

TERROR AND DEMOCRATIC COMMUNICATION

by

Michael Markwick
MA, Simon Fraser University 2002
BA (Hons.), University of Toronto 1990

DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF
THE REQUIREMENTS FOR THE DEGREE OF

DOCTOR OF PHILOSOPHY

In the
School of Communication

© Michael Markwick 2010
SIMON FRASER UNIVERSITY
Spring 2010

All rights reserved. However, in accordance with the *Copyright Act of Canada*, this work may be reproduced, without authorization, under the conditions for *Fair Dealing*. Therefore, limited reproduction of this work for the purposes of private study, research, criticism, review and news reporting is likely to be in accordance with the law, particularly if cited appropriately.

APPROVAL

NAME

Michael Markwick

DEGREE

PhD

TITLE OF DISSERTATION:

Terror and Democratic Communication

EXAMINING COMMITTEE:

CHAIR:

Dr. Kathi Cross

Dr. Martin Laba
Associate Professor
School of Communication

Dr. Pat Howard,
Associate Professor, Retired
School of Communication

Dr. Robert Anderson
Professor
School of Communication

Dr. Jerry Zaslove
Professor Emeritus
English and Humanities

Dr. William Harvey
Professor Emeritus
Department of Philosophy
University of Toronto

DATE:

March 29, 2010



SIMON FRASER UNIVERSITY
LIBRARY

Declaration of Partial Copyright Licence

The author, whose copyright is declared on the title page of this work, has granted to Simon Fraser University the right to lend this thesis, project or extended essay to users of the Simon Fraser University Library, and to make partial or single copies only for such users or in response to a request from the library of any other university, or other educational institution, on its own behalf or for one of its users.

The author has further granted permission to Simon Fraser University to keep or make a digital copy for use in its circulating collection (currently available to the public at the "Institutional Repository" link of the SFU Library website <www.lib.sfu.ca> at: <<http://ir.lib.sfu.ca/handle/1892/112>>) and, without changing the content, to translate the thesis/project or extended essays, if technically possible, to any medium or format for the purpose of preservation of the digital work.

The author has further agreed that permission for multiple copying of this work for scholarly purposes may be granted by either the author or the Dean of Graduate Studies.

It is understood that copying or publication of this work for financial gain shall not be allowed without the author's written permission.

Permission for public performance, or limited permission for private scholarly use, of any multimedia materials forming part of this work, may have been granted by the author. This information may be found on the separately catalogued multimedia material and in the signed Partial Copyright Licence.

While licensing SFU to permit the above uses, the author retains copyright in the thesis, project or extended essays, including the right to change the work for subsequent purposes, including editing and publishing the work in whole or in part, and licensing other parties, as the author may desire.

The original Partial Copyright Licence attesting to these terms, and signed by this author, may be found in the original bound copy of this work, retained in the Simon Fraser University Archive.

Simon Fraser University Library
Burnaby, BC, Canada

ABSTRACT

The *war on terror* throws into sharp relief the problem of developing a political philosophy of communication, as we witness the rise of the security regime and its ultimately totalitarian project of making pluralism safe for what it styles as democratic values. Despite the goal of building a polity of deliberative inclusion, be it through a veil of ignorance or mechanisms of institutional translation, the understanding of communication in much of democratic theory has neutered the potential of social pluralism and entrenched sovereign power as something more cohesive, more trustworthy, and more just than any notional power of a diverse citizenry. The result is, following Maritain's use of Tocqueville, "a rare and brief exercise of free choice with regard to the great things of the State, and enslavement in the minor affairs of everyday life", the camp presenting itself as the polis.

The problem lies in the meta-doctrine of pluralism and its insistence that we are permanently alien to each other, at sea in a post-metaphysical politics. I argue for a conception of democratic communication based on the fact of our common humanity. By democratic communication I mean our ongoing discernment as human persons of the nature, dignity and meaning of human existence, and the critical ordering of our social and political life to suit our best iterations of what it means to be human. On this view, different perspectives on the big questions of human identity should not be sequestered from public deliberation, neither should we seal worldviews off against reciprocal scrutiny. Democratic communication examines competing assertions of the good, driving the process of continually bridging the gap between what is and what ought to be. In this sense, I believe Aristotle is correct to affirm that we are "born for citizenship", because the work of politics is entwined with our ongoing emancipation, together groping for the happiness that comes with becoming human.

My purpose is to examine the impact of the *war on terror* on democratic communication, mapping the persistence of human personality against sovereign power's attempt to reduce us to bare life.

Keywords: Democracy; Communication; Terrorism; Citizenship; Liberalism; Biopolitics; Human Rights; Constitutional Law; Deconstruction; Postmodernism; Epistemology; Social Change; Canada; United Kingdom; United States.

EXECUTIVE SUMMARY

The fact of torture in the *war on terror* and, with it, the abrogation of basic tenets of the rule of law—suspension of the law that took place in the name of the law—present a crisis for the possibility of liberal democracy.

This dissertation examines the crisis by placing liberal democratic theory, including the work of John Rawls and Jürgen Habermas, against the realities of the *war on terror*. It engages critically Giorgio Agamben’s biopolitical theory—specifically his argument that the irredeemable nature of political power today is to lay claim to the ownership of all life as such—to suggest ways we can recover the practice of citizenship from a “thanatopolitics”, a politics of death. Working in this way, I define democratic communication as our ongoing discernment as human persons of the nature, dignity and meaning of human existence, and the critical ordering of our social and political life to suit our best iterations of what it means to be human. In so doing, with the help of Jacques Derrida and Alain Badiou, I break from the uneasy truce Rawls and Habermas make with the fact of pluralism, calling instead for politics as a “truth procedure”, a politics that is open to our deepest beliefs about what it is to be “born for citizenship”.

To ground this theory, the following chapters offer case studies of the *war on terror*. They range from an overview of counter terrorism measures in Canada, the United States and the United Kingdom, to an exploration of terrorism as “mimetic violence”, a critique of Canada’s role in Afghanistan, an examination of the sufficiency of the Herman/Chomsky propaganda model for our moment in history, and a genealogy of the archetype of sovereign power in our era, the Presidency of the United States.

Terror and Democratic Communication engages political philosophy and political science, critical legal scholarship, sociology, communication theory and my background in the enforcement of human rights law to assess how, even in the politics of the camp, a free and democratic society is coming to us.

DEDICATION

To Mary and the Five Luminous Mysteries.

ACKNOWLEDGEMENTS

In arguing for democratic communication as the practical, necessarily human work of emancipation, I must first recognize the people who have helped me understand through their deep humanity the beauty of the democracy that is coming to us even in the dystopia of the *war on terror*.

My senior supervisor and director of the School of Communication, Martin Laba, was ferocious both in his belief in me and in the potential of this dissertation to advance the urgent necessity of communication for social change. His good counsel and continual encouragement have helped keep this work a labour of love. I also thank our colleagues at Simon Fraser University, especially Bob Anderson, Patricia Howard, Jerry Zaslove, and Kathi Cross, for the benefit of their insightful criticism. Much of what I learned through this process I learned from my students who, through my several years of teaching at this university, called me to a bolder and more lucid analysis of the problems ranged against the unfinished work of democracy at our moment in history.

Many people in the wider community have sustained my research in ways too numerous to count. Mme Justice Claire L’Heureux-Dubé gave generously of her time when she sat at the Supreme Court of Canada to demonstrate how an unwavering and intelligent commitment to human dignity ought to animate the development of constitutional law.

The circle of collaborators in *Emancipation Now: the Citizens Summit Against Human Trafficking* showed me how people of radically different backgrounds, many of them victorious over some of the worst forms of brutality, can find power in doing politics as a “truth procedure”.

My friends Joyce Maykut, QC and Gary Lauk, QC were stalwart in their support of my work; more than this, they helped me immeasurably in the process of becoming human. So has Duff Conacher, whose tireless and often thankless advocacy for a more accountable, fair and just political system is exemplary for all of us concerned with the coming of a free and democratic society.

The ideas I explore in the following chapters began their life when I was an undergraduate in the Philosophy Department of the University of Toronto. Although I was blessed to have had very good teachers, Bill Harvey was the only one to reach my soul. If I have a hope of being on that Socratic trajectory of seeing things “clear and pure and unalloyed [...] the divine beauty as it is in its simplicity”, whether or not I ever get there, it is because of the content of his lectures as much as the content of his character—his abhorrence of injustice and cruelty in any form, his radical hospitality and openness, his grace and grit.

Equally, the voice of Rosemary Brown, my friend and mentor of happy memory, has been with me through the bleak work of squaring up to the abnegation of human dignity in the

war on terror. She helped me find the courage to believe in human rights, even as my research showed me the genius sovereign power has for extinguishing human rights. Her presence is undiminished, a living witness to the fact that death can never have the last word over life.

I thank my parents for the gift of life, and the parents of my best beloved for giving birth to the beauty, meaning and love in my life.

I am aware that this volume, to borrow from Susan Sontag, is situated “on the same map” as the *homines sacrae* who have suffered torture and murder, the mimetic violence of sovereign power.

At the same time, I cannot forget the example of my grandmother Inez who risked everything in her widowhood to open her house in Colombo in the first hours of Sri Lanka’s civil war, making it a sanctuary for Tamil women fleeing rape gangs. Her response to terror was an adamant empathy, and this prophetic action is for me the sign and safeguard of democratic communication.

In her name, let me thank you for your interest in this work.

TABLE OF CONTENTS

Approval	ii
Abstract	iii
Executive Summary	iv
Dedication.....	vi
Acknowledgements	vii
Table of Contents	x
Introduction	1
1: “Our country is not a police state”	27
2: Deconstructing “Infinite Justice”	62
3: O Kandahar	88
4: The Land God Gave to Cain	125
5: Despotism’s Discontent	170
6: The Advent of the Messianic Presidency	193
7: Conscience and the Messianic Presidency.....	218
Conclusion: A Praxis of Democratic Communication.....	303
Bibliography.....	310

INTRODUCTION

Aristotle's assertion that we are "born for citizenship" stands in sharp contrast to what the *war on terror* is making of us and of the possibility of free and democratic societies. Although one should proceed cautiously with his claim—Aristotle makes it almost parenthetically in the *Nicomachean Ethics* to bolster his argument about the nature of happiness, an argument he uses ultimately to justify the construction of the state—I find nevertheless the idea that we are by nature citizens opens a path to understanding democratic communication and what it means at a time of terror. (Aristotle & Ross, 1954: I, vii) It is, in the purest sense of the word, a radical claim, calling us back to the ontological primacy of human life as such over the life of the state. The state is not the author or source of human life, though it devotes great energy to simulate this role. To be "born for citizenship" suggests that we are born to be in relationships with each other, relationships that aim to varying degrees at forms of social (if not political) governance and, ultimately, happiness. To be "born for citizenship" is to be born for social communion. At the heart of our species is the capacity to discern together and manifest the nature and purpose of human existence, to order our lives together according to our best understanding of what it means to be human. If this is correct, then "citizenship" is not, in the first instance, a juridical or constitutional status—a ground of exclusion of the alien, as Derrida would have it—but the action of being, the action of the "soul" to borrow again from Aristotle, that is democratic communication. To be "born for citizenship" is to be a participant in the human action of finding the truth about our lives as they are, discerning the truth about our lives as they ought to be and

advancing through all of this the truth about what it means to be human. This involves the practical work of sharing in the ordering of our lives together. Speaking in the sanctuary of Washington, DC's Vermont Baptist Church, on the spot where Martin Luther King Jr. had once preached, Barack Obama delicately established himself as the Joshua to the Moses that was Dr. King. Obama was approaching the first anniversary of his inauguration as President, and this speech was an audacious but strangely majestic moment. As he exhorted the faithful and Americans generally not to lose faith in government, President Obama bound the practice of citizenship to what he described as "that sweet spirit of resistance". Citizenship is this spirit, the action of human dignity in history against every form of oppression.

The purpose of my research is to map the conflict between citizenship as democratic communication, the "sweet spirit of resistance", and the powers at work in the *war on terror* that make an effigy of this spirit. Through a close reading of the impact of the *war on terror* on Canada, Great Britain and the United States, my ultimate purpose is to test our beliefs in what constitutes a free, democratic and just society with a view to developing a pragmatic theory of democratic communication. This theory is pragmatic to the extent it recognizes that the first moments of the twenty-first century reinforced the lesson of its incarnadine predecessor: no war can be held at arm's length. The lesson came home with skyline altering violence in the airspace and on the soil of the United States, Bali, London, Madrid, Baghdad, Kabul and myriad other sites since September 11th, 2001. It leaked out in the point and shoot images of US soldiers at brutal work in Abu Ghraib, a prison made infamous by Saddam Hussein and doubly so by Donald Rumsfeld. It is the refrain in the

litany of horrors recounted by Maher Arar of his “extraordinary rendition” into the hands of Syrian torturers. It bleeds life out of the constitutional norms that have shaped for at least half a millennium our understanding of liberal democracy, feeding the rise of the executive branch as Leviathan and saviour.

The intimate reach of the *war on terror* turns Aristotle’s axiom on its head. It births us into the citizenship of the gulag, the concentration camp, the grave-like cell, ground zero. It supplants the necessary diversity of the ways we manifest human life with the monotony of bare life, rendering us human organisms stripped of personality, dignity and agency. For this reason, my approach to developing an idea of democratic communication is to examine the actual impact of the *war on terror* on our capacity for citizenship. With great respect to Rawls and his seminal theory of justice, I do not believe an adequate understanding of justice in communication can flow from a state of abstraction, from a veil of ignorance. Further, I do not believe the fact of social pluralism supports Rawls’ insistence that politics must eschew any form of metaphysics. Claims about absolutes like the good of human existence always, as I will argue below, make their way into politics. Social pluralism is not a historical accident; the diversity of beliefs about human existence, its origins and ultimate significance is a necessary feature of our species, a visible sign of our capacity actively to reflect on who we are and to organize ourselves accordingly. Equally, Agamben’s grim but apposite insistence that we are trapped ineluctably by sovereign power in the condition of bare life, that the role of law is to entrench our status as *homo sacer*, sacrificial victims for the perfection of sovereign power, misses the paradox that endures at the heart of oppression. Even as the state would push us into a condition of

voicelessness, reducing human life to a raw material, the “sweet spirit of resistance” persists. We retain our capacity for social communion, and affirm our human function as citizens, against the most deplorable and dehumanizing conditions where justice is itself perverted. Indeed, the truly remarkable thing about our human agency as citizens is that we make powerful, ultimately metaphysical, assertions about the good even in the moments of great suffering. This ability to participate in the vast but purposive deliberation about the truth of human existence marks our point of return from bare life to citizenship, from victim to agent of change. My research, therefore, examines democratic communication as this process of assertion, resistance and recovery that marks our participation in the conversation—as broad as history and as diverse as humanity—about who we are as people, and what we are as a species. My aim is to find in the intractable and hard realities of our relationship to the *war on terror* the seeds of a sound understanding of democratic communication.

The problem of communication is one of the foundational disputes in the epochal debate over what democracy actually means. The public use of reason, and what can count as legitimate public reasoning, have been contested since Socrates and his predecessors (Plato & Jowett, 1977), with the controversy remaining fervent and at times illuminating to the present moment in, for example, “deliberative democracy” theory (Bohman & Rehg, 1997) and Habermas’ “discourse ethics” (Habermas, 1996). Drawing from Badiou and Derrida, with a debt I happily acknowledge to Christopher Norris, I define “democratic communication” as a truth procedure that elicits the democracy to come. By democratic communication I mean our ongoing discernment as persons of the nature, dignity and

meaning of human existence, and the critical ordering of our social and political lives to suit our best iterations of what it means to be human. On this view, contra Rawls, different propositions about the big questions of human identity should not be sequestered from public deliberation, neither should we seal worldviews off against reciprocal scrutiny in the name of pluralism. Democratic communication, as diverse as our species and as broad as history, examines competing assertions of the good, driving the process of continually bridging the gap between what is and what ought to be. In this sense, it is antithetical to consequentialist ethics, because it is intimately concerned with criticizing and ordering our lives together according to the truth of our equal human dignity. Seen through the lens of the *war on terror*, and its brutal consequentialist doctrines, my argument in this volume is that democratic communication is not the diffusion of biopolitical power—the power that claims for the sovereign ownership of life as such—among a population. I believe this is ultimately where Habermas’ “discourse ethics” takes us, a perverse result for a well-meaning theory. Democratic communication is not the means by which we share in sovereign power to justify and tame it. It is not the diffusion and expiation of the guilt of sovereign power among a body of voters by plebiscite, propaganda, party politics or any other means. It is the practice of politics as a “truth procedure”, even in the extreme condition of the camp where the possibility of politics, indeed human dignity as such, seems extinguished.

The following chapters set out in some detail salient events and controversies of the *war on terror* in order to deconstruct them. In a break with custom, my work does not provide a discrete literature review but instead integrates it into the chapters as an aid to this work of

deconstruction. The goal here is to ground the theoretical debates, drawing out their implications by applying them to the extent possible to the realities of the *war on terror*. Even so, to help the discussion to follow, it is useful to highlight here thinkers who have helped me triangulate a working idea of democratic communication in a time of terror, specifically with respect to the categories of truth, privacy and solidarity.

“Cette violence terroriste n'est pas réelle”

The *war on terror* is an ignominious term, because its purpose is to mask more than it reveals. Produced by George W. Bush’s phrasemakers, the first inclination of the Obama administration was quietly to anathematize it. Obama subsequently reaffirmed the term in the wake of a foiled Christmas day plot, pornographic and desperate, to bring down Northwest Airlines flight 253 with eighty grams of PETN high explosive sewn into the crotch of a young Nigerian’s underwear; “We are at war,” the president insisted. My research identifies in the *war on terror* what Alain Badiou describes as “genuinely political” events, ruptures in the culture of spin and, with a nod to Herman and Chomsky, propaganda that pass for public debate, for news. More than this, they are phenomenological moments that expose what the state must of necessity conceal, how greatly its powers and reach exceed the scope of human life. “The State,” Badiou observes,

is in fact the measureless enslavement of the parts of the situation, an enslavement whose secret is precisely the errancy of superpower, its absence of measure. Freedom here consists in putting the State at a distance through the collective establishment of a measure of its excess. (Badiou, 2005: 145)

As a phrase, the *war on terror* attempted to brand yet another exponential increase in the superpower of the State, not simply to mask it but, as I will show in subsequent chapters, to make us grateful for it and adore it. However, at the very moment when the State,

specifically in the arrogation of powers by the executive branch of government, unbound itself from the formal checks on the scope of its “enslavement of the parts of the situation”, its dominion over life as such—particularly in its abrogation of the rule of constitutional and international law—in the name of our bodily security, it exposed its errant supremacy. There was in fact nothing subtle in this process. The Bush White House and its “project for the American century” answered the Jihadist spectacle of 9/11 with Infinite Justice, the original and hapless tag for its invasion of Afghanistan, the total violence it rained down on Baghdad starting with “Shock and Awe”, and the intimate vivisections it perpetrated as standard operating procedure in concentration camps of its own invention. The purpose of the White House was to make a planetary spectacle of the superpower at its command, choreographed for a twenty-four hour news cycle with embedded journalists, and cabals of retired senior political and military staff feeding the frenzy as make believe experts for talking head television.

The political moment, in Badiou’s terms, flowed from the critical engagement of this shock and awe. From the exposure of the career ending perjury of then US Secretary of State Colin Powell at the UN Security Council, to Tony Blair’s insistence that Saddam Hussein could launch weapons of mass destruction within fifteen minutes, to the specious logic of the *war on terror* as such, the politics of this moment has involved a continual effort to sort through a welter of direct and systemic lies. It has been the practice of politics, as Badiou would have it, as a “truth procedure”. He does not mean by this a process of inquiry mediated exclusively by the State or situated in formal deliberative venues such as legislative assemblies, courts and the media. The site of politics as a truth procedure is our

capacity as humans for thought, where “a political thought is topologically collective, meaning that it cannot exist otherwise than as the thought of all.” (Badiou, 2005: 142) It manifested itself in the mass demonstrations against the US invasion of Iraq, in the insistent and painful testimony of the victims of “extraordinary rendition”, in digital images of torture conducted under the auspices, if not with the complicity, of American and Canadian authorities. Politics as a truth procedure has a universal reach because, as Badiou correctly asserts, what is true for one is true for all. A central purpose of politics is to establish the facts of cruelty, to pass binding and valid moral judgement, to take corrective, emancipating and just action. Truth, being addressed to all, is a criterion and a proof of equality. Conversely, as we see in the *war on terror*, the diffusion of lies exposes our inequality both with the State and the inequality the State constructs between us.

This necessary connection between equality and truth telling is what marks Badiou’s politics as democratic. So much so, in fact, that I believe it is more helpful to describe the whole process as democratic communication, leaving the term politics to sort itself out over time. Democratic communication describes the ways in which fallible human beings, situated at a specific historical moment, embedded in a matrix of social conditions and relationships, critically engage the facts of their circumstances while, ultimately, passing judgements that make claims about the nature of our species as a whole. In this way, the subject of democratic communication engages all persons in their humanity, inviting response and correction. It addresses our capacity for self-governance and with this the role our species plays, good and ill, in ministering to the life of the planet as a whole. To Badiou’s affirmation of equality, then, I would add the necessity of diversity in the range of

people who participate as deliberators—a deliberative community as large and as diverse as the human species itself at all places and in all ages. Not simply thought but democratic communication is the activity of our species; we are born for citizenship in this respect.

None of this is without controversy. The ideas of a deliberating self and of truth itself are for theorists like Richard Rorty, Jean Baudrillard and, more often than not, Michel Foucault atavistic turns to the project of the Enlightenment, embarrassing and ultimately unhelpful against the forces of oppression. Their relativism denies the possibility of a politics that aims at truth, insisting instead that all knowledge and communication are forms of poetry, performance or domination. In anticipation of the more extensive discussion presented in the body of this text, allow me to highlight here some of my core concerns.

Three weeks out from 9/11, *Le Monde* published Baudrillard’s attempt to codify the “spirit of terrorism”, an article that tries to convert the fact of the collapse of the World Trade Center’s twin towers to “the brutality of the spectacle that alone is original and irreducible”.¹ Far from rekindling the possibility of a reality that persists beyond and despite its representations in the circuitry and “matraquage”, the overkill and hype, of a hyper media culture, the cratering of the Manhattan waterfront’s principal buildings after the impact of two passenger airliners may have been “unimaginable, but this is not enough to constitute a real event.”² What counts instead is our fascination with the spectacle, as

¹ “[C]’est la radicalité du spectacle, la brutalité du spectacle qui seule est originale et irréductible.”

² “L’effondrement des tours du Wold Trade Center [sic] est unimaginable, mais cela ne suffit pas à en faire un événement réel.”

with a disaster movie: “This terrorist violence is therefore not a reigniting of reality, or of history. This terrorist violence is not real.”³ (Baudrillard, 2001)

Baudrillard continues his performance by denying any sense that the people who hijacked civilian airliners on the morning of September 11th, 2001, and the network of resources behind them that orchestrated conflagrations to capture the world’s attention, to communicate their capacity for agency against the globalizing West, against the United States, were agents in any rigorous sense. The only actor here is the system of rapacious globalization, and 9/11 is its own “beautiful suicide”. From this it follows that the victims of the *war on terror*, those like Maher Arar whose cases have been the subject of extensive documentation and scrutiny and those, like detainees rendered by Canadian authorities into the hands of Afghan torturers, whose circumstances are hidden from the Parliament of Canada itself in the name of national security, are not in fact real victims. They are also simulations, without agency even as victims, phantoms haunting the protracted and comely suicide of the West.

Baudrillard’s posture might well prove embarrassing for some of his post-modernist fellow travelers, like Richard Rorty. Writing in *The Nation* one year out from Baudrillard’s contribution to *Le Monde*, Rorty sounded what amounted to a prophetic warning against the consolidation of war powers in the hands of the Bush Administration, powers the Obama White House has preserved intact. For Rorty, 9/11 was an act of “mega-terrorism”, calculated to “bring despair to the heart of the West.” His concern is nothing

³ “Cette violence terroriste n’est donc pas un retour de flamme de la réalité, pas plus que celui de l’histoire. Cette violence terroriste n’est pas réelle.”

like the arabesques of Baudillard on the high wire of postmodern theory, but the practical challenge of preserving democracy against the rise of “an Orwellian condition of perpetual war.” Rorty’s question speaks to the heart of this dissertation: “How can democratic institutions be strengthened so as to survive in a time when governments can no longer guarantee what President Bush calls homeland security?” (Rorty, 2002) I believe the answer must start at a place Rorty will not go, the foundational role of truth for democratic communication.

Writing five years before the conflagrations of the *war on terror*, Rorty attempted to build a politics founded on postmodernism and its repudiation of any sense that “truth” denotes the correct correspondence of human thought with an objective reality. Before we could imagine de-centred cells of Jihadists could pose a material threat to our discourses about democratic values, the advent of what Derrida describes as the irreconcilable other, Rorty posited a normative political order built to reject the shibboleths of the Enlightenment.

“For us ‘post-modernists’,” he wrote,

reason is conceived dialogically. We treat it as just another name for willingness to talk things over, hear the other side, try to reach peaceful consensus. It is not the name of a faculty which penetrates through appearance to the intrinsic nature of either scientific or moral Reality. For us, to be rational is to be conversable, not to be obedient. [...] We think that anything you can do with notions like ‘Nature’, ‘Reason’ and ‘Truth’, you can do better with such notions as ‘the most useful description for our purposes’ and ‘the attainment of free consensus about what to believe and to desire’. Insofar as they claim to add something to these latter notions, invocation of Truth, Nature and Reason are relics of childish fears and superstitions [...] the philosophical analogue of religious fundamentalism. (Rorty, 1997: 43)

By this canon of postmodernist belief, political discourse is at bottom a form of poetry, language games whose purpose, as Rorty would have it, is to make the world less cruel. It does not aim at effecting a correspondence between the organization of our lives together

with any innate human or transcendental values. The purpose of politics is to allow us as intelligent animals to manipulate our environment so as to live as far as possible in peace. Borrowing from Habermas' theory of "communicative reason", Rorty argues that the idea of truth in democratic deliberation does not describe a reality that exists independently as the telos or aim of our discussions; truth describes the extent to which our free reasoning results in an overlapping consensus. Risking circularity, Rorty insists this consensus is not about a reality that exists at an objective remove, in "Nature". It is a consensus about our "intersubjectivity", a consensus about our consensus.

Foucault's biopolitics presents a further complication for Rorty. He would argue that the idea of a self existing at a remove from social discourse, as though one can decide outside the layers of social domination whether to be conversable or obedient, is an Enlightenment fiction that persists even in Rorty's understanding of postmodernism. The ubiquity of power/knowledge makes every exercise of reason an exercise in obedience because, as Desmond Bell correctly observes, Foucault's fundamental conviction is that "reason is irrevocably tainted with domination." (Bell, 1992: 335) There is no footing outside this all encompassing cycle, a "vicious unbroken circle of domination", that would allow anything like the agency Rorty envisions for the requisite postmodern stance. Indeed, Foucault insists there is no subject as such, no choosing self: "Knowable man (soul, individuality, consciousness, conduct, whatever it is called) is the object—effect of this analytical investment, of this domination—observation." (Foucault quoted in Bell, 1992: 335) The result of Foucault's rejection of both truth and the truth-seeking subject is, as

Bell, Norris and others demonstrate, to render futile and necessarily fictional any form of opposition to the powers of domination. The result is a political nihilism.

Similarly, the politics Rorty proposed in 1997 is entirely unequal to the Orwellian challenges we would face with him in the *war on terror*. In the first instance, the valorization of “intersubjectivity” as the best one could hope for out of our deliberations cannot supply the factual certainty we must have in order to find the truth in a morass of lies. Protecting democratic institutions in the *war on terror* requires us to remain vigilant about what is actually happening; it demands more from us than “the attainment of free consensus about what to believe and to desire”.

Further to this, the idea that human reason can make the world less cruel only by calibrating itself to the attainment of a “peaceful consensus”, by being companionable instead of correct, masks the intolerance of pluralism that is at the heart of the postmodernist project, its covert ontology. It privileges the participation in deliberation of people who, like Rorty, are able to accept that all reasoning is a language game. It anathematizes, in the sweet name of tolerance, those who hold deep convictions on religious, philosophical or cultural grounds about Reality and what it amounts to especially with respect to emancipation. There are limits, Derrida would observe, to Rorty’s assertion of the postmodernists’ willingness to “hear the other side”. These limits, ultimately, are imposed by people who have the most power—social, political, economic and military—to determine who counts as “us” and who counts as “the other”, to separate the companionable from the obstreperous. Instead of removing domination and obedience

from the equation, Rorty's rejection of "Truth, Nature and Reason" as "childish fears and superstitions" opens the door wide to the naked exercise of power as the final arbiter of what is good in the way of belief. At the end of the day, Rorty must make an absolute out of "democratic institutions" by which I believe he means the formal structures of the State. In the absence of an objective, knowable moral truth, the only authority that can determine the legitimacy of the actions of the State is the duly constituted apparatuses of the State. In this positivist system, the best one can hope for is procedural or formal legitimacy and never substantive justice. However, the whole point of resistance to the *war on terror* has been that practices like the enshrinement in the war powers of the President of the United States torture, extra-Constitutional arrest, interrogation and detention, and racial profiling are violations of human dignity *per se*. This resistance is anchored in the affirmation that human dignity is not the product of a consensus belief or legislative fiat but a distinct, fundamental and true aspect of being human.

When it comes to democratic communication, reason is not reducible to the mannerly disposition of Richard Rorty and equally well-intentioned souls: reason is more than the simple "willingness to talk". Indeed, to place the onus on the victims of the *war on terror* to "hear the other side" would be like asking Maher Arar to keep an open mind as to the intentions of his torturers and the possibility that their odious accusations might have some merit. There was no possibility of a "peaceful consensus" between them, a chasm signified by the thickness of the electrical cable the torturers used to beat to a pulp the soles of Arar's feet. Second only to the physical release from the ordeal of his confinement, the whole point about Arar's emancipation was making public the truth about what agents of the *war*

on terror did to him. Christopher Norris has played a seminal role in informing my thinking on these matters, and he in turn owes a debt to Harry Frankfurt's apposite essay "On Bullshit". "[A]nti-realist doctrines", Frankfurt contends,

undermine confidence in the value of disinterested efforts to determine what is true and what is false, and even in the intelligibility of the notion of objective inquiry. One response to this loss of confidence has been a retreat from the discipline required by dedication to the ideal of *correctness* to a quite different sort of discipline, which is imposed by pursuit of an alternative ideal of *sincerity* Convinced that reality has no inherent nature, which he might hope to identify as the truth about things, [the anti-realist] devotes himself to being true to his own nature. (Frankfurt quoted in Norris, 1997: 160)

The road to hell in the *war on terror* is paved with sincerity. I would therefore revise Rorty's question about our principal task in the aftermath of 9/11. The challenge is not simply to strengthen democratic institutions, but to recover and advance democratic communication against the anti-realist turns we experience at every quarter. If Truth is the first casualty of this war, the work of democratic communication is to resurrect it.

"At the heart of liberty"

Anti-realist doctrines would present interesting thought experiments if they remained within the cafés in Baudrillard's arrondissement or Rorty's faculty club. However, nine years before 9/11 dramatically increased the risk of playing politics with truth, the U.S. Supreme Court enshrined anti-realism as a dogma of constitutional law, making it the cornerstone of its construction of the right to privacy. "At the heart of liberty", the Court ruled, "is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." (*Planned Parenthood v. Casey*, 1992) The Court is attempting to preserve the epochal promise of liberalism, from Locke to Rawls, of our radical and equal freedom as individuals in the conduct of our

private lives. We are unto ourselves zones of exclusive influence, self-legislating beings empowered to determine our life plans and fashion our convictions about existence, meaning and the universe without interference of any outside authority.

From a Rawlsian perspective, the fact of social pluralism means that we can never look to a resolution of contending religious and ideological beliefs about the good, about the nature and purpose of human existence. (Rawls, 2005) This diversity necessitates a political system that brackets out from public discourse any claims about the big metaphysical questions, to ensure each of us maximal equal liberty to sort through these issues if and as we choose. The result is a conception of privacy in which the right precedes the good, where what matters about human agency is our freedom of choice. On this view, propounded by Rawls and canonized by the U.S. Supreme Court in *Casey*, a pluralistic society must tolerate our inward projects of self-definition.

This position has attracted lively critique, and I take note especially of Sandel's concern that the promise of liberty advanced by Rawls is one that liberalism cannot possibly deliver. (Sandel, 1998) There are two issues Sandel raises that warrant close attention. First, in a line of reasoning similar to Derrida's critique of Habermas, Sandel observes that the State is always imposing its ideas of the good. From the criminal law to tax and social policy, indeed in every action of government, the State continually constructs a normative definition of what it means to be human. The *war on terror* reinforces the State in this role, policing the boundaries of legitimate belief in the name of national security. Derrida would add, along the lines of his rebuttal of Habermas, that the affirmation of tolerance as the

guarantor of human rights, including the right to private life, always carries conditions that, ultimately, exclude the other. Tolerance speaks to the fact that liberalism allows liberty on its own terms, specifically in its construction of the human person as an atomistic subject whose principal faculty is the ability to choose. This is a metaphysical claim in its own right, and it sets a boundary against what Derrida suggests as the alternative to tolerance, a radical hospitality or openness to the other. (Borradori, Derrida, & Habermas, 2003)

Sandel's second concern addresses the highly abstracted picture of the self that is normative in liberal theory and constitutional law, the idea that choice precedes identity. He argues that choice making is not an "unencumbered" faculty. The choices we make flow from our self-understanding, the critical awareness we have of ourselves as persons situated in a specific context of relationships, and features such as race, gender, sexuality, and religion, the fact that we are born at a specific moment in history and live in a finite space. These factors cannot easily be said to be the subject of choice as such, they are given to us as core attributes of our identity. We are not, therefore, in a position to make ourselves *ex nihilo* through the faculty of choice alone. A more realistic conception of the self, Sandel argues, would give our capacity for understanding and discernment at least as much weight as our capacity to choose.

Norris makes a similar point, arguing against the epistemological implications of positions like the U.S. Supreme Court's in *Casey*. Just as we must work to a critical engagement of the objective features of our own identity in order to be fully functioning selves, we must also find our footing in the fact that there is a wider world into which we are born and

which will keep going long after our death. Against the brave and atomistic author of meaning imagined in *Casey* he would argue that

[...] such a sovereign disposer would encounter no resistance—no check upon its world-creating powers—from anything beyond or outside the domain of its own internal representations. [...] T]his ‘personal reality’ cannot be achieved without a sufficiently well-developed sense of that other (objective and mind-independent) reality that may always resist our best efforts of creative description. For there is otherwise nothing that can halt the drift towards, on the one hand, a wholesale anti-realism devoid of epistemic content, and on the other a kind of transcendental solipsism that views both the subject and its ambient world as just what we make of them according to this or that fictive or imaginary projection. (Norris, 1997: 161)

An essential dimension of politics as a truth procedure, of democratic communication, is our ability to manifest our identity in our choices with a view to creating a social order that is substantively pluralistic, where we see ourselves as existing in relationships with each other and with the planet that allows the possibility of life in the first instance.

For these reasons I believe we need to develop a more rigorous understanding of privacy than what we have come to accept in liberal theory thus far. Habermas comes close to this in his orientation of privacy to our roles in a democratic society. “The constitutional protection of ‘privacy’”, he suggests,

promotes the integrity of private life spheres; rights of personality, freedom of belief and of conscience, freedom of movement, the privacy of letters, mail, and telecommunications, the inviolability of one’s residence, and the protection of families circumscribe an untouchable zone of personal integrity and independent judgment. (Habermas, 1996: 368)

Privacy is about more than simply protecting our autonomy as choice-making beings, and preserving what we choose from the streaming gaze of the State, corporations or anyone else. The right to privacy addresses our capacity as human agents for self-determination, the right to participate in the work of defining what it means to be human. Against Habermas, I argue that this cannot be simply a construction of positive rights enshrined by the legislative power into a constitution. I do not believe it gains us very much to conceive

of privacy as a right accorded to us in a positivist manner, a concession of the State to our individuality. If this were the case, and one of our principal shields against the intrusion of the State was at the same time ours by the fiat of sovereign power, then the right to privacy would be another instance of the errant super power of the State, its total enslavement of all aspects of life. Instead, I argue that privacy flows from our ontological status as beings “born for citizenship”. The right to privacy is grounded in the primacy of human life over the life of the State. For the exercise of state power to be legitimate, if it can be legitimate per Badiou’s skepticism, it must derive from our autonomy in democratic communication. On this view, privacy refers to the space we need and must continually reclaim to understand ourselves in the context of the relationships and social conditions that give substance to our identity, to discern in this life-giving context what it means to be human, and to test this understanding in passing judgement on the state’s exercise of its superpower. Privacy draws us out of ourselves and speaks to the foundation we must have to tell the truth about human dignity against the effigies constructed of us by the machinery of the State.

“That sweet spirit of resistance”

Democratic communication speaks to what Habermas describes as “the practice of self-determination on the part of free and equal citizens” where, in my view, the status of citizenship is itself a point of contestation against the positivist power of the State.

(Habermas, 1996: 387) Citizenship, principally, is an ontological feature of human beings, the fact that we have the ability to measure the gap between what is and what ought to be. We have the ability to say “no”. In this sense, democratic communication cannot be a

structure of any specific system of governance; it is not a form of communication that is democratic simply because it takes place under a constitutional regime that presents itself as democratic. Borrowing from Derrida, I argue instead that democratic communication describes the way we are agents of the “democracy to come”, the political community that ought to be. (Borradori et al., 2003) The human task is continually to deconstruct the material circumstances of our lives against our best understanding, one that grows richer and more complete as we enter into deeper and more inclusive solidarity, of human dignity. This is the challenge of politics as a “truth procedure”.

On the face of it, Agamben’s biopolitical critique of the State seems to leave little scope for solidarity and resistance. His argument, substantiated by the phenomenon of the *war on terror*, is that the camp and not the *polis* is the paradigm of the State in the aftermath of Auschwitz. With the rise of Nazi Germany, sovereign power crossed the Rubicon; where it had once made no claim to the ownership of life itself, the State began at this point in history to make itself the guarantor and disposer of life. The shift is irrevocable, and projects striving to devise ways to make the State more accountable, just and democratic—for example, the political liberalism of Rawls and Habermas’ ideas of communicative action—cannot convert the camp into the *polis*. The function of the State is to reduce the human person to bare life, an organism to be quantified and nurtured into productivity, a threat to monitor and eradicate. In subsequent chapters, I examine the evolution of the institution of the presidency of the United States to illustrate this process of transformation, showing how biopolitical authority can coalesce even in the midst of intensive developments of democratic practice in law, theory and social movements.

Further, I show how the construction of mass audiences is directly connected to the reduction of the human person to bare life. Habermas misses the point in criticizing mass media simply for its role in constraining public deliberation; biopolitically, the construction of mass audiences is part of the sovereign project of reducing us to the status of organisms. We find this in Foucault also, however Agamben's biopolitics does not fall into the fatalism that confounds any possibility of emancipation in Foucault's bleak universe. For Agamben, the prospect of a true and defiant affirmation of human dignity against sovereign power flows from the fact that communication and thought remain possible because of the existence of the other. Resistance flows from solidarity.

To move forward in our biopolitical condition, I believe we have to examine the features of agency that remain after the implosion at Auschwitz of our hope for self-determination and justice through the positivist power of the State. We have to work to a critical metaphysics of what it means now to be human, and how this relates to universal truths about our nature. Agamben and Badiou suggest a workable way to move ahead. The former quotes Dante Alighieri with approval, an excerpt that warrants repetition here,

It is clear that man's basic capacity is to have a potentiality or power for being intellectual. And since this power cannot be completely actualized in a single man or in any of the particular communities of men above mentioned, there must be a multitude in mankind through whom this whole power can be actualized.... [T]he proper work of mankind taken as a whole is to exercise continually its entire capacity for intellectual growth, first, in theoretical matters, and, secondarily, as an extension of theory, in practice. (Dante as quoted by Agamben, 2000: 11)

Who counts as part of the "multitude in mankind"? The *war on terror* is a contest between two rival powers for sovereignty over the human species, Western states lead by the United States acting in the name of liberal democracy and Jihadist networks, with a nucleus in Al Qaeda, operating under the presumption of a divine warrant. If this is, as

Agamben suggests, a “global civil war”, how is it possible to speak of one multitude or one “mankind”? Again, the *war on terror* allows us to discern the persistence of diversity and, with it, an organic unity of our species. If nothing else, we are united in the fact that the arrogation of the ownership of our lives, individually and collectively, in the biopolitics of sovereign power is addressed to all of us. This claim, as Agamben suggests in his discussion of the plight of Palestinian refugees, does not have an equal impact on all of us. It is possible to develop a taxonomy of the disparate impact of the *war on terror*, for example in racial and religious profiling. If nothing else, the *war on terror* gives perverse recognition of the fact of human diversity in its constructions of who is likely to be a greater threat to “public safety”. However, Dante’s point is that no single deliberator or population can make a definitive and exhaustive claim about what it means to be human. This process of definition, as I have argued above, can only proceed fully as the diversity of the human species manifests itself through history, feeding a continual process of critical assessment. The threat presented by the factions competing in the *war on terror* is to bring this process of unfolding to an end, to declare the end of history by imposing, with violence against our species as a whole, its own edict about the nature and purpose of human existence.

The task of theorizing communication, and with it our understanding of how to make social change happen, communication ethics and ideas of deliberative democracy, must change in the face of the *war on terror*. Much of this work has the effect of translating social diversity into something like an exercise in solipsism, requiring the other to set aside altogether or to translate her deepest convictions and beliefs into terms that are more decorous for the public sphere. (See, for example, Cohen, 1997) I do not believe these

theories can deliver on their promises of a justice in communication freed of metaphysics. The *war on terror* is an exhibitionism of the superpower of the State, and the countervailing superpower of anti-state terrorist networks. The purpose of this war is to collapse the categories of truth, privacy and solidarity by fiat of violence, dissolving into terror the human task of knowing ourselves.

Agamben is correct on the evidence to assert that the *war on terror* locks us into the “state of exception”. This is not a dictatorship, and it leaves intact—it takes place in the name of—our constitutional order. It is, instead, “a space devoid of law, a zone of anomie in which all legal determinations—and above all the very distinction between public and private—are deactivated.” (Agamben, 2005: 50) Nevertheless, our capacity for communication remains intact because of the existence of the other. Our capacity for communication is grounded in the fact that, even in the state of exception, human beings retain their nature, in Agamben’s words, as “the only beings for whom happiness is always at stake in their living, the only beings whose life is irremediably and painfully assigned to happiness.” (Agamben, 2000: 4) Communication requires diversity; without diversity, we have only a form of solipsism, a sterile monologue aping the life of the species. Its aim, if it is to be democratic, is to find in diversity new forms of solidarity, to bring interpersonal alliances into being within the shell of the state of exception and its biopolitical claims on our lives. Against constitutional constructions of our equality before the law, democratic communication is an upwelling of the fact of our equality. I take Badiou’s point that

[p]olitical equality is not what we desire or plan; it is that which we declare to be, here and now, in the heat of the moment. There is no politics bound to truth without the affirmation – an affirmation which can neither be proved nor guaranteed – of a universal capacity for political truth. (Badiou, 2005: 98)

For Badiou, politics is a process of contestation that is both passionate, claiming deep personal dedication, and establishes universal truths, i.e. assertions of fact and value that “apply across every kind of social, cultural, political, ethnic or other such restrictive boundary.” (Norris, 2009: 76) It changes our relationship to the world, he believes, in the same way loving and being loved changes us fundamentally.

To explore these themes in greater depth, the following chapters examine specific facets of the *war on terror* with a view to mapping its biopolitical impact on democratic communication. Stylistically, these chapters are self-supporting, presenting different features of the *war on terror* in light of a consistent analytical framework. Most of the chapters have been work shopped at international conferences, and I am grateful for the criticisms they received in these sessions with a particular vote of thanks to my colleagues at the European Sociological Association.

The first chapter considers the rise of the security regime in Canada, the United States and the United Kingdom. It explores the paradox of the entrenchment of biopolitical power in states that present themselves as liberal democracies, with specific reference to measures including the expansion of state surveillance and preventive arrest.

Having blocked out the implications of the security regime for the constitutional integrity of these nations, I examine in the second chapter the phenomenon of the *war on terror* in its own right. The contest between the security regime and jihadists is a form of “destructive

mimesis”, a struggle to decide which will become the “reference point for all subjectivity”.

This presents a challenge to the liberal democratic conception of the state.

The security regime has a wider field of action than managing affairs within its own geopolitical boundaries. Canada’s role in Afghanistan, alongside NATO and the United Nations, shows how the security regime coordinates its global project through formal and informal channels, expanding its biopolitical power globally. In the third chapter I develop something of a biopolitical economy of Canada’s attempts at state building in Afghanistan.

Canada’s project of building a refuge on the periphery of the Taliban’s stronghold on the Pakistan frontier opens a path to considering Canada’s status as a refuge in its own right. Amid renewed concerns that Canadian officials have been complicit in the torture of personnel captured in Afghanistan, and the controversy this has triggered in the House of Commons including its prorogation for the second time in one year, I return to the ordeal of Maher Arar in the fourth chapter. Arar reveals the “masculinist power” at work in the security regime.

Twenty years on from Herman and Chomsky’s propaganda model, in the fifth chapter I assess its fit as a heuristic tool against the challenges presented by the *war on terror*. I compare the role of propaganda produced by the Bush White House to the use of *Radio Mille Collines* in the Rwandan genocide, suggesting ways to update Herman and Chomsky’s model to take into account the biopolitical nature of sovereign power. In all of this, my method is to resist wherever possible treating the *war on terror* and its impact on our politics, our governments and our aspirations for democracy as abstractions.

In order to ground this work further, the final two chapters present a close reading of the evolution of the Presidency of the United States as an institution. I argue that the rise of the security regime globally is tied to and informed by the US presidency. The first of these chapters returns to the origins of the presidency, tracing its rapid evolution from the modest and wary construction of the office in the first instance, into an executive branch hardened by the Civil War. I move from this to consider the rise of the presidency to something of a messianic posture in the twentieth century to our present moment. This reordering of the balance of powers under the US Constitution is principally the story of the presidency's powers over communication.

My conclusion moves from the examination of the *war on terror* on a macro scale to consider democratic communication on a human scale. It provides a brief overview of my research in the creation of the Citizens' Summit Against Sex Slavery, a collaborative circle formed by undergraduates to include former prostitutes, the independent women's movement, and other leaders from civil society, both secular and religious. The Summit suggests a praxis of democratic communication that allows people who are particularly vulnerable to the biopolitical nature of masculinist power to create new forms of resistance. I find in this work suggestions or a prefiguration of the democracy to come.

1: “OUR COUNTRY IS NOT A POLICE STATE”

The rise of the security regime over democracy comes to us lawfully, indeed with the moral imperative of human rights. The security regime enervates our performance as citizens, and ultimately all forms of human agency, by subordinating our fundamental freedom of communication and the enduring privacy this freedom requires to the good of keeping us safe against mass murder at the hands of terrorists.

There are two ways to account for what is arguably the central political phenomenon of our era. The security regime, instituted in the arrogation of powers by the executive branch for the purpose of our protection, may be an unhappy though necessary response to the demonstrable threat of militarised fundamentalism, mandated by voters in the western world through the selection of political leadership with converging agendas for improved public safety. If this were the case, then at least the genesis of the security regime would be consistent with liberal norms. The security regime would be the polity’s re-calibration of civic freedoms to allow some curtailments of liberty, part of the ongoing balancing of rights that is characteristic of open societies. As the threat levels subside, the body politic will mandate balancing rights for greater liberty, and democracy will be ascendant once again as checks on the powers of the executive branch become more vigorous.

On the alternate account, the rise of the security regime is due to a tectonic shift in liberal democracy itself. The security regime manifests liberalism’s troubled relationship with

pluralism, bringing to the surface its latent incapacity satisfactorily to account for difference and include the other. The state's illiberal imposition of a collective good – public safety – as prior to individual right is consistent with liberalism's inability to deliver on its promise of liberty. Changes in voter preferences, reliance on the judiciary, and the rule of constitutional or international law will prove insufficient to the task of holding the executive in check and thus displacing the security regime, because its dominance is complete and self-perpetuating.

Both accounts are problematic. Voters were not able to parse through the threat of terrorism and mandate their leadership to act because the information necessary for these choices was corrupted or cut off by the executive branch, a political leadership that also eroded citizens' capacity to deliberate these matters away from the gaze of the state. On this view, the security regime cannot be justified as the product of democratic choice-making because, perhaps strategically, there was little room for open and informed public deliberation. If, on the other hand, the security regime is in fact a systemic implosion of liberal democracy, then it is difficult to see how improved public deliberation and more influential manifestations of citizenship are in any way still relevant.

My purpose in this chapter is to consider the impact of the *war on terror* on democratic communication, specifically with a view to the question of justification. The laudable goal of keeping terrorist cells from parsing out their political programs with the blood of civilians is not in itself sufficient to justify the security regime. The test, I will argue, must account for the necessity of preserving public safety in a manner that fundamentally accords

with the self-understanding of disparate citizens. The pressure exerted by security concerns on the private lives of citizens must, I think, have consequences for testing the democratic justification of the security regime. I will work to this test by first tracing the contours of the security regime through an examination of its effects, and then examining terrorism as a form of communication, considering its impact on the possibility of a deliberative democracy. It is my sense, ultimately, that if we are to have executive branches worthy of respect, we will need a more realistic account of the role of the citizen under duress, a more compelling articulation of human dignity and the idea of privacy, than political liberalism has thus far allowed.

The Security Regime

Authorities in the United States, presumably with intelligence from Canada, render four Canadians into the custody of Syrian officials on the suspicion they are implicated with terrorist groups. The Syrians hold the men captive in fetid subterranean cells in the notorious Far Falestin prison and, with the aid of intelligence from the United States and Canada, torture them. In one case, emblematic of all the rest, this meant “being treated to a stripping down to his underwear, pouring cold water over him, and intense beatings with what he described as a ‘black electric cable roughly one inch thick.’” The ordeal continues for months, fails to extract any information to corroborate the authorities’ suspicions, and the Syrians return the men to Canada. They come home and find they cannot pick up their lives where they left off: the men suffer severe psychological trauma, they can’t find work, their neighbours, co-religionists and friends want nothing to do with them. After some

hesitation, Ottawa strikes a commission of enquiry into the case of one of the four, Maher Arar. This at least carries with it the possibility of public vindication. Nevertheless, the men have no prospect of being made whole against the actions of their vivisectors—the hands that haemorrhaged flesh with the cables and the hands that held the torturer’s leashes are secure against any legal recourse. (2005)

The security regime is the definitive political phenomenon of our era, a polity of communication in two respects. First, its effects are profoundly personal. It has the power, in acting on our core needs for security and liberty, to re-order our sense of self, to insert itself into our most intimate relationships and, by violence both gross and subtle, orient our lives to its purposes. Second, because of its personal impact, the security regime short-circuits democratic deliberation. Schematically, the phrase *security regime* refers to the arrogation of powers by the executive branch, at the expense of the legislative and judicial branches, for our protection. This definition takes us only so far, because it can obscure the role our personal relationship to the security regime plays in its consolidation of power, a relationship I believe to be decisive. Equally, Far Falestin is an extreme, an image of such depravity that it fails to convey the security regime’s democratic seductiveness. No one can love an abattoir. Freeze the frame here, or in Abu Ghraib’s infamous homoerotic tableaux, and you risk losing the fact that most of us desire and willingly yield to the security regime’s dominance especially in the immediate wake of a terrorist attack. Although its direct impact may at times be vicious and reprobate, systemically the security regime communicates a beneficent human ‘face’, of consolation, of hope, and vengeance.

This is a self-justifying face, a face that dominates both interpersonal and democratic communication.

My aim in this section is to triangulate the security regime as a political phenomenon. I will first review theoretical frameworks that speak to key attributes of the security regime. I will then review specific measures at play in Canada, the United States and the United Kingdom. This approach should keep us more or less secure against a reductive reading of a problem with many dimensions. My sense is that the security regime's treatment of communication and with it the idea of privacy are totemic, signifying and giving effect to the transformation of our relationship to the executive branch.

The security regime fosters what Iris Marion Young calls 'emergency obedience'. In the act of protecting us against the depredations of terrorist cells, the security regime subjugates us. "The state pledges to protect us, but tells us that we should submit to its rule and decisions without deliberation, publicity, criticism, or dissent." (Young, 2003: 227) We cannot be equal to the government we formally constitute because it, ultimately, has the last word about our physical safety and the safety of the people we love. Our role is not simply to give our obedience, but also our gratitude and adoration. The result is a polity that infantilises the citizen, where a relationship of dependency dissolves into irrelevance any substantive form of democratic participation or consent. Young describes this as masculinist power writ large and entrenched in virtue, with the executive branch playing the part of chivalrous protector against the bad men outside our walls and the enemy within.

For theorists like Goldberg (2002b) and Ahmad (2004), masculinist power is also white. It makes 'Muslim looking people' the problematic, shifting the onus to the members of this constructed race category to demonstrate they are not a threat. This manifestation of power is not experienced as benign or endearing by the people subject to its race-categorization. During the first Gulf War, as western forces combined under U.S. leadership to roll back Saddam Hussein's invasion of Kuwait, Canada's *Globe and Mail* published an editorial cartoon featuring a "Muslim looking" caricature prostrate on a prayer mat, surrounded by assault weaponry. The title inscribed on the book before him, in an allusion to the Koran, was "How to Kill and Maim." The community's response to the cartoon was tame in comparison to the outcry against the caricatures of Mohammed in Denmark's *Jyllands-Posten*, even though the Koran is more central to Islam. Nevertheless the publication of the *Globe's* cartoon was consistent with the patterns of harassment endured by Muslims in Canadian cities at the time. In referring then, to the bargain 'we' strike with the security regime, the collective pronoun masks a social fragmentation or heterogeneity by race and religion as well as gender. Our personal relationships to the security regime are by no means uniform. They differ dramatically between communities, indeed within our own personalities from one moment to the next.

Our experience of the security regime is primal. This is because it shunts itself directly into the core human need to develop and manifest one's personality or sense-of-self over time. Simone Weil observes that we no longer look to family as the institution that provides the assurance of this development. In her view, most of us do not feel a sense of connection

with family members who died fifty years before our birth; neither do we feel a bond with those who will be born even ten years after our death. Instead, our principal existential relationship is with the state. “To sum up,” she writes, at the time of the Nazi occupation of France,

Man has placed his most valuable possession in the world of temporal affairs, namely, his continuity over time, beyond the limits set by human existence in either direction, entirely at the hands of the State. And yet it is just in this very period when the nation stands alone and supreme that we have witnessed its sudden and extraordinary decomposition. This has left us stunned, so that we find it extremely difficult to think clearly on the subject. (Weil, 2002: 100)

The security regime gives, in return for this profoundly intimate investment, compelling articulations of our human dignity and raises up around us a bodyguard of human rights to preserve us against the intrusion of others. In some jurisdictions this takes on overtly religious language, for example in George W. Bush’s channelling of Pope John Paul II’s phrase “the sanctity of human life.” The security regime’s politics, even in the most secular of states, is very much about the sacredness of human life. A critique from political economy will point out, with justification, that the aim of these affirmations of human dignity is to protect property and not life: The priority is to safeguard the urban landscape, flows of trade, and economic infrastructure. Alternatively, the protection of property may itself be a means to the security regime’s ultimate end of owning human life as such. This is the critique advanced by Giorgio Agamben (1998). When “sovereign power” declares human life sacred, he argues, it reserves for itself the authority to make human life legitimate and, with this, the power to lay claim to us right down to the organic functions of our physical existence. This declaration of sanctity also reserves for the sovereign the power to determine when human life can be sacrificed.

Acting in this way, the security regime sets the boundaries between what is private and what is public. The right to privacy in the security regime is not a simple shield against the interventions of the state in our lives: it is itself an intervention, a product of masculinist power. In Aristotle's *Politics* (1962), privacy had a different meaning. It consisted of abiding in the bonds of affection at the heart of our households and communities, providing for each other in as self-sufficient a manner as possible. Our capacity to make moral and epistemological judgements, our sense of personality, developed in the context of these bonds. It was this form of living that set the limits on the state, and gave citizens the foothold they needed for participation in democratic discourse. Privacy through an Aristotelian lens would consist of the freedom to include others in reciprocal identification, a freedom asserted in the basic human need for intimacy and not deriving from the beneficence of the state. If Weil is correct, we no longer see ourselves as embedded in families, in these primary or extra-political bonds of affection. Consistent with Hobbesian liberalism (1958), we act on our own, as atomistic free agents securing our own good in competition with others. The security regime sets the parameters for this competition. In doing so, it becomes the only agent capable of acting across the entire political order, a super agent of assured temporal succession, a Leviathan.

Most of us are wired for the detection of dystopia, armed with Orwellian archetypes to gauge when a Leviathan has gone mad. For example, in the film *V for Vendetta*, some decades in the future a bio-chemically altered terrorist in a bullet proof Guy Fawkes mask brings down Britain's security regime by means of political assassinations, torture, and the pyrotechnically spectacular demolition of the Old Bailey and the Houses of Parliament.

“People should not be afraid of their governments,” V intones. “Governments should be afraid of their people.” Coincidentally, if there are coincidences, the film hit the screens as Prime Minister Tony Blair pushed a bill through a very much intact Parliament prohibiting the “glorification of terrorism.”

In the film, however, it is not Labour but the Conservative Party that produces for Leviathan a face that plays to everything Orwell warned us against—the barking mouth with tombstone teeth, the unblinking eyes dilated even in fury. This is the human face of the High Chancellor, of an executive branch completely without restraint, not simply mediated by technology but transfigured, an iconic pantocrator projecting his power through television screens and, of course, storm troopers throughout the U.K. He wields a security regime bent on the homogenisation of Britain—one that produces bad television (Fox meets Benny Hill), outlaws good art, and extirpates racial, religious and sexual minorities. But even eleven year old girls in coke bottle spectacles can see the High Chancellor’s fundamentalist moralizing and fear mongering are “bollocks”, turning off the television and tagging the streets with the mark of her vindicator.

