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TORTURE AND ITS MALCONTENTS

Scott Horton*

Paul W. Kahn, *Sacred Violence: Torture, Terror, and Sovereignty* (U. Mich. Press 2010). Pp. 233. \$22.95.

John T. Parry, *Understanding Torture: Law, Violence, and Political Identity* (U. Mich. Press 2010). Pp. 328. \$27.95.

There were broad expectations that the election of Barack Obama would mark an end to the torture debate in America. Not only was Obama unequivocally opposed to the torture regimen introduced by his predecessor, so were each of the three final round candidates for the Republican nomination—John McCain, Mike Huckabee, and Ron Paul.¹ The issue, therefore, figured only on the margins of the 2008 presidential campaign. Moreover, as promised, within his first forty-eight hours in the White House, Obama issued a series of sweeping executive orders that promised to end torture and the CIA's practice of maintaining "black site" prisons.² He pointedly directed government officials to place no reliance on Department of Justice opinions—largely formally rescinded by the Bush administration itself, just as it was out the door—that crafted a legally suspect platform for the use of "enhanced interrogation techniques."³ A pledge to close the prison operations at Guantánamo "within one year" led most press accounts.⁴

But Obama's pledge to close Guantánamo was not fulfilled within the deadline he set for himself.⁵ Moreover, the Republican Party's turn against torture appears to have been itself halted by the failure of electoral efforts in 2008. Strong forces within the party, particularly figures around former Vice President Richard B. Cheney, have taken up the theme that Obama's apparent decision to abandon torture techniques, like waterboarding, hypothermia, and sleep deprivation over two days, puts the country at

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1. Scott Horton, *Harper's Magazine*, *A Vital Election-Year Initiative against Torture*, <http://www.harpers.org/archive/2008/05/hbc-90002973> (posted May 21, 2008, 1:44 p.m. EST).

2. Sara A. Carter & Eli Lake, *Obama to Close Terrorist 'Black Sites'*, *Wash. Times* A1 (Jan. 22, 2009).

3. U.S. Dept. of Just., *Department of Justice Releases Four Office of Legal Counsel Opinions*, <http://www.justice.gov/opa/pr/2009/April/09-ag-356.html> (Apr. 16, 2009).

4. See e.g. Carter & Lake, *supra* n. 2; Martha Neil, *ABA J.*, *Obama Seeks 120-Day Trial Delay in All Gitmo Cases, Plans to Close Prison*, http://devsite.abajournal.com/news/article/obama_seeks_120-day_trial_delay_in_all_gitmo_cases_plans_to_close_prison/ (posted Jan. 21, 2009, 2:41 p.m. CDT).

5. Charlie Savage, *N.Y. Times*, *Closing Guantánamo Fades As Priority*, http://www.nytimes.com/2010/06/26/us/politics/26gitmo.html?_r=1&hp=&pagewanted=print (posted June 25, 2010).

risk.⁶ The Obama White House has opted not to respond to the Cheney campaign, motivated by an apparent political calculus that its interests would best be served by de-emphasis. Instead, Obama continued President Bush's Secretary of Defense, Robert Gates, in office and gave him broad discretion to control national defense and intelligence-gathering policies—leading to policies which generally appear, with only a couple of narrowly defined exceptions, such as the renunciation of waterboarding and the use of CIA black sites, to be largely in continuity with those of his predecessor.

The legal academy has developed an immense appetite for the question of torture. Before 2001, it was a fairly obscure topic covered in some human rights and international criminal law survey courses. But following the disclosures from Abu Ghraib, it suddenly emerged as one of the hottest topics in the curriculum. Seminars were oversubscribed and new textbooks published. The legal literature addressing torture has mushroomed.

These two studies published by the University of Michigan Press are highly complementary efforts to understand the torture debate as it emerged in the Bush era, each working hard to place these developments in the broader context of history and U.S. intelligence community operations, probing both the ethical and legal dimensions of the issue.

