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**SOVEREIGN AUTHORITY AND RULE OF LAW:  
THE EFFECT OF U.S. USE OF TORTURE ON POLITICAL LEGITIMACY**

By:

Sydney Aliah Bradley

An Undergraduate Thesis Submitted in Partial Fulfillment  
of the Requirements for the  
Honors-in-Discipline Philosophy Program  
College of Arts and Sciences  
East Tennessee State University

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## **Sovereign Authority and Rule of Law:**

### ***The effect of U.S. use of torture on political legitimacy***

In 2002, the United States government established the military detention camp at Guantanamo Bay, Cuba. Securely located on the Guantanamo Bay Naval Base, this prison was used to hold what the government considered the country's most dangerous threats. In reality, hundreds of inmates were held there without being given a proper trial, access to any information from the outside world, and little to no knowledge of the charges against them. Prisoners were often exposed to extreme temperatures, deprived of basic necessities, and subjected to various methods of torture. Some prisoners reported that the only explanation of their detention they received was from the brutal interrogations they faced while incarcerated. Despite the abhorrence associated with the use of torture, governments continue to use extreme measures in the name of self-defense.

At that time, the United States maintained another military prison in Abu Ghraib, Iraq, over 7,000 miles away. In 2003, CBS News drew public attention to the atrocities taking place there, including the physical and sexual abuse, torture, rape, and murder of inmates within United States' custody. Of course, the use of these mechanisms is not exclusive to the United States. Torture as a form of interrogation, retribution, or entertainment has been used all over the world throughout time. The use of torture by the United States and American officials is particularly unsettling because it goes against the character, integrity, values, and standards that the U.S. prides itself on. These qualities would imply an aversion of the U.S. to the use of torture, yet it is used in many international conflicts.

It seems that gruesome tendencies such as torture would be permissible in an uncivilized society, but in the leading democracy of the world where individual liberty and personal triumph are personified through every aspect of a nation's culture, torture is deemed even more repugnant. If a society has deemed such an act reprehensible, is the government obligated to limit itself to the desires of the people? This may seem self-evident in a democratic country like the United States, but in circumstances such as Abu Ghraib or Guantanamo, the government does exactly what the people oppose.

These instances posit an essential philosophical question: *Does a government possess the right and power to violate a contract that establishes its agency?* In essence, does a government have the right to do whatever it desires, or is it limited in some capacity by the people?

Philosophers throughout time have struggled with this question. From the beginning of natural law theory and social contract theory, the limits and obligations of a government have plagued the minds of political philosophers. In an attempt to answer this question, one must first create a foundation that is the definition of a government and why they are needed by people. Once this is developed, the task evolves into determining the nature of a government, if it is a person or a collective representative. In this endeavor, one will untangle the roles and obligations of a government and the rights and power of the people. One should conclude that governments, either as persons or as representative entities, are limited in what they ought to do. Torture and governmental response to torture suggest an acknowledgment of both parties within the social contract to respect the rule of law, lest they desire to return to an anarchic state. Foreseeable objections to this claim will be accounted for in proving that the contractual relationship between a government and state is not exclusively an issue for democratic countries; torture is not justified by immediate threat arguments, nor is it wrong because of morality. From the basic

facts known about the human condition, self-interest, and a desire to survive, one can conclude that regardless of the authority of a governmental sovereign, the entity is bound by some obligation to the people that created it.

### **Humanity as a Condition**

The considerations that govern man must be reducible to some inextricable part of humanity that subjects all people to the same laws and rules. Otherwise, society would cease to function. If not for God or some other objective overarching moral entity governing behavior, the only explanation is something fundamentally human. Humanity, the condition of personhood that all people are born into, carries a number of expectations and obligations that would exist regardless of any sense of morality or spiritual foundation. In the instance a man is left on an island with no one but himself and his needs, he is no less or more moral for doing what is necessary to ensure his survival. All people, regardless of their social or religious connections and convictions, find themselves constrained by the will of their persons to survive and protect that which they desire (MSI 25-26). No man can commit to an act of self-annihilation because doing so would make future pleasures impossible to obtain. The laws that govern man are only those which give him the capacity to survive freely, acquire what he desires, and protect it. It can be argued that the rules of society, the social element that determines appropriate and inappropriate conduct, are also laws to man, but these laws exist as an extension of the first kind of law. The social laws that create obligations from roles between people are crafted from the same self-interest (TAN 44-45). Rather than mere survival, man seeks a more enjoyable state of existence that entails social obligations and rules. If not for the intention to live and thrive free from inhibition, man would surely perish.

Humans will always act in a way that preserves their greatest desires over the lesser. These desires are inalienable from the people that hold them, either brought about by biological needs or social roles that people hold. A man is expected to protect his lot at all costs required, and he has the absolute liberty to pursue his desires until he faces a circumstance that requires him to give up his life for the pursuit of whatever it is he sought (MSI 26). There is no moral right or moral wrong in the natural state of humanity because the only role of value to a man is his role as a human entity that needs to survive. As people become more social, these roles increase in number, as do the obligations that follow from them. The values, interests, and rationales people possess come from the identities they take up when filling different roles (TAN 45). Identity is a composite of all of the roles a person has that obligates a person to act or not act. This obligation can be considered the law of identity. These roles create obligations to comply with specific standards that are applicable to that role. In the instance where a person must choose between roles, they may opt to shed one to succeed in the other. To accomplish this, the person weighs the significance of each role and determines what is worth sacrificing in order to fulfill their greatest desires (TAN 45-46). A person chooses who they are and how they are defined by their preferences of the roles.

