nancy L. Rosenblum, ed., *Liberalism and the Moral Life* (Cambridge: Mass.: Harvard University Press, 1989), pp. 127–42.

https://doi.org/10.1017/S0007123407000294 Published online by Cambridge University Press

cases of dirty hands (the democratic accountability aspect of which I questioned earlier). And yet he is willing to endorse Posner's deference to officials to decide when the stakes are 'high enough' to resort to it, and where there is some genuine reckoning for their illegality. In so doing, he effectively allows that torture may fall within the problem of dirty hands, and thus that even torture may be, in some cases, the 'lesser evil'. Perhaps we cannot rightly speak of torture as a lesser evil. We sometimes feel compelled to whisper it, nevertheless.

https://doi.org/10.1017/S0007123407000294 Published online by Cambridge University Press