Paul W. Kahn, the Robert W. Winner Professor of Law and the Humanities at Yale Law School, adopts an approach that borders on the anthropological as he asks, "Does our current interest in torture represent a turn away from a practice of consent toward one of confession?" Kahn plows far beyond the discourse about effective human intelligence gathering and ticking bombs, preferring instead to navigate moral, religious, and psychological dimensions of the issue.

For liberals, torture is a medieval relic, definitively banished by Enlightenment efforts to impose restraints on the exercise of state power in favor of personal freedoms—or at least the physical integrity of human beings. International human rights law may contain many limitations on state conduct that are vague and lack enforcement teeth, but the prohibition on torture at least was viewed as absolute and beyond any further discussion. That at least was the attitude before the American intelligence community began resorting to some of the same tactics that American diplomats had denounced as torture for decades—when they were used by the Soviets, North Koreans, North Vietnamese, and Chinese.

But for the authors of legal rationalizations for the Bush era's "enhanced interrogation techniques," torture is a state-of-the-art tool for defending democracies. They firmly believe that no tool that can save lives should be forbidden to American interrogators, and they view claims that the use of such techniques deprives the country of the moral high ground as idealistic nonsense.

As Kahn notes, these two sides only rarely engage one another's premises. Kahn does an impressive job of demonstrating the limitations of the arguments employed by both camps. But the best contributions in his book focus our attention on some matters that have figured only on the periphery of the debate, if at all. Kahn reminds us of the

6. CNN, *Cheney Says Obama's Policies 'Raise the Risk' of U.S. Terror Attack*, <http://www.cnn.com/2009/POLITICS/03/15/cheney.interview/> (posted March 15, 2009, 10:58 a.m. EDT).

existence of a space that states have created since antiquity—a space to act quietly, secretly, and outside the reach of their own law. This is of course familiar turf for students of Carl Schmitt and Giorgio Agamben, but Kahn covers it with a virtuoso reading of classics, most impressively with Sophocles:

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.⁷

The selection of *Antigone* as a basis for Kahn's discussion is telling in many ways. It demonstrates the relationship between morality and law, the notion of a space outside the law (which Agamben documents in much greater detail on the basis of Roman precedents in *Homo Sacer*), the relationship between sacrament and politics. But it strikes me as curious that Kahn fails to fully develop another aspect—the notion of accountability of those who wield the power of the state for their offenses against law, religion, and morals. The decision to deny Polynices a proper funeral was taken in anger and pettiness by a king who considered himself betrayed. The imprudence of this decision and the need to make amends for it is a powerful theme in Sophocles's treatment of the material—we are presented with Antigone herself, presenting a well-reasoned argument for humanity, and a chorus counseling Creon to rethink the matter in ever more menacing tones. Sophocles was, as he wrote this piece, a general leading troops into battle, and asserting in political dialogue conservative views about state security. That even he would look askance upon the idea of mistreatment of a fallen soldier who defied his government is instructive.

Still, Kahn does a fine job of pulling these threads apart before reweaving them. "The sacred, unlike justice, exists only as an experience," he observes.⁸ The Enlightenment taught us to view these threads—morality, religious experience, philosophy, law—as something sequential, with the religious experience merely a stage in rationalizing morality before it was able to stand on its own legs. But Kahn reminds us that the Enlightenment perspective is not the only one. To the contrary, the religious dimension brings critical insights to bear on the same problem, and the liberal critique of torture is weakened by its failure, generally, to recognize the point.

On the other side of the ledger, Kahn explores the relationship between the American religious right and torture and sees a clear trail:

[M]ore was at stake in torture's production of the confession than the certainty that the victim had performed an alleged criminal act. It does not take modern science or modern sensibilities to understand that under torture someone might confess to a crime he had not committed. Aristotle writes of this, as do Augustine and a whole succession of others.

7. Paul W. Kahn, *Sacred Violence: Torture, Terror, and Sovereignty* 145 (U. Mich. Press 2010).

8. *Id.* at 147.

