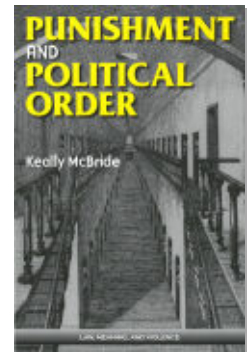




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CHAPTER 3. Earthly Divinity: Punishment and the Requirements of Sovereignty

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Earthly Divinity

Punishment and the Requirements of Sovereignty

That kind of man-made irreality—indeed, that strange construction of a human mind which finally becomes slave to its own fictions—we are normally more ready to find in the religious sphere than in the allegedly sober and realistic realms of law, politics, and constitution . . .

—Ernst H. Kantorowicz, *The King's Two Bodies*

I began this book by rejecting the simple equation of the power to punish and the power of command, and in drawing a connection between punishment and sovereignty I risk the appearance of endorsing this very position. What I offer is a more complicated, and more complete, view of the relationship between sovereignty and punishment. Due to the influence of theorists such as Michel Foucault and Giorgio Agamben, as well as recent historical events, sovereignty has come to be understood as an unstoppable force often trampling the law in its violent assertions. However, examining the history of the concept of sovereignty and its evolution, one finds surprising fragility. Sovereignty is based upon representation and perception, and is therefore vulnerable in regard to its audience. To be sure, it hides this vulnerability well since sovereignty could not successfully provide and enforce political order if the source of its power were easily discernible. Punishment may display the power behind politics today, but a different perspective reveals much of the scurrying that is happening behind stage to orchestrate this spectacle. While the common understanding is that sovereignty and punishment are mutually constitutive, I argue that strategies of representation are the forgotten element in this equation. Adding this third term into consideration fundamentally shifts our understanding of the relationship between punishment and sovereignty. Though sovereignty may be the central tool of modern political

orders, it is nonetheless susceptible to the perceptions of those whose lives it seeks to order.

There has been a flurry of newly released theoretical works that address the problem of sovereignty.¹ A common conjecture is that in our political era, there has been a significant shift in the form and practice of sovereignty. Some have argued that the practice of nation-state sovereignty has become eroded through international administration and institutions, global capitalism, and militarism. Others hold that sovereignty has become even stronger, in the sense that the individual rights that formerly held it in check are now waning in their power of resistance. Against the tenor of much of this scholarship, this chapter explores the more consistent aspects of sovereignty. For even as history unfolds in a dynamic fashion, there are defining aspects of political order that remain present. As sovereignty is one of the key elements of political order (if not the most), understanding how it is constituted, expressed, and maintained is an integral element of this book's endeavor. This is not to say that the expression and practice of sovereignty have been unaltered, only that basic elements nonetheless remain constant.

The fascinating aspect of sovereignty is how firm a grasp on social order is exerted by something so intangible. Modern political orders adopted the notion of sovereignty, inspired by the divine power that had, if incompletely, provided some order in the world. Otherworldly powers are not as evidently fallible as worldly ones, and less contestable. Political sovereignty is a worldly power, but how can an admittedly man-made construction garner the same power as a divine entity? To order the world, a sovereign power must be of it yet simultaneously transcend it. It is tempting to overlook the ethereal aspects of sovereignty lurking behind the sometimes monstrous exertions in its name. But in many ways, the power garnered by modern sovereignty stems from its transcendent nature.

Sovereignty can be described as a self-contained dialectic: it is understood as transcendent yet needs to be actualized. It achieves the reconciliation of these opposing forces through representation that must establish it as a force or presence distinct from all others. While political sovereignty was directly linked with God, there was no question of authority. By locating political authority on earth and making it corporeal, modern sovereignty becomes potentially fallible. The modern sovereign must have a human face but must also be more than

human to serve as the boundary of political order, the guarantor of the lives of others. It must be simultaneously human but perfect; worldly yet superhuman in order to protect subjects from one another.

We have seen how human reason demanded the development of the Leviathan, a creature to redeem suffering and provide comprehensible order. The shape of this figure perfectly fulfills the needs of sovereignty as superhuman, yet earthly. Because Hobbes explicitly unmask his demigod as an "Artificial Man" we often think that the form, but not the substance, of mysticism persists in early modern politics. Yet the demands of sovereignty require that traces of divine privilege remain to order the polity.

Through punishment, sovereignty comes to be represented. The question is, how does a sovereign exercise power but still maintain the trace of divinity or that which is more than mortal? Doesn't the manifestation of power in the practice of punishment pose a risk to the otherworldly status of the sovereign? Agamben and Foucault have focused on the ordering capacities of sovereignty, emphasizing its extreme strength in the face of those subject to it. Because punishment is where sovereignty becomes most evident, it is also where it risks the source of its own power. In embodying and manifesting this "divine power" so concretely, punishment can make the demi-God, in Nietzsche's words, become human, all too human.

