

9/11, Torture, and Law

Michael Keefer^{*}

Abstract

Arguing that a primary motive for the public emergence of torture practices in the American empire after 9/11 was the state's desire to legitimize its account of the events of that day, I propose that the declaration of a permanent state of exception was an intended consequence of the events of 9/11, and suggest that writings of the Nazi jurist Carl Schmitt are relevant to the effective demolition of U.S. constitutional law and governance since 9/11. Analysis of his displaced theology leads to the suggestion that resistance to lawless state sovereignty should incorporate Winstanley's project of a "law of freedom."

* Michael Keefer, a Professor of English at the University of Guelph, has published many essays on Renaissance literature and philosophy, and on contemporary cultural politics; his most recent books are a critical edition of Marlowe's *Doctor Faustus* (Broadview Press, 2008), and *Antisemitism Real and Imagined* (The Canadian Charger, 2010).

Critique will be the art of voluntary insubordination, of thoughtful intractability, aimed at ensuring the desubjugation of the subject in the context of what we could call, in a word, the politics of truth.

— MICHAEL FOUCAULT, “WHAT IS CRITIQUE?”¹

1

The most widely disseminated narrative about 9/11 represents the relationship between the traumatic events of September 11, 2001 and the still unfolding scandal of torture in a worldwide gulag of prisons and ‘black sites’ run by the United States and by co-operating powers worldwide as a sequential one. By this account, when a shadowy network of Islamist fanatics, outwitting the American intelligence, security and air defense apparatuses, managed to strike at the heart of the U.S. financial system and the headquarters of the U.S. military, the American state responded with all the means at its disposal to identify and hunt down the people who had organized the attacks, and to prevent any repetition of them. Extreme measures were resorted to in the handling of people in any way suspected of being enemies – the illegality of which was implicitly acknowledged when Vice-President Dick Cheney spoke of working through “the dark side,”² or when former CIA counter-terrorism director Cofer Black said that “After 9/11 the gloves came off.”³ Through what may

¹ Michel Foucault, *The Politics of Truth*, ed. Sylvère Lotringer, intro. John Rajchman, trans. Lysa Hochroth and Catherine Porter (Los Angeles: Semiotext(e), 2007), p. 47; translated modified.

² Cheney used the phrase in an *NBC* interview with Tim Russert on 16 September 2001; for his full statement, see Dan Froomkin, “Cheney’s ‘Dark Side’ Is Showing,” *Washington Post* (7 November 2005), <http://www.washingtonpost.com/wp-dyn/content/blog/2005/11/07/BL2005110700793.html>.

³ John Barry, Michael Hirsh, and Michael Isikoff, “The Roots of Terror,” *Newsweek* (24 May 2004); quoted by Reed Brophy, “The Road to Abu Graib: Torture and Impunity in U.S. Detention,” in Kenneth Roth et al., eds., *Torture: Does It Make Us Safer? Is It Ever OK? A Human Rights Perspective* (New York: The New Press, 2005), p. 146. This “gloves off” cliché, which appears in Black’s Congressional testimony in 2003, was used in October 2001 by a senior officer in Afghanistan to tell an interrogator of ‘American Taliban’ John Walker Lindh that he had authorization from Secretary of Defense Donald Rumsfeld’s office to treat the prisoner brutally (see Brophy, pp. 147–48; and Frank Lindh, “America’s ‘detainee 001’ – the persecution of John Walker Lindh,” *The Observer* [10 July 2011], <http://www.guardian.co.uk/world/2011/jul/10/john-walker-lindh-american-taliban-father>).

have been excessive or injudicious concern for public safety, the story goes, the Bush administration set aside the niceties of constitutional and international law, producing astonishment among American scholar-ideologues who, until taught otherwise by photographs from Abu Graib, professed to have believed that only other states, “reprehensible regimes,” engaged in torture.⁴

