

Torture and Democratic Violence

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Abstract. To understand the problem of torture in a democratic society, we have to take up a political-theological perspective. We must ask how violence creates political meaning. Torture is no more destructive and no more illiberal than other forms of political violence. The turn away from torture was not a turn away from violence, but a change in the locus of sacrifice: from scaffold to battlefield. Torture had been a ritual of mediation between sovereign and subject. Once sovereignty is located in the people, it no longer makes sense to speak of being sacrificed for the sovereign. Instead, sovereign presence is now realized in an act of self-sacrifice. The wars of modern nation-states have been acts of reciprocal self-sacrifice. Terror invokes torture in response because both speak a primitive language of political sacrifice, denying the enemy the privilege of self-sacrifice.

If we are willing to kill, why not torture? Of all the terrible things that have happened so far in the war on terror, and for which the United States bears some responsibility, the practice of torture has hardly been the worst. This is not to excuse torture, but to ask why we invest so much of our collective attention on this practice. What does this—by which I mean both the practice and the discourse—tell us about ourselves? What is it about torture—for the most part, a non-lethal form of violence—that seems so uniquely problematic to the modern state?

A number of answers have recently been offered. First, torture is illegal, while other forms of violence are not. The United States ratified the Torture Convention and it enacted legislation that flatly prohibits torture. Yet reference to that law has not been sufficient to quell the debate over our current practices, as if torture arose from ignorance of the law. John Yoo did define torture in a peculiarly narrow fashion, but the real debate has been about whether law should govern our behavior in the war on terror.¹ When people imagine torture for the sake of finding a ticking time bomb, for example, they also imagine that legal

* This essay draws upon Kahn 2008.

¹ The Yoo memo (signed by Jay Bybee) can be found in Greenberg and Dratel 2005, 210.

procedures are not adequate to the threat of terrorism. That is the whole point of the example.²

A second answer: Torture has a special place because it is the paradigmatically illiberal act (Luban 2005, 1429–30). When the torturer acts in total disregard of the victim's will, he violates fundamental ideals of equality and dignity that are central to a liberal order. But the question is, "compared to what?" Should we compare torture to law or to war? In both combat and torture, action is taken in disregard of the well-being of the other. Indeed, the logic of combat is to seek just the sort of asymmetry in the application of force that torture accomplishes. Its end is to obtain a position from which as little harm as possible is suffered by one's own forces, while maximum injury is suffered by the enemy (von Clausewitz 1976, chap. 1, sec. 4). If modern combat preserves dignity, it does so by denying any room at all for individual subjectivity. Torture recognizes individual subjectivity and deploys it against the victim; combat never gets to the point of recognition (Timerman 1981). It is hard to compare the two in order to make a judgment as to which is less liberal.

A third argument: Responding to terror with torture, we abandon those principles for the sake of which we are fighting (Barak 2002). We become, like our enemies, "uncivilized." We see this attitude reflected in those surveys that show citizens of other nations judge the United States to pose a threat to world order at least equal to, if not greater than, that of Al Qaeda. But if the United States is indeed at war, how "civilized" is any war? Violence moves in a spiral of increasing ferocity whenever each side believes that it cannot accept defeat. Just look at the civil war raging in Iraq over the last few years or the Intifada in the Middle East. Look for that matter at Hiroshima, Stalingrad, or Dresden. In the end, the extent of the destructiveness of war is less a function of rules, than of the endurance of the enemy. So, we are brought back to our question of why we accept the violence of combat but not of torture?

A final response to the question: Torture is simply not an effective technique of warfare. Torture is likely to do more harm than good, since it alienates the community with which we need to have friendly relations if we are to obtain the information and support we need. It rarely, if ever, produces useful information—in part, because the victim may actually be innocent of any wrongdoing.³ These claims might well be true, but most critics are not really in a position to make confident assertions about the usefulness of different forms of violence. Moreover, we don't really want to hear stories about the successful use of torture. We don't want to hear

² For analysis and critique of the ticking time bomb example, see Luban 2005.

³ See Holmes 2009, quoting M. Rolince, special agent in charge of counter-terrorism in the Washington office of the FBI ("torture and coercion get you, in the vast majority of cases, wrong information that takes you off on a wild goose chase.").

of it at all. The appeal to consequentialism is secondary. Critics stand on principle: “no torture,” period. But why this principle?

Nor do we make more progress on the question when we look at the likely innocence of many of the victims of torture. The victims of war are, for the most part, morally innocent even when they are armed.⁴ The conscripted youth—as well as the merely impressionable youth—is likely to be the victim of his own government leaders, before he is a casualty of war. War is hell because it destroys the morally innocent—combatants and noncombatants alike. When war ends, enemies can become allies and even friends, for despite the reciprocal threats and injuries they remain morally innocent.

