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SACRED VIOLENCE

TORTURE, TERROR, AND SOVEREIGNTY

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CROSSING THE BORDER
BETWEEN LAW AND SOVEREIGNTY

JUXTAPOSING THE TICKING TIME BOMB and the hand grenade hypotheticals poses the question of the relationship between torture and self-sacrifice. If I am willing to suffer terrible bodily injury and even die for the political community, should I be equally willing to do the same to others in order to protect the community? Ordinarily, suffering and acting do not stand in a relationship of reciprocal implication, morally or legally. I might, for example, be willing to give up a kidney for a friend or family member, but that does not mean I am willing to take one from an unwilling donor. Similarly, I might be willing to give up a meal to someone in need, but I am not willing to steal from another for the same purpose. Strikingly, even my willingness to give up something—a kidney or a meal—for someone does not give me a right—legal or moral—to demand one when I am in need. It does not even give me a right to demand reciprocity from my previous beneficiary, although under certain circumstances such “gifts” might create an expectation of response.¹

Insofar as personal sacrifice enters into the modern legal regime, it looks like a unilateral gift. Stripped of a context of informal rules of ex-

change, sacrifice does not create rights or obligations. Before it can do so at law, it has to take on a quasi-contractual form—for example, in the doctrines of unjust enrichment, promissory estoppel, or implied contract. My willingness to sacrifice, accordingly, does not ordinarily give me rights against anyone else. Yet, in the context of political violence, our ordinary intuition of asymmetry between suffering and acting seems to miss the normative order of the exceptional situation. When we turn to the defense of the state, we find just the reciprocity that the legal order denies: sacrifice is inextricably linked to inflicting violent injury, being killed to killing.

Regularly, the state places its citizens in a position in which the willingness to sacrifice life stands in a reciprocal relationship to the license to kill. The ethos of the battlefield, including the combatant's immunity, rests on just this principle: a license to injure and kill is granted to those who suffer the risk of injury and death.² Approached from this perspective, the two examples of the ticking time bomb and the hand grenade are deeply interconnected: the willingness to throw oneself on the hand grenade creates a license to inflict injury and death. It is not just that the willingness to sacrifice creates a psychological willingness to injure in the form of revenge or preemptive action. Killing and being killed here work in the dimension of political culture, which is both normative and objective. It is a literal license to kill. Acting on this license is not just excused; it is demanded and celebrated. It is political duty, not personal interest.

Killing and being killed is a demand that only the state can make on its members. It is the "sovereign prerogative" to demand a life. To act on that demand is more than accepting a delegation of sovereign power. It is to participate in sovereignty; it is to be as an instance of the sovereign. A sacrificial politics is not one in which I get something in return for offering up my life. One hundred years ago, Hubert and Mauss argued that sacrifice is misconceived as an exchange with the gods. Rather, sacrifice is a means of consecrating, of participating in the sacred.³ Short of that, sacrifice is either suicide or murder, which is exactly how it will appear to those not enthralled by the sovereign god of the sacrificial community.

The problem of the torturer is not that he injures for political reasons but that he has not crossed the border from law to sovereignty. The torturer acts as if he is at war, inflicting injury for the sake of a con-

fession of defeat, but he does so within the borders of law. Accordingly, he remains outside of the sovereign ethos of violent reciprocity. Exactly for this reason, when perceptions of risk differ, there will be conflicting claims over whether an act of violence is torture or combat.

Torture is a form of riskless warfare, which is always ethically problematic.⁴ The torturer injures without accepting the reciprocal burden of injury—a paradigm of illegality. Surely, however, it is not enough to view the torturer in isolation and ask whether he, at the moment of action, faces a sacrificial demand. The combatant whose role is to launch missiles or drop bombs may not be personally at risk. Similarly, the target need not be someone who is immediately threatening injury—for example, combatants may be attacked even while sleeping. In both directions, the risk runs to the group of combatants of which the actor or victim is a part and, through them, to the nation. The individual bears the sacrificial demand as a part of the sovereign. It is not any risk of injury or death but the life and death of the political entity that must appear to be at stake. This is the power of the ticking time bomb example. It asserts that the torturer is indeed at risk for the bomb is an attack on the sovereign. When we don't believe there is a bomb or we don't believe it constitutes a threat to the sovereign, then we see the threatened injury as the illegal act of torture.

The same dynamic of risk and no risk by which the torturer places himself inside and outside of the reciprocity of combat is visible with respect to terrorism. The suicide bomber literally sacrifices himself; he has adopted a form of warfare that allows him to display the reciprocity of killing and being killed characteristic of sacrificial violence. He may adopt this form of violence for purely tactical reasons, judging conventional forms of warfare to be futile given the asymmetry of resources. Nevertheless, his act of sacrifice places him in an entirely different category from the terrorist who causes injury but does not expose himself to reciprocal injury. For just this reason, there has never been universal condemnation of terror as a form of warfare, and the suicide bomber is a particular object of respect in much of the world. The terrorist as combatant in the wars of decolonization and liberation has been celebrated. He is condemned only when he crosses into the domain of riskless killing—for example, targeting soft, civilian targets and not exposing himself to the possibility of reciprocal violence.

The reciprocity of killing and being killed has nothing to do with

agreement between the combatants. There is no meeting of the minds between particular combatants or between their respective states by which each grants the other a right to use deadly force. The decision to go to war usually results from a failure of agreement or a unilateral act of aggression.⁵ The warrant for violence derives from the sovereign, not from the enemy either individually or collectively. That warrant, however, has nothing to do with a contractual relationship between sovereign and combatant. There is, for example, no distinction to be drawn between voluntary and compelled sacrifice. The conscript's death on the field of battle is no less a political sacrifice than that of the volunteer. The hand grenade example is not specific to combatants: the grenade can appear before anyone and at any time. This, for example, is the way in which United Flight 93, brought down by the passengers on 9/11, has been interpreted. Legal conscription is only a regularized form of a relationship that is always an implied possibility—a background condition—of popular sovereignty.

Western politics has expressed the same fundamental faith as Western religious practice: only by demonstrating a willingness to die does one participate in the sacred. This is the reciprocity of being sacrificed and sacrificing. If the aim of the political community were to exit the domain of death that is the Hobbesian state of nature, a sacrificial politics would be a logical contradiction. At the moment the state demands my life, Hobbes thought it exceeds the terms of the social contract with which the citizen must comply.⁶ Experiencing a threat of death from the state—indeed, a threat of a short, nasty and brutish life—men are back in the Hobbesian state of nature. If so, they are free to flee the community and start over elsewhere—exactly the option that Socrates rejected. If the state is approached as a means to individual well-being, then neither sovereignty nor sacrifice will ever appear. We will be left with a theory of law that never reaches the experience of the political, which is just what liberal political theory has offered for three hundred years.⁷

A sacrificial politics is one in which the violent destruction of the self is the realization of the transcendent character of the sovereign. The infinite value of the sovereign displaces the finite value of the individual. That displacement is the violence that creates meaning: sacrifice. This is the violence at stake in both the ticking time bomb and

the hand grenade examples—violence that is neither legal nor illegal but beyond law. Sanctified by sacrifice, the individual gains the sovereign power to take life.

Sacrifice as an act of creation through destruction is simply invisible to the law. Legal rights generally give the bearer either a right to exclude—for example, property or privacy—or a right to demand something—procedural or substantive—of the state or another person. The sovereign claim is wholly violative of the ordinary rights to life, property, procedure, and privacy that protect the person from state intrusion. The modern nation-state includes both of these moments: a symmetry of killing and being killed whenever sovereign existence is at issue and an asymmetry of rights and exclusions within the legal order. Negotiating between these two logics is a problem for both theory and practice. The problem, to use the terminology from the last chapter, is to negotiate back and forth between the pledge and the constitution, between the border and the interior of the state, between the ethos of sacrifice and that of law. This is a twofold problem of transgression and separation. When sacrificial violence occurs within the domain of law, we speak of torture and terror.

Transgressing the Border

The border is the point of contact between these two forms of the political imagination: the rule of law and the politics of sovereignty. It is simultaneously the point at which the existence of the sovereign is at issue and law has its origin. This makes the border an inherently dangerous place. Borders operate both temporally and spatially. The violence of the former is revolution; the violence of the latter is war. At both, the sign of the sovereign presence is sacrifice.

Time

Violence is inseparable from revolution because revolution only begins with the rejection of the possibility of reform through legal processes.⁸ Revolution is change outside of law. The revolutionary goes beyond the civil disobedient even though the actions of both will be identified as criminal by existing legal institutions. The revolutionary, however, re-

jects the right of the government to label his behavior criminal and, accordingly, rejects its right to enforce that law. His fundamental challenge is not to particular laws but to the government's claim of the sovereign authority to use violence. The revolutionary always claims to speak in the sovereign voice—the voice of the people. He shows forth the sovereign character precisely in his willingness to sacrifice. A revolutionary unwilling to sacrifice himself is not imaginable as a serious political actor. We can, of course, imagine revolutionaries committed to nonviolence—they will sacrifice themselves but not injure or kill in return. This is the powerful presence of the Christian imagination, which shows us the priority of suffering in the construction of meaning.

The revolutionary founding of the state violates two fundamental moral commandments—the prohibition on worshipping new gods and the prohibition on murder. The sovereign appears as a new god, and for the sake of that god the citizen enters into a sacrificial space of killing and being killed. The violation of these norms takes us very close to the place of terror and torture in the politics of sovereignty. The appearance of the sovereign terrorizes. That appearance always conveys something of the *mysterium tremendum*. It condemns the existing order as fallen—or, in political terms, illegitimate—and threatens its destruction. Nothing, I imagine, is more horrific than living in the midst of the revolutionary birth of a new sovereign. War may be as terrifying as revolution, but terror has a special place in revolution because revolutionary violence extends across the entire populace. No one is excused from a revolution. The distinction of combatants from non-combatants can get no foothold.

The French label a moment in their revolutionary process “the Terror.” That moment has been repeated in numerous revolutions ever since. Revolutionary violence can become an end in itself because no normalized institution, no ordinary course of living, appears adequate to embody this new, sacred force of sovereignty. Even the less violent American Revolution terrorized large elements of the population: little kindness or legal regularity was extended to loyalists or those suspected of being loyalists.⁹ More recently, the birth of Israel was accompanied by the terror of Irgun and the practice of ethnic cleansing. These practices of terror were widespread in the process of decolonization. Not surprisingly, the leaders of the Cambodian and Iranian revolutions had

spent their exiles in Paris. More recently still, the violence of the former Yugoslavia demonstrated the potential for revolutionary terror that remains in Europe itself.

If successful, this moment of terror is recorded as a moment of transcendent significance in the state's narrative. There is no memory of failure except in the record of the application of law to criminality. Soldiers, too, report this double experience of terror and the transcendent as a characteristic experience of the battlefield. Terrorized, they are nevertheless touched by the sacred—so much so that what may appear from the outside as the worst experience of a life becomes, from the inside, the organizing point of meaning for an entire life.¹⁰ Terrorists are supported in their practices and beliefs by the same experience of sacred violence. That does not mark a moral equivalence among terrorists and revolutionaries any more than all religions have the same moral value even when they rest on a similar experience of the sacred. Just the opposite, moral evaluation should not be confused with the political-theological experience of the sacred. Sovereign violence never speaks a universal language of morality.