In every significant detail, this narrative is either false or misleading. The available evidence points to elements within the American state as having at the very least permitted and enabled the events of 9/11. (That evidence includes scholarly exposures of the 9/11 Commission’s novelistic reconstructions;⁵ as well as refutations of the National Institute of Standards and Technology’s analyses of the Twin Towers and WTC 7 collapses by studies which expose disabling methodological errors,⁶ reveal processes of building collapse compatible only with a hypothesis of controlled demolition,⁷ demonstrate the falsity of NIST’s explanation of the debris-bursts emanating from many floors below the collapse fronts in the Twin Towers,⁸ and provide direct proof from the WTC dust that the collapses involved high-temperature exothermic reactions⁹ and the use of nano-thermate

⁴ See Jean Bethke Elshtain, “Reflection on the Problem of ‘Dirty Hands,’” in Sandford Levinson, ed., *Torture: A Collection* (2nd ed., Oxford and New York: Oxford University Press, 2006), p. 77.

⁵ See Michel Chossudovsky, *America’s “War on Terrorism”* (Pincourt, Québec: Global Research, 2005); Peter Dale Scott, *The Road to 9/11: Wealth, Empire, and the Future of America* (Berkeley: University of California Press, 2008); and David Ray Griffin, *The 9/11 Commission Report: Omissions and Distortions* (Northampton, MA: Olive Branch Press, 2005).

⁶ James Gourley et al., “Appeal Filed with NIST, Pursuant to Earlier Request for Correction,” *Journal of 9/11 Studies* 17 (November 2007), <http://www.journalof911studies.com/volume/2007/AppealLetterToNISTGourleyEtAl.pdf>; and David Ray Griffin, *The Mysterious Collapse of World Trade Center 7: Why the Final Official Report about 9/11 is Unscientific and False* (Northampton, MA: Olive Branch Press, 2010).

⁷ Graeme MacQueen and Tony Szaboti, “The Missing Jolt: A Simple Refutation of the NIST-Bazant Collapse Hypothesis,” *Journal of 9/11 Studies* 24 (January 2009), <http://www.journalof911studies.com/volume/2008/TheMissingJolt7.pdf>; David Chandler, “WTC7 in Freefall: No Longer Controversial,” *Architects and Engineers for 9/11 Truth* (2010), <http://www.youtube.com/watch?v=rVCDpL4Ax7I>.

⁸ Kevin Ryan, “High Velocity Bursts of Debris From Point-Like Sources in the WTC Towers,” *Journal of 9/11 Studies* 13 (July 2007), http://www.journalof911studies.com/volume/2007/Ryan_HVBD.pdf.

⁹ Steven E. Jones et al., “Extremely high temperatures during the World Trade Center destruction,” *Journal of 9/11 Studies* 19 (January 2008), <http://www.journalof911studies.com/articles/WTCHighTemp2.pdf>; see also “Forensic Metallurgy: Metallurgical Examination of WTC Steel Suggests Explosives,” *9–11 Research*, <http://911research.wtc7.net/wtc/evidence/metallurgy/index.html>.

explosives.)¹⁰ There are, as well, suggestive indications that the legal transformations and imperial wars for which 9/11 furnished a pretext were planned long in advance.¹¹

But my concern here is not with evidence of this kind. I want rather to engage with the alternative understanding of 9/11 toward which this evidence presses us — which involves relationships between torture, legality, and the events of that day quite unlike those suggested by the ‘official’ narrative.

My discussion of these relationships will take what may seem a circuitous path. After noting that torture in the post-9/11 American gulag has served less as a response to the 9/11 attacks than as a means of constituting the American state’s fictions about 9/11 — and that since torture is the basis of the state’s account of what took place, it is, in epistemic terms, a primary and formative element in the orthodox understanding of that day’s events — I will analyze the implications of the state of emergency proclaimed by George W. Bush on 9/11. Legal scholars including Scott Horton and David J. Luban have remarked on haunting parallels between the theories of the Nazi jurist Carl Schmitt and the effective demolition of constitutional law in the United States since 9/11.¹² In my own

¹⁰ Niels H. Harrit et al., “Active Thermite Material Discovered in Dust from the 9/11 World Trade Center Catastrophe,” *Bentham Open Chemistry & Physics Journal* 2 (2009): 7–31, <http://www.bentham.org/open/toctpj/articles/V002/7TOCPJ.htm?TOCPJ/2009/00000002/00000001/7TOCPJ.SGM>. One objection to studies that support a hypothesis of controlled demolition has been that they do not explain how preparations for it could have escaped public observation. But as a matter of methodology, questions of human contingency cannot displace observed physical occurrences in the order of explanation.

