

## The Mystery of the Terror

### Violence and Natural Right

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**According to the historian Dan Edelstein, the violent phase of the Terror arose directly out of the French revolutionaries' fascination with natural right theory. This new interpretation is unpersuasive to Annie Jourdan; in particular, she questions the relevance of analysing the French Revolution in Schmittian terms.**

Reviewed: Dan Edelstein, *The Terror of Natural Right. Republicanism, the Cult of Nature and the French Revolution*, Chicago & London, University of Chicago Press, 2009. 337 pp., \$40.

Dan Edelstein's response to this review, "[The Republic, Nature and Right](#)" was published in [Books and Ideas](#), 2 September 2010.

Dan Edelstein, who researches and teaches at Stanford University, specializes in the Enlightenment and the French Revolution. In this book he re-examines the Terror, starting from the ideologies fashionable among Enlightenment physiocrats and philosophers. His ambition is to demonstrate that in the eighteenth century, "the liberal theory of natural right, classical republicanism, and the myth of the golden age came together to give birth to an ideology of violence, which was to become the ideology of the Terror".<sup>1</sup> Although Edelstein is a disciple of Keith Michael Baker, a leading historian of eighteenth-century French political

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<sup>1</sup> K.M. Baker, "Transformations of Classical Republicanism in Eighteenth-Century France", *The Journal of Modern History*, vol. 73, no. 1, 2001, pp. 32-53; "Political Languages of the French Revolution," in M. Goldie and R. Wolker (eds.), *The Cambridge History of Eighteenth-Century Political Thought*, Cambridge, Cambridge University Press, 2006; S. Wahnich, *La Liberté ou la mort. Essai sur la Terreur et le terrorisme*, Paris, La Fabrique, 2003.

culture, and cites many of Baker's works, we shall see that he nevertheless distances himself from Baker. Likewise, although Edelstein seems to rely on Sophie Wahnich's work on violence, he inverts the meaning of her work, since for him violence is not a foundation of right.

In fact, Edelstein has more synergy with David Bell and his theories of “total war” in which absolute enemies are pitted against each other, both of them trying to eliminate the other, in accordance with a schema conceived by Carl Schmitt (p. 262). Granted, Edelstein does not explicitly base his book on this author, but Schmitt's shadow hovers over every page. The attacks of 11 September have indeed made more timely than ever this very controversial thinker<sup>2</sup> and certain concepts originating in the twentieth century in a context of racial hatred and nationalist demands. That was not the context of the Enlightenment, nor was it the context of the Revolution itself, which accepted the eighteenth-century idea of the existence of a law of nations, moderate and humane, derived from natural law – and therefore from the moral sense or from reason. However – and it is indubitably a strength of this book that it emphasizes this paradox – the law of nations also allows for the suppression of those who endanger humanity. In truth, there is nothing liberal in the natural right that is brought to bear in the law of nations, the author's view to the contrary notwithstanding. It was conceived in the context of seventeenth-century monarchies that engaged in merciless warfare with each other, and although it was revised and corrected by Emmerich de Vattel in the eighteenth century, it was not at all concerned with the subjective rights of man, but rather with codifying relations among nations and drawing up the rules of just war.

So rather than relying on Schmitt, Dan Edelstein goes back to the origin of the concept of hostility in use since antiquity, in order to analyse the Jacobin Terror. This shows that, implicitly, the positive side of right is ignored, as are the natural rights of man. What matters here are the notions of the enemy or of the outlaw (*hors-la-loi*) and, therefore, the aporias of a right which was actually supposed to be humane. Moreover, consistent with this, Edelstein returns to positivism and historicism, to the detriment of natural right universalism (p. 258). This shows that in his view, facts and history prevail over universal values.

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<sup>2</sup> D.A. Bell, *The First Total War. Napoleon's Europe and the Birth of Warfare as We Know It*, Boston, 2007. For a comprehensive attack against what has become a fashion, see L. Jaume, “Carl Schmitt, la politique de l'inimitié”, *Historia Constitucional* (revista electronica), no. 5, 2004. (<http://www.historiaconstitucional.com/index.php/historiaconstitucional/article/viewFile/102/88>)

### **The Mystery of the Terror Solved?**

Edelstein's thesis is as follows: in 1793-94, the Jacobins tried to create a republic founded exclusively on natural right. Therefore the question that arises is not so much how they intended to end the Terror, but just what kind of republic they hoped to create. According to the author, who bases his interpretation on two institutions typical of Year II – the cult of the Supreme Being and the new revolutionary tribunal – it was to be a republic rooted in nature and preserved by virtuous institutions, aiming to establish the reign of justice on earth. Seemingly, then, this kind of republicanism would break with the Terror. However, it was not to turn out that way at all, since, according to Edelstein, hostility resided at the heart of the system and its laws.