There is some truth in all of these efforts to identify the peculiar evil of torture. Torture is illegal and immoral; it is certainly illiberal, and it may be so costly as to be ineffective. But none of these answers really gets to the heart of the matter. We could change the law, if we thought it necessary.⁵ Modern warfare of every sort is deeply illiberal; political violence is hardly a moral enterprise. I cannot argue that F16 strikes represent a higher level of liberal civilization than suicide bombers. We are confused about torture because we want to think that the turn away from torture is a turn away from violence. But we do not reject torture because we have become less violent. Rather, we have become “differently violent.” This is neither a matter of the triumph of liberal values nor of increasing moral sensitivity. Similarly, it is not a matter of effectiveness. It is rather a story of the history of cultural formations that locate meaning in diverse practices of political violence. To understand the problem of torture, we have to turn from the discourse of law and justice to an exploration of the genealogy and shape of the political imagination.⁶

Before the age of democracy, torture was a traditional instrument of sovereign power. This was the age of the spectacle of the scaffold (Foucault 1977). On display was the sovereign power of life and death. Power did not flow upward from subject to ruler through an expression of consent. In a fallen world, there was nothing the subject could bestow upon the sovereign. Rather, all meaning derived from the sacred. It was a showing forth of the divine: “All earthly Lordship is a limited representation of the divine Lordship of the World. Human Lordship proceeds from, is controlled by, and issues in, divine Lordship” (Gierke 2002, 30). The sovereign’s power followed from his proximity to the sacred; there could be no other source.

The violence deployed by the sovereign worked in the political-theological dimension. The scaffold was the site of a kind of Passion play the end of which was the confession.⁷ This was an ancient script: The

⁴ This idea is central to humanitarian law. See Walzer 1977.

⁵ Alan Dershowitz has proposed just such a change; see Dershowitz 2002.

⁶ See Kahn1999a on methodology.

⁷ Langbein 1977, too, emphasizes the link of torture to confession.

tortured body reproduces the power of the sovereign through the confession of faith.⁸ The violence done to the body was not mere negation. Rather, it was that creation through negation characteristic of sacrifice (Hubert and Mauss 1964; Girard 1977). Torture was, first of all, a form of sacrifice: It inscribed on the body of the victim the sacred presence of the sovereign.

Faith, politics, and violence were conjoined in a spectacle of sacrifice designed to produce in the community a combination of dread and awe before the mystery of sovereign power.⁹ The sovereign power to take a life had to be witnessed in the double sense of seen and acknowledged. The moment of the victim's public confession accomplished both ends. It was literally the last act of a dying man. This was not because of lingering uncertainty over guilt—did he actually commit the crime?—but because the sovereign's power over life required the moment of acknowledgment. Without acknowledgment, the sovereign might exercise violence but not power.¹⁰

If torture was not a part of the ritual production of the sacred, it was nothing but a provocation. Awe, not just fear, was the end, for one can act to overcome one's fears. Political power was stabilized by the transformation of torture from mere fear of violent injury to awe before the sacred character of the sovereign. The mob's access to violence was not yet access to a source of meaning that could displace the sovereign. They could destroy, but not produce. They might kill a king, but they could not rule themselves for the simple reason that they could not save themselves. Before popular revolution could be imagined as anything other than mob violence, the people had to have access to the nation's gods. Indeed, they had to create a new god that is the nation itself.

Torture was a practice of producing truth. In a premodern world, the construction of truth was not in tension with the discovery of truth. When we speak of "discovery" today, we imagine an objective world that exists apart from the subject. The modern problem of truth is precisely that of getting outside of the limited perspective of the self, of seeing the object clearly.¹¹ The objectivity and universality of a truth claim depend upon a subject's capacity to separate his particular perspective from the truth-seeking process. Torture is exactly not the way to accomplish this, for pain is never a good frame for objective inquiry.

There is, however, another sense of truth of which we still have an intuition. For example, the truth of character is revealed not in moments of inquiry stripped of interest, but at moments of extreme difficulty. Character

⁸ Of course, the Christian martyr denied the sovereign's power by refusing to confess any faith but his own. See Castelli 2004.

⁹ For a fictional representation, see Kafka 1995.

¹⁰ On the distinction of violence from power, see Arendt 1970.