¹¹ The voluminous PATRIOT Act, rushed through Congress on the wings of the anthrax attacks, was clearly prepared in advance of 9/11. It appears also that in July 2001 American diplomats threatened an attack on the Afghan Taliban regime, scheduled for October; the evidence, from reports in the *Guardian* and *BBC*, was summarized by Gore Vidal, *Dreaming War: Blood for Oil and the Cheney-Bush Junta* (New York: Thunder’s Mouth Press / Nation Books, 2002), pp. 15–17.

¹² See Scott Horton, “The Return of Carl Schmitt,” *Balkinization* (7 November 2005), <http://balkin.blogspot.com/2005/11/return-of-carl-schmitt.html>; Horton, “State of Exception: Bush’s War on the Rule of Law,” *Harper’s Magazine* (July 2007), <http://harpers.org/archive/2007/07/0081595>; and David J. Luban, “Carl Schmitt and the Critique of Lawfare,” forthcoming in the *Case Western Reserve Journal of International Law*; available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1797904#%23. (I owe to Luban the references to Horton’s articles at the *Balkinization* blog here and in note 14 below.) It is not unfair to label Schmitt a Nazi: some of his most influential publications were published before the rise of Nazism, but he became a prominent Nazi jurist and legal theorist from 1933 onward, and in decades of active life after

comments on Schmitt's view of political sovereignty and systems of law as resting upon a prior, constitutive capacity to decide on states of emergency or exception, I take seriously his identification of political discourse as displaced theology. My use in the fourth and fifth parts of this essay of parallels from Milton's *Paradise Lost* and Calvin's *Institutes* as measures of Schmitt's extremism may suggest affinities with Christian anarchism. But in drawing such parallels, I am not participating in Alexandre Christoyannopoulos's project of recognizing an anarchist orientation within the canonical Christian gospels.¹³ I am prompted rather by the fact, noted by Giorgio Agamben, that Schmitt's understanding of a secularizing displacement of theology into political discourse implies, not the "process of growing dis-enchantment and de-theologizing of the modern world" that one finds in the thought of Max Weber, but rather "a continuing presence and significant agency of theology within the modern."¹⁴

Schmitt is of interest here not just as a theorist of an originary presence of arbitrary power and lawless violence within purportedly constitutional bourgeois-democratic states, but also as a jurist credited with having originated tactics that during the past decade have acquired the name of "lawfare" — which means the use of law (through, for example, "legal judgments authorizing torture as an executive privilege," or "legal advice endorsing immunity for torturers") to enable executive power to violate constitutional and international law with impunity, as well as the use of law as a weapon of war

World War II never expressed regret for that commitment.

¹³ See Alexandre Christoyannopoulos, *Christian Anarchism: A Political Commentary on the Gospel* (Exeter: Imprint Academic, 2010). Although Christoyannopoulos's primary aim is to construct a genealogy of Christian anarchism, I would question his decision to confine himself to the canonical gospels (which postdate the Pauline appropriation of a movement of the *ebionim*, or destitute, and the sack of Jerusalem in C.E. 70), and to ignore current historical and textual-critical studies (which draw on non-canonical texts including the Dead Sea Scrolls and the Nag Hammadi library) of the movement's radically egalitarian insurgent matrix. These studies include John Dominic Crossan, *The Birth of Christianity* (New York: HarperCollins, 1998); Robert Eisenman, *James the Brother of Jesus* (New York: Viking Penguin, 1997); and Eisenman, *The New Testament Code* (London: Watkins Publishing, 2006). The textual naivety of Christoyannopoulos's decision to take the canonical gospels at "face value" as "valid accounts of the life and teaching of Jesus" (p. 15) will be evident to any reader of Bart D. Ehrman, *Misquoting Jesus: The Story Behind Who Changed the Bible and Why* (2005; rpt. San Francisco: HarperSanFrancisco, 2007).