The trouble with *V*’s verisimilitude is its premise that the security regime is out of step with what we receive as liberal values. Part Nietzschean overman, part Catholic anti-hero, the terrorist in the Guy Fawkes mask emancipates Britain through his radical project of self-fashioning. He draws the masses together, eight hundred thousand of them in Guy Fawkes masks, around the Parliament buildings on a fateful fifth of November, to push back the iron fist of collectivism and totalitarian hegemony. As Big Ben and the entire

precinct dissolves to rubble, the masses remove their masks rank by rank like dominoes, reclaiming the right to live their lives on their own terms. This makes good cinema, and a powerful graphic novel, because it works with the grain of the West's apocalyptic imagination. Nevertheless, as a morality play all of this reinforces the dominant belief that social diversity, tolerance and hard-bitten individuality are prophylactic against the abuse of power by the executive branch. In fact, the security regime responds to terrorism not by eradicating difference, but by producing difference on its own terms. It builds open societies by cultivating a climate of rugged self-realization, where privacy consists of the freedom to exclude and compete against others in the execution of one's life plan. In the security regime, tolerance functions as both a mark of distinction against militarised fundamentalism and a means for the extension of its power. As Derrida (2003) suggests, tolerance is an essential feature of security because it consolidates the core authority of the power that does the tolerating, where diversity is embraced as a strategic indulgence, a cover for the concentration of power and not its diffusion.

Giorgio Agamben (2001) can show that security has always been a basic liberal principle, observing that this is in fact the aim of the Hobbesian bargain. We reciprocally agree not to use violence against each other, constitute the state as the guarantor of this pact, and gain thereby the security we need to pursue our own self-fulfilment. Where Rawls (2001) presents the fact of social pluralism as the premise of liberal politics, Agamben contends that today the state takes security as the "sole criterion of political legitimation." Justice is still about fairness, and liberal societies continue their project of allowing maximal scope for the pursuit of individual good: The right to define one's own concept of existence remains

at the heart of liberty. These projects of personal fulfilment are, however, discrete and insular because liberal ideology will not permit them to play any significant role in the public deliberations of the political community. (Sandel, 1998) Liberalism harbours security as a public good that trumps private rights of self-creation. The result, to use Agamben's phrase, is a state of exception where law making, police action and the administration of justice as a whole become depoliticised. Our own concepts of existence, however profound they may be, have no public relevance in critiquing the security regime or assessing its fit with our understandings of the nature and purpose of human life. The state of exception allows the security regime to build open societies, not fortresses by allowing large scope for inward or subjective freedom. It makes the influence of the security regime immanent, permanently suffusing the chaotic diversity of our personal liberty. This is not a project of simple national scope. Agamben argues that liberalism constructs globalization as a security perimeter in its own right. Individual initiative remains intact—driving economies, diversifying trade—with the project of the security regime producing individuals that are at all times governable. The subterranean cells of Far Falestin serve poorly as a trope for the security regime. As a polity, the security regime is not an edifice built for containment or discipline. Security requires pluralism if it is to be immanent, permeating our life plans not just in any specific population but instead throughout the species itself.

This happens in Canada in a strategically boring way, with legislative measures meted out as discrete packages allowing intervals for the public mind to lose track and lose interest. Following *The Anti-Terrorism Act, 2001*, and its entrenchment of tools like security

certificates, the federal government began a series of closed-door consultations on “lawful access”. Although it was in development for some years before 9/11, the terrorist attacks added new impetus and justification for the initiative. I use the phrase *lawful access*, the bureaucracy’s own term, to designate a particular slate of legislative measures that will convert Canada’s communications infrastructure into a latent and ubiquitous surveillance system. Working from the analogy of a first-class letter, the bureaucracy asserts that twenty-first century technologies force a split in the act of communication, between the content and the envelope. The content of Canadians’ communications, especially if cloaked with some form of encryption, would enjoy a “reasonable expectation of privacy”. Interceptions of content would require a warrant, but likely at the lower standard of “reasonable grounds to suspect” and not “reasonable grounds to believe.” In its first iteration, *lawful access* would have required the archiving of all telecommunications content for a prescribed period against the eventuality that some of this information might be useful. The envelope, “transmission data” including who sent the communication, by what means and method, its size, duration and recipient, is in plain view while in transit. As such, envelope information would not attract in *lawful access* the same degree of protection as content, and interceptions of this data would not require a warrant. Instead, it would be sufficient for police and security officers to demonstrate that interception of this information was required in the performance of their duties. (Canada, 2002)

The first class letter analogy breaks down, however, when one considers how much can be detected about our lives from the stream of envelopes we produce on any given day. Simply tracking this information—including who is speaking to whom, which websites a

person visits etc—provides enough data to produce a fine-grained simulation of the user’s online activities. The devil is in the details, though, when it comes to assessing the accuracy of the profile as a representation of the user’s personality, innocence or criminal potential.

In *lawful access*, it is the market and not the state that provides the infrastructure for surveillance. Police and security services do not have the resources to research, develop and deploy surveillance devices that keep pace with the rapid pace of change in telecommunications technologies. To close this gap, *lawful access* would require private telecommunications service providers to do more than simply unlock their systems on an *ad hoc* basis for investigators. Instead, to ensure the fiscal viability of the initiative, industry would also have to wire all existing and future technologies for surveillance, bearing the costs as required and transferring them to the consumer. *Lawful access* would make private sector telecommunications service providers agents of police and security services; collaborators in what would be the country’s most extensive public/private partnership. In *lawful access*, the act of communication emerges as a problematic for the security regime in Canada, a threat it would close by working a qualitative change in the way Canadians communicate and the privacy they have enjoyed heretofore.

The last Liberal government attempted to lay the cornerstone of *lawful access* on November 15th, 2005, fourteen days before the bathos of Paul Martin’s minority ended in a vote of non-confidence. Anne McLennan, then deputy prime minister, tabled the *Modernization of Investigative Techniques Act* (hereafter *MITA*) to “reduce the ability of criminals, organized

crime members and child pornographers” to mask their activities by using sophisticated technologies. Specifically, *MITA* would allow designated police and security officers new powers to conduct warrantless searches, i.e. to compel telecommunications service providers to disclose their subscribers’ contact information including “their name, address, telephone or cell phone number or IP address.” In fact, *MITA* required the service providers to ensure multiple police and security agencies had access to their systems, whether to track the same user or multiple users. These interceptions were not contingent to any standard of proof, requiring only that the officers were acting in accordance with their duties.

The expansion of police and security service powers comes in *MITA* with an attenuation of accountability. The bill, in what the government presented as a concession to civil society groups and government watchdog agencies concerned about its impact on privacy, constructed two forms of oversight: internal audits within the police and security services, and external reviews by the Privacy Commissioner, the RCMP Commissioner, and the Security Intelligence Review Committee. The review mechanisms, however, would be subordinated to national security requirements and not presumptively transparent to the public. These mechanisms would thus be unwieldy and ineffective in assessing how the interceptions and the intelligence they gathered fed into wider, international networks. Canada’s allies in the *war on terror* have no duties to disclose to Canadian review agencies what use they make of intelligence shared by the nation’s police and security services. Furthermore, the external review process locks these oversight bodies in silos, tasking them with the scrutiny of their respective police or security service. This insulates the

cooperation of these services with each other and their foreign counterparts against wider systemic review. The result is a daunting if not impossible task of assessing the accountability of police and security services, especially where multiple agencies have the same person under surveillance.

It is conceivable that the expanded surveillance powers will do harms that will be beyond the powers of even the most exhaustive review mechanisms to redress. There is little or no discussion in *lawful access*—not in government briefings or the advocacy work of civil society groups and public watchdog agencies—for the reparation of harm done to specific individuals or whole communities in the exercise of expanded police and security service powers. In recent years, the Canadian government has paid reparation to Japanese Canadians for the internment during the Second World War, and it has compensated Chinese Canadians for the imposition of a head tax in the past century. Furthermore, the *Emergencies Act, 1988* makes specific provisions for the Crown's liability for harms it causes, and prescribes an avenue for appeals through select federal judges. Although these may be precedents, *lawful access* provides no vehicle to make whole religious or ethnic minorities who may suffer digital internment, the systemic erosion of the privacy of an identifiable group, in the security regime. There is no provision in *MITA* to allow the subjects of surveillance personal remedies for injuries arising out of the exercise of *MITA* powers. Perhaps the most troubling feature of *lawful access*, and its potential covertly to undermine a person's reputation and dignity, is the absence of efficacious means for public vindication.

Although the *MITA* bill died on the order paper with the fall of the Liberals, Stephen Harper's minority Conservative government placed *lawful access* back on the legislative agenda to ensure conformity with similar measures in force in the U.S., the U.K., Australia, and New Zealand. Without harmonizing legislation, Canada would be the Switzerland of cyberspace, a haven for people the world over seeking a solid assurance of privacy in their communications. A purpose of *MITA*, and *lawful access* more generally, is to ensure a level playing field for telecommunications service providers regardless of jurisdiction, by bringing to Canada the re-regulation of the telecommunications sector to the end of prohibiting technological development that favours personal privacy over surveillance. For example, in interrogating the bureaucracy's proponents of *lawful access* I discovered that the initiative would make it an offence punishable by up to five years incarceration for university researchers, or anyone else, to develop for public use thoroughly private communication systems. (Markwick, 2005) Hardwired by industry into the telecommunications infrastructure of the western world, mirrored in the legislation and the policing and security practices of western governments, the project of *lawful access* appears as a given, reified or made to seem a natural, inevitable change in the nature of liberal democratic society. The ideological effect is to present human rights and constitutional guarantees, the idea of privacy itself, through this historical prism, subordinated to the new normal. Changes in governments do not seem sufficient to the task of changing policy at this deep a level. Like their predecessors, "Canada's new government" brought *MITA* back to keep the nation in lock step with its allies, acknowledging that the allies' laws on surveillance "continue to evolve."

Certainly, laws on surveillance are evolving at a rapid pace in the United States. As 2005 drew to a close, the *New York Times* revealed that President Bush started signing secret orders in 2001 allowing the National Security Agency to intercept Americans' international telephone calls and email without the warrants ordinarily required for domestic spying. (Risen, 2005) The initiative sets aside the safeguards against abuse of warrantless interceptions established on the watch of Jimmy Carter in the 1978 *Foreign Intelligence Surveillance Act* (hereafter *FISA*). President Carter identified *FISA* as "one of the most important decisions I had to make." The statute, and the secret Foreign Intelligence Surveillance Court (hereafter *FISC*) it constructed, were designed by lawmakers to prohibit a return to the days when authorities did end-runs around constitutional guarantees against unlawful search and seizure to spy on anti-Vietnam War activists and civil rights advocates. Even so, through its years of operation, the *FISC* has proven itself to be singularly cooperative, refusing a small number of warrants and approving, according to the U.S. Justice Department, 1,754 warrants in 2004 alone. According to Media Matters, the non-partisan Congressional Research Service reports that the Bush administration's casuistry in defence of the secret abrogation of *FISA* "conflicts with existing law and hinges on weak legal arguments." ((2006), *Media uncritically cast Bush's defense of spy program as "strong" and "vigorous"*) Undaunted, President Bush castigated the *Times* for breaking the story, although the paper delayed doing so for a year and even then censored its reporting. "Our enemies," the President said, "have learned information that they should not have, and unauthorized disclosures of this effort damages [sic] our national security and puts [sic] our citizens at risk." The President also made the program a cornerstone of his state of the union address of January 31st, 2006, insisting that his authorization of warrantless

interceptions is entirely in keeping with his constitutional duties. “So, to prevent another attack—based on the authority given to me by the Constitution and by statute—I have authorized a *terrorist surveillance program* to aggressively pursue the international communications of suspected Al Qaeda operatives and affiliates to and from America [added emphasis].” The phrasing “terrorist surveillance program” is pivotal, since polling shows sixty-eight percent of U.S. respondents are more likely to support domestic spying without warrants when it is targeted at “Americans that the government is suspicious of”, with seventy percent opposed to the government’s monitoring the communications of “ordinary Americans.” (*Times*, January 27, 2006)

The president could have sought an amendment to *FISA* to supplant judicial control over domestic surveillance with enhanced executive powers. If the untroubled passing of the *USA Patriot Act* were any indication, such an amendment would have had an easy ride through Congress in the anxious days of post-9/11 legislating. The reason for the president’s secret and unilateral abrogation of *FISA* became clear in the testimony of Alberto Gonzales, the U.S. Attorney General, before the Senate Judiciary Committee. Mr. Gonzales defended the Bush administration’s refusal to seek amendments to *FISA*, arguing that the legislative process would itself compromise the program. (*Times*, February 7, 2006) On this view, the normal course of democratic law making is seen by the White House as a threat to the security regime, because, by its public nature, it runs the risk, to paraphrase Mr. Bush’s castigation of the *Times*, of “alerting our enemies and endangering our country.” (*Times*, December 18, 2005)

The list of “Americans the government is suspicious of” is, according to Mr. Gonzales’ view, extensive indeed if it encompasses Congress as well. The laws on surveillance, and their abrogation, evolve in the United States to conform to the government’s understanding of counter-terrorism as a war measure. The martial metaphor of *war on terror* casts the U.S. approach to the defeat of terrorism as something that is necessarily outside the law; it is a military campaign under the direction of the Commander in Chief and not a police action under the courts. Muneer Ahmad demonstrates that this evolution of powers, if not laws, has a dramatic impact on civilians. According to Ahmad, the weeks following the terrorist attacks of September 11th, 2001 saw over one thousand “bias incidents” inflicted upon “Muslim-looking” people, including “the murders of as many as nineteen people, assaults of scores of others, vandalism of homes, businesses and places of worship, and verbal harassment.” These acts of violence were not, he argues, aberrations, but instead reflected the official mood of the country as shown in law enforcement policy, the judicial response to these crimes, and in the body of immigration laws enacted post 9/11 to target Arabs, Muslims and South Asians. “These laws,” Ahmad writes, “operate in tandem with the individual acts of physical violence that have been carried out against these same communities, thereby aiding and abetting hate violence.” (Ahmad, 2004: 1261-62) Seen in this light, the evolution of laws and powers of surveillance in the United States is not neutral, but is in fact a means of constructing “Muslim-looking” as a race category, anathematising and pushing this population outside the law.

There is no indication that the evolution of powers in Mr. Bush’s “terrorist surveillance program” has in fact made his nation more secure. The *New York Times*, with reports from

sources at the Federal Bureau of Investigation, the agency that carried out the wiretaps on behalf of the National Security Administration, disclosed that “virtually all” of the interceptions secretly authorized by Mr. Bush “led to dead ends or innocent Americans.” (*New York Times*, January 17, 2006) More troubling still, there are indications that Mr. Bush’s program has exacerbated the rivalry between agencies like the FBI and NSA, showing the persistence of the lack of inter-agency cooperation that, according to the 911 Commission, allowed the September 11th attackers to carry out their plans.

As events unfold in Washington, there are signs in the United Kingdom as well, according to the House of Lords, House of Commons Joint Committee on Human Rights, of “an unprecedented power for the executive to interfere with a wide range of [...] rights.” On February 23rd, 2005, the Blair government tabled *The Prevention of Terrorism Act*, 2005 (hereafter *PoTA*). Sections 1 to 9 of the statute allow the Home Secretary power to issue control orders, without charges or the disclosure of evidence. Control orders, as set out in a non-exhaustive list in section 1 (4) of *PoTA*, include:

an 18 hour curfew, electronic tagging, a ban on use of the garden, requirements to report to a monitoring company twice a day, limitation of visitors and meetings to persons approved in advance by the Home Office, requirements to allow police to enter the house at any time and search and remove any item, and to allow the installation of monitoring equipment, prohibitions on phones, mobile phones and internet access, and restrictions on movement within a defined area. (*Twelfth Report* 14)

The aim of the control order system is to identify people capable of committing acts of terrorism and to prevent them from striking by placing their movements under close surveillance and supervision. In keeping with the pattern of counter-terrorism legislating, Mr. Blair pushed this bill through both Houses of Parliament at speed, concluding the

legislative process in two weeks on March 10th, 2005. Seventeen weeks later, the 7/7 bombs brought carnage to London's mass transit system. To appease parliamentarians who objected that the Prime Minister's haste amounted to a denial by the executive of full legislative deliberation, the Home Secretary introduced a number of amendments to the bill late in the day. In chief, the amendments required sections 1 to 9 to return to Parliament for review in a year or expire.

On February 2nd, 2006, the Home Secretary tabled the *Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006* to preserve his power to issue control orders. He used the occasion to justify this power as consistent with the *European Convention on Human Rights* (hereafter *ECHR*) and the *Human Rights Act 1988*.

Parliamentarians in both Houses note that, in bringing forward a continuance order, not a full bill, and again setting tight timeframes, the executive branch once more denied the opportunity to conduct a full debate of the legislation's human rights impact and to seek amendments to reflect their concerns.

Procedural manoeuvres in parliament notwithstanding, Britain's control orders have been the subject of intense scrutiny, arguably more so than similar provisions in effect in, for example, Canada's security certificates. The Joint Committee reported on February 14th, 2005 that it continues to hold deep reservations. This includes concerns that control orders are not consistent with the standards of due process and are thus not, in the committee's words, "compatible with the rule of law and the well-established principles governing the separation of powers between the executive and the judiciary." (*Twelfth Report* 4)

At issue is whether the control order regime contravenes procedural justice rights under the *ECHR*. Article 6(1) affirms:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

The Home Secretary is empowered under *PoTA* to impose non-derogating control orders, subject to secret judicial review, where he has “reasonable ground for suspecting” the named person “is or has been involved in terrorism-related activity.” (*Twelfth Report* 18–19) He may also seek derogating control orders, which remove the named person from the protections afforded under the *ECHR*, by establishing in a secret tribunal on a “balance of probabilities” that the named person is implicated in terrorism-related activity. In both cases, the proceedings exclude both the accused and his counsel. This is because the court is bound in *PoTA*’s revision of the *Civil Procedure Rules* to ensure the proceedings remain secret, thereby preserving among other things “the interests of national security, the international relations of the United Kingdom”. (76.1 (4))

The effect of the control order regime is to construct a judicial process that has the appearance of a civil proceeding, formally classified in domestic law as non-criminal, but is in fact a criminal court in two definitive respects. First, the process weighs allegations that would otherwise amount to charges of a particularly heinous crime. Second, the sanctions it can impose are identical to criminal penalties in both their severity and, because a control order may be renewed indefinitely, duration. (*Twelfth Report* 17–18) There are also signs that the imperative of public safety is corrosive of judicial independence. Counter-terrorism

case law shows a judicial deference to the executive branch on matters of national security, as set out in an October 2001 House of Lords decision upholding the Home Secretary's deportation of Shafiq Ur Rehman. (*Commentary on the Anti-Terrorism, Crime and Security Bill 2001*, 2001) The tribunal constructed to serve the control order process, therefore, appears to abrogate Article 6(1) of the *ECHR*, specifically its guarantee of "a fair and public hearing within a reasonable time by an independent tribunal established by law."

The integrity of the court is further compromised by what amounts to an arbitrary distinction between non-derogating and derogating control orders. Non-derogating control orders, the Home Secretary might argue, are civil obligations analogous to peace orders and thus do not encroach upon the *ECHR*'s guarantees of liberty. Because they are not criminal sanctions, they can carry the lower standard of proof—reasonable grounds to suspect—and afford the executive greater discretionary authority subject to constrained judicial review. The function of the court is restricted to make a determination whether the Home Secretary's order is "obviously flawed", not at law but in the pragmatic determination as to whether the named person is reasonably suspected of ties to terrorist activity. This is a determination the court must make in the absence of rebuttal from the named person or his counsel. Derogating control orders rest on the *ECHR*'s provisions for the state of emergency, allowing governments to abrogate the convention for a limited time to preserve public order. They remove the named person from the rule of human rights law, and thus have two safeguards: They can be imposed only by court order, and they require the comparatively higher standard of proof—a balance of probabilities.

The bright line between the two forms of control order is their impact on liberty. However, the line fades markedly when one considers the constraints on liberty control orders in fact impose. Lord Carlile, whom the Home Secretary cites as an endorser of the control order system, describes the effect as “not very far short of house arrest”, subjecting the persons named in non-derogating and derogating control orders to the “deprivation of much of normal life.” (*Twelfth Report* 14) The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) dispatched a lawyer and a psychiatrist to examine the treatment of controlled persons in July and November 2005, however the executive branch declined to disclose the substance of the delegation’s reports. We do know that the CPT found evidence of “inhuman and degrading treatment” of persons detained indefinitely in the UK under the *Anti-Terrorism, Crime and Security Bill 2001*. Furthermore, the Joint Committee confirms receipt of evidence from the family members of controlled persons showing that, although the intention of control orders is to prevent individuals from committing terrorist acts, in practice they constrain the liberty of entire households. Specifically, the evidence details infringements of the right to privacy as substantial deprivations of liberty. This includes unannounced examinations of the family residence by officials, interference with the family’s ability to communicate by telephone and the internet, and the chilling effect of surveillance as social interactions fall under state supervision. The cumulative effect of these measures, according to the Joint Committee, is a protracted state of “mental anguish” throughout the household “due to fear of their home being searched, the controlled person rearrested, or their own social interactions monitored.” (*Twelfth Report* 26)

The effect of the control order system is to use the courts as tools to amplify, not restrain, the power of the executive branch. In the assessment of the European Commissioner for Human Rights, a view endorsed by the Joint Committee, the result is an untenable usurpation of procedural justice under the *ECHR*. “Substituting ‘obligation’ for ‘penalty’ and ‘controlled person’ for ‘suspect’ only thinly disguises the fact that control orders are intended to substitute the ordinary criminal justice system with a parallel system run by the executive.” (Gil-Robles, 2004: 10 at para 22) The low standards of evidence, the emphasis on preventive detention, the strict limitations on the scope of judicial review and publicity, along with the deference of the judiciary to the executive branch on matters of national security result in a self-justifying system that lays bare the privacy and liberty of British nationals to the suspicions of the executive branch and its allies in the *war on terror*.

The Joint Committee, along with leading European authorities and civil society groups, present the control order system as an abrogation of human rights law. This is technically correct, but it is not a sufficient account of the role human rights plays in the constitution of the security regime. The security regime, judging by the assurances of the executive branch in the U.K., and President Bush’s assurances of the constitutionality of his “terrorist surveillance program,” firmly believes itself to be the global guarantor of human rights. This is because it is. Affirming and defending human rights as the West’s answer to the depredations of militarised fundamentalism is the ethos of the security regime; it is not spin, but substance. Human rights is more central to the justification of the security regime than any claims of objective conformity to the rule of law, as we see in the control order system and the encroachment on judicial independence, or indeed, as shown in the

curtailment of full parliamentary or congressional debate, democratic or legislative warrant. The security regime is an empire of human rights.

When the fledgling United Nations Educational, Scientific and Cultural Organization convened Jacques Maritain and his colleagues to lay the theoretical foundations of a new international order of human rights, the global community's intention was to build a firewall against the rise of regimes that devoured human dignity. Their aim, as Maritain conceived it, was to answer Auschwitz and the abomination of a lawful regime built for genocide with "a universal Charter of civilised life". For Maritain, the principal analytical obstacle to global consensus about human rights was not the Cold War contest between capitalism and communism, but rather an antagonism of ontologies. On the one hand, there were those who believed human rights are "fundamental and inalienable rights antecedent in nature, and superior, to society" as the source of social life. On the other, there were those who believed rights are "a product of society itself as it advances with the onward march of history." To make matters worse, as Maritain acknowledged, there was the fatal corruption of the whole discourse of human rights, where "the truest words have been pressed into the service of so many lies, that even the noblest and most solemn declarations could not suffice to restore to the peoples faith in human rights." The way forward was to understand human rights as a "practical ideology [...] principles of action with a common ground of similarity for everyone." (Unesco, 1949) This ideology would produce agreement on the enumeration of human rights, but not on values. The work of building a common consensus about the *why* of human rights, a universal agreement on

their grounds in light of a shared understanding about what it means to be human, would have to wait for another day.

Sixty years out, we have reason to question whether human rights pragmatism has produced a system of effective or supreme constraints on the power of the state, or, more precisely, the executive branch. The evidence suggests that the practical ideology of human rights plays a function in the security regime that is at odds with the aspirations of Maritain and his collaborators; that it is a platform for the justification of executive power rather than an efficacious instrument for critique, restraint and reform. Connor Gearty discerns this trend in Britain's application of the *Human Rights Act 1988* to the construction of counter-terrorism legislation. "It is noteworthy," he writes,

that none of these concessions to human rights law involved the bald elimination (as opposed to mere procedural elaboration) of powers desired by the executive; right from the start the human rights standard set by the act in the field of anti-terrorism law has been a relatively low one, with the consequence that only a rather undemanding jump by the executive brings its repressive politics within the zone of human rights compliance.

(Gearty, 2005: 21-22)

An identical dynamic is at play in Canada. Throughout the consultations on *lawful access*, and subsequently in its tabling of *MITA*, the government affirmed that these measures are "Charter-proof". The phrasing is telling, because to make something fireproof or waterproof is to ensure that it will remain unchanged or undiminished by its exposure to the elements. A *Charter*-proof law, then, is a law designed by the executive to withstand or trump constitutional rights and freedoms, while, at the same time, presenting the constitution as the supreme source of legitimacy for the executive's arrogations of power.

We see this recurring in the broader framework of Canada's construction of counter-terrorism. As troubling as control orders may be for at least some British Parliamentarians, *The Anti-terrorism Act, 2001* (hereafter the *Act*) allows Canada's peace officers the power to make preventive arrests, by definition without charges, and bring the detained person before a closed court. The detained person may be released if he accepts conditions imposed by the court, otherwise he can be imprisoned for a year. The *Act* also empowers the Minister of Defence to permit the interception of international communications without any requirement to seek a judicial warrant. This builds on what observers note are "the widest electronic surveillance powers in the Western world," even without the passage of *lawful access*. (Stuart, 2002: 182) President Bush's covert usurpation of *FISA* in his authorization of the "terrorist surveillance program", and the outcry it generated among Americans jealous of their civil liberties, appears sloppy in comparison to the elegance of Canada's executive branch. In constructive opposition to the Supreme Court of Canada's affirmation of the necessity for open courts, and its rejection of a presumption of secrecy where national security is at issue, the *Act* is of a piece with British and U.S. revisions to rules of proceedings and, ultimately, judicial independence. It gives the Attorney General power to issue fiats to seal matters away from the courts, specifically where there is a "specified public interest", or where publication would be "injurious to international relations or national defence", or in the name of Cabinet secrecy. Fiats citing the first two of these reasons may themselves be subject to judicial review, but the *Act* gives the Attorney General the last word. It grants the minister authority to stop even these proceedings in the name of Cabinet secrecy, issuing a new fiat that would be closed to judicial review. (Stuart, 2002: 183-84)

So it is that we witness, without widespread public awareness or debate, Canada's executive claim for itself powers that—in the U.S. and the U.K.—have been condemned as dangerous attenuations of democratic freedom. This happens on the watch of the *Charter of Rights and Freedoms*. More precisely, if Connor Gearty is correct, it happens because the executive branch has found in the *Charter* new and potent forms of justification—sources of legitimacy in the “practical ideology of human rights” that would trump Parliament and perhaps the courts.

In the face of this, however, the Supreme Court of Canada is restive. Serendipitously, as Parliament debated *The Anti-terrorism Act*, the Court rendered a unanimous judgement on twin proceedings concerning publication bans. In these cases, Crown counsel—at times with the concurrence of the defence—had secured orders shutting the media out of the lower courts in order to prevent the disclosure of undercover police operations and protect the participating officers from violent reprisal. The Court framed its response with an eye to the democratic necessity of open communication in the administration of justice. The language and timing of the decision suggest it was calibrated to send a clear message to a Parliament stampeded by the imperatives of counter-terrorism. “A fundamental belief,” Justice Iacobucci wrote for the Court,

pervades our political and legal system that the police should remain under civilian control and supervision by our democratically elected officials; *our country is not a police state*.
[Added emphasis.] (*R. v. Mentuck*, 2001: at para 50)

It was this last clause that received wide publicity. I understand it is not an echo of arguments presented by counsel at trial, which suggests instead a deliberate ramping up of the issue by the Court. The tone is consistent throughout the decision:

The improper use of bans regarding police conduct, so as to insulate that conduct from public scrutiny, seriously deprives the Canadian public of its ability to know of and be able to respond to police practices that, left unchecked, could erode the fabric of Canadian society and democracy. (*R. v. Mentuck*, 2001: at para 51)

The Court affirms that open public deliberation is a necessary condition for a free and democratic society, especially where police practices are at issue. The general rule here is that the news media play a crucial role in subjecting the state's monopoly over violence to public scrutiny. The expediencies of police work — and by extension public safety or counter-terrorism — do not trump the imperative of ensuring transparent, citizen-driven government. There is a deeper principle emerging here, as the Court discerns in section 2 of the *Charter* communication as a fundamental freedom:

2. Everyone has the following fundamental freedoms:

[...]

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

The Court links the exercise of this freedom to democratic justification, a determining factor for the legitimacy of police practices and, more generally, the government's exercise of power. Contra Maritain's human rights pragmatism this is a fundamental freedom with a built-in "why". Communication is not a right conferred by the fiat of the state or a product of state power. Instead, if we are to have democratic societies, the freedom to communicate is fundamental because it precedes the state as a condition for the state's legitimacy.

In applying the *Charter* this way, the Court works against the grain of the security regime.

The security regime, by impinging upon the flow of democratic communication through ministerial fiats, closed tribunals, the hardwiring of surveillance into telecommunications infrastructure and other means, grounds its legitimacy in a different framework.

Communication does not function in the security regime as democratic deliberation. The population's capacity for reflective consent as a perpetual test of political legitimacy becomes moot, trumped by the necessity of keeping us secure against militarised fundamentalism. Public safety becomes the *telos* that justifies the state. Neither is communication a fundamental freedom, an organic feature of human dignity that precedes, constitutes and interrogates the state. The security regime, instead, makes communication a right, not a freedom—a legal construct that derives from executive power and not from any feature of human nature that might precede this power. Communication ceases to be fundamental; it becomes instead derivative of the projects of the state, an extension of the power of the executive branch. The security regime reconstitutes the act of communication as a feature of its self-justification; a right extended to the population on the security regime's own terms and contingent to its own purposes.

We can see this dynamic at play south of the 49th parallel in the creation of “free speech zones” by the Bush administration. The zones are a dialectical product of, on the one hand, constitutional guarantees of free speech and, on the other, the perceived threat to the political fortunes of the executive branch in the popular exercise of this freedom. As reported by Maria Cheh (2004: 53),

The Secret Service has created “security zones” insulating the President and his entourage from the sights and sounds of opposition marches and demonstrations. And the police are using sophisticated tactics, such as surveillance, infiltration, disinformation, and preemptive arrests to undermine and frustrate the ability of protestors to conduct their marches and send their message to the larger public.

The result is a right to communicate without the freedom to say very much.

We can also see the same dynamic at play in *lawful access* and its project of converting Canada’s telecommunications infrastructure into a surveillance system, a ubiquitous “security zone” encompassing every communication device and the networks that bind them together. On its face, the Canadian government’s assurance that *lawful access* is constitutional appears counter intuitive when one considers the direction Canada’s Supreme Court has taken on privacy under the *Charter of Rights and Freedoms*. As early as 1988 the Court entrenched the right to privacy in Section 8’s assurance of security against “unreasonable search and seizure”, understanding this section to “protect against the actions of the state and its agents” (*R. v. Dyment*, 1988). *Dyment* provides an interesting, if macabre, trope for life in a surveillance society. Dyment was unconscious and bleeding when the attending physician collected a blood sample from a flowing wound and gave the vial to a police officer. The fact that this blood was, so to speak, in transit and, thus, that the doctor did not actually pierce his patient’s body to get the sample, did not make the invasion of privacy any less unlawful. By the dictum in *Dyment*, privacy is not reducible to the integrity of a physical space, but attaches instead to the dignity of the human person. The Court found a breach of privacy even though there was, strictly speaking, no invasion of the victim’s body. Moreover, it took issue with the devolution of the physician into an agent of the state.

The conversion of telecommunications infrastructure and the corporations that sustain it into a surveillance system, empowering police and security services to monitor without judicial oversight who speaks to whom, must have a deleterious effect on human dignity. We no longer confine our sense of self—be it in our intimate relationships, the deepening and manifestation of our values and core beliefs—to the home. Increasingly, the relationships integral to our health, well-being, and identity radiate through the wider community and indeed the world. There is nothing virtual about these personal networks: they are the sites in which we live our lives, every bit as intimate and revealing as the physical space of the home. The necessity of modern telecommunications for this form of life does not make it any less human, dignified or worthy of respect. Our communications technologies may allow information about us to bleed into the hands of service providers and other third parties, but these are deficiencies in need of correction and not *de facto* invitations to the state to turn on us its unblinking eye. What counts for privacy in Canadian jurisprudence is not the question of place, but instead the moral worth and vulnerability of human personality as it grows and manifests itself well beyond the walls of any domicile.

Viewed from this perspective, privacy entails more than the liberal conception of, as set out canonically by Brandeis, the “right to be let alone” (*Olmstead v. United States*, 1928). On this view, privacy is the right of exclusion, the manifestation as civil liberty of our isolated individual existence. This idea of privacy persists in *Dyment*. I believe it is problematic for two reasons. First, it constructs privacy as a part of the Hobbesian bargain—a right not to

be interfered with, a right conferred by the power of the state and contingent to the interests of the state. Privacy is not about human dignity, but is instead a vehicle for the state's security. Second, the idea of privacy as a liberal right does not reflect how we actually live our lives. We are not radically isolated self-fashioning sources of meaning. It remains that from birth we exist in a matrix of personal relationships that, for good and bad, we did not choose in their entirety, and these relationships are integral to our self-understanding, our values, and our sense of human meaning. By the social nature of our existence, privacy is better conceptualised as the freedom of admitting others into our confidences, building trust and thereby relationships. In Canadian terms, the *Charter* should comprehend privacy in the fundamental freedom of communication. Privacy is at the heart of our moral agency and, indeed, our capacity for citizenship because citizens become more democratically formidable as these relationships flourish. On this reading, state surveillance is a form of social euthanasia, invading the interstitial human spaces where we live and grow as persons in communion with others.

As a system or policy of coercive intimidation, terrorism is a dystopia of communication. It uses violence and the threat of violence to supplant our deliberation about the nature and purpose of human life with its own moral and epistemological edicts. Its aim is to convert what ought to be an open, species-wide discourse into a closed monologue. These features mark terrorism as entirely consistent with militarised fundamentalism in the widest sense—whether it speaks from a desert cave or from a 21st century political machine. The trouble with the security regime, as I hope the preceding review illustrates, is that it weakens our capacity as persons to be resilient to terrorism's project of coercion. It does

this by imparting an inordinate and uncritical dependency on the executive branch in a manner consistent with liberalism's premise that we would, but for the state's domination, be strangers and dangers to each other. We settle for tolerance, the security regime's pretended acceptance of diversity, instead of finding ways to be truly present to each other in the wealth of our differences.

The branding of the *war on terror* by the Bush White House, and the ways in which the animus of this brand permeated the social fabric in the immediate aftermath of the 9/11 attacks, provides a dramatic illustration of the construction of "tolerance" for the exclusion of the other. This was, of course, not confined to the borders of the United States but exercised a profound influence on the recalibration of constitutional norms in Canada and Europe to suit the expediencies of counter terrorism. The following chapter takes a closer look at this dynamic while, at the same time, examining the response to it in the form of Jihadist terrorism.

2: DECONSTRUCTING “INFINITE JUSTICE”

As an artefact spin, the flaw in the phrase *Infinite Justice*, the Bush Administration’s original brand for the *war on terror*, is not so much its hubris as its unconscious candour. Retracted by the White House after some Muslim leaders in the United States bridled at its blasphemous claims – if any justice is “infinite”, it is God’s alone – the phrase nevertheless opens a window to the inner workings of the mind of sovereign power. It was a banal slogan for the launch of pre-emptive wars in violation of international law, a brand-identity for a campaign of violence of shocking scope that has claimed the lives of up to 76,552 civilians in Iraq alone (Dardagan, 2007), a coded justification for the abrogation of due process in liberal democracies, the “rendition” of unknown numbers of detainees to 21st century concentration camps and Bronze Age detention cells, the abnegation of prohibitions against torture; it was all of these things and, at the same time, a self-revelation of the security regime’s rise over democracy, in the name of making us safe, in the name of justice. This justice is infinite precisely because it is not a function of the substantive rule of law, which imposes constraints and renders finite the ambitions of power; it is infinite because it is power that justifies itself.

Democracy does not exist in a static state, its institutions, values and aims sealed off from the crises of the day. Each response to disaster or social crisis, especially where terrorism is a factor, brings to the surface the otherwise latent aim of sovereign power, in democracies and all other polities, continually to expand its dominion. This is where there is common

ground between the security regime and its current nemesis, jihadist Islam. I use the term jihadist Islam instead of fundamentalist Islam because there are Muslims who consider themselves to hold fundamentally to the Koran, who understand *jihad* to be a spiritual discipline, a continual striving in peace and non-violence for submission to God; jihadist Islam, in their view, is the complete inversion of their fidelity to the Koran. Both jihadist Islam and the security regime are self-proclaimed agents of infinite justice, and both declare sovereignty over life itself; they are locked in a dynamic cycle of reciprocal determination. My aim in this chapter, working to the theses of Jacques Derrida, René Girard and Giorgio Agamben, is to map the implications of this rivalry. My sense is that what we are witnessing in the *war on terror* – and it is a war on *terror*, not terrorism – is not an aberration from the otherwise normal course of liberal democracy. Though the brand name may change, the phenomenon of infinite justice is at the core of the nature of sovereign power in these democracies. Its project is two fold: To declare the State's unyielding alliance with good people, and to use this declaration to short circuit democratic deliberation among these good people. The State's project of keeping citizens safe against the depredations of terrorists constructs, at the same time, citizens who are safe for the executive branch, good people who can never be a democratic threat to sovereign power.

This construction of the safe citizen is, in Iris Marion Young's reading, something of an archetypal exercise of masculinist power, the drive to protect us from bad men. What she finds striking is that we do not simply submit to the erosion of privacy and the curtailment of freedoms, be they incidental or fundamental, in the security regime; we in fact embrace

these measures. The security regime claims not only our obedience, but our loyalty and, to use Young's word, adoration.

The state pledges to protect us, but tells us that we should submit to its rule and decisions without deliberation, publicity, criticism or dissent.
(Young, 2003: 227)

The deep personal reach of the security regime, its pledge of protection, is evident in President Bush's declaration of the *war on terror*. This is not, as mentioned above, a war on terrorism as such. In his address to a Joint Session of Congress nine days after the attacks of 9/11, Bush affirmed

Our grief has turned to anger, and anger to resolution. Whether we bring our enemies to justice, or bring justice to our enemies, justice will be done. [...] Our *war on terror* begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated. (Bush, 2001a: Added emphasis.)

This *war on terror* is, therefore, global in scope but with no concrete geopolitical foe: it is a war of deliverance from a subjective state, from the condition of being in terror. It is therapeutic war. In the security regime, the aim of masculinist power is to protect us physically, but also our sense of well being; it imposes a beneficence that reaches into our souls. Young sees in this the infantilization of the citizen, one that we embrace, from a participant in self-governance to the cosseted dependent of the executive branch.

To extend Young's analysis, our feeling of adoration is not simply a personal phenomenon or a strictly subjective response; it is institutional and inter-subjective. It colours the media's reporting of events in the security regime, re-calibrates the balance of constitutional powers as legislative and judicial branches yield to the executive so that the tone of public discourse shifts. The culture of spectacle metastasizes into an oddly reassuring culture of fear and militarism.

In this way, the security regime establishes itself as a “reference point for all subjectivity.” (Badiou, 2005: 40) When one considers the depth of feeling elicited in the aftermath of a terrorist attack – the ubiquitous grief, the sense of outrage at the use of our blood to write proclamations of an impending apocalypse – certainly the very landscape of subjectivity seems to shift. Democratic peoples go into a state of shock, and our ability to deliberate, to share in decision making about how to respond to the threat attenuates and falters. This condition of terror places the imperative on the good of public safety, displacing our own, individual projects of self-fulfilment. It is as though each spectacular act of terrorism brings a reversion to the state of nature, rendering “the life of man, solitary, poor, nasty, brutish, and short.” (Hobbes & Missner, 2008) In response, we yield willingly to the state our capacities for critical democratic engagement.

Having said this, there seems to be little room in Young’s analysis to allow for a shift in our relationship to the security regime. We can grow intolerant of the inconveniences it presents us, suspicious of the executive’s justifications for new extensions of its powers, outraged as evidence of particularly odious actions come to the surface, like the photographs from the depths of Abu Ghraib. It is, therefore, by no means the case that we regard the security regime with undiluted adoration; indeed, as we have seen in the responses of other peoples to heavy handed police powers, gratitude for protection can turn to resentment. When this happens, protection more visibly resembles repression.

There is also little room in Young's analysis for the experience of religious and racial minorities. In my direct experience, Muslim leaders in Canada reacted with horror and moral outrage to the terrorist attacks of 9/11, moving very quickly to manifest their social solidarity. However, they soon began to experience arbitrary and racist exercises of power and this sense of unity slid into an experience of otherness. The sign of a similar slide is also clear in Muneer Ahmad's analysis of the treatment of "Muslim-looking" peoples in the United States in the aftermath of 9/11. This includes the murder of up to nineteen people, assaults, harassment and intimidation, the fire bombing of gurdwaras, temples and mosques and acts of vandalism. Unlike acts of homophobic violence, such as the torture and killing of Matthew Shepard, these crimes were not seen as acts of incomprehensible violence. Instead, in Ahmad's analysis, they were seen as "expressing a socially appropriate emotion—overwhelming anger in the aftermath of the terrorist attacks—in socially inappropriate ways." These crimes were forms of veneration of the American way of life, expressions of adoration of the security regime meted out in the flesh of a racialized minority. They were not solely discrete and isolated incidents, but part of a broader confluence between individual crimes and the institutional mood. "The physical violence exercised upon the bodies of Arabs, Muslims, and South Asians has been accompanied by a legal and political violence toward these communities." (2004: 1262)

In addition to direct acts of violence and abuse against Muslims and Muslim-looking people, and the systemic forms of isolation and disparate treatment, there is also the cumulative impact upon these communities of a public discourse of suspicion, enmity and blame. This is evident in the aftermath of the attacks on Glasgow's airport in 2007. Kafeel

Ahmad, supported by a small clutch of physicians, loads a second hand Jeep with propane tanks and drives it into the airport's entrance court. The Jeep sets off a comparatively small explosion, the only reported injury was to Ahmad who died after sustaining severe burns. The airport's entrance was repaired and opened in short order. Nevertheless, the attack seems to have had a profound impact on Britain's Muslim community. It reinforced the sense of the community as an alien, threatening presence that quickened with the 7/7 bombings of London's transit system. Unlike those conspirators, who were British born and raised, Ahmad and his cohort were immigrants. Even so, British born Muslims experienced a sense of race shame, a feeling of being the "other". In the words of Na'eem Raza, writing for the BBC, "We have lived together for years, carried out business together, our children play together, we support the same team, we walk the same streets, and now we are 'them.'"(Raza, 2007)

Young's thesis that we not only submit to the security regime but also adore it for preserving us against bad men can only take us so far. The subjective state of religious, racial and ethnic minorities in the security regime is considerably more complex: adoration, perhaps, but also a sense of alienation, the dead weight of living under continual suspicion. To her gendered reading of the security regime, and the infantilization of the citizen by masculinist power, I would add a further consideration. A test of our capacity to respond to the very real threat of terrorism as a democratic people must include the degree to which we preserve a public discourse that continually purifies itself of xenophobia and racism. Failing to do this, we grant to jihadist Islam one of its principal objectives, to collapse the possibility of social pluralism.

Clearly, the “bad men” are out there and they are among us. Acts of suicide terrorism in the name of Islam, from New York to Madrid, Bali and London, have changed the skyline and social landscape of our cities, and ignited a global conflagration. Furthermore, this has happened in a remarkably short period, with almost eighty percent of the suicide terrorist attacks over the past forty years perpetrated between 2001 and 2005. (Hoffman, 2006) A similar trend seems to be occurring in microcosm in Afghanistan; where the Taliban’s Hanafi beliefs once anathematized suicide bombing, its frequency has increased over the past five years with the social diffusion of Al Qaeda’s Wahhabist doctrine. (Smith, 2007: 16) Wahhabists today invert the Koran’s prohibition of suicide, rendering it instead a sacramental act to kill oneself while killing the enemies of Islam. This is divine violence, ruthlessly rational in its strategic aims, calculated to call down the Apocalypse and establish the eternal dominion of Islam. The contrast with ideological or nationalist terrorist groups like the Italian Red Brigade is stark. For these groups violence is a form of “armed propaganda”. In the words of an IRA operative “You don’t bloody well kill people for the sake of killing them.” (Hoffman, 2006: 232, 39) As we see in contemporary forms of Wahhabism, violence is both instrumental and sacramental for the religious terrorist, through an act of suicide or other means the intention is to annihilate an open category of enemies of the faith and precipitate a new, divine world order. The escalation of suicide terrorism, and its seemingly rapid diffusion, comes as the exegetical revision of suicide combines with twenty-first century communications technologies and media savvy. The result is a weaponized religion. With each act of sacramental killing amplified through the news cycle, jihadist Islam manages to both terrorise the enemy and evangelize the faithful.

According to Natana DeLong-Bas, Wahhabism was not supposed to be this way. There is, in her view, no “cult of martyrdom” in the writings of Ibn Abd al-Wahhab. She considers erroneous any attempt to make Wahhabism synonymous with terrorism, a product of “reactive emotions” in the wake of 9/11. Al-Wahhab was an eighteenth century reformer, bent on rescuing Islam from a slide into the influence of other religions. Muslims had adopted practices like devotion to saints, and fallen under the influence of leaders whom al-Wahhab considered heterodox. Roughly analogous to Luther, his project was to return to a reading of the text of the Koran purified of worldly ambition and distractions. He affirmed knowledge of Islam as the only source of legitimacy, especially in the political realm. The religion was to be spread by missionary activity, inculcating belief through a programme of reading and prayer. It is through the wide dissemination of devout literacy in the Koran that Muslims themselves can critically assess and keep in check people who would exercise spiritual and temporal power over them. There is not to be one canonical authority in Islam, but a community of believers who read by their own lights, using the unambiguous texts of the Koran to assess the credibility of those attempting to interpret its ambiguous passages.

DeLong-Bas’ apologetics is clear in affirming that al-Wahhab preserved a place for jihad, excusing no individual from the duty to participate. The aim of jihad is to protect and aggrandize the Muslim community, and it is not in simply a spiritual struggle; in al-Wahhab jihad requires taking up the sword, though he places restrictions on the intention and scope of this violence. “Killing is permitted,” DeLong-Bas writes,

only if they express an opinion about religious beliefs against which their community is engaged in battle and participate in resisting it, according to Muhammad's saying, "If they understand/perceive what is everlasting and resist it." In other words, for these men only resistance to the religious message constitutes grounds for killing and this only if they also refuse to enter into a treaty relationship with the Muslims. [...] Clearly, the godfather of Wahhabism did not call for the annihilation of Jews and Christians. He took care to preserve human life whenever possible. (DeLong-Bas, 2004: 205)

However, it is also evident in DeLong-Bas' reading of Wahhabism that violence is in fact necessary in the life of faith, perhaps even a sacramental duty in the "defence of God's omnipotence." Her affirmation that "He took care to preserve human life" shows in al-Wahhab a claim over human life. To use Young's categories, this is a masculinist claim to be protector and avenger, arrogating a dominion over the human body. Be it in God's name or in his own, the effect of al-Wahhab's claim is the same: it makes those who hold to his doctrine agents of sovereign power over life as such.

Contra DeLong-Bas, there does seem to be a continuity between this doctrine and the theology of Osama Bin Laden, indeed al-Qaeda as a whole. On December 9, 2001, in his "Message to the Youth of the Muslim Ummah", Bin Laden entrenched and expanded the fatwah he issued in 1998 with five others. Reflecting an increase in stature, he issued the Message to Youth in his name alone, proclaiming jihad

has become fard-ain [obligatory] upon each and every Muslim. ... The time has come when all the Muslims of the world, especially the youth, should unite and soar against the kufr [nonbeliever] and continue jihad till these forces are crushed to naught, all the anti-Islamic forces are wiped off the face of this earth and Islam takes over the whole world and all other false religions. (Hoffman, 2006: 96)

The project of al-Qaeda is, therefore, one of apocalyptic genocide. Its violence is sacramental violence against an open category of enemies; *kufr* declared as such by the

exegeses of Bin Laden and his cabal. In Wahhabism, the proof of the authenticity of this doctrine is in its wide dissemination and acceptance by the broadest community of believers. Communication technologies are indispensable, therefore, in legitimating this reading of the Koran as singularly normative. Equally, the doctrine's proponents find further proof of its incontrovertible authority as the call to jihad increases the magnitude of carnage and the depth of terror; these are proofs of divine favour, and assert the teaching as binding upon all Muslims. Jihadist Islam, in God's name, claims sovereignty over life as such, arrogating to itself divine omnipotence to mete out infinite justice.

For their part, the liberal democratic societies Al Qaeda seeks to annihilate have embarked on a sweeping re-configuration of the state's relationship to the citizen ostensibly to guard against this threat. By way of illustration, consider the Canada's project "*lawful access*." Although it was initiated well before the attacks of 9/11 to aid in the fight against organized crime, anti-terrorism has now become the overriding justification for the proposed transformation of Canada's communication infrastructure into a latent and ubiquitous surveillance system. In order to conform to the *European Cyber Crimes Treaty*, *lawful access* shifts to industry both the onus and costs of ensuring all telecommunications devices and systems are engineered to permit surveillance. Were it to carry into law this policy framework would make it an offence punishable by up to five years incarceration for university researchers, or anyone else, to develop for public use vigorously private communication systems. (Markwick, 2005) *Lawful access* must be seen in the context of Canada's broader anti-terrorism agenda.

The Anti-terrorism Act, 2001 (hereafter the *Act*) allows Canada's peace officers the power to make preventive arrests, by definition without charges, and bring the detained person before a closed court. The detained person may be released if he or she accepts conditions imposed by the court, otherwise the detainee can be imprisoned for a year.

The *Act* also empowers the Minister of Defence to permit the interception of international communications without any requirement to seek a judicial warrant. As suggested above, this builds on what observers note are "the widest electronic surveillance powers in the Western world," even without the passage of *lawful access*. President Bush's spying on US citizens' communications overseas in the "terrorist surveillance program", and the outcry it generated among Americans jealous of their civil liberties, appears sloppy in comparison to the elegance of Canada's executive branch.

In constructive opposition to the Supreme Court of Canada's affirmation of the necessity for open courts, and its rejection of a presumption of secrecy where national security is at issue, the *Act* is of a piece with British and U.S. revisions to rules of proceedings and, ultimately, judicial independence. It gives the Attorney General power to issue fiats to seal matters away from the courts, specifically where there is a "specified public interest", or where publication would be "injurious to international relations or national defence", or in the name of Cabinet secrecy. Fiats citing the first two of these reasons may themselves be subject to judicial review, but the *Act* gives the Attorney General the last word. It grants the minister authority to stop even these proceedings in the name of Cabinet secrecy, issuing a new fiat that would be closed to judicial review.

These dramatic changes in the legislative framework take place without substantive popular debate, the media are generally compliant, and, judging treatment Canada's *Counter Terrorism Act* and the *USA Patriot Act* in their respective capitols, their passage through constitutional checks and balances is uncomplicated by anything resembling serious legislative scrutiny. Frequently, surveillance measures like the inclusion of biometric identifiers in passports and other documents are entrenched in international agreements before they have been the subject of domestic debate. They are then policy laundered as the executive branch insists the measures must be carried in order to comply with international obligations and contribute to the defeat of terror.

Furthermore, the tight international integration of policing and surveillance is creating a system that is supra national and, as such, defies any form of civilian oversight, accountability or redress. For example, on December 20, 2002, U.S. authorities signed with Europol the Supplemental Agreement on the Exchange of Personal Data and Related Information. The Agreement, as reported by Maureen Webb,

gives an unlimited number of U.S. agencies access to Europol information—including sensitive information on the race, political opinions, religious beliefs, health, and sexual lives of individuals, for the *prevention*, detection, suppression, investigation, and prosecution of any specific criminal offenses and for any specific analysis. (Webb, 2007: 142 Original emphasis.)

This is part of a strategy to create a meta-database, a system so comprehensive it could create an extensive, continually updated dossier for every person on the planet. Monitored by software, the data would calculate each person's threat level based on probabilities. In a world where prevention trumps the rule of law, the security regime offers its protection contingently: We are good people for now. Our lives become bifurcated, as our day-to-day living leaves indelible data footprints in an unforgiving virtual reality. This is what

Owen Lattimore, the academic who stood falsely accused in the McCarthy era of being the Soviet Union's principal mole, called "[...] the national insecurity state: a data world that shadows, mimics, and caricatures the real world." (Lattimore, 1950)

It is not the case that this climate of suspicion affects equally all citizens. As we have seen in Munir Ahmad's account of the treatment of "Muslim-looking" Americans post-9/11, we seem to be in the midst of a diffuse state of martial law where the full weight of the state, stripped of any substantive judicial safeguards, is brought to bear on persons because of their race, religion or ethnicity. Indeed, the indicia for disparate treatment, repression or torture may be triggered by otherwise innocuous information like the name of the person who witnessed a leasing agreement and her travel history or internet surfing habits.

Crucially, none of these changes has required the abrogation of existing constitutions. What we find instead is a splintering of the constitutional order into discrete contexts of law, e.g. the context of immigration and refugee law, the context of communication surveillance law, the context of military tribunals. In this splintering, judicial oversight remains the one conspicuous factor lending an appearance of constitutional cohesion, and perhaps this has now become their principal function. Judges sell the rightness of the security regime, not as hucksters, but in lending their office to the reduction of constitutional law to an agglomeration of procedures. This is consistent with Giorgio Agamben's reading of the *war on terror*. The *war on terror* brings with it, he argues, a state of exception in which the established constitutional order continues to exist, but does so in parallel with a new structure of emergency powers. It is a suspension of the rule of law

within the rule of law itself. “The state of exception,” Agamben writes, “is not a dictatorship [...] but a space devoid of law, a zone of anomie in which all legal determinations—and above all the very distinction between public and private—are deactivated.” (Agamben, 2005: 50) In this “space devoid of law”, the distinctions between executive, legislative and judicial powers break down. Faced with the threat of apocalyptic genocide, politics itself reaches a limit point and judges become agents of policy. What we are left with, as Kanishka Jayasuriya observes, is a condition in which “[...] conflict and debate—the raw materials of *politics*—get submerged in the search for *policies* of risk management and control.” (Kanishka Jayasuriya cited in Anderson, 2004: 318) The rule of men replaces the rule of law. (Bartholomew, 2006)

Liberalism was to preserve us from this; certainly, a stated purpose of liberalism is to anticipate and prevent the rise of governments that would supplant the rule of constitutional order. Its as old as Aristotle that “transgression of the law creeps in unnoticed” to destroy a constitution. (Aristotle, Sinclair, & Saunders, 1981: 1307b) John Rawls spoke out against what he described as “authoritarian cabinet government.” (Rawls, 2005: lxi) To curb the possibility of such a state of affairs, Rawls posited a political liberalism that would work with the grain of social pluralism. His intention was to devise principals for a just constitutional order on the premise that there is no possibility for agreement on a universal good, because we hold diverse, reasonable and mutually irreconcilable views about the nature and purpose of human existence. Since a substantive idea of justice is not possible, justice must be about procedure. “Political liberalism,” Rawls writes

looks for a political conception of justice that we hope can gain the support of an overlapping consensus of religious, philosophical, and moral doctrines in a society regulated by it. [...] Citizens themselves, within their exercise of their liberty of thought and conscience, and looking to their comprehensive doctrines, view the political conception as derived from, or congruent with, or at least not in conflict with, their other values. (Rawls, 2005: 10, 11)

In this way, Rawls believes, we are able to develop a constitutional order that preserves maximal space for our individual projects of self-fashioning. We are each of us free to seek the nature and purpose for human existence, emancipated from any canonical good established by the power of the State. In fact, the justification for the State's constitutional order rests in Rawls on the degree to which it conforms with the meaning of human existence we discern in our own "reasonable comprehensive doctrines."

Infinite justice puts the test to Rawls' hypothesis. The genesis of the *war on terror* involved no process, formal or otherwise, of deliberative inclusion. Instead, the State moved very quickly to make explicit what I believe was implicit all along: that there is in fact a public good that subordinates all "reasonable comprehensive doctrines", the good of keeping good people safe. If we were in fact to construct some form of constitutional deliberation, it might be the case that the good of safety would be a feature of our overlapping consensus. We would likely also agree that the State should have some scope to enter into international security agreements, and perhaps keep information away from citizens even though this impedes our capacity to exercise our share in self-governance. Nevertheless, it is difficult to imagine that we would accept, by the lights of our own discrete doctrines, ceding democratic control over our protection to supra national authorities, that the State should hold over us masculinist power, that the State should have dominion over life as

such. Were we to accept such a state of affairs, it would not be the fruit of sober doctrinal reflection on our core values, our sense of dignity as citizens or persons; it would be an acceptance born of pragmatic or fatalistic resignation in the face of forces too vast and profoundly alienating. When security becomes the meta-good, it trumps all projects of individual self-fashioning; this sets the “political conception of justice” beyond the practice of politics, and paves the way for law to devolve into policy. Rawlsian political liberalism breaks down at this point, because it results in a constitutional order that, in the name of liberty, further inscribes our lives and our subjectivity into the life of the State.

The trouble persists with Rawlsian political liberalism and its inability to posit an inclusive and just constitutional order founded on substantive pluralism. My sense is that Michael Sandel’s critique of Rawls still holds. (Sandel, 1998) The approach to pluralism in Rawlsian political liberalism does not result in increased civic space for legitimate deliberative participation. We must bracket our or set aside our own conceptions of the good, of the nature and purpose of human life, because there is no possibility of a public or political reconciliation of our disparate views. These views can play no public role in developing or refining the political conception of justice. Instead, we keep our “reasonable comprehensive doctrines” to ourselves, inwardly assessing their fit with the dominant conception of justice. Of course, this can work both ways, as the political conception of justice itself exerts pressure to conform our views to itself or, as we have discussed above, masculinist power elicits a subjective response to the projects of the security regime. The failure to create a thoroughly inclusive public space where we can challenge and learn from each other courts extremism and radical xenophobia. Furthermore, the system gives a

privileged deliberative seat to the people whose reasonable comprehensive doctrines most resemble the dominant discourse. Those holding doctrines that are in part or in whole remote from the content of political liberalism will experience alienation. Rawls' liberal polity is not saved by his assertion we somehow inwardly test and justify the State sequestered in our own reasonable and comprehensive conceptions of human existence. This doctrinal sequestration leaves no public space for us peacefully to contend with each other and debate the good, the nature and purpose of human existence. This may be a conversation that never ends—a conversation that will endure for the duration of our existence as a species—but it is nevertheless a conversation we urgently need to have. Political liberalism pre-empts this conversation, decides the matter for us through the imposition of its conception of justice. This is an imposition because it co-opts the core values of the citizen, making them internal to the state rather than points of reference and critique external to the State's hegemony.