Torture was maintained not because of a failure to understand the negative epistemic value of pain. It was pursued for reasons of faith, not fact.⁹

Kahn is director of the Schell Center for International Human Rights at Yale, but he emerges in this work as a skeptic of the great human rights law project that followed in the wake of World War II. He senses pacifist idealism lurking behind every corner - a determination to circumscribe the state's power to wage war. He questions whether these strictures make any sense when a state is coping with the challenges not of other states, but rather ideologically motivated terrorists. In all of this Kahn seems curiously to accept, without critical inspection, many of the arguments advanced by neoconservatives, and to forget that international humanitarian law itself was born in an historical environment filled with ideologically motivated terrorists.

More to the immediate point of the book, however, Kahn criticizes the absolute nature of the prohibition on torture. Quoting the definition of torture from Article 1 of the Convention Against Torture ("Convention"), Kahn observes "[i]f the definition is read literally, combat qualifies as torture, for combat surely is the intentional infliction of severe pain and suffering in order to intimidate or coerce."¹⁰ He argues that the prohibition on torture has disregarded the power of the state to wage war - "no torture with no exceptions' translates into 'no war; no Exception.'"¹¹ His conclusion: "The autonomy of law, including the privileging of the torture prohibition, was purchased at the cost of recognition of political reality."¹²

This is harsh criticism indeed, but it rests on some questionable readings of the Convention and the laws of armed conflict. Kahn's deft wielding of concepts of moral philosophy, literature, and history is impressive, but his discussion of international humanitarian law is alarmingly misinformed. The notion that "combat is torture" in particular is a dangerous blurring of concepts - albeit one that was aggressively peddled during the Bush years. Prisoners were repeatedly said to be continuing their combat against the United States behind bars and while wearing restraints. This claim was used to help justify the use of extraordinary techniques against them. In the view of the Bush era apologists, the prison was just another battlefield, and the techniques used there against the prisoners were part of an on-going struggle against an unvanquished, if disarmed, foe. But this flies in the face of the law of armed conflict, which draws a sharp distinction between what can be done to a foe on the battlefield and what can be done to him after he has been seized, disarmed, and placed in confinement. A person held in confinement is *hors de combat*, removed from combat. The protections against torture go to persons who have lost their freedom, who have fallen under the power of a government - whether in a police station, a jail, a prison, or in a detention facility for enemy prisoners seized in wartime.

Moreover, the prohibition against torturing prisoners taken in wartime is hardly a project of post-World War II human rights law - it stretches back to the beginnings of the modern law of war in the late eighteenth century, and was included in the first systematic

9. *Id.* at 26-27.

10. *Id.* at 59.

11. *Id.*

12. Kahn, *supra* n. 7, at 59.

codification of the law, authored by Francis Lieber and promulgated by the Lincoln administration in 1863.¹³ Kahn's notion that combat is per se torture and that the Convention was intended as some sort of Kantian pacifist project to prohibit warfare is pure nonsense. It would certainly be a departure from political reality to assume that the prohibition of torture was a prohibition of warfare. Alas, the states that ratified the Convention and implemented its provisions have not subscribed to a prohibition of war.

Still, Kahn's key insight - that "the real conflict is between an ethos of love for a particular community and a moral universalism"¹⁴ - is well maintained, as is his downbeat conclusion that "[t]he terrorist with weapons of mass destruction may very well put an end to our dream of a global community of human rights."¹⁵

By comparison, John Parry's book, *Understanding Torture*, carries a stronger focus on torture as a matter of practice and law over the last century. Although Parry launches his book with a discussion of the Bush administration's torture memoranda, his scope is broader. "Law will likely fail when it seeks to regulate state violence, of which torture is a central, but hardly singular, example."¹⁶ He discounts the notion that law alone can provide the necessary force to ban torture - and certainly the celebrated Office of Legal Counsel memoranda by John Yoo, Jay Bybee, and Steven G. Bradbury would appear to back up his conclusions. But so does Parry's in-depth review of international, European, and U.S. law dealing with state violence.