¹⁴ Giorgio Agamben, *Il Regno e la Gloria: Per una genealogia teologica dell'economia e del governo. Homo sacer II, 2* (2nd ed., Turin: Universale Bollati Boringhieri, 2009), p. 15; my translation.

against those who attempt to constrain state violence by appealing to codes of civil liberties or of international law which the state has supposedly bound itself to respect.¹⁵

Evidence of an unmistakable pattern not just of the violation of domestic laws upholding citizens' rights and international law protecting civilians from unrestrained exercises of military power, but of their systematic dismantling, will lead to my concluding reflections on the role of law in radical democratic resistance to post-9/11 practices of state-terroristic rule by the "sovereign exception."

2

I would propose that the relationship between the 9/11 attacks and what ensued was not as advertised. The proclamation on the day itself of a state of emergency, and shortly thereafter of a Global War on Terror, the effective cancellation of the U.S. Bill of Rights through the USA PATRIOT Act and other measures, and the invasions and occupations of Afghanistan and Iraq were not contingent *sequelae* of an unforeseen event. On the contrary: the event was a planned pretext for what followed it.¹⁶

¹⁵ I have quoted here from Philip Giraldi, "All's 'Fare' in War," *Antiwar.com* (7 July 2011), <http://original.antiwar.com/giraldi/2011/07/06/all-fare-in-war/>. See also Scott Horton, "Carl Schmitt and the Military Commissions Act of 2006," *Balkinization* (16 October 2006), http://balkin.blogspot.com/2006/10/carl-schmitt-and-military-commissions_16.html; Horton, "Carl Schmitt, the *Dolchstoßlegende*, and the Law of Armed Conflict," *Balkinization* (21 October 2006), <http://balkin.blogspot.com/2006/10/carl-schmitt-dolchstoßlegende-and-law.html>; Horton, "A Kinder, Gentler Lawfare," *Harper's Magazine* (30 November 2007), <http://www.harper.org/archive/2007/11/hbc-90001803>; and Luban, "Carl Schmitt and the Critique of Lawfare," 5–10.

¹⁶ This may seem a bold claim: I am proposing simply that patterns of intentionality evident within state action (or abstention from action) on 9/11 are linked to the intentionality of later state responses to the events of that day. Two essays in Paul Zarembka, ed., *The Hidden History of 9/11* (2nd ed., New York: Seven Stories Press, 2008), are relevant to these patterns of intentionality: David McGregor, "September 11 as 'Machiavellian State Terror,'" pp. 183–214; and Diana Ralph, "Islamophobia and the 'War on Terror': The Continuing Pretext for U.S. Imperial Conquest," pp. 253–90. The evidence relating to the material facts of the destruction of WTC 1, 2 and 7 cited in notes 6 to 10 above points to extensive advance planning of demolitions, whose timing was linked to attacks with hijacked aircraft which succeeded due to multiple lapses within the U.S. air defense system. (The suspect nature of these lapses has been widely studied: see, for example, Scott, *The Road to 9/11*, pp. 194–235; and Nafeez Mossadeq Ahmed, *The War on Truth: 9/11, Disinformation, and the Anatomy of Terrorism* [Northampton, MA: Olive Branch Press, 2005], pp. 267–316.)

As to torture, the practices that became so widespread after 9/11 were hardly unprecedented — for although most American political scientists and journalists have averted their eyes from the fact, the U.S. has for over half a century been the principal international disseminator of torture. During the 1950s and early 1960s the CIA developed a new model of torture — adding, as Alfred W. McCoy writes, “sensory deprivation and self-inflicted pain” to the existing repertoire “for an effect that, for the first time in the two millennia of this cruel science, was more psychological than physical”;¹⁷ the new torture methods were then propagated to American satrapies throughout Latin America and Asia.¹⁸