No person can neglect the roles that are fundamental to their concept of self because doing so would destroy all integrity and identity the person possesses. In the circumstance that a man is faced with a decision to protect his life or to neglect his life, he is obligated to opt to survive out of the unconditional obligation to maintain identity (HG). Thus, a person cannot commit an act of self-annihilation for two reasons: (1) It would violate the laws of nature, and (2) it would violate the laws of identity. In order to survive and manage the identities that create

obligations that people have, a person would want to exist in a state of peace rather than war so that they may optimize their opportunity to thrive in life rather than survive.

Social Contract Theory explains the means by which a population abandons the rules of nature and enters into civil society. By adopting a system of contracts between each person and a sovereign, the people create a valid legal agreement that holds all parties accountable to the actions and consequences of one another.

There are many authors that discuss different versions of Social Contract Theory. Originating in the construct of civil society with Hugo Grotius and Thomas Hobbes, it was adapted by John Locke, Jean-Jacques Rousseau, and Immanuel Kant to account for many aspects of human interaction. The basic premise of Contractualism (the umbrella term for the family of Social Contract Theories) is that all moral, social, and political obligations are created by consensual agreements voluntarily entered into by the people (MSI 26-27). These contracts are what create the obligation, not the moral or otherwise ethical value of the information in the contract. In this sense, a contract may include barbarous obligations, but the people apart of that contract are bound to it if they have consented to it. The moral worth of the actions of people would be determined by this contract and the relationship built from it, not by the inherent value of the act. If a contract required something evil, a person would be acting appropriately by committing that evil. If the person did not commit the evil, they would be committing a legal and moral wrong. Most societies do not contain evil obligations because they are not readily agreed upon by the constituents who are inherently self-interested. In the event that the barbarous civilization did exist, morality would be determined by the contract rather than the contract being validated by morality.



This is not contradictory to the concept of roles and identity. All roles other than that of an individual are an effect of social relationships. Every relationship presupposes a kind of contract between the people. In some instances, it is tangible, where in others, it may be verbal or otherwise implied. These relationships and the roles that come from them are as obligatory as those originating from a physical contract. The contract created by a government and a body of people is the acknowledgment of particular roles and a relationship. The government will govern, and the people will be governed. The only difference between this relationship and others is that there is a legitimate contract between the parties that enumerates the roles of each party. The question that flows from that is: What matters more, the contract itself or the roles that are created from the contract? Can the government act in the role of a government while still violating the contract? Does the government have the capacity to take up other roles, form its own identity, or hold its own values?

## **The Nature of a Government**

### *Personhood or Collective Representative*

If the natural pursuits of men put them at odds with one another, but they opt for peace to ensure their own survival, they must restrain themselves. Otherwise, one person has the power to overtake the other, making the one who committed an act of self-restraint a victim. In order to ensure that no one person retains the right of power that each person must limit themselves from, that power must be given to a third party. This third party serves in the roles of mediator and judge, the advocate for the wishes, demands, and reprieve of the people. Because this entity is created by the people, they must give of themselves their entire right to retaliate against one another, giving that power solely to the government they created (HG). This government cannot

be constrained by any individual person or other collective because doing so would not make the government the sovereign, but rather who dictates the government.

The people create a binding contract between themselves and the government that defines the roles and obligations of each party to hold each accountable to their responsibilities. This contract gives the sovereign an inextricable identity as a government because the very existence of the sovereign is dependent on the contract and the power and authority it is given by that contract. If not for the contract, the sovereign would either not exist completely (like a democratic government) or would not possess the sovereignty that is given to it (like an authoritarian leader) (TSC 12-14, 16-22). By the same logic, one can see that the life of a sovereign government is maintained by the contract. If it were to be destroyed and the roles dissolved that were created by the contract, the sovereign would cease to exist.

### **Government as a Person**

Thomas Hobbes argues that once the sovereign is created, it possesses an identity apart from the people and apart from the contract (HL 118-138). The sovereign becomes an artificial man, possessing all of the capacities and freedoms of a person. If this is true, and the government (sovereign) is given a status of personhood, then would the government not also be constrained by the rules that govern men, those that include the law of nature and law of identity, requiring a person never commit an act of self-annihilation?

Those philosophers that believe that a government possesses “personhood” hold that it is an independent moral agent. The phrase *independent moral agent* consists of three major parts: independence, moral autonomy, and human agency. The government is independent of the people that made it. It is not constrained by the moral or otherwise normative values of those that made it and can establish its own moral standards outside of its original contracts. Finally, the

government is an entity that possesses human agency. Human agency is a person or entity's capacity to live, choose, and actualize its choices in varying areas. If a government is a person, then the government must have independent moral agency as people do. Authors like Hobbes and Hugo Grotius believe that this is true. If a government is a person of sorts, though the contract gave birth to the sovereign, what grows from that is totally independent of its founding documents. If these authors are correct, a government is an entirely separate entity from its constituents that is free from contractual constraints that were necessary for its development. Because of this freedom, the government has the capacity and the right to establish and act on its own values regardless of the reflection that may cast on the people that developed it.