To understand how punishment both constitutes and threatens modern sovereignty, I begin with an examination of the origins and development of the term *sovereignty* and revive the representational and perceptual elements. Taking the issue of representation as key, I look at sovereignty's relationship to law and institutions of governmentality in practices of punishment as proposed by Schmitt, Agamben, and Foucault. Using their discussions as a point of departure, we can look at practices of punishment not only as a material expression of the power of sovereignty but also as a strategy of maintaining distance between the sovereign and the punishment done in its name. The sovereign must punish to assert power, but these same practices of punishment must reveal the transcendental aspects of sovereignty. This is a difficult balance to achieve, and it makes punishment the most crucial undertaking of a sovereign power. A concluding discussion of Camus' "Reflections on the Guillotine" demonstrates how the expressions of the force of sovereignty also reveal the vulnerabilities of modern political order.

Sovereignty

In the *Oxford English Dictionary*, one finds that the word *sovereign* was used during the late fourteenth century to mean divine authority over the earth and its inhabitants, the power of a man over his wife or of fathers over their children, as well as the power of a king over his subjects. Interestingly, it was also used to designate someone who was superior to others within the same class, someone who is truly exceptional, simultaneously belonging to yet standing apart from a particular category. The simultaneity of these different uses suggests it is erroneous to designate the divine form of sovereignty as medieval and the worldly one as modern, since sovereignty was understood as having both transcendental and worldly origins.

Nonetheless, we can see that the worldly origins of sovereignty came to be more important with the establishment of secular regimes, and that this form of sovereignty continues to have a central role to play in the establishment, legitimation, and perpetuation of political regimes. Hardt and Negri's work *Empire* includes a short passage on the nature of modern sovereignty. While they detail the concept in order to prove that it is eroding, their observations are still an excellent place to begin.

Sovereignty is thus defined both by *transcendence* and by *representation*, two concepts that the humanist tradition has posed as contradictory. On the one hand, the transcendence of the sovereign is founded not on an external theological support but only on the immanent logic of human relations. On the other hand, the representation that functions to legitimate this sovereign power also alienates it completely from the multitude of subjects.²

This description beautifully evokes the paradoxical nature of sovereignty, though I do not think that it necessarily is limited to modern sovereignty as they suggest. Sovereignty is something that exists above and beyond what is immediately apparent. We may not see divine majesty, but we see different occurrences as proof of his grace or displeasure. In other words, we look to the world to confirm that which exists outside of it. It is a curious fact that we are willing to adopt such a stance even toward ideals that do not threaten us with the ultimate punishment or reward of hell or heaven.

Recognizing the awkward corporality of a king who is supposed to stand for something much greater than a mere mortal, English jurisprudence of the Tudor period developed an understanding that the king had two bodies, one which was mortal, the other immortal and political. This was an ingenious solution to the problem of the need for permanent sovereignty accompanied by a worldly embodiment, the perfect illustration of what Hardt and Negri note is the simultaneously immanent and transcendent presence of sovereignty. Kantorowicz describes the innovative law in *The King's Two Bodies*.

For the King has in him two Bodies, viz., a Body natural, and a Body politic. His Body natural (if it be considered in itself) is a Body mortal, subject to all Infirmities that come by Nature or Accident, to the Imbecility of Infancy or of old Age, and the like Defects that happen to the natural Bodies of other People. But his Body politic is a Body that cannot be seen or handled, consisting of Policy and Government, and constituted for the Direction of the People, and the Management of the public weal, and this Body is utterly void of Infancy, and old Age, and other natural Defects and Imbecilities, which the Body natural is subject to, and for this Cause, what the King does in his Body politic, cannot be invalidated or frustrated by any Disability in his natural Body.³

Rarely has there been such an excellent demonstration of the necessity of rescuing transcendental order from the vulgarities of raw materiality. Kantorowicz observes that the utility of the device is that the imagined political body of the king always supersedes the failures or incapacities of the natural body. Transcendent fiction mitigates flawed fact.

Representation is the primary means by which the transcendent becomes manifest. Here the presupposed empiricism of law helps to establish the fiction of the king's two bodies as fact. Every system of sovereignty utilizes a system of representation and perception. Paradoxically, signifying the transcendent in recognizable ways relies upon systems of perception, visibility, and knowledge that are immanent. This is the aspect of their own definition that Hardt and Negri fail to explore. For they say that the representation itself tends to create distance between the sovereign and those beneath it. Yet the sovereign is created through perception. Representing sovereignty is not enough to establish it; instead the *perception* of sovereignty as it is represented is the key.

The truly miraculous nature of sovereignty is its self-referentiality, and the power it gains through this process. The sovereign defines itself as the supreme power and then creates a system of political order to sustain itself as such. Foucault observed, "In every case, what characterizes the end of sovereignty, this common and general good, is in sum nothing other than submission to sovereignty. This means that the exercise of sovereignty is circular: the end of sovereignty is the exercise of sovereignty. The good is obedience to the law, hence the good for sovereignty is that people should obey it."⁴ In short, one becomes sovereign because one claims it and can represent oneself as such in a relatively convincing fashion. The end of sovereignty is the preservation of sovereignty at all costs: sovereignty is both the means and end of political order.