There is a further concern, and it goes specifically to the reality of the challenge we face with the rise of jihadist Islam. Even as we develop an overlapping consensus, this very action also creates an absolute other; the other who cannot fit into the overlapping consensus becomes, by definition, the other who can never be politically reconciled and can take no place in the deliberative community. The result must be violence, direct or otherwise, as we extirpate the other who cannot be included. This is bracketing in another form, because of the coercive effect of potential exclusion. If we fail to participate in consensus building, if we grow strident on issues of deepest concern, we risk deliberative ostracism. The function of the political conception of justice is, therefore, not to resolve

the challenge of pluralism on the side of maximal inclusiveness but to subordinate, neutralize and suppress all comprehensive doctrines—especially the ones it deems threatening or unreasonable.

William Rasch make a similar point in his reading Carl Schmitt. “Liberal pluralism,” he writes

is not in the least pluralistic but reveals itself to be an overriding monism, the monism of humanity. Thus, despite the claims that pluralism allows for the individual’s freedom from illegitimate constraint, Schmitt presses the point home that political opposition *to* liberalism is itself deemed illegitimate. Indeed, liberal pluralism, in Schmitt’s eyes, reduces the political to the social and economic and thereby nullifies all truly political opposition by simply excommunicating its opponents from the High Church of Humanity. After all, only an unregenerate barbarian could fail to recognize the irrefutable benefits of the liberal order. (Rasch, 2003)

Both in the actual workings of the security regime—the ways in which a state of exception now obtains as we see in the establishment of new, supra democratic frameworks for surveillance, arrest and detention—and the ways liberal theory itself makes this an inevitability, for example in Rawlsian political liberalism, power justifies itself. Infinite justice marks that space in which the rule of law is not substantive, but is positivist, procedural.

Infinite justice is, therefore, the “monism” imposed, respectively, by jihadist Islam and the (liberal) security regime. In both cases, we find the use of violence to justify an absolute claim over human life, a claim that in fact has a completely arbitrary foundation. We can see this is arbitrary because it supplants any dialogue, open ended and as broad—temporally, spatially—as the human species, about the nature and purpose of human life.

My sense is that Jacques Derrida would have two principal criticisms of Rawls' construction of democracy as political liberalism: its ultimate exclusion of ethics and its affirmation of tolerance. First, the nature of Rawls' project impedes the scope of ethical analysis; pragmatic political concerns, above all in the area of security, trump the affirmation of ethics every time. As law gives way to policy, so must ethics give way to politics:

[...] political responsibility always involves a relative and provisional calculation, whereas ethical responsibility is absolute and incalculable.
[...] Derrida insists that incalculable ethical absolutes (eg. Justice) need to be put to work in contingent political calculations that are irretrievably context bound (eg. law). (Reynolds, 2006)

There is, therefore, a double move in the declaration of fundamental human rights as an ethical absolute central to the ethos of the security regime. This declaration repeats continually in political discourse, in Tony Blair's insistence that the *war on terror* is a fight of "our values against their values", in the joint UN/NATO re-construction of Afghanistan as a western Islamic republic. While retaining the aura of an absolute, the security regime renders human rights instrumental. The Universal Declaration of Human Rights, municipal constitutions of fundamental rights and freedoms, thus exist in parallel with the security regime's direct abrogation of human rights, for example in the case of indefinite detention, extraordinary rendition or *refoulement*. Globalized and supra democratic, the security regime curbs the ability of individual states to serve human rights. As Agamben observes, "In the nation-state system, the so-called sacred and inalienable rights of man prove to be completely unprotected at the very moment it is no longer possible to characterize them as rights of the citizens of a state." (Agamben, 1995: 116) This is the

effect of the globalization of surveillance, the shift from a culture of law as the iterative articulation of ethical absolutes to a culture of policy based on the pragmatics of preventing terror. At the heart of the security regime, in the name of human dignity, in the name of tolerance, Agamben is correct to find that “When the rights of man are no longer the rights of the citizen, then he is truly *sacred*, in the sense that this term had in archaic Roman law: destined to die.” (Agamben, 1995: 117)

The second criticism Derrida would have of political liberalism goes to the issue of tolerance. In his view, tolerance is an essential feature of security because it consolidates the core authority of the power that does the tolerating. The security regime embraces diversity as a strategic indulgence, a cover for the concentration of power and not its diffusion. We have seen this in Rawls’ construction of “reasonable comprehensive doctrines.” The effect of tolerance is to make power secure, to ensure the power that does the tolerating always remains dominant.

Tolerance always carries within itself a limit point, marking at the same time the two possibilities of inclusion and expulsion. It is a secular virtue entirely consistent with what Agamben observes to be a change in the nature of sovereign power after Auschwitz. The Shoa changed irrevocably the relationship between the human person and sovereign power. Agamben argues that the scope of politics was clearly constrained at the origins of democracy in ancient Greece. Politics minded the *bíos*, the material organization of communal life—enacting laws to govern the market, define and protect against offences against the community etc. These laws, and political power as a whole, stopped at the

threshold of life as such, *zoë*, life that belongs to God alone. This limit point for law making provides a reference point, a vantage from which to test and assess the claims of politics to justice. The Shoa obliterated this distinction, establishing for the sovereign a claim over life as such.

Agamben is correct to point to the singular nature of Auschwitz or Europe, and for the human species as a whole. However, the experience of the sovereign stripping the human person down to “bare life”, its radical collapse of human dignity to the mechanics of organic existence, is also the experience of aboriginal peoples, on that pre-dates and prefigures the Shoa: It is the experience of enslavement, apartheid and genocide that aboriginal peoples have endured for centuries.

The idea of tolerance must be seen in this light; it is an attempt to make peace with the now infinite claim of sovereign power over life without exorcising the spirit of the Shoa. Tolerance is the action of the state of exception, constructing human rights to justify and entrench sovereign power, perfecting the claim of the security regime over life as such in the name of human dignity. The terrorism of jihadist Islam, in the name of defending God’s omnipotence, is the spirit of the Shoa stripped of the gloss of tolerance to its diabolical essence. The effect of the idea of tolerance in the polity of the security regime is to define it as qualitatively different from jihadist Islam, to present a global contest of “our values against their values.” Certainly, as we have seen, the project of jihadist Islam is the extirpation of the other. It remains, nevertheless, that the liberal politics of the security

regime and the apocalyptic politics of jihadist Islam make rival claims to sovereignty over life as such, competing hegemonies that would bring an end to history.

For Jacques Derrida, the totalitarian aspirations of the present cannot neutralize the call of the future. In his “messianisms without a Messiah”, the future exerts an active pull on the present. I do not believe this idea is simply Hegelian dialectics in another form because there is nothing in it remotely resembling determinism. It is instead an idea of the future’s necessary openness to the present, and the challenge of preserving in the present a radical openness to the things to come, to the people to come. Considered solely in terms of our biology, our progenitive organs are pathways of the future. At the risk of being heterosexist, it remains nonetheless that our capacity for reproduction marks a point of organic openness to the future, an affirmation in our own flesh that history cannot end with us. Derrida resists any attempt, therefore, to consider any particular polity or constitution as definitive of democracy. For him, authentic democracy is always the democracy-to-come, a condition of substantive emancipation from every form of dominance, expulsion or violence.

The democracy-to-come, the messianic age without the Messiah, cannot arrive except through our biology. This is why the spirit of the Shoa, the spirit that animates in different ways both the security regime and jihadist Islam, must claim dominion over our organic life, including our capacity for reproduction. New human life, even when it is born into a camp, always marks the arrival of the future and, with it, the future’s subversion of the present.

This is, in my view, where Derrida's affirmation of hospitality over tolerance must take us. Hospitality is a complete openness to the other, without condition or exception. Derrida argues that the threat of expulsion necessarily harboured in the idea of tolerance creates terrorism as the West's "auto-immune condition". In denying hospitality to the other we create an implacable other, an alien community, an alien force with which we can never be reconciled, and against which we must fight for the continuation of life itself. The way forward in hospitality requires us to surrender any pretence or claim of control over our own household, over our own culture, our politics, over the material conditions of our existence. (Derrida, Habermas, & Thomassen, 2006)

If this is in fact where Derridan hospitality takes us, then it has a grating counter-intuitive feel. There is no possibility of radical openness to jihadist Islam and its project of apocalyptic genocide. This is not a demonizing construction of the aims of Bin Laden's Wahhabists; it is their stated goal. I do not see how it is possible to reconcile hospitality to this "other" while, at the same time, building a democracy that is radically open to the "others" whom Bin Laden would annihilate.

My sense is that Derrida is missing a step, a dimension of human culture that is a dominant theme in the anthropology of René Girard. Girard argues that sacrificial murder is both the origin and subtext of human culture. The theories of Agamben and Girard can be seen as a dialogue on this theme, although there is no space here to allow me to explore it at length. Like Agamben, Girard discerns the phenomenon of scapegoating, the life made

sacred so that it can be killed, and in this killing purify the community. He holds this to be foundational to religion. Girard believes human beings do not exist in radical isolation from each other. We develop as persons from the first moments of life by *mimesis*, by emulation. We do not learn *ex nihilo* how to be human. Instead, we pattern our sense of humanness on the personalities of the people closest to us. Violence and murder enter into the equation when we desire for ourselves, as a condition of our personal fulfilment, the identical good held or sought by our role models. We fall into an existential competition for this good, and our role model becomes our rival. The condition of rivalry changes the role model also, and the reciprocal relationship devolves into one of simultaneous attraction and repulsion. The result is a destructive mimetic rivalry, a zero sum contest that permeates our personality. The scapegoat mechanism prevents this mimetic rivalry degenerating into a *bellum omnium contra omnes*. We transfer our core conflict, the unconscious desire to eliminate our role model, onto an innocent victim; with one mind we murder the innocent so that we can be innocent of the desire for murder. This is, in Girard's view, the foundation of human culture "hidden since the foundation of the world." (Williams, 2004)

Where Derrida suggests terrorism is the autoimmune condition of the West, Girard would, I believe, take a more de-centred view. Jihadist Islam and western liberalism are locked in a mimetic rivalry, a process of reciprocal influence or "autoimmunity". Derrida's approach risks reserving agency for the West, making jihadist Islam a derivative phenomenon of the West's own pathologies. I believe this is a mistake; it leads to an underestimation of the autonomous nature of jihadist Islam.

This rivalry is a destructive mimesis, a zero sum contest for absolute sovereignty over life as such—the spirit of the Shoa at war with itself. Infinite justice is the product of this conflict, and it marks the precipice of our times—the point at which politics and religion reinforce a nihilistic spiral, an infinite regress of scapegoating.

It is possible to rupture this cycle in our responses to disaster and social crises, in our responses to infinite justice. For Girard, *mimesis* can also be positive, a dynamic of contact and communion between persons and cultures. It can deepen our sense of what it means to be human if we are conscious of the reality of mimetic rivalry. The challenge is to see through the construction of the victim to the person; to defy the reductivism that is victimization and discern instead the unique expression of human dignity in each specific person. In this way, the response to disaster and social crisis can become a singular opportunity to recover a conversation about the nature and purpose of human existence, a conversation of practical solidarity, a conversation that is conscious of the pull to destructive mimesis, that works continually to identify, isolate and exorcise the influence of the spirit of the Shoa.

Understanding the *war on terror* as a form of mimetic rivalry can help in the deconstruction of the militarization of development. For example, Canada's role in Afghanistan articulates the *war on terror* as a war for human rights and democratic values, an epic struggle for which we are willing to spill our own blood and the blood of our adversaries. The following

chapter examines what Canada's war in Afghanistan is making of that country, sorely tried after decades of unending war, and what it is making of us.

3: O KANDAHAR

The blood Canada spills in the *war on terror*, in Afghanistan's Kandahar province—the cradle of the Taliban, shows the two-way nature of this contest for the fate of the region and, ultimately, the meaning and purpose of human existence. This is what marks the *war on terror* as a war of mimetic violence, the site of encounter between the West's biopolitical claim to ownership over life as such in the name of the Enlightenment and jihadism's claim over life in the name of the God of Mohammed. The *war on terror* is a war of reciprocity between sovereign powers: this much is clear in the rise of the “neo-Taliban” and Canada's new-found belief that this network, headquartered across a porous border in Pakistan's ungovernable Waziristan frontier, cannot be defeated. The inevitable consequence of war, of mimetic violence, is to fashion us in the image of our enemy; the heart of violence, the heart of war, is mimicry, *mimesis*. There is always a force of communication in the violence of war, a discourse—demonic, incarnadine—about what it means to be human.

If it is true that Canada has never been a nation of military conquest—a claim one might contest standing on the Plains of Abraham, or on the banks of the Red River, or on Coast Salish territory in the heart of Vancouver—then our war in Afghanistan alongside NATO, under the auspices of the UN, is an exemplary practice of Canadian sacrificial altruism. We are engaged in an emancipating, humanitarian mission to build a “democratic Islamic state” on this battle worn terrain, and to ensure the new Afghanistan is a willing and effective collaborator in ridding the world of jihadist terrorism. My purpose is to analyse

this claim through two lenses, mindful of the continuing toll on human life, as corruption, violence and the rate of civilian casualties rise to their highest levels since “infinite justice” ended the Taliban government in 2001.

First, there is ample evidence to show the Afghanistan Compact and its meta-constitutional design for the new state is unapologetically neo-liberal. Measures that cause at least some consternation at Canadian polling and talk-radio stations—the privatization of health care and public utilities, the sale of all Crown land, and the eradication of the ‘informal economy’ as a threat to stability—are the bedrock of the Compact’s development strategy. However, it would be reductive to see profit maximization as the extent of the West’s interests in “securing Afghanistan”; the project is far more comprehensive, and it requires comprehensive critique. Reading the situation through political economy will produce an important forensic analysis of the dynamic at play, but I do not believe the work of judging the West’s intervention in Afghanistan can stop there. This is because political economy, especially when styled as ‘critical’, is always freighted with implicit normative judgements that warrant exposure and careful articulation. I argue that biopolitics can help to advance this task, because it opens an avenue to exposing and assessing the ethics of development and its critics in political economy, taking on their implicit doctrines of justice. With the benefit of Mark Duffield’s biopolitical analysis of development as “securitization”, my aim is to show how market fundamentalism, security, and the discourse of human rights and democratic freedom combine in the reduction of the Afghan peoples to bare life.

My second lens requires a reworking of biopolitics itself, due to the two-way nature of the war in Afghanistan. Specifically, Agamben's premise of a sole sovereign power as the author of the force of law and of the suspension of law does not translate easily into the mimetic rivalry of sovereign powers in Afghanistan. The abomination suffered by Afghan peoples is that multiple, overlapping states of exception reduce them to bare life. I argue Canada in Afghanistan shows how the force of communication, rather than the force of law, is the principal driver of sovereign power's claim over life as such in the globalization of the exception. My sense is that Agamben's construction of law and its suspension as the ground of sovereignty needs adjustment, because Afghanistan is a mimetic rivalry of sovereign powers. In the absence of one, monolithic sovereign, the force of communication—the campaigns, ours and the Taliban's, for “hearts and minds”—eclipses the force of law in both Afghanistan and Canada. For this reason, I suggest the production of bare life is an act of communicative violence. Using Iris Marion Young's articulation of subsidiarity as a principle of global social justice, I will suggest that the ethics of Canada's role in Afghanistan—along with that of NATO and the UN—should be measured against the ways the Afghan peoples practice their right to self-determination while holding to account the West's force of communication. My hope is that this approach will help the urgent task of assessing how the war is transforming the UN and Canada in our creation of a brave neo-liberal Islamic republic.

Afghanistan's Security Regime

Afghanistan's presidential and provincial elections of August 2009 mark what may be another grim milestone in a war that is approaching the duration of the Red Army's war

against the Mujahadeen. One of the chief reasons for Canada's heavy military commitment in Kandahar, which includes its investment in humanitarian aid and development, is to make the region secure for democratic governance. Nevertheless, four years out from the UN's administration of the first round of post-Taliban elections, the International Crisis Group reports that the Afghan government and its international partners have "fail[ed] to embed a robust electoral framework and drive democratisation at all levels." The report catalogues the intersecting technical, political and security issues that mar the prospects for elections that are, and are seen to be, transparent, fair and maximally inclusive. At the heart of the matter is a systemic defect in the construction of the Afghan government itself, an executive branch that is unaccountable to the legislative branch and, in the absence of a robust and autonomous judiciary, feeds political corruption and "an ever-growing culture of impunity." (Arbour, 2009) Therefore, the challenges facing the fledgling Afghan Independent Election Commission, including the failure to compile an authoritative voter registry, the failure of disarmament programs, the failure of reforms to policing and the administration of justice, are the product of the rise to power of a UN backed and NATO defended security regime in Afghanistan. The elections of 2009 show the limits of treating democracy as a by-product of securitization.

The process of making Afghanistan secure had little to do with the rule of international law. Indeed, on a strict reading of the law the United States' aerial bombardment and invasion, with its "coalition of the willing", may well have offended against the International Court of Justice's insistence that, in the words of C.M.H. Waldock, "respect for territorial sovereignty is an essential rule" in the law of nations. The U.S.-lead invasion

of Afghanistan as reprisal for the Taliban's harbouring Bin Laden and Al Qaeda, to apply Waldock's reading of the law, amounts to "forcible self-help to obtain redress for rights already violated" which the Court "condemned as illegal". (Waldock, 1962: 240)

Nevertheless, instead of supporting the rule of international law, the Security Council passed a resolution on November 14th, 2001 that condemned the Taliban "for allowing Afghanistan to be used as a base for the export of terrorism" and ratified the Bush White House's offensive for regime change. At this time, UN Secretary-General, through his Special Representative for Afghanistan, convened a summit of select Afghan representatives and other interested parties at Bonn to develop a plan to "re-create the State of Afghanistan". On December 5, 2001 they endorsed the ponderously titled "Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions", the Bonn Agreement. This was a charter to govern the territory in a state of exception, and it was "welcomed" by the Security Council resolution the following day. The Bonn Agreement brought the populations of Afghanistan under the control of a provisional authority that would prepare the way for "the establishment of a broad-based, gender sensitive, multi-ethnic and fully representative government". (UN, 2001)

Crucially, as senior UN officials have admitted in my hearing, the Bonn Agreement was not the product of a peace process; indeed, it is antithetical to a peace process because it established a new, proto-constitutional order to exclude the Taliban as a threat to peace, security and human rights. (*Evidence*, 2007) Furthermore, it excluded Afghans from popular participation: though understandable on pragmatic terms, the substantive effect of

this was to make their right to democratic self-determination contingent to the Agreement's stipulation of what would constitute a suitably secure setting for the advent of democracy. The steps mandated in the Agreement, including the election of an Emergency Loya Jirga in June 2002, President Karzai's appointment of a Constitutional Drafting Committee in October of the same year and its approval by an elected Constitutional Loya Jirga in January, 2004—after one month of deliberation—do not alter the fact that the entire program of state re-construction, the Bonn Agreement as such, was decided without the plebiscitary participation of Afghans. Consequently, Afghans in their diversity became a population to be administered by the trustees of a government-to-come. In this respect, therefore, the Bonn Agreement and the process it represents are biopolitical. Their substance is not sovereign power as the rule of law but as the force of communication, a process designed to assert the authority of the United Nations and NATO in making Afghanistan safe for democracy in the West and, eventually, within its own borders. In the Bonn Agreement and the state building project it set in motion, the force of communication backed by the force multipliers and weapons systems of Canada and its allies created a security regime in Afghanistan and integrated it into the West's security apparatus.

This process, Mark Duffield argues, marks a shift in the UN from the imaginary of an open forum for the reconciliation of conflicts between and within states to a coercive force in global politics. It stands in marked contrast to the studied neutrality of the Secretary-General as a Cold War era peace maker: negotiating the 1988 Geneva Accords between Afghanistan, Pakistan, the USA and USSR that ended the Soviet occupation, and

mandating the 1994 UN Special Mission to Afghanistan to broker a ceasefire between the Taliban and the Northern Alliance. (Dorransoro, 2008) Duffield presents a brief history of this transformation, one which helps situate the Bonn Agreement—with the ongoing mutation of its aims and means—on the map of the UN’s earlier attempts at the reconstruction of Afghanistan. He shows what amounts to a tectonic movement from the UN’s negotiated relationship with Afghans as sovereign peoples to a policy of securitization and the management of human life. The consolidation of the Taliban movement’s hold on the territory, after its seizure of Kabul in September 1996, presented the members of the Security Council with a jihadist sovereign power that was an inspiration and an aid to similar movements in the region and beyond. Consequently, the UN set to work calibrating its development programs in Afghanistan as tools for securitization, to school Afghans in the proper use of their right to self-determination with a view to containing the threat of an increasingly influential Taliban. Development and security produce the capacity for self-determination.

Christiane Wilke captures the feel of the dynamic of securitization, and its premise that “lawless and ruthless enemies have to be fought without the constraints of the law”. The post-Cold War United Nations, as we see in its joint briefings with NATO to Canada’s House of Commons, does not hesitate to participate in the work of the security regime. It shares in the anathematization of the West’s enemies. “These enemies”, Wilke continues,

are placed beyond the law. Their treatment becomes a matter of ethics and policy, thus it is not lawlessness. Still, the treatment of these enemies is dictated by policy concerns, and not by their rights as persons. (Wilke, 2005)

This is illustrated in the history Duffield traces of the UN's political engagement in Afghanistan, starting in 1981 through its brokering the withdrawal of Soviet forces in 1988 and its failure to prevent the collapse of Afghanistan into the "vicious factional warfare" that proved fertile ground for the Taliban. The rise of the Taliban allowed the UN a new prospective political collaborator and an adversary in humanitarian relief, even as it unnerved the Security Council. In order to build greater coherence between its political and humanitarian activities, the UN developed the 1998 Strategic Framework for Afghanistan (SFA), part of a wider strategy for regional stabilization. The aim of the SFA was to bring a "principled and accountable way of engaging the Taliban", combining humanitarian aid with programs to foster the civic engagement. In this new paradigm, the purpose of aid, Duffield writes,

was to rebuild civil society, create local constituencies for peace and, at the same time, encourage the acceptance of moderation and democratic representation among political actors—it was concerned with changing and modulating behaviour. The aim was not to support the state per se but, indirectly, to empower self-reliant groups and communities as responsible political actors—in other words, to create the conditions for internal political change. (Duffield, 2007: 143)

The General Secretariat, if not the Security Council, attempted to preserve relations with the Taliban government as a "state party". The premise of the SFA, that politics, aid and human rights should reinforce each other as pillars, continues in the present iteration of the UN's state building project in Afghanistan. Duffield argues that the SFA was ultimately defeated by an incoherence between the UN's "political mission and its development wing", a polarization between the "'state' and 'people' as their respective and opposing reference points." (Duffield, 2007: 139) To be more precise, on October 15, 1999 the Security Council's Resolution 1333 unanimously imposed embargos that "criminalized

the Taliban” for nurturing a jihadist movement, a “common enemy” that threatened the “United States and China, Israel and Iran, China and Russia, Egypt, France and India.”

The CIA’s Cold War sponsorship, with Saudi money, and arming of tribal factions—when bin Laden was an erstwhile ally against the Red Army—had coalesced into a jihadist movement of potentially global reach that claimed its own sovereignty over life.

(Dorronsoro, 2008: 459; Moran, 1999) It was up to the United Nations to take into a form of trusteeship the lives of the Afghan peoples while, at the same time, using its development programs and sanctions to foster regime change.

This dynamic has intensified since the fall of the Taliban in 2001 and the Bonn Agreement’s design for a new Afghanistan. It created a political partner after its own image in the government of Afghanistan, a powerful and insular executive branch that was accountable to an elite, closed cadre of international economic and military backers rather than the peoples of Afghanistan through their National Assembly. Even so, the Karzai presidency is a pale reflection of the security regimes that are its model in western liberal states. It does not have exclusive control over economic development, as donor countries by-pass the federal budget to channel vast amounts of aid money directly to projects of their own design. Although Karzai has strenuously protested against the increasing rate of civilian deaths due to military operations, he has no strategic command over the deployment and role of NATO forces. Afghanistan’s security regime is, therefore, a hybrid of an indigenous executive branch that functions under the direction of a plethora of governing international agreements, compacts and memoranda of understanding. The Afghan peoples, for their part, hold an electoral franchise that cannot change this meta-

constitutional framework. Their ballots are not free expressions of self-determination; they are instead instruments for the ritual justification of a trans-national power far removed from any semblance of democratic control.

Duffield suggests that the purpose of the UN/NATO presence in Afghanistan implicitly draws a distinction between the status of “insured life” in dominant states and the “uninsured life” of Afghans, indeed all populations in developing states. He defines development as a “liberal technology of security”; its purpose is not to extend the protections of insured life to the uninsured, but to contain and pacify the “effects of underdevelopment”. (Duffield, 2007: 24) This locks Afghans into a lower order of uninsured life, with development itself marking the boundary of emancipation, limiting the ways they might deploy resources and organize their labour to produce material conditions of life that equal or exceed the quality of life enjoyed by the insured life. Integral to the *war on terror*, the “liberal technology of security” must prevent autonomous social, political and economic organization because they are, by their very nature, destabilizing. Pointing, critically, to Michael Ignatieff’s prescription for an international order that fosters pacification through development and humanitarian aid, Duffield argues we are witnessing a “new and enduring political relationship:

a post-interventionary terrain of international occupation. In policy terms, it signals a shift from humanitarian assistance in ongoing wars to social reconstruction and the transition from war to peace. [...] All those interconnecting UN, donor, military and NGO endeavours that mobilized to intervene, save lives and end conflict now increasingly appear as assemblages of occupation defining a new post-interventionary society. That is, they constitute the enduring multi-agency apparatus of *Empire Lite*. (Duffield, 2007: 27 Original italics.)

Afghanistan's security regime, as it passes through the elections of 2009, cannot be the product of the democratic self-determination of the Afghan peoples. This is consistent with the nature of the security regime and its relationship to bare life, insured or uninsured, in Ottawa or Kabul. The security regime cannot be the product of democratic communication. As a prototype of security regimes to come, however, Afghanistan reveals the construction of the security regime by the force of communication rather than the operation or suspension of international law. The world, without question, is well rid of fundamentalists who gain sovereign power and extend their writ over life in the name of an implacable, unaccountable divine authority; ours is a better world without the Taliban in power. The trouble with its successor, the security regime installed by fiat of the United Nations Talks on Afghanistan and by the power of the Bush White House, with its coalition of the willing, is that accountability and substantive respect for human dignity have not shown measurable gains under the auspices of the secular "liberal technologies of development." Bare life remains bare life. Kabul is the product of closed international negotiations, a creature of the Bonn Agreement and the instruments of its implementation. It is the expression of the self-justifying, at times fractious, international order that would make human life secure by differentiating it according to its geopolitical significance and administering it in every respect. Afghanistan's security regime, a precursor of security regimes to come to the developing world, shows that the word of the United Nations in concert with NATO, by the force of communication, is law.

Neo-liberalism as Emancipation

The Afghanistan Compact is a communication instrument that reflects what Canada, the United States, the European Community, and China with a host of other nations and their collaborators in the UN expect of the Karzai government, and all of its successors.

Negotiated in London from January 31st to February 1st 2006, it sets out in explicit detail the obligations of Afghanistan's executive branch to the "international community" in building "a democratic, peaceful, pluralistic and prosperous state based on the principals of Islam." Fourteen days later, the Security Council endorsed the Compact in its resolution 1659. It is a five-year plan for development in three 'pillars', which the text presents as mutually reinforcing: "security; governance, rule of law and human rights; and economic and social development". To be clear, when the Compact speaks of the "Afghan Government" it sets out the accountability of the executive branch to the international community, a polity of aid and development that effectively reduces Afghanistan's legislators in the National Assembly to third party status. The Compact makes no provision for ratification by the National Assembly, or by plebiscite. This is consistent with the model of public administration in the security regime generally, the attenuation of the democratic accountability of the executive branch to legislators—in Washington and Ottawa, London and Canberra—as it arrogates powers to administer life. The effect of the Compact's construction of the Afghan executive branch is to close it to any form of substantive democratic scrutiny. Thus, while the International Crisis Group is correct to criticize the failure of this reconstruction project to "drive democratisation at all levels", the fault lies in the first instance with the Compact's imposition of a comprehensive legislative agenda on the Afghan peoples, and the construction of an executive branch that

is not accountable to Afghans but to a supra national cadre of donors governments and agencies.

The Compact is also a signal to Islamic states worldwide—it counts Iran, Pakistan, Saudi Arabia and others as participants—that the liberal democracies are willing, and potentially generous, collaborators in the formation of democracies “based on the principles of Islam”. It sets out a model, therefore, for a global compact based on the pragmatics of securitization, with the elites of liberal and Islamic states working together to integrate human rights and economic development in comprehensive action for peace and prosperity. This is an agenda that is not addressed to the populations of Islamic states, because they cannot be granted the role of initiating programs of state reform or reconstruction; to do so would be to introduce an unplanned and unmanageable variable against the demand of securitization for docile, compliant bare life. The ultimate goal of the Compact and the end-of-history project it represents is to close all polities, liberal or Islamic, to the revolutionary intrusion of new forms of social and political organization.

At the doctrinal heart of the Compact is the neo-liberal conviction that the market is both morally and prudentially the most effective mechanism for organizing human existence. Unfettering the market from constraints of every kind, unless they can be justified on a cost-benefit analysis, will open Afghanistan to the benefits of foreign investment and productively integrate its people in an emancipating formal economy. Open markets will liberate women from their roles in the informal economy and educate them for their rightful place as wage earners in a formal, globally integrated economy. Implicit in the

text of the Compact, but set out in detail in its implementing documents and demonstrated in the changes it has wrought to date, is the assertion that the unfettered market is a neutral framework that will harmonize the doctrinal basis of Islamic democracies with their liberal forerunners. The Compact makes explicit doctrinal claims, imposing “zero-tolerance policy” against “official corruption” and the narcotics industry, which it condemns as “both immoral and a violation of Islamic law”. Nevertheless, the text itself has a corrupting effect because, as I have argued above, it constructs the executive branch as the “Government of Afghanistan”, to the exclusion of the National Assembly and the judiciary, thus blocking any form of substantive democratic accountability. The sweeping economic reforms it mandates are not subject to parliamentary scrutiny and the role of the judiciary, embattled and impecunious, is to patrol the vanishing boundaries of an increasingly permissive regulatory framework. Neo-liberalism becomes the mode for the biopolitical administration of life, integrating bare life into the logic of the market as a voiceless and compliant human resource.

The Joint Coordinating and Monitoring Board, the body tasked with policing Afghanistan’s implementation of the Compact, has begun to step back from many of the text’s assumptions as “overly ambitious due to changing circumstances”. (JCMB, 2008) The resurgence of the Taliban, record profits for the illicit opium trade, and the persistence of corruption in a culture of warlord cronyism have forced the Board to recalibrate some of the specific prescriptions, but none of these factors lead the Board to question the undemocratic nature of the Compact and its neo-liberal ethos.

The constitutional role of neo-liberalism in the construction of the new Afghanistan is clear in the June 2008 report of the government's Private Sector Development and Trade Sector Strategy. In the words of President Karzai, this "Afghan-owned strategy" sets out a plan of action for economic development through privatization, trade liberalization and deregulation. It presents the restructuring of Afghanistan's telecommunications sector as a paradigm for the restructuring of the economy as a whole,

where donor-funded advisers and a fully committed Ministry worked together to rapidly develop an enabling environment for the private sector, thereby encouraging private sector cellular companies (and one corporatized public sector company) to compete in providing cellular phone services. This was managed by the public sector under a user-friendly regulatory system designed to ensure competition but otherwise leaving the firms relatively free to operate. (Afghanistan, 2008: 18)

The report documents, as a consequence, upwards of \$700 million of investment by private corporations and \$100 million in licensing fees, amounting to 20 percent of the national government's revenue. This laissez faire approach does not preclude requiring the service providers to ensure their networks are enabled for surveillance, after the fashion of Canada's own proposed *lawful access* regulatory framework.

The Afghan government, "in the name of Allah, the Most Merciful, the Most Compassionate", is solemn in its resolve to extend the telecommunications privatization model to other sectors, including mining, agriculture, energy and construction under the guidance of donor agencies. While admitting this will require "careful consideration of the enabling environment", the report does not entertain how it would, for example, proceed with the redistribution of land title through a private, free-hold system against the territorial claims of tribes and warlords. In an inversion of the precautionary principle, it

stipulates that the ecological impact of deregulated and intensified resource extraction and large-scale agriculture would be curbed only where the environmental benefits outweigh the potential costs of environmental protection. For example, the report provides no guidance as to how one might quantify the protection of human health against the costs to business of preventing the release of carcinogens. The government is enthusiastic for the whole panoply of neo-liberal reforms, from the elimination of tariff and non-tariff trade barriers to public private partnerships. This includes the blanket commitment to “encourage private provision of public services wherever it will be feasible, including areas such as health, education, municipal services, for example.” The report presents the “predominance of the informal economy” as a threat that “undermines the stability of the nation” and adverts to mechanisms like micro-credit as a means of increasing women’s participation in the formal economy and, thereby, greater gender equality. The role of the state, therefore, is to establish the conditions necessary for the free operation of the private sector, because it is the principle vehicle of social organization and renewal. (Afghanistan, 2008: 16, 3, 21)

This agenda, at least outside the closed-door sessions of the Afghanistan Compact and the deliberations of its backers, has proved controversial—globally—at demonstrations against the World Trade Organization and the G8 in, to name a few instances, Seattle, Montréal, and Genoa. Nevertheless, with the full support of the UN, it is enshrined in the Afghanistan Compact as the twenty-first century’s answer to the Taliban’s retrograde, misogynist theocracy. The project of state reconstruction elites of the international community have undertaken in Afghanistan, in the name of emancipation, produces the

new nation as a state of exception that is open for business. Development, in this instance, and its militarization reduces human life to bare life in the name of human rights and gender equality, freedom from want and oppression in every form.

Canada and the Force of Communication

My close encounter with the selling of Canada's mission in Afghanistan came in Ottawa on a February morning in 2007, a time of year when the weather itself can express existential dread. Under the Peace Tower, through the Rotunda and to the committee room on the left, the largest in Canada's Parliament, the UN and NATO gave a joint briefing on Canada's role in Afghanistan. There was every reason to expect a large contingent of observers from civil society, sufficient to fill the room several times. Canada's role in Afghanistan is posting the nation's highest military casualties since the Korean War—three times the rate of our allies, the Canadian press do not report the numbers of civilian casualties; it constitutes the greatest military and human development expenditures in generations, costing the equivalent of \$3.40 per Afghan per year for development against \$140 per Afghan per year for the military expedition⁴; it represents a mortal threat to the viability of the ruling Conservative minority government, sufficient to cause the Prime Minister to shift his rhetoric from “defeating the Taliban” to “building the capacity of the Afghan National Army”. Yet the observers' seats in the committee room were, on the whole, empty. This is not because Canadians have already made up their minds about what we are doing in Afghanistan; in fact, the public mood is more one of stupefaction than resolve, though for a time it brought to the surface a fault line between the left in Québec

⁴ Senlis Council, *On a Knife Edge*, March 2007, 10.

and the right in the rest of Canada. There was enough fodder in the committee room to go around, especially given the remarkably candid performance of Christopher Alexander, the UN General Secretary's representative to Afghanistan. In his view, the Bonn Agreement was not a peace treaty, because it tactically excluded several parties including Mullah Omar and the Taliban. This was, Alexander held, the most significant failure of the international community, one that leaves the future of Afghanistan less than, to use his judiciously constructed phrase, "monolithically positive". All of this very interesting stuff, but no one was beating down the doors to hear it.

To my mind, this event illustrates the compatibility of formal parliamentary deliberation and broader civic discourse with Agamben's take on the "state of exception". He argues the state of exception is not a dictatorship but "a space devoid of law, a zone of anomie in which all legal determinations – and above all the very distinction between public and private – are deactivated." (Agamben, 2005: 50) This is, as I have suggested above, a space created not by the rule of law but by the force of communication wielded by the executive branch for the benefit of the supra democratic interests it represents, interests outside the reach of accountability to citizens. Communication instead of law becomes the organizing principle of the state of exception, the means by which the powers of coercion in the executive branch sell themselves in the name of democratic values like the rule of law and the protection of human rights. Iris Marion Young would call this an exercise of masculinist power, compelling us not simply to submit to the beneficence of the executive branch but in fact to adore it. (Young, 2003) The project of building an Islamic republic

in Afghanistan, undertaken jointly by the United Nations and NATO, where the use of force is mandated by UN Security Council resolutions, is *supra* democratic in two respects.

First, as we have seen in the UN's own admission of the failure of the Bonn Accord to result in anything like a peace process, the reconstruction of Afghanistan has been, from its origins, a tactically selective exercise in the fabrication of a constitution. Whatever else it may be, the agenda set by the international community precludes the possibility of Afghans building a process that accords with their values and their dignity as deliberative participants. In this context, the exercise of voting because of the failure to fully democratize the constitutional project of Afghanistan must not be construed as substantive democratic participation. The persistence of corruption in all branches of government, the fact that sitting Afghan legislators are at the same time armed war lords, and, above all, the continuing military successes of the Taliban, the resurgence in their support and social influence suggest a profound disconnect between the project of building *this* Islamic republic and the Islamic republic Afghans might themselves desire. Furthermore, the Afghanistan Compact, an ambitious agenda for the construction of a viable political economy, binds the Karzai government to enact generous neo-liberal laws to permit extensive resource exploration and extraction without anything resembling legislative or regulatory oversight.

The troubling fact of the new Afghanistan is that, in the rise of its own security regime and an executive branch effectively insulated against popular accountability, the attenuation of parliament and the news media, we are building a democracy very much like our own.

There is a second sense in which our building democracy in Afghanistan is supra democratic. The citizens of participating Western countries have no direct role to play in ensuring democratic accountability for the programme as a whole, or the role played by their respective countries. Certainly, the United Nations in its present construction is as removed from democratic accountability as the Vatican's College of Cardinals. In fact, accountability generally runs in the opposite direction as the executive cites the international warrant to neutralize restive parliamentarians, civil society groups and individual citizens. The cause is just because it has been determined as such by the United Nations, by the Security Council, by NATO.

Indeed, the selling of Afghanistan by Canada's executive branch reads like a stenography of the White House's spinning of Iraq: we do not "cut and run", we are helping the Afghan people to grow a democracy, we are building the capacity of the local army and police forces, the schools are open, and women are safe. Apart from some determined investigation into the practice of Canadian soldiers of handing personnel they have captured in combat over to Afghan authorities without effective monitoring against torture or cruel conditions of detention, the Canadian media seem to have bought the executive's narrative. There is little public discussion of the numbers.

For example, NATO has acknowledged that its single most important mistake in 2006 was the unacceptable numbers of innocent bystanders who lost their lives during military

operations.⁵ The BBC estimates the fighting claimed the lives of 1,000 civilians in 2006, with 51 civilians killed in hostilities the week of April 30th 2007.⁶ Although it is difficult to find official reports as to the number and causes of civilian deaths, a contributing factor may be the use of air strikes. US authorities disclose conducting 340 air strikes in Afghanistan in 2006, compared to 160 in Iraq the same year. This changed dramatically in 2008, with reports from the United Nations that the number of Afghan civilians killed in military actions increased forty percent, from 1,523 in 2007 to 2,118 in 2008. Of these, U.S. backed forces killed 828 civilians, with most of the deaths due to airstrikes on villages at night. (Filkins, 2009) NATO has committed, again, to “reducing” the rate of civilian deaths, and spins the UN’s numbers to put “the number of Afghan civilians killed by its International Security Assistance Force (ISAF) at just 97.” (Bettermann, 2009) However, there is every likelihood that the Obama administration’s decision to relocate its principal front in the *war on terror* from Iraq to Afghanistan will only increase the risks to civilians of being killed in the intensifying combat. Clearly, the insurgents are deliberately targeting civilians. According to Human Rights Watch, in 2006 at least 669 Afghan civilians were killed in insurgent attacks that appear to have been launched intentionally at civilians.⁷

Since 1978, an estimated one-and-a-half million Afghans have been killed in wars. Today, more than two million Afghan children are orphaned. According to the World Food Programme, a famine in the southern regions places 2.5 million people in urgent need of

⁵ Gordon Smith, *Canada in Afghanistan: Is it Working?*. Canadian Defence & Foreign Affairs Institute. March, 2007, 18.

⁶ BBC News, Karzai anger over civilian deaths. May 2nd, 2007.
http://news.bbc.co.uk/2/hi/south_asia/6615781.stm

⁷ http://hrw.org/english/docs/2007/04/16/afghan15688_txt.htm

assistance. Fifty percent of children under 5 years are stunted because of malnutrition.⁸ The system of food distribution is under stress due to persistent attacks on convoys. The Red Cross reports many people are unable to access quality health care, and there are “large influxes of war-wounded”. It has also assisted over 15,000 people displaced in and around Kandahar since the start of 2007 alone.⁹ As to the situation of Afghan women, Human Rights Watch reports the deterioration in the security of women against “social and political violence”. Although equal access to education for both boys and girls has improved, in some provinces girls continue to be shut out. Furthermore, lack of access to health care is reported as resulting in the deaths of thousands of Afghan women and girls.¹⁰

It is not the principal aim of the state of exception to prevent information of this kind from coming to light, although the executive will try its hand at censorship as opportunities arise. As a product of the executive branch’s force of communication, the aim of the state of exception is to neutralize the political significance of information. Spin plays a key role in this, but I think what is more significant is the structural change in the organization of government as such. In this respect, Agamben’s observations about the Italian government are apposite for Canada also:

Parliament is no longer the sovereign legislative body that holds the exclusive power to bind citizens by means of the law: it is limited to ratifying the decrees issued by the executive power. [...] And though it is significant that though this transformation of the constitutional order (which is today underway to varying degrees in all the Western democracies) is perfectly well known to jurists and politicians, it has remained entirely unnoticed by the citizens. At the very moment when it would like to give lessons in democracy to different traditions and

⁸ World Food Programme,
http://www.wfp.org/country_brief/indexcountry.asp?country=004#Facts%20&%20Figures

⁹ ICRC Press Briefing, Afghanistan: three decades of war and no end in sight.
<http://www.icrc.org/Web/eng/siteeng0.nsf/html/afghanistan-briefing-120607>

¹⁰ http://hrw.org/backgrounder/wrd/afghanistan0805/2.htm#_Toc11958708

cultures, the political culture of the West does not realize that it has entirely lost its canon. (Agamben, 2005: 18)

Spin is not, at least in the Canadian experience, a discrete technique of governance. There is something at play in the state of exception that is more comprehensive, more systemic than specific acts of propaganda. Propaganda is a visible sign of a fundamental reorientation of government, the ascendancy of the executive over all other branches, over the substantive rule of law itself. Supra democratic projects like the construction of Afghanistan as a (western) Islamic republic have the effect of insulating the executive branch against direct accountability to the citizenry. They entrench the state of exception as our best hope for the broad defence of a culture of human rights against the atavistic pull of groups like the Taliban, our best hope for security against the depredations of terrorists.

This insulation from political accountability and the concentration of executive power has the effect of populating the executive branch with what Arendt described as “desk murderers”, be they active or latent. I believe Chalmers Johnson is correct to apply this judgement, provocatively, to the U.S. executive branch with respect to its role in Iraq.

“Arendt was trying to locate Eichmann’s conscience,” Johnson writes, explaining the genesis of the phrase.

She called him a “desk murderer”, an equally apt term for George W. Bush, Dick Cheney, and Donald Rumsfeld—for anyone, in fact, who orders remote-control killing of the modern sort—the bombardment of a country that lacks any form of air defense, the firing of cruise missiles from a warship at sea into countries unable to respond, such as Iraq, Sudan, or Afghanistan, or, say, the unleashing of a Hellfire missile from a Predator unmanned aerial vehicle controlled by “pilots thousands of miles from the prospective target.” (Johnson, 2006: 21)

This helps to locate the subjective impact of the state of exception as a mode of political communication, its impact upon the wielders of power and upon the citizen. It bureaucratizes the operation of conscience in the powerful, corrupting the horizon of decision making into a self-justifying loop. As a zone of anomie, the state of exception dissolves any substantive points of reference into a positivist haze; when there are no objective constraints on the use of power, the only considerations that remain are of technique, process and expediency.

The state of exception also induces something like a state of entropy in the self-understanding of the citizen. In the state of exception, the fact of social pluralism becomes an invitation to supplant any possibility of sovereign deliberation among citizens with the executive's own determinations about the public good. Pluralism, in a vigorous democracy, would act as a check on political corruption by bringing diverse perspectives to bear on discerning the moral probity of government. The state of exception presents itself as the guarantor of pluralism while, at the same time, signalling that pluralism is a threat to social cohesion. The diversity of our ways of understanding the good, about the nature and purpose of human life, becomes politically irrelevant. Whether, with Rawls, we bracket out our deepest beliefs from the determination of political justice, or, with Habermas, find a way to risk controversy and bring our reasons publicly into play, it remains that in ordinary democratic communication our reasons seem to matter less—even to ourselves—and the reasons of the State, the state of exception, rise to dominance. Citizenship becomes the emotive condition of participating in public acts of grieving a terrorist attack; we hold a passport, we have a franchise to vote, we retain freedoms of movement and

assembly. Nevertheless, we are unable to impose the democratic rule of our collective conscience onto the executive branch's use of power, largely because we have ourselves lost touch with our own values. The state of exception imposes a condition of inward anomie in the citizen, as we leave the determination of the public good to the executive branch. In this sense, the state of exception works in us a condition of statelessness from the inside out, attenuating our capacity for sharing in self-governance by suppressing our acuity for moral judgement. The whole point of propaganda is, I think, not so much to distort the facts—although it certainly does this in abundance—but to short circuit our ability to deal with values, to come to some form of normative conclusions of our own about the facts. Mastering the language of pluralism, tolerance and democratic values allows the “desk murderers” the ability to produce a passable effigy of doctrinal justification.

Of the democratic values deployed by the executive branch in the state of exception, the idea of human rights holds a singularly powerful resonance. Human rights, like the rule of law in general, becomes the medium of the projects of the executive, short circuiting the processes of deliberative legitimisation that would obtain in a free and democratic society. Conor Gearty's (2005) assessment of the political economy of human rights in the United Kingdom's counter-terrorism legislative program is instructive for Canada as well, and perhaps the security regime as a whole. The U.K.'s *Human Rights Act 1988* and the prospect of litigation against counter-terrorism legislation ensured that the executive's own thinking and the discussion in Parliament about these measures were “conducted in the language of human rights.” This was not enough to quell the watchdogs. Britain's Joint Committee on Human Rights set out its case against the new counter-terrorism powers.

Nevertheless, Gearty writes, “the executive persevered with many of its more illiberal initiatives, and was indeed able to use the breadth of the exceptions in the Human Rights Act to camouflage its intentions with a veneer of human rights sensitivity” . In the security regime, human rights cannot function as an objective constraint on the executive branch, but in fact serves to further entrench its power. In this way the executive branch, Gearty concludes, “brings its repressive politics within the zone of human rights compliance.” (2005: 21-22)

We see this trend in Canada as well, with the *Charter of Rights and Freedoms* functioning as a mere procedural hurdle to the projects of the executive branch. Space does not allow me to offer anything like a treatment of the Supreme Court of Canada’s jurisprudence in the area of counter terrorism. Allow me to point instead to the executive branch’s project of converting Canada’s civilian telecommunication system into a latent, ubiquitous surveillance system: the project of “*lawful access*”. The Conservative government, as the Parliament prorogued for the summer of 2009, announced its intention to bring forward its *lawful access* legislation in the autumn session, in an attempt to accomplish what its Liberal predecessor had failed to do. Presented as an inevitability because of Canada’s obligations under the European Cyber Crimes Treaty—an international instrument that received little democratic consideration in Canada—*lawful access* shifts to private industry the onus and cost of ensuring all new communications systems are wired for surveillance. The technology is not the issue; industry proved to be ready to comply as long as everyone in the sector was equally affected. Thus, *lawful access* would make it an indictable offence for university researchers or anyone else to develop a surveillance-proof telecommunication

system. The issue for the executive branch is not technology or the cooperation of industry, but instead how to make *lawful access*—to use the bureaucracy’s own phrase—“*Charter proof*”. So I make Gearty’s assessment my own, as the construction of the human rights standard in this project, a procedural standard as opposed to a question of substantive compliance with the norms of a free and democratic society, leaves “only a rather undemanding jump by the executive [to bring] its repressive politics within the zone of human rights compliance.”

It is important to note that the condition of statelessness in the state of exception has a disparate impact on religious, racial and ethnic minorities. This much is clear in the real life consequences of counter-terrorism on vulnerable communities. We now have extensive documentation of the effect of counter-terrorism on Muslim and “Muslim looking” people. (Ahmad, 2004) The simple possession of a map of a government installation in Ottawa was enough to trigger the detention and torture of Canada’s Ahmad Abou-El Maati in Syria’s notorious Far Falestin prison. In Mr. El Maati’s case—as it was for Abdullah Almalki, Muayyed Nureddin, and Maher Arar—this meant being confined in a putrid subterranean cell and “being treated to a stripping down to his underwear, pouring of cold water over him, and intense beatings with what he described as a ‘black electric cable roughly an inch thick’” (Toohey, 2005: 7). To be clear, these men were detained by U.S. authorities most likely on the basis of Canadian intelligence, and then transferred ultimately into the hands of Syrian officials on the suspicion that they were implicated with terrorist cells. There is no information in the public record to show that these suspicions

were justified in any respect, and the men themselves have given compelling testimony as to their innocence.

The suffering endured by Mr. El Maati et al ought to be sufficient to drive home the flesh and blood reality of what could otherwise be dismissed as picayune judicial concerns. With Justice Denis O'Connor's conclusion in the Arar Commission that Canadian officials were in fact complicit in the detention and torture of Maher Arar, enough information has come to light to show a clear transnational pattern of predacity in the security regime. For example, the International Commission of Jurists (which counts as members all of the Supreme Court of Canada's justices) has condemned a host of deviations from "the rule of law and human rights" in the practice of counter-terrorism. They cite the abrogation of states' duty to protect, the erosion of judicial independence, deformations in criminal law and procedure, and the rise of derogations or the stripping of rights, torture and "cruel or inhuman treatment or punishment", the deprivation of liberty and right to a fair trial, and the practice of non-refoulement – i.e. the deportation or "rendering" of suspects to jurisdictions for torture, degradation and disappearance. In February 2008, the European Court of Human Rights ruled unanimously in *Saadi v Italy*, against the arguments of the United Kingdom, to uphold the absolute prohibition of torture and ill-treatment. "States face immense difficulties in modern times in protecting their communities from terrorist violence", the Court ruled. "It cannot therefore underestimate the scale of the danger of terrorism today and the threat it presents to the community. That must not, however, call into question the absolute nature of Article 3 [of the European Convention, prohibiting torture and other ill-treatment]." (Howen, 2008)

Canadians, clearly, are not immune to these measures. What is instructive, however, is the executive's continued push to lower the safeguards against harms inflicted by the state, and this in the name of the constitutional protections the executive is in fact subverting. Thus we have the plain reading in *Dyment* that "[...] the constitution does not tolerate a 'low standard which would validate intrusion on the basis of suspicion, and authorize fishing expeditions of considerable latitude'" (*R. v. Dyment* 438). This to say that, in the Court's view, there is no support in the *Charter of Rights and Freedoms* for the expansion of police powers to the degree that citizens (plainly, some more than others) face—constructively or in fact—the prospect of vivisection by the state and its vassals, whether they are in the employ of telecommunications corporations or the Syrian prison system. The purpose of a substantial standard of prior authorization, again reading *Dyment*, is to prevent unjustified searches before they happen, where the courts are in fact at arms length from the agendas of the executive and projects of the police. In the face of this, we find the executive busily re-writing the *Criminal Code* and the *Competition Act* to establish, in the name of the *Charter of Rights and Freedoms*, enervated standards and procedures for prior authorization that the Court, once upon a time, condemned.

Much depends, to borrow from Brandeis, on the capacity of the Court to protect itself (*Olmstead v. United States*, 1928). The common denominator among civil society groups and Canada's privacy commissioners critical of *lawful access* is a reliance on the capacity of the judiciary to prevent abuses of the state's expanded surveillance powers. However, the *war on terror*, as the International Commission of Jurists makes plain, has made the

independence of the judiciary far from a certain thing. In fact, a starting point for *lawful access* and the diminution of standards required for prior authorization—from reasonable grounds to believe to, in many cases, reasonable grounds to suspect—is the problematization of courts *per se* as obstacles to the exercise of executive and police power. Defeating terrorism has brought with it pressure to reduce the bench as an apparatus—in secret tribunals, in the abrogation of *habeas corpus* etc.—of the security regime. *Lawful access* works with the grain of the legislative framework of counter-terrorism, which carried in 2001 through a Parliament so docile it was supine, to the end of entrenching the bureaucratisation of the judiciary.

Gearty leaves it open whether the range of measures brought forward in the name of counter-terrorism is in fact an authentic response to 9/11 or is, instead, an “opportunistic” attempt to push a longstanding legislative agenda. Certainly, Canada’s *lawful access* initiative predates the September 11th attacks by several years. The phenomenological issue, then, is why the executive branch in liberal democracies adopt measures—in their own nations as in Afghanistan—that, in the words of Robert A. Brady, are not “consonant with democratic institutions” (D. Schiller, 1999).

From Hobbes to Rawls, liberal positivism suffuses our ideas of democracy and freedom with the premise of fear. In this tradition, politics mediates the competition for scarce resources among equal, atomistic individuals. It keeps at bay the ever-present mortal threats in nature, and keeps us from annihilating each other—*bellum omnium contra omnes*—by managing the goods necessary for survival. Fear is never far below the surface of Rawls’

theory of justice as fairness. He retains the ontology, central to liberalism, of the radically isolated self-producing individual whose definitive feature is the capacity to make choices and secure his or her own good over and against others. (Sandel, 1998) The result of this ontology is the ethic of tolerance, co-existence with the other but never acceptance or reciprocal identification.

Months before his death, Jacques Derrida (2003) suggested that tolerance gives effect to terrorism as the autoimmune condition of liberal democracy. Tolerance, he proposed, is a transference of our fear of the other, ensuring the power that tolerates always remains in dominance. Perhaps this is what we see at play in the geography of the *banlieu*, a zone of interdiction marking the boundary between tolerance and acceptance or profound inclusion. Exposed in the *banlieu*, formal liberal secularity favours those persons as citizens who are best able to conform to the state's normative icon: the self-authenticating agent, the citizen of constructed whiteness unencumbered by religious beliefs, racial memory, or any other points of reference outside the singularity of the state's hegemony. A political economy of human rights based on tolerance, the political economy of the *banlieu* and the security regime, sets the limits to justice with the dictum that, in the language of the U.S. Supreme Court Justice Holmes, "a constitution is not a suicide pact." Giorgio Agamben (1998) would contend that this form of reasoning is central to the function of law (and perhaps human rights law especially) in the post-Auschwitz state, as the vehicle for arrogating to "sovereign power" ownership over life itself. Holmes' dictum reveals that the principal power of the constitution is to enable its own abrogation, confirming the authority of the sovereign to push individuals or whole races outside the law and what

protection it affords. The trope Agamben uses, in a dark vision of contemporary politics, is not the agora but the concentration camp.

The Panopticon is the camp, from Bentham's original design to Foucault's subsequent critique. A camp without gates or cells, its function is to discipline without recourse to explicit violence. This penetrates even to our capacities for critique, where dissent itself is disciplined and constructed by panoptic coercion. We can see this in the conception of privacy advanced by many of the opponents of *lawful access*. Their appeal is to the liberal conception of privacy, set out canonically by Brandeis as the "right to be let alone" (*Olmstead v. United States*, 1928). On this view, privacy is the right of exclusion, the manifestation as civil liberty of our isolated individual existence. This idea of privacy persists in *Dyment*. I believe it is problematic because privacy as a negative freedom reinforces the sense that the citizen is passive before the power of the state, in a fashion entirely consistent with the security regime's ontology. Furthermore, its premise of profound interpersonal alienation does not reflect how we actually live our lives. It remains that from birth we exist in a matrix of personal relationships that, for good and bad, we did not choose, and these relationships are integral to our self-understanding, our values, and our sense of human meaning. By the social nature of our existence, privacy is better conceptualised as the freedom of admitting others into our confidences, building trust and thereby relationships. If Norris (1993) is correct, and Foucault overstates his scepticism about our capacities for meaningful dissent, then it is in these relationships and the deliberations on human meaning they embed that we can find hope of securing an Archimedean point against sovereign power.

Subsidiarity and the Communication of Social Justice

The central problem the new Afghanistan presents for ideas of democratic communication is the fact that we accept the state of exception as legitimate, that sovereign power—in Canada as in the international community—must have the ability to administer life, to produce bare life, in order to emancipate us and make us secure. I argue that this is because the force of communication obtains in the rule of law and the sovereign's suspension of the rule of law, and point to Afghanistan as a product of this communicative violence. I want to conclude by considering this situation in light of Iris Marion Young's idea of communicative democracy, as it relates to the ideas of self-determination and subsidiarity.

To be clear, the contest for sovereignty in Afghanistan is very much a two-way affair. The Taliban and its fellow travellers are constructing a “miracle” with their own hands, as though they are the purifying agents of an implacable, infinite justice. They see themselves as the divinely mandated agents of Afghan self-determination. This is consistent with the mythology of the group's origins, a self-styled cadre of divinely ordained warriors who rescued a youth from same sex rape at the hands of the Northern Alliance, proved its invincibility in raiding a Mujahedeen arms cache at Spin Baldak in October 1994 and seized major weapons systems—including MiG-21 combat planes—when it captured Kandahar airport and the Shindad airbase. The Taliban possess their own civilizing mission, and they represent an international community of their own design. The war in Afghanistan is mimetic, a contest to decide who will have the power to own human life as such, to determine the nature and purpose of human existence.