The sovereign is born in a sacrificial shedding of blood that marks a new appearance of the sacred. One knows that the popular sovereign is present not by counting the numbers in the crowds but by witnessing acts of sacrifice.¹¹ The power of the sovereign is that of taking possession of the body of the citizen, emptying it of any meaning that it may have previously represented, and claiming it entirely. That claim takes the twofold form of killing and being killed. Traditionally, the power of a god was displayed in its capacity to destroy. Sovereign violence perpetuates this elemental form of the sacred. Terrorist violence, no less than lawful forms of combat, is an insistence that others see the same presence of the sacred.

I don't offer any of this as a prescription for violence in the place of nonviolence. The point is not that violence is good but that we cannot disavow political violence—and the terror that accompanies it—without disavowing revolution. From the perspective of revolution, the choice between violence and nonviolence, even at a moment of great political possibilities, can come down to a matter of tactics. The velvet revolutions in Eastern Europe were largely tactical successes; the protests at Tiananmen and Beirut were not.¹²

The revolutionary emergence of popular sovereignty in the West was obviously marked by sacrificial violence. Even nonviolent revolutions, however, require a willingness to sacrifice. A revolutionary movement cannot succeed if at the threat of violence the people retreat from the public forum. This is illustrated not just by the recent velvet revolutions but also by the American civil rights movement. Sacrifice was a lingering demand on the American black community, in part, because the slaves had been freed largely through the sacrificial acts of others.¹³ The Civil War, not a slave rebellion, ended slavery. The change of legal rights was not enough in itself, however, to change the perception of political meaning attached to the black person's body. Participation in the sovereign body could not be advanced short of the demonstration of a willingness to sacrifice, to bear in one's own body the violence of the state.¹⁴ For the nation's black community, this change in symbolic perception began in earnest during World War II. It became a revolutionary program with the civil rights movement, which was characterized by suffering bodies in the streets. When southern states mobilized the coercive mechanisms of law enforcement against the protestors, they created a classic confrontation between law and sovereignty. Who stood for the nation became an open question: Bull Connor or Dr. Martin Luther King Jr.¹⁵

Nonviolence, for King, did not mean an absence of violence. Rather, it meant sacrifice: creative destruction. In politics, sacrifice is always the foundation; dying always has an existential priority over killing. The point is lost if one views a political movement only as conveying a moral message. Of course, political actors believe in the morality of what they are doing. But those moral norms are embedded in a political experience of sacrifice. At issue is not merely the moral character of the nation's laws and practices. Rather, the soul of the nation is at stake. The achievement of the civil rights movement was to displace the image of the suffering black body from that of the lynch victim to that of the political martyr—for example, Medgar Evers and—most important—King himself.¹⁶ These sacrifices are misread and belittled if stripped of their political claim to the sovereign presence. They are not only representations of injustice; they are a new showing forth of the sacred character of the sovereign. If it is seen only within the lens of a claim for justice under law, then the black community looks no differ-

ent from a community of aliens that might also seek the equal protection of the law. Sacrificial suffering was about more than such legal treatment. It was about that intersection of being and meaning that is the politics of sovereignty.

The civil rights movement and the largely concurrent antiwar movement differed fundamentally in their achievement of the politics of sacrifice, even though the moral positions of the two were linked. The civil rights protesters are remembered as martyrs; not so the antiwar activists of the 1960s. One group is memorialized; the other is amnestied. There is no memorial for those Vietnam protesters who went to jail or those draftees who fled the country. Even if we agree with the moral claims behind their actions, they are not memorialized, just as there is no memorial for those who suffered the police violence in Chicago in the summer of 1968. Martin Luther King Jr.'s sojourn in a Birmingham jail, on the other hand, is recognized as a form of sacred suffering. The letter he wrote there is part of the canon of American political life. The suffering in Selma and Birmingham is memorialized in books, films, and monuments.

The participants in these "revolutionary" political movements often claim for themselves the virtues of the "true" Constitution in the same way that the American founders appealed originally to the "rights of Englishmen." But law, constitutional or otherwise, is not a hypothetical argument that can be made from the reading of a text. Rather, it is a practice linking interpretation to institutional forms of coercive power. A court's interpretation of the text is not authoritative because it is the "best" interpretation but because the mechanisms of state authority act on that interpretation and not on others.¹⁷ Regardless of their legal claims, revolutionary actors stand against law; they stand instead in the tradition of "self-evident truths." We know this precisely because they are willing to sacrifice themselves in their opposition to the judgments of legal institutions. King bases his authority on a "dream" not a court order. His dream is just another way of speaking of "self-evident" truths in an age skeptical of natural law. These conflicts do not end when the court speaks; they end when the court speaks the "truth."

Revolution is direct action of the popular sovereign. Short of that, a political movement is one only for reform, in which case violence is not threatened and sacrifice is not demanded. Reformists seek to mobilize

voters; they do not challenge the claim of the institutions of governance to represent the sovereign. Liberal states successfully transit from revolution to constitution, from the ethos of sovereign violence to the rule of law. That transition, however, is never complete, not just because the revolutionary reappearance of the sovereign remains a possibility but also because sovereign violence threatens as an imaginative possibility at the spatial border of the state.

There is nothing liberal about sacrificial violence. When the ends of politics move from advancing well-being to sacrifice, we have moved from law to sovereignty. Only the sovereign can claim a life; only for the sovereign are citizens willing to give their lives. One could abandon the World Trade Organization; one could even cause it to break down. But there is no conceptual space for a revolution against the WTO, for it makes no claim to sovereign authority. At the core of revolution is the existential claim of the sovereign to dwell in the state. When all possible change is seen from within the imaginative matrix of reform, when every issue becomes a suggestion for a legislative initiative or a matter of litigation, then sacrifice has no place and sovereignty is no longer an aspect of political experience.

Space

The popular sovereign makes an appearance that is the origin of history within a people's narrative. Equally, every sovereign is attached to a land. Traditionally, a sovereign god was always the god of a particular place. A universal god is as disturbing a thought as a universal, political sovereign. Christianity appears as a religion making a universal claim, but in order to make that claim the Christian must engage in self-sacrifice without sacrificing the other. He must be killed without killing. Absent that, claims to universality become just another form of imperialism—the victory of one faith over another. A universal politics of suffering without killing would not be a politics of sovereignty at all. To the ordinary political imagination, it looks like nothing more than slavery.

War, like revolution, puts at issue the same existential claim of sovereignty. It does so, however, in the spatial dimension. War begins with a transgression of the border. Its end is to push the enemy back across the border.¹⁸ Not every war is literally fought at the border, but every

war imagines itself as a “pushing back” of an enemy across a border. Today we know that war can as easily take the form of the expulsion of peoples—ethnic cleansing—as the movement of borders. These are two expressions of the same phenomenon of securing a space of sovereignty.

There is an implicit threat of war as long as one can imagine a contest across a border. Even today, when advanced technology shapes the imagination, what is “star wars” but a technological fantasy of securing the borders? The dream of peace remains that of sealing the country from any form of cross-border invasion.¹⁹ This is why the UN Charter models the “inherent right of self-defense” as the response to an armed attack across a border.²⁰ It is also why the fundamental principle of the postwar, international legal order turned out to be the immutability of borders: *uti possidetis juris*.²¹ If the charter imagined a world without war, then it necessarily had to try to create a world in which borders would not be contested. In the first decades of the UN's existence, this meant trying to match borders to a communal imagination of political identity—the movement of decolonization. In recent decades, it meant to create a transnational sense of identity in which borders were merely administrative demarcations—the movement of globalization.

The European Union represents a largely successful shift in the political imagination of the border. Member states can no longer imagine, vis-à-vis each other, a threat across the border. The border ceases to be a space for sovereign action; it is merely administrative. The border between Canada and the United States has long had a similar status: it is not just demilitarized but depoliticized. Once imagination of the cross-border threat is gone, problems between states appear as policy issues to be negotiated in the same manner as domestic issues. For most of the world, however, including the United States in its other relations, this borderless world has never materialized. Indeed, the dangers from across the border became all the greater with technological advances in weapons delivery systems, as well as with the turn to terror as a form of warfare.²² In the West, the fear of the terrorist transgression is, for the most part, a fear of alien penetration, while in the rest of the world it is often a fear of revolution.

The post-Cold War world presented a conceptual puzzle. On the one hand, it was to be an era of globalization in which borders would

no longer function as barriers to the free flow of commerce, ideas, and people. An increasingly cosmopolitan identity would expand the horizon of concern beyond the localism of place. The global rule of law and the global market were the most important projects of social construction at the beginning of the new millennium. This idea of a global order that transcends borders was only imaginable, however, to the extent that states felt no existential threat. Absent such security, the lowering of the valence of borders simultaneously pointed to a global order of law and a threat to sovereignty.²³ This tension was substantially ignored until September 11, 2001. In the aftermath of the attack, however, there were immediate arguments that globalization was a threat to national security. The reaction has been a focus on the border—on fences, surveillance, and, of course, the cross-border movement of peoples. To many, that focus seems disproportionate to the actual threat from this source.²⁴ The real point is just the opposite: the hysteria over the border is not an indication of actual threat but of the imagined existential challenge to sovereignty. War, including a war on terrorism, requires defense of the borders and expulsion of the alien. This is exactly what we have seen over the last six years in the United States and increasingly in Europe as well—not to speak of Israel's commitment to the construction of an actual fence.²⁵

The border provides a geographical representation of the possibility of the existential threat that is war. Because the border symbolizes sovereign danger, it is imagined as a violent place that never fits easily into the legal regime. This is true even during periods in which there is no explicit, direct threat. For example, the American law of the border has repeatedly affirmed the "plenary" power of Congress. *Plenary* is a technical term for identifying points at which political discretion effectively supersedes a judicially enforceable legal regime.²⁶ The ordinary rule of law doesn't apply in this place—so much so that the geography of the border is itself destabilized. At law, the border is not a geographical place: people who literally cross a geographical marker have not necessarily "entered" the space of the country.²⁷ They only enter the country when they pass from the regime of sovereignty to that of law. The function of the border is symbolic transit. That function may appear deep within the geography of the national space.²⁸ It may also ap-

pear outside that space entirely. There is, for example, a tradition of understanding flagged vessels as sovereign territory.²⁹

The border unavoidably has this unstable nature, for there is no ideal of justice by which we can distinguish between citizen and non-citizen. This is a political distinction maintained by force and the threat of force. Aliens are those who can be excluded at the border; citizens are those who can freely cross. Because exclusion and penetration are at issue, the border is quite literally a space of life and death.

Wherever the violent act of exclusion occurs, we are at the border. There the citizen can be asked to sacrifice himself to maintain the sovereign while the alien quite literally puts his life at risk as he approaches. The violence of the border, its existence beyond the order of law, is nothing other than a recognition and replication of the killing and being killed that is at the foundation of the polity. The border is, in this sense, the archetypal space of sovereignty, just as revolution is the archetypal time of sovereignty. Even the peaceful border between the United States and Canada and the somewhat less peaceful border with Mexico are remnants of past violence.

The ticking time bomb example places us at an imagined border. Indeed, the power of the hypothetical arises from its paradigmatic representation of the problem of establishing the secure borders that are the condition of law. The presence of the bomb represents a breach of the border. The jurisdiction of law, represented by the no-torture principle, shrinks to the dimensions of the cell itself. The question is whether even those borders will be breached. We can defend law, but only in a rapidly diminishing space, as the threat of terror appears as if it could burst forth anywhere. Thus, the ticking time bomb is a kind of parable that asks the central question of modern politics: At what point does the domain of law give way to the violence of the border? When are we secure enough that violence can be pushed out of sight and we can live as if law and politics were coextensive? The hand grenade example answers this question: it shows us the violent transgression of the border of the cell itself and, with that, the end of law.