A “ticking time bomb” scenario in which, against all plausibility, the forces of order somehow know everything about an impending mass-casualty bomb attack except where the person in their custody (whom they also know with certainty to be the bomber) has planted his explosives, is regularly used by contemporary apologists for torture to justify “preventive interrogational torture.”¹⁹ But the primary purpose of torture in the post-9/11 American gulag has not been to wrest information from enemies, whether about past events or current and future actions. Henry Shue has argued that “The extraction of information from the victim, which perhaps — whatever the deepest motivation of torturers may have been — has historically been a dominant explicit purpose of torture is now, in world practice, overshadowed by the goal of the intimidation of people other than the victim.”²⁰ There is copious evidence that the dominant form of

¹⁷ Alfred W. McCoy, *A Question of Torture: CIA Interrogation from the Cold War to the War on Terror* (New York: Metropolitan/Owl, 2006), pp. 26–53. The words quoted, from p. 50, describe the CIA’s *Kubark Counterintelligence Interrogation* handbook (1963).

¹⁸ See, for example, Lesley Gill, *The School of the Americas: Military Training and Political Violence in the Americas* (Durham, NC: Duke University Press, 2004); and McCoy, *A Question of Torture*, where details are given on the Phoenix Program in Vietnam, which between 1966 and 1972 involved the murder of 82,000 suspected enemies and of 26,000 prisoners (pp. 62–71), similar operations in Uruguay, Colombia and Central America from the late 1960s to the 1980s (pp. 71–74), the exporting of torture to Iran in the 1960s and 70s (pp. 74–75), and to the Philippines from 1972 to the early 90s (pp. 75–86), and continuities in torture training and the effective legalization by 1997 of CIA torture techniques (pp. 86–107). See also Kate Millett, *The Politics of Cruelty* (New York: Norton, 1994), pp. 253–79 (on Guatemala and El Salvador). The American military denied any involvement in Central American atrocities, but in 2004, after the outbreak of resistance to occupation in Iraq, senior officers spoke openly of moving to a “Salvadoran option.”

¹⁹ Oren Gross, “The Prohibition on Torture and the Limits of the Law,” in Levinson, ed., *Torture*, p. 237.

post-9/11 torture has been “terroristic” in this sense, rather than “interrogational.”²¹

And yet it is also well documented that a more immediate aim of post-9/11 torture was to provide support for fictions being propagated by the Bush administration. Jonathan Schell has remarked that in late 2001 and 2002,

The Bush administration, hellbent on justifying its forthcoming invasion of Iraq, was ransacking the intelligence bureaucracy to find or produce two things that, it turns out, did not exist: weapons of mass destruction programs in Iraq and cooperation between Al Qaeda and the regime of Saddam Hussein. [. . .] Soon, prisoners were being tortured to provide evidence of the Al Qaeda-Saddam link. As Col. Lawrence Wilkerson, Colin Powell’s chief of staff, has stated, the “harsh interrogation in April and May of 2002 . . . was not aimed at pre-empting another terrorist attack on the U.S. but discovering a smoking gun linking Iraq and Al Qaeda.” And according to the recent Senate Armed Services report on the treatment of detainees, a former Army psychiatrist, Maj. Charles Burney, has confirmed the charge. “A large part of the time,” he told Army investigators, “we were focused on trying to establish a link between Al Qaeda and Iraq [. . .].”²²

²⁰ Henry Shue, “Torture,” in Levinson, ed., *Torture*, p. 53.

²¹ These are Shue’s terms. See the *Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Persons Protected by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation* (February 2004), in Karen J. Greenberg and Joshua L. Dratel, eds., *The Torture Papers: The Road to Abu Graib* (Cambridge and New York: Cambridge University Press, 2005), pp. 383–404, for evidence of terroristic treatment (including routine torture) of detainees in Iraq. It seems to have been widely understood that most detainees had no connection to the Iraqi resistance: intelligence officers are quoted as estimating that 70% to 90% of them had been “arrested by mistake” (p. 388).