¹¹ Modern rules of criminal evidence, for example, are measured against this end. We contrast our practices of criminal trial to the "show" trials of totalitarian regimes.

is produced—as well as proven—in responding to adversity. We find out who we are when we are asked to sacrifice for an objective or person that we care about. We want to know of ourselves, just as we might want to know of others, where we take a stand. I discover the truth of myself only by being it (Scarry 1985). Some might argue that the same is true of a nation. Just last January, for example, President Bush said, “The year ahead will demand more patience, sacrifice and resolve [. . .] times of testing reveal the character of a nation.”¹²

Torture worked in a similar register of producing its own truth. Only from the perspective of third-person objectivity do we see this as an epistemic failure. Torture was embedded in that inversion of truth and faith expressed by Saint Anselm’s, “I have faith in order to understand.” Torture was used as test of faith. The outcome of this performance was a truth established in the act itself. Its product was understanding for both the victim and the torturer. The victim would know whether for the sake of his beliefs he would suffer self-sacrifice, i.e., martyrdom. The torturer, as well as the audience, would know whether sovereign power was real. In a world in which life offered a continual test of faith, torture was a form of inquiry designed to reach truth.¹³

Thus, more was at stake in torture’s production of the confession than the certainty that the victim had indeed performed the alleged criminal act.¹⁴ It does not take modern science or modern sensibilities to understand that under torture someone might confess to a crime he had not committed. Aristotle wrote of this, as did Augustine and a whole succession of others (Aristotle 1941, 1376b–1377a; Augustine 1960, XIX, 6). Torture was maintained despite an understanding of the negative epistemic value of pain. It was pursued for reasons of faith, not fact.

Today, we might offer a utilitarian justification for punishment of the innocent: Belief in a penal response to crime deters, regardless of whether the process correctly identifies the perpetrator. In the symbolic economy of torture and confession, the same sort of displacement could occur. What mattered was the display of the power of the sovereign. Of course it would be better if power and justice ran in the same direction, but even without justice, torture could still be effective for it demonstrated the power of the sovereign wholly to occupy the subject. God’s presence always precedes God’s justice—just read Job. The same was true with the political sovereign. Justice is a debate about the deployment of sovereign power, not about its creation.

¹² Statement of President George W. Bush on January 10, 2007.

¹³ This relationship of torture, truth, character, and sovereign power was at the core of the political narrative offered by John McCain.

¹⁴ Just here Langbein’s perspective, focusing on the confession as part of the law of proof, is too narrow; see Langbein 1977.

By speaking the sovereign's words, the torture victim offered a display of the sovereign's power over life and death. His last act was to make of himself a symbol: His finite being was now pure negation, while all that was positive was the sovereign power expressed in his confession (Scarry 1985). This was a literal reenactment of the power of sacred speech to create its own truth. God spoke the world into existence. The political sovereign spoke the smaller world of man into existence. His voice created and sustained the state. Before there was a theory of law, there was the belief that law is the word of the sovereign.

Torture was linked to trial because the trial is a site of sovereign power. The outcome of every trial is the sentence of the judge, who speaks in the name of the sovereign (Kahn 2000, 12–6). The judgment must create its own truth: The guilty confess because the sovereign's speech creates reality. A criminal justice system that no longer requires confession as either an element of proof or an element of punishment is one that no longer relies on torture, regardless of how offensive we may find its techniques of violent punishment. The object of confession today, if it occurs at all, is not acknowledgment of the sovereign power to take a life, but the showing forth of the inner state of the criminal. Modern confession is the beginning of therapy. A criminal who confesses is on his way to rehabilitation (Sarat 1999).

Only to modern sensibilities does the distinction between the forced denial of the self in the ritual of torture and the voluntary denial of the self in the religious confessional seem so essential as to mark a difference in kind. From the perspective of the pre-modern imagination both forms of confession are practices of sacrifice. If man cannot save himself—if meaning always comes from without—then consent is simply not an important category. Consent is not a condition of an authentic opening of the self to the sacred. It is not itself a source of power. It has no more power to create the sacred than it has to feed the hungry. The religious confession is an element of a ritualized giving up of the finite self and a taking on of the body of a sovereign Christ. Torture replicated, even while it relocated, this giving up and taking on. Its grammar is the symbolic logic of sacrifice: to destroy in making present the sacred (Hubert and Mauss 1964).

The fundamental principle of faith in the West is that the finite only gains meaning by taking on the presence of the sacred. This is the symbolic structure of sacrifice: Life has positive meaning only when and to the extent that it is filled by the sacred. Isaac has his life given back to him only after his sacrifice. Christian faith begins with Paul's claim that the believer has already suffered death on the Cross with Christ. Neither of these symbolic claims works in the dimension of consent. Both, instead, work within the symbolic structure of sacrifice: Destruction is a condition of consecration. There must be a "giving up" in order for there to be a "taking on."