Against theories that ground or reify the state and national autonomy as a zone of exclusive jurisdiction, Young suggests that “the normative idea of self-determination should be reconceived in relational terms that cohere with openness and interdependence. Self-determination should be conceived as about non-domination, rather than non-interference.” (Young, 2002: 237) I believe this is a helpful insight for two reasons.

First, it recognizes the persistence of factors affecting human life and well-being that transcend geopolitical borders. Indeed, the greatest challenges facing us—global warming and destruction of the biosphere, pandemics, the proliferation of nuclear weapons, and sovereign power itself, to name but a few—defy the resources of any single state or regional community of states. Young also insists, correctly, that the obligations of justice cannot be confined to classical considerations of a state’s responsibilities to its own people, to the exclusion of all others. The escalating nature of refugee flows, human trafficking, the depredations of multinational corporations and neo-liberalism show the necessity of a more demanding accounting of the state’s duties of justice. “If obligations of justice are contingent on political jurisdictions”, she writes, “then people can remove their obligations simply by redrawing borders.” (Young, 2002: 239) Furthermore, the idea that our relationships with each other are principally determined by state allegiance bears little resemblance to the ways we actually understand ourselves and our place in the world: the sources of personal identity do not stop and start at borders. I would add to this, however, that considerations of justice count most when people have little sense of interpersonal affinity with each other. To this Young would reply that it is a mistake to see feelings of

solidarity as an organic and immutable component of identity: one of the purposes of democratic communication is to foster or, to use her word, “construct” a sense of solidarity.

Second, in grounding her idea of self-determination in the ethical imperative of non-domination, Young presents subsidiarity as a fundamental principle of justice in democratic communication. Even as the global risks to human life and well-being mount, Young insists on the right of local communities to decide for themselves how best to respond to these crises without domination from higher levels of social, economic and political organization. She defines the right to be free from domination as a freedom from “arbitrary interference”. New communication technologies bring with them “denser interactions among the world’s peoples”. New forms of relationships, though mediated by social communication technologies, are in no sense virtual: they are potentially powerfully, identity-forming encounters that expand both our capacity for solidarity and its content. Against Agamben’s insistence that bare life is necessarily voiceless, we see continually—in Clinton’s East Timor and Rwanda, in Bush’s Baghdad, and the Iranian election of 2009—the ability of people *in extremis* to communicate the facts of their suffering to people in the wider world. Increasingly, at the risk of lapsing into a technological triumphalism, these communications are not to audiences, an aggregate and abstracted hearer, but to persons. These relationships are the seedbed of subsidiarity, the ability of people to empathize with each other, to form authoritative factual and normative judgements and, on this basis, organize for power. Young distinguishes this from the liberal notion of “relational autonomy” and its normative assumption of non-interference, where we order our

relationships to minimize any impediment to our individual capacities for choice. Instead, Young calls for a shift to a more inclusive sense of agency, one that takes into account the persistence in our very capacity for agency of interpersonal bonds we may not have chosen. Subsidiarity in this paradigm requires continual collaboration to free ourselves and each other from domination, arbitrary interference. This is the basis for Young's insistence that we can, and indeed ought, to be mutually interested in the protection of human rights across political jurisdictions. It is an argument against the practiced indifference of relativism that masquerades as a post-modern respect for cultural diversity and forms of life.

Young's argument is helpful, but it needs a caveat. It is entirely possible for state actors, the United Nations and non-governmental agencies to construct solidarity and subsidiarity for their own purposes and in their own image. For example, the United States Institute for Peace has produced a blue-print to suggest how the Obama administration should structure the intensification of US military and development operations in Afghanistan. One of its principal recommendations, reminiscent of the UN's 1998 Strategic Framework for Afghanistan, is to build a "bottom-up" dimension, with a three-fold focus: a) "on local leaders and their jirgas and shuras, not on individuals", b) it should "avoid significantly strengthening some tribes over others and unnecessarily re-igniting tribal rivalries", and c) the "U.S. and the international community should work with a range of local rule-of-law entities like *Saranwali*, which perform many functions associated with the police in common-law countries." (Fair & Jones, 2009: 24)

Against this colonization of subsidiarity itself, Young calls for radical reforms in the international system. The Security Council must be fully representative of the world's population especially, I would add, people who are the most in need of security. The United Nations must be re-constituted as a democratically elected and accountable global government. Its constitutional mandate would be premised on non-domination rather than non-interference, transforming the idea of state sovereignty that has persisted since the Treaties of Westphalia. Her approach would anathematize the existing UN's state building project in Afghanistan. It would answer the force of communication in this state of exception with democratic communication in a condition of voicelessness—our technologically mediated but authentic capability to enter into each others' suffering and build together the power we need to be free from domination in every form.

The project of constructing a Canadian refuge in Kandahar invites scrutiny of Canada's status as a refuge in its own right. As the discussion above shows, where refuge is articulated as tolerance it must necessarily be a mode of exclusion. Refuge, in this sense, is necessarily a form of domination. A stated aim of Canadian public policy in the *war on terror* is to provide a refuge for Canadians, to ensure our bodily safety as a cardinal obligation of government. We turn now to this issue, examining how the *war on terror* has shifted the balance of powers in Canada's post-*Charter* polity to build the dominion on tolerance.

4: THE LAND GOD GAVE TO CAIN

“I am rather inclined to believe that this is the land God gave to Cain.”
—Jacques Cartier, May 10th, 1534

“[...] we were of different races, not for the purpose of warring against each other, but in order to compete and emulate for the general welfare.”
—George-Étienne Cartier, February 7th, 1865

Canada is not a nation that existed before its capacity for refuge; it came into existence to be a refuge. The theme of refuge dates almost half a millennium to Jacques Cartier’s first sighting of Canada. For its perceived barrenness and remoteness, Cartier sardonically saw in Canada “the land God gave to Cain.” Cain was the first murderer, the absolute other because he killed his brother, Abel; the farmer exiled by God to till barren land and, at the same time, protected by God from violence and annihilation. On that first sighting, Canada was both a place of exile and bleak, divine refuge. From Cartier’s biblical trope to the project of Confederation, it is Canada’s capacity to include the other that marks it as a refuge principally, where being a refuge is intrinsic to the nation’s coming into being.

This much is clear, I believe, in the moral vision of Canada advanced by the second Cartier during the Confederation debates. In positing a new “political nationality”, George-Étienne Cartier suggested that Canada be established as a reciprocal refuge: refuge was not to be the largess or undertaking of any dominant race; it would be a polity of competition and emulation among equal races for the advancement of “the general welfare.” Canada

was to be a democratic communion of diverse peoples, and could only be so if it was a nation founded in our granting refuge to each other. It must be remembered that Cartier advanced this idea, courageously, during a period of profound international crisis, with the United States caught in the horror and fratricide of its Civil War. His view of federalism could have produced a nation unstained by manifest injustice to First Nations, Métis and Inuit peoples – if, for example, Riel or the Kelowna Accord had carried the day. Nevertheless, Cartier continues quietly to haunt Canada especially in times of crisis, calling it to be a refuge, a nation of dissimilar peoples in substantive solidarity.

My purpose is to explore what is to become of Canada as refuge today in the existential crisis that is the *war on terror*. Canada's nature as a democracy is, in my view, inextricably bound to its nature as a refuge. An attenuation or abrogation of the latter presents a fundamental shift in the idea and viability of the country; for Canada to be a democracy, it must first remain a refuge. My concern is that increasingly the logic of counter terrorism is bringing with it a shift in Canada from refuge to camp, from democracy to security regime. To move forward, I believe we must consider how to ensure the practice of democratic communication in Canada, the practical and determined exercise of our share in self-governance, remains potent, maximally inclusive and secure against both terrorism and counter terrorism.

Ten years out from 9/11, the relationship of the executive branch to all other players in the Canadian polity has undergone a transformation of profound significance and at astonishing speed. Remarkably, counter terrorism in Canada has been subjected to nothing like the

extensive, agonistic scrutiny Canadians brought to the Canada/US Free Trade Agreement or the Charlottetown and Meech Lake accords. The paucity of democratic deliberation to date on counter terrorism is by no means unique to this country; in the United States, the *USA PATRIOT Act* carried without any Congressional hearings or amendments little over one month from the date of the terrorist attacks. In Canada, with successive governments formed by two bitterly opposed parties, the counter terrorism agenda has continued apace, working sweeping changes in the constitution, the bureaucracy, the security, policing and national defence establishment, and the administration of the world's longest (formerly) undefended border (Lennox, 2007: 1018). The counter terrorism agenda has effected a shift in the rule of law, mandating, for example, curbs to the right of *habeas corpus* and importing "new and potentially dangerous" concepts like investigative hearings (Roach, 2002). It has added new impetus to the expansion of Canada's already considerable surveillance of civilian communications (Webb, 2007), and harmonized with the United States our treatment of refugees under the *Convention Relating to the Status of Refugees* and the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (*Canadian Council for Refugees v. Canada*). Counter terrorism in Canada has enervated the ability of Standing Committees to scrutinize the executive. For example, with Canadian Forces at war for the first time since the Korean War, members of the House of Commons Defence Committee receive only heavily redacted reports of the activities of the Canadian Forces in Afghanistan. It is difficult to imagine British parliamentarians tolerating such disequilibrium between the legislative and executive branches. Initiated in the name of keeping Canadian citizens secure against terrorists, there is little to suggest that counter terrorism in Canada has made democracy itself secure.

To be clear, I believe the existential threat to Canada is not in terrorism so much as the *war on terror*. Despite the assertion in political rhetoric that “terrorists will not change our way of life”, this is precisely what we have allowed to transpire. Our failure to read the threat of terrorism in context, to calibrate a response to the empirical reality of terrorist activity—our failure to affirm the primacy of human dignity despite the temptations of fear and consequentialism, have resulted in a disproportionate response that has worked perhaps irreversible changes to the Canadian political nationality. In the sections that follow, I will first consider the impact of the *war on terror* on democratic deliberation in Canada; I will then examine how some recent developments under the *Charter of Rights and Freedoms* are shaping the promise of Canada as refuge. To conclude, I will suggest ways in which renewed forms of democratic communication, returning to the polity of reciprocal refuge, may be attempted in the shell of the security regime.

“Gun-Barrel Vision”: Fear and Public Reasoning

The construction of Jihadist terrorism as the definitive threat to western democracies is not an activity exclusive to the news media and politicians. Chief Justice Beverley McLachlin shows that even a dispassionate, judicial mind with no market share to preserve and no votes to garner can sound the alarm with the best of them. “[T]he horror of the bombing of the World Trade Centre [sic]”, she writes,

shook the world and announced a new scourge, *more elusive and terrifying than the old ones*—the scourge of radical, organized, worldwide terrorism. Since then, terrorists have struck in diverse parts of the world and in diverse ways. Who, we ask, is next? (McLachlin, 2003: Added emphasis.)

To take these words at their face value, Osama Bin Laden’s weaponization of Wahhabist

doctrine is a threat more “elusive and terrifying” to the West than Hitler’s demonic program, the Cold War’s nuclear brinksmanship, the AIDS pandemic, the deepening impoverishment of the world’s have-nots, and climate change. The stated purpose of the Chief Justice’s text is to make the case for the vigilant protection of constitutional guarantees against the excessive restriction of liberties in the name of national security. She follows the thinking of Tom Bingham, Senior Law Lord, and his caution against allowing the practice of “executive detention”, his insistence that national security not be permitted to shield governments from close scrutiny and accountability (Bingham, 2003). However, the discursive effect of Chief Justice McLachlin’s reading of our historical moment is to construct terrorist acts as something more than crimes, mass murder as grotesque propaganda, to be prevented and prosecuted through effective police work and an uncompromising application of the criminal law. Terrorism, “organized, worldwide”, is a threat so exceptional that it requires us to re-think our constitutional liberties and sacrifice them, when necessary, for the maximization of our security. If this is true, then constitutions are not objective limits on the powers of the state but contingencies to be moulded by this the most exceptional crisis of our era.

The trouble is, Chief Justice McLachlin’s perception of the threat is unhinged from the facts of the threat. Using data compiled by the FBI and U.S. State Department, the number of international terrorist incidents over the last thirty years (1969–2001) is demonstrably in decline (Kern, Just, & Norris, 2003: 283). I believe her frame of mind personifies the deliberative climate in Canada more generally about 9/11 and its implications for our relationship to the executive branch. It illustrates the degree to which voices that should

have been raised at a critical distance from the dominant political agenda in fact lend themselves to its purposes, allowing a slate of far reaching changes to be implemented with minimal democratic commotion.

I would like to canvass four plausible explanations of this phenomenon.

From the perspective of critical communications scholarship, the *war on terror* begins with a conversion of public discourse in the mass trauma and fear of a 9/11 to a martial posture. It collapses the distinctions between “battlefield and home, civilian and combatant, and combat and politics” (Palmer, 2007: 293). This shift is not unique to terrorist attacks. For example, the first Gulf War inaugurated the morphing of the video cameras mounted on smart bombs into television cameras, converting in our living rooms Iraqis from persons to targets. I worked at the time in Toronto, one of the world’s principal multicultural centres, for the Ontario Human Rights Commission. In my experience, the consequence of news coverage of the war was immediate, as Muslim and “Muslim-looking” families complained to the Commission of escalating acts of discrimination in their workplaces, their schools, and apartment buildings. This was so even though Canada played a secondary military role in Operation Desert Storm. Politics collapsed into combat.

The *war on terror* is, on this view, in the first instance an artefact of framing. It is a product of the “gun-barrel visions produced by political, military, and cultural frames” (Kern et al., 2003: 298), a process of framing that affirms, at the same time, the West’s generous tolerance and its life and death struggle against the singular scourge of terrorism. Framing

suppresses, indeed punishes, explicit disagreement and contention among politicians, journalists and experts about the formation of epistemological and ethical claims. It sets out in declarative terms the boundaries of those who are “For us and against us.” The power that does the tolerating, that defines the scope of multicultural inclusion, reserves for itself at the same time—as Derrida has shown contra Habermas—the power to be intolerant, to define, contain and reject the alien other (Borradori et al., 2003). What we see in the *war on terror* is that there is no “life world” that exists at a pristine remove from the projects of the state. The process of colonization is pervasive and incessant, as combat would compel politics, our judgements of fact and value, our sense of self and our sense of the other into its closed circuitry of self-justification.

Having said this, I do not believe the process of framing is the sole determining factor in our capacity for democratic communication. The research suggests that fear does impede our capacities for public deliberation; we draw inward and become less disposed to macro solidarity and cooperation, we withdraw from electoral politics and defer to the judgements of our leaders, we overestimate risk and anxiety impedes our ability to process information (Huddy, Feldman, Lahav, & Taber, 2003). At the same time, public agencies like the Ontario Human Rights Commission, and community organizations like interfaith associations can act as gyroscopes even in a maelstrom of society-wide anxiety. As the state shifts to a war footing, interpersonal bonds intensify especially as people we know and trust experience discrimination. In mono-cultural minority communities, the realities of human rights abuses, especially if there is no reliable and swift public avenue to redress, is likely to cause the communities to experience alienation and withdraw into themselves.

The impact of terrorism framing on thickly knit, diverse communities—rich in mixed marriages and friendships—is not, I suspect, sufficient to unravel these bonds. Instead, I believe it is more likely to trigger an intensification of personal solidarity and a sense of estrangement from the frame. This sense of being out of step with the dominant discourse can result in a critique of authority and dissenting from the *war on terror*. We have seen evidence of this, in vast numbers, as communities mobilized against the invasion of Iraq.

What we did not see, however, was a mobilization of Canadians as Ottawa brought the country structurally into lock step with Washington. There is a second plausible explanation of this in political science. Unlike the failed Meech Lake and Charlottetown accords, projects that were in comparison wholly determined by Canadians, counter terrorism marks a limit point of Canadian sovereignty. There was no rigorous democratic deliberation among Canadians about options for Canada's response to terrorism because the matter had already been decided by the United States, rendering moot any thorough debate in Canada. All political discourse took up the task of reinforcing and safeguarding our relationship with the Bush White House because the failure so to do imperilled, as Patrick Lennox argues, "Canada's economic and sovereign survival". If Parliament failed to replicate swiftly and comprehensively the United States' domestic response to 9/11, the United States would secure North America unilaterally. "This means that Canada is a captive and abiding audience", Lennox continues,

to Washington's securitizing speech acts. In other words, what the United States says, as far as continental security is concerned, goes for Canada. In defining terrorism as the primary existential threat to the North American homeland, the United States established a new security paradigm to which the Canadian state had no option but to conform. (Lennox, 2007: 1021)

There was no space for Canadian sober second thought. Securitization made irrelevant any sustained public debate about the facts of the threat of terrorism, aggravating the epistemological vulnerability of a traumatized Canadian population.

In addition to compromising our ability to weigh the facts, the new security paradigm required a re-calibration of values. Arguably for the first time in its twenty-five years, the *Canadian Charter of Rights and Freedoms* loomed as a potentially destabilizing influence on Canada-U.S. relations, if its application required a more substantial protection of human rights and civil liberties than the Bush White House was prepared to accept. The executive had to devise a slate of securitization measures that would appease Washington while, at the same time, being, to use the executive's phrase, "*Charter-proof*". The result was a framework of bureaucratic casuistry that addressed the small letters of the *Charter* while ignoring its spirit and intent. It permitted the executive branch to advance measures that were arguably more troubling than those undertaken by Canada's allies, "neither the American *Patriot Act* enacted in response to September 11 or the United Kingdom's *Anti-terrorism Act, 2000* provide for investigative hearings of the type contemplated in Bill C-36." (Roach, 2001: 137) The result of *Charter-proofing* is similar to the dynamic Connor Gearty has identified in the application of Britain's *Human Rights Act* to counter terrorism. In Canada, as in the U.K., *Charter-proofing* did not require the elimination of the expanded powers sought by the executive; instead, "it allowed only a rather undemanding jump by the executive [to bring] its repressive practices within the zone of human rights compliance" (2005: 22). Instead of presenting an objective check on the executive branch, use of the *Charter* in this way entrenches and justifies the executive's abrogation of

the *Charter's* aims. By shifting as much as possible debate over counter terrorism from Parliament to the courts, with judges affirming an obligation to defer to the judgement of the government on matters of national security, the executive de-politicizes the harmonization of Canada's constitutional order with the human rights standards of the Bush White House.

Initiated by the majority government of Jean Chrétien, the minority government of Stephen Harper has allowed securitization broader application. One of the most significant developments in this regard is Prime Minister Harper's declaration that Canada will no longer advocate for Canadians facing capital punishment in the United States. This reverses an aspect of Canada-U.S. relations that has stood for decades, and it has met with little public outcry. Furthermore, Canada's Privacy Commissioner has produced a study showing that the new anti-terrorism powers are being used in ordinary law enforcement, as the lower standards for warrants and judicial oversight bleed into police work more generally (Den Tandt, 2005). Her research bears out the apprehension of some of the first critics of *Charter*-proof securitization. For example, Kent Roach in his critique of Bill C-36, *The Anti-Terrorism Act*, observed, "The minimum standards of conduct in the Charter are quickly becoming the maximum standards of restraint that we can expect of our governments." (Roach, 2001: 137)

Parliamentarians are showing signs of restiveness. In February 2007, the Stéphane Dion Liberals, notwithstanding the Party's original authorship of the *Act*, joined the other opposition parties to defeat the powers of investigative hearings and preventive arrests.

These provisions were sufficiently controversial in the first instance that the Chrétien government made them subject to a sunset clause, requiring their re-affirmation by Parliament after five years. The minority Conservative government had attempted to renew the powers. Its failure is not the end of the matter; the government introduced legislation in the Senate to see the powers returned to the *Criminal Code*. At time of writing, Bill S-3 is at first reading in the House of Commons.

Securitization may mark a fundamental change in the idea of Canada comparable to the promulgation of the *Charter* itself. Where other western nations have adopted new and controversial measures to curb terrorism, Canada is unique in its proximity to the rise of an imperial United States. The shift from republic to empire presents its own constitutional challenges to the United States, as we see in the arrogation of powers by the Bush White House. Unlike Congress, Canada's executive branch through two successive governing parties has been willing to cede to Bush the power to dictate the re-balancing of security and freedom. It has done so through a process of careful choreography, as the Governor in Council acts to preserve the simulacra of autonomous, sovereign agency. Securitization must bring with it a muscular branding strategy in order to sell to Canadians the sense that they remain in control of their government. This took concrete, if ironic, form in the Conservative Party's make over as "Canada's New Government". Securitization requires an effigy of democratic communication, masking the reality of a qualitative change in the executive's understanding of Canada, from refuge to client state.

I find in Iris Marion Young's feminist analysis a third plausible explanation for the absence of public outcry at this historic moment. She argues that the public trauma of 9/11 allowed a new impetus for "masculinist power" to assert itself, to displace democratic practice in the United States. The result is a shift from democracy to security regime, a "protection racket" that elicits not simply our compliance but our adoration and loyalty (Young, 2003). The action of masculinist power post 9/11 is to define a cadre of "bad men" who are not simply criminals but, to use Bush's phrase, "evil doers" bent on the annihilation of our families, our civilization. Judging from Bin Laden's tirades and the actions of his agents, it is certainly their aim to contain and roll back liberal democratic societies according to the edicts of their Wahhabism. Perversely, masculinist power amplifies their message, constructing Al Qaeda and its fellow travellers as our ontological negation, "a new scourge, more elusive and terrifying than the old ones" (McLachlin, 2003). Masculinist power, writ large through the 24/7 news cycle, works with the grain of the mass psychological impact of terrorism to entrench itself, to make itself the object of our hope and adoration. In this way, the security regime requires not our assent as citizens but our grateful submission as the executive branch arrogates to itself unprecedented powers, weakening the ability of the legislative and judicial branches to act as counter weights. In the name of defending core democratic values, above all human dignity, it reduces us to the fact of our biological existence and mortality.

Young's analysis takes us only so far. It is by no means the case that Americans, or Canadians for that matter, received the effects of the security regime with an unadulterated sense of relief. She omits a consideration central to the construction and impact of the

security regime, the fact that it operates in a racially and religiously diverse society. Muneer Ahmad advances an exhaustive study of the impact of post-9/11 violence on Muslim and “Muslim-looking” minorities in the United States. Unlike the brutal, homophobic murder of Matthew Shepherd, the law and news coverage of these acts of racist violence did not present them as hate crimes. Instead, Ahmad argues, the courts treated them as crimes of passion, manifestations of the trauma Americans were suffering (Ahmad, 2004). Masculinist power is also white, and its subjective impact is more complex than Young believes. People who understand themselves as part of the racially and culturally dominant group may find in the security regime an affirmation of their sense of belonging. Minorities who resemble, however superficially, the security regime’s shifting constructions of the “bad men”, the “evil doers” may find no easy refuge here, and must instead carry the onus of demonstrating that they are not a threat. In this way, the security regime articulates its dominance as tolerance.

The security regime also suffers, to borrow from Derrida, an autoimmune condition. Derrida described Jihadist terrorism as the autoimmune condition of the West, and I will make no comment here about this approach (see, for example, Borradori et al., 2003). Instead, I want to consider, as the fourth plausible reason for the absence of public outcry in Canada, the autoimmune reaction in the security regime against democratic values. This is the argument from biopolitics. A core premise of the security regime is that the rule of law, privacy, access to information, the scrutiny of the executive branch are potential threats to public safety. The preservation and expansion of the powers of the executive branch become the meta-norms, justified consequentially in their maximization of security.

Political and judicial discourse that speaks of the necessity of balancing rights and freedoms against the exigencies of national security affirm, implicitly, that there is a zero-sum contest between these values. At a moment of existential crisis in the body politic, when we most need the protections assured to us as citizens of societies aiming to be free and democratic, these protections are rendered by politicians and judges together as contingent. The effect of this discourse is to impose what Giorgio Agamben refers to as the state of exception. The security regime is a state of exception, an autoimmune turning of the power of law against the rule of law.

For Agamben, it was Auschwitz, not 9/11, which changed everything. The death camp, which presented itself as a labour camp, revealed that the foundation of the sovereign power of the state is not the authority we delegate to it as citizens but, instead, its capacity to own our biological existence. Pointing to ancient Greece, Agamben argues that there was a time when a distinction could be drawn between the natural life of the person—organic life that persisted at an inviolable remove from politics—and one’s political and economic participation. Auschwitz marked a point of no return for politics as such, a moment in the anti-Eden when the power of the sovereign claimed power over life itself. Reading Hannah Arendt, Agamben contends this reality is revealed in the contemporary phenomenon of refugees. The refugee, as a stateless person, exists before the community of nations as a bare human existent. Equally, he could argue that Maher Arar beaten with cables in the depths of a Syrian cell, the “enemy combatants” interned indefinitely outside the rule of international law at Camp Delta and the Baghram Airbase, the detainees of Abu Ghraib tortured in homoerotic tableaux attest to the power of the security regime to place

the person outside the rule of law by the force of law. Agamben believes this reveals inalienable human rights are not rights we hold by the fact of our humanity, but rights accorded to us by the power of the state as it lays claim to life itself. A refuge, therefore, would be a place in which human life is bare life, a life bereft of any inherent rights or dignity, a life whose value is derivative of the power that tolerates it and allows it to continue. A refuge, on this reading, is a camp.

On a biopolitical reading, the security regime is a refuge. It is an empire of human rights, arrogating ownership of human life by presenting itself as the author of these rights. It is a state of exception, in which democratic freedoms and the rule of law are never objective limits on sovereign power because nothing can restrain this power. In the security regime we are not citizens, self-governing originators of a collective sovereignty; we are all of us refugees. Agamben's argument here is apposite and bears repeating. "One of the essential characteristics of modern biopolitics", he writes,

(which will continue to increase in our century) is its constant need to redefine the threshold in life that distinguishes and separates what is inside from what is outside. Once it crosses over the walls of the *oikos* and penetrates more and more deeply into the city, the foundation of sovereignty—non-political life—is immediately transformed into a line that must constantly be redrawn. Once *zoē* is politicized by declarations of rights, the distinctions and thresholds that make it possible to isolate a sacred life must be newly defined. And when natural life is wholly included in the *polis*—and this much has, by now, already happened—these thresholds pass [...] beyond the dark boundaries separating life from death in order to identify a new living dead man, a new sacred man. (Agamben, 1998: 131)

As bleak as his thesis is, I am not certain that Agamben is arguing this is an ineluctable condition. Certainly, he must be aware that even in Auschwitz, in October 1944, there was a rebellion of the condemned. The fact of this uprising points to the persistence, even in a concentration camp, of a capacity to see the truth in a demonic situation, to judge it

for what it is, and to expend one's life in opposing it. We are, as Monty Python affirmed, not dead yet. Agamben also, if obliquely, takes issue with Derrida's insistence that the arrival of democracy, the "democracy to come", is forever to be deferred, a messianic advent that is radically disconnected from human history and never to occur (Thurschwell, 2005). Although he maintains that the claim sovereign power now makes over life itself is irreversible, he also seems unable to accept that authentic democratic practice is something that may never be realized, even fleetingly.

Each of the four reasons discussed above—the arguments from communication theory, political science, feminism and biopolitics—indicate that we need to consider in a new way what democratic communication might look like given the reality of the *war on terror* and its impact on the viability of Canada as originally conceived by the second Cartier. This Canada would be a refuge and not a camp because it is de-centred; it is not the product of a unitary, sovereign power but the fruit of our granting refuge to each other, recognizing the permanent fact of our diversity of races. In Cartier's view, Canadian federalism, a federalism of distinct races, was to be the ideal political framework for this new polity because it prevented any one race, region or interest from dominating over the nation as a whole. The practice of executive federalism, the concentration of power in a small cadre of political elites, is proving itself unequal to Cartier's vision. In the *war on terror*, instead of expansive debate about how to discern and apply Canadian values to this moment of existential crisis, instead of competing and emulating for the general welfare, we are strangers to each other and to our government.

“The Maintenance of Foreign Confidences”

I turn now to look at the contest over the *Charter of Rights and Freedoms*, and whether it can be a firewall for democratic values in the *war on terror*. This contest ultimately attests to the fact that time is not on the side of the security regime. Harold Innis argued, perhaps tautologously, that in order for a civilization to survive it must balance spatial extension with temporal succession. The security regime is a “monopoly of space”, and its aim is to administer life “legally and politically over vast territories.” (Innis, 1995) Monopolies of space present themselves as the end of history. My sense is that the contest over the *Charter* is precisely about whether it can be used to this administrative end, for the spatial dominance essential for the security regime. Alternatively, the *Charter* could function as a tool of temporal organization, the living, powerful and resilient transmission of democratic values through adversity to successive generations. Used in this way, the *Charter* would be a means to remember and situate ourselves in the story of democracy, to articulate what a free and democratic society—a democracy that is coming—would require, to deconstruct and judge the present political order accordingly. For this to happen, persons who suffer the abuse of their human dignity in the security regime must be able to see in the *Charter* their empowerment, a secure footing for the substantive affirmation of their personality against the dehumanizing actions of the state.

My sense is that an effective critique of the *war on terror* and its impact on democracy must address the human impact of this existential moment. Therefore, in this section I propose to keep this human impact in the foreground whilst parsing some recent developments under the *Charter*, considering their impact on the promise of Canada as refuge.

Justice Dennis O'Connor, in the exhaustive work of the Arar Commission, has canonized the facts of the nightmare Maher Arar endured. A naturalized Canadian citizen, Arar was seized in New York by U.S. officials acting on intelligence provided by Canadian authorities, constructively stripped of his citizenship and rendered into the hands of Syrian torturers. This happened one year after 9/11. The Syrians held him in a subterranean, grave-like cell and attempted to exact from his flesh with a "black electric cable roughly an inch thick" information to corroborate the Canadian intelligence. "We went into the basement," Arar recalls,

and they opened the door, and I looked in. I could not believe what I saw. I asked how long I would be kept in this place. He did not answer, but put me in and closed the door. It was like a grave. It had no light. It was three feet wide. It was six feet deep. It was seven feet high. [...] I spent ten months, and ten days inside that grave. (Maher Arar quoted in Webb, 2007: 15-16)

Arar was, in Agamben's phrase, a living dead man. In the House of Commons, the official opposition of the day, lead by Stephen Harper, reinforced Arar's grim biopolitical status by calling into question how he came to be granted Canadian citizenship, deriding the government for its "high level consultations to defend a suspected terrorist", and justifying his deportation by the United States to Syria. (CTV GlobeMedia 2008) In this way, Arar's body became an artefact in Parliamentary debate about the adequacy of Canada's approach to securitization, the ability of the sitting executive to satisfy American concerns that multicultural Canada not be a refuge for terrorists.

As his ordeal unfolded, his wife and small children kept vigil in Ottawa on Parliament Hill and the story made headlines, not all of them favourable to Arar. It is now clear that

Canadian authorities, chiefly from the RCMP, launched an orchestrated series of leaks designed to discredit the Arar family's assertion of his innocence, justify the authorities' actions against him and, ultimately, prevent a public inquiry. This campaign of disinformation did not succeed in keeping Arar in the hands of the Syrians; announcing they could not find any evidence of ties to terrorist groups, the Syrians released Arar on October 5th, 2003 and he returned to Canada.

Although the source may never be known, one such leak resulted in journalist Juliet O'Neill's November 8th, 2003 front-page story in the *Ottawa Citizen*, citing secret documents that affirmed Maher Arar trained for Al Qaeda in Afghanistan. She would later comment that the purpose of the story was to explain why the Liberal government of the day was resisting the appointment of an Arar inquiry. The story exacted a steep price from O'Neill. The RCMP's Truth Verification Section secured warrants under the *Security of Information Act*, revised and updated by the *Anti-Terrorism Act*, and dispatched twenty officers to her home, with another eight to her office at the *Ottawa Citizen*, on the morning of January 21st, 2004. Section 4 of the *Security of Information Act* criminalized the "communication, receipt and possession of classified information" (O'Neill, 2006); it criminalized the simple act of communication regardless of intent. Backed by a maximum sentence of 14 years imprisonment, if convicted of this crime, O'Neill might have served more time than the serial killer Karla Homolka. Margaret Atwood, Michael Ignatieff, the official opposition and Paul Martin expressed outrage. Nevertheless, the raids effectively brought O'Neill's career as a journalist to a halt. Within a week of these events, the

Liberal government struck a commission of inquiry into the Arar affair under Justice Dennis O'Connor.

Maher Arar's ordeal, with Juliet O'Neill, thus became a two-fold test of securitization. It challenged the ability of Canada's security and intelligence infrastructure to work in secrecy with foreign agencies. What it failed to do, as I will suggest below, is place the executive firmly on the hook.

O'Neill and the *Ottawa Citizen* vigorously litigated against the raids. In her ruling of December 18, 2006—a ruling the federal government will not appeal—Justice Lynn Ratushny found Section 4 of the *Security of Information Act* unconstitutionally vague. She writes, at paragraph 62,

This is legislation that fails to define in any way the scope of what it protects and then, using the most extreme form of government control, criminalizes the conduct of those who communicate and receive government information that falls within its unlimited scope including the conduct of government officials and members of the public and of the press. (*O'Neill v. Canada (Attorney General)*, 2006)

The *Act* imposed severe criminal penalties without requiring “any element of fault”, criminalizing the mere fact of a communication. This breached the guarantees of life, liberty and security of the person enshrined in Section 7 of the *Charter*, in a manner that was not “demonstrably justifiable in a free and democratic society.”

O'Neill thus represents a significant entrenchment of the right to communicate as a constitutional right, and it does so deliberately to rebut the unconstitutional expansion of executive and police powers. The judgement places the *Charter* in conflict with the security

regime; it has been praised for bringing “the death of a villain statute” (Paciocco, 2007) and affirming the vital importance of freedom of expression, democracy, the search for truth and individual autonomy (McKay-Panos, 2007). To the extent that it enshrines democratic communication as fundamental to the *Charter*, *O’Neill* preserves as indispensable for freedom our ability, apart from the projects of the state, to discern, debate, and transmit our judgements of fact and value to each other and to successive generations. In this way, *O’Neill* sets the temporal integrity of a democratic people against the security regime’s spatial dominance.

Justice O’Connor’s work in the Arar Commission was also presenting a challenge to the security regime. The very construction of the Commission revealed Canada’s junior role in the securitization of North America. U.S. authorities refused to participate in the Commission’s work. They remained nonetheless a negative presence throughout the process: the Harper government heavily redacted from Justice O’Connor’s reports any reference to the role of U.S. agencies. The government did so with the assistance of William Elliott; formerly national security advisor to Prime Minister Harper and Associate Deputy Minister of Public Safety, Elliott now heads the RCMP as Commissioner.

The Commission produced two sets of recommendations: twenty-three oriented to correcting the harms done by Canadian authorities to Maher Arar, and thirteen to work comprehensive improvements in the oversight and accountability of Canada’s policing, security and intelligence establishment. In its response, the Harper government accords a central role to fulfilling the first set of recommendations, often referring to the set of

twenty-three as though they are the only recommendations made by the Commission. The Prime Minister, on January 26th, 2007 released his letter of apology to Maher Arar and his family and confirmed a payment to him of \$10.5 million plus legal costs. “Although these events occurred under the last government,” he wrote, “please rest assured that this government will do everything in its power to ensure that the issues raised by Commissioner O’Connor are addressed.” (Harper, 2007)

The issues raised by Justice O’Connor, and advanced in his set of thirteen recommendations, included the necessity of an effective civilian review agency empowered to conduct self-initiated investigations into the national security activities of the RCMP. On December 12th, 2006, Justice O’Connor released his final report affirming “The case for giving an independent review body the mandate to conduct self-initiated reviews of the RCMP’s national security activities is now overwhelming.” This measure—the Independent Complaints and National Security Review Agency for the RCMP (ICRA)—was essential, he concluded, because of “increased information sharing, increased police powers of coercion and increased integration among Canadian and foreign national security actors.” (O’Connor, 2006) The recommendations also included an expanded role for the Security Intelligence Review Committee to include agencies like the Department of Foreign Affairs and International Trade, Transport Canada, and Citizenship and Immigration.

I can find no evidence that the Harper government has acted on this set of thirteen recommendations, and no indication that they have factored into the government’s agenda

for public safety. Moreover, on a preliminary analysis of the media to date, there is no indication that the government's failure to act on the systemic reforms recommended by Justice O'Connor has been controversial. The success of the Harper government's elision has had the strategic effect of transforming the Arar Commission into a ritual of partisan absolution, presenting the sitting executive as a contrite and tolerant defender of public safety.

The findings of the Arar Commission, however, are playing a role in the continuing development of case law on counter terrorism. For example, in a judgement of November 29th, 2007, Justice Michael Phelan made reference to the Commission's findings in ruling the Canada/U.S. Safe Third Country Agreement violates the *Charter*. The Safe Third Country Agreement is central to Canada's securitization strategy, and was negotiated as part of the Smart Border Agreement. It came into force in December 2004, at which time Canada designated the United States as having a comparable refugee protection and immigration system, with standards that reflect Canada's obligations to refugees under international law in the *Refugee Convention* and the *Convention Against Torture*. The effect of the Safe Third was to prohibit refugees from seeking admission to Canada from the United States, and compelled them instead to comply with U.S. refugee and immigration systems.

Justice Phelan takes judicial notice of the Arar Commission's report. He observes that the United States, though it did not participate in the work of the Commission, gave assurance to Justice O'Connor that it complied with the *Convention Against Torture* in its treatment

of Maher Arar. On a review of the findings in the Arar report, Justice Phelan concludes there is reason to doubt the veracity of this assurance. Furthermore, he expresses concern at paragraph 263 that the Governor in Council, in receipt of the conclusions of the Arar Commission, did not “immediately put into operation on an urgent basis” a complete review of U.S. practices as mandated by section 102(3) of the *Immigration and Refugee Protection Act*. (*Canadian Council for Refugees v. Canada*, 2007) The executive had an obligation to do so under Canada’s international treaty obligations and under the *Charter*, because its protection of the right to life, liberty and security of the person is accorded to “everyone” in Canada’s jurisdiction, including prospective refugee claimants. Contra Agamben, in *Canadian Council for Refugees* we find an affirmation that *Charter* rights apply to persons qua human existent, and are not a function of their civic status or nationality. Justice Phelan’s finding that there was no review of the Safe Third following the Arar report suggests that the executive allowed securitization to trump the application of Canadian statutes.

With sufficient evidence in the Arar report to show the United States, if only in this instance, violated the *Convention Against Torture*, Justice Phelan finds that the premise of the Safe Third Country Agreement, that Canadian and U.S. refugee protection systems are substantially equivalent, cannot hold. This was part of a broader pattern of concerns, including

the rigid application of the one-year bar to refugee claims; the provisions governing security issues and terrorism based on a lower standard, resulting in a broader sweep of those caught up as alleged security threats/terrorists; and the absence of the defence of duress and coercion. Lastly, there are the vagaries of U.S. law which put women, particularly those subject to domestic violence, at real risk of return to their home country. (*Canadian Council for Refugees v. Canada*, 2007: 92-93)

On this basis, he ruled that the Safe Third causes Canada to violate both international law and the *Charter*.

It can be fairly argued that Canada has abdicated its international and domestic responsibilities towards potential refugees in favour of the administrative convenience of passing back to the U.S. the responsibility for assessing those refugee claims. From a public policy perspective, it may be advantageous to do so since the vast bulk of these prospective refugees are inbound to Canada not vice versa. This administrative convenience does not overshadow the individual rights and no s. 1 evidence has been adduced to justify the Canadian position under section 1 of the Charter. (Canadian Council for Refugees v. Canada, 2007: 112-13 Added Emphasis)

On February 1st, 2008, Amnesty International Canada and the Canadian Council for Refugees expressed dismay that the Federal Court of Appeal decided to stay Justice Phelan's judgement striking down the Safe Third. The Agreement remains in effect.

If nothing else, the events surrounding Maher Arar's rendering, torture, defamation and ultimate vindication suggest that there is an epistemological defect in the ability of the security regime to identify who is and who is not a terrorist. This is a function of the abrogation of the normal ways facts are tried through the adversarial processes of the criminal law. The security regime rolls back the right to *habeas corpus*, the right to legal representation before an impartial tribunal and public scrutiny of the proceedings claiming these rights are too cumbersome and too transparent for the exigencies of national security. Counter terrorism, by definition, must act to prevent terrorist attacks and this requires a more manoeuvrable and expeditious system than the normal course of criminal law. The new normal is to resort to surveillance and profiling technologies so that a threat can be identified at the earliest stages. The more invasive and comprehensive the surveillance, the

more complete the threat assessment. However, in the security regime this flow of data is globalized, the identities of its sources and authors protected in the name of national security. Secrecy makes the whole system circular, allowing no means of objective scrutiny or verification. This new normal failed Maher Arar; it got the facts wrong.

In addition to his personal suffering, it is essential to see in the situation of Maher Arar how the security regime failed to deliver democratic security. As a system of masculinist power, the nature of the security regime is to infantilize the body politic by asserting itself hierarchically, paternalistically as the source of our safety. Democratic security demands more than the protection of our physical well being by powers beyond our knowledge and control. It demands, first, that we safeguard the processes of public deliberation essential for our sharing in self-governance. Justice Ratushny's decision in *O'Neill* is precisely this kind of safeguard. Furthermore, it demands that the policing and security apparatuses of the state remain presumptively transparent to public scrutiny and accountability. Justice O'Connor's thirteen reforms would have produced, if implemented, civilian oversight equal to the importance and invasiveness of Canada's public safety infrastructure. The Harper government's failure to enact these reforms, keeping the systems secure *against* public scrutiny, constitutes an insupportable risk to democratic security. The less involved a population is in directing the systems that would make it more secure, the more infantilized and dependent a population on masculinist power, the more vulnerable it must be to the debilitating cognitive impact of a terrorist attack. This is why I believe we should view with alarm the lack of vigorous, far reaching and urgent public debate about how to advance Canada's democratic security.

Central to the security regime is the conviction that the rule of law has failed, that it is too cumbersome, too transparent to answer the immediacy and viciousness of terrorism. On this view, terrorist violence is not analogous to even the most heinous crimes because it is a singular scourge. We cannot fight it as we fight organized crime, because terrorism is a qualitatively different existential threat. The rule of law must yield to the force of law, the exercise of masculinist power, if we are to be safe. This power imposes on us a refuge against terrorism, and its principal justification is not any manifestation of our democratic will but its effectiveness in protecting our bodies. America's rendition of Maher Arar is a function of the belief that the rule of law has failed. Canada's corollary to the U.S. practice of rendition is the security certificate, if only to this extent: both tools strip a terror suspect of personality before the law, exposing the suspect as a human organism to the sheer force of law.

Security certificates in Canada have been made to seem kinder and more decorous than rendition because the Supreme Court, in a unanimous judgement, simultaneously ruled security certificates to be contrary to fundamental rights and freedoms in the *Charter* and prescribed ways in which they could be made permanent, *Charter*-proof. In *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350, 2007 SCC 9, the Court affirmed that it is not unconstitutional to have in place legal procedures that treat differently citizens and non-citizens, observing that only citizens have the right to enter and remain in Canada; it suggested that the practice of *refoulement*, deporting persons to nations where they are likely to be tortured, has no absolute bar in Canadian law and may be

permissible “in exceptional circumstances”. The Court, quashing the use of security certificates, gave the executive a year before its decision would take effect to improve the system by adding Special Advocates. At bottom, the Court sought to tailor the application of *habeas corpus* to the executive’s securitization imperative of the “maintenance of foreign confidences” (*Charkaoui v. Canada (Citizenship and Immigration)*, 2007: 63, 43).

At issue in *Charkaoui* was the imprisonment by order of security certificates of Adil Charkaoui, Hassan Harkat and Mohamed Almrei from, respectively, 2003, 2002 and 2001. The men are not Canadian citizens: Charkaoui is a permanent resident; Harkat and Almrei are Convention refugees. Although the personal impact on liberty of security certificates may be every bit as onerous as any penalty under criminal law, security certificates are essentially administrative tools under the *Immigration and Refugee Protection Act* (“IRPA”). The *Anti-Terrorism Act* empowers the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness to issue security certificates for the immediate apprehension and indefinite detention of non-citizens whom they believe inadmissible to Canada “on grounds of security, violating human or international rights, serious criminality or organized criminality”. It requires the Ministers to file with the Federal Court their evidentiary basis for the certificate, and to provide the named person with a summary of this information so that he or she can “be reasonably informed of the case made by the Minister but that does not include anything that, in the Minister’s opinion, would be injurious to national security or endanger the safety of any person if disclosed” (*Immigration and Refugee Protection Act*, 2001, c. 27: s. 77 (1) – (2)). The Federal Court must conduct its review of the security certificates away from public

scrutiny of any kind, and, contrary to the *Canada Evidence Act*, the *IRPA* strips judges in these proceedings of the discretionary power they would otherwise have to override national security and order the release of information in the public interest (*Charkaoui v. Canada (Citizenship and Immigration)*, 2007: 53). The review of security certificates at the Federal Court is therefore a resolutely closed process.

Writing for the Court, Chief Justice McLachlin grants the necessity of allowing the executive the power to avert the risk of “catastrophic violence”, affirming that under such circumstances “it would be foolhardy to require a lengthy review process *before* a certificate could be issued.” (*Charkaoui v. Canada (Citizenship and Immigration)*, 2007: 52) The issue is not, in my view, the action the executive must take to prevent an imminent, catastrophic terrorist attack, but whether the system that allows this action is both just and epistemologically sound. The rendition of Maher Arar was both a violation of his human dignity and based on false evidence: How can we be certain that security certificates and the closed judicial proceedings that test the executive’s claims are demonstrably more reliable? The meticulous practice of adversarial justice protects against the abuse of dignity and errors in fact by requiring full disclosure of the charges and evidence to the accused, and allowing both accuser and accused to debate the evidence before a judge who is, in fact and appearance, independent. Section 7 of the *Charter* guarantees that the right to life, liberty and security of the person may not be deprived except in accordance with the principles of fundamental justice, principles instantiated in scrupulously adversarial, unbiased proceedings. However, the Court asserts there is in the *Charter* no absolute right to the application of these principles; the threat of terrorism is such that it allows a state of

exception. National security concerns can, the Court insists, allow the executive the power to limit the disclosure of evidence and information to the person named in a security certificate.

This places squarely on the shoulders of judges the onus of ensuring both the veracity of the executive's claims and the fairness of the process. It falls to a judge, acting solely on information provided by the executive, to determine whether the facts are accurate and that they establish, for example, the named person's connection to a potential catastrophic act of terrorism. The Court finds this insupportable. "The judge," Chief Justice McLachlin writes,

working under the constraints imposed by the IRPA, simply cannot fill the vacuum left by the removal of the traditional guarantees of a fair hearing. The judge sees only what the ministers put before him or her. The judge, knowing nothing else about the case, is not in a position to identify errors, find omissions or assess the credibility and truthfulness of the information in the way the named person would be. Although the judge may ask questions of the named person when the hearing is reopened, the judge is prevented from asking questions that might disclose the protected information. Likewise, since the named person does not know what has been put against him or her, he or she does not know what the designated judge needs to hear. If the judge cannot provide the named person with a summary of the information that is sufficient to enable the person to know the case to meet, then the judge cannot be satisfied that the information before him or her is sufficient or reliable. Despite the judge's best efforts to question the government's witnesses and scrutinize the documentary evidence, he or she is placed in the situation of asking questions and ultimately deciding the issues on the basis of incomplete and potentially unreliable information.
(*Charkaoui v. Canada (Citizenship and Immigration)*, 2007: 45)

To cut this Gordian knot, the Court directs the executive to revise the procedures for security certificates, allowing Special Advocates to act as proxies for the named persons. Unable to grant that the *Charter* would require, on the broad grounds named in the *IRPA*—"security, violating human or international rights, serious criminality or organized

criminality”—that the named person be allowed to know and meet the case against him or her, the Court suggests that fundamental justice is satisfied if a lawyer named and granted a security clearance by the executive, acts on the named person’s behalf. The Court shifts the onerous burden from the judge to the shoulders of a Special Advocate.

The Court takes notice of the operation of the Special Advocate system in the United Kingdom, specifically as criticized by the House of Lords, House of Commons Joint Committee on Human Rights and Counter-Terrorism. This system applies to control orders, a tool comparable to security certificates. The Court enumerates three of the Committee’s concerns: the inability of Special Advocates, after they have seen the secret information, to take instructions from the named person, the lack of resources to allow a full defence in secret, and the fact that they have no power to call witnesses. Nonetheless, the Chief Justice dismisses these concerns, “Parliament is not required to use the perfect, or least restrictive, alternative to achieve its objective[.]” (*Charkaoui v. Canada (Citizenship and Immigration)*, 2007: 56)

The Joint Committee’s concerns about the U.K.’s Special Advocate system are more pointed. After the Court rendered its decision in *Charkaoui*, the Committee released a report in which it quoted Special Advocates describing their system as “Kafkaesque” and “like a Star Chamber”. It concluded that the system “does not afford the individual the fair hearing, or substantial measure of procedural justice, to which he or she is entitled under both the common law and human rights law.” (2007: At paragraphs 210, 212.) There is reason to suggest, as the British experience unfolds, that the Special Advocate

system advanced by the Chief Justice as a means of *Charter*-proofing security certificates will not meet her standard of the “meaningful and substantial protection” required under s. 7 of the *Charter*.

There is no doctrine of infallibility that attaches to the Chief Justice of Canada, not even, I suspect, when he or she writes for a unanimous Court. I believe the central error in *Charkaoui* is evident from the first sentence of Chief Justice McLachlin’s judgement, “One of the most fundamental responsibilities of a government is to ensure the security of its citizens.” (*Charkaoui v. Canada (Citizenship and Immigration)*, 2007: Added emphasis.) This statement is at odds with Section 7 of the *Charter*, which affirms the duty of the state to protect the life, liberty and security of “everyone” in Canada’s jurisdiction. Justice Phelan affirms this in his judgement against the Safe Third Country Agreement, citing Justice Bertha Wilson in *Singh v. Canada (Minister of Citizenship and Immigration)*, [1985] 1 S.C.R. 177. (*Canadian Council for Refugees v. Canada*, 2007: at paragraph 278.) Security is not a right that is a function of one’s citizenship, but of the fact of being human. On a biopolitical reading, the Chief Justice risks limiting the set of humans who count to those who enjoy the status of citizen, relegating all the rest to a subordinate ontological status before the state. There is a dark precedent for this, Agamben would observe, in the Wansee protocols. Joining this to a feminist reading, the Chief Justice inscribes the lives of citizens into the machinery of the state, allowing the state to justify itself in exercising masculinist power—the power to keep us safe against the bad men, the “evil doers”. Even citizens, then, in the Chief Justice’s assertion of the primacy of counter terrorism, are reduced to human organisms.

The effect of *Charkaoui* is to make the security certificate system permanent, because in advancing the Special Advocate fix the Court inoculated Parliament against any rigorous criticism of the system. On February 14th, 2008, Stockwell Day, the Minister for Public Safety, announced that Bill C-3, an act to return the use of security certificates to Canada's counter terrorism strategy, had received Royal Assent. The judicial and parliamentary impact of Chief Justice McLachlin's reasons bring to mind Lord Acton's prescient dissent, "I view with suspicion the attitude of judges who [...] show themselves more executive minded than the executive." (Lord Acton, dissenting, in *Liveridge v. Anderson* [1942] AC 206, 244 cited in Dyezenhaus, 2001: 21)

Although by no means an exhaustive review of counter terrorism case law, the cases I have raised above suggest an agonised and searching debate among Canada's courts about the nature and possibility of liberty under the *Charter*. It is certainly possible that more "executive minded" decisions from the Supreme Court will chill this debate, and cause Canada's judiciary more uniformly to *Charter*-proof the *Charter* itself. What is likely not to change, though it will remain secreted from public view in security certificate proceedings, is the discomfiture judges feel about remaining at risk of becoming adjuncts to the counter terrorism apparatus. The judiciary cannot supply in the *Charter* a surrogate for the inclusive, uncompromising and, ultimately, sovereign deliberation among Canadians about how their core values—their beliefs about the nature and purpose of human life—apply to the challenge of keeping the nation a secure democracy. Absent this conversation, the

Charter cannot be a firewall against the manifest pressure of securitization; it cannot make of Canada a refuge that is not a camp.

Pluralism and Democratic Security

The aim of jihadist Islam is to collapse the capacity of the human species to understand itself, to seek and live the truth about its nature, into a single totalitarian belief. Its program is to proselytize not through reason but mass murder, where the scale of the destruction serves as a perverse proof of divine favour. Presenting itself in this way as the definitive religious practice, it views as satanic the project of building a democratic polity of diverse peoples, a polity in which we freely encounter, challenge and learn from each other in our dissimilarity. Jihadist Islam is, therefore, antithetical to Cartier's idea of Canada. I have no doubt this doctrine is being preached in Canada, and assume that we are no more immune than Britain to "home grown" terrorism.

How is Canada to be a refuge, then, when faced with a threat that is its negation, the *other* which does not seek sanctuary but our annihilation?

At the risk of hyperbole, this is also the question of the First Nations and Inuit, the question of French Canadians confronting assimilation into British Canadian nationalism, the question arising in every personal encounter with manifold discrimination, hatred or abuse under the heel of a dominant majority. It is a foundational Canadian question.

The answer is in Cartier's project of reciprocal refuge, that we are to be refuge for each other. Derrida may say that a conditional refuge is no refuge at all, but an exercise of the power to dominate; this is the aporia, the impasse, which taints all refuge. However, I find in Cartier a reply to Derrida's aporia. Canada's political nationality consists in the agreement of a diversity of "races" in two parts. First, it acknowledges and protects the right of each "race" to exist in its dissimilarity, a pact of mutually assured survival. However, this is more than a *modus vivendi* because it also calls upon the members of the "races" to encounter each other, "to compete and emulate for the general welfare." Crucially, there is no suggestion in Cartier, or in the original pragmatics of Canadian federalism¹¹, that the "races" must set aside their identities and beliefs as a condition for their public collaboration. This would be, in his view, prelude to assimilation and unacceptable. Instead of bracketing out their linguistic and religious differences, Canada's "races" are to be a political nationality through substantive, public communication in thick dissimilarity. While opening public space for our participation in the fullness of our identities, this encounter also calls the members of the "races" to a larger sense of self, one that is not exclusively oriented to their group of origin but sees it in the context of a larger set of humanity. Taken at face value, and ignoring for the moment the ways in which Canadians continue to betray their political nationality, this is not a program for dominance, assimilation or genocide. It constitutes refuge reciprocally, in the dynamic encounter of diverse "races" as they bring their distinctiveness to the public sphere, to learn from each other and order their affairs from a richer sense of what it means to be human. This is not a polity without boundaries because, in order to be maximally inclusive, it must

¹¹ For example, the Crown's constitutional promise to fund Catholic schools in Québec and minority Catholic schools in Ontario.

exclude any “race” that is, by definition, unable to accept the two parts of Canada’s political nationality. It exists in an ongoing relationship of exclusion with any “race” that would destroy this polity of reciprocal refuge.

Of what does this exclusion consist, and how ought it to be justified?

The aporia or impasse in exclusion is that it cannot undo or end a relationship; it is a radical transformation of the relationship between the self and the other, an affirmation of the self in the rejection of the other. Canada’s constitutional obligations, as Justice Phelan ruled, remain even though the operation of the Safe Third Country Agreement would exclude prospective refugee claimants from refuge in Canada. The relationship remains, and the issue becomes how to justify the exclusion.

To conclude, I would like to turn to this issue of justification with a view to sketching how Canadians might build a refuge in the shell of the security regime.

John Rawls’ conception of political liberalism has played an influential role in constitutional interpretation, certainly in the United States and, I believe, in Canada.

Jürgen Habermas advances an idea of communication and its role in democratic justification that is very much in line with Rawls, their differences notwithstanding. I find in this stream of thought a theory of justification that is fundamentally discordant with Cartier’s understanding of Canada’s polity as an inclusion of the other.

Political liberalism recognizes, as Cartier recognized, that pluralism is a permanent feature of the social world. Both approaches are post-secular in the sense that they accept religion and religious diversity are here to stay (Thomassen, 2008). However, political liberalism works from the fact of pluralism to the judgement that there can be no public agreement on the good. It relegates to the private realm any judgements about the nature and purpose of human life. The consensus it seeks is political, ground rules that are neutral and will permit us to seek our own good without unduly interfering in the freedom of others to do the same. The point of politics is not to produce a substantive justification of public policy; it is to preserve fair rules of deliberation to produce from a plurality of reasonable worldviews an “overlapping rational consensus.” Justice is not about the good, it is about fairness; justification is procedural, the operation of deliberative rules that keep everyone on a level playing field (Rawls, 2005).

Rawls requires as central to the rules of democratic deliberation that the holders of “reasonable comprehensive doctrines” bracket out their core beliefs and thus refrain from bringing them to matters of public concern. Seen the other way, tolerant, public reasoning “neither criticizes nor attacks any comprehensive doctrine, religious or non-religious.” Doctrinal views can only be brought to public debate if they are translated into sufficiently public terms (Bohman, 2003). Habermas concurs with Rawls, and would allow religious values to be presented in public discourse only if they are translated into the dominant, secular political vernacular (Thomassen, 2008: 8).

I believe Lasse Thomassen is correct to observe that the place Habermas, I infer Rawls also, grants to religious expression in the name of tolerance in fact results in its marginalization. “The (ethical or religious) tolerated”, Thomassen writes,

must relativize her claims so that they are only ethical, and not political claims to be enforced across society as a whole. This effectively amounts to a privatization of the individual’s or group’s ethical and religious difference. The way it takes place is through ‘translation’: religious reasons must be translated into the terms of secular, political society. [...] While allowed to count, religious reasons are not allowed to count when it really counts, namely in the institutional fora of lawmaking. The onus is on the ethical-religious constituencies to *adapt to a society within which* they are tolerated [...]. (Thomassen, 2008: 82)

Political liberalism constructs a public square in which the voices that are best suited to rational, secular argumentation have the advantage, though it presents itself as a level playing field. It sets aside, as Young has shown, forms of contestation that are not verbal or syllogistic (Young, 2002). Following Michael Sandel, I believe that in the name of preserving a public sphere neutral to various, competing ideas of the good, political liberalism imposes surreptitiously its own doctrine of the good. This is Tony Blair’s affirmation that the *war on terror* is a war of “our values” against “their values”, and Chief Justice McLachlin’s dictum that the cardinal duty of government is to ensure the security of its citizens. The result is a stylized pluralism: relegating to what it presents as the private sphere the features of our identity that make us truly different from each other, that give our personalities content and substance, political liberalism prevents, as a condition of our participation, any debate over its doctrine of the good. We are self-originating authors of meaning, but the meaning we discover or produce—be it as compelling as the Beatitudes or the Baghavad Gita—is publicly irrelevant and we must set it aside if we are to participate in democratic deliberation. Political liberalism results in a public square in

which the debate over the nature and purpose of human life is reduced to a zero sum contest between the self-justifying speech acts of masculinist power and the “narrow, intolerant moralisms” of odious fundamentalism (Sandel, 1996: 24).