Despite the multiple usages of the term, sovereignty still enjoys a unique position when thinking about power. In all of these cases, it is power that declares itself such and is accepted as supreme. In fact, one may be sovereign without having done anything except appear as sovereign. Sovereignty is a status and a norm rather than an action. For instance, a military commander holds the powers of life and death over her soldiers, yet this does not make her their sovereign, even though they are trained to obey without question. Conversely, a lame-duck executive may not be able to rule as he did before an election but is sovereign in the given territory until the term officially expires. These two examples suggest that it is not merely the ability or inability to command that makes one sovereign. Instead it is the belief in these exclusive powers by those subject to and embodying sovereignty that creates it.

In *The Province of Jurisprudence Determined*, John Austin observes that sovereignty must have three qualities—be accepted, perceptible, and beyond restriction: "The habitual obedience to the government which is rendered by the bulk of the community, partly arises, therefore in almost every society, from the cause which I now have described: namely, a perception of the bulk of the community of the utility of political government, or a preference by the bulk of the community of any government to anarchy."⁵ For practical reasons, people desire government. But this government only acquires the form of sovereignty when it defines itself as such. Austin points out that sovereignty is human, must be determinate, and must be recognized as sovereign, and that the society itself must be defined as political and independent. "If a determinate human superior, not in a habit of obedience to a like

superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent."⁶

What defines a political order is the existence of the sovereign. What makes one sovereign is to not be subject to any other human superior, as well as be recognizable as the sovereign. This much seems clear: the power of the sovereign establishes political and legal order. But there is one more element here—the habitual obedience of the sovereign. Austin argued that the society must have already established the practice of obeying; otherwise the advantages of, for example, the social contract, would not be evident. As Charles Merriam observed, "Custom is not law, it is true, until it is endorsed by the sovereign; but on the other hand, the sovereign is not sovereign until recognized by custom. Habitual obedience, the custom of obeying, constitutes the fundamental and essential basis of the political society and of the supreme power."⁷ What would generate the custom of obedience other than punishment? Punishment emerges as the grounds of the unity of law and power in the concept of sovereignty.

Punishment generates the custom of accepting authority and demonstrating its advantages even in the absence of express consent. Furthermore, the practice of punishment provides the habits of obedience not just in those being punished but in all those who accept the authority's right to punish. It is the custom of obedience that creates the perception of authority, serving as the grounds for the more formal codification of a social order into a political one. From the habits of the whip come the legitimation of the law and the subsequent transformation of the earthly sovereign into something much grander than its origins.

It may seem all too simple to generate the habits of obedience and thus cultivate sovereignty through punishment. But it is important to remember that the representation of sovereignty must contain elements of the transcendental. How can punishment be used to represent the sovereign without coming to embody it and thereby compromise its unique status? The particular challenges of establishing and exercising sovereignty were noted by Foucault: "This means that, whereas the doctrine of the prince and the juridical theory of sovereignty are constantly attempting to draw the line between the power of the prince and any other form of power, because its task is to explain and justify this essential discontinuity between them, in the art of government the task is to establish a continuity, in both an upwards and a downwards

direction.”⁸ The power of the prince and the state in general must appear to be distinct from all other forms of power, as well as those people who act in its name. In this way, the understanding of sovereignty as transcendental helps to accomplish the necessary segregation of state power from all other forms of social control. The need to use other forms of power, yet remain distinct from these implements, demonstrates why representation becomes the central element in the balance of sovereignty. Representation must distinguish sovereignty from its embodiment, whether it is a contract, population, person, or law. For this reason, the representation of sovereignty as transcendental is just as important as the representation of the sovereign as all-powerful.

Punishment may generate obedience, but it relies upon laws, executioners, prisons, and other instruments to do so. In examining practices of punishment we see the difficult balance between the maintenance of sovereignty’s ethereal status, combined with the need to have a worldly embodiment of sovereign might. The law and institutions of punishment have been two primary methods by which sovereignty has maintained paradoxical presence. In these next two sections, I will be drawing on the work of Foucault, Agamben, and Schmitt, who also looked at the constitution and exercise of sovereignty in relationship to law and institutions.

Sovereign Exceptionalism in Law and Punishment

The concern with creating a political power that was strong enough to enforce social and political order is what drove the earliest modern conceptions of sovereignty. Jean Bodin, confronted with the rebellion of the Huguenots in sixteenth-century France, insisted that sovereignty had to be both indivisible and absolute. However, the need to have a worldly embodiment of sovereignty caused a problem in modern philosophy from the beginning. Bodin, writing about the absolute, indivisible power of the sovereign, was confronted by the empirical proof that the sovereign was indeed limited. As one commentator noted, “the gap between the abstract fiction of his lawful sovereign and what he conceived to be the reality of the actual constitutional position of the King of France remains astonishingly and revealingly wide.”⁹ As the consolidation of France under a central authority remained tenuous, in his 1576 work on sovereignty Bodin insisted that consent was immaterial.