Sovereign power was this capacity to create the truth conditions of its own speech: To make law real in the body of the subject. The failure of sovereign power was not the absence of consent, but the refusal of the victim to speak. A torture victim could “choose” to become a martyr and thereby defeat the sovereign claim. He could, in other words, refuse to surrender, maintaining faith in his own god. What was unimaginable was that he could withhold speech simply because he did not consent. Those without faith, confess easily.¹⁵ In a sacred world, only one faith can displace another. For this reason, torture is associated with the struggle between faiths.

Every act of torture is a competition between the power of the sovereign to demand confession and the power of the victim to refuse and to die as a martyr. When we see torture reappearing in our own world, the question we must ask is whether it continues to perform the same truth function. To answer that question we have to take up a specifically political-theological perspective.¹⁶

The great transformation of political modernity was not the abandonment of the political-theological. Of course, there was some of this as Enlightenment values of doubt, reason, and objective investigation spread from the domains of science and production into the fields of political, economic, and social organization. But it is a mistake to view political modernity solely through this lens of bureaucratic/administrative rationality. The political space was not desacralized. The state remained embedded in the awe of the sacred, and sovereignty remained linked to sacrifice. The revolutionary change of modernity was the relocation of the sovereign from a sacral-monarch to the people as a collective, transtemporal subject. The popular sovereign remained as mystical and sacred an entity as the king ever was. “We the people” inspires awe and demands sacrifice. Indeed, sovereign destruction of the finite became wider and deeper, reaching out not in the occasional display of the scaffold, but as a systematic demand. In the modern nation-state, everyone lives under the power of the sovereign to demand a life (Agamben 1998; Kahn 2008).

After the death of kings, citizen participation in the sovereign no longer depends upon a ritual of sacral power. This god is no longer at a distance; mediation is no longer necessary. The structural change in the relationship of citizen to sovereign is exactly what the popular, political revolutions of the modern period owe to the earlier revolution in faith that was the rise of Protestantism. The rejection of the priestly role of ritual mediation between parishioner and God was not a rejection of the experience of the body of Christ as the community of the church. Participation in that body, however, was now immediate. The Protestant Christ is an immediate

¹⁵ There simply are no histories of martyrs who lacked faith.

¹⁶ See generally my two-volume political theology of modernity: Kahn 2005; 2007.

presence, requiring no external ritual, but only an inward turning. So it is with popular sovereignty. The ritual of torture no longer conveys sovereign presence in a political theology of immediacy. The disappearance of torture, however, hardly marks a disappearance of sovereign violence as the sacrificial destruction of the finite in and through the presence of the infinite. The modern nation-state is, if anything, more violent than its political predecessors.

The gap between sovereign and subject has been permanently overcome at the moment revolution is imagined as action by the popular sovereign. The king may have died, but the sacred quality of the sovereign remains, and it remains a hungry God. Since sovereignty no longer stands apart from the subject, its presence no longer terrorizes—although the awe remains. The site of sacrifice fundamentally shifts from the spectacle of torture to the confrontation of national armies on the battlefield. Even the battlefield turns out to be too limited a space for sovereign violence, which continually overflows any territorial limits until it fills the entire domain of the state. The combatant now stands for the citizen as everyman and, increasingly, every woman. Everyone is already vulnerable before any formal, legal act of conscription begins. The contemporary terrorist, in failing to respect the distinction of combatants from noncombatants, enacts the deepest meaning of citizenship in the modern nation-state: Political identity itself, not any additional act, is a matter of life and death.

Political modernity does not end the link of sovereignty to sacrifice. Rather, it generalizes sacrificial violence to an ordinary condition of life. We enter the age of citizen armies, of mass mobilization, of universal conscription—or at least the ever-present possibility of such conscription—and of pervasive vulnerability. The violence of the modern state continually lays claim to all of the resources—material and personnel—of the state. Today, war can involve everyone and everything. The naturalization oath of the United States, which makes explicit the sovereign demand on citizenship, expresses precisely an open-ended willingness to sacrifice: “I will support and defend the Constitution and laws of the United States against all enemies. [. . .] I will bear arms on behalf of the United States when required by law.”¹⁷ This oath is demanded of all who would become citizens, not just that small number of them who enter the formal ranks of combatants.¹⁸ The call to sacrifice can now appear as if from nowhere on a clear fall day in a large office building in New York. One is never released from a political identity that can demand a life. For this reason limitations

¹⁷ 8 USC §1448.

¹⁸ Those with religious objections may be granted an exemption from that part of the oath that refers to bearing arms. This exemption, however, is a matter of congressional discretion. See *Girouard v. United States*, 328 U.S. 61 (1946). In *Girouard*, the Court emphasized that under modern conditions of total war, all citizens, not just combatants, may be required to make the “supreme sacrifice.” *Ibid.*, 65.

on military service—traditionally women, but now homosexuals—will always appear as a denigration of equal citizenship.