The *war on terror* reveals the biopolitical nature of political liberalism, its project of supplanting our own subjectivity—our ability to contend with each other publicly over the nature and purpose of human life—with its own construction of what it means to be human. To be human in the security regime is to be, in the first instance, a mortal organism that must be contained positively or negatively. Positive containment is the discourse of human rights in the security regime, the construction of a narrow scope of rights and freedoms—narrow because the state reserves for itself the authority to determine what, if anything, human dignity will be. Negative containment is exclusion from this discourse of rights, stripping a subject of personality and subjecting him or her to the force of law, not the rule of law.

I do not believe this is compatible with the Canadian political nationality Cartier envisioned. Furthermore, I believe the operation of political liberalism in Canada has had a structural impact, replacing a federation decentred in a “diversity of races” with an executive federalism. Much is made of Stephen Harper’s supposed agenda to re-situate Ottawa, removing the central government from the daily lives of Canadians.

Nevertheless, he is continuing apace the accretion of powers to the Prime Minister’s Office whilst closing the workings of government to public and parliamentary scrutiny. Having won a minority government by assailing the manifest corruption of Liberal Party

apparatchiks in the sponsorship scandal, he has refused to implement the recommendations of Justice John Gomery that would have resulted in the transparent, accountable government he professed to champion. Executive federalism is consistent with Rawlsian bracketing because it treats the fact of difference in Canada as irreconcilable. As a consequence, it develops in the PMO enough muscle to reduce the complexities of democratic deliberation in a pluralistic society to the binary options of partisan rhetoric. The deliberative disenfranchisement of Canadians in executive federalism is consistent with the infantilization of citizenship in the security regime. It is the executive that will be, increasingly unchallenged by the legislative or judicial branches, the final arbiter of the good.

Against the “executive minded” doctrine in *Charkaoui*, I suggest that it is a primary act of a *democratic people* to provide for its security, the security of both personal life and political life. The Court’s error was to locate sovereignty in the government, to make citizens vassals in the name of their protection. I believe instead that the process by which a democratic people makes itself secure is a matter of substantive justice, and it requires public debate about our conceptions of the good. Personal life is more than simple organic existence, it is our capacity to know ourselves in the context of the conditions that give our lives content and personality—the moment and place of our lives, the features and relationships that are central to a sense of identity. It is the capacity to enter into a critical relationship with all of this and discern meaning, to manifest in our lives our sense of what it is to be human. Our political life becomes more secure when it is the site of rich contestation about the good, when the projects of the executive are exposed to criticism from a multiplicity of

perspectives about the nature and purpose of human life. This places the body politic in the position of answering the challenge presented by jihadist Islam, or any other form of totalitarianism, with an uncompromising and clear affirmation of the ways in which our democratic practice advances the human quest for meaning and emancipation. I believe this is more congruent with the intention of the *Charter* than the Court's ruling in *Charkaoui*.

Trudeau had a very clear intention for the *Charter*; it was markedly different from the Court's dolorous observation that the Constitution is not a "suicide pact" (*Application under s. 83.28 of the Criminal Code (Re)*, 2004: 17). In his mind, the *Charter* was not to be a plastic instrument in the hands of the executive branch, parliament, or the judiciary. Although he presents the *Charter* as "in keeping with the purest liberalism", Trudeau was not a pure liberal—at least not in the sense of Rawls and Habermas. Pointing to Jacques Maritain, he argued human persons

are "human personalities," they are beings of a moral order—that is, free and equal among themselves, each having absolute dignity and infinite value. As such they transcend the accidents of place and time, and partake in the essence of universal Humanity. They are therefore not coercible by any ancestral tradition, being vassals neither to their race, nor to their religion, nor to their condition of birth, nor to their collective history. (Trudeau, 1990: 365 Added emphasis.)

Our freedom and equality, dignity and value as human personalities are not given by a fiat of the state, they are ontological realities that precede and give form to the authority of the state, a secure footing for citizens to debate and assess the justice of the state. Trudeau justified the *Charter* substantively, not procedurally, by asserting its congruence with what he contended is an objective good. These are not shibboleths; we experience

discrimination and other abuses of power viscerally as violations of our dignity and worth. Experiences of oppression show our immediate, epistemologically powerful, connection to “the essence of universal Humanity.” The *Charter* derives the right from this good.

Trudeau intended the *Charter* to be a safeguard against tyranny, a refuge for the ontological priority of human dignity against any totalitarian claim of the state. In weighing the relationship between the individual and the state, he was not a liberal in the tradition of Rawls and Habermas, but a personalist in the tradition of Maritain. “Personalism essentially said that the individual,” he wrote,

not the state, must be supreme, with basic rights and freedoms, because the individual is the only moral entity, the only one who has significance. But, granted that, we should view the individual as a person involved in society and with responsibilities to it. In other words, sovereign individuals can get together to co-insure each other against the accidents and hazards of living in society. This co-insurance is exercised through the welfare state, by helping those who can’t help themselves. I found personalism a good way to distinguish my thinking from the self-centred individualism of *laissez faire* liberalism (or modern-day neo-conservatism, for that matter) by bestowing it with a sense of duty to the community in which one is living. (Trudeau & Graham, 1998: 5)

Intrinsic rights, which persons hold not because they are citizens of Canada but because they are human, are to be a constitutional limit to the exercise of the powers of the executive, legislatures and judiciary (Trudeau, 1990: 357 – 85). This contextualization of the power of the state is consistent with Cartier’s approach, which made Canada’s sovereignty a function of the diversity of its peoples, the product of their “co-insurance”.

Perhaps the principal challenge in pointing a way to democratic security is recovering the space Canadians need to communicate with each other in the fullness of our differences, to

attempt a polity of competition and emulation for the general welfare. The impediments to this are considerable. For example, the executive's *lawful access* project would convert Canada's civilian communications infrastructure into a latent, ubiquitous and covert surveillance system. Although on the drawing board before 9/11, counter terrorism has added to *lawful access* a powerful consequentialist argument for fixing Canadians ever more resolutely under the gaze of the state.

Iris Marion Young suggests that our work of organizing political life does not “occur under conditions free of coercion and threat, and free of the distorting influence of unequal power and control over resources.” The ongoing challenge of democratic communication is that we must continually make it secure against the interests and systemic barriers that would prevent its occurrence or pervert its exercise. I believe the framework of Canadian federalism, and latterly the *Charter*, are attempts to provide structural tools to aid in freeing our deliberations from inequality and duress. At the same time, we cannot wait for the process to become fair before we participate; the struggle for justice necessarily occurs under conditions of inequality (Young, 2002: 17, 50).

Multiculturalism was intended to be a structural answer to the problem of systemic inequality. Will Kymlicka presents Canada's unique constitutional construction of multicultural citizenship as an application of liberal values that truly allows people to be who they are. Its goal is not assimilation or homogenization but, instead, the integration of ethnic, racial and religious distinctiveness into an expansive understanding of what it means to be Canadian. He observes that this approach is integral to framing an answer to

Québec nationalism, and allowed immigrants to keep the federation intact during the hair's breadth results of the 1995 referendum. (Kymlicka, 2008) Nevertheless, it remains that even as this inclusive understanding of Canadian citizenship developed, perhaps even to the verge of global diffusion, I do not believe it has been an impediment to the rise of the security regime in Canada. The power of the executive branch in Canada continued to grow and become increasingly immune to scrutiny and accountability, as we see in the McLachlin Court's *Charter*-proofing of executive detention in the security certificate process. Multicultural citizenship has not yet enabled Canadians to frame a maximally inclusive and rigorous critique of securitization. The problem may be that multiculturalism is itself biopolitical: its intention and effect are to integrate the totality of the human personality into the life of the state, to own this personality in the name of its emancipation. For example, anecdotally, I understand leaders of the Muslim community in Canada experience post-9/11 multiculturalism as the practice of the federal government to draw the community into dialogue as part of its threat assessment measures. Multicultural citizenship has not yet produced a polity powerful enough to keep the branches of government responsive to the sovereign will of a multicultural democratic people.

The *war on terror* presents for Canadians an opportunity once more to build a political nationality through reciprocal refuge, to answer the challenges of terrorism and counter terrorism by affirming the sovereignty of our deliberation about the nature and purpose of human life. For Canada to be open to the democracy that is coming to it, the free and democratic society anticipated in the *Charter of Rights and Freedoms*, it must remain a site for

the substantive encounter of a diversity of races. The structures of Canadian federalism, multiculturalism and the *Charter* cannot replace the necessity of this encounter or act as surrogates for the personal confluence of dissimilar peoples. Ultimately, this requires the determined assertion of citizenship as an ontological feature, and not as a positive status accorded to us by the state. Canada must be a refuge that is not a camp but a conversation. Although periodically masculinist power may supplant it and totalitarian fundamentalism suppress it, this is the conversation keeps us human.

The continual work of discerning together what it means to be human, to exercise our capacity for thought and manifest the character of our species in all of its diversity, is fundamentally a threat to the dominion over life claimed by sovereign power. If Badiou is correct, and the state is “incapable of thought”, then the threat of our ongoing affirmation of the truth of our humanity poses an incalculable risk to the security regime. Seen in this context, propaganda is the means by which the state attempts to supplant human thought with the antithesis of thought. The next chapter revisits Herman and Chomsky’s seminal propaganda model, with a view to suggesting ways it might be strengthened for biopolitical analysis.

5: DESPOTISM'S DISCONTENT

CHARLAYNE HUNTER-GAULT: Well, Bosnia, Rwanda...

NOAM CHOMSKY: Bosnia and Rwanda are a little bit different because these are among the few examples of atrocities where you cannot accuse the United States of primary responsibility for it. Correspondingly, they were covered. We're... the press does a fine job of covering other people's atrocities. I mean, probably the same is true of "Pravda." I'm sure it covered other people's atrocities reasonably well. I don't read it, but I imagine.

CHARLAYNE HUNTER-GAULT: I think the press was very critical of the United States for its lack of involvement in Bosnia.

NOAM CHOMSKY: Yeah, but notice what happened. Here you could blame it on someone else-- you know, horrible Serb peasants. So everybody is outraged--somebody else did an atrocity. And then you can say, "Look, we're not doing anything about it, isn't that terrible, but I have nothing to say about what we ought to do."

CHARLAYNE HUNTER-GAULT: But the press reported all of that.

NOAM CHOMSKY: Virtually none of this.

CHARLAYNE HUNTER-GAULT: Oh, yeah. It was reported.

"Human Rights in the Media"
May 14, 1996

Rwanda is a problem for Noam Chomsky. The Propaganda Model he devised with Edward Herman brailles but a small part of the elephant; it fails to give an exhaustive explanation of the recurring abrogation of human dignity through propaganda, and as such can have limited utility in advancing democratic communication. Rwanda reveals the limit point of the Propaganda Model's premise of class war, its inability to grasp the role of propaganda in the production of bare life. Though doubtless a man of deep empathy,

Rwanda is at the event horizon of Chomsky's social conscience because the ruling elites of the United States, whose collective sins Chomsky exhaustively catalogues, did not have their fingerprints on this genocide. I believe this marks the Propaganda Model as an apologetics for a critical political economy that ultimately holds little respect for persons. The effect is to filter out the radical inhumanity of Rwanda, to accord it secondary or tertiary status in Chomsky's demonology: "somebody else did an atrocity". This was atrocity without the star power of the Kennedy-Johnson-Nixon Viet Nam, Carter's El Salvador, Reagan's Nicaragua, Clinton's or the Bushes' Iraq. My sense is that in failing to give an adequate account of Rwanda, the Propaganda Model cannot give a satisfactory account of the true horror of Abu Ghraib and the comprehensively despotic enterprise it signifies.

I will first summarize my understanding of the Propaganda Model, and then build a case for how it might be brought into service in a more comprehensive approach to democratic communication.

Herman and Chomsky's stated purpose in positing the Propaganda Model is to advance a theory about the behaviour of the dominant news media, and they intend this to be a purely empirical tool. This modest purpose carries with it a number of implicit claims about the nature of state power and our relationship to it, claims informed by the model's grounding in critical political economy. The Propaganda Model, against its authors' stated resolve not to present it as a theory of media effects, is freighted nonetheless with assumptions about the effect of the dominant news media on a reasoning public—it is a

theory about *manufacturing consent*. My sense is that the Propaganda Model is performatively a theory of democratic communication; further, seeing it in these terms can help us to critique, adapt and strengthen the model to take on the unabated reduction of the human person to bare life—a concern I believe Chomsky shares. The promise, and urgent necessity, of the Propaganda Model is precisely its usefulness in forming sound judgements of fact and value against the projects of sovereign power.

On its face, the model analyzes the epistemological degradation of journalism by corporate capitalism, the systemic and non-conspiratorial distortion of facts to lies through a five-fold filter: “ownership, advertising, sourcing, flak and [market] ideology”. Herman is clear: the intention is to “model media behavior and performance”, specifically the operation of dominant news media in forming elite consensus that gives the “appearance of democratic consent”. Propaganda is a function of the fact that “the dominant media are firmly embedded in the market system”, this system coordinates their representation of the world to suit the interests of “profit-seeking businesses, owned by very wealthy people (or other companies)”. (Herman, 2000: 102) On this view, manufacturing consent is a necessary function of the maximization of profit. The state and the propaganda it generates serve the interests of capital, which retains a meta-sovereignty: presidents commit atrocities because they are the vassals of big money.

The model, conservatively, tries not to suggest that propaganda is ubiquitous: there is, for example, none of Ellul’s contention that propaganda is in the very fibre of an information society. (Ellul, 2006) Instead, for Herman and Chomsky, propaganda consists of discrete

packets of deception and deflection that protect the interests of the moneyed elites. Its aim is to fool some of the people some of the time, with propaganda taking the form of “campaigns”. Certainly, examples of propaganda campaigns abound, with many of them the subject of insightful scholarly analysis (e.g. Plaisance, 2005). Herman and Chomsky point to the alternate media, news outlets outside the control of corporate capital, as firm footing for the “general public’s persistent refusal to fall into line”. (Herman, 2000: 103)

Apprehending the correct facts will result in the public rounding on the elite classes through sound moral reasoning. On this view, alternate media provide an Archimedean point, allowing us to check our facts and form right judgement. The truth will set us free. This has prompted some critics to suggest that Chomsky’s work is “antipolitical”, taking us out of the realm of democratic contention and into the realm of “technoscience”. If the propaganda deployed by elites is analogous to epistemological smart bombs, targeting and taking out only a specific cluster of facts – Saddam held weapons of mass destruction; Nixon’s CIA did not aid Pinochet in his rise to power¹² – then the work of emancipation is to regain a justified, true belief about these matters. Democratic communication is simply the work of getting to the truth, through sources that are free from the perverting effects of corporate capital. There is, in this sense, “something sainted about this passionate faith in knowledge’s trump-card status and Correct Information’s ability to save us”. (Brahm, 2006: 455)

I find this criticism of Chomsky’s “epistophilia” resonates with Susan Sontag’s scepticism that simple exposure to photographs of war is enough to bring an end to war. In her

¹² See <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB8/ch05-01.htm>

seminal essay *Regarding the Pain of Others*, Sontag takes issue with Virginia Woolf's belief "that the shock of such pictures cannot fail to unite people of good will." (Sontag, 2003: 6) Woolf's assumption is, I believe, very much like that of Herman and Chomsky—the act of seeing the odious truth about an atrocity necessarily forms a community of concern, common cause among people of good will. This seems to be the hope of the Propaganda Model: that epistemological clarity will generate popular resistance; move us to collaborate against the forces of repression. Facts, like photographs, do not produce meaning by their own power. They find us thickly situated in the relationships and material conditions that give substance to our self-understanding, that inform and ground our capacities for deliberation and normative judgement. The heuristic act of recognizing any specific instance of propaganda for the lie that it is, though vital if we are to see the global advent of free and democratic societies, must be accompanied by an articulate, insistent, perhaps necessarily incomplete, understanding of human dignity. Without the continual expansion of our normative frame of reference—something the Propaganda Model does not provide—the ability to read the *New York Times* with a weather eye out for lies will not increase our aptitude for justice. To this point, Sontag reasons

Our sympathy proclaims our innocence as well as our impotence. To that extent, it can be (for all our good intentions) an impertinent—if not inappropriate—response. To set aside the sympathy we extend to others beset by war and murderous politics for a reflection on how our privileges are located on the same map as their suffering, and may—in ways we might prefer not to imagine—be linked to their suffering, as the wealth of some may imply the destitution of others, is a task for which the painful, stirring images supply only an initial spark. (Sontag, 2003: 102-03)

Exposure to the images of Abu Ghraib gave Sontag the opportunity to practice what she preached. She was confronted, as all of us were, with images through a demonic lens—

digital photographs and video clips shot by U.S. soldiers in the infamous abattoir of a prison they had liberated from Saddam. These were the images of prisoners pushed by the fiat of the Bush White House outside the rule of international law, contorted, stripped naked by soldiers and military consultants and framed in homoerotic degradation, the slow motion vivisection of “stress positions”. They provoked her to a reading of the photographs that did not simply challenge Donald Rumsfeld’s epistemological perversion, his attempt to elude “the ‘torture’ word”; these images provoked her to a lucid moral outrage against “the fundamental corruptions of any foreign occupation together with the Bush administration’s distinctive policies.” (Sontag, 2004) The facts, and what corporate capital was making of them at Fox News and CNN, were not the ground of contention. The issue was, and remains, normative: whether the images could provoke a democratization of moral outrage, exorcising from American political culture its pornographic rapaciousness for bare life.

In their insistence that the Propaganda Model is not a conspiracy theory, Herman and Chomsky use critical political economy to affirm a systemic dimension in the production of propaganda. The main problematic, they contend, is that propaganda is endogenous in a class stratified, capitalist society. The determination of what constitutes news through to the professional norms that construct how it is made fit to print are distorted by the structural role of capital, as a black hole warps the fabric of space-time. What capital cannot do, as Chomsky makes clear in his debate with Foucault, is snuff out the “human essence”: the structures of repression in government, and the supplemental institutions that amplify their influence—the dominant news media, the corporation, the university—

cannot erase human nature even as they bend us to be “cogs in a machine”. It is this persistence of human identity that allows alternate media and in some instances public broadcasters to continue to tell the truth.¹³ The Propaganda Model, therefore, works from a premise of enduring human agency, a premise I share. My contention is that the model takes altogether too narrow a view of the nature of the powers ranged against human agency, of the relationship between the human person and sovereign power, of propaganda’s role in the construction of sovereign power.

This is why the Propaganda Model is of no use at all in parsing the horror of Rwanda’s genocide. For one hundred days in 1994, radio broadcasting was the core of a ruthless system of mass murder. *Radio Mille Collines* debased the Tutsi minority as “cockroaches”, reducing them to bare life and calling for their complete obliteration. The broadcasts gave names, addresses, licence plates, disclosing the locations of Tutsis to Hutu death squads so effectively that “Killers often carried a machete in one hand and a transistor radio in the other.” (Power, 2001) This was genocide by propaganda. Samantha Power, whom Chomsky criticizes as a liberal apologist, provides an apposite account of the events.

“Using firearms, machetes, and a variety of garden implements,” Power writes,

Hutu militiamen, soldiers, and ordinary citizens murdered some 800,000 Tutsi and politically moderate Hutu. It was the fastest, most efficient killing spree of the twentieth century. (Power, 2001)

This was genocide in the Pax Americana, Clinton at the helm of the last superpower standing. The United States, without putting a single boot on the ground, had the

¹³ See, for example, "The Lies that Lead to War", The Fifth Estate, Canadian Broadcasting Corporation, March 2007.

capability to jam the broadcasts and at the very least slow the rate of the slaughter. Instead, the White House formulated unwieldy criteria for humanitarian interventions, gave undue credence to Rwandan authorities, and pushed the UN to *just say no* to what the U.S. deemed pyrrhic humanitarian interventions. Consequently, the United Nations Department of Peacekeeping Operations ordered Canadian General Romeo Dallaire, commander of the UN Assistance Mission in Rwanda, to maintain neutrality and avoid combat except for self-defence and to assist in the evacuation of non-Rwandans. (Power, 2001) These factors—from transistor radios to neurotically callous, self-serving geopolitics—yielded the “fastest, most efficient killing spree of the twentieth century.” To my mind, Rwanda suggests an inner life of propaganda that eludes the Herman/Chomsky model. School yards and church grounds became killing fields not for the maximization of profit of any kind, but because the Hutu authorities arrogated to themselves the organic lives of the Tutsis *per se* as property, detritus to be extirpated from the human species, from history, forever. Propaganda played a central role in this abasement of human life, the reduction of Tutsis to bare life. Further, the killing proceeded unabated because there was nothing in the political discourse of the international community or the calculations of the Clinton White House to affirm the inherent, ontological dignity of the Tutsis—their personhood—and fight in their defence. Rwanda shows that the machinations of capital and the elites who control it are neither a necessary nor a sufficient condition for propaganda. The business of propaganda is to arrogate to sovereign power the ownership of life as such.

The propaganda effect of the Propaganda Model is to frame Rwanda as an aberration, a brutal but nonetheless tangential anecdote because history, the events that count, is the account of the global depredations of capital and our struggle for emancipation from the imperial, neo-liberal elites. There are without question demonstrable cases in which propaganda serves the interests of money, but to suggest that propaganda is necessarily a vehicle for the maximization of profit does a profound injustice to the truth about Rwanda, the scope of its impact on human life. Biopolitically, propaganda works the reconstitution of the citizen as organism, as bare life.

Eight years into the *war on terror*, fifteen years out from Rwanda, I find Giorgio Agamben's grim critique of sovereign power persuasive. Auschwitz, he argues, changed everything; it marked the anti-messianic moment when the administration of human life became the ground and justification of the state. From this moment, Agamben argues for all time thereafter, the camp eclipsed the *polis* as the site of sovereignty. Sovereignty ceased to be a matter of spatial and temporal control over a specific territory, and became instead the capacity to wield existential control over life itself. (Dillon, 2007: 11) At issue here is something larger than the "fifth freedom" of corporate capital—"the freedom of capitalist corporations to rob, exploit and rape the natural resources and people of the developing world"—that is the moral site of the Propaganda Model. (Klaehn, 2002: 167) Sovereign power is the power to define who may be permitted to live and what constitutes life, the power to determine who is a citizen, a person and who is an alien, an organic existent, the power to decide when the law holds and when it can be suspended in a state of exception. When capital fails, as it has in the current global collapse of neo-liberal economics, the

illusion of capital's autonomy or meta-sovereignty fades and we are left with the hard reality of sovereign power, the power of the state totally to administer life through new forms of force and economic compulsion. Making Auschwitz the tropism of contemporary political life has lead Laclau to charge Agamben with "political nihilism". Laclau insists that the mere fact that "increasing areas of social life are submitted to human control and regulation" does not mean we are, all of us, living in a totalitarian condition. (Laclau, 2007: 18) Unhappily, he begs the question of what "human control and regulation" amount to; social life is by definition the product of human governance. The challenge Agamben's biopolitics presents is to determine whether such governance takes the form of a society of persons, a *polis* or the form of a camp, where personhood gives way to the totally administered life.

My sense is that propaganda is a definitive faculty of sovereign power. Propaganda is the communicative force of sovereign power, a sign that is what it signifies: the reduction of human life to bare life. It works a perverse inversion of Aristotle's bold affirmation that "Man is born for citizenship", stripping one's inherent personality and civic agency to impose an effigy of citizenship—the citizen not as "holy will" but as organism.

Propaganda is the self-justification of sovereign power, the voice of its monopoly on violence. Its purpose is to render us speechless, stripping us of the voice necessary for citizenship. (Edkins, 2003: 241) It is, to borrow from Mattelart, communication as excommunication in "the theologisation of the apocalyptic struggle between good and evil". (Constantinou, 2008: 34) Its fundamental aim is to entrench sovereign power's

claim to ownership of life as such, absolute agency as the source and guarantor of both our moral value and organic existence. It is the camp presenting itself as the *polis*.

A biopolitical reading, rather than the approach of the Propaganda Model through critical political economy, allows a more exhaustive treatment of the phenomenon of propaganda. It opens and makes explicit a number of important areas of analysis, including the crucial question of the impact of propaganda on human agency. I believe it would be insupportable, indeed racist, to suggest that reasoning selves in the West have a different subjective relationship to propaganda than the Hutu majority had to *Radio Mille Collines*. The propaganda of capitalist political economies does not operate at a cerebral, epistemological level whereas Rwandan propaganda was atavistic, primal. The branding of the *war on terror* – *Infinite Justice*, *Enduring Freedom*, *Shock and Awe* – was biopolitical. Amplified through the circuitry of the news networks with their closed circles of expert commentators and embedded journalists, diffused in anticipatory memorial rituals (Edkins, 2003) and slap-on car decals, the Bush White House and its fellow travellers calibrated the construction of the invasions of Afghanistan and Iraq not simply to manufacture consent but to gain our adoration. Iris Marion Young speaks to this dynamic in her critique of “masculinist power” in the security regime. By her analysis, popular submission to the projects of the state is not enough. Masculinist power does not simply punish us into subjugation; it courts our gratitude for being our protector against bad men, our reverent solidarity against the menacing alien. (Young, 2003) Be it *Radio Mille Collines* or Fox News, the work of propaganda is to draw the better angels of our nature, to borrow from

Lincoln, into the service of the security regime; to make these angels creatures of sovereign power.

By Young's analysis, the reduction of persons to bare life can bring with it a sense that one must make the moral reasoning of the state one's own, not out of any duress but because of loyalty. Sovereign power can gain our affection and amplify through us its ability to produce bare life, to push whole communities—with our reasons and energetic participation—outside the rule of law. For example, in his exhaustive treatment of post 9/11 violence within the United States, *A Rage Shared by Law*, Muneer Ahmad documents a groundswell of “private” and “public” racial violence against what he terms “Muslim-looking” people—Arabs, Muslims and South Asians. What I find interesting about this study is its echoing of the dynamic that was at play in the Rwandan genocide. Ahmad argues that over one thousand “bias incidents”—“including the murders of as many as nineteen people, assaults of scores of others, vandalism of homes, businesses and places of worship, and verbal harassment of countless individuals”—was ostensibly spontaneous but in fact found tacit encouragement and indeed backhanded justification in “legal and political violence” against these communities. (Ahmad, 2004: 1261–62) He contrasts these outrages to the homophobic murder of Matthew Shepherd, which was seen to be a hate crime because—despite the homophobia that persists in American culture—it was said to have been irrational, wholly gratuitous. Public discourse did not treat violence against Muslim-looking people, in the aftermath of 9/11, on the same terms. “A desire for vengeance found broad support among the American people,” Ahmad argues,

and ultimately found expression in American foreign policy; by virtue of this broadly held desire, vengeance was *made* rational, and with it, bias

against “Muslim-looking” people. Thus, the motives of the post-September 11 perpetrators were shared by many Americans after September 11, even as the perpetrators’ chosen means of achieving it were disavowed. (Ahmad, 2004: 1300)

The Propaganda Model has, I believe, as difficult a time accounting for this as it does Rwanda. From its vantage in critical political economy, it might suggest that the individual acts of racist violence are collateral damage, a by product of an American foreign policy that is calibrated to build empire for the expansion of the “fifth freedom”, the freedom of corporations to use the world and its people as silage for the maximization of profit. A class stratified, capitalist economy sows brutality; it punishes us into seeing each other and ourselves as holding only instrumental value. This is reinforced by the dominant news media, and their “if it bleeds it leads” quest for market share.

The fact is that violence against Arabs, Muslims and South Asians in the United States after 9/11 wrote the trauma of the terrorist attacks into their flesh. The violence was about their bodies, racialized and reduced to bare life. The effect of the violence, as Sontag argues via Simone Weil, was not to aid in profit making of any kind, however indirectly, but to make persons into *things*. Although it certainly can be used to support a political economy, and there is without question a menacing synergy between racism and property, I do not believe capital itself can be said to be the author of race categories and race hatred. The money comes second. The principal issue is the arrogation by sovereign power of the authority to impose a taxonomy on the human species. This springs from its claim to ownership of life as such, to grant subjects the status of personhood—of inclusion in the political community—under the terms of a rule of law, and to suspend the rule of law, reducing its subject to bare life in the state of exception. Racism is therefore not an

incidental result of market-driven propaganda; racism is a mode of propaganda's biopolitical function as the voice of the state's monopoly over violence.

The aftermath of 9/11 as constructed by the George W. Bush administration, and globalised through complicit western democracies, made explicit in our political cultures the same despotic reasoning and instruments that Chomsky saw the United States field test in Latin America, East Timor and the Middle East over his many decades as a public intellectual. This is especially the case for people anathematised to bare life because of their racial profile or religious beliefs. Although Bush's entrenchment of the security regime garnered unprecedented powers for the executive branch over the legislative and judicial branches, in the United States but demonstrably in Canada as well, and worked a re-calibration of the rule of law with security interests trumping failsafes like *habeas corpus* and international covenants against torture, the perception endured that all of this was constitutional. The rise of the security regime in western democratic culture had to be seen to be in perfect conformity with this culture. In the same way, sovereign power aims at presenting its claim to the totality of life as life itself, as the ground of our being. This applies both when it renders a subject to the hands of torturers, and when it is called to account and analogously makes its victim whole—as we saw in the Government of Canada's treatment of Maher Arar. The de-politicization of life, the supplanting of civic agency with the consumer ethic, the economic coercion that disciplines us according to our productive capacities, the devaluation of women's work and the work of racialized minorities, the exclusion of whole populations to the status of stateless people, the

definition of when life starts and when it ends, the structure of the market and the value accorded to capital itself are functions of sovereign power's claim to own the totality of life.

Even so, resistance endures. The study of propaganda is the study of sovereign power's representation, or effigy, of democratic communication. It is the critical task of laying bare sovereign power's self-understanding, of converting this unwieldy abstract noun into a readily analyzable structure and, in so doing, make possible the reclamation of our own personhood out of bare life. I have argued that the Propaganda Model, in its present construction, is an imperfect tool for this work: there is more at issue here than its critical political economy can process. At the same time, we need a better sense of what democratic communication would in fact look like—what would nourish it, and enable it effectively to contend with the biopolitical project of the security regime.

I find Robert Entman's cascading effects model helpful in understanding how journalism can contribute to the appearance of democratic communication, especially because of its account of the structures of sovereign power and the space it provides for the subjective condition of journalists. Entman argues that the ability of the White House to dominate in the news cycle, something at which Bush the younger had an advantage over Clinton, it "must package frames in ways that comport with the motivations of media personnel and organizations. News organizations and personnel", Entman continues,

are driven by economic pressure and incentives; professional customs, norms, and principles; and normative values. *The latter include self-images as guardians of democracy, and they may at times modify or overcome the restraining force of the economic pressures and professional norms.* (Entman, 2003: 421-22 Added emphasis.)

The process is reinforced through social and professional contact among elites in the branches of government and the media, networks that make it easier to be a “cognitive miser” because common knowledge is socially constructed and reinforced. (Entman, 2003: 420) There is at least some degree of heterogeneity in these circles with, for example, pronounced differences in the worldviews of elites in the religious right and secular liberals. Nevertheless, Entman’s theory allows for a White House like that of Obama’s—if early indications prove correct—with the ability to develop frames that tactically reinforce the respective elites’ adoration of masculinist power, their self-respect as democracy’s guardians, and the conservation of their knowledge networks. From these elite reaches, propaganda cascades down to opinion leaders in communities and to mass audiences with each level sending responses back up the pathway. What is significant about Entman’s approach is that it suggests a dialogical production of propaganda, a process that agrees with Young’s theory of the security regime—that we want to respond with gratitude to the powers that protect us—and Ahmad’s demonstration of the propagation of hatred against Muslim-looking people in the aftermath of 9/11.

The result is the construction of a public square that sets the agenda for public debate while, at the same time, preserving the appearance of openness and neutrality. W. Lance Bennet, echoing Herman, shows how this is constituted through the confluence of formal political power and journalism. “The over-riding norm of contemporary journalism”, he argues,

seems to involve compressing public opinion (at least law-abiding, legitimate opinion) to fit into the range of debate between decisive institutional power blocs. In this ironic twist on the democratic ideal, modern public opinion can be thought of as an “index” constructed from the distribution of dominant voices as recorded in the mass media.

By adopting such an opinion index, the media have helped create a political world that is, culturally speaking, upside-down. It is a world in which governments are able to define their own publics and where “democracy” becomes whatever the government ends up doing. (Bennett, 1990: 124-25)

We are left with a representation of democratic communication that is all the more convincing because it has the appearance of corroboration in a neutral public square. Jay Black’s facile assurances support this epistemologically corrupt framework. He argues that “what many call *propaganda*” should be part of the “marketplace of ideas”. It is up to “producers and consumers [...] to wisely sift and sort through” a panoply of propagandas is of a piece with this false assumption of a level playing field, one that lends legitimacy to the stupefying practice of formal and false “balance”—as though a verifiably truthful source and a liar are simply opposing points of view. (Black, 2001: 135) This effigy of democratic communication is the product of both deliberate strategy and unconscious resonance. The process is enhanced further by the constitutional promise of liberal democratic societies, articulated cogently by John Rawls, that the state will never impose the good on public life; that it will preserve maximal freedom for each of us to seek the good on our individual terms, building a public square that is neutral to all conceptions of the good. (Rawls, 2005) The liberal promise of neutrality, though this is nowhere in Entman, reinforces the perceived neutrality of the news media—the enduring distinction between hard news and opinion—where it is the reader or the viewer who freely comes to her own conclusions about the facts, his own judgement of values.

I have the sense that the Propaganda Model shares this ethos in its assumption that, if we can do the epistemological heavy lifting necessary to disabuse ourselves of the discrete lies

handed down to us, we will come to a neutral condition, an objective point from which we can make our decisions as citizens. If this is in fact the case, then it is problematic in two respects. First, as Michael Sandel and other critics of Rawls have shown, the public square is in no sense neutral; the liberal state is perpetually imposing its articulations about the good, about the nature and purpose of human life. (Sandel, 1996) Indeed, this process of imposition is central to the entrenchment of sovereign power's claim to life as such.

Second, we do not exist as abstracted reasoning beings; we are persons, and our inherent capacities for language, rational thought, self-understanding, and agency are informed by the material circumstances of our personalities—including the people who know and love us, the religious beliefs (if any) that claim us, our sense of gender and race, space and historical moment. The work of finding clarity against biopolitical propaganda cannot be the solitary epistemological undertaking presented in the Propaganda Model. It has to be the steady process of building democratic communication, a discussion that aims at making absolute and correct findings of fact and value because it flows from a diverse, indeed disparate, community of deliberators. The ultimate aim of democratic communication, because it must square off against the totalitarian claim of sovereign power to own and define the good of human life, is to sustain an active reflection about the nature and purpose of human life that is as wide and inclusive as the human species itself.

Democratic communication marks the transition to a different form of life, from bare life to personhood. It is the assertion of human dignity not as an abstract but in the features of one's personality and (political) will. I believe Chomsky shares this goal; further, I believe it is possible to modify the Propaganda Model as a tool for the deconstruction of the

propaganda generated by the security regime and its biopolitical aim of reducing life to bare life. In order for this to work, the model must work from, at the risk of being crude, a biopolitical economy; it would place corporate capitalism's concern for the maximization of profit within the context of sovereign power's encompassing project of claiming ownership of life as such. The model has much to gain from cascading effects theory, specifically the sense of propaganda's dialogical perpetuation. Furthermore, the fifth filter, "ideology", would ground and re-orient all the rest if we modified it to signify the totalitarian ontological project of the state post-Auschwitz. In this way, we can re-orient the Propaganda Model from its ostensible role as an exclusively empirical model to of media distortions by surfacing its implicit normative account of communication ethics; media effects matter and should be an explicit component of the model because they alter our capacity for democratic deliberation, our ability to respond to the force of communication in propaganda.

The Emperor of Atlantis

Agamben contends that there is no possibility of seeing sovereign power abandon the claim to own life as such; it is a necessary feature of the human condition that politics will always be *thanatopolitics*—it will always be about the power of dealing out death. The project of the state, in the name of protecting and emancipating us, is to treat us principally as bare life whilst according us constitutional rights and freedoms that simulate personhood, citizenship; hence the charge that he is a "political nihilist". I think there is enough in the recent historical record—from the *Law for the Protection of German Blood and German Honour* to the *Bantu Homelands Citizenship Act* and the *USA PATRIOT Act*—to show Agamben is

in fact a grim political realist. There are odious statutes, camps and gulags enough to prove the persistence of the sovereign's resolve to establish the conditions for personhood as the author of personhood, always holding in reserve the power explicitly to reduce us to bare life. Propaganda, as I have argued above, is this power cascading through a thousand voices—eliciting our adoration or pronouncing our excommunication.

The camps were real, and they have returned (if, in fact, they ever left). What Agamben misses is the persistence of personality, of determined human agency, even in the camps. For all of the energy sovereign power has expended on the extirpation of human dignity, human dignity, nevertheless, can find its voice. It is in the state of exception, where the person stands bereft of any cultural or juridical trappings of personhood, stripped down to the muteness of bare life by the perversion of justice that is biopolitically the rule of law, that we find evidence of the spontaneous upwelling of human dignity as an absolute feature of life. It does not seem to register with Agamben that even in the camps, even at this stage of the total abnegation of personhood, human agency continues to meet ultimate violence with rebellion and beauty.

Viktor Ullmann, a pupil of Arnold Schönberg, found himself interned for two years with his wife at Theresienstadt, at the same time a concentration camp and ghetto. It was 1942, and the Nazis had transformed this Czech village into a waypoint to the death chambers of Auschwitz, holding up to 60,000 Jews in a facility designed for 7,000. The death rate from disease and starvation was so high the year of Ullmann's arrival at Theresienstadt that the SS built an adjacent crematorium with a capacity of 200 bodies a day. Of the estimated

140,000 Jews held at this facility, 33,000 died at the site with approximately 90,000 removed to death camps. At the same time, Hitler presented Theresienstadt as a “spa town” for elderly German Jews, a place to keep them secure against the ravages of war; the Red Cross enhanced the impact of this propaganda with a favourable report of the camp.¹⁴ In reality, the Nazis designed the site to grind the inmates down to a bestial condition. But the Theresienstadt inmates included leading intellectuals, poets, rabbis, musicians and other artists, together they developed a secret and, under the circumstances, vigorous cultural and spiritual life. They mounted an estimated 2,340 covert lectures on a wide array of subjects, including “ethnography, psychology, politics, religion, or even Zionism”, maintained religious observances, a lending library and schools for the 15,000 that passed through the camp. (Kaufmann, 2008)

This is where Ullmann, in the last month of his life in 1944 composed *The Emperor of Atlantis* with librettist and fellow inmate Petr Kien. The one act opera depicts a world at total war under the heel of the Emperor Uberall, whom Ullmann defiantly introduces with a reconstruction of *Deutschland Uber Alles* in a minor key. Death goes on strike when the emperor attempts to annihilate art itself, leaving battlefields thick with the undying corpses of Uberall’s armies; he will return to work if the emperor agrees to be Death’s first victim. The libretto is a powerful allegory of the biopolitical condition, of life reduced to bare life—a society of the undead—by sovereign power. Emancipation comes through the figure of Death, because he has the power to reduce the body of the sovereign itself to bare life.

Ullmann sets this resolution in Bach’s chorale of the Lutheran hymn *A Mighty Fortress is our*

¹⁴ For further information, see *Holocaust Encyclopedia*, United States Holocaust Memorial Museum, <http://www.ushmm.org/wlc/article.php?ModuleId=10005424>

God, with Death presented as the means for the expiation and forgiveness of sins as enormous as the emperor's: "Thou shalt not take Death's great name in vain."

The SS discovered the opera, and when they understood its meaning they immediately sent Ullmann, with his wife and the cast, to death at Auschwitz.

I find in *The Emperor of Atlantis* and the defiant communal life whence it comes a proof of the adamant persistence of democratic communication. It confirms for me that the definitively human capacity for collective deliberation about the nature and purpose of human life can continue even in the camp, that the debate about what constitutes a good life and the political conditions necessary for its fulfilment endures even in the teeth of degradation to bare life. There is hope in this, because it suggests the ultimate fragility of propaganda and the total violence to which it gives voice. It may present the camp as the *polis*, but "Man is born for citizenship": the *polis* is in our species being and it is, one way or the next, coming to us.

The Propaganda Model, with the aid of biopolitical analysis, pushes the study of the political economy of communication to deconstruct the genealogy of power in the security regime. As argued above, it is insufficient to see propaganda as a tool of profit maximization and leave the analysis there. Its larger purpose is to facilitate the development of the State's warrant over life itself. The story of the contest between sovereign power and human agency is, ultimately, the story of communication, the ongoing confrontation between human thought and the anti-thought of the State. This

story is written on an epic, indeed messianic, scale in the rise of the Presidency of the United States.

6: THE ADVENT OF THE MESSIANIC PRESIDENCY

Only crime and the criminal, it is true, confront us with the perplexity of radical evil; but only the hypocrite is really rotten to the core.
—Hannah Arendt, *On Revolution*

The mere fact that we exist, that we conceive and want something different from what exists, constitutes for us a reason for hoping.
—Simone Weil, *Oppression and Liberty*

The Constitution of the United States is a law for rules and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.
—Justice David Davis, United States Supreme Court *Ex Parte Milligan*

71 U.S. 2 (1866)

Conscience persists even in the camp, and remains the site of democratic communication even when every vestige of citizenship is erased. While Agamben is correct to point to Auschwitz as the biopolitical moment of the corruption of sovereign power, Theresienstadt stands as a witness to the voice that persists in the state of voicelessness—the persistence of conscience as the sign and safeguard of human dignity against sovereign power.

Theresienstadt points to the capacity in us that remains despite structures of domination and oppression, a persistent, besieged faculty to judge facts and values that cannot be annihilated by the violence that is sovereign power. This obdurate, dynamic core of

human personality is what I mean by *conscience*. Against the attempts of Rawls and Habermas to build an account of democratic communication on the categories of classical politics, and contain the operation of conscience within these categories, I hold with Agamben that sovereign power has “taken from us forever” the distinctions of classical politics between public and private, between the citizen and the biological body.

(Agamben, 1998: 188) At the same time, Agamben does not seem to recognize that the persistence of conscience exerts its own force against sovereign power, and compels it to evolve. This is clear when one considers the shift in the construction of the presidency of the United States, from its origins as the dignified vassal of Congress to its aim of messianic dominance over political life and the life of conscience. The way forward, Edkins and others suggest, is to find in a new, public assertion of conscience a voice for bare life at a time when the violence of the messianic presidency, as seductive as it is comprehensive, presents itself as democratic communication. (Edkins & Pin-Fat, 2005)

In order to understand the impact of the *war on terror* on democratic communication, an examination that begins with conscience may be more fruitful than the debate over citizenship has proven to be. The contestation between republican and liberal theorists, their strategies for reconciling the persistence of pluralism, lead to justifications of sovereign power and constructions of diversity that, in my view, fail the test of building a satisfactory ethic of democratic communication. My hope is that an analysis that begins with the problem of conscience will, first, provide a way forward concerning the problematic of citizenship and pluralism, the construction and anathematisation of the “other” that comes with every construction of the “we” of citizenship. (Hayward, 2007) Conscience includes

our faculty for both encountering the other and reflecting on this encounter. Second, it explores the persistence, indeed primacy, of conscience in democratic communication despite our constitutional or positive status as citizen or stateless other. In this sense, I do not believe conscience is reducible to the structures of discipline and dominance ranged against it. Even in situations of the annihilation of citizenship, of its inscription into the projects of the state and our reduction to bare life, the human capacity to reflect upon the nature and purpose of existence remains intact despite attenuation, an enduring site of judgement and resistance, of agency and emancipation.

To be clear, I do not mean by *conscience* an isolated, individual “holy will”, standing at one remove from others, a transcendent atomistic self. Conscience, etymologically, is to know together, and it suggests a communion of deliberation, where the act of communication goes, as it were, all the way down to the core of our sense of self. It is not the choice-making agent one would find, for example, behind a Rawlsian veil: conscience takes up the complications and intricate conflicts within oneself, examining the features of identity including personal relationships and beliefs that claim us, that often precede our capacity to choose. This ongoing discernment of one’s sense of self is at the core of W.E.B. DuBois’ powerful exposition of the dilemma of race. “One ever feels his two-ness, an American, a Negro” Dubois wrote,

two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder. [The American Negro may long] to merge his double-self into a better and truer self. [But] in this merging he wishes neither of the older selves to be lost. He would not Africanize America, for America has too much to teach the world and Africa. He would not bleach his Negro soul in a flood of white Americanism, for he knows that Negro blood has a message for the world. He simply wishes to make it possible

for a man to be both a Negro and an American. (The Souls of Black Folk, as quoted in Calhoun, 2007: 289)

The porous nature of conscience, not a zone of exclusion but the inward point of contact between the self and the other, between aspects of the other in oneself, is also its great vulnerability.

From Bush to Obama, the *war on terror* is principally a war over conscience. The aim of the security regime is to justify itself not only through the ownership of bare life, but in laying claim to the life of conscience as well. Its purpose is to continue the century-old devolution to the messianic presidency through the permeation and colonization of conscience. Its agenda, on the strength of the values it presents as liberal and democratic, is to make conscience the ground of the presidency — to mollify, conscript, subdue and seduce the operation of conscience in sovereign power's construction of democratic citizenship. The biopolitical project of the *war on terror* is to produce, and lay claim to, what Agamben calls “forms of life” of which there are two: politically qualified life, the life of the choice-making citizen, and bare life, the naked fact of our biological existence. I argue that the *war on terror* produces these forms of life through two integrated means. Vivification is the process of animating public deliberation or doing the work of conscience for us in an effigy of democratic communication. It provides a more satisfactory account of the subjective impact of sovereign power as violence than theories of total biopolitical oppression (e.g. Edkins and Pin-Fat) because it acknowledges, with Iris Marion Young, that this power elicits adoration and gratitude. (Young, 2003) Vivisection is the extraction of the truth that makes us secure through rendition, torture and structurally

reinforced racism, from the matter of the human body reduced to bare life. The powers of vivification and vivisection mark the rise of the messianic presidency, its biopolitical function as the source of citizenship and arrogator of conscience. They allow a more precise definition of the violence of sovereign power that reduces all of us to *homines sacri* or bare life. At the same time, it is essential to recognize that these powers have a disparate impact on human personality, through the construction of a taxonomy of citizens and human existents according to their race, gender, religion and social condition. The violence of sovereign power is by no means equal. An ethic of democratic communication would speak to this contest over conscience, mapping it out as the terrain upon which the troubled story of citizenship unfolds and bare human life finds a new political voice.

Barak Obama's presidency—like good philosophy—raises more questions than it settles about democratic political culture in pluralistic societies. The central problem liberal political philosophy attempts to decide is how to sustain a culture of democratic communication, allowing us equally to share in self-governance as citizens even as we bear disparate, fundamentally irreconcilable views about the big questions of human existence. Will Kymlicka summarizes this project as seeking “equality between groups, and freedom within groups”; the sequestering of deep personal beliefs is essential if we are to allow maximal equality and freedom. (Kymlicka, 2007: 255) The rise to power of this son of a Kenyan scholar, it would seem, affirms the wisdom of a polity designed to relegate existential questions, questions about the good, to the small circles of our private lives whilst structuring the democratic playing field to address the basic, non-metaphysical issue of fairness. More astonishing still, this drama played out against the *war on terror's*

reassertion of race categories. (Ahmad, 2004) Standing in the light of Obama's victory, it is tempting to see the theocratic ambition of the Bush White House—its retrograde imposition of faith based standards in domestic policy and on the global stage, branding the *war on terror* a crusade to rid the world of evil—as an anti-liberal atavism that died with a stake through its heart in the election of 2008. Obama's triumph was the triumph of political liberalism and its project of creating a neutral framework of democratic communication, a public square emancipated from the stubborn intimacy of race, religion, gender and so on. Political liberalism allows anyone—any domestically born U.S. citizen—to be president. Obama won because he was constitutionally emancipated to fashion for himself answers to the big questions, while excelling in the political capacity to keep his metaphysics to himself and thus prove his worth for the leadership of the world's leading pluralist democracy: the bi-racially telegenic, cool and neutral decider. The prize is a presidency the framers of the republic would not have recognized as *republican*—not simply in the scale of the nation's martial, social and economic resources, but that the president should have these at what amounts to an imperial command.

My sense is that Obama's success, like the core function of the presidency itself, has nothing to do with anything like a liberal restraint concerning the big questions of human existence but is, instead, a most illiberal and muscular intrusion into these matters. Instead of carving out a zone of exclusion for the private operation of conscience, the function of the presidency in contemporary U.S. political culture is to elicit the conformity of conscience with powerful, charismatic affirmations of the nature and purpose of human life. Clearly, the core of Obama's ongoing resonance with voters and aliens alike—why we

want to adore him—has nothing to do with his bracketing out his beliefs about the big questions, the facts of his race and his religion, his worldview; he built political power in large measure through his acumen in actively presenting these features of his personality. Furthermore, these features were not parsed through the rarefied Cartesian space of a public square, they were embroiled in the maelstrom of detraction, calumny and desperate star gazing that is political discourse in the United States. Judging by his biography, the capacity to foreground his beliefs and make them publicly resonant is not something Obama purchased with his campaign contributions. It is a capacity that is integral to his political personality. None of this was novel or revolutionary in any way because U.S. electoral politics demands that candidates make bold claims about the big questions as defined in the political culture of the United States. Politics, in this sense, remains very much about the power to produce doctrine. The situation persists not as an aberration from the norms of political liberalism, but because of them.

Far from living in a post-metaphysical era, I believe Connolly is correct in his assertion that every “political interpretation projects presumptions about the primordial character of things”. (Connolly, 1993: 1) There is, therefore, a caesaropapist effect in the liberal narrative of public neutrality; it provides plausible cover for the construction of dominant, history-ending definitions about what it means to be human. Instead of building a political culture beyond metaphysics—the purely procedural and inclusive political culture, democratic in the equal freedoms it accords for our private fulfilment in seeking the good individually—this narrative allows sovereign power to enforce its edict about the nature and purpose of human life. The post-metaphysics feint allows a political culture to develop

and enforce the limits of the political community, setting the bounds between the citizen and the alien, and the community of life itself, setting the bounds between human and sub-human, the quick, the dead and the expendable. It is the means by which sovereign power bifurcates human existence, producing on the one hand politically qualified life—the citizen made in its own image—and, on the other, bare life, the human organism. Political liberalism’s restraint about the big questions, its concern to create maximal space for our individual, creative self-fashioning, is part of its edict about the “primordial character of things”. Instead of standing against republicanism, political liberalism works symbiotically with the republican project of defining the national character, the way of life, of a democratic people. Together they confer freedom and equality on the terms of sovereign power, not on the terms of conscience. They set the bounds of democratic communication, and remove from the function of citizenship public deliberation about existential questions. There is no return through political liberalism to classical politics, the sharing in self-governance of a democratic people through the scrupulous separation of public and private life, of political life and organic life. Instead, citizenship becomes the constructed acceptance of a synthetic freedom and equality, synthetic because freedom and equality under sovereign power are not the fruit of the operation of conscience; they are, instead, the doctrines of the state policed by violence. Citizenship becomes sovereign power’s imposition of a doctrinal closure on the debate about what it means to be human, because the definition of who is a citizen carries with it the power to define who is and who is not human. This places citizenship at odds against conscience and its principal function of continually discerning the meaning and purpose of human existence; sovereign power

might simulate conscience, but it cannot replace the restless human work in conscience of examination and deconstruction.

I will argue below that the persistence of this unexamined, dominant metaphysics allows the continuing ascendance of the security regime. Further, the political effect of this metaphysics is to consolidate power in the messianic presidency. A great deal of authoritative work has been done to map the contours of, and at times laud, the “imperial presidency”, with reference to the global reach of the executive branch in the United States. (Schlesinger, 1989) In the words of Michael Ignatieff, “Yet what word but ‘empire’ describes the awesome thing that America is becoming?” (Ignatieff, 2005) My concern is the biopolitical dimension this office now assumes; I believe the claim it makes to validate human life as such, to “touch the soul” of the citizen, to be the agent of a divine plan in the unfolding of human history suggest a presidency that is not simply imperial in its self-understanding but messianic. I will suggest that a biopolitical reading of the *war on terror* gains ground in deconstructing the covert ontology of what passes for democratic political culture, moving the analysis from ideology and discipline to the messianic powers of vivification and vivisection. Ostensible neutrality “about the primordial character of things” is the shell within which the messianic presidency quickens, rising to primacy over constitutional governance in the United States. The Obama White House does not represent a break with this phenomenon; it does not return the Office of the President to the proportions the framers of the republic entrenched constitutionally. Instead, through its reinvigorated prosecution of the *war on terror*, the Obama White House represents the next phase in the maturation of the messianic presidency.

At the same time, the messianic presidency as sovereign power is the product of continual negotiation, and its powers of vivification and vivisection do not—indeed cannot—extirpate the operation of conscience. Against the facts of the *war on terror*, I argue for the role of conscience in democratic communication, across the full range of cultural expression, from formal political and jurisprudential discourse to movements of social change and popular culture. Democratic communication persists even in the midst of bare life as the site of the public operation of conscience, of *knowing together*. It is the assertion of conscience against sovereign power, not through grand narratives or defiant, beautiful acts of hopelessness but through our agonistic and reflexive encounters in a plurality of worldviews. The point, therefore, of Kymlicka’s “equality between groups, and freedom within groups” is not to isolate conscience as an insular entity, but rather to allow us to meet each other and contend with each other over the big questions about human existence, to get to the truth and to order our affairs to suit our best understanding about these questions. The project of democratic communication is not to create zones of exclusion for our creative self-fashioning, it is to allow us to take seriously the content of each other’s lives, to discern therein insights into the way we understand ourselves as human persons. In this sense, democratic communication necessarily involves the ongoing articulation and deconstruction of ontological claims, not to rid us of metaphysics but instead—agonistically, empathetically—to find our own voice in it.

Vivification

Vivification is the claim sovereign power makes over life itself, the claim to a) breathe life into the body politic and b) guarantee and legitimize our organic life. It is the arrogation to sovereign power of the work of conscience, to decide for us the nature and purpose of human existence. Vivification simulates our species being to displace it. In the attempt to mark the end of history, the conclusion of the process of human becoming, vivification presents the order of sovereign power as the penultimate expression of what it means to be human. We do not, to the degree that we benefit from this dominant ontology, experience this as oppressive. Instead, sovereign power functions through vivification not simply to secure our submission but our adoration and complicity; it wants us to make its reasons our own reasons not in any superficial intellectual assent but at the very core of our self-understanding. Vivification aims at total deliberative closure, denying the possibility of any insight or Archimedean point that might serve conscience at a critical distance from sovereign power; it is the violence that is sovereign power presenting itself as a democratic political culture.

Perhaps the clearest example of vivification is the messianic stature of the President of the United States, specifically its rearticulation of prosaic politics in, to borrow from Bill Clinton's use of Lincoln, the "better angels of our nature". From Mike Huckabee's assertion that his candidature was to bring about "a revival of our national soul", to Hillary Clinton's goal of awakening America from its "sleeping sickness of the soul", to Bush II's sense of his God-given vocation to "touch somebody's soul by representing our country" and the redemptive promise of Obama's "new birth of freedom", the presidency presents

itself as a point of contact between brutish political reality and the sacred. The president approaches the body politic as if it were the bound and corrupt body of Lazarus to speak a word of power and revivify the dead flesh. Each moment of incantation struggles in a fractious political culture to assert the president's primacy over souls he or she would awaken, to make biological life the subject of the president's sovereign word in order to consolidate and justify political power. This is in stark contrast to the intentions of the framers of the republic and their construction of what is, in comparison, a docile presidency. Their goal was to create an executive branch simply to preside over the implementation of laws enacted by the legislative branch—the seat of the motive force of government—under the scrutiny of the courts. They explicitly rejected proposals to grant the president the trappings of a monarch, and one can surmise they would have viewed any pontifical aura for the office with equal opprobrium. (Healy, 2008) In this way, they sought a government of laws and not men. Today's president-as-avatar is not, therefore, in the constitutional tradition of the United States. It is instead, borrowing from William Connolly, biocultural in its attempt to synthesize the spiritual life of a pluralistic people even as it consolidates extra-constitutional power, a monopoly of sovereign violence that inscribes biology into politics. Its aim is to present this power, this violence as something consistent with the soul of the citizen, warranted by the sacredness of human life.

The messianic discourse of the U.S. presidency is not a form of political communication because its goal is to foreclose the possibility of dialogical critique and contestation about what it means to be human, presenting its program as definitive of the species as such. Edkins and Pin-Fat, in their reading of Agamben and Foucault, argue “a properly political

power relation” must bring with it the possibility of resistance—“the subjects it produces are party to the relation, and their resistance is a necessary component of what is happening.” (Edkins & Pin-Fat, 2005: 23) On this view, the biopolitical production of bare life establishes a relationship of violence between sovereign power and subject: “In the face of a biopolitics that technologises, administers and depoliticizes, and thereby renders the political and power relations irrelevant, we have all become *homines sacri* or bare life.” (Edkins & Pin-Fat, 2005: 11) The presidential power to touch the human soul brings with it the power to admit and exclude souls from presidential attention, to feel their pain or to excommunicate. Where Hobbes contended that the sovereign’s monopoly over violence— “that mortal god”—marks the foundation of politics and the possibility of citizenship, in Edkins and Pin-Fat’s reading of Agamben polity dissolves in the sovereign’s capacity for total violence. There is no return, they say with Agamben, to the classical political distinctions between public and private, biological and political, citizen and alien. Political communication becomes sovereign violence, the means by which it produces our lives as bare life.

