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## Beyond Kafka

**A lawyer looks at French heretics, Moscow show trials, Nuremberg prosecutions, and more. TAP talks to Sadakat Kadri, author of *The Trial: A History, from Socrates to O.J. Simpson*.**

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**Your book spans a range from the myth of Orestes to the trials of Bernhard Goetz and O.J. Simpson. What changes did you observe during that long period?**

Trials throughout the pre-modern world were very often explicitly religious rituals. Punishments, meanwhile, treated criminals as pollutants or pests. In ancient Athens, for example, murderers supposedly emitted a vapor that could be cleansed only by a court hearing. Celtic druids burned wrongdoers in huge wicker men. And lawyers in late medieval Europe prosecuted animals and human corpses if they seemed blameworthy enough. It's too easy to dismiss those precedents as "superstitious." Although our theories of proof and punishment have changed, I was always more struck by the continuities between past and present than by the differences. Trials are still structured so as to repair damage to the moral fabric of society. The hope remains that by exacting vengeance in court, we will achieve a moral balance.

**You began *The Trial* shortly before the September 11 attacks, which you experienced while living in New York. Did the post-9-11 discussions of enemy combatants and military commissions influence the book?**

They certainly did. Modern trials can be understood in many ways, but most people would probably underscore their role as a check on state power. The Bush administration's post-9-11 promise to bring enemies to justice -- even "Infinite Justice" -- at the same time as it consigned hundreds of them to the shadowlands of Guantánamo Bay and Bagram made me realize, however, that the avoidance of trials can be as significant as their staging. Although O.J.'s prosecution is the last I describe in detail, the jurisprudence of the war on terror pops up throughout my book.

**Could you explain how torture, which has recently found proponents once again in the U.S., first entered the history of the trial, and how it then left?**

The peculiar notion that violence begets truth has been around for millennia. Ancient Athenians thought the evidence of slaves inadmissible *unless* obtained through torture. With the fall of Rome, torture's use declined. Its formal reintroduction comes in the early 13th century, the era of the Crusades, a precedent that is instructive and alarming. In 1252, Pope Innocent IV approved the temporary use of non-lethal force to extract information and confessions. Torture then became integral to the inquisitorial system for 500 years. The rack and thumbscrew were abandoned only in the late 1700s thanks to the campaigns of liberals such as Cesare Beccaria and Voltaire. This came with some pretty basic intellectual changes: a new view of citizens as free agents whose humanity entitled them to physical respect, and new developments in our theory of knowledge that rendered apparent the logical shortcomings of torturing someone to see if they ought to be tortured. Now we have people who, in the name of combating barbarism, want to reverse the Enlightenment.

**Which brings me neatly to the next question. You highlight the role of reforming jurists such as Pierre Ayrault in 16th-century France and Cesare Beccaria in 18th-century Italy. Both were instrumental in the ending the use of torture and secret trials. Today, law professors in the United States like Alan Dershowitz seem to play a more ambiguous role.**

Hmm ... ambiguous is one word for it. The story I tell is filled with so much lunacy and brutality that I certainly wanted to highlight the positive where possible, and I was particularly impressed by the wisdom and humaneness of Ayrault. When I began writing, I didn't know anything about him. Though he was hugely influential in his time, he's barely remembered today, even in France. But I also write about other jurists whose contributions were far more dubious: men like Jean Bodin, the French counterpart of Machiavelli and Thomas Hobbes, whose late 16th-century writings constitute some of the first justifications for state suppression of civil liberties. One of the most influential of Bodin's legal works, incidentally, was a 1580 manual intended to promote the prosecution of witches and werewolves.

Ever since the rebirth of rationalism in 12th-century Europe, otherwise astute men have been convincing themselves that justice is primarily about analysis and the power of the police to elicit answers to pertinent questions. Dershowitz's apologies for pre-trial torture have placed him squarely within that tradition. To be sure, he's always prefacing his cheerleading for a law-on-terror with caveats -- usually, the claim that he only wants a debate -- but I wouldn't really call his role ambiguous. To me, his willingness to countenance needles under fingernails in order to combat evil recalls the obsessiveness of men like Jean Bodin.

**The U.S. government has developed a set of techniques to circumvent the criminal process, for instance by using the immigration process, or by designating people as “enemy combatants.” How do these developments fit into the history of the trial?**

The avoidance of trials has always been at least as significant as their existence -- and the legal manipulations of the U.S. government have often been extraordinarily cynical. The Pentagon's general counsel stated in 2002 that acquittal by a military tribunal would not preclude continued indefinite detention. In June 2003 President Bush asserted a power to judge and punish Ali Saleh al-Marri, who was already in the criminal justice system charged with federal offences. And while some supposedly unlawful combatants are snatched from courts, others such as John Walker Lindh and Zacharias Moussaoui are selected for criminal prosecution. We don't know yet why these choices have been made. Arbitrary rule has a long and sorry tradition in continental Europe, and the Supreme Court has yet to pronounce on most of Bush's pretensions -- but I've nevertheless been amazed by the extent to which executive unilateralism has been allowed to take hold in a country that is theoretically governed by laws rather than men.

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