The juxtaposition of the two hypotheticals suggests a kind of political phenomenology: law gives way at the border, and citizens are at the border when they confront a demand for sacrificial violence. Whether

an act is perceived as torture or warfare depends on this perception of the security of the border.³⁰ Accusations of torture often look unjust to the perpetrators precisely because they do not share the view that the space of custody has established secure borders within which there has been or can be a return to law. They believe that they are pursuing the sacrificial symmetry of warfare—killing and being killed. The dirty warriors of Argentina thought they deserved medals for winning the war on subversives, not prosecution for violating the law.³¹ Torture is the continuation of warfare within the space of custody. Because terror breaches the borders in an indeterminate and amorphous fashion, a war on terror will always be mired in ambiguity: Is it torture or combat? Torture and terror both exist in this gray zone of transgression when sacrificial violence appears within the bordered space of law.

The Disappeared

Torture and terror are violent forms of the production of truth: the truth of political sovereignty. The task of political philosophy is not to condemn their lawlessness but to understand the social imaginary within which this political violence not only makes sense but appears necessary. That social imaginary is one in which the polity is an expression of the will of the sovereign, the community rests on an erotic bond—not a judgment of reason—and citizen participation in the sovereign is realized through sacrifice. The sovereign has its origin in the pledge, the action of the pledge is sacrifice, and the locus of sacrifice is the border. Sovereign and sacrifice form a linked pair: sacrifice is the transformation of the finite self into an expression of the infinite value of the sovereign, and sovereignty comes into existence only through the sacrificial destruction of the finite body.³²

The subject, or bearer, of sovereignty in the West has moved from God to monarch to the people.³³ The point, however, is always the same. The sovereign is the source of meaning: it is not a means to any end apart from itself. It reveals itself in the act of sacrifice. Terror and torture are contemporary forms of killing and being killed in the political-theological space of sovereignty. We can try to cabin sacrificial violence by law. Indeed, that has been the project of modern international law.³⁴ It has not, however, had great success. In the twentieth century,

we had more and more law, but violence always escaped the boundaries of law. The forms of violence may be changing in the twenty-first century, but the general pattern of more law and more violence looks to remain the same.

Today's war on terror is a confrontation between two political-theological constructions of meaning, only one of which is Western but both of which operate on the same ground of sacrificial violence. Once politics enters the domain of sacred violence, conflict takes the form of each side seeking to prove the other an idolater—that is, a worshiper of false gods, which means a worshiper of nothing at all. The body of the enemy must be read as a sacrifice for our god alone. In the classical tradition, defeat was the moment at which all the men were killed, the women and children sold into slavery, and the city razed. A people are literally destroyed to prove the emptiness of their faith. Today we call that practice genocide. The legal prohibition has hardly done away with the impulse; it has not even eliminated the practice.

A war on terror practices its own form of victory over idolatry: to disappear the enemy. The general theme is as old as Sophocles' *Antigone*, which begins with the dead body of Polynices lying outside the city's walls. The issue is whether that body will become the object of traditional religious ritual. To leave the body unattended outside the walls—the borders—is to leave it in an empty space where sovereign power expresses itself in death without memory. Polynices' body expresses nothing except the power of the city to exclude and thus make of him nothing at all. What his sister, Antigone, demands out of respect for family and religion would, were it to be granted, simultaneously create the possibility of political memory.

Similarly, in the contest of meaning over today's terrorist, the state would treat him as less than a common criminal. Criminals remain members of the community; they are extended recognition through law.³⁵ Like the observance of a religious ritual for Polynices, participation in the legal process implies recognition and respect. The terrorist, however, is to be denied even that much recognition. Best of all, from the sovereign point of view, would be to “disappear” him, to remove him from the human world of memory. This was no doubt the impetus behind the creation of extrajudicial prisons by the Americans after September 11. The state's end is to leave the terrorist perpetually in the

space of sovereignty beyond the walls of law. For the United States, that space was to be Guantánamo.³⁶

Just as Polynices is left to be eaten by animals, and so made invisible in death, the modern state would render the terrorist invisible. He is denied the visibility of the sacrificial act—that is what it means to be an “unlawful combatant.” Invisible, he cannot appear as a martyr for his own political faith. The most basic privilege of the lawful combatant is to claim recognition for his sacrifice. Each side to a conflict between nations recognizes the reciprocal possibility of sacrifice. This, I have argued, is war modeled on the duel: it combines violence and recognition in the symmetry of risk.³⁷ A war on terror lacks this reciprocity. Each side seeks total defeat of the other’s god by destroying the conditions of sacrifice. The terrorist may practice his own form of “disappearing”—for example, kidnapping. More deeply, the same symbolic exchange is at the heart of terror. By targeting civilians arbitrarily, the terrorist attempts to create the conditions of a meaningless death. It is a death without the ritual of sacrifice; death as if from nowhere. The plane disappears from the radar screen somewhere over the ocean.

The ambition of the terrorist is to demonstrate that there is no border behind which law can displace sovereignty. Rather, sovereign identity defines the state at every point. All are potential targets of violence wherever they are. Sovereign politics is all about life and death—sacrifice and being sacrificed. With that, the distinction between combatant and noncombatant disappears. The terrorist practices yet another form of that total war—a low-tech form—which characterized twentieth-century violence. Total war, whether by terrorists or armies, denies that there is any space apart from the exceptional space of the sovereign contest; it denies that law has succeeded revolution or secured national borders. The reciprocal response is to eject the terrorist and leave him in the legally unorganized space of sovereignty. The terrorist will die, as the trial court judge recently told Zacarias Moussaoui, “with a whimper.”³⁸ That whimper is the missing voice of any symbolic force whatsoever. Like Polynices, he is denied the human.

Disappearance is the direct way of attempting to eliminate the possibility of a memory of sacrifice. We do not know whether the disappeared are alive or dead.³⁹ They are literally removed from the human world of order. To disappear someone is to deploy the personal psy-

chology of hope—one hopes that the loved one is still alive—against the political psychology of faith. It requires faith to see through a murder to an act of sacrifice, to see the infinite informing the violated body. As long as one cannot know whether the disappeared lives, hope will struggle against faith. More than that, the perception of sacrifice is itself tactile. We need to come into contact with the sanctified body. Antigone wants to perform the rites of the dead on the body of Polynices. The state goes to great effort to obtain the return of the war dead; it buries them under the flag. The sacred is not an idea but a presence. The tomb of the unknown soldier is not just a memorial; it must contain the body of the fallen soldier.⁴⁰ The maimed veteran is a kind of living memorial that intrudes into our everyday life to remind us of the claim of the sovereign on the citizen’s body.

When the mother demands to know her child’s fate, she is, of course, also protesting against state injustice. Her demand as a mother, however, follows the sisterly demand of Antigone: it depoliticizes the contested body. She maintains one form of the human—familial love—against the denial of humanity by the state. Only so does she gain a certain immunity—tenuous as it is. It is tenuous because, as Sophocles expressed it, we cannot neatly separate the forms of our humanity. Creon may exclude Polynices for political reasons but the result is his own destruction through the effect of that exclusion on familial love. The state fears that the disappeared will be seen as the locus of a sovereign act of sacrifice. The mother responds that she wants her child, not revolution. But the multiple forms of meaning intersect in the same body, and there is no returning of the body to the family that does not potentially disrupt the state.⁴¹

The sacred, unlike justice, exists only as an experience. There is no abstract conception of the sacred against which we can measure particular instances. We cannot argue about what the sacred should be. When we no longer experience the sacred in a particular time or space, we don’t say that once the gods were present but they are no longer. We think, instead, that there was never anything there but false belief—idolatry. There is, accordingly, no memory of the sacred that is not itself an experience of the sacred.⁴² We are either enthralled or we are not. When we lose that faith, those who were holy warriors may come to be seen as terrorists and torturers. Acting on sovereign truth, they are

judged by law. If they, too, lose that faith, they may come to the same conclusion about themselves.

If the sacred is inextricably tied to experience, then the need for presence is a need for the body. It is a need for the thing itself, not just the abstract memory. Even Christ must be experienced as a real presence after his death. It is not enough to have the memory. As a memory, he becomes only an example of how to lead a good life. An example is always understood by reference to an abstract principle. This attitude produces such works as Jefferson's redaction of the Bible, in which all claims of the sacred are removed, leaving only the ethical. Without the material reality—the presence—of the sacrificed body, a refounding of the sacred character of the political community is impossible. A community might be re-formed on the basis of a principle of justice; it would become an example of the abstract principle. But justice does not ground sacrifice. It might be a just community about which no one particularly cared, for it would make no claim on the body.

If power worked in only one dimension, a state that could disappear its enemies would have to be judged powerful. It would be acting out the first commandment, "Thou shalt have no other gods before me." But power works in multiple dimensions, including the order of law: "Thou shalt not kill." To disappear the enemy simultaneously speaks to sovereign strength and legal weakness. Such a state can never end the exception; it is in a constant war on terror. It is the politics of sovereignty once the border has been breached. This is a form of sacrificial violence that cannot be spoken within the borders of law. That state of exception can be maintained only as long as the perception of an enemy's threat to sovereignty remains vital.

In Argentina, for example, the popular revolt against the military junta occurs as a consequence of dead bodies that are recovered by their families. The Argentine soldiers who die in the unsuccessful Malvinas war appear as failed sacrifices. The government cannot make them sacrificial objects. Instead, the state is seen as the agent of their meaningless deaths at the hands of the British. They are killed but not sacrificed, victims not martyrs. The Malvinas war shows us a state that had the power to disappear victims but lacked the power to invest those who died with sacrificial meaning. Killing and dying for the state had fallen out of the symmetry that characterizes sacrificial violence. At that point, killing—or disappearing—became an extremely weak political

force, bordering on murder. Without self-sacrifice, there is no license to kill. The soldier who kills but does not sacrifice is the torturer.

Some fear that the United States today is approaching a similar position. It has the power to maintain extrajudicial prisons in which it secretly disappears the enemy terrorist, but it may lack the power to sacrifice its own citizens. This is what is at stake in the deaths of more than four thousand Americans in Iraq: Are they experienced by the larger community as engaged in an act of sacrifice or are they the unfortunate victims of poor policy by a government that no longer speaks with the sovereign voice?

These political events trace the architecture of a social imaginary that spans death, sacrifice, sovereignty, and law. Of course, extrajudicial prisons and killings offend the idea of law. To disappear the enemy is to make him invisible to law. This is why the "disappeared" became such a symbol of the global human rights campaign. Sovereign violence cut free from law in all its forms looks like the formlessness of the disappeared, who may be alive or dead, who lack names, and who, if the state is successful, leave no trace of meaning. This is power as pure violence—the point at which destruction and creation exactly coincide. It is a modern form of the Terror.

The Argentine experience, however, reminds us that none of these descriptive claims refers to facts. Each of these propositions is contested, and not just by the generals, who may really believe that theirs, too, was a sacrificial politics of sovereignty.⁴³ The sovereign state cannot exist for long in an imperial mode in which violence is separated from faith. Either law will extend to these invisible prisons or sovereign faith will assert itself through the perception of a continuing existential threat. The privilege of writing the history of the state, including the theological history of the sovereign, belongs to the victors.⁴⁴ Victory, however, is only as stable as the faith on which it rests. There is no last word. Less than ten years after their convictions, the Argentine generals were pardoned. Ten years after that, we see a renewal of prosecutions.