The same shift was present in the wars of national liberation that characterized the post-War period, and continue in the Middle East today. These wars have not been about policy disagreements. Rather they have been about sovereign presence, which is signified by sacrificial violence. Any citizen can claim to embody the presence of the sovereign and take up arms as an expression of sovereign power. Similarly, any person can be the victim of this violence. Terror is a democratic form of sovereign violence, but surely we have known this since the French Revolution. Terror is simply the low tech form of total war, and the age of popular sovereignty is the age of total war (Bell 2008).

In the modern world, violence outgrew torture because sovereignty shifted from King to people. Political violence has become a practice of democratic participation. The revelatory power of the sovereign continues to occupy the body; it continues to lead to violent destruction. The sovereign made present in the sacrificial act today, however, is the popular sovereign. Killing and being killed, the citizen reveals that which he already is (Kahn 2005: 274–6). His truth lies within, not without. This does not mean that every time the state has recourse to violence the citizen-soldier steps forward to sacrifice. When the citizen fails to see the demand for violence as an expression of self-sacrifice for sovereign existence, he will see it only as an abuse of power; he will see it as killing and being killed for “no reason” at all.

Torture is the primitive religion of the state. It characterizes a sacred sovereign who has not yet fully and completely penetrated the body of the state. But in the modern state, every citizen already stands equally in the mystical corpus of the sovereign. This change in the character of the political-theological subject is the symbolic condition of revolution. Revolution is direct action by the popular sovereign; acting, citizens realize the truth of their being. They become that which they already are: “We the people.” This is most certainly not a shift from the mystical to the secular, nor is it a shift from a politics of violent destruction to one of physical well-being.

Torture was a ritual of mediation between sovereign and subject. When it succeeded, one saw only sovereign presence; when it failed, one saw only a brutal form of violence.¹⁹ The same phenomenon is visible in war today: Either it increases faith in the popular sovereign or it leads to a rejection of the practice as nothing but violence for partisan interests. About sacred presence, all one can say is that it either appears or it does not. There are no excuses, no normative claims that it “should be seen,” no representations of what might have been.

¹⁹ For this reason, Foucault points out the risk of political failure that always accompanied torture and execution on the scaffold. See Foucault 1977, 62–85.

Torture, in sum, falls away as an element in modern political practice because it is no longer an effective symbolic practice. It now appears as mere violence, not sacrifice. It is as if Abraham continued to sacrifice Isaac when neither any longer heard the voice of God demanding the act. We pass from the sacred to the abusive, from ritual to pathology. In an age of popular sovereignty, the idea of the scaffold as a site of competition between sacrifice and martyrdom no longer makes sense, for the criminal is no longer the enemy of the sovereign. The new site of competition between political faiths is the battlefield.

Turning away from torture has not meant abandonment of violence in our penal practices. In many ways, the United States has become increasingly violent in its attitude toward prisoners (Whitman 2003). The criminal, however, has been reconceived. He cannot be the enemy for he has been radically depoliticized. He is nothing more than a privative expression of political life, precisely because the victory of the popular sovereign has been so complete. The criminal has fallen away from what he already is: a member of the sovereign body. Because law is seen as the product of the popular sovereign, crime is a sin against one's own nature (Kahn 1997, chap. 4). In the United States, the idea of a political prisoner verges on being an oxymoron, which is one of the reasons why there has been so much uncertainty and debate about a turn to criminal law as the appropriate response to terror (Hakimi 2008; Fletcher 2007).

In this new world of popular sovereignty, the question is not whether the criminal has a political identity as such, but whether he can be "rehabilitated" to the point at which he can bear the single truth of his political identity. One of the archetypal stories of criminal redemption in the democratic state is that of the prisoner who volunteers for military service, redeeming himself by taking on the burdens of sacrificial violence.²⁰ Sacrificing himself, he realizes the truth of his being. If the scaffold produced truth by sacrificing the victim, the battlefield produces truth through an act of self-sacrifice. In the West, we are never far from the idea that through death is life. Progress, we think, is marked in this turn from being sacrificed to self-sacrifice, from the scaffold to the battlefield.

It is a misreading of our political practices to believe that the no-torture principle rests on a turn away from state violence, or even on a general desacralization of political beliefs and practices. The prohibition was rather a step on a path toward the generalization of political violence that characterized Western nation-states throughout the nineteenth and twentieth centuries—and is likely to remain true of the United States in the twenty-first. Torture has no place in the modern nation-state because it fails to correspond to the locus of sovereignty.