"We thus see that the main point of sovereign majesty and absolute power consists of giving the law to subjects in general without their consent."¹⁰ The authority of the sovereign was inherent in the concept itself and by definition contingent upon neither consent nor law. Bodin, considered the father of modern sovereignty, developed his understanding of the term according to what was required by his era. He is not an apologist for absolutism but rather argues in favor of absolutism, which did not at the time effectively exist.

Even more revealing, Bodin argued that the appearance of sovereignty was misleading. In its essence it was infallible, no matter how flawed or limited it appeared. In example after example, Bodin admits that in particular times and circumstances, it may appear that power is divided or that the king exists in a subservient position to the law. Nonetheless, he insists *by his own definition of sovereignty* that these scenarios are simply impossible. Bodin is a prime example of a philosopher willing the world to exist in a fashion that it clearly did not. Hence, looking at the theory of sovereignty in historical context, there is a great distinction between the empirical workings of sovereignty and the normative understanding of it. Serving as the intermediary step between the fragility of political regimes and the fiction of absolute power was the juridical-legal system.

The law helped to provide the empirical confirmation of the fiction of the king's two bodies in medieval English law. Here, Bodin moves one further step, using the law itself as the device with which to bridge the gap between fact and norm. This analysis reverses the one posited by Michel Foucault in his lectures at the Collège de France published under the title *"Society Must Be Defended."* Here, Foucault argues that there was a switch from late medieval forms of sovereignty that were aligned with the king's body and largely exercised upon the bodies of his subjects. In an argument reflected in *Discipline and Punish*, Foucault points out that the juridical forms of sovereignty that come after this period are more focused on land and maximizing productive capabilities. He implies that the juridical apparatus is only a cover for the ever-increasing administration of bodies, however. "One might say that once disciplinary constraints had to both function as mechanisms of domination and be concealed to the extent that they were the mode in which power was actually exercised, the theory of sovereignty had to find expression in the juridical apparatus and had to be reactivated or complemented by judicial codes."¹¹ Here he implies that judicial codes

made a new kind of sovereignty possible, one that utilized disciplinary mechanisms while at the same time invoking rights. Legality is viewed as an ideological cover for a dominating and extracting political power.

On the contrary, one finds when examining Bodin that legality serves as the empirical referent for the fiction of absolute power. In reality, worldly sovereignty is limited and fallible; it needs the political fictions of theorists as well as the law to establish the power of the sovereign as infallible. The exclusive alliance made between sovereignty and law sets sovereignty apart from other forms of domination, but not just because it can then cloak itself in the guise of legality. The law defines sovereignty as such and, since Bodin, has provided its primary empirical referent: it makes the transcendental aspects of modern sovereignty worldly in its power.

Restated in other terms, sovereignty is a problem of how to relate what Foucault calls two different ways of analyzing power, “the juridical schema” whereby power is constituted and circumscribed by the law, or the “domination-repression schema” whereby power is achieved or resisted in terms of struggle and submission.¹² While Foucault argues that the oppressive-dominating effects of power lurk beneath the juridical apparatus, Schmitt argues that the two aspects are intertwined in the concept of sovereignty. After all, *sovereignty* is a juridical term that is nonetheless meaningless without the ability to act and to wield authority. That such actions are not then subject to the same judicial oversight, no matter how egregiously they offend written law, is what Schmitt refers to as the sovereign exception. Schmitt’s analysis states that sovereign power, not law, is ultimately what matters.

Schmitt believes all political concepts are adopted from religious, theological ones. Modern sovereignty is no exception.

All significant concepts of the modern theory of the state are secularized theological concepts not only because of their historical development—in which they were transferred from theology to the theory of the state, whereby, for example, the omnipotent God became the omnipotent lawgiver—but also because of their systemic structure, the recognition of which is necessary for a sociological consideration of these concepts. The exception in jurisprudence is analogous to the miracle in theology.¹³

Schmitt argues that the transport of sovereignty from heaven to earth is not only driven by historical development but also reflects a switch in metaphysics. Immanence, not transcendence, becomes the defining aspect of modern sovereignty. This basic view guides Schmitt's view of the relationship between sovereignty and law, with sovereignty standing for worldly power and law as an idealistic construction.

Bodin's work suggests that the empiricism of the law is used to transform the fiction of sovereignty into a historical force. Schmitt's argument offers a twist on this logic by stating that law is fiction, while sovereignty is real. The fact that the sovereign can suspend the law proves that law is contingent upon sovereignty, not the reverse. Even though typically the rule of law provides the basis for everyday governance, the exception proves that the sovereign is ultimately superior. Take, for example, a state of emergency when typical legal or legislative procedures are suspended. Only the sovereign may determine whether such a state of emergency has arisen. Even more tellingly, when the law is suspended, the sovereign still rules.