Law and Sovereignty, Again

Modern law puts the rights-bearing individual at its center: it declares his rights against the state, as well as those rights he has against others, which the state will enforce. Doing so, the state promises the individual

the personal security that Hobbes envisioned as the end for which the state comes into being. Individual rights and personal security, however, cannot provide the frame of reference for understanding the state at war. The fundamental feature of war is killing and being killed, the destruction of life and property, not security. It is as if the state that structures itself through law in order to secure individual well-being enters into a parody of itself in which all values, including life itself, are inverted. War always borders on the carnivalesque.

At stake in war is neither the life and death of the individual nor the distribution of goods but the existence of the sovereign as an imagined reality of transcendent value. The existence of the sovereign is not a state of being of individuals or institutions that can be objectively measured. The scale of an existential threat works entirely in the imagination, just as a threat to religious belief cannot be measured in actual numbers. The sovereign is threatened whenever the perception of threat arises. In retrospect, individuals and communities may come to believe their perception of the threat was wrong. They wonder what it was that moved them to sacrifice, just as an adult may wonder what it was that moved him so deeply when he was in love in his youth.

When the killing and being killed of war begins, we see that instead of the state offering a means to the end of individual well-being sovereignty shows itself as an end in itself. For this reason, there is nothing liberal about war.⁴⁵ Because liberalism is fundamentally a commitment to a politics of reason through law, its ambition will always be to extend the rule of law first to those conflicts that can lead to war and second to the conduct of warfare.⁴⁶ To think that war arises from substantive disagreements that can be resolved through law is like thinking that religious disputes over the locus of the sacred can be resolved in court. Today we do not even know how to frame our dispute with the terrorist. Nor do we have a Geneva to which we and our potential or actual enemies can retire in order to establish a set of legal rules for the conduct of a war on terror.

Nations can go to war even when they have no substantial disagreements over the content of their law. The long wars of Europe, beginning with the religious wars of the Reformation and going right through the Cold War, were more like family disputes than conflicts over fundamental values. That, of course, does not make them any less

intense; civil wars often take this form. The American Revolution against the British may have been framed initially in terms of rights, but postrevolutionary Americans were quickly puzzled over what exactly had been the problem with British law.⁴⁷ Only over the course of its development did the American Civil War come to focus on a difference in fundamental values: slavery. Even here, in light of the continuation of racism and Jim Crow legislation after the war, there is reason to doubt that race was at the center of the sacrificial politics that was the war. Of course, not all wars are between brothers.⁴⁸ The point is neither similarity nor difference; rather, it is that war operates in a different dimension from the substantive concerns of a legal order and cannot be explained as if it were simply a failure of law. The modernist ideal of displacing war by legal institutions that would resolve the disputes between nations assumes that law and sovereign violence work in the same dimension of problem solving. If they do not, law won't solve the problem of political violence.

The killing and being killed of war occur on a symbolic field of sacrifice and sovereignty, which simply cannot appear within the ordinary order of law. We do not enjoin armies; we do not provide just compensation for the property and lives lost.⁴⁹ Today we may imagine enforcing such an injunction in the form of humanitarian intervention, but that is only war by another name.⁵⁰ Similarly, enforcing a regime of compensation is only to require reparations from the losing side of a war. There are attempts to bring law into war itself, but for this an entirely new legal regime must be created—one that puts death, not life, at its center. This law tells us who can be intentionally killed and who can suffer death as a result of collateral damage.⁵¹ This is no longer law cast in the Hobbesian mode. It is the order of Hell, not that image of divine creation that is the Hobbesian Leviathan. If war were not so serious, this law would appear as comedy, specifying the permissible boundaries of death and injury.

The justification of a law of warfare is always to minimize the destructive consequences of war. But the turn to law for this end is always balanced by exactly the opposite turn: to push violence to an extreme in order to end the killing as quickly as possible.⁵² The promise of an overwhelming threat of force is that it will not have to be used. We have no way of knowing which of these contrary moves is likely to be a more

successful strategy.⁵³ We do know that, despite the international law-making effort of the twentieth century, it was the most violently destructive period of human history.

Entire populations can be destroyed within the parameters of humanitarian law. Moreover, humanitarian law will always give way—regardless of what might be said formally—at the moment of an extreme existential threat to the sovereign state.⁵⁴ When Winston Churchill spoke to the British nation before the threat of a German invasion, he said, “We shall defend our island, whatever the cost may be, we shall fight on the beaches . . .” He was not speaking of a fight limited to lawful combatants. Rather, he spoke to an entire nation—or even nations—engaged in sacrificial violence: “The British Empire and the French Republic . . . will defend to the death their native soil.” Churchill captured the sovereign spirit of the modern nation-state in pointing to a campaign of popular resistance against an enemy that breaches the border: “[W]e shall fight in the fields and in the streets.”⁵⁵ Ironically, he also anticipated the anticolonial wars of terror that Britain and France would face just a few years later.

The motivation for compliance with humanitarian law, when it is not the tactics of military reciprocity, is the professional soldier’s regard for honor.⁵⁶ Different cultures locate honor in quite different practices—for example, the honor of the suicide bomber who takes up a religious conception of martyrdom. If there is no universal conception of honor, then there is no universal ground for humanitarian law. Even in the West, we know that, while honor has a place, it is not the dominant place when there is a perception of an existential threat to the sovereign. Honor, as well as tactical judgments of reciprocity, disappears in the face of that contemporary guarantor of sovereign existence: nuclear weapons. There is nothing limited and little that is honorable about the nuclear threat. The justification is purely existential.

Honor and reciprocity are values easily affirmed in the discourses of law. Where they give out, political speech becomes sacrificial rhetoric. The nation-state straddles this divide, but it cannot bring the two forms of its existence into contact. It cannot speak the language of law to appeal to sovereign sacrifice; it cannot explicitly disavow law for the sake of sovereignty. Each form of speech—including the institutions and practices that sustain it—must maintain an “acoustic separation” from

the other.⁵⁷ We can hear only one at a time. The ticking time bomb example is a kind of test. Which form of discourse do we hear in the example? When the two forms are brought into contact, we literally lose our political balance. It is as if we don’t know who we are. Can we really be torturers? Must we be?

Acoustic Separation

Metaphorically, the first citizen is Abraham and the last is Christ. All of the history of the nation occurs between the sacrifice of Isaac and the presence of Christ. This is a mythical rendition of a genuine ambiguity between difference and sameness in the political imagination. Abraham bears the burden of the sacred within the finite world; Christ bears the burden of finite man within the sacred world. Isaac would die for his god; Christ dies for man. The sacrifice of Isaac shows us the violent act of faith required to sustain a sovereign presence, which continues to work through acts of killing and being killed. Christ endures sacrifice without accepting the reciprocal license to kill. Breaking the reciprocity of killing and being killed, he is the last man.

The Western nation-state exists in a tension between the particularity of Abraham and the universality of Christ. There are many Abrahams but one Christ. Because of this tension, there is no politics without a guilty conscience. Our contemporary struggle with the ticking time bomb example reflects exactly this guilty conscience. Indeed, some argue that the struggle is to be resolved by accepting our guilt; follow Abraham but with the conscience of Christ.⁵⁸ What is not perceived, however, is that this guilt attaches to politics as a kind of metaphysical condition.

The claim to the universal can no longer take the form of an aspiration for a single religious faith. Still, we understand quite well the pull of the universal that stands against all particular claims of sovereign faith. Western moral theory has always taught the universality of justice. This idea is rooted equally in Athens and Jerusalem. It appeals simultaneously to the universal character of reason and to the idea that all men are created in the image of God. Today law has inherited this tradition of the universal. The modern state purports to base its law on standards of liberty, equality, and due process that are of universal application.

Because justice is universal, many imagine a seamless movement from a national rule of law to a global order of law. No state claims that its idea of justice is at variance with what it takes to be the “truth” of justice. We give institutional expression to the idea of universal justice when we measure a state’s law against the international law of human rights.

Nevertheless, the state embodies the universal character of law within the borders of a very particular historical project. It understands itself as sovereign not by measuring itself against an abstract, universal standard but by standing within a particular history and at a particular place. Sovereignty literally creates a rent in the universal that is beyond repair. We kill and are killed for that particular god that is the sovereign. We stand with Abraham, not with Christ. We do so, however, fearing that our sacrifices may be a practice of idolatry. Our faith struggles against our knowledge of our own contingency.

The sacred erupts into political life in the same way that the sacred appears elsewhere—as if from nowhere. It cannot be explained as the consequence of a chain of causation that is either temporal or spatial.⁵⁹ It is just the other way around: the sacred creates the borders of time and space.⁶⁰ There is no polity without a homeland and no homeland without a founding narrative. This space is sanctified by the appearance of the sacred, which is preserved in memory by the national narrative. Political space, like national history, is created through the willingness to sacrifice. It reaches just as far as it has been or will be defended as a matter of life and death. Despite the universal aspiration of law, political communities exist in a world of polytheism. Each sovereign nation will defend its own continued existence against other claims to the sacred.

Judaism introduced the West to the puzzle of the relationship between universal law and a uniquely “chosen” community. The puzzle is replicated in every state that purports to order itself according to universal truths while simultaneously appearing to itself as a “chosen community.” We are no better today at understanding the relationship between justice and the sacred, law and sovereignty, than were the Jews of the Old Testament. Revolutionaries may proclaim the “rights of man,” but the state to which and for which they proclaim these rights comes into being by distinguishing itself from others. Indeed, it is the very act of declaring—“We hold these truths to be self-evident”—that distinguishes one state’s history from all others. Revolutionaries often con-

fuse the universality of their insight with the sovereign power they may temporarily embody. No one, however, has ever successfully led a world revolution. Jefferson, Lenin, and Mao all learned that actual power is located in the political life of the sovereign and that world revolution is a dream of law unleashed from the experience of the political.

The Universal Declaration of Human Rights did not found a single nation. It is relentlessly universal and therefore is not claimed as the founding truth of any particular community. This tension between the universal aspiration of law and the bordered character of sovereignty creates the familiar dualities of the state. Promising peace, it finds itself at war; promising an order of law that will preserve life and property, it demands the sacrifice of both; promising equality, it creates the fundamental inequality of citizen and alien. The legal order of the liberal state rests on notions of equal dignity, a right to life, due process, and equal opportunity to achieve material well-being. The liberal state at war, no less than other states, denies all of these claims. It, too, will kill and take; it will do all of this with no regard for ordinary legal process.

The sovereign state is structurally bound to this internal contradiction. The truth that it holds forth as self-evident has a universal aspiration (“all men are created equal”) at precisely the same moment that it founds a particular community. Liberal states, no less than others, are caught in this contradiction. Insofar as they are liberal, they proclaim principles and values that they hold to be of universal significance. Insofar as they are states, they are bound to a very particular time and place. This tension produces the dual commitment to the rule of law and to political sovereignty. Both sides of the tension produce a vision of an absolute: the universal claim of justice and the sacrificial claim of sovereignty. When forced to confront this tension directly—for example, in the ticking time bomb example—we lose our way. We cannot decide on which side we stand: with Abraham or with Christ?