²⁰ Consider, for example, the film "The Dirty Dozen" (1967).

We condemn the violence of torture, but that condemnation must sound hollow to others when they see a nation that maintains, in the name of the people, a nuclear arsenal and a million-person army—and expresses a willingness to use both. The problem is not our condemnation of torture, but our failure to understand why it is that torture offends us. Torture offends our sense of the political-theological. With the passing of the king, the age of torture came to an end. Torture is no longer capable of embodying the relationship of sovereign to subject for there are no more subjects, only citizens. Citizens relate to each other as equal members of the popular sovereign bound to each other through mutual participation in sacrifice, on the one hand, and following the rule of law, on the other.

Wherever torture appears as an expression of sovereign power, there is an anachronistic claim to the localization of sacred violence. The worry that an American administration may support the practice of torture is a worry that there has been a fundamental failure in the politics of popular sovereignty. This is not primarily a failure of law or of morality—although it is both—but rather a failure in the politics of the sacred. That the threat of torture should appear alongside renewed claims for exceptional presidential power—that is, claims for an “imperial presidency”—is no surprise. Torture is the practice of power by the sacral-monarch. It makes no difference if he is elected, born to office or takes power through a coup—peaceful or otherwise.

My argument has so far focused on how and why torture fell out as a practice of violence between citizen and sovereign. The most immediate concern of torture today, however, focuses not on the citizen—citizens are specifically excluded from Guantanamo, for example—but on the non-citizen. Torture of the enemy is not exactly the same sort of metaphysical mistake as the torture of the citizen. A regime that prohibited torture domestically could be reconciled with the pursuit of torture abroad. Why is torture not just another form of warfare, even if it is no longer an acceptable part of criminal law?

Of course, the first thing to note in response is that we do practice torture against the enemy and, for many—both torturers and observers—it does not appear to present the same kind of problem as the practice of torture upon citizens. Nevertheless, it is also true that the displacement of torture by self-sacrifice in a regime of popular sovereignty colors the perception of torture wherever it is pursued by agents of the state. We do not think of ourselves as a people who practice torture.²¹ We don't practice torture because we believe in popular sovereignty. Sovereign presence is always marked by sacrifice. In a regime of popular sovereignty, sacrifice and self-sacrifice—killing and being killed—must coincide (Kahn 1999c). This

²¹ Consider the conflict between the FBI and the CIA on this issue. The former is primarily a domestic law enforcement agency; the latter practices violence against a foreign enemy.

conflict of intuitions—first, that torture of the enemy might be acceptable, and second, that a self-governing people do not torture—gives us our current torture debate, as expressed, for example, in the ticking time bomb example. Should we torture the enemy terrorist? Can we?

When we think about how modern states—that is, states organized under the principle of popular sovereignty—go to war, we see a generalization of the prohibition on torture, which begins with criminals and moves to enemies. These states imagine conflict as a reciprocal exchange of self-sacrifice. A regime of popular sovereignty does not imagine ruling over others; it does not imagine itself playing the role of sacral monarch over any subordinate population.²² Nevertheless, it does—and arguably it must—imagine citizens sacrificing themselves for the maintenance of the state. War remains a force that gives us meaning for it demonstrates faith in and through a willingness to sacrifice (Hedges 2003). Politically, nothing appears of higher value than the continued presence of the popular sovereign; one realizes wholly and completely one's faith in that sovereign presence only through the sacrificial act. Sacrifice without imperialism gives us the modern conception of a just war: Every war must be a war of self-defense.²³ Not aggression, but sacrifice for the defense of the nation. Torture strips violence of the element of self-sacrifice. We can no more do that than strip self-defense from the justification of the use of force. All these terms are set into relation with each other: Self-defense is to self-sacrifice as imperialism is to torture.

We learned in the latter half of the twentieth century that an ideology of self-defense can be just as dangerous, if not more dangerous, than an ideology of aggression. Indeed, we learned that these can be hard to tell apart (Franck 1970). For the sake of self-defense, the superpowers were willing—and we remain willing—to threaten nuclear annihilation. This is just the position that the egalitarianism of popular sovereignty can lead to: A perfect and complete union of killing and being killed that encompasses the entire population. When there is no value higher than sovereignty, there may be no limits on war—even a war in self-defense. This is where we ended the twentieth century: We could imagine mutual assured destruction, but we could not imagine torture. This is hardly a matter of moral progress. Even the International Court of Justice when asked for an advisory opinion on nuclear weapons, could not rule they were illegal, since self-defense was an unlimited first principle of sovereignty (Kahn 1999b). No state need imagine its own surrender. Yet, that Court, we can be sure, would have no such trouble ruling that torture is illegal—the no-torture rule is the very paradigm of a *jus cogens* norm.