Hobbes believed that the only immoral act a person could commit would be violating a covenant to which they voluntarily bound themselves (MSI 26). From this logic, he argues that the people, because of the voluntary forfeiture of their rights, are subject to the consequences of the independent moral agency of their sovereign (HL 120-124). The people must comply with the decisions of the sovereign, submitting themselves to the rule of the sovereign regardless of their opinions or desires.

There are two issues with these arguments. First, even if a government is a person, it would be constrained by the same laws that govern a person. This is not resolved in giving the government autonomy; if anything, it is only exacerbated by giving the government a need to survive. Secondly, if the government is a person and can violate the contract as it pleases, then the people who possess their own independent moral agency would have an equal right to violate the contract. Assuming the government can act with disregard for the contract presupposes an immoral act, and if it is justified for the sovereign to do, then the same standard would, or should, apply to the people. Otherwise, it would be a double-standard where the government has

unlimited authority, and the people lack any recourse. If this is true, then a government is not a *government* at all but a rogue entity with a surplus of power and no moral or social bounds. Without a government, the people are left to their own devices to survive and return to the anarchy of the state of nature that conceived the government originally (TSC 10). Thus, regardless of whether or not a government is an independent moral agent, it is bound to the contract and must limit itself as a person would in order to ensure the survival of its life and identity as a government.

### **Government as a Collective Representative**

The alternative is that a governmental sovereign is not its own person but is only a composite of rights, limited in authority and power to act on behalf of the people as a representative of the collective (TSC 12-14, 16-18). In this instance, the government is completely dependent on the contract because all other power remains in the hands of the people. Other philosophers, such as Jean-Jacques Rousseau and Ronald Dworkin, consider this to be true. They argue that because a sovereign is just the culmination of “granted rights” of the people, it is limited in its authority and agency by the people that created it (JWVBR 253-265).

This concept supposes that the relationship between the people and government mirror a typical principal-agent relationship. A principal, or owner of a right, gives an agent (representative of the principal) limited or absolute authority to act on the principal’s behalf. The contract defines the duty of the agent and the repercussions for failing to meet that duty. Opposed to the opinions of Hobbes and Grotius, these philosophers consider the conversion of rights happening within the development of a civil society as a loan that is contingent on the success of the sovereign rather than a permanent conversion regardless of the sovereign’s use of

power. In the event that a government fails to meet the demands of the people, it is considered a faulty sovereign that can be invalidated, ignored, or dismantled.

The opinions of Rousseau and Dworkin and many other philosophers that argue for this sense of limited authority argue that even if the sovereign possesses human agency, that agency is limited and not absolute, meaning it lacks the necessary independence for independent moral agency. Furthermore, if the founding contracts of a sovereign include moral constraints, then the sovereign would also lack moral autonomy. Some contracts in existence do not include moral constraints allowing the government to act with its own moral agency, but in the instance where a contract has moral principles, a government cannot violate those principles without violating the contract. In governments like theocracies which are built around these normative values (consider Sharia Law, for example), morality is a necessary requisite for legality and binding authority. However, where there is no objective standard underpinning those rules and obligations, the contract that is written is the dictating voice of morality.

In the United States, humanitarian standards are vastly and deeply incorporated into every fiber of the country's identity. The contracts are riddled with these standards, even using the Christian God as a reference and foundation. However, the contracts, such as the Constitution or Declaration of Independence, do not specifically say that the governing law is that of scripture; rather, it lists each and every right given or retained by the people and says specifically what instances or types of instances violate humanitarian standards. Morality is only binding so far as it provides those standards, and identity and integrity require abiding by them (LE 178-180). Those standards are what the government and people are bound to, not the morality that it was derived from. It is completely dependent on the contract.

The contention between both groups, those that believe the government is a person and those that believe it is a collective representative, is actually on whether or not the government is dependent on its founding contracts, not whether or not it can make decisions. Their disagreement is on if the government may alienate itself from the constraints of the contract without destroying its own authority. The issue to be resolved is not whether the government can make autonomous choices but if the choices it is allowed to make are limitless or constrained.

### **Concepts of Authority**

As previously mentioned, the only power that the government possesses is that which is given to it by the people. Thus, the government's authority, or legitimate power, is dependent on its relationship to the people that gives it that authority. That relationship defines whether or not the authority is limited or absolute. In order to understand this, consider the application of these forms of authority in ordinary principal-agent relationships.

If a homeowner (principal) were to tell an interior designer (agent/ representative) to furnish the homeowner's house, they might give that designer limited or absolute authority. If the authority were limited, the homeowner might ask the designer to buy furniture of a particular brand, color, or design. This would require that the designer not purchase whatever they saw fit but constrain their purchases to the regulations of the principal. In the event that the agent was to buy something that violated these rules, they would have committed an *ultra vires* act. This means that they have exceeded the authority granted to them by the principal. Say, in another situation, that the homeowner simply told the designer to purchase whatever they wanted to furnish the home. In this circumstance, the designer would have absolute authority over the furnishing decisions. If the designer brings home a bright blue couch and leopard print curtains,

the homeowner cannot reprimand the agent because the designer was given absolute authority from the principal to act in whatever way they saw fit.