The trouble with this account of biopolitical violence is that it rests on the assumption, as Connolly suggests, that there was in fact a classical moment when there was a distinction between public and private spheres, between political life and biological life. “Every way of life”, Connolly argues, “involves the infusion of norms, judgments, and standards into the affective life of participants at both private and public levels. Every way of life is biocultural and biopolitical.” (Connolly, 2007: 29) The risk in Agamben’s biopolitical analysis is that it could obscure the ways in which sovereign power constructs the idea of

private life as the foundation of a free, pluralistic society as though there was a time when *bios* left *zoë* in a state of radical purity. It seems nostalgic for the myth of liberal pluralism, and thus misreads the ethos of sovereign power. By this myth, the purpose of the public sphere is to set the conditions necessary to leave us to our own, private devices to sort out individually the meaning of life without the intrusion of the state. The United States Supreme Court rendered this a precept of constitutional law when it ruled,

At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State. (*Planned Parenthood v. Casey*, 1992)

In contrast, the hope Connolly finds in pluralistic societies—he specifies the permanent pluralism of “existential faiths”—is to see the proliferation of zones of public contestation about the sacredness of human life, biological and political.

Further, Connolly rejects Agamben's definition of the sacred as the life that can be killed without committing murder, the perfectly expendable, sacrificial victim. The sacred for Connolly is that which is closest to the divine, touching “the highest concerns of human existence.” (Connolly, 2007: 28) On this basis, I propose that to be human is to communicate culturally and politically our biological life, and the life of the Earth as a whole, as part of this sacred nature. Borrowing from Connolly, the purpose of democratic political culture is to “negotiate a generous ethos of pluralism that copes in more inclusive ways with the nexus between biology, politics and sovereignty.” (Connolly, 2007: 30) The violence of sovereign power is, therefore, not simply a totalitarian extirpation of personality, the reduction to bare life; it includes the imposition of a synthetic, authoritarian spiritualism as the ghost in a machine-made subjectivity. It is the attempt to

pervade the inner life of the human person, the life of conscience, with the ethos of sovereign power, blocking one's participation in the ethos of pluralism.

The messianic discourse of the U.S. presidency is precisely this kind of sovereign violence, the subjugation of conscience through vivification. When the sovereign claims the function of articulating and instantiating “the highest concerns of human existence”, as the mediator and source of the sacred, it must orient all constitutional, economic, and cultural power to itself. I suggest this is a more compelling explanation of the rise of the imperial presidency over the legislative and judicial branches than more traditional approaches through political economy: profit maximization is a necessary but not a sufficient condition for this phenomenon.

Connolly provides a powerful illustration of the role of the sacred in the construction of the imperial presidency in his analysis of the convergence between evangelical Christianity, “cowboy capitalism” and the Republican Party in the “theo-econopolitical machine” that was the presidency of George W. Bush. (Connolly, 2005: 878) Bush becomes the earthly vicar of the fictive Christ of the *Left Behind* series, the Christ of total violence fashioned in the image of the Evangelical right's “collective will to revenge against” Jews, Muslims, Catholics, homosexuals whose very existence proves humanity's fallen nature and frustrates the Kingdom of God. (Connolly, 2005: 875) The more fervently they strive against these godless forces, the more they prove their worthiness and sense of election. The O'Reilly Factor and the offerings of Fox News as a whole, the apocalyptic branding of the *war on terror* and the U.S. invasion of Iraq, the grooming of experts cum apologists to inoculate

audiences against hard evidence, and the proliferation of the Rovian attack machine against critics of economic neoliberalism and its energetic production of grinding poverty are principally forms of anathematization and excommunication. In this light, Bush's recourse to torture at Abu Ghraib and as-yet-unknown sites throughout the world, his declaration of presidential primacy over the rule of law and constitutional polity, and his relegation of "non-enemy combatants" to the status of bare life at Guantanamo Bay and Baghram Air Base are of a piece with his martial Christology, his own "royal priesthood".

The resonance between the "existential bellicosity" of economic greed and the "transcendental resentment" of those born-again in "the righteous violence of Christ" sustains a pervasive, normative pressure on one's sense of self-as-citizen. Connolly argues that this "works by infiltrating and inflecting a variety of perceptions, creeds, interests, institutions, and political priorities; each of them in turn recoils back upon it, modifying it in this way and intensifying it in that." (Connolly, 2005: 876, 72) This is the process I call vivification; its aim is to create a political economy that serves the entrenchment of a closed, unchallengeable doctrine about the nature and purpose of human existence, to make sovereign power the source and safeguard of the sacred. Although the Bush White House provides a particularly cogent illustration of the dynamic, Connolly is correct to insist that "the drive to existential revenge, while more amenable to some economic creeds and religious doctrines than others, can in fact inhabit any faith, constituency, doctrine, institution, or machine". (Connolly, 2005: 881) Like Tennyson's rift in the lute, vivification is a permanent feature of democratic communication. Further, I propose that the imperial presidency as an institution, in its messianic dominance, embodies "the drive

to existential revenge”; there may be no return in the political culture of the United States from the imperial presidency.

The polity of the United States has come a long way since Edmund Randolph, representing Virginia at the Constitutional Convention, worried that placing executive powers in the hands of a single elected official risked creating “the foetus of monarchy”. (Healy, 2008: 38) Constitutionally, the separation of powers was to have guarded against tyranny by creating similarly situated branches of government in perpetual tension. This contest of ambitions, policed by a vigilant, free press, was to preserve a “rule of law not of men”. Against John Woo’s revisionist constitutional theory and his insistence of the “unitary” president’s primacy over all branches of government, indeed the rule of law itself, the historical record shows that for the first hundred years of the republic it was Congress, not the White House, that decided the national agenda. For example, in a message to Congress of 1822, President James Monroe affirmed

Of these [branches] the legislative [...] is by far the most important. The whole system of National Government may be said to rest essentially on the power granted to this branch. They mark the limit within which, with few exceptions, all the branches must move in the discharge of their respective functions. (As quoted in Healy, 2008: 37)

Jefferson ended his two predecessors’ custom of speaking in person before Congress, arguing that this was too similar to the British “Speech from the Throne”. Instead, he sent written state of the union addresses to Congress, a practice that held through his successors for 112 years. This suggests that presidential spectacle was foreign to the political culture of the United States, but it would be erroneous to infer that Jefferson placed decorum and the rule of law above all considerations. Instead, he insisted that an abrogation of the

constitutional structures designed to guard against tyranny would be a legitimate exercise of citizenship if the future of the republic was imperilled. “A strict observance of the written laws”, Jefferson wrote to a friend in 1810,

is doubtless *one* of the high virtues of a good citizen, but it is not *the highest*. [...] The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means. (As quoted in Goldsmith, 2007: 80)

In the canon of U.S. constitutional thinking, this observation may seem to be an *obiter dictum*; nevertheless, as Goldsmith shows, it played a role in the Bush White House and its doctrine of presidential primacy in the *war on terror* and the casuistry of the Office of Legal Council.

Presidential messianism and the “terror presidency” it sustains did not begin *ex nihilo* with George W. Bush. Despite the revolutionary mistrust of concentrated power, the constitutional structure and contentious political culture it inspired, the office of the President of the United States seems to have been encoded from the outset, if embryonically, with the power to decree the state of exception.

In the earliest days of the republic, Congress enacted as an “emergency” measure the *Alien Friends Act* of 1798. Set to expire on the last day of John Adams’ presidency, the *Act* anticipated the biopolitics of the *USA Patriot Act* vesting total authority in the executive branch to seize, detain, and deport *any* non-citizen deemed dangerous to the United States, without the rights to a hearing, to know the charges or the evidence. (Stone, 2004: 31)

At issue was the threat from Jacobins, not Jihadists: the French Revolution, in the view of the decidedly non-populist Federalist Party, was a threat to the dignity and cohesion of the United States as even one Jacobin could “alarm a whole country with ridiculous fears of government.” (Stone, 2004: 34) Tallyrand and his cohort cast a shadow across the Atlantic, exacerbating tensions between Federalists and their Republican rivals in the nascent partisan politics of the United States. President Adams, against the advice of his friends, actually drafted articles of war against France and began to mobilize the navy.

In this overwrought climate, Benjamin Franklin Bache, grandson and pupil of the polymath of Philadelphia, tested the limits of the First Amendment’s guarantees of democratic communication in excoriating Adams and his predecessor, Washington. Adams was “blind, bald, crippled, toothless [and] querulous”. As to the “neomonarchical” father of the republic, Bache wrote that if a nation could be “debauched by a man, the American Nation has been debauched by Washington”, “the source of all the misfortunes of our country.” (Stone, 2004: 35) Invective of this kind threw Adams and his party into fury, moving the Federalists to make the *Sedition Act* the cornerstone of their agenda of 1798. The *Act*, as Stone argues, declared war on dissent:

[...] if any person shall write, print, utter or publish ... any false, scandalous, and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame [them], or to bring them [into] contempt or disrepute; or to excite against them [the] hatred of the good people of the United States ... then such person ... shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years. (Stone, 2004: 36)

Both of these Federalist statutes, the *Alien Friends Act* and the *Sedition Act*, asserted primacy of sovereign power over citizen and non-citizen alike, reducing both categories of persons

to mute, bare life.¹⁵ Sovereign power held the trump over constitutional rights, guarding against the republic “absurdly sacrificing the end to the means”. In this instance, the state of exception was imposed to guard against the threat of Jacobin terrorism but it also had the effect, as the Republicans of the day were quick to demonstrate, of using criminal sanctions to chill political debate, entrenching the power of the Federalists and their newspapers. For example, the New York *Commercial Advertiser* opined that any critic of the *Act* itself, this would include the Republican press, “‘deserves to be suspected’ of sedition.” (Stone, 2004: 46) The Orwellian turn in the early days of the United States triggered passionate and urgent debate about the First Amendment and its right to free speech, the nature of government and its relationship to republican citizenship. James Madison condemned the *Act* as unconstitutional because it stood on the “exploded doctrine ‘that the administrators of the Government are the masters, and not the servants, of the people’.” (Stone, 2004: 45)

The courts of the day did not share Madison’s view; instead of finding the *Sedition Act* unconstitutional, the Federalist judiciary, with the “reprehensible” jurist Samuel Chase in the vanguard, was zealous in its prosecution of “the difference between liberty and the licentiousness of the press”. (Stone, 2004: 62) Republicans did not attempt to seek a ruling from the Supreme Court because it, too, was dominated by Federalist appointments.

¹⁵ Two decades before these events, comparatively more broad-minded exercises of sovereign power began to unfold to the north. On June 22nd, 1774 the British Crown gave Royal Assent to the *Quebec Act* and radically altered the polity of the nascent Canada. Cited as one of the “intolerable acts” in the Declaration of Independence, the *Act* broadened the scope of religious tolerance. While Catholicism remained illegal in Britain, the Crown guaranteed religious freedom for Quebec’s Catholic majority, eliminated religious references in the Test of Oath, preserved the seigneurial system and the Napoleonic Code in civil law, and confirmed Quebec’s territorial integrity south of the Great Lakes between the Mississippi and Ohio Rivers. The *Act*’s provision of religious freedom was confirmed in the *Constitutional Act* of 1791, making this a cornerstone of what would become Canadian federalism. (Foulds, 2009)

(Stone, 2004: 68) The Court would not speak to the statute until 1964, when it stated in *New York Times v. Sullivan* “although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history.” (As quoted in Stone, 2004: 73)

Congress designed the *Alien Friends Act* and the *Sedition Act* to be emergency measures, and set them to expire on the last day of Adams’ presidency; accordingly, the statutes died on March 3rd, 1801. Jefferson took the White House for the Republicans and, in one of his first official acts, pardoned everyone convicted under the *Sedition Act*, stating that he viewed it “to be a nullity as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image.” (Stone, 2004: 73) This ended the era Jefferson described as “the reign of witches”. (Stone, 2004: 46)

The state of exception triggered by the Federalist’s apprehension of a Jacobin threat to the republic, and their own political ambitions, brought all branches of government, the judiciary included, and much of the press into biopolitical collusion. Despite the vehement and articulate outrage of citizens, from July 1798 to March 1801 the Federalists succeeded in turning the newly minted Constitution and its First Amendment to their own purposes in the production of bare life. All of the institutional safeguards against tyranny seem to have failed, except the persistent outcry from ordinary people and statesmen alike that this new republic was an effigy of their fundamental understanding about the nature and purpose of human existence. This outcry was something of a quiet revolution, because it restored the semblance of a democratic project in carrying Jefferson to the presidency; it

was, however, not enough to exorcise from the presidency its arrogation of power and capacity for sovereign violence.

Two years after his inauguration, Jefferson, notwithstanding the lessons he had learned from Adams about the perils of presidential over-reaching, conducted the Louisiana Purchase without the requisite constitutional authority. Similarly, Madison took West Florida in 1810. Twenty-three years later, Henry Clay, “the Great Pacifier”, heaped scorn on Andrew Jackson for bringing about “a total change of the pure republican character of the Government, and ... the concentration of all power in the hands of one man.” In 1846, James K. Polk triggered a congressional declaration of war by dispatching troops into territory claimed by both the United States and Mexico. (Healy, 2008: 39– 41) This earned the president censure by the House of Representatives. It also stoked the wrath of Abraham Lincoln, set down in a letter on February 15th, 1848 to his law partner and defender of Polk, William Herndon:

Allow the President to invade a neighbouring nation whenever he shall deem it necessary to repel an invasion, and you allow him to do so *whenever he may choose to say* he deems it necessary for such purpose, and you allow him to make war at pleasure. Study to see if you can fix *any limit* to his power in this respect after having given him so much as you propose. If to-day he should choose to say he thinks it necessary to invade Canada to prevent the British from invading us, how could you stop him? [...]

The provision of the Constitution giving the war making power to Congress was dictated, as I understand it, by the following reasons: kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This our convention understood to be the most oppressive of all kingly oppressions, and they resolved to so frame the Constitution that no one man should hold the power of bringing this oppression upon us. But your view destroys the whole matter and places our President where kings have always stood. (As quoted in Stone, 2004: 123)

With this on the record, Lincoln nevertheless arrogated to the presidency unprecedented powers in his prosecution of the Civil War. This included blockading the ports of the Deep South and suspending *habeas corpus* in 1861, suppressing resistance to the draft by extending the suspension of *habeas corpus* into the North in 1862, shutting down over 300 newspapers and arresting an estimated 13,000 to 38,000 civilians without due process. (Healy, 2008: 41; Stone, 2004: 124) Lincoln's state of exception resolutely placed the president "where kings have always stood", entrenching in the office a monopoly over sovereign violence. The author of the Emancipation Proclamation reduced the citizen to bare life in order to rebuild the cohesion and indivisibility of the republic.

From the earliest days of the presidency, there is a pattern of contestation between the strict constitutional limits of the office and its construction in U.S. political culture, including the ambitions, personality and historical moment of its incumbent. The revolutionary ethos of the republic, its demand for accountable sovereign power, seems to be in perpetual tension with the concentration of power in the office of the president. Dick Cheney and his fellow travellers did not invent out of whole cloth the idea of presidential primacy; they tapped into one of the oldest scandals, which Kernell correctly insists predates Fox News, the O'Reilly Factor and "the emergence of broadcast technology". (Kernell, 1987: 1031-32) In the first century of the United States, dissent against presidential primacy, in formal political discourse, in the press, and in popular uprisings was strident, vitriolic and at times incarnadine, bathed in fratricidal blood. It was the chaotic upwelling of dissent, not any constitutional mechanism or safeguard, that repeatedly returned the United States from a polity of tyranny to the fragile experiment of

democracy. Democracy was in the act of communication, imperfectly captured in institutional structures and political personalities. It contended against the surd of a desire for the opposite, our desire as Bob Dillon aptly insists to “serve somebody”. We often seem to want the state of exception.

Every state of exception triggers a response in our self-understanding, in the personal life of conscience. The biopolitical question, as Edkins and Pin-Fat have it, is whether this response can be properly political. In their reading of Foucault and Agamben, they draw a distinction between a power relationship, which is political, and the relationship of violence that is sovereign power. The former is “invariably accompanied by resistance: the subjects it produces are party to the relation and their resistance is a necessary component of what is happening.” Republican outrage against the *Sedition Act* is a serviceable example of this dynamic. This is distinct from sovereign power where violence creates the totally administered life, the “production of bare life, not political subjects, attempts to rule out the possibility of resistance.” (Edkins & Pin-Fat, 2005: 23) Connolly takes a different view. On his premise that every way of life exercises pressure on subjective human life, he argues that resistance in the state of exception is always possible:

But, within the idea of the exception “decided” by sovereignty, an oscillation flows between a juridically established authority that authoritatively decides the exception and social powers that assert themselves irresistibly in and around the decision. (Connolly, 2007: 32)

Connolly must acknowledge that these “social powers” do not exist at a pristine remove from “juridically established authority”. I suggest that in invoking the state of exception, sovereign power attempts at the same time to dictate our response, to “touch our soul”

and condition the movement of conscience. This movement of conscience was the foundation of democratic communication in the first century of the United States, repeatedly calling the republic back to its revolutionary project of holding sovereign power to account. The first decades of the twentieth century brought a profound shift in this dynamic, as the rise of messianism in the presidency attempted to administer all aspects of life, including the life of conscience upon which democratic communication depends.

7: CONSCIENCE AND THE MESSIANIC PRESIDENCY

The bleakness of Woodrow Wilson's moment in history—the Bolshevik revolution and the First World War—is matched only by his capacious self-regard. He took to the White House like an American uberman, a political scientist swollen to the proportions of a Hegelian world historical figure. Taking his seat in 1919 at the Paris Peace Conference, Wilson is reported to have told Britain's Lloyd George and France's Georges Clemenceau,

Why has Jesus Christ so far not succeeded in inducing the world to follow his teachings in these matters? It is because he taught the ideal without devising any practical means of attaining it. That is the reason why I am proposing a practical scheme to carry out His aims. (As quoted in Healy, 2008: 63)

Inelegant and preposterous, Wilson's claim of divine warrant nevertheless reveals the subjective life of the presidency from the Great War through the *war on terror*: the U.S. president is to purify the world of evil in every form, safeguarding our biological being and the sacredness of human existence. The self-described leader and defender of the free world becomes the ground of democracy itself, both the means and the telos of our emancipation as a species. It would be a mistake to see this solely as the function of the hubris of any particular incumbent, though the temptations are ample, because it is the discursive product of political culture. Connolly's "resonance machine" is a workable model for the interplay of institutional structures, rapacious ambition and profiteering, and the cultural toxicity of an apocalyptic hatred of the other in the construction of the president-as-messiah. The theocratic imagination of presidents, regardless of their footing on the political spectrum, stirred devout collaboration in Congress. The result, as described by

constitutional scholar Edward Corwin, was the dawn of a new constitutional regime consisting of

[...] the attribution to Congress of a legislative power of indefinite scope; the attribution to the President of the power and duty to stimulate constantly the positive exercise of this indefinite power for enlarged social objectives; [and] the right of Congress to delegate its powers *ad libitum* to the President for the achievement of such enlarged social objectives. (As quoted in Healy, 2008: 73 - 74)

Presidential messianism amplifies sovereign power and inverts the revolutionary norm of democratic justification: citizenship derives its legitimacy and scope from government.

The *de facto* constitutional change Corwin discerns in the roles of the President and Congress is, therefore, a change in what it means to be a republican citizen.

My argument is that the ongoing constitutional transformation of the United States is a biopolitical process, and vivification—the colonization of conscience by sovereign power—is one of the two principle means by which it takes place. Further, this happens within the intensification of the culture of the “sovereign individual” in public discourse. In legislation and jurisprudence, philosophy and political economy, popular and counter-culture the idea of the radically self-fashioning individual, the choice-making author of the meaning of the universe enshrined in *Planned Parenthood v. Casey*, becomes axiomatic even as the rise of the messianic presidency attempts continually to turn it to its own purposes. Martha Nussbaum’s treatment of the Pledge of Allegiance is an apposite example of this process. She argues that the author of the pledge, the nativist Francis Bellamy, intended its canonical articulation of individualism—“with Liberty and Justice for all”—as a liberal norm to have the systemic effect of putting new immigrant populations in their place.

For Bellamy, the Pledge of Allegiance was crucial both because it affirmed a moral basis for nationhood in a world of greed and also—and inseparably—because it affirmed the values of a Protestant, Northern and Western European America against the subversive values vaguely associated with new immigrants from Southern and Eastern Europe, and their Catholic faith. For that reason it is not altogether surprising that the pledge itself expressed liberal ideals, while the ritual of compulsory school recitation that Bellamy associated with it expressed a less lofty set of values, creating an imposed order into which all newcomers would be inserted at their peril. (Nussbaum, 2008: 201)

Nussbaum is at pains to show that, from its origins in the 1890s, Bellamy's project was not right wing: racist and anti-Catholic, he advocated economic justice for the deserving poor and was passionately involved in Protestant socialist circles. The purpose of the pledge was to bind the conscience of the citizen and exclude the alien in the advancement of American democracy. With the support of the American Legion, the Daughters of the American Revolution and the Ku Klux Klan, the pledge was a social movement that became the credo of the nation's civil religion, a powerful tool of vivification.

The cultural entrenchment of presidential messianism resonated with the use of law making to curb the operation of conscience, at a time when the White House effectively crossed the Rubicon to claim for itself a legislative role. Woodrow Wilson introduced a prime ministerial approach to the executive branch, insisting that the president should not simply leave Congress to its own devices in defining the legislative agenda; instead, the executive branch should secure its own aims by asserting leadership in the Capitol.

Breaking with his constitutional role, Wilson insisted that the president should function as a "prime minister, as much concerned with the guidance of legislation as with the just and orderly execution of law." (Healy, 2008: 63) However, by adopting the practice of delivering the State of the Union speeches in person, and assuming leadership of the

legislative agenda, he defined a role for the presidency that was more regal than prime ministerial. The first statutes Wilson chose to advance targeted communication and the public operation of conscience at a time of war, with a view to safeguarding the republic against “espionage” and “sedition”.

Congress, as yet unaccustomed to its new role of looking to the White House for its lead, subjected the *Espionage Act* of 1917 to nine weeks of intensive and heated debate. The purpose of the statute was to criminalize any attempt to interfere with recruitment into the United States armed forces or the morale of its personnel. In its original form, the statute would have made it illegal to publish in time of war information the president declared to be “of such character that it is or might be useful to the enemy.” It would have criminalized communication intended to “cause or attempt to cause disaffection” from the United States or “promote the success of its enemies”. It would have granted the postmaster general authority to refuse transmittal of any writing or publication that violated “any of the provisions of this act” or was “of a treasonable or anarchistic character”. It was specifically the press censorship provision that caused members of Congress to bridle. Wilson intervened personally, insisting “authority to exercise censorship over the press ... is absolutely necessary to the public safety.” Thirty-six members of Wilson’s own Democrats joined the Republican opposition to defeat the press censorship provision. Maine’s Representative Ira Hersey carried the sentiment of the day, rejecting the executive’s bid “to place into the hands of the President unlawful powers, to grant to him ... authority to take away from the citizen the protection of the Constitution.” (As quoted in Stone, 2004: 147 – 49) Even so, the *Espionage Act* carried

and made it a criminal offence punishable by up to twenty years imprisonment for any person, during time of war,

(a) willfully [sic] to “make or convey false reports or false statements with intent to interfere” with the military success of the United States or “to promote the success of its enemies”; (b) willfully [sic] to “cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States”; or (c) to “obstruct the recruiting or enlistment service of the United States.”

It empowered the postmaster general to exclude from the postal service “any matter advocating or urging treason, insurrection or forcible resistance to any law of the United States.” (Stone, 2004: 151 – 52)

The *Espionage Act* remains in effect. It was at the centre of the Cold War’s “culture of secrecy.” Nixon used the *Act* to threaten the New York Times against publication of the “Pentagon Papers”, the 7,000 page top-secret study of the Vietnam War commissioned by Robert McNamara and leaked by Daniel Ellsberg. Ellsberg insisted these documents “demonstrated unconstitutional behavior [sic] by a succession of presidents, the violation of their oath and the violation of the oath of every one of their subordinates.” In the *war on terror*, as late as 2006, the Bush administration threatened journalists with prosecution under the *Act* for publishing classified information. (Vaughn, 2008: 155)

Wilson had successfully pressed Congress for a declaration to bring the United States into the Great War as an “Associated Power”, and the *Espionage Act* was to have consolidated in the executive branch control over communication as a war power. The urgency of communication in the ethos of the war could only have been heightened by the British interception, and publication in the United States press, of the Zimmerman telegram in

1917. This missive from the German Foreign Secretary to his ambassador in Washington encouraged an overture to Mexico, promising German assistance in any attempt they made “to reconquer the lost territory in New Mexico, Texas and Arizona”. (As quoted in Hershey, 1918: 156) The telegram was useful in Wilson’s attempts to mobilize his nation to spill its blood and treasure in a remote, European conflict. However, as congressional debate over the *Espionage Act* showed, it was not enough to galvanize national sentiment for war. Wilson turned to the progressive journalist George Creel, naming him head of the Committee on Public Information (CPI) and chair of the Board of Censors. His task was not simply to mobilize public opinion for the White House but to teach it to “stand at attention and salute”. (Stone, 2004: 153)

Powered by the same anti-immigrant sentiment that fuelled Bellamy’s success in the Pledge of Allegiance, Creel’s propaganda campaign produced war movies that made an exhibitionism of the enemy’s atrocities, pamphlets, posters, speeches and editorials to enflame xenophobia, hatred of Germans and anyone critical of the United States. (Stone, 2004: 154) The cultural effect of the campaign worked a potent and dark synergy with the coercive force of the *Espionage Act*. The CPI encouraged the formation of vigilante groups—like the 200,000 strong American Protective League, the Boy Spies of America and the Sedition Slammers—to keep the authorities apprised of disloyal conduct. These organizations quickly developed programs of their own, including “wiretaps, breaking and entering, bugging offices, and examining bank accounts and medical records.” In Cincinnati, a group of masked men seized and whipped a minister before he could speak at a demonstration against the war. In Illinois, a mob wrapped a suspected dissident in the

flag and murdered him in the street. Wilson would aver that he had “no sympathy with the men who take ... punishment into their own hands”, they were not “worthy of the free institutions of the United States”; even so, it remained very much the program of his administration to foment outrage, to dominate the conscience and deliberative life of U.S. citizens. (Stone, 2004: 157)

Over two thousand people were charged in this period under the *Espionage Act*, resulting in over one thousand convictions by a judiciary that was on the whole compliant with the executive branch’s aims. Stone argues that, in fact, the repressive effect of the statute was something Congress did not intend, but a function of its aggressive application by the federal court. (Stone, 2003: 335) Even though Congress voted down the statute’s proposed press censorship measures, the function of the *Act*, in the courts and society generally, reinforced the status of the dominant press, casting a pall of suspicion over papers intended for German- and Irish-American, socialist and pacifist readers. (Vaughn, 2008: 154)

The “revolutionary” journal *The Masses*, with its bohemian Greenwich Village aesthetic and the intellectual heft of contributors including Bertrand Russell, provoked a test of the *Espionage Act* that resulted in the publication’s demise and the passage of the draconian *Sedition Act* of 1918. The postmaster general sought an injunction to refuse carriage of the August, 1917 issue arguing that it featured cartoons and text that caused or attempted “to cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces” and obstructed recruitment or enlistment. He cited as evidence a poem by Josephine Bell

honouring Emma Goldman and Alexander Berkman for their imprisonment as conscientious objectors to the war and conscription:

Emma Goldman and Alexander Berkman
Are in prison tonight,
But they have made themselves elemental forces,
Like the water that climbs down the rocks;
Like the wind in the leaves;
Like the gentle night that holds us;
They are working on our destinies;
They are forging the love of the nations; ...
Tonight they lie in prison. (As quoted in Stone, 2004: 164 – 65)

Judge Learned Hand, when he was assigned to try the case, anticipated that deciding it the wrong way could cost him an appointment to the court of appeals. He made no ruling on the constitutionality of the *Espionage Act* under the First Amendment. Instead, Hand adverted to the intention of Congress, arguing that in passing the statute it did not seek to prohibit all expressions of opposition to the war. The test was whether the accused urged others actually to violate the law. “If that be not the test,” he insisted, “I can see no escape from the conclusion that under this [act] every political agitation which can be shown to be apt to create a seditious temper is illegal.” He concluded Congress did not have this “revolutionary purpose” in view, and found the evidence did not support the conclusion that *The Masses* urged its readers to break the law. This incurred the wrath of the Wilson administration, the Attorney General charging that Hand had eviscerated the *Espionage Act*. The court of appeal reversed Hand’s ruling, indicting seven of the journal’s editors for conspiracy to violate the *Act*. Denied access to the mail service, *The Masses* circulation plummeted and it ceased publication by the end of the year. (Stone, 2004: 168 – 70)

The *Sedition Act* of 1918 testifies to the remarkable evaporation of democratic discourse over the course of these few fevered months. With most of the judiciary falling into lock step with the White House, Hand's decision in *The Masses*, combined with the similarly restrictive decisions of judges George Bourquin and Charles Amidon, revealed what the Wilson administration considered to be an intolerable flaw in its capacity to police communication in its prosecution of the war. Attorney General Thomas Gregory and Senator Thomas Walsh concurrently proposed amendments to the *Espionage Act* that would revive, after over a hundred years, sedition as a crime of communication. The rising tide of repression by this time had flowed into Congress also. Every member felt compelled, in debating the sedition amendments, to declare their own loyalty to the nation. They attempted to out do each other in vituperation against critics of the United States. Senator Henry Cabot Lodge—scion of Boston's two leading families, staunch advocate of a muscular and militarised U.S. stance in world affairs, and determined foe of Woodrow Wilson—captured the umbrageous tone of the proceedings. “I have become a little weary” he declared, “of having Senators get up here and say that those of us who happen to think a word had better be changed [...] are trying to shelter treason.” (Stone, 2004: 186)

Much of the debate involved parsing particular words, leaving the impression Congress was attempting to avoid discussion of the bill's implications for constitutional freedoms even though they were very much aware of that it proposed a “drastic law”. In a bid to moderate what he perceived to be the most repressive criminal statute since the Dark Ages, Senator Joseph France proposed an amendment, “nothing in this act shall be construed as

limiting the liberty ... of any individual to publish or speak what is true, with good motives for justifiable ends.” His colleagues roundly defeated the motion; the bill carried by a vote of 48 to 26 in the Senate, 293 to 1 in the House. (Stone, 2004: 187 – 91) On May 16th, 1918, Wilson signed the *Sedition Act* into force. On pain of fines up to \$10,000 and or imprisonment for up to 20 years, it became a criminal offence for any person “when the United States is at war” to, among other things,

[...] willfully [sic] utter, print, write or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States into contempt, scorn, contumely, or disrepute, or shall willfully [sic] utter, print, write, or publish any language intended to incite, provoke, or encourage resistance to the United States, or to promote the cause of its enemies, or shall willfully [sic] display the flag of any foreign enemy [...] (Congress, 2006)

Wilson secured with this statute the broad powers of press censorship Congress had denied him in 1917. However, its impact on the scope of the presidency was even more extensive because it allowed the executive branch an unprecedented role in the formation and coercion of conscience. The audacity of the *Sedition Act* of 1918 and its wartime state of exception comes into sharp relief in comparison to Lincoln’s treatment of public dissent and press freedom in the Civil War. The Lincoln administration did not seek laws against sedition and the three hundred or so newspapers that suffered reprisals were not the targets of the White House but of zealous military commanders; Lincoln’s overall practice was to have anyone arrested for seditious speech quickly released. (Stone, 2004: 133) It fell to Wilson to be the first president to construct and wield vast powers of vivification. Popular opinion, which the White House had a hand in generating, demanded nothing less—mobs of citizens wanted the president to have the ability to extirpate dissent. The Attorney

General claimed that the new presidential powers were necessary to curb the violence of these mobs, the vigilantism fostered by the administration's Committee on Public Information. Though formally denounced by the president, the vigilantes' patriotic fervour meted out the violence of the sovereign by their own hands, reducing the lives of anyone they perceived to be disloyal to the bleeding meat of bare life. The *Sedition Act*, along with Wilson's propaganda infrastructure, were biopolitical in their impact on communication, administering political life and the life of conscience as indistinguishable from biological life. As the demise of *The Masses* shows, the consolidation of a canonical, dominant press was very much part of this project—their profitability was a by-product of the degree to which they served as agents of vivification, inscribing the edicts of the messianic president in their readers' capacity to judge facts and values. Wilson's war on conscience turned the public square into a concentration camp.

In the mind of the Wilson administration, the principal targets of the *Sedition Act* were not the readers of *The Masses* and their fellow travellers—people who dissented because of concern for the emancipation of the proletariat, because of a secular critique. The statute gave the president unprecedented power to evangelize or excommunicate anyone—citizen or alien—in his jurisdiction; Wilson's chief concern was to use this power against dissent from the Great War on religious grounds. “The most dangerous type of propaganda,” in the words of Assistant Attorney General John Lord O'Brian, “is religious pacifism, *i.e.*, opposition to the war on the ground that it is opposed to the word of God.” (As quoted in Stone, 2004: 190) Mennonites, among others, felt the heat. At their General Conference in 1917, they issued a statement to explain the reasons for their pacifism with reference to

their reading of the Gospel. “[A]ccording to this teaching”, the Conference stated, “we cannot participate in a war in any form; that is, to aid or abet war, whether in a combatant or noncombatant capacity.” The statement concluded with a plea for tolerance: “No one who really understands our position will accuse us of either disloyalty or cowardice.” The vigilante culture encouraged by Wilson’s propagandists would have none of it. The “ALL AMERICAN STRONG ARM SQUAD” delivered “first and last notices” to Mennonites demanding they support the war effort or leave. Vigilantes covered Mennonite homes, businesses and churches with yellow paint. (Gaustad, 2006: 135)

The thuggery continued in the secular canonical press. Before passage of the *Sedition Act*, the *New York Times* reported on March 30th, 1918, under the headline “Warn Seditious Pastors: Federal Officials After Religionists Who Preach Disloyalty”, that the Department of Justice “regards the preaching of opposition to the aims of this particular war as of seditious nature”. Officials had intervened to warn preachers, among them German- and Austrian-Americans, to “desist from criticising the nation’s war motives”, to cease publishing pamphlets and curb any doctrinal claims that the Great War “is the great human folly described in the Book of Revelations.” (“Warn Seditious Pastors”, 1918)

Earlier in the month, the *Times* lionized Cosmo Gordon Lang, Lord Archbishop of York, for lauding “our new army”. The prelate, who had once incurred scorn for praising the Kaiser’s mourning of the death of Queen Victoria, found social redemption in his address to U.S. officers at Camp Upton. “If, as President Wilson has said,” the Lord Archbishop intoned,

it is true that the hand of God is laid upon this nation, it must be true
that the hand of God is laid upon every man and woman in this nation.

That means that every man and woman in the United States must pledge his or her might to the triumph of the greatest principles of truth—to the triumph of God's law. ("Archbishop Sees Hope in America", 1918)

Decades before the rise of the Bush dynasty in the Christian right's "resonance machine", the Wilson administration made strategic use of ecclesiastical authority and religiously motivated dissent to assert biopolitical control over the operation of conscience. In both cases, the articulation of the dogma of "American exceptionalism", which traces its origins to Tocqueville's description of the American people *as a whole*, carries the sense that the president uniquely has a divine mandate because "the hand of God is laid upon this nation". The president's messianic function as the agent of divine law is to condemn false doctrine, and in his institutional person—the president acting as president—he is the fierce incarnation of justice.

In his book *State of Exception*, Giorgio Agamben points to the ways in which Wilson—through the *Espionage Act* and the *Sedition Act*—caused Congress to cede much of its powers to the executive branch. Wilson used the constitutional war powers assigned to the presidency to work a lasting change in the polity of the republic. The result was a permanent state of exception, the collapse of the separation of powers, "an unprecedented generalization of the paradigm of security as the normal technique of government."

(Agamben, 2005: 12) Elsewhere Agamben suggests the biopolitical role of communication in this political turn. The West, he argues, "renounced a while ago the balance of powers as well as real freedom of thought and communication in the name of the electoral machine of majority vote and of media control over public opinion—both of

which had developed within the totalitarian modern state.” (Agamben, 2000: 81) My sense is that the monopoly of violence against conscience, legislated in his laws against espionage and sedition, was a necessary and sufficient condition for Wilson’s biopolitical success. Wilson began the process of making the White House the fountainhead of vivification, like a latter day Moses striking the rock in the desert—an image that would have comported with his self-anointment as the perfecter of God’s work in human history. The power to dominate the operation of conscience, and from this position of strength create an ersatz democratic communication, in which the deliberations, hope and rage of citizens channel the program of the executive branch, became the central power of the presidency. From this I believe it would be incorrect to read Agamben’s state of exception without taking into account the generative force of communication. The state of exception is not simply a juridical perversion springing fully formed from the forehead of sovereign power; it is imposed discursively. “Contemporary politics”, Agamben holds,

is this devastating experiment that disarticulates and empties institutions and beliefs, ideologies and religions, identities and communities all throughout the planet, so as then to rehash them and reinstate their definitively nullified form. (Agamben, 2000: 110)

I argue the ascendancy of the messianic presidency is precisely this politics; by its power of vivification, it supplants the life of the species with the State. Wilson’s recourse to vivification shows that in order for the rule of law to become biopolitical, sovereign power must inscribe its own will on the heart of the citizen—it must first make the state of exception obtain inwardly, rooting it in our self-understanding. In the state of exception, to use Agamben’s words, “every citizen seems to be invested with a floating and anomalous *imperium* that resists definition within the terms of the normal order.” For this

“zone of anomie” to obtain, in which “all legal determinations—and above all the very distinction between public and private—are deactivated”, anomie must also claim the life of conscience. (Agamben, 2005: 43, 50)

Nevertheless, dissent in the body of litigation in the United States from the Great War to the *war on terror* amply demonstrates the obduracy of dissent in the face of sovereign power. Vivification, with the orthodox political culture it produces and renews, has not been able to extinguish the persistent upwelling of witnesses to a human dignity standing over and against sovereign power. The “resonance machine” that produces “bare life”, though it may claim to be the author of human meaning, must continually recalibrate against authoritative manifestations of our species being, the stubbornness of human meaning. Edwin Scott Gaustad speaks to this in his erudite *Dissent in American Religion*. “The liberal,” he writes,

so often seen as the major instrument of progress and change, may in fact be the major voice of accommodation and consent. He sees the cultural train as something that all right-thinking persons should get aboard. The dissenter, on the other hand, may indicate that he really does not care for the way the tracks are laid, nor does he have much confidence that adjustments in throttle settings will give society a sense of direction or purpose. Long before counter-culture became a cliché, the dissenter was in the business of resisting a tyrannous majority, disturbing an establishment’s peace, and breaking the bondage to a moderating, mollifying, debilitating civility. (Gaustad, 2006: 5)

Even though he had enacted the most sweeping criminalization of communication in U.S. history, and built a vicious apparatus—both official and vigilante—for its prosecution, Wilson could not silence dissent.

The morning of August 23rd, 1918 at the corner of Houston and Crosby streets in East Harlem, brought a challenge to Wilson’s “debilitating civility”, and with it a sustained attack on the *Sedition Act* that moved through Harvard and into the United States Supreme Court. A skiff of leaflets in Yiddish and English filled the summer air, thrown in profusion from the upstairs window of a tenement. They fell upon a group of workers as they awaited the opening of their manufacturing plant. (Chafee, 1920: 120) The text left no ambiguity in its criticism of the Wilson administration’s dispatching a platoon of marines to fight against the Bolshevik revolution in Vladivostok and Murmansk, calling the reader to “spit in the face of the false, hypocritic [sic] military propaganda”. Its title in English condemned

THE
HYPOCRISY
OF THE
UNITED STATES
AND HER ALLIES

It concluded with an exhortation to a general strike, “Woe unto those who will be in the way of progress. Let solidarity live! The Rebels.” (As quoted in Stone, 2004: 205)

The rebels consisted of a luckless circle of young Russian émigrés who fell short of the Greenwich Village chic of *The Masses*—self-described socialists and anarchists lead by Jacob Abrams, Molly Steimer and others. Abrams was sufficiently prominent in these circles to have chaired a meeting in New York where Leon Trotsky spoke. Military Intelligence Police arrested the lot of them alleging criminal communication under the *Sedition Act*. (Chafee, 1920: 144) Judge Henry DeLamar Clayton, a son of the Deep South, heard the case. A “plantation progressive”, Clayton was fervent in his belief that his civilization

rested on the firm foundation of “white supremacy” under the Democratic Party; he was also one of the first Alabamans to oppose the Ku Klux Klan for its vigilantism. (Pruitt Jr., 2007: 86) Nothing in the proceedings suggested the defendants opposed the war in Germany; the exclusive concern of their protest was the involvement of the United States in the Bolshevik revolution. The fact that the *Sedition Act* required intention to obstruct or cast aspersions on the United States’ prosecution of the Great War did not trouble Clayton’s conduct of the trial. “If it were the case”, Clayton said, “where the defendant was indicted for homicide, and he was charged with having taken a pistol and put it to the head of another man and fired the pistol and killed the man, you might say that he did not intend to do that.” (Chafee, 1920: 144) The jury convicted. Before sentencing “these miserable defendants who stand convicted before the bar of justice”, Clayton declared “we are not going to help carry out the plans mapped out by the Imperial German Government, and which are being carried out by Lenine [sic] and Trotsky.” (Chafee, 1920: 147) There was, however, no evidence that the Kaiser was the mastermind of the Russian revolution. Clayton put the rebels away, some of them for three years, others for twenty.

The following summer, Zechariah Chafee published his article “Freedom of Speech in War Time” in the *Harvard Law Review*. Chafee was a friend of Harold Laski, and there is every indication this friendship played a role in forming his views on democratic communication. For Laski, the free operation of conscience was essential for the very possibility of a democratic society: “where the conscience of the individual is concerned, the state must abate its demands, for no mind is in truth free once a penalty is attached to thought.”

(Rabban, 1997: 353) Chafee's defence of the First Amendment, against a Supreme Court more inclined to rule with the executive branch than against it, earned him a disciplinary meeting before Harvard's board of governors. To put this clarity of vision in context, consider that John Dewey, despite his advocacy for free speech and civil liberties, defended the Wilson administration's suppression of "sedition" and questioned the "Americanness" of religious minorities. (Nussbaum, 2008: 274) He believed the civic obligation of a pacifist at a time of war was to "connect conscience with forces that are moving in another direction." (As quoted in Cywar, 1969: 589) The fog of war made Dewey and Clayton, Yankee civil libertarian and plantation progressive, bedfellows. Dewey would later recant his casuistry, lamenting the war's poisonous effect of public discourse, "the increase of intolerance of discussion to the point of religious bigotry." (Stone, 2004: 230) In comparison, Zechariah Chafee was a man of remarkable constancy. As Congress, and much of the judiciary, walked in lock step with the executive branch, and "strong arm squads" meted out vigilante justice in the name of the Republic, Chafee attacked the Wilson administration's abrogation of the First Amendment rights to free speech, free exercise of religion, and dissent. At issue, he insisted, was the feasibility of the republican project of the United States. "Two different views", Chafee wrote,

of rulers and people were in conflict. According to one view, the rulers were the superiors of the people, and therefore must not be subjected to any censure that would diminish their authority. [...] According to the other view, the rulers are agents and servants of the people, who may therefore find fault with their servants and discuss questions of their punishment or dismissal. (Chafee Jr., 1919: 945-46)

There is an implicit biopolitical dimension in Chafee's argument, as he points to the claim made by the executive branch in its espionage and sedition acts to mastery over the people. It grounds a criticism of Wilson that remains salient into the *war on terror*: "The

government regards it as inconceivable that the Constitution should cripple its efforts to maintain public safety.” (Chafee Jr., 1919: 937) Chafee affirms the primacy of our capacity for democratic communication: to dissent against sovereign power and organize for its “punishment or dismissal” is central to our personhood and cannot be made contingent to the exigencies of war or the logic of public safety.

In the hands of the courts, Wilson’s sedition laws were brutally effective in converting personhood to bare life. Chafee scrutinizes this body of judgements against free speech, “decided largely by intuition”, zealous in their amplification of sovereign power. (Chafee Jr., 1919: 945) He discerns two fundamental flaws in the courts’ treatment of democratic communication. First, Chafee faults Oliver Wendell Holmes’ importation of Blackstone’s doctrine of “prior restraint” into the United States Supreme Court’s reading of the First Amendment. By this dictum, “the liberty of the press ... consists in laying no *previous* restraints upon publications and not in freedom from censure for criminal matter when published.” Instead of censoring the press, the state would prosecute unlawful publications—seditious or criminal libel. This results in the tautology of despotism, a Humpty Dumpty circularity where an unlawful communication is anything Congress, the White House, or a judge anathematizes as unlawful, in the words of the *Sedition Act*, “disloyal, profane, scurrilous, or abusive”. An unlawful communication, Chafee correctly asserts, would be “any restriction of speech that has military force behind it”, any speech act that triggers sovereign power’s capacity for total violence. Holmes would later renounce this doctrine, but it continued to work its way through the espionage and sedition cases, entrenching the power of public officials—against the republican ethos of the

United States—to prohibit “just criticism upon their conduct in the exercise of the authority which the people have conferred upon them.” (Chafee Jr., 1919: 938, 69, 40)

Chafee finds a second flaw in “bad tendency”, the doctrine of indirect causation. In *Shenck v. United States* Holmes upheld the application of the *Espionage Act* in the conviction of Charles Shenck, general secretary of the Socialist Party of the United States, for circulating leaflets equating the draft with slavery. “The most stringent protection of free speech”, Holmes wrote, “would not protect a man in falsely shouting fire in a theatre and causing a panic.” (As quoted in Chafee Jr., 1919: 944) A week later, Holmes broadened this test in ruling against anti-draft articles in the German language newspaper *Missouri Staats Zeitung*. Instead of “falsely shouting fire”, the articles were illegal because “the circulation of the papers was in quarters where a little breath would be enough to kindle a flame”. (As quoted in Stone, 2004: 196) This test converts the *Espionage Act* into a tool of *ex post facto* press censorship, a power Congress had explicitly denied the President in 1917. Chafee argued the *Act*, by Holmes’ standard, would punish “every political agitation which can be shown to be apt to create a seditious temper.” (Chafee Jr., 1919: 962) He anchors his refutation of Holmes in Learned Hand’s contentious ruling in *The Masses*. “Political agitation, by the passions it arouses or the convictions it engenders, may in fact stimulate men to the violation of the law”, Hand argued.

Yet to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government. The distinction is not a scholastic subterfuge, but a hard-bought acquisition in the fight for freedom. (As quoted in Chafee Jr., 1919: 962)

Chafee insisted that nothing in the text of the *Espionage Act* made it a criminal offence to express “pacifist or pro-German” views. There was nothing in the act to police the use of language in any form, but this did not stop the reversal of Hand’s judgement on appeal. (Chafee Jr., 1919: 962) The *Sedition Act* changed the equation, allowing the courts much greater breadth in criminalizing democratic communication. Clayton’s jury returned a guilty verdict against Abrams and his earnest rebels even though the target of their dissent was not the war on Germany but the involvement of the United States in Russia. In the name of public safety, the three branches of government worked synergistically, not to check sovereign power but to advance its intrusion into the life of conscience. The “bad tendency” doctrine, Holmes’ test of the “little breath” of dissent, allowed the judiciary an open terrain to impute criminal intent.

The doctrines of prior restraint and bad tendency were mortal threats to the ongoing epistemological struggle of a free society. In heaping opprobrium on the courts, on Holmes, I find Chafee argues for the central place of conscience in democratic communication, its indispensable, public role in both discovering the facts of our situation and passing judgement. Far from being a question of private scruples, conscience is the substance of citizenship because it affirms personhood against the projects of sovereign power. Where these doctrines, and the statutes they animated, reduced citizenship to bare life, the insistent operation of conscience—from *The Masses*, to the rebels Jacob Abrams, Molly Steimer and their hapless East Harlem cabal, and Chafee’s bold constitutional theory—affirmed in the public square the refractory stuff of human personality. Democratic communication had to persist even in time of war, Chafee insisted; it could

not be compromised by the expediency of public safety. “Truth can be sifted out from falsehood”, he argued,

only if the government is vigorously and constantly cross-examined, so that the fundamental issues of the struggle may be clearly defined, and the war may not be diverted to improper ends, or conducted with an undue sacrifice of life and liberty, or prolonged after its purposes are accomplished. Legal proceedings prove that an opponent makes the best cross-examiner. Consequently it is a disastrous mistake to limit criticism to those who favor the war. (Chafee Jr., 1919: 958)

In a riposte to the logic of the Wilson administration—a riposte that remains valid and urgent for Wilson’s successors—Chafee maintained that the First Amendment and its protection of conscience and free speech are “just as much a part of the Constitution as the war clauses, and that it is equally accurate to say that the war clauses cannot be invoked to break down freedom of speech.” The solution was to read the Constitution as a whole, so that all of its features worked in a “process of mutual adjustment.” Democratic communication should not be restricted by censorship or punishment in time of war “unless it is clearly liable to cause direct and dangerous interference with the conduct of the war.” (Chafee Jr., 1919: 960, 55)

Harold Laski, after making a close study of Chafee’s article, invited him to tea with his close friend Oliver Wendell Holmes late in the summer of 1919. It appears Chafee and Holmes left the encounter agreeing to disagree. Chafee reported, “Holmes is inclined to allow a very wide latitude to Congressional discretion in the carrying on of the war.” (Rabban, 1997: 354) This changed dramatically in the course of the following months. On October 27th, 1919 the Supreme Court heard *Abrams v. United States*. With Louis Brandeis standing with him against the majority, Holmes adopted Chafee’s strict standard

of “direct and dangerous interference” in the abrogation of First Amendment rights. His dissenting opinion is worth quoting at some length, because it shows remarkable judicial courage. “Persecution for the expression of opinions seems to me perfectly logical”, Holmes wrote.

If you have no doubt of your premises or your power, and want a certain result with all your heart, you naturally express your wishes in law, and sweep away all opposition. [...] But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system, I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States, through many years, had shown its repentance for the Sedition Act of 1798, by repaying fines that it imposed. Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, “Congress shall make no law . . . abridging the freedom of speech.” Of course, I am speaking only of expressions of opinion and exhortations, which were all that were uttered here, but I regret that I cannot put into more impressive words my belief that, in their conviction upon this indictment, the defendants were deprived of their rights under the Constitution of the United States. (*Abrams v. United States* 1919: 630 – 31)

As with its predecessor at the founding of the U.S. republic, no court found the *Sedition Act* of 1918 to be unconstitutional; instead, they were zealous in expanding its application. Congress inconspicuously repealed the statute on December 13th, 1920, but the *Espionage Act* remains in effect. Starting with Wilson in March 1919, the executive branch proceeded to reduce the sentences or release prisoners convicted under the *Espionage Act* or the *Sedition*

Act. A dozen years later, it fell to Franklin Delano Roosevelt to grant amnesty to everyone convicted under the statutes, restoring to them their rights under the Constitution. (Stone, 2004: 230 – 32)

Woodrow Wilson brought a messianic hubris to his moment in history, and he changed the presidency forever. On his watch, the exercise of sovereign power became irrevocably caesaropapist as the executive branch lead the legislative and judicial branches in asserting control over the operation of conscience. The First Amendment, the separation of powers and a republican political culture that seemed to have learned the lessons of history—“live free or die”—did not protect East Harlem’s Trotsky wannabes, Mennonite pacifists, and home-grown Socialists as the imperative of public safety reduced them to bare life. Wilson made the White House the driving force of the vivification of the United States, the nucleus for the production of both bare life and the political personality of the citizen. His innovations in the militarization of mass communication for propaganda, the abrogation of the Constitution in a state of emergency, and the assumption of what amounted to a royal prerogative over Congress aimed at making the president the master of life as such, body and soul. He took the presidency across a biopolitical Rubicon, making the republican project of the United States contingent to a permanent state of exception.

The *war on terror*, as we experience it today, is rooted in the foundational aporia of the United States, the impasse between sovereign power and democratic accountability, between violence and governance. Revolutionary violence—its logic persisting in the Second Amendment’s “right of the people to keep and bear arms”—was to keep sovereign

violence in check, prevent or correct a claim the state may make to mastery over the citizen. In this riposte to Plato, an armed, private citizenry would watch the watchers, guard the guards: oppression would trigger revolution in an infinite regress of states of exception. Sovereign power would remain contingent to democratic consent, never an absolute or divine right, and the citizens' reserve capacity for terror would patrol the bounds between bare life and the state. Should the ballot catastrophically fail, the bullet would safeguard the citizens' sharing in self-governance; the citizens' power in collective violence was the failsafe for democratic communication. At least this was the original position, the founding fiction of the republic. In practice, the right to keep and bear arms, to maintain a reserve civic potential for armed rebellion, was by no means universal; sovereign power determined who had access to ballots and bullets alike. The enslavement of Africans and the Jim Crow subjugation of their American descendants, the subordination of women, the nativists' response to the influx of swarthy and Catholic populations amply demonstrate the selective application of the Second Amendment and the right to the means of rebellion it enshrined. Their freedom to apply the judgement of conscience to the material facts of their situation, to resist oppression and force political change found no ally in this text. The Constitution was not a check on biopolitical power; it provided a firm footing for sovereign interests to police the expression of conscience and reduce life to bare life. Within its first twenty-five years, Federalist partisans in all three branches of government used the putative threat of Jacobin incursions and an impending war with France viciously to curb political dissent, to shut down presses and silence their Republican rivals. In the name of public safety, the republic's checks and balances conspired against the operation of conscience and democratic communication. One hundred and ten years later,

with the support of the courts and much of Congress, to the relief and gratitude of dominant communities propagandized to outrage by the threat of the Hun, the president became a mortal god, the ground and safeguard of the soul of the nation. The *war on terror* began here, with the birth of the messianic presidency.

The president's claim of dominion over conscience drove the militarization of mass communication from Wilson's era onward. Dan Schiller demonstrates the entanglement of communications and "military purpose" first in the continental expansion of the young republic and then in its global conquests. (Dan Schiller, 2008) His analysis, though helpful, is incomplete because it omits the biopolitical impact of communication in this time. It leaves out consideration of how biopolitics shaped the form and content of the militarization of communication, especially in the work of Edward Bernays and his use of his uncle Sigmund Freud's psychoanalytic technique. "Ideas," Bernays wrote, "are weapons too." (Bernays, 1942: 236)

The reciprocal development of psychological warfare and new technologies—Bernays points to radio, talking movies and the airplane—made communication the transcendent power of the messianic presidency. The executive branch, increasingly freed of constitutional restraints, grew in the capacity to capture and orient the operation of conscience in a hyper-industrialized, otherwise disparate agglomeration of races, religions and ethnicities to serve the high purpose of sovereign power. Bernays and, presumably, his uncle would have it no other way: conscience, if it existed at all, could not be left to its own devices. Against the dark and savage impulses of the human subconscious, which

Freud viewed as the perennial danger to all forms of social organization, the purpose of sovereign power is liberation itself, an empire of human rights and democratic freedom in the form of well-adjusted individual autonomy. It is Franklin Delano Roosevelt's New Deal, a vast increase in presidential power—"as great as the power that would be given to me if we were in fact invaded by a foreign foe"—to administer the economy, contain the ruinous operation of *laissez faire* capitalism in the Great Depression, and advance the American dream of a classless society in the middle class. (Roosevelt, 1933) It is Harry Truman's rejection, in the shadow of USAF nuclear attacks on Hiroshima and Nagasaki, of old imperialism for a new internationalism: "Democracy alone can supply the vitalizing force to stir the peoples of the world into triumphant action, not only against their human oppressors, but also against their ancient enemies—hunger, misery, and despair". (Truman, 1949) It is John F. Kennedy's stoic avowal that "we shall pay any price, bear any burden, meet any hardship, support any friend, oppose any foe, in order to assure the survival and the success of liberty". (Kennedy, 1961) It is Ronald Reagan's anathematization of New Deal collectivism in his pledge of individual emancipation, his vow to "check and reverse the growth of government which shows signs of having grown beyond the consent of the governed". (Reagan, 1981) It is Bill Clinton's erasure of "division between what is foreign and what is domestic", the second Bush's appropriation of Mother Teresa's pledge "to do small things with great love", and Barack Obama's affirmation that "America is a friend of each nation and every man, woman, and child who seeks a future of peace and dignity". (Bush, 2001b; Clinton, 1993; Obama, 2009) The spatial extension of the United States, and with it the militarization of communication, required and followed the intensification of the messianic presidency's sway over

conscience, its claim to conclude history with the authoritative declaration of what it means to be human.

One month following the Japanese attack on Pearl Harbour and the formal entry of the United States into World War II, Bernays published an encomium to war propaganda. The article argued for the application of “public relations” or marketing techniques and censorship to ensure “the psychological ramparts in this country [are] as strong as our physical ramparts.” (Bernays, 1942: 243) Bernays had used his experience in the Committee for Public Intelligence and his relationship with Sigmund Freud, who at the time was largely unknown in the United States, to create the field of public relations. Against the historical record, Bernays asserts the CPI did its job “democratically, without threat or intimidation, and with only voluntary censorship.” (Bernays, 1942: 239) He brought Freud’s premise of the fundamental untrustworthiness of human beings, of our capacity for unthinkable barbarism, to the development of techniques of mass suggestion and control. These techniques, in addition to promoting greater social order, would produce great wealth for the masters of a new economy, the capitalism of engineered consumption. The primordial, seething world of the human subconscious could find equilibrium, adjustment and happiness in the new world of consumer goods. For example, at the request of tobacco magnate George Hill, Bernays induced women to smoke as an act of liberation. Armed with a psychiatric opinion that men had stigmatized women into not smoking because the cigarette symbolized the penis, Bernays positioned the product as “torches of freedom”, a suffragist lingam. Sometimes a cigar was not just a cigar. Adam Curtis, in his documentary series *The Century of the Self*, argues that Bernays used

psychoanalysis to shift the democratic subject from citizen to consumer. His innovations included the use of celebrities as opinion leaders, the orchestration of public demonstrations and spectacle, such as General Motors' "Democracity" at the 1939 New York World's Fair, and the infiltration of newspaper editorials. This last technique proved so devastating in raising dissent against FDR's New Deal and its rejection of *laissez faire* capitalism that the Roosevelt administration created newsreels demonizing public relations as "a grave danger to democratic institutions", teaching audiences how to construct charts to analyze the press for bias. Working closely with the barons of industry, Bernays fomented the political culture of consumerism in which democracy would be a palliative for the experience of social pain and inequality. The purpose of democracy was no longer social change, but the pursuit of happiness in the satisfaction of unconscious, manipulated desires. (Curtis, 2002) This is the democracy Bernays wanted to triumph in the Second World War.