This conflict cannot be resolved. It can only be managed, first by practices of acoustic separation—we see and speak from only one perspective at a time—and second by rituals of stabilization—maintenance—when the two sides have come in contact. To disappear the enemy can be thought of as a dramatic form of acoustic separation. It is the practice of sovereign killing literally hidden from legal perception. Citizens “know and don’t know” that sovereign power is being exer-

cised beyond the law: they know it, but they need not confront it. Or at least they need not acknowledge it until the alleged enemy includes their child, friend, colleague, or comrade. Polynices may have been the enemy, but he was also a brother. When those lines cross, the sovereign claim will be judged from the perspective of law. What had appeared as an act of war will now be redescribed as “extrajudicial killing.” The self-described warrior becomes the murderer.

A successful state knows how to maintain both law and sacrifice. It knows how to keep them acoustically separated and how to negotiate the line between the two. Most important, it knows who its enemies are. The perception of the enemy invokes the sacrificial imagination, which makes possible the double-sided violence of killing and being killed.⁶¹ A government may have the legal power to declare war, but it has no similar declaratory power to create an enemy. Every act of identifying an enemy is fraught with risk, for if the populace fails to see that person or group as the enemy, it will see only murder, not sacrifice. True enemies can be sacrificed in a display of sovereign power, but it is certainly not the case that anyone who is sacrificed becomes the enemy.⁶² The possibility of failure is built into the very idea of acoustic separation—that which cannot tolerate contact may, in fact, come into contact. When the victim is not the enemy, his death becomes murder and the agent of that death is a murderer.

The imaginative limits on sacrificial violence are very much at stake in the contemporary criticism of the U.S. intervention in Iraq. Critics argue that we are fighting the “wrong war” because Iraq is not the site of our enemies. Even if the ends at stake are just, the absence of an enemy means that there is no legitimate claim on Americans to sacrifice their lives. Nor is there a ground for Americans to be killing Iraqis. Without an enemy, there are only criminals subject to the processes of law and victims with claims for compensation from wrongdoers. The construction of Iraq as enemy was exactly what was at stake in the administration’s efforts to portray Saddam Hussein’s regime as an existential threat to the United States. That regime could appear as the enemy, but ordinary Iraqis were never imagined as anything but victims of the regime. The distinction left us wholly unprepared for the violence of Iraq today, which seems to come from everywhere but with no identifiable enemy. In the absence of the perception of an enemy, not

sacrificial violence but law will provide the imaginative frame to govern our relationship with Iraqis. Not surprisingly, one legal claim after another has been brought against American combatants in Iraq. If they are not fighting an enemy, they risk being perceived as engaged in unlawful violence. Matters, of course, are entirely different with respect to members of Al Qaeda, against whom Americans have little inclination at all to apply the institutions of legal due process.⁶³ Here the perception of an existential threat calls forth sacrificial violence.

Knowing who its enemies are, the state knows when to appeal to sacrifice and when to deploy law. It can practice acoustic separation of the two rhetorical forms. The state knows all of this not as a set of propositions but as a combination of practices and beliefs that are already in place. The state constantly performs its own existence. The government does not control a community’s political practices; rather, it is itself a product of the political imaginary that informs a set of practices. Of course, it contributes to the construction of that imagination, but so do civil society institutions, popular culture, families, global forces, and countless other sources.

Like other culture formations, the state practices a sort of bricolage. It is by no means committed to a principle of noncontradiction. The political imaginary includes a commitment to both law and sovereignty, rather like the simultaneous faiths in science and religion that many individuals hold today. The state lives within this contradictory world of law’s rule and sovereign sacrifice—“lives” in just the double sense of drawing on and maintaining the imaginative conditions of both. It can abandon neither the language of law nor the rhetoric of sacrifice. It keeps each in its place by deploying the categories of citizen and enemy, of interior and border, of policing and war. Each of these sets of categories structures the political imagination from the inside. None can be measured against objective truths. Each element of a pair is understood only in the contrast with the other.

In hard cases, we don’t know which set of categories to deploy. Acoustic separation can fail. One can always appeal to law to criticize the sacrificial practices of the state, just as one can appeal to those practices to criticize strict adherence to law. The ticking time bomb hypothetical pursues the former style of critique—but for law, we become torturers. The hand grenade example pursues the latter—too

much law and we will all be blown up. Each form of critique represents a failure of the ordinary condition of acoustic separation. The competing practices have come into contact, at which point we learn what we have always known but could not speak: law and sacrifice cannot be reconciled.

Techniques of acoustic separation can be geographic—the battlefield is at the border—or temporal—revolution is in the past. They can be jurisprudential—doctrines of judicial self-limitation or substantive rules of plenary power—or rhetorical—Churchill’s wartime appeal to sacrifice is not a judicial opinion. They are also institutional: the judiciary is not the military. There are moments, however, when contact is inevitable. The sacrificial violence cannot simply be left in the distant past or on the other side of the border. Thus, the towers of the World Trade Center fell on the most ordinary of days. More important, a constant threat of failure of acoustic separation is created by the returning soldier. The veteran presents a problem of managing contact rather than maintaining separation.

Rituals of Recovery: Memorialization

The ordinary means of managing the unavoidable crossing of the two narratives in the voice of the returning soldier is the memorial, which creates an exceptional domain within which past sacrifice can be celebrated without threatening to break into current space and time. This celebration works to cabin the threat that political violence poses to a regime of law. The memorial and its accompanying ritual bring forward a representation of violence, not the thing itself. Celebrating violent sacrifice, it disarms the veteran. We see this literally in the spiked cannon that appear as monuments of memorialization around the nation. Representing past sacrifice, the memorial simultaneously remembers and projects the violence to a different time and place. Its point is to transform the combatant into a memory of himself, separating past from present and here from there.

The primary space of memorialization in the United States is the Mall in Washington, DC. There we find juxtaposed the two narratives of the state. On the one hand, there are the memorials to sacrificial violence. On the other, there are the institutions of lawful governance,

which are themselves linked to the Mall through the museums that pronounce a national project of advancing civilization. In one day, the visitor is to divide his time—usually his family’s time, for this is an intergenerational project—among the Smithsonian, the Vietnam and Lincoln memorials, and the Capitol. We learn that we are a nation that sacrifices for the maintenance of a community dedicated to the project of enlightened self-government under law. We are particular in our sacrifices and universal in our law. We memorialize past violence within a space from which we can simultaneously see the rule of law. We turn from the sacrificial past to the narrative of the present as the stabilized order of law. Thus, the Mall gives geographic representation to the double narrative; it provides an ordered, bounded space for each, making possible an easy transition across these two domains. On the Mall, one cannot answer the question of which site best represents the nation. Rather, one absorbs them all, just as Congress, which presides on a hill overlooking this national bricolage, is to absorb them all, producing a law that is simultaneously an expression of the sovereign will and the progressive realization of reason.⁶⁴

Sacrifice always has an ineffable quality. It is the act that follows the end of argument; it moves beyond that which argument can justify or law can demand.⁶⁵ The purpose of the memorial is to reclaim, and thus cabin, the violent, sacrificial act by giving it speech. That immediately makes the violence something other than itself: a representation, not an act of sacred presence. By converting the sacrificial act to a representation, the triumph of law is rendered secure from the violence of the sovereign. Has not the role of ritual and representation always been to convert the destructive character of the sacred presence into a memory of itself? Order, including law, depends on this triumph of representation over violence in the imagination of meaning.

If the memorial is the ordinary means of managing transition, the most dangerous form of breach of the acoustic separation in a democracy comes from the veteran as the “living dead.” In the United States, this phenomenon was seen most recently in the Vietnam veteran as protester. He represented a twofold failure: first, he failed in the task of sacrifice, for he did not die; and, second, he failed to stay within the cabined space of the memorial. In a curious inversion, the problem of the speaking Vietnam veteran was often described as a failure on the

part of state adequately to memorialize him. Instead of returning home to the political rhetoric of sacrifice, he returned to silence—a silence that he then filled with speech of his own. The veteran was not memorialized because the nation did not see his violence as sacrifice. Vietnam was, for many Americans, a “dirty war” that had to be disavowed. Not able to see himself as engaged in an act of sacrifice, the veteran saw his own experience through a legal/moral lens on killing and being killed. He was simultaneously murderer and victim. His speech expressed his guilt and victimization.⁶⁶

Abraham returned from the mountain to say that through death is life: through the willing sacrifice of the sons, the nation will sustain itself as a sacred project. He returned with the knowledge that life is a gift from the sovereign. Only by means of a willing offer of that life does the subject realize a transcendent meaning, for the sovereign shows itself directly only at the moment of sacrifice. Every state has an existential need to sustain this belief in sovereignty and sacrifice. To sustain this myth is the fundamental task of the rhetoric of memorialization, which links recent sacrifices back through a chain of martyrs to the founding moment of sovereign revelation. The practice of memorialization secures the memory of the act as a sacrifice while preparing the imagination for the possibility of a sacrificial demand. It does all of this without disturbing the rule of law.

We can never be certain, however, that this is the narrative that the returning soldier will affirm. Multiple lessons can be learned at the front. Indeed, this is a space in which the state’s power to control the imagination is exceptionally weak, for the combatant suffers pain in every dimension of his person. He is not just citizen, but son, lover, father, friend, religious believer, and moral agent. War may not teach a lesson of sovereignty and sacrifice. At the moment of sacrifice, Isaac could have turned on his father. If he did not see a saving god at that moment, then he might see only his own murder in the violent act. The message of the returning veteran may be that God failed to appear, that there was no experience of a sacred sovereign but only of murder and death that should be judged by law. At that point, he is speaking what cannot be said. One aim of memorialization is to preempt that speech with the language of sacrifice—whatever he may have thought of the violent act at the time.

What exactly is the lesson that the state cannot permit the returning soldier to speak? He may not speak of the failure of belief at the moment of death. He cannot say that he was there and saw only the destruction of the body, not the saving grace of the sovereign. He cannot say that his comrades died as victims, not martyrs. He cannot say that the enemy was a man who died just the same as his fellow citizens. The nation cannot tolerate this lesson of the universal. It can hear neither that there is no god nor that there is only one god of all men. It must hear the message of Abraham: the sovereign must accept the sacrifice, save the nation, and bring life to overcome death.

When what cannot be said is spoken, the “imaginative dissonance” can produce radical consequences. At one extreme is the possibility of revolution. The responsible government appears illegitimate and murderous. If killing and being killed is not sacrifice, it is murder. The government can now appear as the enemy to be met by the sovereign response of the nation. The failure of war can thus lead to civil war. Something like this happened in Russia with the collapse of the Eastern front in World War I. Conversely, the response may be to extend the rule of law: the problem is not the failure of sacrifice but the absence of law. This, too, can be fatal to an existing government. Now, however, the leadership goes to jail rather than before a revolutionary firing squad. We see both strategies at work in the management of the transition from authoritarian to democratic regimes in the 1980s and 1990s: the color revolutions, on the one hand, and the extension of the rule of law on the other.

A third possibility, and perhaps the most likely, is recovery of the rhetoric of memorialization. The Vietnam veteran is finally silenced when he is memorialized as himself a sacrificial patriot. He moves from victim/murderer to the citizen/soldier linked in the great chain of national martyrdom. He moves out of the streets and back into the cabined space of the memorial—quite literally onto the Mall. He is silenced by his own sainthood. The Vietnam veteran’s accusation that the state is an instrument of torture and murder becomes a dim political memory that can no longer be spoken and of which we do not want to be reminded—as John Kerry recently discovered when he threatened once again to disrupt the narrative of citizen sacrifice with the cry of victimization.