When considering how this applies to government, one must decide whether or not the people have given the sovereign absolute or limited authority. This is the same issue of whether governments should be considered independent moral agents or if their agency is limited to a representative role. The solution is embedded in the content of the contract.

### **The U.S. Government as a Representative**

The United States Constitution distinguishes the rights of the government from the rights of the people. The government is allowed to represent the people in international politics and situations, arbitrate conflict between the 50 sub-sovereign states, and is intended to protect and serve the people of the United States. Within the document itself, there are rights listed out as those that are inalienable from the people. These protected liberties can be found littered throughout the document as well as focused within the beginning “Bill of Rights.” All of these rights are derived from three broad concepts that are considered sacrosanct humanitarian standards: life, liberty, and the pursuit of happiness. They are often included or alluded to in contracts written and maintained by the United States, like the Declaration of Independence, the Geneva Convention, and other International Laws of Human Treatment. Though these contracts are relevant to the current discussion, their relevancy is based on the application of these humanitarian standards. The U.S. Constitution is the optimal example of this contract because it provides protections for those rights through the Bill of Rights and numerous locations throughout. Focusing on this document avoids delving into the complexities of international contracts while still explaining how humanitarian standards must be considered and abided by in all United States government decisions.

Some may argue that human agency and inalienable rights are alienable in practice. The moments to which these critics would be referring are those like arrest, detention, or any other form of punishment where the government fulfills its role as a government. The government would be breaking the contract by failing to punish those who violate the law. It is the United States Constitution that gives the government the right to revoke those liberties when people voluntarily break the law, subjecting themselves to the consequences that follow.

Furthermore, when a person commits a crime and is then punished by the government according to the laws established by the Constitution and other laws, it is not the government infringing upon that person's agency but the necessary action of the sovereign to uphold its end of the contract. In this event, the government is required to grant the person *secondary rights* (DBPA 1-28). Secondary rights, such as freedom from excessive fines or punishment, double jeopardy, and necessary due process are intended to protect the human agency of a person to the greatest degree. It is not the government truly taking those rights from the people, but the people (by violating the contract) giving away their liberty voluntarily.

The contracts that establish the rules of government punishment also determine what the government may not do. It may not require citizens to quarter soldiers, testify against themselves, or give up their private property for public use without just compensation. These are just a few examples of the protections granted by the Constitution, which are all indicative of the fact that there are some areas where the government does not have authority.

Many historians and political philosophers have debated over the way in which the Constitution should be interpreted. Is it a contract that lists out the "rights retained" by the people, giving otherwise absolute authority to the sovereign, or is it a contract that lists out the "rights granted" by the people to an otherwise limited sovereign? The text reads, "The powers



not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people” (TAUSC). In essence, if a specific power is not given to the government at any level, it is retained by the people. This lends to the idea that the authority of the United States Government is limited and not absolute.

All of these things considered, the U.S. Constitution is not a document that grants absolute authority to a sovereign. That authority is limited. This contract enumerates the powers of the government, not the powers of the people. It is for this reason that one must consider the government subject to the rules of the principal because the government is established, legitimized, and maintained by mutual respect for the contract that created it.

### **Authority in a Non-Democratic State**

Although the United States is the focal point of this discussion, something must be said for those countries that do not have a democratic government. If one attempts to make a claim, as I do, about the contractual relationship being the binding force between a government and its people, then societies where the contract favors one party far more than others also have to be considered. What is important in these circumstances is delineating authority from brute power. Authority is legitimate, recognized, and intended influence, not just force and might (Au). In many non-democratic countries, such as China, the question of legitimate authority has plagued the minds of the people and the government alike. In these countries, rather than a valid relationship and the roles that are created from those relationships, fear and coercion force compliance and weakness among the people. It also forces the government to give a mirage of legitimacy through political ideology (support for the Communist Party of China) or intense nationalism and pride (MNDJE 187-194). Where those fail, kidnappings, police brutality, and public humiliation do not. This is not legitimate authority. This is tyranny.

China is a good example of a country where one could consider the government a totally independent moral agent. The CCP is negligent to the needs and wishes of the people, with evidence pre-dating the riots of Tiananmen Square, Hong Kong Umbrella Movement, and so on. The government grew out of public support, lost public support, and then maintained power without it (GRSCC 123-155). What is lacking is not the capacity of the government to fulfill its role but the reciprocity intrinsic to the relationship between a government and its people. Citizens violate the law to survive, children lead revolts in the streets and hunger strikes, and hundreds of thousands of religious groups remain in underground, undocumented group gatherings. The fact that there have been so many instances of the people trying to overthrow their government is indicative of the claim that authority and legitimacy, regardless of the independent moral agency or sole representative capacity of a government, requires public support. Disregard for the relationship between the people invalidates the government and results in anarchy. The only reason this has not occurred is for the lack of power and capacity of Chinese citizens to overthrow their bully.