²² From this, some have theorized a democratic peace. See, e.g., Doyle 1983a; 1983b.

²³ See U.N. Charter, art. 51 (referring to the “inherent right of individual or collective self-defense if an armed attack occurs.”)

The evolution of the prohibition on torture, accordingly, is bound up with the evolution of total war because total war is the expression of the sacrificial character of violence under a regime of popular sovereignty. No one is tortured because all are potential combatants. The no-torture rule is the negative expression of the reciprocal recognition of killing and being killed that lawful combatants extend to each other. We are, as I said at the beginning, differently violent, not less violent, in our political faith. We imagine political violence as reciprocal self-sacrifice, not sacrifice of the other. This is what lawful combatants do: They extend to each other the possibility of self-sacrifice—known as “the combatants’ privilege.” This is why, from the outside, war makes no sense. It cannot be reduced to, or explained by, an appeal to some other set of concepts.²⁴ It is not moral and rarely profitable. It totters between appearing to be the most important practice and most senseless practice of the state. It is, in this respect, like any other religious ritual. Without faith, it appears senseless.

The prohibition on torture emerges out of this only half-understood social imaginary of a practice of self-sacrifice in the modern age. It reflects a history of the imagination, not an abstract moral principle by which we distinguish torture from those other forms of horrendous violence to which we remain committed. For this reason, the prohibition is always vulnerable in situations in which our intuitions fail us. The war on terror is just such a situation of failure, which is why we find ourselves in an endless discussion about recourse to torture.

Precisely the problem with terror is that it is violence outside of the reciprocal recognition of self-sacrifice. It is more like torture than combat: The unilateral direction of violence against a victim for the sake of making present a sacred meaning that is resisted in the body of the victim. The terrorist may sacrifice himself, but he does not recognize his victim’s faith as grounding a reciprocal act of self-sacrifice. When the terrorist kills proclaiming the greatness of his god, we are very close to witnessing again the spectacle of the scaffold. We see the capacity of faith in the sacred—a sovereign force—to destroy as it fully occupies the injured body.

The response to such a ritual of destruction will be to try to reverse the hierarchy of meanings at stake. Just for this reason, terror invokes torture. This is a competition of faiths in the most primitive key of violence. Each side will injure and kill for its faith. Each tries to degrade the other by proving, through the violently destructive act, that the enemy believes in a false god, that is, one that cannot save him from being sacrificed. Neither extends recognition to the other. Just this denial of recognition is at stake in the Bush Administration’s insistence that the terrorist is an “unlawful combatant.” What this really means is that he has no privilege of self-sacrifice. He is to be reduced to nothing at all; he is to be nothing more

²⁴ Carl Schmitt already made this point in Schmitt 1996.

than a locus for the showing forth of our sovereign power. This is the dynamic of torture. It does not matter whether the victim is disappeared in the black hole of legality that is Guantanamo or physically abused. In fact, we cannot tell them apart, for both work with the same elements of the political imagination: What the Torture Convention refers to as “inhuman or degrading treatment.”

In this essay, I have tried to speak of torture without speaking of law. Our objection to torture has little to do with our perception of a violation of law. To juridify torture, as Alan Dershowitz suggested in his proposal for torture warrants, would not change our perceptions (Dershowitz 2002). We cannot understand sacrificial violence from within the structures of law. Political violence—killing and being killed—is always beyond the capacities of law to comprehend. Law, after all, is about justice and well-being, not about sacrifice. We go wrong when we try to comprehend our reactions to torture as if the issue were either a matter of violence or of law. Torture, like all forms of political violence, is a symbolic practice. The right question, therefore, is what does it mean? Only when we ask that question can we understand why it is banished, why it reappears, and why a country as committed to the use of violence as our own can nevertheless believe that there is something at stake in the no-torture rule.

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References

- Agamben, G. 1998. *Homo Sacer: Sovereign Power and Bare Life*. Stanford, Calif.: Stanford University Press.
- Arendt, H. 1970. *On Violence*. New York, N.Y.: Harcourt, Brace & World.
- Aristotle. 1941. Rhetoric. In *The Basic Works of Aristotle*. Ed. Richard McKeon. New York, N.Y.: Random House.
- Augustine. 1960. *The City of God*. Vol. 6. Trans. W. Green. Cambridge, Mass.: Harvard University Press.
- Barak, A. 2002. Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy. *Harvard Law Review* 116, 16: 148–60.
- Bell, D. 2008. *The First Total War: Napoleon's Europe and the Birth of Warfare as We Know It*. London: Bloomsbury.
- Castelli E. A. 2004. *Martyrdom And Memory: Early Christian Culture Making*. New York, N.Y.: Columbia University Press.
- Dershowitz, A. 2002. *Why Terrorism Works: Understanding the Threat, Responding to the Challenge*. New Haven, Conn.: Yale University Press.
- Doyle, M. 1983a. Kant, Liberal Legacies and Foreign Affairs. *Philosophy and Public Affairs* 12, 3: 205–35.
- Doyle, M. 1983b. Kant, Liberal Legacies and Foreign Affairs. Part 2. *Philosophy and Public Affairs* 12, 4: 323–53.