At stake in these symbolic battles are not the dead but the meaning of history for the living. There is no moment of life that is more contested in its meaning than death. Even the person who affirms his faith, believing that he dies a martyr, may lose control and come to be seen as murdered—and vice versa when the person who experiences his death as murder is memorialized as a martyr. The sovereign promises life until the moment when it is seen as the instrument of death. This is the threat of failed memorialization: the veteran can report that it was not renewed life but only death that he saw.

The problem of the returning soldier is symbolic, not psychological. Of course, there will always be soldiers who find it difficult, if not impossible, to return from the violence of the front to the domestic order of law. They suffer post-traumatic stress disorder; they may need individual therapy. Their condition may be exacerbated by their perception that a “grateful” nation does not want to hear any message other than that of memorialization. They may feel silenced by the symbolic weight of the celebration of sacrifice and the closing of any other public space of discourse. That closing of the imagination, not the various psychological reactions to it, is the fundamental phenomenon.

All citizen-soldiers know a deeply disturbing truth: that in the face of death there is a certain homogeneity of fear, that all men can feel abandoned by their god—religious or political—on the battlefield. One does not need to be a combatant to know this to be true. Only with the structured performance of memorialization does death turn securely to sacrifice and fear to faith. These are meanings, after all, that must be secured for the survivors. War becomes a “force that gives us meaning,” even if it was experienced as an overwhelming fear of nothingness.⁶⁷ The personal psychology of fear, however, is wholly compatible with the successful performance of memorialization, even though it inevitably leaves as victims those who cannot accomplish the transformation of the personal into the political. Like the collateral dead, they are the debris of war.

Managing Contact: The Scapegoat

Memorialization is one way of managing contact between law and sovereign violence. Scapegoating is another. The scapegoat bears the sins

of the community, taking onto himself symbolically that which the community can neither do without nor acknowledge as its own. He is both polluted and sanctified. The sin must be cleansed. Memorialization refuses to see killing and being killed as anything other than sacrifice. Scapegoating sees the killing but pushes the killer out of sight. Where memorialization is not possible, scapegoating is necessary.⁶⁸

We see just this relationship between memorialization and scapegoating in the case of the veteran. Celebration (memorialization) and prosecution (scapegoating) of the veteran have a way of turning into each other. We know that if pressed too hard, if we look too closely, that which we memorialize can easily show itself to be a subject for prosecution. The hero becomes the murderer. Conversely, the prosecuted veteran may feel the injustice of a failure to memorialize his deeds. This ambiguity is just what we should expect when acoustic separation fails. That there can be no social contract of well-being absent the pledge to engage in the violence of killing and being killed is a proposition that is both undeniable and inexpressible. The veteran bears this foundational sin of the political community. He is a site of the symbolic exchange that maintains the order of law within the sacred time and space of the sovereign.

The recently prosecuted guards at Abu Ghraib, for example, make visible elements of sacrificial violence usually hidden from view behind the rhetoric of memorialization. We sense that they were treated as scapegoats for what was a pervasive practice of abuse, if not torture, of those held in American and allied custody.⁶⁹ We do not necessarily conclude that they should not have been prosecuted, but we have to confront the relationship between law and the behavior of men at war. Abu Ghraib was a locus of degradation. At law, the issue is when degrading treatment passes a formal line and becomes a crime. The unspoken truth, and the reason the guards are scapegoats, is that all warfare is a practice of degradation. It is a practice entirely the opposite of law, which is founded on an ideal of individual dignity. Abu Ghraib was, from the perspective of law, a prison, but from the perspective of war it was just another site of violent conflict, that is, of sacrificial violence.

The method of combat is reciprocal physical injury, but its political psychology is humiliation and degradation. Degradation is too quickly described as treating someone as less than human. In fact, it is just the

opposite. Not their humanness but their fundamental beliefs are the object of destruction. Degradation conveys the political meaning that the victim has placed his faith in the wrong god. Its end is the defeat of an imagination of sovereignty. It aims to “break the will of the enemy,” but that will is always founded on faith. Combat, as a practice of degradation, is directed at faith, not reason. Indeed, it uses reason against faith.⁷⁰

Degradation is a demonstration that that which one thought provided a transcendent meaning for life provides nothing at all. For the individual, it is degrading to be treated as if one’s beliefs about the character and sources of meaning—the sacred—count for nothing. A parent is degraded when his beliefs about family are treated as nothing at all. It is degrading to learn that your children have no care for you. Even in the intimacy of love, an experience of degradation arises with rejection: to be told that one’s love is empty, that it is nothing at all, is to experience that failure of faith that is degradation. In each of these examples there is an internal and external perspective. One does not experience degradation until one actually comes to a change of belief—that is, until one actually abandons faith. Until that point, what appears degrading from an external perspective is experienced internally as a sacrifice for faith. The martyr defeats degradation through sacrifice.

The victim is degraded whenever he experiences the emptying out of a symbolic world of meaning. Degradation is the experience of the collapse of that world, which leaves one literally alone. Combat works in the most elemental forms of degradation. It aims to reduce the body of the enemy to nothing but a field for the display of one’s own sovereign power. This is the powerful connection between the physical destruction of combat and rape. Degradation works through the use of pain to destroy faith in that which provides meaning and identity. In this sense, degradation is the opposite of argument. Argument is a mutual effort to reach a common opinion with respect to truth. Each participant in an argument is open to persuasion by the other. There is nothing degrading about “changing one’s mind” in response to argument—indeed, just the opposite. Faith, however, is beyond argument, which is why torture so often steps into the place of persuasion under

extreme circumstances. Combat and torture are each experienced as a test of faith. To lose faith when tested is to experience degradation.

For the nation, nothing is more degrading than defeat. Defeat is the disappearance of the sacred from the world. To get to the concession of defeat one must pass through the possibility of martyrdom. This is the same dynamic that is at issue in torture: martyrdom is the alternative to confession. The degrading moment is not the injury itself but the failure to convert suffering to martyrdom. That is the moment of the failure of faith and, simultaneously, the experience of the body as nothing but an object of sacrifice for an alien god. Degradation lasts as long as the memory of the failure of the sacred. We know that such a memory can last a very long time—not just decades, as in the Middle East, but centuries as in the Balkans.

Injury becomes degradation when it is stripped of its sacrificial meaning. This is the degradation of defeat; it is a failure of self-sacrifice. This is also the goal of torture and, of course, of terror as well: to take control of the body of the other as a signifier. Torture, terror, and combat all work to deny the enemy/victim a space for sacrifice by showing in and through his body the total lack of power of his gods and the total presence of an alien power. This is the way in which the prisoners at Guantánamo are degraded. They are denied the possibility of self-sacrifice. Interestingly, the most potent form of protest to surface from this attempt to degrade has been suicide. This act was described by the American military commander as a continuation of combat by the enemy.⁷¹ While much of the public was unsympathetic to this military response, it was exactly on point from the perspective of the underlying dynamic of combat: self-sacrifice competes with being sacrificed. Suicide is the act of taking possession of one’s death.

In Abu Ghraib, we saw yet another variation on these themes. Again, the prisoners were degraded through the denial of a sacrificial space. There, too, they lost control of the meaning of their suffering. Instead of being forced to bear the image of the American sovereign, however, the power of the political was confused with a fantasy of the pornographic. These two forms of ecstatic power are deeply related.⁷² Has there ever been a war in which the enemy was not represented in a pornographic image? The grotesque character of the pornographic

displaces with comedy the tragic character of martyrdom. Ridicule stands with torture as a form of degradation. Again, the point is to destroy the symbolic space of sacrifice by seizing the entire domain of the possible representation of bodily suffering.

Warfare can be sustained only as long as there is a perception of an enemy. Without that perception, killing will be seen as murder and injury will not be seen as sacrifice. However, once there is a reciprocal perception of an enemy, once sovereign existence and the presence of the sacred is at stake, wars are won by eliminating the conditions under which sacrifice will continue. This means to destroy the faith in the alien sovereign. That act of destruction is exactly the experience of degradation. This is what combatants do. Without achieving this end, the destruction of war is no more meaningful than that of a natural disaster. It is only injury, to be repaired as quickly as possible. The Israelis learned this lesson in southern Lebanon in the summer of 2006. Success at arms affirms the twofold character of sacrifice: the victor engages in self-sacrifice, the loser is sacrificed. Degradation is the experience of being sacrificed. At the heart of humanitarian law is an image of warfare as reciprocal self-sacrifice. Torture and terror are beyond the Geneva Conventions because they work in the more fundamental political psychology of nonreciprocal killing and being killed: my sacrifice is your degradation.

The sense that the guards at Abu Ghraib are scapegoats arises from the perception that their behavior was continuous with that which combatants must do: degrade through the infliction of injury and death. It is far too narrow a view to think that only other combatants are the object of this activity, even if the direct injury is limited to them. The end, after all, is to defeat the enemy, not merely the enemy combatants. Often the enemy is an entire nation; always it is a community, only some members of which actually bear arms—or bombs. If Americans are fighting a war in Iraq, the enemy is still far from the experience of degradation that is the condition of defeat. One form of seeking to achieve that degradation was the destruction of Fallujah; another form was the practice of humiliation at Abu Ghraib. That one is celebrated and the other prosecuted should not blind us to their underlying unity in the domain of political psychology. Of course, it is entirely possible

that neither worked: in both cases, the experience may have been one of martyrdom rather than degradation.⁷³

By prosecuting the guards, the community displaces onto them the sins committed in our name. That sin is the complete inversion of the order of law in the name of the sovereign: not dignity but degradation, not well-being but injury, not reason but faith. Prosecution, like memorialization, recognizes and cabins what cannot be directly acknowledged. The process of prosecution cleanses, for those who are not prosecuted appear to themselves—and the rest of us—as innocent. We are innocent for we have given up the guilty. They are torturers; we are not. This division reestablishes the conditions of acoustic separation in which sovereignty and law are once again mutually reinforcing.

This process shows us in microcosm the larger dynamic that attaches to all veterans. They bear the violence of the state that cannot be acknowledged within the order of law. One form of silencing is the memorial; another is prosecution. The veteran is hero or criminal. Many, I suppose, secretly fear they are criminals; they cannot quite convince themselves that they are heroes. Others think they are heroes until they are exposed as criminals. They are, of course, both, which is just the status of the scapegoat: polluted and sacred. The veteran bears the burden of the state's sacrificial violence. All veterans, for this reason, have the right to be buried at Arlington National Cemetery, America's field of martyrs. Short of death, the veteran is to appear in public only in the ritualized practice of memorialization. If he should otherwise speak that which he knows, he risks prosecution at worst or therapy at best.

Politics beyond Law

The fundamental problem for the liberal nation-state is to maintain an acoustic separation between the double commitments that are constitutive of its own character: law and sovereignty. Whenever either commitment intrudes into the domain of the other, there is a crisis. This conflict provides a framework for understanding the confusion, for example, over the question of American participation in the International Criminal Court. The proposal is rejected as an inappropriate ef-

fort to juridify that which must remain outside of law: the sovereign action of killing and being killed. Many are genuinely puzzled as to how a nation committed to the rule of law can object to such an international court. The answer is that law represents only one half of a double commitment constitutive of our political life.⁷⁴ Another example of this same tension is the Bush administration's reluctance to subject the prison at Guantánamo to the ordinary rule of law. To it, Guantánamo is a space of sovereignty outside of law. To its opponents, this is an intrusion of the categories of sovereignty into what is perceived as the ordinary space of law. That space begins at the border and is represented symbolically in the idea of custody. Again, the problem arises because the acoustic separation of the order of law from that of sovereignty has been breached.