The transformation into a political order based upon immanence is also accomplished by the establishment of juridical principles that will lead to a routinization of political order. The goal of modern constitutionalism is to encompass all contingencies and thereby prevent any occurrences that could potentially fall outside of the law. For this reason, the law itself specifies under what conditions and exactly how it can be suspended. In this way, even the lapse of the law appears as its own confirmation. However, as Schmitt points out, the state of emergency that requires the suspension of law reveals the true workings of sovereignty. "What characterizes an exception is principally unlimited authority, which means the suspension of the entire working order."¹⁴ The law itself, in conformity and assuming a norm, cannot determine whether such a norm exists. Instead, sovereignty, the power that stands outside yet is reinforced by the law, "definitively decides whether this normal situation actually exists."¹⁵ Because order persists, even when the law is suspended, *in practice* sovereignty clearly provides the basis for political order. Sovereignty, no matter how well it is defined, rationalized, divided, or confirmed, does not have any substantial meaning outside of its exercise. Schmitt argues that the *exercise* rather than the definition of sovereignty reveals its mechanics.

Undoubtedly, Schmitt is correct in offering this assessment of the

mechanics of sovereignty. There are times when the sovereign suspends the law, and the ability to punish itself can be seen as exhibiting an exceptional relationship to the law. The fact that the state can incarcerate while all others cannot demonstrates the paradoxical relationship Schmitt describes: the sovereign is not subject to the laws in the same way as all other entities and can therefore guarantee the rule of law.

The work of Giorgio Agamben takes Schmitt's insights and applies them to recent political events and also trends in the twentieth century. Agamben observes that these "exceptional" demonstrations of power gradually become the rule. He also points out that one expression of the power of the sovereign is that it can decide which populations are governed by the rule of law and which are not. Schmitt's exceptionalism can also be applied to populations, in addition to standard legal proceduralism. Agamben's argument seems particularly relevant today given the diffusion of special extralegal categories such as enemy combatant, and the definition of physical spaces in which political power can be exercised without any tempering by international human rights or domestic legal regulations. Thinking of sovereignty as a force that is only imperfectly tempered by the rule of law, Agamben's view of sovereignty as an unstoppable power creeping over the entire globe feels scary and prescient.

Agamben does point to real dynamics in contemporary politics. However, he also overstates the power of sovereignty. After all, at times the exercise of even sovereign exceptionalism has brought censorship and removal from office, international outrage, or popular rebellion. If sovereignty were able to define its own terms as completely as Schmitt and Agamben would have us believe, the Soviet Union would still be intact and all "democratic" elections would be purely theatrical or usually suspended if they posed the risk of producing a regime change.

The fact is that sovereignty can be taken away, and it can be risked through its exercise. If the ability to exercise power were enough to generate sovereignty, political history would be a tediously constant narrative. There are instability and uncertainty, however. Part of this is due to the requirements of sovereignty to both order a polity yet remain aloof from it as well. Bodin's originating work offers us a new way of thinking about the rule of law and sovereignty today. The ability to suspend the law, to exercise clemency, or to determine which

populations are more vulnerable may also be a way of signaling the transcendental elements of the sovereign. It alone can stand apart from legal order, and it becomes a power entirely unique through this privilege. The effects of this unique relationship are all too real, and often tragic or deadly.

Yet sovereignty is still vulnerable. Punishment poses a very particular challenge for the exercise of sovereign power: to demonstrate and uphold the rule of law, the sovereign must provide sanctions. Yet punishment cannot become personal or viewed as merely a way of maintaining power, otherwise it seems a product of worldly calculations and limitations, not a semidivine presence. It must be allied with the transcendental order if sovereignty is not to become weakened. The concluding chapter of this book will examine this hypothesis in more detail with an examination of current U.S. penal practices at home and abroad. The central issue, made crystal clear in the practice of state punishment, is how sovereignty can order yet transcend the world. In many ways, you can look at the development of bureaucratic elements of political rule as a strategy to minimize the risk in exercising sovereignty, as I explain in the next section.