If we pursue the logic of his analysis, since the Convention and its committees actually took charge of making permanent written laws, and devised republican institutions, the emphasis he places on natural law is a problem. For the “Jacobin republic” drew up in the same space of time many and various legal codes, which had to do not so much with nature as with positive laws. These laws were founded on natural right, here understood as the rights of man. The concept of hostility taken from the law of nations really applied only to the revolutionary laws. The other laws were based rather on natural right. This characterizes not just the Jacobins but all the revolutionary countries of this period, including diverse American states. Besides, the author himself weakens his argument when he notices that the thinkers and legislators of this time agreed on the idea that “natural law is the essential basis of all contracts” (p. 74), while at the same time he interprets this law in a merely negative way.

In truth, the allegedly natural republic of Year II wanted to make the ordinary government, with ordinary laws, work in conjunction with the revolutionary government, with revolutionary laws; the tautology is that of the committee of legislation of Year II! Thus it is improper to confuse Montagnard legislation with natural law in the sense of hostility.

It is true that the exceptional steps taken during the trial of the king were emphatically justified as a legitimate defense against inhumane enemies who were betraying, pillaging and truly murdering France. According to the law of nations, France had the right to defend itself. As Vattel remarks, there is reciprocity between adversaries. Cruelty meets with cruelty, even though natural law requires moderation and mercy. For example, Vattel cites the Duke of Montpensier's odious crimes against the Protestants, who responded in kind. So, to emphasize this aspect of the law of nations is to reduce it to what is actually its exception, since these excesses or cruelties

violate the rules of just war. Moreover, as jurists will notice, the author is ambiguous in employing the concepts of natural right, natural law, the law of nations, and nature *tout court*.<sup>3</sup>

Further ambiguity lies in Edelstein's confusions between Montagnards and Jacobins, and among the Jacobins themselves. This, in spite of the fact that in an article published in 2001, Keith Michael Baker clearly pointed out what separated Marat from Robespierre and Robespierre from Saint-Just, while Patrice Gueniffey rightly drew attention to the diversity of the Jacobins – unanimity and uniformity being more often than not merely a pious wish.<sup>4</sup> For Edelstein, on the contrary, all Jacobins seem to become identified with the fanciful and fragmentary theories of Saint-Just, while in fact Saint-Just was the only one who developed the idea of society as the natural state of man and who rejected the political state as a perversion of the natural state, because of being founded on force and domination. Saint-Just was also alone in condemning the social contract, in the name of natural law. To attribute to all the Montagnards what was personal to him is to mistake a part for the whole. In the same way, Robespierre, however idealistic, shared with the men of his time the idea that natural rights are the foundations on which one should construct society and draw up a constitution. As far as I know, he never rejected the idea of the social contract, also based on natural right. And while he did try to establish the cult of the Supreme Being – the god of nature and the universe – his “naturalism” did not in any way displace his classical republicanism. Keith Baker, in an article published in 2006 (cited above), acknowledges this. As for Billaud-Varenne, another influential Jacobin, he raged against contempt for the (positive) laws, and his suggestion for a *Bulletin des Lois* to circulate these laws among the *départements* was in fact enacted. There is nothing very “natural” in all that, although Edelstein suggests there is when he remarks that the Jacobin republic governed not with laws but with natural right alone.

This problem becomes even greater when the focus is on the Year II revolutionaries' interest in moral, social and political institutions. For these too had nothing to do with nature; Montesquieu had already emphasized that they were the job of the legislator. Edelstein himself makes the point that they are inseparable from classical republicanism! Neither does

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<sup>3</sup> There is a hierarchy in these diverse categories. For example, natural right derives from natural law, which is the law of God or of human nature. Starting from this basis, seventeenth- and eighteenth-century jurists derived the natural and subjective rights of man. The law of nations, which is in short international law among states, draws inspiration from these principles in regulating international relations. On this complex subject, see especially L. Ferry and A. Renaut, *Philosophie politique*, Paris, PUF, nouvelle édition, 2007.

<sup>4</sup> P. Gueniffey, *La Politique de la Terreur. Essai sur la violence révolutionnaire*, Paris, Fayard, 2000.

the desire to classify the laws reveal naturalism. The Convention foresaw the creation of a massive number of legal codes, among them that of the revolutionary government. The paradox seems lost on the author; nevertheless that creation clearly showed not only that the Convention would provide itself with permanent written laws, but moreover that the revolutionary government would perpetuate itself. Also strange and paradoxical is the upholding of the *Declaration of the Rights of Man and of the Citizen* of June 1793 by a government that incessantly violated those rights in the name of public safety. None of this argues in favour of the existence of a “natural republicanism”. At most it suggests a state that was exceptional, but which had not abandoned legality.