²² Jonathan Schell, “Torture and Truth,” *CBS News* (7 June 2010), <http://www.cbsnews.com/stories/2009/05/28/opinion/main5047700.shtml>. It should be noted that evidence of Iraqi WMDs and links with al Qaeda did not just “turn out” not to exist. Senior American officials knew in 1995 from the interrogation of Saddam’s defector son-in-law that Iraqi WMD programs had been cancelled after the 1991 Gulf War and existing stocks of biological and chemical weapons destroyed. And U.S. claims about al Qaeda links — based upon a meeting in Prague between Mohammed Atta and Iraqi diplomats that never occurred, supposed treatment in Iraqi hospitals of the largely fictional terrorist Abu Musab al Zarqawi, and the existence, in a part of northern Iraq bordering on Iran that had been removed from Saddam Hussein’s control, of a training camp run by a CIA-supported fringe group — were wholly implausible.

The WMD and Saddam-al Qaeda fictions may be remembered as notorious failures, but they served their short-term purpose of stirring up war fever, and the U.S. corporate media dutifully withheld the evidence of their falsity from the American public until it could make no difference. Despite early and continuing refutations, another torture-based fiction, the *9/11 Commission Report*, appears to be enjoying some degree of continuing success, at least among propagandists for the official story: in the first chapter of his recent polemic against 9/11 skeptics, Jonathan Kay recommends it to readers “who wish to devote more time to the issue.”²³ But in early 2008 an analysis of this text conducted for *NBC News* by Robert Windrem and Victor Limjoco revealed that “more than one-quarter of all footnotes in the *9/11 Report* refer to CIA interrogations of al Qaeda operatives subjected to the now-controversial interrogation techniques”²⁴ — or, in Windrem’s words, “enhanced interrogation techniques, or torture.”²⁵ Moreover, “[m]ost of the information in Chapters 5, 6 and 7 of the *Report* came from the interrogations. Those chapters cover the initial planning for the attack, the assembling of terrorist cells, and the arrival of the hijackers in the U.S.”²⁶

The fact that the *9/11 Commission Report*’s “most critical chapters, those on the planning and execution of the attacks,”²⁷ are based on torture raises a problem that goes beyond any questions of legality: statements arising out of torture have no evidential value, because the intentionality they express is that of the torturers. Admissions elicited from “9/11 mastermind” Khalid Sheikh Mohammed, for example, might well be confirmed by those of Abu Zubaydah, another “high-value” prisoner — but when one knows that the former was waterboarded a hallucinatory one hundred and eighty-three times by the CIA, and the latter eighty-three times,²⁸ both the admissions

²³ Jonathan Kay, *Among the Truthers* (Toronto: HarperCollins, 2011), p. 20.

²⁴ Robert Windrem and Victor Limjoco, “9/11 Commission Controversy,” *MSNBC* (30 January 2008); though deleted from the *MSNBC* website, this article is available at http://911research.wtc7.net/cache/post911/commission/msnbc_commission_torture.html.

²⁵ Robert Windrem, “Blogs & Stories: Cheney’s Role Deepens,” *The Daily Beast* (13 May 2009), <http://www.thedailybeast.com/blogs-and-stories/2009-05-13/cheneys-role-deepens/p/>.

²⁶ Windrem and Limjoco, “9/11 Commission Controversy.”

²⁷ Windrem, “Cheney’s Role Deepens.”

²⁸ “September 11 mastermind Khalid Sheikh Mohammed ‘waterboarded 183 times,’” *The Sunday Times* (20 April 2009), http://www.timesonline.co.uk/tol/news/world/us_and_americas/article6130165.ece.

and their confirmation are meaningless.

As Elaine Scarry wrote in a classic study, “torture consists of acts that magnify the way in which pain destroys a person’s world, self, and voice”; and torturers “mime” the effects of pain by “breaking off the voice, making it their own, making it speak their words. . . .”²⁹ Torture, in short, is a form of ventriloquism — and the *9/11 Commission Report’s* statements about the agencies responsible for the attacks that launched the War on Terror therefore have the epistemic status of pure fiction.³⁰

The 9/11 Commission’s own members appear to have been troubled by the information they were receiving from the CIA, but their requests to interview the “high-value” prisoners, or, failing that, their interrogators, were denied — and led only to a further round of torture interrogations.³¹ In 2005, the CIA destroyed its videotapes of interrogations, in defiance of court orders requiring their preservation.³² Not merely is the torture ‘evidence’ effectively fictional, then, but the primary documents which might have allowed a judgment of the meaning — and the accuracy — of the transcripts supplied to the Commission no longer exist.