### **Final Remarks on the Nature and Limits of Governmental Authority**

At this point, whether or not a government is a person or just a representative makes no difference when it comes to respecting the contract. If a government is a person, it cannot commit an act of self-annihilation and must maintain the contract that gives it life. If it is not a person, it is a representative that has limited authority and not absolute authority, limiting it to the constraints of the contract. Furthermore, the kind of government and system is not important to the discussion at hand. When it comes to torture, one could say the type of system is important, but the use of torture by any entity that has no legitimate authority is not acting as a

representative at all, nor is it a representative at all, and is thus subject to judgment as an independent moral agent, having no bearing on the people that are victimized by its tyranny.

### **Legitimacy from Authority**

The issue of political legitimacy can be interpreted through four different lenses. These lenses each portray a government's legitimacy as a reflection of some kind of interaction between the people and the government that results in a recognized and accepted authority (PC 14-15). If authority is the means by which a government can control its people or act on behalf of the people, legitimacy is required in order for the people to comply. Legitimacy is the product of people acknowledging the authority of their sovereign and the sovereign respecting the responsibility that comes with that authority.

The first of those four lenses, legitimacy because of habit, establishes that legitimacy may be a consequence of tradition. If a government has had authority for centuries, the people adopt this accepted legitimacy without needing proof of authority. This is somewhat similar to the second lens, legitimacy by identity. Identity includes all religious, social, or ideological ties that the people feel to their government. This can be seen clearly in theocratic civilizations, where religion creates an obligation to recognize the legitimacy of a sovereign.

In the case of authoritarian and some democratic countries, procedures may be what maintain a government's legitimacy. Hart discusses this in his development of primary and secondary rules. Primary rules govern actual behavior, and secondary rules are laws that allow for modification, maintenance, and retention of legitimacy by giving a government the capacity to change over time (WIIPV 1169). When rulers die, retire, or are replaced, the secondary rules of a political system maintain legitimacy in their stead.

All of these constitute the maintenance of legitimacy, how it is kept up within a society that has already determined a sovereign. History, habit, faith, and procedure do not procure the authority bestowed on a government but serve as protection for threatened legitimacy. In order for legitimacy to be granted to the sovereign, the contract giving it power must first be legitimized. This requires that the people adopt the contract for themselves, limiting themselves individually and trusting that the contract will be enforced by the sovereign. It is this first act and the first act of reciprocity that legitimizes the government (LFMV 242-250). The contract must produce results both ways.

Without results, the relationship between people and government could not be established. If the people trusted the sovereign to defend them against the imposition of others, and the government failed, the people would not trust the government to perform its contractual obligation. In the same sense, if the government told the people what to do, but the people refused to do it, the government loses its identity as a government, and the only role it had is destroyed. After this first act of reciprocity, all other manifestations of legitimacy motivate people to continue to believe in the system. If not for the first act, there would be no legitimacy to maintain.

Once the original results have long passed, religion, tradition, or procedures may be used to protect the established system. These maintenance mechanisms for legitimacy do not protect the system when there are systematic breaches of contract (LFMV 255-262). One can see from the China example that continued neglect of the contract (and a lack of results as a consequence) lead to the illegitimacy and dissolution of governments or attempts in that direction. If the contract is not respected by either party, the contract and the authority created by it would be

revoked (TSC 10-12). Legitimacy requires this first application of the contract and constant upkeep to that relationship, or what will be called the rule of law.

### **Rule of Law**

There are often times in which a person may not agree with the choice of the sovereign. The legitimacy of a government is not destroyed every time it acts in a way that irritates its constituents. If this were the case, there would be no legitimate governments at all. It is clear, however, that the continued abuse of contract between either party in the sovereign-citizen relationship will eventually destroy the validity of that system.

Such abuses of contract would be dismantling what philosophers call the *rule of law*. The rule of law is considered the mutual respect of both government and populace for the established order. The people express this by putting faith in the sovereign to exercise its authority, and the sovereign reciprocates this by conducting the actions required by the contract. When a government fails to meet the standards given to it by the people, it violates the rule of law as well as the contract itself. There must be some mechanisms in place that explicitly detail the obligations of the people as well as the sovereign to avoid this.

In Lon Fuller's description of an ideal legal system, he concluded that there must be an inner morality of law. He argued that laws must be general, public, prospective, coherent, clear, stable, and practicable (TML 38). Broadly these mean that the people have to understand what is expected of them, be capable of exercising that expectation, and the government has to be willing and able to enforce punishment for when those expectations are not met (TML 40). He believed that because these qualities are necessary in order for a legal system to be just and legitimate, there is an implication that morality must be necessary within the development of law.

Hart, who believed these attributes were not a standard of morality but just a matter of common sense, argued that these qualities have instrumental value and are necessary in a nonmoral way. If these mechanisms were not in place, neither party within the system would know what was expected of them.

He takes it a bit further, arguing that the rule of law requires that people adopt an *internal point of view* (WIIPV 1159). In layman's terms, this means that individuals must personally acknowledge and buy into the rules that govern them. It would be impossible for a person to adopt this mentality if they could not see, know, understand, or complete what is asked of them in those rules. Thus, those qualities are necessary but not because of any moral sense. What is important to distinguish at this point is that not all people have to acknowledge the contract, or the obligations created by them for there to be legitimacy, but a majority must in order for it to be considered valid. Those that are still living within society, reaping the benefits of society, are subject to its laws regardless of their understanding or acknowledgment of the contract, and they have still adopted the law internally by accepting its benefits. The government must adopt the same perspective on the rules; if it acknowledges itself as the government, it must operate as the government of the people. It must prosecute what it is expected to prosecute, protect what it is expected to protect, and act in accordance with the constraints of the contract.