Parry's review of jurisprudence from the European Court of Human Rights is clear-eyed and offers a careful attention to the political consequences of decisions as opposed simply to discussion of legal doctrine. He concludes that it "tends to efface state responsibility for torture."¹⁷ This remark is warranted by the jurisprudence of the 1970s and 1980s, but the more recent cases, especially those involving Russia and Turkey, point to a far less forgiving posture. Parry presents insightful reviews of France during the Algerian conflict, Britain in its colonial war in Kenya and suppression of the troubles in Ireland, Spain in its efforts to suppress Basque separatists, and finally Israel in its struggle with the Intifada. Each of these case studies does indeed bear out his thesis. Much of this ground has been worked by earlier writers, notably by Darius Rejali, but Parry worked in interesting new detail and succeeded in finding common threads that link the experiences - particularly those of colonial powers.

By contrast, Parry's discussion of the experience of the Bush years is weaker and contains some irritating mistakes. Reviewing the process through which harsh techniques were introduced by the military, for instance, he states that "the request went up the traditional chain of command, from people in the field to highest levels of the military and their political superiors."¹⁸ But Philippe Sands demonstrated very persuasively in *The Torture Team* that the appearance of a bottom-up request was a sham; in fact the need for the new techniques was settled upon within a high level of political actors, and a

13. See Yale Law School, *The Avalon Project: Documents in Law, History, and Diplomacy*, http://avalon.law.yale.edu/19th_century/lieber.asp (last accessed Oct. 8, 2010).

14. Kahn, *supra* n. 7, at 88.

15. *Id.* at 178.

16. John T. Parry, *Understanding Torture: Law, Violence, and Political Identity* 13 (U. Mich. Press 2010).

17. *Id.* at 93.

18. *Id.* at 183.

request was then carefully staged.¹⁹ Similarly, Parry concludes that “although Rumsfeld certainly expanded the methods available to military interrogators, he did not go as far as the CIA.”²⁰ This would be true if the only action Rumsfeld took was the celebrated December 2002 order. But it is clear that apart from this order, which addressed only conditions at Guantánamo, other orders were issued under special-access programs which authorized the use of techniques like those used by the CIA in Afghanistan and Iraq. Even with respect to the Guantánamo operations, however, things are not so clear as Parry portrays them. For instance, he notes the standard operating procedures introduced by General Geoffrey Miller: “The standard operating procedures confirm that the exceptional space of Guantánamo was not lawless.”²¹ Subsequently leaked, the SOPs authorized a number of highly abusive practices, but they were also carefully delimited to apply only within the perimeters of Camp America. In other words, they did not apply in the CIA-operated facilities inside the Guantánamo enclave but just outside of Camp America, the site of three mysterious prisoner deaths in June 2006, among other things. In the final pages, Parry refers to the use of “stress positions and waterboarding” at Guantánamo.²² But the Bush administration insists that only three prisoners were waterboarded and that the waterboarding occurred at CIA black sites, and it fervently denies that any prisoners were waterboarded at Guantánamo.²³ But viewed in its entirety, Parry’s book captures the essence of the Bush administration practices and draws well-justified conclusions about them.

The current state of the law opens more space for coercive conduct. Torture may not be legitimate, but cruel, inhuman, and degrading treatment seems to be. Some of this is expected to change under the Obama administration, but the anticipated retrenchment may not be as thorough as many people hope, and to the extent that some of this change happens through executive orders, it will further entrench ideas of executive control over detention and immigration policy.

Kahn and Parry are joined in an appreciation of the difficulty of asking the state to impose upon itself a limitation on the use of certain forms of violence, or to demand accountability for infractions of the law that were sanctioned by political actors at the highest level. The torture debate is likely to be with us for some time to come.

19. See Philippe Sands, *Torture Team: Rumsfeld's Memo and the Betrayal of American Values* (Palgrave Macmillan 2008).

20. Parry, *supra* n. 16, at 183.

21. *Id.* at 186.

22. *Id.* at 210.

23. See Randall Mikkelsen, *Reuters, CIA Says Used Waterboarding on Three Suspects*, <http://www.reuters.com/article/idUSN05191813> (posted Feb. 5, 2008, 6:50 p.m. EST); Paul Reynolds, *BBC News, Report Claims CIA Used 'Torture'*, <http://news.bbc.co.uk/2/hi/americas/7945783.stm> (last updated Mar. 16, 2009, 16:17 GMT).