Freudianism in the hands of Bernays brought a quantum increase in the sovereign power of vivification. In reducing the citizen to the status of consumer, it produced the human subject as bare life, the raw pulp of the subconscious that had to be suppressed and channelled by the market and the state. The job of the market was to generate an ethos of consumerism so powerful that it could displace a sense of citizenship, supplying a fake existential satisfaction and thus allowing sovereign power a wide field on the big matters of human existence. Faced with the prospect of the United States once again in a global war, Bernays saw the primacy of the state over the market and took up work with the CIA and the U.S. Government. His article of January 1942, and its backhanded admiration for

Nazi Germany's innovative techniques of "psychological rearmament", provides a detailed summary of his aims in this new role. Great Britain and the United States were at risk of being outclassed by the Reich's "totalitarian apotheosis of morale building carried on in total psychological warfare". Bernays points to the use of symbols—the swastika made ubiquitous by law, the person of the Führer—as essential for the integration of the "common man" into larger goals. "To persuasion and suggestion" Bernays argued, "they added brutality, threat, intimidation and censorship. All negative viewpoints were eliminated by one or more devices to bring about an enforced 'national unity'". The United States had to mount its own program of psychological armament, but without "dictatorial authority"; it had to use propaganda and censorship to channel into the war effort the deep seated and unfulfilled desires of its citizens for "security and the ideals of democracy". (Bernays, 1942: 242 - 44) In all of this the Freudian turn of vivification insisted, if covertly, that the citizen was not to be the source and ground of democratic ideals as a political personality—the barbarism of the subconscious precluded such a role; the citizen had to consume and internalise as ideals the edicts of sovereign power.

The result was the system of vivification that is with us to this day, an ever more sophisticated integration of propaganda, censorship, and surveillance. For a brief moment, immediately following the attack on Pearl Harbour and against Roosevelt's wariness of allowing power to pool in hands other than his own, J. Edgar Hoover controlled much of this system. Roosevelt appointed Hoover to head the censorship portfolio, a position he held while remaining at his duties at the FBI. On December 9th, 1941, Hoover advised the president to ban outright a list of subjects from media coverage, including the movement

of ships and troops, munitions production and economic activity related to the war effort; he urged “background investigations” of “Axis aliens” employed in radio broadcasting. In a move that foreshadowed the racist internment laws to come, Hoover recommended allowing, under scrutiny of the Federal Communications Commission, German- and Italian-language broadcasts to continue, and the complete prohibition of Japanese-language broadcasts. (Sweeney, 2001: 32) Twenty years earlier, as the nation fell into its first Red Scare, Hoover had used his experience as a Congress librarian to create for the Bureau of Investigation’s General Intelligence Division a system of index cards tracking “more than 200,000 individuals suspected of radical activities, associations, or beliefs”. (Stone, 2004: 222 – 23) This work of surveillance had to continue, inextricably bound to the new apparatus of censorship. To this end, Hoover recommended a comprehensive censorship of press and radio, administered by a civilian operating at arm’s length from the government and the armed forces. (Sweeney, 2001: 33) This last recommendation showed his grasp of the political moment.

In anticipation of a declaration of war, Roosevelt initiated discussions in 1939 about the forms censorship should take in the United States. Germany was invading Poland, and Roosevelt immediately began to inculcate in the press a voluntary censorship even as he proceeded with a formal declaration of U.S. neutrality. Gathering the nation for a “fireside chat” on September 3rd, he said

You are, I believe, the most enlightened and the best informed people in all the world at this moment. You are subjected to no censorship of news, and I want to add that your Government has no information which it withholds or which it has any thought of withholding from you. At the same time...it is of the highest importance that the press and the radio use the utmost caution to discriminate between actual verified

fact on the one hand, and mere rumor on the other. (Sweeney, 2001: 22)

The press was happy to comply. G.H. Lash, director of Canada's public information office, toured the offices of the *New York Tribune* in December. An editor produced an unpublished story documenting details of the Canadian First Division's deployment from Halifax to Europe. He assured Lash that the principal papers in Boston and New York "had entered into a mutual agreement not to print anything which they thought might endanger the lives of Canadians." (Sweeney, 2001: 21)

The armed forces were restive and pushed for a more coercive approach. On June 10, 1940 a joint board of military, State Department and FBI officials submitted a \$50 million "Basic Plan for Public Relations Administration" that would undertake censorship of all mass media, including radio and film, executed under the direction of the military. Roosevelt rejected the plan, and chastised its authors for their "political naïveté"; his instinct was that the U.S. press would not abide censorship that smacked of a police state. Military insistence on control of censorship was not so easily dismissed. One year later, on June 4th 1941, a joint board of three army officers and three navy officers secured Roosevelt's approval of a report that called for an executive order creating a censorship office, the training of army and navy personnel to censor international communications, and voluntary censorship of the domestic press. With the president's approval in hand, the joint board drafted legislation that would place the censorship bureau under military administration. Roosevelt balked again, and on November 7th he struck an ad hoc committee under the chairmanship of Frank C. Walker, the postmaster general, to find a way forward. Through some of fractious discussion, the committee formed consensus

around a solution proposed by the Attorney General, Francis Biddle. The president should be invested with broad new powers to create and, without consulting Congress, expand a new office of censorship as he saw fit; a “newspaperman” would run this office. Roosevelt accepted Hoover’s recommendations because they agreed with the Biddle consensus; the president would have total control over the scope and construction of censorship, domestic and international. On the recommendation of Francis Biddle, and to the acclaim of the press, Roosevelt appointed Byron Price, executive news editor of the Associated Press, Director of Censorship effective December 20th, 1941. (Sweeney, 2001: 28 – 36)

To clarify the scope of his powers, Price asked the Attorney General whether he could censor or close down radiotelegraph transmissions in the merchant marine or among oilrigs. Biddle’s opinion, resting on the *First War Powers Act* of 1941 and the Executive Order N° 8985 that established the Office of Censorship, affirmed that Price had “almost absolute power” to censor communications in the United States in his reporting relationship directly to the president. He reached this conclusion even though the *War Powers Act*, unambiguous in giving Price “absolute discretion” in his power to censor international communications, did not confer similarly sweeping authority over domestic broadcasts. Further, the Executive Order offered no guidelines on the matter of what to do with media on the home front. Nevertheless, the Attorney General’s opinion affirmed that radiotelegraphy was under his purview, along with the entire commercial radio system, because their transmissions “could not practically and with certainty be confined to the continental limits of the United States.” (Sweeney, 2001: 11) By this interpretation, Roosevelt had succeeded in granting to a civilian the same sweeping authority over

censorship practiced in a police state, while preserving the appearance of a government that “has no information which it withholds or which it has any thought of withholding from” the people. These powers brought to telecommunications the same degree of state control postmasters general enjoyed under the *Espionage Act* of 1917, and held the same potential to police content as the *Sedition Act* of 1918. It was at Price’s discretion to determine whether, and to what degree, he would bring an Orwellian dystopia to the United States including a censorship bureaucracy 3,000 strong to cover each eight-hour shift in the nation’s radio stations. He convened a meeting of the Censorship Policy Board, an advisory body that included the vice president, the attorney general, the secretaries of war, navy and treasury, the postmaster general and the heads of government information agencies. Price also invited James Lawrence Fly, director of the Federal Communications Commission, even though he had no seat on the Board, because Fly administered the licensing of private broadcasters. The Director of Censorship opened the session on May 19th, 1942 arguing against coercive censorship of the U.S. broadcasters, insisting that “if this sort of control once were established, the stations never would be returned to private hands... Compulsory censorship would only prove a first step to government monopoly.” (Sweeney, 2001: 12 - 13) The better way to proceed was to follow Roosevelt’s lead in fostering cooperative censorship among the broadcasters and the press—a disposition the media had already embraced. Price won the support of the Attorney General Biddle and Fly, carrying the day. Broadcasting in the United States redoubled its long march in service of aims of the nation, continuing a practice that dated back to the cohesion of the original *Sedition Act*, the Federalist Party and its presses in the first decades of the Constitution.

The capitulation of France to the invasion of Nazi forces on June 25th, 1940 exacerbated, perhaps in a bitter irony, a fear of fifth columnists in the United States that recalled the Jacobin paranoia of the late 18th century under John Adams. The French military blamed their humiliating defeat to the operation of Nazi and Communist sympathizers and sleeper cells within France. These rumours raised alarm across the Atlantic, causing Congress to bring back the *Espionage Act* of 1917, making it applicable for the first time while the United States was not at war. Like Adams, Roosevelt could not resist enflaming emotions further, warning Congress of the “treacherous use of the Fifth Column” in a bid to increase defence spending. (Stone, 2003: 251)

The Depression had also done its work in fomenting enmity and suspicion. The Communist Party of the United States saw its membership increase, and the German-American Bund showed similar gains as it filled its ranks with members who dressed and saluted each other like Nazis. The signing of the non-aggression pact between Nazi Germany and the U.S.S.R. in 1939 and their collaboration in the invasion of Poland heightened fears that, on U.S. soil, these otherwise improbable bedfellows could form a united fifth column of their own. The pressure in Congress was considerable. After initially defeating Representative Samuel Dickstein’s 1937 motion to strike a committee tasked with the investigation of “un-American propaganda” by a vote of 184 to 38, May 26th, 1938 saw the inversion of these numbers. Congress voted to convene the House Un-American Activities Committee, chaired by Representative Martin Dies of Texas. Its initial, and most flamboyant, target was Fritz Julius Kuhn, the jackboot wearing, self-styled

Bundesleiter of the Bund. A naturalized American citizen, Kuhn had been a pioneer member of Germany's Nazi Party and founded the Bund to be its clone. By 1938, he had swelled its ranks to 25,000 members, half of whom were German citizens, who had pledged they were "of Aryan descent, free of Jewish or colored racial traces." However, Martin Dies had a clear, partisan agenda for the Committee and deftly turned its attention to his allegations of the "Communistic affiliations" of Democrats and "Communist-controlled" organizations including the Boys Scouts, the Catholic Association for International Peace, and the American Civil Liberties Union along with its celebrated affiliate Eleanor Roosevelt. The First Lady was, he insisted, "one of the most valuable assets ... the Communist Party possess[es]." In a line of attack that echoed Edwin Bernays and his public relations campaign against the New Deal, Dies charged Roosevelt's centrally planned economy was "influenced" by Communists. (Stone, 2004: 244 - 46)

Two years before Dies began his inquisition, Roosevelt had secretly tasked J. Edgar Hoover with an inquisition of his own. Beginning in the summer of 1936, Hoover dispatched FBI agents "to obtain from all possible sources information concerning subversive activities being conducted in the United States by Communists, Fascists and representatives" of organizations "opposed to the American way of life." Hoover saw that the covert investigation of political beliefs was "repugnant to the American people", and so urged Roosevelt to keep the FBI's work in the "utmost degree of secrecy to avoid criticisms". By the time the House Committee on Un-American Activities was getting started in 1938, Hoover advised Roosevelt that the FBI and its revived General Intelligence Division had developed a list of 2,500 "probable subversives". Using the

subscription lists of German, Italian and Communist periodicals, the membership rosters of legitimate organizations, along with informants planted at meetings and demonstrations, Hoover marshalled the Bureau to build dossiers on individuals “both aliens and citizens, ... [whose] presence ... in this country in time of war or national emergency would be dangerous to the public peace and the safety of the United States government.” The FBI’s actions came to light in November 1939, when Hoover revealed to a subcommittee of the House of Representatives that he had developed an extensive index of individuals, groups and organizations he believed might be “detrimental to the internal security of the United States.” Attorney General Biddle, after many years of the program’s existence, reprimanded Hoover for what amounted to illegal surveillance, and ordered him that the information must “not be used for any purpose whatsoever.” This only served to drive Hoover into deep cover; he renamed the program and instructed his agents that it “should at no time be mentioned or alluded to in investigative reports discussed with agencies or individuals outside the Bureau.” Hoover, arguably at Roosevelt’s bidding, had created what amounted to a secret police. (Stone, 2004: 248 – 50)

The threat of aspiring fifth columnists was by no means an abstract concern for American Jews; they did not need a battalion of FBI agents to find them because the subversives were openly peddling Nazi texts on the streets of New York. In its annual report of 1940, the Executive of the American Jewish Committee documented the German American Bund’s attempts, with other unnamed “subversive organizations”, to launch a popular anti-Semitic movement in New York and other eastern cities. By this report, the Bund and its fellow travellers had “sponsored the sale of scurrilous periodicals by street vendors who

indulged in offensive remarks while crying their wares”. They “held meetings on street corners, picketed radio stations and their advertisers”. The report pointed to Martin Dies’ assertion that this movement “secretly planned to establish a military dictatorship in the United States”, and the conviction of the Bund’s self-styled fuehrer, Fritz Kuhn, “as a common thief”. It found reason for hope in the uprising of resistance to anti-Semitism outside the Jewish community, in the “sense of decency and the religious sentiments of conscientious Christians”. The authors celebrated the application of these religious beliefs to denounce the “efforts to divide Americans along religious lines”, specifically a committee formed by “leading Catholic intellectuals” in June, 1939 to “actively combat these manifestations”, along with actions of the Federal Council of Churches of Christ in America, professional, civic, social service and labour organizations. (Adler, 1940: 652 – 53) This is especially remarkable given the notoriety of the radio sermons of Father Charles Coughlin, whom the Bund lauded for his invective against “the problem of the American Jews.” In his journal, *Social Justice*, the prelate named Hitler “Man of the Week” after the invasion of Czechoslovakia, praising the Third Reich’s social justice. The Catholic hierarchy, horrified, intervened in May 1942 to silence Coughlin for the duration of the war. (Stone, 2004: 276 – 77) The American Jewish Committee’s report is instructive because it shows the dialogical nature of the operation of conscience against the threat of American Nazism. It suggests the degree to which radio broadcasting had become a battleground, a choice target for U.S. anti-Semites and Nazis and, presumably, a site of resistance for the Jewish community and its Christian allies. It shows the personal impact of the war, how this experience found a voice both within and between

communities, in the language of their convictions about the nature and purpose of human existence.

This process of inter-religious solidarity against anti-Semitism and fascist organizing in the United States expressed a bold capacity for citizenship in a pluralistic society, even as this society faced the existential threat of Nazism. The report of the American Jewish Committee shows none of the vigilantism and xenophobia that stained public discourse in the First World War; it stands as a dignified affirmation of the community's determination not to allow itself to be cowed and isolated, not to be cut off from a broader communion of democratic deliberation. Religious diversity was not an obstacle to the possibility of this communion—it was a prerequisite, a foundation.

Diversity was, however, a threat in the calculations of the White House and its bid to make the United States secure on the home front. The Roosevelt administration refined the machine-tooled face of the messianic presidency, presenting it as the only sure hope for the victory of human dignity over the dehumanizing Nazi agenda, both foreign and domestic. The messianic presidency was the answer to *Kristallnacht*, God's own answer to the camps. The core of Roosevelt's program, even before the declaration of war, was the production of a "political justice", a rule of law that conformed to the executive branch's reinvigorated and singular power to define and administer human life. In "political justice" Roosevelt secured for the presidency the ability to define and document who in the United States was a friend and who was an "enemy alien", to prosecute individuals "more for

what they represented than for what they had done”, and to place whole populations in detention through the imposition of race categories. (Belknap, 1994: 179)

Herbert Hoover took a first step. In June 1940, he launched the FBI’s Custodial Detention Program to investigate and document enemy aliens—specifically, US non-citizens of German, Japanese, Italian, Rumanian, Hungarian and Bulgarian nationality—in anticipation of a declaration of war. The program executed one of the original powers of the executive branch, conferred in 1798 in the *Alien Enemies Act*, a statute that remains in force to this day. The *Act* authorized the president to “detain, relocate, or deport enemy aliens” during a time of war or threatened invasion, subject to the norms of any applicable treaties and, in their absence, “according to the dictates of humanity and national hospitality”. On December 7th, 1941, when Japanese forces attacked Pearl Harbour, the Bureau immediately arrested 770 Japanese named in the Custodial Detention Program. After this initial step, over the course of the following months, the authorities seized 9,121 “alien enemies” or one out of every 923 Italians, one out of every 80 Germans, and one out of eight Japanese. Attorney General Biddle insisted that every detainee received something approaching due process, in the form of the Enemy Alien Hearing Boards. Stone suggests this was an act of largesse, that the *Alien Enemies Act* did not “require a hearing before an enemy alien is detained”; Biddle did not have a statutory obligation to create the Enemy Alien Hearing Boards. (Stone, 2004: 285 – 86) This might have comported with the jurisprudence available to him at the time, however researchers have recently found that the courts did in fact play an active role when the *Act* was used for the first time, during the War of 1812. On December 4th, 1813, Chief Justice John Marshall heard and allowed “a

writ of *habeas corpus* to bring up the body of Thomas Williams”. He ordered Williams, a British national, discharged because the authorities had failed to assign a place for his detention. (Newman & Hobson, 2006) In a similar fashion, the courts paroled or released approximately seventy-five percent of Roosevelt’s detainees, leaving a core group of 2,525 in custody by June 1944. (Stone, 2004: 285)

Original documents show that, even with judicial oversight, the Roosevelt administration’s execution of the *Alien Enemies Act* had the effect of bringing whole families into administrative detention. According to an FBI “Bureau Bulletin” of November 25th, 1942, the

Alien Enemy Control Unit of the Department of Justice had advised that in view of the fact that the dependents of many interned alien enemies meet with economic and other difficulties which, in addition to the internment of members of their families, embitters them to an extent creating a security problem, the Unit is initiating a program whereby such dependents may be interned together with the members of their families who are already in custody. ((Anonymous), 1942)

The memorandum’s use of “security problem” as the justification for holding families in detention suggests the elastic nature of how the administration defined who was an enemy alien. If the experience of World War I were a guide, the families of non-citizens held in detention would have included native-born citizens of the United States. (Garner, 1918)

The power of the executive branch to define the “enemy alien” brought with it the power to define citizenship also, to impose a state of exception in the name of security that removed individuals and families alike from the rule of law. Where Agamben tends to present the state of exception as a power totally at the disposal of the sovereign, as the power definitive of the sovereign, in practice—in the United States during World War II

and, indeed, the *war on terror*—it seems the state of exception cannot be contained by the power that imposes it. It becomes the expediency of the messianic presidency’s total administration of life, the bare life of the human body and the inward life of conscience; this expediency has no limit.

As Hoover launched his preparations for custodial detention, federal legislators turned once again to the codification of a crime of sedition. On June 29th, 1940, the *Alien Registration Act*, otherwise known as the Smith Act, passed with little opposition in Congress; reticent members assented to it in “fear of a worse bill”. It required the registration of all resident aliens with government officials, simplified the process of deportation, and made it a criminal offence for any person “knowingly or wilfully” to “advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence.” The legislative intent of the law, according to its principal author, Representative Howard W. Smith of Virginia, was to “level the playing field” between aliens and U.S. citizens in the prohibition of treasonable conduct and speech. (Stone, 2004: 251 – 52) It was a law to govern both the body and conscience of alien and citizen alike.

The Smith Act had a two-fold biopolitical function. First, it was, as Stone asserts, “the first time United States had ever made a ‘complete inventory’ of noncitizens.” In the assessment of Robert H. Jackson, the Attorney General at that time, the process of registering aliens in the United States was difficult to distinguish from Hitler’s registration of Jews; indeed, in his view, “there was ... somewhat the same tendency in America to

make goats of all aliens that in Germany had made goats of all Jews”. Registration emphasized the lack of political personhood and affirmed, with limited subtlety, that the registered alien owed his life to the tolerance of the state. This is why the Attorney General was at pains to make a deliberate distinction between the registration of aliens in the United States and Germany’s registration of Jews as *Untermenschen*. To this end, Jackson decided to keep the program out of the hands of the FBI and immigration authorities; he assigned Francis Biddle, then Solicitor General, to lead the process. Biddle launched a communication program to elicit voluntary compliance, directing non-citizens to register and give their fingerprints at post offices. The result was monumental: his system registered approximately 5 million people as aliens under the *Act*. (Stone, 2004: 283 – 85)

The second biopolitical function of the law was to make the content of communication a threshold for alien and citizen alike, marking the boundary between a politically acceptable life and bare life. The statute’s criminalization of intentionally communicating the “the duty, necessity, desirability, or propriety” of the violent overthrow of any government in the United States lives on in chapter 115, section 2385 of the *US Code*. In the Second World War, and into the *war on terror*, this criminalization of communication became entangled with racial profiling, with the categorization of populations that might be inclined to speak in a seditious manner. The crime of sedition migrated from the content of one’s communication to the inferred content of character, from what a person has said to what the person represents. The taxonomy of a bare life—the place of birth, the indicia of race—and not the intent to make a seditious statement became the reason for

administrative detention or criminal sanction. The body itself became seditious. This is why two seemingly incongruous aims of the *Act*—the criminalization of some speech as seditious and the command that all aliens register themselves as such—are coherent applications of biopolitical power. The *Alien Registration Act* shows the intimate correlation between sovereign power's governance of communication and its production of bare life. The state's imposition of race categories and other stereotypes functions as an effigy of personhood; it replaces the intricate, dynamic sense of self and conscience of the living person with a threat assessment. The *Alien Registration Act*, together with the broad powers conferred in the *Alien Enemies Act*, consolidated in the hands of the president unprecedented authority to administer the lives of non-citizens and citizens alike, authority Roosevelt was not hesitant to use.

By Executive Order N° 9066, on February 19, 1942, Roosevelt gave the Secretary of War and his designates broad discretionary powers to exclude persons from “military areas” so as to ensure “every possible protection against espionage and against sabotage.” He issued the order without raising the matter with General George Marshall or the Joint Chiefs of Staff, and after what amounted to a pro forma discussion in Cabinet. (Stone, 2004: 294) One month later, on March 21, 1942, the Secretary of War secured from Congress a resolution to reinforce the Executive Order, making it a misdemeanour punishable by a fine of \$5,000 and/or imprisonment for one year for anyone “to knowingly enter, remain in, or leave prescribed military areas” against the orders of the Secretary or a commanding officer. (Corwin, 1970: 93) The Executive Order and the statute do not make race categorizations of any kind. Without the declaration of martial law, they gave the military

authority to abrogate the constitutional freedoms of 120,000 people of Japanese ancestry, two-thirds of whom were U.S. citizens. Through a series of proclamations, the authorities removed families from their homes in Washington, Oregon, Arizona and California, holding them for three years in “resettlement communities”, concentration camps. A year before, Eleanor Roosevelt gave the assurance that “no law-abiding aliens of any nationality would be discriminated against by the government.” (Stone, 2004: 286 – 89) However, the Japanese internment made no distinction between citizens and non-citizens, between American-born and educated *Nisei* and first-generation *Issei*. Three days before the Executive Order, Theodor Seuss Geisel leant his pen and ink to the cause, depicting for the editorial page of the left leaning newspaper *PM* an “Honorable 5th Column” of stereotypically “Japanese” masses filing down the Pacific coast of the United States to take up parcels of TNT.

Roosevelt made the construction of race central to the internment process. In a letter of June 3rd, 1943 he assured Herbert Lehman, the Governor of New York State, that he was “keenly aware of the anxiety that German and Italian aliens living in the United States must feel as a result of the Japanese evacuation” and that “no collective evacuation of German and Italian aliens is contemplated at this time”. (Weglyn, 1976) Roosevelt’s action followed the clamour in the western states, in the words of Idaho’s attorney general, “to keep this a white man’s country”. All of the newspapers of the U.S. Pacific coast, including the liberal broadsheets, with the American Legion, the Chamber of Commerce of Los Angeles, the California Farm Bureau Federation and the Native Sons and Daughters of the Golden West fed a social movement of racist calumny, vandalism and vigilantism

against “citizens of Japanese extraction”. General John L. DeWitt gave all of this a military imprimatur in 1942 as commander of the defence of the Western United States. In a report Supreme Court Justice Frank Murphy would castigate as a “blanket condemnation of all persons of Japanese descent”, a condemnation based not on evidence but “questionable racial and sociological grounds”, General DeWitt argued that the “continued presence of a large, unassimilated, tightly knit and racial group, bound to an enemy nation by strong ties of race, culture, custom and religion” was an immediate threat to the security of the United States. (DeWitt, 1943) Hoover advised the Attorney General there was no evidence to be found for the internment, insisting that the “necessity for mass evacuation is based primarily upon public and political pressure rather than on factual data”. (Bernstein, 1982) Roosevelt, through the Secretary of War, gave General Witt biopolitical power to define Americans and “aliens” of Japanese ancestry as a racial group, and to reduce their lives to the bare life of the concentration camp. The General’s word, in this state of exception, became the rule of law.

Military authorities were not of one mind in the execution of the president’s Order. In Hawaii, the only state to have felt the sting of the *Nihon Kaigun*, the Imperial Japanese Navy, military governor General Delos Emmons gave this assurance in a radio address two weeks after Pearl Harbor:

There is no intention or desire on the part of the federal authorities to operate mass concentration camps. No person, be he citizen or alien, need worry, provided he is not connected with subversive elements.... While we have been subjected to a serious attack by a ruthless and treacherous enemy, we must remember that this is America and we must do things the American way. We must distinguish between loyalty and disloyalty among our people. (Takaki, 2000: 138)

Nonetheless, it remains that the president, latterly with the support of Congress, had vested in Emmons the same biopolitical power he had granted the Secretary of War and his delegates. At best, therefore, Emmons' assurance there would be no concentration camps in Hawaii—and it seems he kept this word—is a magnanimous suspension of his sovereignty over the lives the White House had produced and anathematized as Japanese. There was also dissent in the civilian agency Roosevelt struck to administer the internment. As the War Relocation Authority produced propaganda films to justify the camps, its director Milton S. Eisenhower wrote to Roosevelt on April 22, 1943. “My friends in the War Relocation Authority”, he advised,

are deeply distressed over the effects of the entire evacuation and relocation program upon the Japanese-Americans, particularly upon the young citizen group. Persons in this group find themselves living in an atmosphere for which their public schools and democratic teachings have not prepared them. (Weglyn, 1976)

Eisenhower's sensibility, and that of his friends, may account for the tone of the Authority's film *Challenge to Democracy*, and its presentation of the camps as an urgent humanitarian intervention. These qualms—in the executive, military and civilian organs empowered to define and detain people of Japanese ancestry—were no substitute for the constitutional rule of law; they were no comfort against the degradation of human life as bare life, “Japanese blood”, in the concentration camps of the United States.

Three Americans, Gordon Hirabayashi, Fred Korematsu and Mitsuye Endo were restive as DeWitt's public proclamations intruded into their daily lives, choking the host of unremarkable actions that manifest one's experience of liberty and sense of self. They asserted their personhood through independent acts of disobedience, a spontaneous upwelling of resistance that saw the United States Supreme Court constitutionally anoint

the messianic presidency and, eventually, order something of an end to the interment camps.

On May 16, 1942, Gordon Hirabayashi refused to board the last bus from Seattle to the interment camps and reported instead to the FBI. He was in his senior year at Washington State University, living at the YWCA dormitory; with the support of his “dorm mates”, he adapted his routine to the constraints imposed by the military. “Each day, as it neared 8 p.m., they would find me wherever I was on campus to make sure I made curfew. They didn’t want me to get in trouble.” One evening, while running to the Y to make curfew, a question stopped him. “I thought, ‘Why am I dashing back and my roommates are not?’ As soon as the question came up, I knew I couldn’t accept the curfew. I turned around and went back to the library. Nobody turned me in.” In all of this, in the notices posted on Seattle’s telephone polls and all official communications, Hirabayashi felt the sting of the authorities’ continual reference to “non-alien”: “They never referred to me as a citizen.” From then on, it became a deliberate “expression of freedom” for Hirabayashi to remain out after curfew. (Hall & Patrick, 2006: 111)

In the same way, Hirabayashi was ready to comply with a public proclamation removing all people of Japanese descent from Seattle. He did not register for the university’s spring semester in anticipation of being removed from campus. On his account of the events, a question stopped him again: “ ‘If I couldn’t accept curfew, how can I accept this thing? It’s even worse. I’m not going to allow my citizenship to be usurped without my protest. I’m going to stand up for my rights.’ Immediately I knew I couldn’t board the bus.”

(Anonymous, 2000) Hirabayashi wrote a statement explaining his reasons for refusing to comply with the removal order and, with a lawyer from the American Civil Liberties Union, took it to the FBI. Charged with violating the exclusion order and, latterly, violations of curfew, after a one-day hearing he received a sentence of 90 days imprisonment. (Hall & Patrick, 2006: 112) Two days later, Hirabayashi appealed to the federal courts in the hope of a ruling based on the Constitution. “But the judge told the jury,” he recalls, “‘You heard the defense talking about defending the Constitution. That’s irrelevant. The issue is the executive order that the military issued.’ Under those circumstances, the jury came back very fast.” (Anonymous, 2000) Undeterred, he took the case with the ACLU to the Court of Appeals and the Supreme Court.

Chief Justice Stone ruled that the internment process was not an unconstitutional delegation of powers from Congress to the military; further, in removing from their homes “citizens of Japanese ancestry and those of other ancestries” the military did not violate the Fifth Amendment and its guarantees of, among other things, due process and property rights. “*The adoption by Government,*” he stressed,

in the crisis of war and of threatened invasion, of measures for the public safety, based upon the recognition of facts and circumstances which indicate that a group of one national extraction may menace that safety more than others, is not wholly beyond the limits of the Constitution, and is not to be condemned merely because, in other and in most circumstances, racial distinctions are irrelevant. [...] We cannot close our eyes to the fact, demonstrated by experience, that, in time of war, residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry. Nor can we deny that Congress, and the military authorities acting with its authorization, have constitutional power to appraise the danger in the light of facts of public notoriety. (*Hirabayashi v. United States*, 1943: 101 - 02. Original italics.)

The Chief Justice upheld the conviction for a Court of uneasy unanimity. Justice Frank Murphy, the Michigan Catholic who, in his one year as Roosevelt's Attorney General established the Civil Liberties Section of the Department of Justice, initially drafted a dissenting opinion. Murphy, yielding to the argument of Justice Felix Frankfurter that division in the court would be dangerous for a nation at war, assented to *Hirabayashi's* conviction while attempting to keep intact his reasons for dissent. (Stone, 2004: 298)

In a line of argument that echoes Chafee's denial of the primacy of the war clauses over the rest of the Constitution, Murphy's concurring opinion held

It does not follow, however, that the broad guaranties of the Bill of Rights and other provisions of the Constitution protecting essential liberties are suspended by the mere existence of a state of war. It has been frequently stated and recognized by this Court that the war power, like the other great substantive powers of government, is subject to the limitations of the Constitution. [...] We give great deference to the judgment of the Congress and of the military authorities as to what is necessary in the effective prosecution of the war, but we can never forget that there are constitutional boundaries which it is our duty to uphold. It would not be supposed, for instance, that public elections could be suspended or that the prerogatives of the courts could be set aside, or that persons not charged with offenses against the law of war [...] could be deprived of due process of law and the benefits of trial by jury, in the absence of a valid declaration of martial law. (*Hirabayashi v. United States*, 1943: 110)

Murphy then proceeded to decry the invidiousness of the blanket condemnation by the federal authorities of racial groups, a theme he would develop as litigation against the internment continued. "Distinctions based on color and ancestry", he argued,

are utterly inconsistent with our traditions and ideals. They are at variance with the principles for which we are now waging war. We cannot close our eyes to the fact that, for centuries, the Old World has been torn by racial and religious conflicts and has suffered the worst kind of anguish because of inequality of treatment for different groups. There was one law for one and a different law for another. (*Hirabayashi v. United States*, 1943: 110)

It would take over forty years for Gordon Hirabayashi to feel the benefit of Murphy's opinion, though he would never hear from the Supreme Court again. In 1981, two years before his retirement as chair of the University of Alberta's Department of Sociology, he learned of documents that demonstrated the U.S. authorities had concealed evidence from the courts in the prosecution of his case. Hirabayashi brought an action before Donald Voorhees, federal judge for the Western District of Washington State. Voorhees, no stranger to civil liberties, had struck down in 1979 a voter-driven initiative against desegregated school bus programs. (Heller Anderson, 1989) After a two week evidentiary hearing in June 1985, Voorhees ruled the conviction of Hirabayashi for violation of the exclusion order was tainted by official misconduct, but he upheld the conviction for violation of curfew. The federal government appealed the overturning of the exclusion order reversal, Hirabayashi appealed on the issue of curfew. In September 1987, Hirabayashi secured from a unanimous court of appeal a decision striking down his convictions on both the exclusion and curfew orders. (Hall & Patrick, 2006: 112)

One year out from its difficult unanimity in *Hirabayashi*, the U.S. Supreme Court began to polarize around the themes of Justice Murphy's dissent. Two justices, Owen Roberts and Robert H. Jackson, joined Murphy in dissenting to the Court's ruling in *Korematsu v. United States*. Roberts captured the bind two conflicting proclamation orders presented to Frank Korematsu:

he was forbidden, by Military Order, to leave the zone in which he lived; he was forbidden, by Military Order, after a date fixed, to be found within that zone unless he were in an Assembly Center located in that zone. [...] In the dilemma that he dare not remain in his home, or voluntarily leave the area, without incurring criminal penalties, and that the only way he could avoid punishment was to go to an Assembly

Center and submit himself to military imprisonment, the petitioner did nothing. (*Korematsu v. United States*, 1944: 230)

Jackson, echoing Roberts, insisted Korematsu's "crime" consisted of "being present in the state whereof he is a citizen, near the place where he was born, and where all his life he had lived." (*Korematsu v. United States*, 1944: 243) The police of San Leandro, California stopped Korematsu on May 30, 1942 as he walked with his Italian-American girlfriend. He had undergone plastic surgery to make his appearance occidental, and identified himself to the authorities as being of Hawaiian and Spanish descent. The police took him in for questioning, at which time he gave his true name and confirmed that his family had been removed to the Tanforan assembly centre, a racetrack converted into a race prison. He was in his early twenties. (Stone, 2004: 299)

Writing for the majority, Hugo Black categorically rejected as "unjustifiable" any attempt to cast the "assembly centers" as "concentration camps, with all the ugly connotations that term implies". (*Korematsu v. United States*, 1944: 223) The task facing Black was to apply the principles of Chief Justice Stone's ruling in *Hirabayashi*, upholding the authority of the military to issue exclusion orders on the basis of race, while distinguishing this from the authority of the military to hold in detention these excluded populations. Concurrent with *Korematsu*, the Court was parsing through the issues of detention raised in the case of Mitsuye Endo; Black wrote for the benefit his colleagues who could not find a distinction between the martial powers of exclusion and detention. "Our task would be simple, our duty clear," he argued,

were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. [...] To cast this case into outlines of racial prejudice, without reference to the real military

dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and, finally, because Congress, reposing its confidence in this time of war in our military leaders -- as inevitably it must -- determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot -- by availing ourselves of the calm perspective of hindsight -- now say that, at that time, these actions were unjustified. (*Korematsu v. United States*, 1944: 223 - 24)

Therefore, the Court upheld the power of the President, arguably with or without Congress, to order the segregation of populations on the basis of race. Indeed, it converted biopolitical power from an *ad hoc* exercise of executive authority into something consistent with the Constitution—the state of exception as a constitutional norm. The President was confirmed in the power constitutionally to step outside the Constitution, becoming the author in his actions of the nation’s supreme law.

Murphy would not allow Black’s construction of this Gordian knot to stand, and admitted no distinction between the powers of exclusion and detention. Instead, the issue cut to the founding principle of the democratic project, the inherent, human dignity of the citizen. His dissent from the Court’s insistence on what amounts to a meta-constitutional role of war-making power, retrospectively from the *war on terror*, is apposite and prophetic. “The military necessity which is essential to the validity of the evacuation order”, Murphy wrote,

thus resolves itself into a few intimations that certain individuals actively aided the enemy, from which it is inferred that the entire group of Japanese Americans could not be trusted to be or remain loyal to the United States. No one denies, of course, that there were some disloyal

persons of Japanese descent on the Pacific Coast who did all in their power to aid their ancestral land. Similar disloyal activities have been engaged in by many persons of German, Italian and even more pioneer stock in our country. But to infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group is to deny that, under our system of law, individual guilt is the sole basis for deprivation of rights. Moreover, this inference, which is at the very heart of the evacuation orders, has been used in support of the abhorrent and despicable treatment of minority groups by the dictatorial tyrannies which this nation is now pledged to destroy. To give constitutional sanction to that inference in this case, however well intentioned may have been the military command on the Pacific Coast, is to adopt one of the cruelest [sic] of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow. (*Korematsu v. United States*, 1944: 240)

The Court's disposition of Mitsuye Endo's application for a writ of *habeas corpus* is in the canon of emancipating moments of U.S. history, the decisive moment when the genius of the republic corrected the drift to an atavistic politics. On this reading, *Ex Parte Endo* represents the motive force that ended the internment, the removal and detention of Americans because of their Japanese ancestry. The Court in *Endo* did nothing of the kind. The majority found, as the Court's fractious debate in *Korematsu* shows, that the "abhorrent and despicable treatment of minority groups" was not the exclusive practice of "dictatorial tyrannies"; it was also consistent with constitutional powers of the President of the United States. In formulating the whole system of internment—its restriction to people of Japanese ancestry on the Pacific Coast and not Hawaii, its exclusion of Germans and Italians on the Atlantic Coast for similar treatment—military considerations were a cover for Roosevelt's preoccupation with mollifying the greed and bigotry of powerful blocks of voters. His reduction of Japanese-Americans to bare life was motivated by a political calculus; indeed, Roosevelt used the power of detention to delay the release of all interned "non-alien" until after the 1944 elections, in a bid to preserve his prospects on

the Pacific Coast. The Court seems to have facilitated this, delaying the release of its decision in *Endo* to allow the President to terminate the program when he saw fit. (Stone, 2004: 302 – 03)

The California government released Mitsuye Endo from her employment in Sacramento because she was “unavailable” for work. Her detention by the War Relocation Authority at its Tule Lake camp prevented her getting to the office. Faced with the prospect of a writ of *habeas corpus*, the Authority attempted to strike a deal with Endo, offering to release her on the condition that she stayed away from the West Coast. The Authority made a regular practice of releasing people from detention, as long as they adhered to its circumscription of their liberty. She declined the offer, because it would not allow her to return to her position with the State of California. She remained in detention for two more years, as her lawyer coaxed her application for a writ of *habeas corpus* through a Kafkaesque process to the Supreme Court. (Irons, 1983: 255 – 56) The demand was that the authorities either bring a charge against her, or set her free.

The sole issue in *Endo*, therefore, concerned the practice of the War Relocation Authority to hold people in detention and prescribe the conditions of their release. In the facts before it, the United States Supreme Court confirmed there was nothing to suggest Mitsuye Endo was herself a threat to the security of the Pacific Coast. Writing for the majority, William Douglas ordered the release of Mitsuye Endo, finding that when “the power to detain is derived from the power to protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized.” Detention might

be permissible in the execution of the evacuation orders, but in the case of Endo detention had ceased to be “narrowly confined to the precise purpose of the evacuation program.”

(*Ex Parte Mitsuye Endo*, 1944: 323)

With this established, the Court articulated what amounted to a doctrine of presidential infallibility that would have struck at least some of the framers of the republic as, at the very least, the revenge of George IV’s royal prerogative. This doctrine both flows from and develops the messianic presidency. “We must assume that the Chief Executive and members of Congress,” Douglas argued,

as well as the courts, are sensitive to and respectful of the liberties of the citizen. In interpreting a war-time [sic] measure we must assume that their purpose was to allow for the greatest possible accommodation between those liberties and the exigencies of war. We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used. (*Ex Parte Mitsuye Endo*, 1944: 299 - 300)

The original constitutional polity of the United States did not rest on such good-faith assumptions, but on the capacity of the three branches of government zealously to protect their own spheres of authority to prevent the rise of despotism, Randolph’s despised “foetus of monarchy”. As we have seen, it was precisely the monarch’s claims to total authority at a time of war, “pretending [...] that the good of the people was the object”, that the young Lincoln, before he was tested in the Civil War, denounced as “the most oppressive of all kingly oppressions”. Mimicking this kingly oppression, the presidency further grounded itself in its ability to use national security to short circuit the critique and justification of its actions through the institutions and discourse of democratic communication. Roosevelt reduced 120,000 American citizens to the status of non-alien

because of their ancestry and delegated to the military the power to legislate criminal sanctions against them, in the name of public safety. Security served as an apolitical justification, a pretext to shut down vigorous scrutiny—by legislators, by the courts, by a democratic press and citizenry—of the executive branch’s arrogation of powers over human life, the power totally to administer life, to abrogate both citizenship and the Constitution. In fact, as discussed above, Roosevelt was not motivated by the image of Japanese bullets strafing the docks of Seattle, but by the ballots at stake on the Pacific Coast in the 1944 presidential election. The Constitution, in the assessment of his Attorney General Francis Biddle, was not something that overly concerned Roosevelt or any wartime president: it “was a question of law, which ultimately the Supreme Court must decide. And meanwhile—probably a long meanwhile—we must get on with the war.” (Stone, 2004: 296) The courts were content to allow the president to do precisely this, to get on with the war without the unnecessary encumbrance of constitutional law; their complicity—though denounced by dissenting justices—benefited from a minority group that was not generally litigious. Irons suggests that one in ten thousand of the interned population brought actions before the courts, contrasting this to the African American civil rights movement and its vast mobilization of a racialized minority in the decades following the war. (Irons, 1983: 76) Certainly, the rulings in *Hirabayashi* and *Korematsu* would not have encouraged similarly situated complainants to step forward. In *Endo*, with its doctrine of presidential infallibility, the U.S. Supreme Court confirmed the presidency as it claimed the place “where kings have always stood.”

Lincoln's tropism takes us only so far, because the United States presidency brought a qualitative change in the nature of sovereign power that neither he nor any monarch could imagine. The development of nuclear weaponry in the Second World War, along with the communications and military infrastructure necessary for their global deployment, put the president in a place no king had ever reached. From Eisenhower's doctrinal commitment "to secure and protect the territorial integrity and political independence of such nations, requesting such aid against overt armed aggression from any nation controlled by international communism" (Eisenhower, 2009) to the Bush doctrine's pledge "to seek and support the growth of democratic movements and institutions in every nation and culture, with the ultimate goal of ending tyranny in our world" (Fiala, 2007), the universal emancipation promised by the messianic presidency was undergirded by the president's capability—at his sole discretion—to burn the Earth to a cinder several times over. The messianic president became a new archetype of sovereign power, a model to be emulated by other putative agents of thermonuclear utopia, starting with the presidents of the Soviet Union.

From Harry Truman's nuclear bombing of Hiroshima and Nagasaki in August 1945, through the Cold War to the present day, the coming of the atomic age gave sovereign power the capability, through weaponry that was in every sense omnicidal, to objectify the human species, to reduce all life to bare life. The thermonuclear threshold marked the boundary of Max Weber's definition of the state, "that human community which (successfully) lays claim to the *monopoly of legitimate physical violence* within a certain territory, this 'territory' being another of the defining characteristics of the state." (Weber,

1994: 310 Original emphasis.) Truman attempted to legitimize this “new and revolutionary increase in destruction” as a “powerful and forceful influence towards the maintenance of world peace.” (Truman, 1945) In the thermonuclear age, the global reach of the United States through its weapons systems, latterly rivaled by those of the U.S.S.R., made the capacity to claim ownership of life itself through total violence the foundation of sovereign power; territory became a secondary concern. Seen in this light, the Cold War was a contest over the monopolization of violence over human beings as a whole; thermonuclear arsenals allowed the contending sovereign powers to vie for ontological control of the species—its life, its identity and meaning. With these thanatechnologies at its disposal, a death-dealing infrastructure unprecedented in human history, sovereign power became an existential threat in its own right to our species being and the biosphere itself. The destructive power of the weaponry, the cybernetic capacity for their instantaneous deployment over the face of the planet made it impossible to place them under any semblance of democratic control—no Congress, Parliament or Central Committee would have the time to vote for a first strike (“anticipatory retaliation” in Alexander Hague’s Orwellian obscenity) or counter strike. Attempts to curb them in bilateral and international fora, through test ban and non-proliferation treaties that purported to speak on behalf of the human race, could not eradicate the threat of nuclear weapons. Therefore, the advent of the bomb made a new thing of sovereign power: it concentrated in the hands of an insular executive branch—in liberal democracies, soviet socialist republics, Islamic states—the ability and authority to kill our species being. Thermonuclear weaponry epitomizes what Alain Badiou describes as the “errant

superpower of the State”, a superpower in its capacity to reduce all life to the material stuff of bare life. (Badiou, 2005: 145)

The purpose of vivification, as it unfolded in the United States, was to legitimize this authority in the name of liberty and in the person of the messianic presidency. It animated the story of a vibrant, liberally empowered democratic citizen precisely at the moment when no act of citizenship could strip the president’s power to nuke the world to save it.

For example, liberal theories of democratic communication have generally failed to take into account the fact that the messianic presidency holds in reserve the power to reduce the diversity of all life to ashes, to the singularity of non-being. An extensive and intricate phylum of political philosophy, liberalism’s core theme of liberty and its foundational role in modernity come to a moment of crisis, of performative contradiction, in the thermonuclear age.

The debate between John Rawls and Jürgen Habermas provides a good illustration. The political liberalism of Rawls and the discourse ethics of Habermas posit models of political justification that pay scant attention to the fact that sovereign power exists within and is conditioned by the meta-political shell of thermonuclear capability. The relevance of this shell has not diminished since the fall of the Berlin Wall: public discourse in the United States remains very much about the protection of “freedom-loving people” against, borrowing from Iris Marion Young, “bad men”. From the threat of a jihadist “dirty bomb” to the reserve capacity of the United States to bring “a rain of ruin from the air, the

like of which has never been seen on this earth”, the *war on terror* is a nuclear war by other means. (Truman, 1945) Its imperative of public safety ensures the entire apparatus of economic and social production along with, in Weber’s phrase, the “material means of administration” continues to be oriented to the maintenance of this shell. However, Rawls and Habermas posit models of liberty as though this shell does not exist, as though the power of the state remained on a human scale and human life continued to exist, as it were, on its own terms.

Though a point of contestation between them, Rawls and Habermas insist that liberty is not metaphysical, or founded in any transcendent or universal feature of human identity; liberty plays out in the material conditions of our lives together, in our equal freedom individually to seek the good. The result is a discourse of liberal materialism. It presents the citizen as a political personality, a democratic agent, the autonomous producer of meaning. At the same time, if covertly, it presents the liberty of this citizen as the justification for sovereign power’s ability to reduce to fallout everything we know. The thermonuclear shell marks the absolute limit point of liberal materialism’s promise of radical, individual emancipation, the condition of our freedom to pursue the good exclusively on our own terms. Theories of democratic communication, as advanced by Rawls and Habermas, are hard pressed to critique the sovereign power of vivification and its project of inducing us to embrace the appalling premise of our liberty. Indeed, they make straight the path for the messianic presidency and its self-justification in the ownership and protection of bare life.

Their differences notwithstanding, which they consider to be an intra-familial debate, Rawls and Habermas share with Weber the project of determining what legitimates sovereign power and justly compels our obedience. Briefly, Weber suggests there are three “pure types” of grounding for sovereign power: *custom* or what purports to be the authority of the ancient past, the personal charisma or ‘*gift of grace*’ of the magical or charmed leader, and a juridical order of *statute* and the constitutional rule of law. He acknowledges there is potentially a vast array of overlap and permutations in the actual workings of these categories. These types describe forms of political justification, with *politics* understood as the contest over “the distribution, preservation or transfer of power”; *power* is ultimately a question of being “the sole source of the ‘right’ to use violence.” (Weber, 1994: 311 – 14) The liberal project, exemplified by Rawls and Habermas, keeps Weber’s definition of politics intact. Its aim is to build a theory of justification on the last of these types.

Rawls and Habermas insist that democratic communication, if it is to be democratic, must exorcise from the rule of law the patriarchal influence of custom and the prophetic pull of grace. They articulate forms of liberal materialism to deliver on the promise of the Enlightenment by excluding from democratic justification any public appeal to the transcendental—be it divine right, tradition or claims of prophetic insight. The challenge in a pluralistic society, if it is to be at the same time a just society, is to determine how this purified rule of law and the state’s monopolization of violence relate to the persistence of custom and grace in the private doctrinal life of the citizen. This is the principal point of contention between Rawls and Habermas. However they share the core conviction that the path to freedom moves resolutely away from the official doctrines and ontologies of the

past, allowing the individual a share in self-governance and, above all, maximal and equal liberty to pursue his or her own good.

Rawls correctly affirms as “the fact of oppression” that the use of state power to impose “one comprehensive religious, philosophical, or moral doctrine” would on its face be tyrannical, even if the doctrine was “the reasonable liberalisms of Kant or Mill”. (Rawls, 2005: 37) This fact of oppression is an integral part of what I criticize as the sovereign power of vivification. The way forward, Rawls argues, is to remove doctrinal claims—religious and secular—from the justification of political power, to build a politics without metaphysics. He works to a “political conception of justice”, based on the norms that would be selected in a model of society, abstracted and “free from distracting details”.

First, it is a closed and self-contained society—membership is by birth alone, and there are no interactions with other societies. One can live a “complete life”, he suggests, in this radically insular space; the encounter with the other, people excluded from society, is not integral to democratic life. (Rawls, 2005: 12) With this criterion, Rawls begs the question of what counts as membership in society, supplying in his premise the conclusion he seeks to prove. He takes bare life, the fact of being born into a specific social context, as the foundational act of membership in a political community. This brackets out the problem of membership—one of the principal sites of contestation in diverse societies—while, at the same time, making the fact of birth itself the ground for exclusion of the other.

Second, it is a pluralistic society—its members hold diverse “reasonable comprehensive doctrines” and this diversity will remain as a permanent historical condition.

Third, if it is to be a just society, it must be the exclusive source and sole ground of the values and norms that govern it; to be free and democratic, contra the Preamble of the U.S. Declaration of Independence, the just society cannot govern itself according to “the laws of nature and of Nature’s God”. Instead, we are to assess the projects of the state in the privacy of our own reasonable comprehensive doctrines, contemplating the works of political justice in this discrete, inward operation of conscience. Joshua Cohen describes this as the “principle of deliberative inclusion”, suggesting that any policy that cannot be embedded in one’s deep and reasonable beliefs about the nature and purpose of human life would be, by definition, oppressive. (Cohen, 1997: 417) Similarly, Rawls acknowledges and seeks to protect the “political and non-political” attachments that “specify moral identity and give shape to a person’s way of life.” The just society would respect the ways in which its members see their “religious, philosophical and moral convictions”, in addition to a host of other attachments and loyalties, as inseparable from one’s sense of self. (Rawls, 2005: 31)

Based on this model Rawls attempts to elide the tyranny of state-imposed doctrine by defining justice as *fairness*, political justice—basic rules of public encounter that allow each of us the equal right individually to pursue the good as we define it, and in so doing keep faith with one’s sense of self.

Political justice aims to set out what amount to supra democratic rules to govern the state's monopoly over violence; Rawls argues it has the axiomatic character of the "rules of inference of mathematics or logic", and thus can never be ratified by a vote. (Rawls, 1995: 144 Footnote 22.) Michael Sandel argues that this results in a purely formal conception of democratic life, procedural norms that would require us to bracket out from the practice of citizenship the features of identity—such as gender, race, religion and sexual orientation—that lead to claims against the state and public conflict. (Sandel, 1996) Habermas shares this concern, observing that in the Rawlsian universe "reasonable characteristics of moral persons are replaced by the constraints of rational design." (Habermas, 1995: 112) The result is a conception of justice—of democratic communication in a pluralistic society—so abstracted from the ways we actually live, encounter each other and contend with government that it is too formal, too pristine to be of any use in building a substantive, real-world politics. In response to his critics, Rawls is at pains to show that political liberalism and its conception of justice as fairness is substantive, and indeed cannot stand on its own without substantive justice. "Justice as fairness is substantive", he argues,

[...] in the sense that it springs from and belongs to the tradition of liberal thought and the larger community of political culture of democratic societies. It fails then to be properly formal and truly universal [.] (Rawls, 1995: 179)

In an attempt to assert his system is not metaphysical, Rawls argues that political justice is like the axioms of mathematics and logic but, through this appeal to context, he surrenders any claim that it might be universal. We are left with a conception of justice that does not claim to be normative of society as such, but of a liberal construction of society. His argument, therefore, is that political liberalism is a substantive account of the norms of a

liberal society, a distillation of the “political culture” of this form of democracy. The result is not an axiom but a circularity, where “substantive” describes the operation of the values of a liberal democracy as liberal.

None of this seems to sit well in Rawls’ Kantian soul, the instinct that justice speaks to moral truths that are not contextual, truths about what it means to be human that are universal and absolute. Consider, for example, how Rawls and his school of thought treat the issue of equality. Rawls argues that the struggle for equality shows the singular importance of public contestation over substantive justice,

[...] our considered judgments with their fixed points—such as the condemned institutions of slavery and serfdom, religious persecution, the subjection of the working classes, the oppression of women, and the unlimited accumulation of vast fortunes, together with the hideousness of cruelty and torture, and the evil of the pleasures of exercising domination—stand in the background as substantive checks showing the illusory character of any allegedly purely procedural ideas of legitimacy and political justice. (Rawls, 1995: 178)

It is difficult to believe Rawls would accept these “condemned institutions” and “evil pleasures” might be defensible in societies that do not share liberal, democratic values. His demonology does not speak to the abuse of persons as members of a society; the abuse consists in their exclusion from society. He must therefore point to something about human beings as such, a moral truth that cannot be reduced to social convention. Further, Rawls correctly insists on the fallibility of even our best attempts to weave this truth into society:

[...] there is no human institution—political or social, judicial or ecclesiastical—that can guarantee that legitimate (or just) laws are always enacted and just rights always respected. To this add: certainly, and never to be questioned, *a single person may stand alone and be right in saying that law and government are wrong and unjust.* (Rawls, 1995: 166 Added emphasis.)

Rawls needs to find a footing for justice that is not purely contextual, one that will allow the oppressed to stand in judgement over and against the social production of oppression.

Equality has always demanded that the members of subjugated communities—individually as in the case of Mitsuye Endo or collectively in the struggles of African Americans, women, gays and lesbians—apply the full force of their moral personalities against the violence of the state. These forms of resistance were not, however, spontaneous expressions of the democratic culture; they built democratic culture by insisting on norms not yet in the canon of the rule of law, norms that were in the Weberian sense prophetic.

In her account of the struggle for equality, Martha C. Nussbaum is perhaps more candid than Rawls. “Even the most hardened skeptic”, she insists, “should grant that much energy for good in American life, including virtually the entirety of the abolition movement and the civil rights movement, has religious roots.” (Nussbaum, 2008: 233–34) She makes this assertion to argue vigorously for the exclusion of religious doctrine and practices from the public life of the United States. The answer is to build a political culture along the lines of a Rawlsian consensus, in which the holders of reasonable doctrines—religious and secular—affirm political justice, and with it equality, as a fundamental norm, as something central to their otherwise disparate systems of belief. The result would be an idea of equality that points to something more than material parity—in wealth, social conditions and so on. “The equality we are discussing here is something different and very basic,” Nussbaum argues,

closely correlated with the idea of equal respect. It is the idea that people are of equal worth as citizens, and are therefore to be treated *as equals* by laws and institutions. Citizens may have different views about the basis or ground of that equal worth. Christians will ground equality in our equality before God; others will ground it in some related conception of the soul; others will find other accounts. I have argued [...] that the political realm should avoid a comprehensive religious or metaphysical account of human equality, precisely in order to leave room for, and show respect for, the many different ways in which citizens interpret this idea. (Nussbaum, 2008: 226)

As a constitutional norm of a free and democratic society, equality must be free of any “religious or metaphysical” claims. This is necessary to preserve reasonable doctrinal diversity, where to be reasonable a doctrine must find a place within its system of beliefs for, among other things, the secular idea of equality. On Nussbaum’s reading of the U.S. Constitution, an official metaphysical account of equality would be oppressive, indeed unconstitutional, because it would covertly establish a doctrinal belief or civic religion. Nevertheless, this is precisely where her account of equality leads. Equality, it would seem, is more than the power of the state to treat us *as though* we are equal; she grounds equality in a conception of human dignity that is not the product of state power, but is a feature of persons as such:

So, at the most general level, we are saying that our political principles include a commitment to the idea that all citizens are equal in dignity, and, because of that dignity, are to be treated with equal respect by laws and institutions. (Dignity and respect are a pair, to be understood together; dignity probably cannot be defined altogether independently of respect.) (Nussbaum, 2008: 226)

There is no escape, as Connolly insists, from metaphysics—not in Rawls’ account of political justice, or in Nussbaum’s Rawlsian take on equal human dignity. The “overlapping consensus” among reasonable doctrines supports what remain, at the end of the day, a consensus doctrine about the moral worth of the human person as such, and not

as the member of a particular society or political culture. Even if Rawls maintained that this consensus was specific to the beliefs of a specific community—not the systems of belief of a global Islam, Judaism or Christianity but the intersection of these beliefs at, for example, the Harvard School of Divinity—the consensus would still be doctrinal. Furthermore, although Rawls insists his approach is to leave reasonable comprehensive doctrines intact, an approach Nussbaum grounds in the imperative of liberty of conscience, political liberalism does not deliver on its promise of emancipation from the “fact of oppression”. The “overlapping consensus” on issues of substantive justice does not leave reasonable comprehensive doctrines at a pristine remove but works, instead, “*to shape those doctrines toward itself.*” (Rawls, 1995: 145 Added emphasis.)

In the name of respect for pluralism, Rawlsian liberalism presents a model of democratic communication that enshrines a canonical doctrine of doctrines, as it were, as the test of sovereign power’s justice and legitimacy in the monopolization of violence. Although he maintains one person can stand alone against this doctrine, and be right, Rawls presents no account as to how this might in fact be so; there is no footing available in the post-metaphysical posture of his politics for anyone to have a prophetic standing against the disinterested, rational consensus of specific rational doctrines. There is no basis that would allow us to determine how such a solitary figure—be it Martin Luther King, Rosa Parks or Mitsuye Endo—can actually speak a moral truth that refutes the consensus doctrine. Certainly, the enormity of the destructive power over the life of the species and the planet as a whole now concentrated in the hands of sovereign power, along with its capacity to colonize and administer this life according to its own purposes, suggests that there has

never been a greater need for these emancipating voices. The adequacy of a theory of democratic communication must be determined by the ways it makes room for the disruptive, revolutionary and authoritative intrusion of truth against the bodyguard of doctrine that sustains sovereign power. For these reasons, I find Rawls does not provide a framework for democratic communication sufficient to build a politics against the sovereign power of vivification; in fact, he presents a detailed anatomy to show how the organs of political liberalism ought to consume the life of conscience.