The rule of law has conditional non-instrumental value, according to Colleen Murphy. It is non-instrumental in that it has value in itself rather than for the purpose of something. It is conditional because the people are only required to comply with the law if that respect is reciprocated in the upholding of the law from the government (LFMV 242-250). When the officials routinely violate the rule of law, citizens are relieved of their obligation to obey the law. Where she believes that the government violating reciprocity justifies citizens dismissing the

law, it could easily be translated to the government breaching contract and the citizens acting as if the contract were nullified.

Not all things that violate the contract violate the rule of law. There are many instances where the government commits minor infractions against the contract, but people ignore it or do not care. In many circumstances, people do not even know. In instances as extreme and obvious as torture, which is specifically listed as inappropriate use of power for the government, the violation is more impactful and has a bigger consequence for the rule of law. This is especially true in instances where the behavior continues to occur and is not resolved. Often, people become aware of smaller violations to the rule of law when attention is called to the larger offenses. This creates a snowball effect of destruction for political legitimacy because the people become increasingly aware of the fact that their government systemically, consistently, and unapologetically violates the contract with little to no regard for the people. These instances are more disruptive to the rule of law compared to those that are either remedied or too small to notice.

### **Breaching Contract**

So, what happens when governments break the rules? When the government acts in a way that breaches the contract, they violate the rule of law. It may not be in one instance, but the continual dismissal of the government of the contract will eventually disintegrate the way all people view the law. In violating the rule of law, they invalidate the sovereign's legitimacy. This is because people will no longer respect the views, decisions, and actions of the government. By losing that sense of legitimacy, the government forfeits its claim to authority, removing itself from the only contract that gives it life, committing an act of self-annihilation (TSC 10).

Normally, when a contract is breached, the non-breaching party would seek recourse through

some type of Adjudicatory hearing held within a judicial system. When the breaching party is the government, the non-breaching party is left to seek recourse through extra-judicious and anarchical actions.

As previously discussed, there may be ways that a rogue government can prolong its eventual demise. It may rely on legitimacy by habit, identity, or procedure. Eventually, however, procedures will be invalidated when the people no longer believe in them. Identities will shift with the overwhelming distrust in government, and habit will not be enough. The lack of results will lead to the dissolution of civil society, returning those who once belonged to it to the anarchic state of nature.

### **Attempts to Salvage the Rule of Law**

In an attempt to justify the actions being taken by the government in Abu Ghraib, the U.S. Department of Justice released what would be termed the “Torture Memos,” which gave the government the legal right to use *enhanced interrogation techniques* on international detainees (TDA 1-7). The techniques that were listed described torture mechanisms such as extreme sensory overload, manipulation of circadian rhythms, and deprivation of survival necessities such as light, food, water, or social interaction. Intending to establish that humanitarian laws were not applicable to those who were thought of as “enemies of the state,” these documents justified the torture, abuse, and murder of people who were never found guilty in a court of law. Although this stance has now been judicially overturned, the legality of such claims survived for far too long. Two things should stand out from this: (1) It was overturned with public outcry, and (2) if domestic contracts do not apply in international decisions of the government, no legal or social remedies would have been necessary to “save face.” If the government was not constrained by the original humanitarian standards within its contracts, it would not have had to



use secrecy, manipulation, and post hoc justification as a means of maintaining the rule of law. Because the government uses these strategies, one can deduce that the government recognizes its limitations and strategically avoids the repercussions of abusing its authority.

### **Inalienable Rights**

Torture, rape, and murder are typically recognized as bad things. No one particularly likes any of these events for themselves or anyone that they love. In fact, the majority of legal systems have rules specifically forbidding these actions because of their negative effects. There is an argument to be made for why these behaviors are particularly wrong. They destroy the most basic units of human agency. The capability to think, believe, live, and operate with bodily integrity and autonomy is completely neglected.

Opposed to common sensibilities, it is not because of the moral wrongness of these acts that the government faces reprimand from the people. Rather, it is the fact that the government has no right to do those things. In fact, the Constitution and other humanitarian laws explicitly protect the people from those actions, keeping them as “rights reserved.”

As previously mentioned, there are moments in which a person may appropriately forfeit their rights to the government. This can be seen in domestic conflicts in the United States. A person commits murder. That person gets put in prison. The government has not abused its authority because the contracts between the people and state give the government the right to rebuke someone when they violate the law. In essence, the people give up their primary rights to human agency by committing a crime. What is wrong with the actions of the United States in Abu Ghraib and Guantanamo Bay is the fact that the government did not honor the contract that gives it the power to even be in Iraq or Cuba. It violates the contract that gives it governmental sovereignty, and in doing so, commits an *ultra vires* act by torturing those people.

There have been perfectly legitimate regimes in history that allowed for humanitarian atrocities. Though one can view those regimes with disgust and indignation, the legitimacy of the system is not in question. When the government does not have the authority to do what it is doing, it must proactively work to maintain the rule of law, and its authority, by convincing the people that it did not breach the contract or should not be punished.