The Disciplinary Articulation of Sovereignty

The ability to suspend the law through exceptionalism, providing clemency, or even defining which populations can be sacrificed is one way that sovereign power establishes itself as transcendent vis-à-vis the law. Another method for establishing this simultaneously transcendent and immanent presence is by separating the executive powers of sovereignty from their administration. This is the dynamic of sovereignty that captures the attention of Michel Foucault. Foucault's work investigates the teleological development of the power of sovereignty toward a disciplinary regime and, finally, what he terms *governmentality*. He offers a trio of terms—sovereignty, government, discipline—and explores the evolving nature of their interrelationship. Initially, sovereignty, which he understands largely as a judicial construct, utilizes a system of punishment and violence to embody the power of the king. As sovereignty is embodied in the king, when a crime occurs, the king himself is considered the injured party. Like the laws themselves, the punishment must reflect both the immanent and transcendent bodies of the king. Here is Foucault's description: "Now, this portion

belonging to the prince is not in itself simple; on the one hand, it requires redress for the injury that has been done his kingdom (as an element of disorder and as an example given to others, this considerable injury is out of all proportion to that which has been committed upon a private individual); but it also requires that the king take revenge for an affront to his very person."¹⁶ In the practice of punishment, particularly in the era of spectacular corporal punishment, the full complexity of the king's sovereignty is acted out and reconstituted upon the body of the condemned.

However, Foucault points out that this practice was ultimately unstable. The bloody spectacular display of sovereign power actually created more violence and destabilized, rather than consolidated, the power of the sovereign. Perhaps the too literal embodiment of the transcendental in such gruesome fashion made it more difficult to sustain the fiction of sovereignty. Interestingly, this was one of Locke's primary objections to absolutist forms of government. When the king is always party to the crime, as he is when he and sovereignty are singular, the punishment will always carry a tinge of revenge. As both party to the crime and judge and executioner, rationality cannot be maintained, hence punishment only extends the state of war rather than reestablishing the power of the social compact. Locke's observation is borne out by Foucault's studies of the disorder of the mob at public punishments.

Foucault's oeuvre suggests that sovereignty was redefined along with the methods of punishment that represented it. With the development of popular sovereignty came the acute necessity for the development of discipline. *Discipline and Punish* explores the historical development of a new penal apparatus along with shifts in government methods to enforce this discipline. Because he describes to such great effect how sovereignty becomes dispersed and ultimately a matter of self-discipline, the overall outlook of this particular work of Foucault's is rather bleak. Once again, it seems as though there is nowhere one can escape the sovereign power, and resistance is futile. But Rousseau's *Social Contract* can be read as a companion volume to this work, as it describes the internalization and social control in the terms of the freedom gained through popular sovereignty.

It is crucial to remember why the administration of the population that Foucault describes to such horrific effect was considered a movement toward freedom. It is not that the false promise of personal free-

dom was able to blind many generations to the increasing power of sovereignty. Rather, self-governance was understood as a form of self-control (the connections between democratic practice and punishment shall be explored in full detail in the next chapter). What is important to note here is that the changes Foucault describes reflect a vision of popular sovereignty, a fact that becomes occluded in his own discussion. Sovereignty is the one aspect of Foucault's triangular configuration that remains static, and he implies that it loses its importance except as an ideological cover for the increase of disciplinary practices.

Foucault looks at a fundamental reorientation away from what he describes as a sovereignty-based state, to a disciplinary society—one in which power is more productive and conducive to political economy. This shift ends in governmentality, an era of complete administration upheld by institutions in and outside of the state. Foucault describes governmentality as "the process, or rather, the result of the process, through which the state of justice of the Middle Ages, transformed into the administrative state during the fifteenth and sixteenth centuries, gradually becomes governmentalized."¹⁷ Sovereignty then comes to legitimate itself based upon the sanctity of the body and the protection of the rights of citizens, rather than the sanctity of the ruler. This requires a new form of social control that seeks to maximize the productive capacities of its citizens. The development of various institutions of education, penality, and health helps to create and administer the population of the modern state. The sovereign power of the state has become increasingly effective at utilizing institutions that appear to be independent.

In this way, the transcendence of the sovereign state is maintained, while the exercise of its power has only increased. Because the sovereign is so removed from the actions done in its name, its exercise generates virtually no resistance. Foucault's basic insight is that an invisible and decentralized power is able to exercise greater control than an embodied one. The primary concern is how changes in the form of government have created regimes that have almost complete control over the human body, a process that he terms *biopolitics*.

Foucault's work adds two new elements to this discussion of punishment and the requirements of sovereignty. First, the development of a disciplinary apparatus certainly reduces the potential of generating resistance through the exercise of sovereign powers. But the separation between the act of punishing and the ability to wield sovereignty needs

to be noted. The common understanding is that the exercise of sovereignty through punishment is its constitution, as in Agamben's and Schmitt's works. Foucault's work suggests a rather startling evolution, that the act of punishing does not generate sovereignty at all. If it did, the prison guard would be sovereign. Instead, she does not perceive herself as such, nor do others, even though she is exercising the classic power of command. While modern sovereignty may use a greater variety of tools to manifest itself, Foucault's discussion reveals that sovereignty is still reliant upon perception rather than any particular action or capacity. Sovereignty cannot be traced only by the actions done in its name. We also need to pay close attention to its strategies of self-representation, which is particularly revealing in cases of punishment. Here the orchestration of the perception of the sovereign becomes visible, and crucial if the power is not to become overly worldly and limited.