Instead of working to an idea of democratic communication from Rawls' starting point of an original position, Habermas posits a discourse ethics on a pragmatic exploration of the impediments to participation in society as we know it. The challenge of democratic communication is to remove these impediments so that all participants can be truly free and equal. Where Rawls attempted to construct an overlap of rational comprehensive doctrines, Habermas posits a pluralistic society in which membership requires us to come to a collective understanding by seeing the world from each other's points of view.

"Discourse ethics", he argues,

rests on the intuition that the application of the principle of joint universalization, properly understood, calls for a joint process of "ideal role taking".

It requires a continual assessment of the material conditions that impede participation, and calls for the removal of these factors so that social pluralism can truly find its voices. This is why Habermas insists that

[u]nder the pragmatic presuppositions of an inclusive and noncoercive rational discourse among free and equal participants, everyone is required to take the perspective of everyone else, and thus project herself into the understandings of self and world of all others; from this interlocking of perspectives their emerges an ideally extended we-perspective from

which all can test in common whether they wish to make a controversial norm the basis of their shared practice; and *this should include mutual criticism of the appropriateness of the languages in terms of which situations and needs are interpreted.* (Habermas, 1995: 117 Added emphasis.)

The “we-perspective” is essential, Habermas argues, in order to build a democratic politics to against the fact that the rule of law often “provides illegitimate power with the mere semblance of legitimacy.” The challenge is to discern the ways citizens actually form consent, and recognize in the rule of law the “laws of freedom”, from the operation of “administrative self-programming and structural social power” that produces mass loyalty, an effigy of democratic consent. (Habermas, 1996: 40) On this view, a Rawlsian doctrinal consensus would work against democratic communication because it would point to a “metasocial guarantee” aimed at insulating the rule of law, and sovereign power generally, from the determined scrutiny of citizens communicating democratically—citizens who build their critique of government by taking full account of each other’s points of view.

For Habermas, the fact of social pluralism is given not simply in the enduring diversity of doctrines, but in the multiplicity of *lifeworlds*. He grounds the act of social communication in the lifeworld, “the horizon of shared, unproblematic beliefs”, the “resources *always already familiar*” that nourish and give substance to one’s sense of self, one’s subjectivity. “The lifeworld”, Habermas writes, “forms both the horizon for speech situations and the source of interpretations, while it in turn reproduces itself only through ongoing communicative actions”; it “embraces us with an unmediated certainty out of whose immediate proximity we live and speak.” We are not, on this view, disembodied Kantian

“holy wills” because our capacity for reason is “communicative”: never to be abstracted from the fact that we are each embedded in a “complex of interpenetrating cultural traditions, social orders and personal identities”, our communicative reason always operates from and within a framework of knowledge that we experience as axiomatic, without the “awareness that it *could* be false.” Our communicative reason is always situated in a lifeworld that is “shot through with fallible suppositions of validity”. (Habermas, 1996: 22 Original emphasis.) Habermas strenuously objects to Rawls’ attempt to derive a theory of justice from the rarefied space of an original position because it bears no resemblance to the ways we actually live and think. Instead, the test of validity is whether our assertions would be rationally acceptable to an “unlimited interpretation community” of actual persons embedded in their own lifeworlds. (Habermas, 1996: 19)

The dark side of every lifeworld would, presumably, be formed by the internalization of oppression and privilege that must accompany the social construction of the other. The lifeworld of Audre Lorde—in her own words, “black, lesbian, mother, warrior, poet”—would bear the indicia of cumulative forms of oppression, the burdens of living in a white supremacist, misogynist and homophobic culture. (Tharps, 2004) Her lifeworld would be an intricate matrix of these factors, and those aspects of her personality that moved her to resist: “My revolution is not just mine, and I am not less loving.” Indeed, where Habermas asserts that a defining feature of the lifeworld is that it must persist unexamined, that to reflect upon it is to annihilate its unmediated influence on our subjectivity, it is by no means clear that people who live in conditions of oppression, and multiple oppressions, enjoy this luxury of unconsciousness. For example, the very nature of a racist culture is to

continually push the subjectivity of the racialized other inward, triggering the continual assessment of the radical incongruity between one's sense of self worth and the constructed features of oppression that presume to deny it. This sense of incongruity—of injustice—is the heart of all democratic communication for social change, and the measure of whether this change is in fact a change for the better.

Habermas attempts to build a theory of democratic communication on a rigorous epistemological framework, making the public disputation of knowledge about facts and values central to the ongoing work of governance and emancipation. Democratic citizenship requires us to be able to take into account each other's lifeworlds, and to ensure the factual and normative claims we make are accessible to others as rational beings situated in their own microcosms of knowledge. "Every speech act", he argues, "involves the raising of criticizable validity claims aimed at intersubjective recognition." (Habermas, 1996: 18) Citizenship is therefore the practice of communicative action, a discipline that recognizes the pluralism of our lifeworlds and requires us to engage each other in order to reach an understanding. To be a "communicatively engaged" citizen means one is capable of a degree of openness, disposed to reciprocity, and can see oneself as sharing in the rational authorship of positive law. (Habermas, 1996: 32) Although Habermas sees the elimination of barriers to participation as central to this construction of citizenship, I believe Derrida is correct to question the ways in which this approach necessarily establishes a hierarchy of citizen and non-citizen. (Borradori et al., 2003) It requires of people who have the most to say against the impact of the rule of positive law, the people reduced by sovereign power's rule of law to the status of bare life—because of their race or

religion, gender and sexual orientations, or social condition—the epistemological flexibility to see the world through the eyes of their oppressors. It requires them, if they are to become communicative citizens, to translate the truth of their affliction into criticizable claims made in “appropriate” language.

The claims about facts and values made by the oppressed against their oppressors do not seem to be, in Habermas’ epistemological politics, claims that admit to being true or false absolutely; they are always contingent systems of belief and knowledge. While Habermas insists that “we must not forget that the relation to reality contains a reference to something independent of us and thus, in this sense, transcendent”, it is difficult to see how truth has any relevance in his politics of knowledge. (Habermas, 1996: 14) The pressure to contextualize their demands for justice, to present as contingent assertions what are demonstrably true statements of fact and value, would very likely be experienced by radically disenfranchised communities as a form of deliberative oppression in its own right. Indeed, it is indispensable for every movement toward emancipating social change—against Holocaust deniers and their fellow apologists for oppression in every form—that the oppressed have the benefit of an unqualified declaration of the truth of their suffering; further, that this truth remain as the living ground for ongoing reform.

Communicative action describes the procedural ways reason plays out in public discourse, calling the rule of law to greater legitimacy. Habermas, like Rawls, rejects any attempt to ground the legitimacy of law in any metaphysical, metasocial dimension. They share with Hobbes the assertion that “authority not truth makes law”. Therefore the rights to which

oppressed communities aspire cannot be based on any ontological claims about their dignity as persons, because “there is no longer any fixed point outside that of democratic procedure itself”. (Habermas, 1996: 186) Correct democratic procedure is the authority that legitimizes the rule of law, the state’s monopolization of violence. This procedure functions to secure the consent of citizens, so that they recognize in the rule of law the “laws of freedom” and accept that in uncoerced deliberation “they themselves would also authorize the rules to which they are subject as addressees.” (Habermas, 1996: 38) In this way, Habermas tries to “positivize” legal norms that were at one time considered to be grounded in the sacred, as though they flowed from a law natural and absolute.

(Habermas, 1996: 36) The result is a social construction of law, and of the rights oppressed communities would claim as ontologically *human* rights: “the positivity of law means that a consciously enacted framework of norms gives rise to an *artificial* layer of social reality that exists only so long as it is not repealed, since each of its individual components can be changed or rendered null and void.” (Habermas, 1996: 38)

Habermas’ insistence on the artificial nature of positive law goes a long way to explain the persistent pattern of the US Supreme Court’s entrenchment of the powers of the executive branch, its consecration of the messianic presidency in constitutional law. In cases like *Shenck* and *The Masses*, *Korematsu* and *Endo*, the Supreme Court read the Constitution not as an objective or absolute constraint on the power of the State, but as an expression of this power. Candidly, Judge Richard Posner argues the Court does not apply rights enshrined in the Constitution; it creates rights that it presents as constitutional and defines their scope. The justices enjoy the “monarchical security of their tenure” to develop a

constitutional regime that is effectively permanent because the process of actually amending the Constitution is so onerous as to be improbable. Further, successive generations of justices are unlikely to reverse their predecessors lest they “drop the mask and reveal a court engaged in making legislative judgments.” (Posner, 2006: 19 – 21)

Arguing that the Constitution is not a “suicide pact”, a theme of interpretation that began with Jefferson, Posner insists the Court must create constitutional rights of limited scope so that the executive branch can prosecute the *war on terror*—with “enhanced interrogation”, deeper surveillance, the abrogation of a *habeas corpus*—in a way that is necessarily legal. This is positive law, a process of judicial balancing in which Supreme Court justices use weights that

are influenced by personal factors, such as temperament (whether authoritarian or permissive), moral and religious values, life experiences that may have shaped those values and been shaped by temperament, and sensitivities and revulsions of which the judge may be quite unaware. (Posner, 2006: 25)

Justices Frankfurter and Murphy may have felt they were articulating universal constitutional norms as they dissented from majorities imbued with the same sense of canonical certainty, but in fact the whole discourse sacralized in legal procedure an inherently biased process of pragmatic reasoning. This is consistent with the view of positive law Habermas advances, a Court at which justices debate opinions, not truths. Authority makes the law.

If Rawls, Habermas and Posner are correct, and justice is at best a procedure for the production of an opinion as authoritative, then there is no escape from what the oppressed experience as a perversion of justice because the rule of law can never be based on truth as

such. Consider, for example, the Court's ruling in *Dred Scott* and its reprobate assertion that Americans of African descent

had for more than a century been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior they had no rights which the white man was bound to respect; and that the negro might justly be reduced to slavery for his benefit. (Quoted in Goldberg, 2002a: 85)

Faced with the naked exercise of judicial power to entrench white supremacy, the best hope for the oppressed is to push democratic procedure to construct an “artificial layer of social reality” on their terms, to treat them *as if* their claims of fact and value are true. Indeed, the very category of “oppressed” as a normative claim would have to yield to a more neutral construction so that the contest could be presented as one of competing knowledge systems or worldviews. Plainly, this is not what Rawls and Habermas intended; they seek an imperative and substantive social justice, but fail to deliver a conceptual framework equal to this necessity. The fault lies in their attempt to purge politics of ontology. They posit ideas of democratic communication in which doctrines overlap and forms of knowledge feed on each other in an infinite regress. There can be no radical disruption of the closed epistemological circuit they produce: there is nothing “outside” democratic procedure. Habermas in his way, Rawls and Posner in theirs, produce a politics that, despite the goal of defining democratic communication as a check against illegitimate power, gives the authority that makes the law the absolute status of a natural law or divine legislator because truth can never be sovereign.

The messianic presidency, as a form of sovereign power, is a performative metaphysics. Its vast, interconnected systems in the machinery of the state, its capacity to orient political

culture and the market to its self-perpetuation, its unilateral control over conventional and thermonuclear weaponry of unimaginable scale allow this institution to administer or obliterate life, from individuals to the biosphere, and in so doing define the nature and purpose of existence as such. If the contemporary State is, as Alain Badiou argues, a “superpower”, the messianic presidency is something greater still. Badiou argues that the State is the Leviathan Hobbes could not imagine, that there “is no answer to the question about *how much* the power of the State exceeds the individual.” (Badiou, 2005: 144 Original emphasis.) It holds a capacity for violence far greater than the sum of our individual capacities for self-defence; Agamben would observe that this excess is so great that it erases the distinction in classical politics between the life of the individual, the power of the people, and the superpower of the State. The State is not principally a superpower against any ideology or doctrine, but against life itself—the life of the human species and of the biosphere as a whole. I believe it is important to distinguish this analysis of the phenomenon of the State and its biopolitical rule from the specific nature of the messianic presidency as it has developed in the United States, especially from Wilson to Bush and Obama. In the messianic presidency, the unknowable excess of the State’s superpower becomes flesh, communicates itself to the lives and systems it would form in its own image. The messianic presidency is the personification of this power relationship, obscuring it, making it absolute and the object of our political desire. To be clear, it does this within the public culture of the United States, but it also does so globally to affirm the dominance of the State over life as an ontological absolute. The messianic presidency establishes the superpower of the State as the author of history, in order to make it unimaginable that democratic communication might take other forms. In this way—in its

promise of emancipation from terror, want and oppression in every form—authority presents itself as truth. It vivifies conscience, calling us to see through its unblinking gaze the world as it ought to be. The messianic presidency is therefore the sign and safeguard of the State, the voice and guarantor of the superpower that is greater than the superpower itself.

The imbalance between the citizen and the State provokes Badiou to posit an idea of politics, of democratic communication, that breaks with liberal categories. Habermas and Rawls attempt to preserve the distinction in classical politics between the private life of the citizen—in the autonomy of a “lifeworld” or in fashioning “one’s own concept of existence, of meaning, of the universe, and of the mystery of human life”—to locate liberty in this space, as a zone of exclusion. The democratic challenge, on this view, is to determine how privately formed opinions ought to guide the public exercise of power, ensuring these opinions are purified of doctrinal content and at the same time formed at a remove from the power of the State. This liberal project is no longer feasible because, as Agamben and Badiou show, the State will not be excluded from private life. The sovereign power of vivification continually attempts to colonize our lifeworlds or life plans with the State’s ontological claims about the nature and purpose of human existence. As we incorporate these claims into the life of conscience, we gain the feeling of political agency or communicative reason, a false sense that we are not bare life.

Badiou, more lucidly than Agamben, argues that the superpower of the State and the frustration of the liberal project do not mean an end to politics, but a reorientation: politics

is a truth procedure, comparable to mathematics, science and love. While he grants it is rare and fleeting, politics exposes the radical imbalance between the human person and the State's superhuman power, it "summons the power of the State" and "is the only truth procedure to do so directly." Politics is the practice of a freedom that is larger than the ultimately illusory liberty promised by liberalism—the liberty of the insular, creatively self-fashioning individual; it is a necessarily public liberty. The fact that, in Badiou's words, "it is essential to the normal functioning of the State that its power remains measureless, errant, unassignable" does not bring, contra Agamben's darker moments, an ineluctable condition of voiceless bare life. It brings, Badiou insists, a new imperative for politics and with it freedom as the "interruption of this errancy". "The State", he continues,

is in fact the measureless enslavement of the parts of the situation, an enslavement whose secret is precisely the errancy of superpower, its absence of measure. Freedom here consists in putting the State at a distance through the collective establishment of a measure for its excess. And if the excess is [sic] measured, it is because the collective can measure up to it. (Badiou, 2005: 144 – 45)

Politics is therefore a truth procedure of communication, a public application of conscience that aims to build a deliberative collective. We weigh issues of fact and value together in order to come to the best articulations of the empirical and moral truth. Democratic communication is not the production of free-floating opinions, or knowledge as a simple catalogue of beliefs (where difference brings an indifference to whether they are justified and true). It is Badiou's politics, a determined and perpetual form of collective ontological enquiry that engages all people—citizen and non-citizen alike—because truth claims are addressed to all of us, they are claims about what it means to be human and to share the material conditions of existence, including the reality of sovereign power's capacity for omnicide.

If politics is a truth procedure, then justice must be so as well. With Badiou, democratic communication in a pluralistic society can allow for the arrival of a person of courageous and true insight, the single person Rawls anticipates—but cannot include—who “may stand alone and be right in saying that the law and government are wrong and unjust”.

This is possible because, as Christopher Norris observes, Badiou rejects the notion

[...] that justice can best be served or human welfare most effectively promoted through a maximal respect for the differences, rather than the commonalities, between people of various ethnic affiliation, cultural background, social class membership, linguistic provenance, or sexual/gender orientation. On the contrary, [Badiou] argues that this emphasis on difference along with its sundry cognate terms (alterity, otherness, heterogeneity, incommensurability and so forth) very often betokens not so much a respect for the diversity of human values and beliefs but an absence of genuine, that is, reasoned and principled respect for any of them, one's own included. (Norris, 2009: 31)

The fact of social pluralism, as a permanent and dynamic feature of the human species, is not an impediment to discerning with greater clarity the identity of our species and the conditions we face together. Indeed, it is through a “genuine, reasoned and principled respect” for the diversity of human values that the identity of our species becomes more explicit as the substantive ground for a *human* justice. William Connolly echoes Norris and Badiou in his understanding of critical pluralism as the ground for a new and authoritative ground for a politics of emancipation, a way out of the ossified and unexamined metaphysics of the State. “In critical pluralism,” he argues,

each constituency would acknowledge its own identity to be bound up with a variety of differences sustaining it. Each identity depends on the differences it constitutes, and each attempt to define identity through difference encounters disturbing responses by those who challenge the sufficiency or dignity of its definition of them. Each identity is fated, thereby, to contend—to various degrees and in multifarious ways—with others it depends on to enunciate itself. That's politics. The issue is not if but how. (Connolly, 1993: 28)

Politics cannot be a truth procedure if pluralism is an infinity of solitudes mediated by the State. When pluralism is grounded in conscience, when we see our own identity and circumstances existing in a form of communion with others, then truth becomes the motive force for social change. Against the entropy of relativism and the self-serving nostrums of sovereign power and its vassals, the challenge of finding and telling the truth is the fundamental work of democratic communication. It allows us, as Sontag enjoins us, to see that our privileges exist on the same map as the pain of others; it impels us to recognize that we are all *homines sacri*, bare life even though we may for the moment be covered—unequally, arbitrarily, unjustly—in dignities at the pleasure of sovereign power. (Sontag, 2003)

Vivisection

Just before midnight on November 4th, 2003, Sabrina Harman, a military police officer, stood in a communal shower in the Abu Ghraib prison and took photographs with a Mercury Deluxe Classic camera. Her subject was naked, covered in a blanket the colour of ashes, head covered in a burlap sack, and made to stand cruciform on a box—an Iraqi man her age, a “young guy, very decent”. She helped other soldiers attach electrical wires to his fingers. They told him he would be electrocuted if he moved from the box; they did not tell him the wires were not connected to a power source. This was a “stress position”, calculated to deprive the man of sleep and compel him to talk. (Morris, 2008) By the authority of the 43rd president of the United States, and the casuistry of a White House determined to bend domestic and international laws against torture its way, the event

Harman's now iconic photograph captured was not illegal and it was not torture; on the orders of Secretary of Defence Donald Rumsfeld it was standard operating procedure. After Harman's photographs and a host of others like it streamed into global circulation, BBC News persisted in describing the prison as a "square kilometre of hell during Saddam Hussein's horrific rule". (Asser, 2004) But this was George W. Bush's Abu Ghraib, and it exposed the errancy of the presidency's sovereign power of vivisection.

Errol Morris, in his brutally perspicacious film about these photographs, *Standard Operating Procedure*, does not allow any of the detainees to speak. Instead, the U.S. soldiers and private contractors who forced the detainees into "stress positions"—handcuffed naked to a bed frame, drowning under drenched burlap—and beat them into sexual degradation—masturbating as a twenty-first birthday present for MP Lynndie England, stripped and stacked in a homoerotic pyramid—testify. Women and men, gay and straight, black and white these soldiers and contractors, many of them imprisoned as Rumsfeld's "bad apples", are united through Morris' lens in placing the blame elsewhere. They were following orders to "keep more Americans from dying". In the words of Sergeant Javal Davis, they were doing the preparatory work of "humiliation" and "softening up" for senior officials. "Torture happened during interrogations. Guys go into interrogations and they're dead. And they were killed, and they died. That's where the torture happened. We don't have pictures of that." (Morris, 2008) "Ghosts" did the torturing, operatives from a host of intelligence agencies, including the CIA, who remained nameless in the logs of the military police and faceless before the soldiers' ubiquitous cameras.

The trouble with this “square kilometre of hell” is that it was, and remains, global. Through the work of a cadre of six senior administration lawyers, culminating in a one-page memo on “Counter-Resistance Techniques”, the Bush administration claimed the power to suspend the rule of international law and the U.S. Constitution at will. (Sands, 2008) Abu Ghraib, Baghram, and Guantanamo Bay are comparatively small measures of the presidency’s immeasurable biopolitical power. Vivisection is the materialist epistemology of this power, asserting that the ability to bleed intelligence out of a tortured subject makes the sovereign omniscient, all seeing. Torture is therefore a form of surveillance, backed by the “modern processing power and data-mining technology” claiming for the sovereign complete knowledge of the subject when it dissects the organs of bare life. “Terrorist suspects” and “enemy combatants”, be they citizen or alien, have no transcendent political personality, no inherent rights; they, and all of us, have an instrumental utility as both a threat to be contained and quantified. (Healy, 2008: 166, 86-87) In this way, vivisection, for Rumsfeld and his lawyers, is a truth procedure with no jurisdictional limit.

Vivisection is the diffusion of sovereign power’s capacity for total violence. It is the expression of discipleship, the willingness to be the monsters of sovereign power. This is possible as vivification displaces politics, creating the messianic presidency in each of us. The reality of the messianic presidency’s superpower, and its project of producing this power in us from the inside through the corruption of conscience, is the “fact of oppression” that tests every theory of democratic communication. It brings with it the challenge of grounding a practice of justice in the empirical and moral truths of our

condition, to build a politics that works from the permanence of our diversity to an authoritative assertion about the nature and purpose of human existence. Borrowing from King, the challenge is to build a politics of maladjustment, a politics that will not adjust itself “to the madness of militarism, to self-defeating effects of physical violence”, the “bleak and desolate midnight of man’s inhumanity to man”. (King, 1963: 32) This politics will reclaim from sovereign power the discourse of human rights and dignity, affirming their foundation in the truth of what it means to be human.

CONCLUSION: A PRAXIS OF DEMOCRATIC COMMUNICATION

Ten years out from the terrorist attacks of 9/11, the entrenchment of the security regime continues apace as a phenomenon larger than the fevered aspirations of the Bush White House and, in every likelihood, more permanent than the *war on terror* itself. We are in the eye of a biopolitical phenomenon in which the nature of government is to lay claim to the ownership of life, of our lives individually and as a species, of the life of the planet. It does so in the name of our deepest hopes for emancipation, but the claim is necessarily violent.

It is difficult and perhaps foolhardy to predict where all of this might lead but I believe George Grant and Harold Innis will be vindicated in their grim assessments of our future. However, the concern here is larger than the former's "lament for a nation". It is not Canadian sovereignty that is at issue in this biopolitical moment, but the possibility of democratic sovereignty itself. Our capacity for self-determination as human beings of diverse origins and beliefs but of equal dignity is supplanted by sovereign power and its arrogation of the status as the ground of our being and the author of history, the one true agent. Grant saw glimpses of this in nuclear proliferation, the errant superpower of the State against all life secreted in forests of intercontinental ballistic missiles. (Grant, Christian, & Grant, 1998) Innis, equally, believed the imbalance between Western civilization's unprecedented spatial dominance—through communication technologies and a military industrial complex spanning the face of the planet—and its stunning lack of

memory, its attenuated capacity for temporal succession, was a sign of its impending collapse. He reasoned, perhaps tautologously, that a civilization unable to balance governance of space and time was doomed to fail; Minerva's owl was about to fly away from the West. (Innis, 1995)

There's evidence of this flight in the persistence of "*lawful access*" in Canada's legislative agenda. Though the implementing legislation has died, again, on the Order Paper, there is every reason to believe the minority government of Stephen Harper or its successor will persist in the work of converting Canada's civilian communications infrastructure into a latent, ubiquitous surveillance system. Quite apart from its impact on the devices in our hands today, and the exponentially more powerful tools to come, the effect of "*lawful access*" is to recalibrate our understanding of privacy. It will entrench the idea that we hold our private lives by the positive fiat of the State, that communication is unlawful unless it is accessible to the streaming gaze of the State. *The Canadian Charter of Rights and Freedoms*, interpreted by a Supreme Court that is happily integrated into the projects of the security regime, will be a paper firewall against this Orwellian project.

Indeed, there is no reason to believe the Court will be more vigilant in its discernment and defence of our substantive human rights as people "born for citizenship" than it proved itself to be for Omar Khadr. Khadr was a child soldier, a Canadian citizen seized by US forces in Afghanistan, his body shredded by their ordinance, after he reportedly killed a US soldier with a hand grenade. He was fifteen years old at the time and his family made

notorious claims about their friendship with Osama Bin Laden. Army surgeons dutifully patched him back together, allowing his interrogation to begin while his sutures were setting. Consistent with Donald Rumsfeld's "torture memo", they made him carry heavy weights and forced him into stress positions that taxed his body's ability to heal. They shipped him to Guantanamo Bay, where he remains the only citizen of a Western democracy still held by the United States at a discrete remove from the reach of the US courts. Indeed, not only did Canadian officials, from Prime Minister Harper down, refuse to demand Khadr's return to Canada, the undisputed evidence is that they interrogated him knowing he had been "softened up" for this purpose by a program of torture at the hands of his captors at Guantanamo Bay. "A threat to the United States," Stephen Harper vowed to Fox News and its cohort in the hearing of President Obama, "is a threat to Canada"; Khadr's life is a grain of incense on this altar. Omar Khadr is a Canadian citizen and, at the same time, bare life, a human organism and this is where the Supreme Court of Canada has determined to leave him.

The Court's unanimous ruling in *Khadr, 2010* has the same Kafkaesque ring as the decision of its United States counterpart in *Endo*. This was Canada's turn to face the program of the messianic presidency, and the Court quailed. It ruled it could provide Khadr with only "declaratory relief", condemning the actions of Canada's executive branch in violating Khadr's rights under international law to be free from torture and abuse. The effect of this declaratory relief, however, is to confirm the Prime Minister in this illegal conduct as his constitutional "royal prerogative" to exercise "arbitrary authority" when dealing with foreign governments. The Court asserted that there may be times when it can constrain

the actions of the Prime Minister in this respect, but found it beyond its competence to require the Prime Minister request Khadr's return to Canada. "Mr. Khadr is not under the control of the Canadian government", it found. "[T]he likelihood that the proposed remedy will be effective is unclear; and the impact on Canadian foreign relations of a repatriation request cannot be properly assessed by the Court." (*Canada (Prime Minister) v. Khadr*, 2010 SCC 3) The Court condemned and absolved the Prime Minister in one gesture, allowing Khadr's detention by US authorities to remain unchallenged, to allow US authorities to use testimony wrested from him through torture, to keep Khadr in a state of exception.

I remember the feeling of pride and reassurance hearing Pierre Trudeau explain that the purpose of the *Charter* was to ensure that, when the day came for us to face the worst moments, we would not forget the democratic people we are meant to be. By this I believe he meant, along the lines of Innis, that the necessary task of a constitution is to allow us to govern our affairs through time. The function of the courts is to ensure the rule of law, but in doing so they help us to find our footing in time, to remember who we are and preserve our freedom to become something greater. *Khadr 2010* shows that positivist law cannot accomplish this, because it is a product of the exigencies of the present, serving the immediate needs of keeping the wheels of spatial dominance oiled.

My initial research suggested that Canadians were quite happy to allow their biopolitical condition to remain unchallenged, to reject as nonsensical and moralistic any sense that

they were “born for citizenship”. This pattern emerged in my report *Brave New Works of Peace*, which included both a statistical survey and qualitative research with civil society leaders. Canadians in the aftermath of the 9/11, attacks presented in the media and by politicians as an assault on our democratic way of life, expressed a reduced desire to be active in the formal exercise of their citizenship. (Markwick, 2002) This research is confirmed in the continuing erosion of voter participation, the seeming willingness of Canadians to allow the executive branch to flourish untroubled by democratic accountability. However, I have since revised my view. Against this data, we have witnessed Facebook mediated protests against Stephen Harper’s prorogation of Parliament for the second time in a year, a move the Prime Minister contrived to relieve his ministers from scrutiny for their complicity in the torture of Afghans. This Facebook mediated democratic movement suggests Canadians are restive and willing to live democracy informally, on their own terms. The question now is whether a spontaneous network of over two hundred thousand “facebook friends” can consolidate into a sustained political force.

I believe it can, based on my research in the development of the Citizens Summit Against Sex Slavery. (Markwick, 2010) This process, ably organized by a group of volunteer undergraduates, gathers former prostitutes, the independent feminist movement, aboriginal communities and other civil society leaders, both secular and religious, to discern the moral truths at issue in sex slavery and press for social change. It confronts the diffusion of biopolitical power into the very bodies of youth and women in the name of “sex work”. The approach is to allow otherwise disparate groups to listen to the experiences of people

who have made their way out of sex slavery. It is a practical application of Badiou's insistence that a truth is addressed universally. For example, we have heard the testimony of an Aboriginal woman who was formerly prostituted that she recants wearing t-shirts proclaim that "a blow job is better than no job". These positions found a hearing in both informal and formal settings, in circles of deliberators that included scholars, parliamentarians, opinion leaders in civil society and policy makers. The process allowed the participants to enter into each other's reasoning, and to bring to the issue their deepest beliefs about the nature and purpose of human existence. Indeed, all participants were encouraged to present their beliefs undiluted and free of any Rawlsian bracketing. It allowed them to form a consensus for social change to define and end sex slavery, but the consequence was larger than this. It confirmed the capacity of the participants, many of whom have little formal education and formerly low self-esteem, to be agents of social change in their own right, as people "born for citizenship". This project shows how communities can coalesce and build their power to oppose violence against youth and women, against their biopolitical degradation in this intimate and vicious *war on terror*.

Democratic communication is not the function of any form of government. From Auschwitz to Abu Ghraib, Theresienstadt to Guantanamo Bay, the continual abasement of human dignity in the murderous biopolitics of our times has not extinguished the continual upwelling of resistance, our capacity not simply to say "no" but to declare the truth about what it means to be human, to assert our equality against the errant superpower of the State. It is as though there is a messianic expectation in our species as a whole, the anticipation that in the vast sweep of our history, in the rich convolutions of the beliefs that

claim us, we will come continually to deeper and authoritative articulations about the truth of what it means to be human. These moments arise in great suffering, and in quiet contemplation, they move us forward through the teeth of oppression, and bring us to the light of meaningful social change. Democratic communication is ours not by the fiat of any constitution. It calls us to deeper truth, privacy, and solidarity because democratic communication is given in our nature, a visible sign of the invisible grace we have as beings born for citizenship.

BIBLIOGRAPHY

- (Anonymous). (1942). Bureau Bulletin No. 69. In Federal Bureau of Investigation (Ed.) (pp. 3). Washington, DC: Federal Bureau of Investigation.
- Abrams v. United States* 250 U.S. 616 (Supreme Court of the United States 1919).
- Adler, C. (1940). *American Jewish Yearbook*. New York: American Jewish Committee.
- Afghanistan, I. R. o. (2008). *Private Sector Development Sector Strategy 1387-1391 (2007/08-2012/13)*. Kabul.
- Agamben, G. (1995). We Refugees. *Symposium*, 49(2), 114-19.
- Agamben, G. (1998). *Homo sacer : sovereign power and bare life*. Stanford, Calif.: Stanford University Press.
- Agamben, G. (2000). *Means without end : notes on politics* (Vincenzo Binetti & Cesare Casarino, Trans.). Minneapolis: University of Minnesota Press.
- Agamben, G. (2001). On Security and Terror.: European Graduate School.
- Agamben, G. (2005). *State of exception*. Chicago: University of Chicago Press.
- Ahmad, M. (2004). A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion. *California Law Review*, 92, 1259.
- Anderson, L. (2004). Shock and Awe: Interpretations of the Events of September 11. *World Politics*, 56(2), 303-25.
- Anonymous. (2000). 45 Years Later, an Apology from the U.S. Government. *A & S Perspectives*(Winter 2000).
- Application under s. 83.28 of the Criminal Code (Re)*, 248 (Supreme Court of Canada 2004).
- Arbour, L. (2009). *Afghanistan's Election Challenges*. Brussels: International Crisis Group.
- Archbishop Sees Hope in America. (1918, March 5, 1918). *New York Times*.
- Aristotle, & Ross, W. D. (1954). *The Nicomachean ethics of Aristotle*. London: Oxford University Press.
- Aristotle, & Sinclair, T. A. (1962). *The politics*. Baltimore,: Penguin Books.
- Aristotle, Sinclair, T. A., & Saunders, T. J. (1981). *The politics* (Rev. ed.). Harmondsworth: Penguin.
- Asser, M. (2004). Abu Ghraib: Dark stain on Iraq's past, *BBC News*. London: BBC.
- Badiou, A. (2005). *Metapolitics*. London: Verso.

- Bartholomew, A. (2006). *Empire's law: the American imperial project and the 'war to remake the world'*. London Toronto: Pluto Press; Between the lines.
- Baudrillard, J. (2001, November 3). L' esprit du terrorisme. *Le Monde*.
- Belknap, M. R. (1994). *American political trials* (Rev., expanded ed.). Westport, Conn.: Greenwood Press.
- Bell, D. (1992). Michel Foucault: A Philosopher for All Seasons? *History of European Ideas*, 14(3), 331 – 46.
- Bennett, W. L. (1990). Toward a Theory of Press-State Relations in the United States. *The Journal of Communication*, 40(2), 103–27.
- Bernays, E. L. (1942). The Marketing of National Policies: A Study of War Propaganda. *Journal of Marketing*, 6(3), 236 – 44.
- Bernstein, J. Z. (1982). *Personal Justice Denied*. Washington, DC: Commission on Wartime Relocation and Internment of Civilians.
- Bettermann, E. (2009). NATO to Discuss Afghanistan Amid Record Civilian Death Toll Retrieved July 21, 2009, from <http://www.dw-world.de/dw/article/0,,4040454,00.html>
- Bingham, T. (2003). Personal Freedom And The Dilemma Of Democracies. *International and Comparative Law Quarterly*, 52.4 (841).
- Black, J. (2001). Semantics and Ethics of Propaganda. *Journal of Mass Media Ethics*, 16(2), 121 – 37.
- Bohman, J. (2003). Deliberative Toleration. *Political Theory*, 31(6), 757–79.
- Bohman, J., & Rehg, W. (1997). *Deliberative democracy : essays on reason and politics*. Cambridge, Mass.: MIT Press.
- Borradori, G., Derrida, J., & Habermas, J. (2003). *Philosophy in a time of terror : dialogues with Jürgen Habermas and Jacques Derrida*. Chicago: University of Chicago Press.
- Brahm, G. N. (2006). Understanding Noam Chomsky: A Reconsideration. *Critical Studies in Media Communication*, 23(5), 453 – 61.
- Bush, G. W. (2001a). Address to a Joint Session of Congress and the American People. Retrieved August 25, 2007, from <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>
- Bush, G. W. (2001b). Inaugural Address of George W. Bush, *The Avalon Project* (2008 ed.): Yale Law School, Lillian Goldman Law Library.
- Calhoun, C. (2007). Social solidarity as a problem for cosmopolitan democracy. In Seyla Benhabib, Ian Shapiro & Danilo Petranović (Eds.), *Identities, affiliations, and allegiances* (pp. ix, 424 p.). Cambridge ; New York: Cambridge University Press.
- Canada (Prime Minister) v. Khadr*, 2010 SCC 3 (Supreme Court of Canada 2010).
- Canada (2002). Lawful Access Consultation Document.
- Canadian Council for Refugees v. Canada* (Federal Court 2007).

- Chafee Jr., Z. (1919). Freedom of Speech in War Time. *Harvard Law Review*, 32(8 (June)), 932 – 73.
- Chafee, Z. (1920). Freedom of speech (pp. vii, 431 p.). New York: Harcourt, Brace and Howe.
- Charkaoui v. Canada (Citizenship and Immigration)*, 9 350 (Supreme Court of Canada 2007).
- Cheh, M. M. (2004). Demonstrations, security zones, and first amendment protection of special places. *The University of the District of Columbia Law Review*, 53, 53 – 76.
- Clinton, W. J. (1993). First Inaugural Address of William J. Clinton, *The Avalon Project* (2008 ed.): Yale Law School, Lillian Goldman Law Library.
- Cohen, J. (1997). Procedure and Substance in Deliberative Democracy. In James Bohman & William Rehg (Eds.), *Deliberative democracy : essays on reason and politics* (pp. 407 – 37). Cambridge, Mass.: MIT Press.
- Commentary on the Anti-Terrorism, Crime and Security Bill 2001*. (2001). London: Human Rights Watch.
- Congress, U. S. (2006). The Supreme Court. Retrieved April 25, 2009, from http://www.pbs.org/wnet/supremecourt/capitalism/sources_document1.html
- Connolly, W. E. (1993). *The Augustinian imperative : a reflection on the politics of morality*. Newbury Park, Calif.: Sage Publications.
- Connolly, W. E. (2005). The Evangelical-Capitalist Resonance Machine. *Political Theory*, 33(6), 869-86.
- Connolly, W. E. (2007). The Complexities of Sovereignty. In Matthew Calarco & Steven DeCaroli (Eds.), *Giorgio Agamben : sovereignty and life*. Stanford, Calif.: Stanford University Press.
- Constantinou, C. M. (2008). Communications/excommunications: an interview with Armand Mattelart. *Review of International Studies*, 34, 21 – 42.
- Corwin, E. S. (1970). *Total war and the Constitution; five lectures delivered on the William W. Cook Foundation at the University of Michigan, March 1946*. Freeport, N.Y.: Books for Libraries Press.
- Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006*. (2006). London: House of Lords and the House of Commons Joint Committee On Human Rights.
- Curtis, A. (2002). The Century of the Self. London: BBC Four.
- Cywar, A. (1969). John Dewey in World War I: Patriotism and International Progressivism. *American Quarterly*, 21(3 (Autumn)), 578 –94.
- Dardagan, H. (2007). Iraq Body Count Project. Retrieved August 19, 2007, from <http://www.iraqbodycount.org/>
- DeLong-Bas, N. J. (2004). *Wahhabi Islam : from revival and reform to global Jihad*. Oxford ; New York: Oxford University Press.

- Den Tandt, M. (2005, October 7, 2005). Privacy has suffered since 9/11, report says. *The Globe and Mail*.
- Derrida, J., Habermas, J., & Thomassen, L. (2006). *The Derrida-Habermas reader*. Chicago: University of Chicago Press.
- DeWitt, J. L. (1943). *Final Report; Japanese Evacuation from the West Coast 1942*. Washington, DC: Govt. Printing Office.
- Dillon, M. (2007). Governing terror: the state of emergency of biopolitical emergence. *International Political Sociology*, 1, 7 - 28.
- Dorronsoro, G. (2008). The Council and Afghanistan. In Vaughan Lowe, Adam Roberts, Jennifer Welsh & Dominik Zaum (Eds.), *The United Nations Security Council and war : the evolution of thought and practice since 1945* (pp. xxi, 793 p.). Oxford ; New York: Oxford University Press.
- Duffield, M. R. (2007). *Development, security and unending war : governing the world of peoples*. Cambridge: Polity.
- Dyezenhaus, D. (2001). The Permanence of the Temporary: Can Emergency Powers be Normalized? In Ronald J. Daniels, Patrick Macklem, Kent Roach & University of Toronto. Faculty of Law. (Eds.), *The Security of freedom : essays on Canada's Anti-terrorism Bill* (pp. vii, 499 p.). Toronto: University of Toronto Press.
- Edkins, J. (2003). The rush to memory and the rhetoric of war. *Journal of Political and Military Sociology*, 31(2 (Winter)), 231-50.
- Edkins, J., & Pin-Fat, V. (2005). Through the Wire: Relations of Power and Relations of Violence. *Millennium - Journal of International Studies*, 34(August), 1 - 24.
- Eisenhower, D. D. (2009). The Eisenhower Doctrine, 1957. *Timeline of U.S. Diplomatic History* Retrieved June 8, 2009, 2009, from <http://www.state.gov/r/pa/ho/time/lw/82548.htm>
- Ellul, J. (2006). The Characteristics of Propaganda. In Garth S. Jowett & Victoria O'Donnell (Eds.), *Readings in Propaganda and Persuasion: New and Classic Essays* (pp. 1 - 49). Thousand Oaks: Sage Publications.
- Entman, R. M. (2003). Cascading activation: Contesting the White House's frame after 9/11. *Political Communication*, 20, 415 - 32.
- Evidence*, House of Commons, 39th PARLIAMENT, 1st SESSION Sess. (2007).
- Ex Parte Mitsuye Endo* 283 (U.S. Supreme Court 1944).
- Fair, C. C., & Jones, S. G. (2009). *Securing Afghanistan*. Washington, DC: United States Institute for Peace.
- Fiala, A. (2007). The Bush Doctrine, Democratization, and Humanitarian Intervention A Just War Critique. *Theoria: A Journal of Social & Political Theory*, 54(114), 20.
- Filkins, D. (2009). Afghan Civilian Deaths Rose 40 Percent in 2008. *New York Times*.
- Foulds, N. B. (2009). Quebec Act. *The Canadian Encyclopedia* Retrieved April 18th, 2009, from

- <http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=A1ARTA0006592>
- Garner, J. W. (1918). The Treatment of Enemy Aliens. *The American Journal of International Law*, 12(1), 27 – 55.
- Gaustad, E. S. (2006). *Dissent in American religion* (Rev. ed.). Chicago: University of Chicago Press.
- Gearty, C. (2005). 11 September 2001, Counter-terrorism, and the Human Rights Act. *Journal of Law and Society*, 32(1), 18-33.
- Gil-Robles, A. (2004). *Report by Mr. Alvaor Gil-Robles Commissioner for Human Rights, On His Visit to the United Kingdom, 4th - 14th November 2004*. Stasbourg: Council of Europe.
- Goldberg, D. T. (2002a). Racial Rule. In David Theo Goldberg & Ato Quayson (Eds.), *Relocating postcolonialism* (pp. 82 – 102). Oxford, UK ; Malden, MA: Blackwell Publishers.
- Goldberg, D. T. (2002b). *The racial state*. Malden, MA: Blackwell Publishers.
- Goldsmith, J. L. (2007). *The terror presidency : law and judgment inside the Bush administration*. New York: W. W. Norton & Co.
- Grant, G. P., Christian, W., & Grant, S. (1998). *The George Grant reader*. Toronto: University of Toronto Press.
- Habermas, J. (1995). Reconciliation Through the Public use of Reason: Remarks on John Rawls's Political Liberalism. *Journal of Philosophy*, XCII(3), 109-31.
- Habermas, J. (1996). *Between facts and norms : contributions to a discourse theory of law and democracy* (William Rehg, Trans.). Cambridge: Polity.
- Habermas, J., Derrida, J., & Borradori, G. (2003). *Philosophy in a time of terror : dialogues with Jürgen Habermas and Jacques Derrida*. Chicago: University of Chicago Press.
- Hall, K., & Patrick, J. J. (2006). *The pursuit of justice : Supreme Court decisions that shaped America*. Oxford ; New York: Oxford University Press.
- Harper, S. (2007). Letter of Apology to Maher Arar and his Family. In Office of the Prime Minister (Ed.). Ottawa: Government of Canada.
- Hayward, C. R. (2007). Binding problems, boundary problems: the trouble with "democratic citizenship". In Seyla Benhabib, Ian Shapiro & Danilo Petranovi*c (Eds.), *Identities, affiliations, and allegiances* (pp. ix, 424 p.). Cambridge ; New York: Cambridge University Press.
- Healy, G. (2008). *The cult of the presidency : America's dangerous devotion to executive power*. Washington, D.C.: Cato Institute.
- Heller Anderson, S. (1989, July 9, 1989). Donald S. Voorhees, U.S. Judge Who Backed Internees, Dies at 72. *New York Times*.
- Herman, E. S. (2000). The Propaganda Model: a retrospective. *Journalism Studies*, 1(1), 101 – 12.

- Hershey, A. S. (1918). Treatment of Enemy Aliens. *The American Journal of International Law*, 12(1), 156 – 62.
- Hirabayashi v. United States* 81 (United States Supreme Court 1943).
- Hobbes, T. (1958). *Leviathan, parts one and two*. New York,: Liberal Arts Press.
- Hobbes, T., & Missner, M. (2008). *Thomas Hobbes : Leviathan*. New York: Pearson Longman.
- Hoffman, B. (2006). *Inside terrorism* (Rev. and expanded ed.). New York: Columbia University Press.
- Howen, N. (2008). European Court of Human Rights reaffirms the absolute prohibition on return to torture. Retrieved July 21, 2008
- Huddy, L., Feldman, S., Lahav, G., & Taber, C. (2003). Fear and Terrorism: Psychological Reactions. In Pippa Norris, Montague Kern & Marion R. Just (Eds.), *Framing terrorism : the news media, the government, and the public* (pp. 255–78). New York: Routledge.
- Ignatieff, M. (2005). The American Empire; The Burden. *New York Times Magazine*(January 5).
- Immigration and Refugee Protection Act*, (2001, c. 27).
- Innis, H. A. (1995). *The bias of communication*. Toronto: University of Toronto Press.
- Irons, P. H. (1983). *Justice at war*. New York: Oxford University Press.
- JCMB. (2008). *Report of the Implementation of the Afghanistan Compact By the Joint Coordination and Monitoring Board (JCMB), Paris 2008*. New York: United Nations Islamic Republic of Afghanistan.
- Johnson, C. A. (2006). *Nemesis : the last days of the American Republic* (1st ed.). New York: Metropolitan Books/Henry Holt and Co.
- Kaufmann, J. (2008). The Emperor of Atlantis in Terezin. *All About Jewish Theatre* Retrieved February 4, 2009, from http://www.jewish-theatre.com/visitor/article_display.aspx?articleID=3076
- Kennedy, J. F. (1961). Inaugural Address of John F. Kennedy, *The Avalon Project* (2008 ed.): Yale Law School, Lillian Goldman Law Library.
- Kern, M., Just, M. R., & Norris, P. (2003). The Lessons of Framing Terrorism. In Pippa Norris, Montague Kern & Marion R. Just (Eds.), *Framing terrorism : the news media, the government, and the public* (pp. 281–302). New York: Routledge.
- Kernell, S. (1987). Congress and the Presidency as News in the Nineteenth Century. *Journal of Politics*, 49(4), 20.
- King, M. L. (1963). Social Justice, *Conscience of America* (2005 ed.). Kalamazoo, Michigan: Western Michigan University Libraries.
- Klaehn, J. (2002). A critical review and assessment of Herman and Chomsky's "Propaganda Model". *European Journal of Communication*, 17(2), 147 – 82.

- Korematsu v. United States* 214 (United States Supreme Court 1944).
- Kymlicka, W. (2007). *Multicultural odysseys : navigating the new international politics of diversity*. Oxford ; New York: Oxford University Press.
- Kymlicka, W. (2008). The Three Lives of Multiculturalism, *UBC Laurier Institution Multiculturalism Lecture*. Vancouver: University of British Columbia/Laurier Institution.
- Laclau, E. (2007). Bare life or social indeterminacy? In Matthew Calarco & Steven DeCaroli (Eds.), *Giorgio Agamben : sovereignty and life* (pp. 11-22). Stanford, Calif.: Stanford University Press.
- Lattimore, O. (1950). *Ordeal by slander*. Boston: Little, Brown.
- Lennox, P. (2007). From Golden Straitjacket to Kevlar Vest: Canada's Transformation to a Security State. *Canadian Journal of Political Science/Revue canadienne de science politique*, 40(04).
- Markwick, M. (2002). *Brave New Works of Peace: Canadian Citizenship in the Aftermath*. Ottawa: Department of Canadian Heritage.
- Markwick, M. (2005, March 15, 2005). *Consultations on Lawful Access*. Paper presented at the Department of Justice Canada Consultations on Lawful Access: Meeting with Civil Society Groups, Vancouver, Vancouver, British Columbia.
- Markwick, M. (2010). Emancipation Now: The Citizens Summit Against Human Trafficking. Retrieved March 15, 2010, from www.emancipationnow.com
- McKay-Panos, L. (2007). Freedom of the Press: Juliet O'Neill. *Law Now, March/April 2007*.
- McLachlin, B. (2003). Remarks of the Right Honourable Beverley McLachlin, P.C. to the Vietnam-Canadian Business Association (pp. 7). Ottawa: Supreme Court of Canada.
- Media, C. G. (2008). *Opposition quotes on Arar from November 2002* (Transcript).
- Media uncritically cast Bush's defense of spy program as "strong" and "vigorous"*. (2006). Media Matters.
- Moran, M. (1999). Time's Up for the Taliban. *Council on Foreign Relations*.
- Morris, E. (Writer) (2008). Standard Operating Procedure. In Errol Morris & Julie Bilson Ahlberg (Producer). United States: Sony Picture Classics/Participant Media.
- Newman, G. L., & Hobson, C. F. (2006). John Marshall and the Enemy Alien: A Case Missing from the Canon. *Columbia Law School Report* Retrieved May 28, 2009, from http://www.law.columbia.edu/law_school/communications/reports/winter06/forum2
- Norris, C. (1993). *The truth about postmodernism*. Cambridge, Mass.: Blackwell Publishers.
- Norris, C. (1997). *Against relativism : philosophy of science, deconstruction, and critical theory*. Oxford ; Malden, Mass.: Blackwell.

- Norris, C. (2009). *Badiou's Being and event : a reader's guide*. London ; New York: Continuum.
- Nussbaum, M. C. (2008). *Liberty of conscience : in defense of America's tradition of religious equality*. New York: Basic Books.
- O'Connor, D. (2006). Arar Commission recommends a new review agency for the RCMP's national security activities, and a new review process for five other agencies. In Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (Ed.). Ottawa: Arar Commission.
- O'Neill, J. (2006). Rogue Elephants and Press Freedom, *Seventh Annual Kesterton Lecture, School of Journalism and Communication*. Ottawa.
- O'Neill v. Canada (Attorney General), 35004 (Ontario Superior Court of Justice 2006).
- Obama, B. (2009). Inaugural Address of Barack Obama, *The Avalon Project* (2009 ed.): Yale Law School, Lillian Goldman Law Library.
- Olmstead v. United States (United States Supreme Court 1928).
- Paciocco, D. (2007, March 2, 2007). The journalistic profession turns on itself. *The Ottawa Citizen*.
- Palmer, I. (2007). Terrorism, suicidebombing, fear and mental health. *International Review of Psychiatry*, 19(3), 289–96.
- Plaisance, P. L. (2005). The propaganda war on terrorism: an analysis of the United States' "Shared Values" public-diplomacy campaign after September 11, 2001. *Journal of Mass Media Ethics*, 20(4), 250 – 68.
- Planned Parenthood v. Casey, 505 833 (U.S. Supreme Court 1992).
- Plato, & Jowett, B. (1977). *The portable Plato : Protagoras, Symposium, Phaedo, and the Republic. Complete, in the English translation of Benjamin Jowett*. New York: Penguin Books.
- Posner, R. A. (2006). *Not a suicide pact : the constitution in a time of national emergency*. New York ; Oxford: Oxford University Press.
- Power, S. (2001). Bystanders to Genocide. *The Atlantic Online*.
- Pruitt Jr., P. M. (2007). Plantation Progressive on the Federal Bench: Law, Politics, and the Life of Judge Henry D. Clayton. *Southern Studies*, XIV(Fall-Winter), 85 – 139.
- R. v. Dymnt, 2 417 (Supreme Court of Canada 1988).
- R. v. Mentuck, 3 442 2001).
- Rabban, D. M. (1997). *Free speech in its forgotten years*. Cambridge ; New York: Cambridge University Press.
- Rasch, W. (2003). Human Rights as Geopolitics: Carl Schmitt and the Legal Form of American Supremacy. *Cultural Critique*, 54(Spring 2003), 120–47.
- Rawls, J. (1995). Political Liberalism: Reply to Habermas. *Journal of Philosophy*, 92(3), 132–80.

- Rawls, J. (2001). *Justice As Fairness: A Restatement*. Cambridge, Mass: Harvard University Press.
- Rawls, J. (2005). *Political liberalism* (Expanded ed.). New York: Columbia University Press.
- Raza, N. e. (2007). Reflecting on Glasgow's terror attack. *BBC News* July 2, 2007. Retrieved August 5, 2007, from <http://news.bbc.co.uk/1/hi/scotland/6262402.stm>
- Reagan, R. (1981). First Inaugural Address of Ronald Reagan, *The Avalon Project* (2008 ed.): Yale Law School, Lillian Goldman Law Library.
- Reynolds, J. (2006). Negotiating the Non-negotiable: Rawls, Derrida, and the Intertwining of Political Calculation and 'Ultra-politics'. *Theory & Event*, 9(3).
- Rights, H. o. L. H. o. C. J. C. o. H. (2007). Joint Committee on Human Rights - Nineteenth Report. London: House of Commons: The Stationery Office Limited.
- Risen, J. a. L., Eric. (2005). Bush lets U.S. spy on callers without courts. *New York Times*.
- Roach, K. (2001). The Dangers of a Charter-Proof and Crime-Based Response to Terrorism. In Ronald J. Daniels, Patrick Macklem, Kent Roach & University of Toronto. Faculty of Law. (Eds.), *The Security of freedom : essays on Canada's Anti-terrorism Bill* (pp. vii, 499 p.). Toronto: University of Toronto Press.
- Roach, K. (2002). Did September 11 change everything? Struggling to preserve Canadian values in the face of terrorism. *McGill Law Journal*, 47(4), 55.
- Roosevelt, F. D. (1933). First Inaugural Address of Franklin D. Roosevelt, *The Avalon Project* (2008 ed.): Yale Law School, Lillian Goldman Law Library.
- Rorty, R. (1997). *Truth, politics and 'post-modernism'*. Assen: Van Gorcum.
- Rorty, R. (2002). Fighting Terrorism with Democracy. *The Nation*.
- Sandel, M. J. (1996). *Democracy's discontent : America in search of a public philosophy*. Cambridge, Mass.: Belknap Press of Harvard University Press.
- Sandel, M. J. (1998). *Liberalism and the limits of justice* (2nd ed.). Cambridge, UK ; New York: Cambridge University Press.
- Sands, P. (2008). *Torture team : Rumsfeld's memo and the betrayal of American values* (1st ed.). New York: Palgrave Macmillan.
- Schiller, D. (1999). "The legacy of Robert A. Brady: Antifacist Origins of the Political Economy of Communications". *Journal-of-Media-Economics*, 12(2), 89-100.
- Schiller, D. (2008). The Militarization of U.S. Communications. *Communication, Culture & Critique*, 1, 126 - 38.
- Schlesinger, A. M. (1989). *The imperial presidency*. Boston: Houghton Mifflin.
- Smith, G. (2007). *Canada in Afghanistan: Is it Working?* Ottawa: Canadian Defence & Foreign Affairs Institute.

- Sontag, S. (2003). *Regarding the pain of others* (1st ed.). New York: Farrar, Straus and Giroux.
- Sontag, S. (2004). Regarding the Torture of Others. *New York Times Magazine*.
- Stone, G. R. (2003). Judge Learned Hand and the Espionage Act of 1917: A Mystery Unraveled. *The University of Chicago Law Review*, 70(1), 335-58.
- Stone, G. R. (2004). *Perilous times : free speech in wartime from the Sedition Act of 1798 to the war on terrorism* (1st ed.). New York: W.W. Norton & Co.
- Stuart, D. (2002). The Anti-terrorism Bill (Bill C-36): An Unnecessary Law and Order Quick Fix that Permanently Stains the Canadian Criminal Justice System. *Canadian Institute for the Administration of Justice*, 172-91.
- Sweeney, M. S. (2001). *Secrets of victory : the Office of Censorship and the American press and radio in World War II*. Chapel Hill, NC: University of North Carolina Press.
- Takaki, R. T. (2000). *Double victory : a multicultural history of America in World War II* (1st ed.). Boston: Little, Brown and Co.
- Tharps, L. (2004). Warrior Poet: A Biography of Audre Lorde. *Essende*, 35(5), 138-38.
- Thomassen, L. (2008). *Deconstructing Habermas*. New York ; London: Routledge.
- Thurschwell, A. (2005). Cutting the Branches for Akiba: Agamben's Critique of Derrida. In Andrew Norris (Ed.), *Politics, metaphysics, and death : essays on Giorgio Agamben's Homo sacer* (pp. 311 p.). Durham: Duke University Press.
- Toope, S. J. (2005). *Report of Professor Stephen J. Troope Fact Finder*. Ottawa: Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar.
- Trudeau, P. E. (1990). The values of a Just Society. In Tom Axworthy & Pierre Elliott Trudeau (Eds.), *Towards a just society : the Trudeau years* (pp. 404 p.). Markham, Ont.: Viking.
- Trudeau, P. E., & Graham, R. (1998). *The essential Trudeau*. Toronto: M&S.
- Truman, H. S. (1945). Statement by the President of the United States. In White House (Ed.) (pp. 3). Washington, DC: Harry S. Truman Library & Museum.
- Truman, H. S. (1949). Inaugural Address of Harry S. Truman, *The Avalon Project* (2008 ed.): Yale Law School, Lillian Goldman Law Library.
- UN. (2001). Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions (Bonn Agreement). In Special Representative of the Secretary-General for Afghanistan (Ed.). Bonn: United Nations.
- Unesco. (1949). *Human rights: comments and interpretations*. New York,: Columbia University Press.
- Vaughn, S. (2008). *Encyclopedia of American journalism*. New York: Routledge.
- Waldock, C. M. H. (1962). States and the Law Governing Resort to Force. *Recueil des cours de l'Académie de droit international de La Haye*, 106.

- Warn Seditious Pastors. (1918). *New York Times*.
- Webb, M. (2007). *Illusions of security : global surveillance and democracy in the post-9/11 world* (1st ed.). San Francisco, USA: City Lights Books.
- Weber, M. (1994). *Weber : political writings*. Cambridge ; New York: Cambridge University Press.
- Weglyn, M. (1976). *Years of infamy : the untold story of America's concentration camps*. New York: Morrow.
- Weil, S. (2002). *The need for roots : prelude to a declaration of duties towards mankind*. London ; New York: Routledge.
- Wilke, C. (2005). War v. Justice: Terrorism Cases, Enemy Combatants, and Political Justice in U.S. Courts. *Politics & Society*, 33(4), 637-69.
- Williams, J. G. (Ed.). (2004). *The Girard Reader*. New York: Crossroad Herder.
- Young, I. M. (2002). *Inclusion and democracy*. Oxford: Oxford University Press.
- Young, I. M. (2003). Feminist Reactions to the Contemporary Security Regime. *Hypatia*, 18(1), 223-31.