3

According to the interpretation advanced by George W. Bush and his government, the attacks of 9/11 were an expression by Muslim fanatics of irrational hatred for the freedoms enjoyed by Americans. If the crime in this view had a religious dimension, so also did Bush’s

²⁹ Elaine Scarry, *The Body in Pain: The Making and Unmaking of the World* (1985; rpt. New York: Oxford University Press, 1987), pp. 50, 54.

³⁰ This does not invalidate other non-torture-based statements made within the *Report*. But the fact that nearly every claim in the *Report’s* “most critical chapters” is based on torture does wholly invalidate the narrative of those chapters.

³¹ See “The 9/11 Commission & Torture: How Information Gained Through Waterboarding & Harsh Interrogations Form Major Part of 9/11 Commission Report,” *Democracy Now!* (7 February 2008), http://www.democracynow.org/2008/2/7/the_9_11_commission_torture_how.

³² “Complete 911 Timeline: Destruction of CIA Interrogation Tapes,” *History Commons*, http://www.historycommons.org/timeline.jsp?timeline=complete_911_timeline. See also Marisa Taylor, “No charges over destroyed CIA tapes,” *Miami Herald* (10 November 2010), <http://www.miamiherald.com/2010/11/10/1917891/no-charges-over-destroyed-cia.html>.

public response to it. Speaking on September 14, 2001 from the pulpit of the National Cathedral in Washington, DC, he declared that

our responsibility to history is already clear: To answer these attacks and rid the world of evil. War has been waged against us by stealth and deceit and murder. This Nation is peaceful, but fierce when stirred to anger. [. . .] In every generation, the world has produced enemies of human freedom. They have attacked America, because we are freedom's home and defender. And the commitment of our fathers is now the calling of our time. On this National Day of Prayer and Remembrance we ask Almighty God to watch over our Nation and grant us patience and resolve in all that is to come.³³

The most immediate message of 9/11 was that Americans are not safe in their own cities: Bush claimed they could be made safe once more by an answering violence, eye-for-an-eye, that would destroy the shadowy Islamist network blamed for the attacks, together with all of its adherents and supporters, whether governments, gangs, or individuals.

When might the world at last be purged of evil? In his National Cathedral address, Bush declared that "This conflict was begun on the timing and terms of others. It will end in a way and at an hour of our choosing." (That hour, it gradually emerged, might be long-deferred: retired General Wesley Clark has revealed that in October 2001, by which time the bombing of Afghanistan had begun, the Pentagon received a memo from Secretary of Defense Donald Rumsfeld laying out plans for the military to "take out" a further seven Middle Eastern and North African countries over the next five years;³⁴ and in January 2004, Vice President Dick Cheney announced that the global war on terror might last for generations.)³⁵

³³ George W. Bush, "Remarks at the National Day of Prayer and Remembrance Service, September 14, 2001," *The American Presidency Project*, <http://www.presidency.ucsb.edu/ws/index.php?pid=63645#axzz1ODDkXOtT>.

³⁴ See Amy Goodman, "Gen. Wesley Clark Weighs Presidential Bid: 'I Think About It Everyday,'" *Democracy Now!* (2 March 2007), http://www.democracynow.org/2007/3/2/gen_wesley_clark_weighs_presidential_bid. The countries in question were Iraq, Syria, Lebanon, Libya, Somalia, Sudan, and Iran.

³⁵ "Cheney: War Could Last Generations," *NewsMax.com Wires* (17 January 2004), <http://archive.newsmax.com/archives/articles/2004/1/16/232041.shtml>.

Bush — an unlikely diarist — was said by *CBS News* to have written in his diary on the evening of September 11 that “The Pearl Harbor of the 21st century took place today.”³⁶ The National Cathedral address was, in response, both a declaration of war and also a sermon, situating the 9/11 attacks within a discourse of divine providence: “God’s signs are not always the ones we look for. We learn in tragedy that his purposes are not always our own.” Nonetheless, “This world He created is of moral design.”³⁷ Acts of sacrifice, generosity, courage, and resourcefulness in the responses of ordinary Americans on 9/11 were taken in this sermon as evidence of the nation’s essential goodness — and therefore, by implication, of its fitness for the leading role in an apocalyptic Manichaean drama of good versus evil.