## **Secrecy**

The most common way for a government to avoid public disapproval is to keep its actions a secret. If the people are unaware of the violations being conducted, then the rule of law is maintained, and legitimacy is never questioned. This strategy was adopted by the Bush Administration when navigating Abu Ghraib and Guantanamo Bay. They are obviously no longer well-kept secrets. The problem with resorting to secrecy is that doing so is a blatant admission of guilt if the secret gets leaked. If the government was not acting improperly, there would be no reason to keep it hidden.

As long as the actions are kept secret, the rule of law may appear to be secure. The government maintains its sense of legitimacy because the people are unaware of its abused authority. In the example used earlier, this would be if the limited designer decided to buy leopard curtains and hide them in a storage unit. The homeowner has no idea that the designer broke the rules, and unless attention is called to the curtains or missing money, the designer will not be fired for abusing authority.

History proves that with ever-increasing access to information and technology, human atrocities are not kept under wraps very long. It is at this point when governments must act to defend their actions in order to stabilize the rule of law they have damaged.

The obvious counterargument is that secrecy is used to cover up the moral wrongdoings of these actions, not the contractual violations. Regardless of those standards being set with morality or justified by some morality, they exist as binding rules. If the government was concerned with changing the moral stance on torture, it would civilize torture by defending the use, polarizing threat perception, and normalizing the tactics. Instead, the government attacked the legal issue around torture by publishing the Torture Memos, which had very little indication of moral conviction or concern for social backlash as an effect of morality.

### **Post Hoc Justification**

When the truth is out, people become aware of the governmental violation. In the examples of Guantanamo Bay and Abu Ghraib, people were exposed to the piles of live naked bodies cattle-tied and stacked on top of one another in photos, American soldiers holding their thumbs up in approval. Human feces painted on their faces, bodies, and spaces, subjected to solitude with a single tune on repeat for days; the people became aware. People knew that those incarcerated at these prisons never saw a judge, were never read any rights, nor would they ever be free. If the people were let go, the use of torture and murder would have contributed to more terrorism than it may have stopped (TDA 36-62).

During the Obama Administration, Guantanamo Bay was brought fully into the public purview. Former President Obama ordered that the prison be shut down in response to the outcry. Of the 780 people incarcerated there, 731 were transferred to other secure military prisons, 40 remained at Guantanamo Bay, and the other nine died while there. Eighty-five percent of those who were imprisoned at Guantanamo Bay are not currently suspected of terrorist activities (FTGD). With statistics like these coupled with the images and stories attached to them, the government had to act quickly to rectify the damage done.

There are two primary ways that we see governments justify their *ultra vires* acts, both of which were used following these events. In some circumstances, the government will claim the acts as necessary evils. The opposing side will often be villainized, painted as a worse wrongdoer. This creates a sense of obligation for the government to claim: the enemy must be dealt with despite the government's reservations. By portraying the event in a way that magnifies the wrongdoings of the opposing side, the government alienates itself from its own questionable behavior. This kind of justification can begin early on by trying to convince the population that there is a threat associated with particular groups, people, or attributes. By demonizing these actors, the government can create fear and resentment that will lead people to support actions they might not otherwise comply with. In a study conducted by Courtenay Conrad and others, evidence showed that associating Arabic names with terrorist activities played on two narratives already established in peoples' minds: (1) the villainized Arab and (2) their associated risk of threat (TPAST 990-991). The participants routinely justified humanitarian standard abuses more for this group than for any other demographic or threat.

In the case of Guantanamo Bay, where the prisoners were overwhelmingly uninvolved with terrorist endeavors, the U.S. had to use more than just social alienation and threat perception to justify the abuse of authority. The Torture Memos argued that United States' contracts end at the edge of American soil. With the United States operating a military base in another country, it was subjected to the laws of that country and not U.S. law. This allowed the Department of Justice to defend the use of torture.

The defenses commonly used maintain an underlying theme. The government would claim that immediate emergency or danger justifies *ultra vires* acts (TDA 65). Although this argument could be used to partially justify the detention of those accused of associations with

terrorists, torturing those people for weeks, months, and years is a different issue altogether. In extenuating circumstances, a government is obliged to act in a way that best represents the people while maintaining the rule of law. This requires that the government do and reasonably maintain the contract during immediate threats. Torture does not constitute an immediate danger, and if it did, the government would still be acting wrongly in using that behavior because it blatantly violates the contract. Although attorneys and government officials argued that the extraordinary conditions of war, terror, and nuclear capacity constituted the use of those techniques, the attacks never materialized, nor did the threats that justified them.

Hundreds of legal documents attempting to downplay, justify, or excuse the use of torture in Abu Ghraib were released after people became cognizant of the government's actions. For as many documents were published, even more were destroyed containing the errors, illegalities, and admissions of those conducting torture and abuse there (TP xxi-xxix). Politicians, attorneys, and military officials attempted to get ahead of the recourse by legalizing the actions they knew were questionable.