The liberal nation-state is truly committed to both of these dimensions of law and sovereignty. But the nature of that commitment is such that the two social imaginaries cannot easily be brought into actual contact. Whenever they do touch, there is a crisis, for neither is prepared to subordinate itself to the other. Those points of contact are negotiated daily at the border, celebrated at the memorial, and ritually purified with the scapegoat.

Law and sovereignty are bound to each other, but they cannot appear simultaneously. In ordinary times, we know how to maintain the line between law and sovereignty, between the criminal and the enemy. In extraordinary times, we lose our bearings. It is not clear in which direction the resolution will occur. That depends less on the structural characteristics of law and sovereignty than on the perception of threat. And that, we do not control. Before 9/11, many thought globalization meant that law would now rule everywhere. After 9/11, the ticking time bomb asks whether there is a politics beyond law.

The combatant is outside of the law without being in violation of the law. If there is any legal regime operative in fighting wars, it is not one insisted on by the courts as a matter of constitutional necessity or the rule of law. The legal regime of war is never at home in the courts, for it is a calculus of death, injury, and degradation.⁷⁵ The practice of sacrifice always eludes the ordering capacities of law. The combatant occupies the memorial, not the courts; the space of sovereignty, not that of law. If law is forced to gaze on this practice of violence, the com-

batant becomes the scapegoat. If law and sovereignty were exactly co-extensive, the scapegoat would disappear, but so would the memorial.

The ticking time bomb scenario puts in question just this line between sovereignty and law. The first mistake of legal theorists is to believe that there must be a legal answer to the problem, whether it is prohibition or judicial warrants. The second mistake is to think that the right answer can be found by turning to an analysis of the moral content of our law. Neither of these moves will give us access to the fundamental problem: the relationship between the sacrificial space of sovereignty and the jurisdictional reach of law.

(D. Held & A. McGrew, eds. 2003) (“Where states were once the masters of markets, now it is the markets which, on many crucial issues, are the masters over the governments of states. And the declining authority of states is reflected in a growing diffusion of authority to other institutions and associations, and to local and regional bodies, and in a growing asymmetry between the larger states with structural power and weaker ones without it.”); S. Krasner, “Compromising Westphalia,” 20 *Int’l Security* 115 (1996); S. Krasner, *Sovereignty: Organized Hypocrisy* (1999); Y. Soysal, *Limits of Citizenship* (1994); and J. Camilleri & J. Falk, *End of Sovereignty? The Politics of a Shrinking and Fragmenting World* (1992).

70. What I have elsewhere called “political action” exists right alongside the rule of law. See P. Kahn, *The Reign of Law: Marbury v. Madison and the Construction of America* 27–34 (1997).

71. Compare J. Whitman, *Harsh Justice: Criminal Justice and the Widening Divide between America and Europe* 179 (2003) (on the European tradition of distinguishing those who were “‘really’ criminals” from political prisoners).

72. For this reason, liberal theorists such as Kant argue that the person who violates his moral duty is living a contradiction: he must affirm the very rule that he violates. Modern theorists speak instead of a free-rider problem.

73. See M. Foucault, *Discipline and Punish: The Birth of the Prison* (A. Sheridan, trans. 1977).

74. See D. Luban, “The War on Terrorism and the End of Human Rights,” 22 *Phil. & Pub. Pol’y Q.* 9 (summer 2002); N. Feldman, “Choices of Law, Choices of War,” 25 *Harv. J.L. & Pub. Pol’y* 457 (2002).

75. See H. Arendt, *Eichmann in Jerusalem: Report on the Banality of Evil* 120–22 (1963). The harsh reaction to Dershowitz’s proposal of torture warrants is yet another example. See chapter 3.

76. See Kahn, *supra* note 70, at 156–60.

77. For an interesting exception, see O. Gross, “Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?” 112 *Yale L.J.* 1011 (2003).

Chapter Five

1. There can be quasi-legal regimes of gift. See M. Mauss, *The Gift: The Form and Reason for Exchange in Archaic Societies* (W. D. Halls, trans. 1990) [1923–24].

2. See P. Kahn, “The Paradox of Riskless Warfare,” 22 *Phil. & Pub. Pol’y Q.* 2 (summer 2002).

3. See H. Hubert & M. Mauss, *Sacrifice: Its Nature and Functions* 44 (W. D. Halls, trans. 1964) [1899]. (“The victim is the intermediary through which the communication [with the sacred] is established. Thanks to it, all the participants which come together in sacrifice are united in it.”).

4. See Kahn, *supra* note 2.

5. Even states that agree to comply with humanitarian law are not thereby agreeing to a mutual exchange of deadly force: compliance with *jus in bello* has no bearing on *jus ad bellum*. Modern international law has simultaneously pro-

hibited the use of force under the UN Charter and regulated the forms of warfare under the Geneva Conventions.

6. See T. Hobbes, *Leviathan*, pt. 2, chap. 21, ¶¶ 11–16 (C. B. Macpherson, ed. 1968) [1651] (“[C]ovenants not to defend a man’s own body are void. Therefore . . . a man that is commanded as a soldier to fight against the enemy, though his sovereign has right enough to punish his refusal with death, may nevertheless in many cases refuse without injustice.”); and M. Walzer, *Obligations: Essays on Disobedience, War, and Citizenship* 82–88 (1970).

7. See generally P. Kahn, *Putting Liberalism in Its Place* (2005).

8. As politics has become more democratic around the world in the twentieth and twenty-first centuries, the incidence of violent civil war has dramatically increased. See N. Ferguson, “The Next War of the World,” 85 *Foreign Aff.* 61 (Sept.–Oct. 2006).

9. See C. Moore, *The Loyalists: Revolution, Exile, Settlement* (1984); and C. van Tyne, *The Loyalists in the American Revolution* (1959).

10. See J. G. Gray, *The Warriors: Reflections on Men in Battle* 28 (1970) (describing war years for soldiers as “the one great lyric passage in their lives”) (quoting Dixon Wecter).

11. The Cedar Revolution in Lebanon provides a recent example of such a struggle over the meaning of a political death—that of Rafik Hariri. For many Lebanese, Hariri died a martyr. If he was not sacrificed for the revolution, then his murder expressed only Syrian power.

12. Here one needs to compare the dissolution of Czechoslovakia to that of Yugoslavia. The former was an example of a desecralized politics of the sort that has been advancing within the European Union project. Even in the 1990s, however, the choice of nonviolence was not always tactically possible. In particular, the long wars over the breakup of the former Yugoslavia remind us just how violent the struggle for a historical and geographical presence can be.

13. Slave rebellions occurred, but, because they were unsuccessful, they were not memorialized—remembered—in the national narrative.

14. *Demonstration* is deliberately ambiguous with respect to whether its meaning lies with the actor or the spectator. A demonstration must be perceived, which means that the sacrificial act of the black person had to occur under conditions within which it could be perceived as such. The need for a common ground of perception sets the practical limits of any nonviolent campaign for political recognition.

15. This clash is at issue in *Walker v. Birmingham*, 388 U.S. 307 (1967), in which the Supreme Court upheld a contempt citation against King for failing to comply with legal procedures in disobeying a state court’s temporary restraining order.

16. That sacrificial victim as an instantiation of the sovereign can now move back and forth across the color line—consider the murders of civil rights activists Andrew Goodman, James Chaney, and Michael Schwerner.

17. See R. Cover, “Foreword: Nomos and Narrative,” 97 *Harv. L. Rev.* 4 (1983); and P. Kahn, “Interpretation and Authority in State Constitutionalism,” 106 *Harv. L. Rev.* 1147 (1993).

18. The category “civil war” is, therefore, always difficult to maintain unless it rests on a spatial division—expressed in classic international law in the concept of “belligerency.” What appears to one side as a civil war appears to the other as the revolutionary appearance of the popular sovereign. For example, the British lost their civil war with the American colonies while the Americans won their revolution. The American Civil War had the same conceptual shape with an opposite outcome. The North won its civil war, while the South lost its revolutionary claim to speak in the name of the popular sovereign.

19. Accompanying this “dream” is often a parallel fear of the presence of a “fifth column,” that is, a worry about an unseen presence.

20. UN Charter art. 51. (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs.”)

21. See Frontier Dispute Case (*Burkina Faso v. Mali*), 1986 *I.C.J. Reports* 554 (Dec. 22) (holding that *uti possidetis juris* is a “general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs”). See also W. M. Reisman, “Protecting Indigenous Rights in International Adjudication,” 89 *Am. J. Int’l L.* 350, 360–61 (1995); and Resolution on the Inviolability of Frontiers, OAU Doc. AGH/Res. 16(I) (1964), quoted in Reisman at 361 (all the member states of the Organization of African Unity “solemnly . . . pledge themselves to respect the frontiers existing on their achievement of national independence”).

22. See, for example, the International Court of Justice’s judgment in the Nicaragua case, identifying American support for the Contras as a transborder violation even if it was not an “armed attack.” Military and Paramilitary Activities (*Nicaragua v. United States*), 1986 *I.C.J. Reports* 14. See also T. Franck, “Who Killed Article 2(4)? or Changing Norms Governing the Use of Force by States,” 64 *Am. J. Int’l L.* 809 (1970).

23. The United States, in particular, lived in the ambiguity, supporting international law for others while constantly worrying that an effective, institutionalized international law would undermine its own sovereignty. See *American Exceptionalism and Human Rights* (M. Ignatieff, ed. 2005).

24. By virtue of its disproportion, the reaction raises questions of racism. Race can easily become a marker of difference at the border.

25. The United States has also authorized construction of a fence in response to what is perceived as a challenge to sovereign identity from illegal immigration through Mexico. Secure Fence Act of 2006, Pub. L. No. 109–367, 120 Stat. 2638 (codified at 8 U.S.C. § 1101 [2006]).

26. See *United States v. Flores-Montano*, 541 U.S. 149, 152–53 (2004) (“The Government’s interest in preventing the entry of unwanted persons and effects is at its zenith at the international border. Time and again, we have stated that searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border. Congress, since the beginning of our Government, has granted the Executive plenary authority to conduct routine searches and seizures at the

border, without probable cause or a warrant”) (internal quotations and citations omitted).

27. U.S. immigration law has traditionally distinguished between “deportation,” the expulsion of an alien already present in the country, and “exclusion,” the refusal to admit an alien into the country. Despite the apparent simplicity of the distinction, a legal presence has never been coterminous with an actual presence: aliens who are physically located within U.S. territory have often been “excluded” not “deported.” Congress unified the terminology with the passage of the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA), but many of the functional distinctions remain. The delinking of a physical and legal presence leads to serious consequences for individual aliens, some of whom have lived in the United States for years but, for purposes of their removal proceedings, are treated as though they have not yet crossed the border. See, for example, 8 U.S.C. § 1101(a)(13)(B) (on parolees); and *Leng v. Barber*, 357 U.S. 185, 187–89 (1958) (distinguishing between legal and physical entry).

28. Consider, for example, the altered operation of the Fourth Amendment at the international border, allowing for “border searches” without a warrant or probable cause. See *supra* at note 26; and *United States v. Ramsey*, 431 U.S. 606, 619 (1977). Notably, the “border search” rule applies not only at the physical border but also at certain locations within the interior of the United States such as some checkpoints along roads leading from the border, which are considered to be the border’s “functional equivalents.” See *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); and *United States v. Hill*, 939 F.2d 934, 936 (11th Cir. 1991).