- Fletcher, G. 2007. The Law and War and its Pathologies. *Columbia Human Rights Law Review* 38, 3: 517–46.
- Foucault, M. 1977. *Discipline and Punish: The Birth of the Prison*. Trans. Alan Sheridan. New York, N.Y.: Pantheon Books.
- Franck, T. 1970. Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States. *The American Journal of International Law* 64, 4: 809–37.
- Gierke, Otto. 2002. *Political Theories of the Middle Age*. Union, N.J.: Lawbook Exchange. (1st English ed. 1913).
- Girard, R. 1977. *Violence and the Sacred*. Trans. Patrick Gregory. Baltimore, Md.: Johns Hopkins University Press.
- Greenberg K., and J. Dratel, eds. 2005. *The Torture Papers: The Road to Abu Ghraib*. Cambridge: Cambridge University Press.
- Hakimi, M. 2008. International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict and Criminal Divide. *The Yale Journal of International Law* 33, 2: 369–416.
- Hedges, C. 2003. *War Is a Force that Gives Us Meaning*. New York, NY: Anchor Books.
- Holmes, S. 2009. In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror. *California Law Review* 97: 301–51.
- Hubert, H., and Mauss, M. 1964. *Sacrifice: Its Nature and Function*. Trans. W.D. Halls. London: University of Chicago Press.
- Kafka, F. 1995. In the Penal Colony. In F. Kafka, *The Metamorphosis, In the Penal Colony, and Other Stories*. Trans. Joachim Neugroschel. New York, N.Y.: Simon & Schuster.
- Kahn, P. W. 1997. *The Reign of Law: Marbury v. Madison and the Construction of America*. New Haven, Conn.: Yale University Press.
- Kahn, P. W. 1999a. *Cultural Study of Law. Reconstructing Legal Scholarship*. Chicago, Ill.: University of Chicago Press.
- Kahn, P. W. 1999b. Nuclear Weapons and the Rule of Law. *New York University Journal of International Law and Politics* 31, 2–3: 349–416.
- Kahn, P. W. 1999c. War and Sacrifice in Kosovo. *Philosophy & Public Policy* 19. http://www.puaf.umd.edu/IPPP/spring_summer99/kosovo.htm
- Kahn, P. W. 2000. *Law and Love: The Trials of King Lear*. New Haven, Conn.: Yale University Press.
- Kahn, P. W. 2005. *Putting Liberalism in Its Place*. Princeton, N.J.: Princeton University Press.
- Kahn, P. W. 2007. *Out of Eden: Adam and Eve and the Problem of Evil*. Princeton, N.J.: Princeton University Press.
- Kahn, P. W. 2008. *Sacred Violence: Torture, Terror and Sovereignty*. Ann Arbor, Mich.: University of Michigan Press.
- Langbein, J. H. 1977. *Torture and the Law of Proof: Europe and England in the Ancien Régime*. Chicago, Ill.: University of Chicago Press.
- Luban, D. 2005. Liberalism, Torture, and the Ticking Time Bomb. *Virginia Law Review* 91: 1425–62.
- Sarat, A. 1999. Remorse, Responsibility, and Criminal Punishment: An Analysis of Popular Culture. In *The Passions of Law*. Ed. S. A. Bandes, 168–90. New York, N.Y.: New York University Press.
- Scarry, E. 1985. *The Body in Pain: The Making and Unmaking of The World*. Oxford: Oxford University Press.
- Schmitt, C. 1996. *The Concept of the Political*. Trans. G. Schwab. Chicago, Ill.: University of Chicago Press.

- Timerman, J. 1981. *Prisoner Without a Name; Cell Without a Number*. New York, N.Y.: Knopf.
- von Clausewitz, C. 1976. *On War*. Ed. and trans. Michael Howard and Peter Paret. Princeton, N.J.: Princeton University Press.
- Walzer, M. 1977. *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. New York, N.Y.: Basic Books.
- Whitman, J. 2003. *Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe*. New York, N.Y.: Oxford University Press.