### **Analysis**

There is ample evidence supporting the claim that the United States government recognizes its limitations. The fact that secrecy and post hoc justifications are used to misrepresent the *ultra vires* acts to the people shows that the government is concerned with the maintenance of public support. If the government had absolute authority, there would be no need for such political mobilization. The constant maintenance of political support suggests that the government recognizes its need to uphold the rule of law even when it violates the foundational contracts that create it.

There are obvious arguments against this conclusion. The most notable of these is that the contracts between the people and sovereign only regulate interactions between those two entities. Third parties, according to these critics, would be excluded from the humanitarian securities encompassed in those contracts. In response, there is no point in a principal-agent relationship without considering how it will impact third parties. Return to the original purpose of the contract. The people, amongst and governed by themselves, cannot coexist peacefully. The entire reason a sovereign is created is to deal with third-party entities. It is an arbitrator of conflict, a representative of most basic values. If not for the sole purpose of third-party conflict resolution, what is the aim of a sovereign at all?

Another notable counterargument would be that the United States is a democratic republic that requires political support from a procedural standpoint. As stated previously, even in authoritarian regimes, the sovereign must (1) initially create its own legitimacy through public support and (2) must maintain that power by their public support or public coercion. This does not mean that those governments are authoritative or legitimate. As Hart argues, coercion does not create a sense of obligation or the adoption of an internal point of view that is necessary to create legitimacy. Coercion is a way of manipulating a person's agency, not tending to it. Legitimacy, and the authority that is its foundation, are only granted by voluntary acts of a person's agency. In this regard, if an authoritarian government exists and is supported freely by its people, it may be a legitimate regime. If, however, that system is ruled by a despot who uses fear, coercion, and abuse to subject others to its ruling, it is not a legitimate sovereign but a powerful parasite. The United States is used because it exemplifies a system founded on humanitarian standards and violates those standards regularly.

## Consequences in Action

What does this mean for the land of the free and home of the brave? It is not because the government acts as an independent agent that it faces the problems it currently does, but because the government has not constrained itself to the limitations established by its contracts. If the government continues to act with disregard for its foundational contracts, we will see a number of events unfold. First, the government will create a sense of distrust, irritation, and other forms of public disapproval. This first event will be characterized by political polarization, social unrest, and increased rates of diversion. More people will be upset with the decisions and actions of the government.

Social unrest will indicate the progressing dissolution of the rule of law. People will start to claim that the government does not represent them, rescinding their support for their sovereign. They will act compliant out of habit, but their support will wane. Incarceration rates will likely increase as people neglect their obligations to the state. The government will be forced to respond to this movement. It will either change its behavior to rectify the violations, or it will use coercion and force to secure its own claim to authority and the legitimacy that flows from it.

Legitimacy will be the second attribute of a political system to fade. Because the legitimacy of a government is founded on the perception of its constituents, the loss of the rule of law will be disastrous. The government will continue to act in a way that will protect its power, even to the detriment of what remaining support it has (GRSCC 127-128). Once this legitimacy is completely destroyed, the government will be left with no legitimate authority, and all rights that were granted to it will be returned to the people. With those rights returned, the laws of nature will take the place of the sovereign, forcing the people to either develop a new system from the rubble or exist in the anarchic state of nature (TSC 58-62).

## Conclusions

The future of a devolving sovereign is frightening. This is a concern for all regimes, but especially those that are actively violating the laws that create it. The authority of a government is not absolute, limited by the contracts that give it power, and even if it is absolute and the government is considered a person, the contracts will still constrain the government to some degree. By exceeding its authority, the United States government has breached the contract that gave it life. Without remedying this, the contract will become nullified, resulting in the loss of reciprocal obligations. With those obligations waved, the legitimacy and authority that are created by that relationship will fail, resulting in the eventual self-annihilation of the sovereign.

Evidence exists to support the reality of this predicament, where the government acts to protect the rule of law despite abusing its authority. This is exemplified in the use of torture and abuse in Guantanamo Bay, Cuba, and Abu Ghraib, Iraq. In order to reconcile the relationship between the American people and the United States government, both parties must reconsider the role of humanitarian standards within its contract. If the people are quick to support the abuse of torture in special circumstances, then it may be that the contracts should allow torture so that there is no issue to resolve.

As long as the government is able to maintain the rule of law, either by justifying its violations as “exceptions to the rules,” then it may persist as an established and legitimate government. This hope rests on the assumption that secrets will remain kept, people will remain scared, and the government will remain trustworthy despite its abuses.

All in all, a government can technically do whatever it wants. As an independent moral agent, it can decide for itself what it values, desires, and does. However, serving as a government creates a particular role for the sovereign. This role is inextricable from its identity, and if it



sheds the role of a government, it destroys its entire existence, identity, and integrity. This invalidates it as a government, stripping it of all power and authority and will inevitably result in its suicide. A government as a representative is also capable of violating the contract, destroying the rule of law, and committing an act of self-annihilation by destroying all sense of legitimacy and diminishing any reciprocated obligation or compliance from the people. It is technically possible for these things to occur; however, no person or entity will ever intentionally commit an act of self-annihilation because it violates their self-interest. If it commits an *ultra vires* act, it is not because it wants to destroy itself, but because there is an assumption that no consequences will flow from the decision to damage the rule of law. Caution and correction are warranted, lest we aim to return to a life solitary, poor, nasty, brutish, and short.

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