29. See the United Nations Convention on the Law of the Sea art. 92(1), Dec. 10, 1982, 1833 U.N.T.S. 397. (“Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas.”) The same logic extends by analogy to aircraft. See 18 U.S.C. § 7 (extending U.S. jurisdiction to U.S. maritime vessels, aircraft, and other vehicles).

30. Traditionally, prisoners could be shot when they could not be taken safely behind a secure border. See, for example, U.S. Army General Order No. 100, Instructions for the Government of Armies of the United States in the Field [the “Lieber Code”] art. 60, Apr. 24, 1863, available at <http://www.yale.edu/lawweb/avalon/lieber.htm>. (“A commander is permitted to direct his troops to give no quarter, in great straits, when his own salvation makes it impossible to cumber himself with prisoners.”)

31. See L. Rohter, “Death Squad Fears Again Haunt Argentina,” *New York Times*, Oct. 8, 2006, § 1, at 6 (describing the Argentine Association of the Victims of Terrorism as the counterpart of the Torture Victim Association); and M. Osiel, *Mass Atrocity, Ordinary Evil, and Hannah Arendt: Criminal Consciousness in Argentina’s Dirty War* (2001).

32. The full elaboration of this perspective is the project of my two-volume *Political Theology of Modernity*. See Kahn, *supra* note 7; and P. Kahn, *Out of Eden: Adam and Eve and the Problem of Evil* (2007).

33. Kofi Annan, the former secretary general of the United Nations, went further, suggesting that sovereignty has moved to the individual. K. Annan, "Two Concepts of Sovereignty," *Economist*, Sept. 18, 1999, available at <http://www.un.org/News/ossg/sg/stories/kaecon.html>. ("State sovereignty, in its most basic sense, is being redefined—not least by the forces of globalisation and international co-operation. States are now widely understood to be instruments at the service of their peoples, and not vice versa. At the same time individual sovereignty—by which I mean the fundamental freedom of each individual, enshrined in the charter of the U.N. and subsequent international treaties—has been enhanced by a renewed and spreading consciousness of individual rights.") But compare the Constitution Restoration Act, S. 520, 109th Cong., 1st sess. (Mar. 3, 2005) (proposing to protect from judicial review any official acknowledgment of "God as the sovereign source of law, liberty or government").

34. See chapter 2.

35. See H. Arendt, *Origins of Totalitarianism* 292 (1951) (the stateless would gain legal recognition, and thus be better off, were they to commit a crime).

36. The president's asserted power to label a citizen as an "enemy combatant" and detain him on that ground indefinitely was rejected in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). In *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006), the Supreme Court ruled that under current law the president lacks such a power even with respect to noncitizens. Congress then responded by giving the president much of the authority to proceed as he had proposed. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006).

37. See chapter 2.

38. "Judge Hits Back in Moussaoui Spat," *BBC News Online*, May 4, 2006, available at <http://news.bbc.co.uk/2/hi/americas/4972/84.stm>.

39. This ambiguity ironically created an opening for law in Latin America. If disappearance is outside of law, then a statute of limitations cannot begin to run. See Inter-American Convention on the Forced Disappearance of Persons art. VII, June 9, 1994, 33 I.L.M. 1529 (entered into force March 28, 1996) ("Criminal prosecution for the forced disappearance of persons . . . shall not be subject to statutes of limitations.").

40. Because of technical advances in identifying remains, we are approaching a point where there may no longer be an "unknown soldier." The remains of the unknown Vietnam veteran were removed from the tomb at Arlington National Cemetery after they were identified in 1998.

41. Even truth and reconciliation commissions, when they name the disappeared, must negotiate a line between justice and memorialization. The former sees victims; the latter sees martyrs. These are not necessarily the same, as the failure of posttransition prosecutions around the world reminds us.

42. Sacred productions may, of course, continue to be appreciated as art, but while the aesthetic and the sacred may intersect in the same object they are not the same experience.

43. See J. Malamud-Goti, *Game without End: State Terror and the Politics of Justice* (1996).

44. See W. Benjamin, "Theses on the Philosophy of History," in *Illumina-*

tions 255 (H. Zohn, trans. 1968). ("Only that historian will have the gift of fanning the spark of hope in the past who is firmly convinced that *even the dead* will not be safe from the enemy if he wins.")

45. See M. Howard, *War and the Liberal Conscience* (1986).

46. See chapter 2.

47. On the American rule of law's continuity with British law, see P. Kahn, *The Reign of Law* 150–53 (1997).

48. See M. Ignatieff, "The Narcissism of Minor Difference," in *The Warrior's Honor: Ethnic War and the Modern Conscience* 34–71 (1998).

49. On December 12, 2006, the Israeli Supreme Court invalidated a ban on any lawsuit brought by Palestinians for damages for harm inflicted by the Israeli Defense Forces. The decision, however, specifically excluded damages resulting from "acts of war." See H.C. 8276/05 *Adalah v. Minister of Defense* [2006] IsrSC; see also S. Erlanger, "Israeli Court Rules Army Can Be Held Liable," *New York Times*, Dec. 12, 2006.

50. Schmitt already makes this point. C. Schmitt, *The Concept of the Political* 54 (G. Schwab, trans. 1996).

51. See N. Berman, "Privileging Combat? Contemporary Conflict and the Legal Construction of War," 43 *Colum. J. Transnat'l L.* 1 (2004).

52. For example, U.S. Civil War General William T. Sherman is quoted as saying, "War is cruelty . . . the crueler it is, the sooner it will be over." H. Hathaway & A. Jones, *How the North Won* 548 (1983). Others have echoed this statement. See "Note, Discrimination in the Laws of Information Warfare," 37 *Colum. J. Transnat'l L.* 939, 958 n.73 (1999) (referring to similar statements from Harold Selesky); "Colonial America," in *The Laws of War: Constraints on Warfare in the Western World* 61 (M. Howard et al., eds. 1994) (reporting that the British strategy in Ireland evinced a belief that a "short war was . . . better for the Irish . . . because the terror sown by cruelty to a few would break resistance sooner . . . than would . . . a campaign of attrition"); and U.S. Army General Order No. 100, Instructions for the Government of Armies of the United States in the Field [the "Lieber Code"] art. 29, Apr. 24, 1863, available at <http://www.yale.edu/lawweb/avalon/lieber.htm> ("The more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief.").

53. The "Powell Doctrine" is a contemporary variant on this idea of deploying an overwhelming force. See C. Powell, "U.S. Forces: Challenges Ahead," 71 *Foreign Aff.* 32, 40 (winter 1992–93). ("Decisive means and results are always to be preferred . . . [War] is the scourge of God. We should be very careful how we use it. When we do use it, we should not be equivocal: we should win and win decisively. If our objective is something short of winning—as in our air strikes into Libya in 1986—we should see our objective clearly, then achieve it swiftly and efficiently.")

54. See chapter 2.

55. W. Churchill, Speech on Dunkirk before the House of Commons (June 4, 1940), in 6 *Winston S. Churchill: His Complete Speeches, 1897–1963*, at 6231 (R. James, ed. 1974).

56. See generally Ignatieff, *supra* note 48; see also chapter 2.

57. I borrow the term from Meir Dan-Cohen. See M. Dan-Cohen, "Deci-

sion Rules and Conduct Rules: On Acoustic Separation in Criminal Law,” 97 *Harv. L. Rev.* 625 (1984).

58. See O. Gross, “Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?” 112 *Yale L.J.* 1011 (2003).

59. Arendt, for this reason, speaks of the political as miraculous. See H. Arendt, “Introduction into Politics,” in *The Promise of Politics* 111–14 (2005).

60. See the discussion of borders earlier in this chapter.

61. Of course, it is also the case that the existence of the sacrificial imagination makes possible the perception of an enemy.

62. See M. Foucault, *Discipline and Punish: The Birth of the Prison* 59–65 (A. Sheridan, trans. 1977) (on the risk that the audience might judge the execution unjust and rebel against the executioner).

63. See the Military Commissions Act of 2006, *supra* note 36.

64. See P. Kahn, “Reason and Will in the Origins of American Constitutionalism,” 98 *Yale L.J.* 449 (1989).

65. The speechless quality of sacrifice leads us to describe the sacred violence of others as “nihilism.” Of course, that is only to say we don’t live in the symbolic universe within which that violence gains its meaning.

66. This must have been the experience of the many European soldiers/victims of World War I.

67. See C. Hedges, *War Is a Force That Gives Us Meaning* (2002).

68. See R. Girard, *Violence and the Sacred* (P. Gregory, trans. 1972).

69. There have been, for example, allegations of British troops engaging in similar behavior in Iraq. See “UK Troops in Iraqi Torture Probe,” *BBC News Online*, May 1, 2004, available at http://news.bbc.co.uk/2/hi/uk_news/politics/3675215.stm (reporting on the *Daily Mirror*’s publication of photos apparently depicting British soldiers torturing an Iraqi prisoner). But see also “Doubt Cast on Iraq Torture Photos,” *BBC News Online*, May 2, 2004, available at http://news.bbc.co.uk/2/hi/uk_news/3677311.stm (reporting doubts about the photos’ authenticity). The internal conflict in Iraq demonstrates a pervasive turn to torture. See Human Rights Watch, “The New Iraq? Torture and Ill-Treatment of Detainees in Iraqi Custody” (Jan. 2005), available at <http://hrw.org/reports/2005/iraq0105/index.htm> (documenting widespread abuse of prisoners by Iraqi police and security forces since late 2003).

70. To deny the rational requires more than torture. It requires the Nazi world of the Final Solution in which reason itself can no longer function as a guide. See P. Levi, *Survival in Auschwitz: The Nazi Assault on Humanity* (S. Woolf, trans. 1996).

71. “The Deaths at Gitmo,” *New York Times*, June 12, 2006, at 16 (quoting the camp commander Rear Adm. Harry Harris Jr.: “I believe this was not an act of desperation, but an act of asymmetrical warfare waged against us,” he said. The inmates, he said, “have no regard for life, neither ours nor their own.”).

72. See Kahn, *supra* note 7, at 208–18 (on politics and pornography).

73. Degradation as the condition of defeat of an enemy state was traditionally also pursued in the violence peripheral to combat itself: rape, looting, and slavery.

74. See P. Kahn, “Why the United States Is So Opposed,” in *Crimes of War*

Project: The International Criminal Court—an End to Impunity? (2003), available at <http://www.crimesofwar.org/print/icc/icc-kahn-print.html>.

75. For an expression of the opposite point of view, compare Israeli chief justice Barak’s opinion in the targeted killings case in which the court extended elements of due process even as it held that extrajudicial killings of members of terrorist groups are not “inherently illegal.” HCJ 769/02 Pub. Comm. Against Torture in *Isr. v. Israel* (Dec. 14, 2006).

Conclusion

1. See M. Howard, *War and the Liberal Conscience* 3 (1978). (“[T]he liberal tradition . . . regards war as an unnecessary aberration from normal international intercourse and believes that in a rational, orderly world wars would not exist.”)

2. See D. Luban, “Liberalism, Torture, and the Ticking Bomb,” 91 *Va. L. Rev.* 1425 (2005).

3. Undoubtedly the structure of the myth precedes its recording in the Old Testament.

4. Of course, a criminal can become an existential threat to the sovereign, at which point he would cross into the category of enemy. We see a metaphorical suggestion of this movement when the government declares war on drugs or organized crime. In each case, there is a sense that the state itself is in danger of being overwhelmed by the criminal activity.

5. See chapter 4 on the combatant’s license to kill.

6. See chapter 2.