Second, while Foucault's discussion of sovereignty and power suggests that both become stronger through dispersion, a constant relationship to the law remains intact. The disciplinarity that Foucault describes suggests that all of us somehow become instruments of sovereignty. But sovereignty itself is still distinguished by a particular relationship to the law. Consider the difference between vigilantism and the exercise of disciplinarity described by Foucault. If the point would be to have the most pervasive implementation of the interests of the sovereign, vigilantism would certainly help in accomplishing the task. Mobs could enforce discipline and thereby increase the sovereign rule. At times social reprisals would be a more effective deterrent against future crime than state-sanctioned procedures. If it was only about adherence to the law, vigilantism could be embraced as a partner in, if not substitute for, state punishment. Instead, it is officially prohibited. Admittedly, at times vigilantism is tolerated and even encouraged by state officials,¹⁸ but the practice cannot be officially sanctioned because to do so would relinquish the sovereign's unique relationship to the law. It is the strategic representation and perception of this relationship to the law that remains the source of sovereign power.

These two observations are linked. Sovereignty is able to represent itself and be perceived as distinct from other expressions of force through a unique relationship to the law. This requirement remains even at the moment when it appears that sovereign power becomes most manifest, in the act of disciplining bodies. The requirements of sovereignty in the act of punishing are then taxing—it becomes partic-

ularly vulnerable given the need to demonstrate an allegiance to the law during the exercise of force.

Camus: Sovereignty Unveiled

This body of literature on sovereignty that emphasizes the power of sovereign exceptionalism, the diffusion of its instruments, and the consolidation of its power demonstrates how successful this hybrid concept has been in constructing the basis of modern political power. Yet there is instability in the relationship between punishment and sovereignty that needs to be exposed. Albert Camus' "Reflections on the Guillotine," a complex and masterful rhetorical piece against capital punishment, also reveals something essential about the exercise and nature of modern state sovereignty. Capital punishment displays the exclusive prerogatives of the state but simultaneously risks its unique authority through its exercise. After all, if state punishment were simply a matter of exercising power, it would not have spawned the intricate legal codes and machinery for assistance. Camus' discussion more than any other I have encountered reveals the methods by which sovereignty can be undone through its punishment practices.

Camus begins his essay with a story.

Shortly before the war of 1914, an assassin whose crime was particularly repulsive (he had slaughtered a family of farmers, including the children) was condemned to death in Algiers. He was a farm worker who had killed in a sort of bloodthirsty frenzy but had aggravated his case by robbing his victims. The affair created a great stir. It was generally thought that decapitation was too mild a punishment for such a monster. This was the opinion, I have been told, of my father, who was especially aroused by the murder of the children. One of the few things I know about him, in any case, is that he wanted to witness the execution at the other end of town amid a great crowd of people. What he saw that morning he never told anyone. My mother relates merely that he came rushing home, his face distorted, refused to talk, lay down for a moment on the bed, and suddenly began to vomit. He had just discovered the reality hidden under the noble phrases with which it was masked. Instead of thinking of the slaughtered children, he could think of nothing but that quivering body that had just been dropped onto a board to have its head cut off.¹⁹

Camus starts with the story to replace the abstract pronouncements of justice with descriptions of severed heads that still have the power of vision and limbs that jump during burial. He points out that even though punishment is justified through tradition, the impartial application of the law, and procedural administration, we still use language to occlude the reality of administering pain. We say "justice has been served" when someone has been sentenced to life in prison or death, and "the prisoner" and "the condemned" become figures with no identity outside of his or her status. Camus wants to emphasize the materiality of punishment, pointing out that these are bodies in pain. The gruesome reality will belie the noble phrases if we are forced to contend with the fact that "the condemned" is not a position in a justice system but rather a living being. Camus' strategy is to illuminate the practice of capital punishment, contending it cannot stand close examination.

If punishment were only about the demonstration of sovereign power, Camus' strategy would have little effect and in fact would backfire. If the ability to punish constructs the power of the sovereign, then describing it in detail would only make that power seem more formidable. Instead, Camus' hunch is correct: the more closely we examine practices of punishment, the more fallible modern sovereignty appears. Camus' strategy works because the nature of sovereignty demands certain opacity.

The processes of state punishment are done in the name of the law or state, but those who administer them do not occupy positions of power. I have argued why this is a necessary aspect of sovereignty and that punishment must make it operable without becoming limited. Punishment occurs in the name of the sovereign without becoming overly manifest in the figure of guard, judge, or even executioner. In "Civil Disobedience," Henry David Thoreau described the division particularly clearly. He observed that the jailers serve the state "as machines, with their bodies" while those who make the laws and policy serve the state with "their heads"—it is the division of the two, body and mind, that eases culpability for those who do punish and those that command it.²⁰ Asserting the individual identity of the person who administers punishment disturbs this configuration by insisting upon his or her human identity. Camus understands this dynamic and exploits it in his essay against capital punishment, by relaying the diaries and feelings of those who administer sovereign power.