The author also claims that the Montagnard republic was confronted by a legal vacuum unknown to any previous revolutionary body. He forgets that 1789 broke completely with the Old Regime and everything restarted at zero. Not for nothing was the National Assembly called “Constituent”. France in 1789 was like America in 1776; both were convinced that their revolution restored the state of nature. So it became necessary to rethink the basis and the principles of the new social pact. This took place in the declarations of rights, preambles to the systems of government, with a written constitution seen as the fundamental law, in harmony with those principles. The Convention did not have this problem. It could function on the basis established since 1789, and could enact its exceptional laws, without however placing the French people into the state of nature or a legal vacuum. From this followed, just as in America in 1787, the pointlessness of a new social contract. The smooth operation of the normal system of justice, juries and justices of the peace bears eloquent witness to this, as does that of the civil laws – divorce, among others. And what about the legal codes regulating commerce, public assistance and public works, devised by the Convention at the same time? The author focuses on the exceptional side of the justice system, disregards the continuing relevance of the laws introduced between 1789 and 1793, and ignores the committee of legislation's codification projects.

We still have to account for the fact that the law of 22 Prairial Year II reaffirmed the pre-eminence of the concept of hostility in eliminating an adversary without formalities. This was a wartime law, introduced at the very moment when the Republic was victorious on all fronts. For Edelstein, this repressive law confirms his premises, since it treats various categories of citizens as enemies to be destroyed. But contractualism – a bit neglected in this book, because little loved by the Jacobins, or at least by Saint-Just – is not far removed from this way of

thinking. For example, Rousseau clearly sees that some individuals might refuse to agree to the social contract. In which case, they are exiled; or, if they have committed treason, they are executed as traitors to their country.<sup>5</sup> Accordingly, at this time the crime of high treason was punishable by death.

The problem of the Republic of Year II – we cannot deny that it did indeed have one – is that those who had dissenting opinions or whose actions were out of step were considered to be enemies or traitors. From this point of view, as one sees in reading contemporary correspondence and parliamentary debates, the terrorist begins to look like the one who is being terrorized. Behind every failure he sees some treachery or other; acts of resistance are seen as crimes; all assassination attempts are seen as evidence of conspiracies. And yet, it was not as simple as that. Letters from Montagnard representatives on assignment show that some among them understood the situation very clearly. How often they referred to “these men gone astray” who must be brought to see reason; to these “fanatical” peasants who must be educated with all speed; or to these “men of good faith” betrayed by malicious men, as Robespierre put it! In October 1793, Saint-Just insisted that the detention of foreigners be “mild and not too strict, for the republic is not expressing resentment, it is just taking political action against them.” In other words, this was by no means a case of an absolute or inhumane enemy. Of course, from time to time Convention orators proposed outrageous things – Barère, an occasional Jacobin, excelled in this register – and appealed to the law of nations in order to dismiss their adversaries as barbarians. Did they really believe in what they were proposing? Rhetorical strategies and constraints, even if they do not explain everything, cannot be ignored or simply dismissed in the way the author does here. Doubtless, things were different in Vendée. There, it well and truly was a matter of extreme warfare and of exterminating the adversary, in accordance with rules that Vattel would have found irregular because they were out of line with the moderation and mercy that in principle govern the law of nations. It is true that the revolutionaries replied in kind to the attacks and atrocities. There is abundant evidence of this. As we have seen, it just so happens that the principle of reciprocity rules in the law of nations. The inhumanity of one party generally leads to that of the other. Which, however, is not to say that this reveals the internal logic of the Terror. But neither is this logic revealed by the fusion (so dear to Edelstein) of the three elements. The mystery remains.

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<sup>5</sup> J.J. Rousseau, *Oeuvres complètes*, Paris, Gallimard 1959-1995, vol. III, p. 997; *Le Contrat social*, Paris, GF Flammarion, 2001, p. 72, note p.141 and p.179.

## The Terrorist Temptation

An essential point, which is not tackled in this book, is the fact that all eighteenth-century revolutions at one time or another experienced the “terrorist temptation”, first felt by the people in clubs, later initiated by the government. Popular violence and revolts were followed by repressive laws and a resumption of control by the authorities. Compared to France, terror did not last long in these countries, and did not give rise to such tragic events. However, America and Holland, in particular, resembled France in invoking natural right and public safety to condemn the enemies of the revolution. Thus there remains the question of why the violence was limited in these countries,<sup>6</sup> and why, although recurring, it was of short duration, whereas in France the turn taken by events in Prairial Year II magnified the intensity of the violence. Was this due to the federal structures of America and Holland? To a culture of consent, or of consensus? To a less brutal history? To an earlier introduction of tolerance into morals? To decentralized authorities who had a greater hold over their citizens? To the fact that these countries no longer confronted external threats, as France had from 1792 to 1794? Billaud-Varenne, with his advice to borrow energetic laws from the Old Regime to make them serve the establishment of liberty, suggests another avenue of research. He, for one, was aware that France inherited a centralizing and autocratic tradition, which had been initiated by “despotism”. How much did this tradition weigh on the revolutionaries? An analysis that takes this heritage into consideration would be welcome.

It would be better to ask these questions, even if they cannot all be definitively answered, than to play down the radicalism in countries other than France, as historians have done for too long now. Edelstein borrows their arguments to put into perspective the violent events and the innovations of the trans-Atlantic revolution, and to accentuate these features of the revolution in France. Yet, in America, were not plenty of violent actions taken against enemies before 1776? Consider the torture of tarring and feathering in vogue at this time, which had serious after-effects or ended with the painful death of the victim! And there were further acts of violence during the war from 1776 to 1783, and then on up to 1787, notably in the Shays Rebellion of 1787. Nor were the repressive laws of 1798 very tender toward

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<sup>6</sup> With the well-known exception of Geneva, which experienced its terror from 1794 to 1795. In Italy, the terror was above all that of the counter-revolutionaries in 1798-99.

foreigners and “seditious” persons, including Republican journalists. Granted, the guillotine did not show up in America, but in its place were the gallows, the dungeon and the whip.<sup>7</sup>

It seems to me that only comparative studies can make it possible to discern how things really were, and to account for the causal and purposive heterogeneity of the phenomenon. In this book, that heterogeneity is veiled by an interpretation that puts such a heavy accent on the role of natural law and on the myth of the golden age, which is said to be found at the heart of natural republicanism, incarnated by Saint-Just, but of which few traces appear in the discussions of Year II – except perhaps in the limited context of the festival of the Supreme Being. In fact, judging from the Convention's discussions, it is rather the “age of iron” that is coming back. A temporal dimension could enhance this spatial comparatism, with a closer consideration of the regime that followed Thermidor, such as Howard Brown has undertaken.<sup>8</sup> It transpires that the exceptional laws remained in force until 1802. So, under the Consulat, was natural right still ruling in France, or was it actually a military or security regime, or even a police state? And when the great powers in 1815 outlawed Napoleon, were they following Grotius, or were they being terrorists?

Dan Edelstein's book will doubtless set off many debates,<sup>9</sup> because of its provocative interpretations, and because of its analyses of the political thought of the period and the questions that will ensue. But once again this will concentrate attention on a tragic episode that does not by any means encapsulate the great event that was the French Revolution. In truth, the book demonstrates above all how much the present influences the approach taken by historians. For it is very much the problem of terrorism today and the reactions it provokes that elicit this kind of enquiry. It is not surprising that the book's conclusion takes up the later influence of the Terror, not only in the totalitarian regimes of the twentieth century, but right up to current American legislation. This shows that we are very far from the “natural

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<sup>7</sup> Not to mention exile. Robert Palmer was one of the first to note that the number of loyalists exiled was proportionately greater than the number of French *émigrés*. Moreover, in 1783 they did not necessarily return to the United States. For example, the Penn family stayed in Great Britain. Other loyalists stayed in Canada.

<sup>8</sup> H. Brown, *Ending the French Revolution. Violence, Justice and Repression from the Terror to Napoleon*, Charlottesville, Virginia University Press, 2006. Moreover, the reference to nature did not disappear after Thermidor. Everyone agreed that “in nature one is a man, while in the social state one is man and citizen.” And it is necessary to protect the rights “that each person brings with him when entering society.” There is an undeniable continuity between 1789 and 1795 (*Le Moniteur Universel*, 1795, vol. 25, pp. 148-152; see also the interventions in favour of natural right by Roux and by Cambacérès, p. 151).

<sup>9</sup> In particular, on the universalization of the exception, which is obviously an interesting point in the book. On the debate about David Bell's book, *The First Total War*, see the discussions in the forum dedicated to the book: *H-France Forum*, Vol. 2, no. 3, Summer 2007. Among others, Jeremy Black, Jeremy Popkin and Annie Jourdan on David Bell, and the response by David Bell.



republicanism” that the author imagined uncovering in the France of Saint-Just and Robespierre. There remain with us exceptional laws motivated by public safety; these, at any rate, may well turn out to be eternal!

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