Camus describes two different responses in those who administer

the penal system. On the one hand, we have those who cannot bear their involvement in such activities. "Just listen then to the warden of an English prison who confesses to 'a keen sense of personal shame' and to the chaplain who speaks of 'horror, shame, and humiliation'" (195). The cruelty of capital punishment in particular, and all punishment in general, affects not only the faceless guilty ones, but also the deliberately nameless people who administer it. Even more disturbing are Camus' descriptions of those who like to deliver the punishment. An executioner's assistant writes in his journal, "The new executioner is batty about the guillotine. He sometimes spends days on end at home sitting on a chair, ready with hat and coat on, waiting for a summons from the Ministry." There are also overly eager citizens, ready to participate in the due punishment of the condemned: Camus reports that "hundreds of persons offer to serve as executioners without pay" (196). The fact that those who punish exhibit emotion, regret, *or* anticipation destroys the illusion of punishment as a mechanical process. But sovereignty must deploy mankind as its tools: we are complicit, not separate.

Camus points out that capital punishment has become ever more hidden from view to hide the fact of human agency. The same is true of all punishment today in the United States. If a prison guard were to acquire a face, we could look and find indifference in the face of suffering, an anguished soul, or sadism: any of these options would disturb our sense of the administration of punishment tempered by law and institutional mechanisms, therefore we choose again and again to obscure any specifics. We like the idea of the machinery of justice but recoil when presented with a concrete example, as in Kafka's "In the Penal Colony."

While much of Camus' essay is a case against capital punishment, for the purpose of this argument the most revealing passages come when he links the practice of capital punishment with state sovereignty. He has detailed how capital punishment fails to deter, he has demonstrated that capital punishment potentially destabilizes the representation of the state as a benevolent or at least neutral party, and therefore it hides the practice away from the public eye. This is not a spectacular representation of state sovereignty; instead, sovereignty represents itself as hidden, invisible—as is appropriate to maintain the aura of transcendence through impartial administration.

Since the practice of punishment places such a stress on this system, one would assume that the practice of punishment would be lessened

or avoided. On the contrary, the state must take on the mantle of punishment. Camus points out how the practices of punishment become integrally linked to the self-conception of the state and the nature of the power it demands for itself. At one time, the state punished—with death and other penalties—in the name of religious values or deities. When the state serves the interests of the divine, its punishments can be seen as a sort of intermediary step, not the ultimate end in itself. Camus points out that for true believers, even today, capital punishment is “a temporary penalty that leaves the final sentence in suspense, an arrangement necessary only for terrestrial order, an administrative measure which, far from signifying the end for the guilty man, may instead favor his redemption” (224).

The last chapter displayed how modern sovereignty moved from punishment in the name of unearthly order to the earthly divinity described in this chapter. The state still punishes, and must do so to provide this “terrestrial order,” but it does so in its own name, in the name of a worldly order. As Camus points out, this makes those who administer punishments hypocritical: they do it in the name of a God they don’t believe in. But in fact, the very act of punishing asserts human political order over a divine one. No matter whether the blade is drawn in the name of God or the law of state, it establishes the sovereign on earth. And this sovereign becomes visible through its manifestations.

Camus’ piercing critique of capital punishment amounts to this: that the state punishes in the name of absolute right, and that the power to punish is essentially godlike, but the force is exerted without faith. Instead, punishment happens in the name of reason, knowledge, and information—not mystical faith. “Europe’s malady consists in believing nothing and claiming to know everything” (229). With the secularization of state order, the state had to punish in its own name. But the ability and right to punish cannot be grounded in something as worldly as knowledge and reason. They are too fallible. For instance, clear rationales can be provided for differing views, knowledge does change, and information is less than perfect. How can we then use these secular tools as the basis of administering pain? On the other hand, there is no choice if political power is to have secular grounds.

Camus has unveiled the unstable foundations of modern sovereignty: it is secular, but assumes the powers of a god. For this reason, whenever sovereignty is revealed as human, fallible, it becomes threat-

ened. This is why it is particularly important to deny the impulse to see sovereignty as the overwhelming mechanism described by Foucault, Agamben, and Schmitt. This perception of sovereignty as otherworldly only strengthens it. As Camus observes and demonstrates in this essay, once punishment is viewed in all of its materiality, both the condemned and the administrator become all too human, interfering with the current justifications for sovereign power. Inherent in the form of modern sovereignty is a check on its exercise: if it becomes too earthly or exposed as human, it ceases to have the same power. Therefore we must look at punishment as an expression of sovereign power, and not be awed by its strength, though it certainly does exhibit tremendous force at times. We must be willing to look closely in order to expose its weakness. After all, it is nothing without the hand that holds the key, the judge that shuffles the papers, and the person who chooses whether or not to file charges. Our perception is what creates the power of sovereignty; that same perception can and should contest its absolutist claims.