By means of this unprecedented declaration of war in a cathedral, the French 9/11 skeptic Thierry Meyssan remarked in 2002, “the American government consecrated [. . .] its version of events. From then on, any questioning of the official truth would be seen as sacrilege.”³⁸ We had entered the domain of what the Nazi jurist and political theorist Carl Schmitt called “political theology.”

4

Carl Schmitt’s book *Politische Theologie* (1922) famously defined sovereign power in terms of its capacity to suspend, through a state of exception or of emergency, the structure of legality and rights over which it ostensibly presides. By the same act or decision, the sovereign power also exempts itself from whatever system of law it applies to others; this sovereign exception or self-exemption is therefore one of its defining features.³⁹ Intimately linked to this view

³⁶ Quoted from *The Washington Post* (27 January 2002) by David Ray Griffin, *The New Pearl Harbor: Disturbing Questions about the Bush Administration and 9/11* (2nd ed.; Northampton, MA: Olive Branch Press, 2004), p. xi.

³⁷ George W. Bush, “Remarks.”

³⁸ Thierry Meyssan, *9/11: The Big Lie* (London: Carnot, 2002), p. 79; quoted by Griffin, *The New Pearl Harbor*, p. xv. Two years later Griffin — a prominent theologian and philosopher of religion as well as a 9/11 skeptic — was himself accused of something like sacrilege: Tucker Carlson, interviewing him on *MSNBC TV*, said that it was “wrong, blasphemous, and sinful” to have published books concluding that the evidence pointed to government complicity in the attacks of 9/11. See “‘Tucker’ for August 9,” *The Ed Show, MSNBC TV* (updated 10 August 2006), <http://www.msnbc.msn.com/id/14285603>.

³⁹ Carl Schmitt, *Politische Theologie. Vier Kapitel zur Lehre von der Souveränität* (Munich: Dunckler & Humblot, 1922); *Political Theology: Four Chapters on the Concept of Sov-*

of sovereign power is Schmitt's view that all significant modern theorizing of the State rests upon a secularizing displacement of theological concepts. Not surprisingly, his analysis of the structure of the exception is overtly displaced from the domain of theology.

Schmitt reproduces the traditional distinction between divine transcendence and immanence when he writes that the sovereign is "at the same time outside and inside the juridical order": "the sovereign stands outside the juridical order and, nevertheless, belongs to it, since it is up to him to decide if the constitution is to be suspended *in toto*."⁴⁰ Theological in the same sense is Schmitt's claim that the exception, while defying general codification, "simultaneously reveals a specifically juridical formal element: the decision in absolute purity." This claim rests upon the fiction that what precedes a juridical order must be chaos, and that only a sovereign power possessing an absolute and unshared power of decision-making can "creat[e] a situation in which juridical rules can be valid." Schmitt outlines this position in a sequence of aphoristic assertions:

There is no rule that is applicable to chaos. Order must be established for juridical order to make sense. A regular situation must be created, and sovereign is he who decides if this situation is actually effective. All law is 'situational law.' The sovereign creates and guarantees the situation as a whole in its totality. He has the monopoly over the final decision. Therein consists the essence of State sovereignty, which must therefore be properly juridically defined not as the monopoly to sanction or to rule but as the monopoly to decide [. . .].⁴¹

George W. Bush's declaration at a 2006 press conference that "I'm the decider, and I decide what's best" was interpreted at the time as a childish tantrum provoked by journalists' questions about his refusal to fire Defense Secretary Donald Rumsfeld.⁴² One might just

ereignty, trans. George D. Schwab (Cambridge, MA: MIT Press, 1985; rpt. Chicago: University of Chicago Press, 2005).

⁴⁰ *Politische Theologie*, p. 13. Here and below I am quoting passages from this text as translated by Daniel Heller-Roazen in Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford: Stanford University Press, 1998) — in this instance, in Agamben, p. 15.

⁴¹ *Politische Theologie*, pp. 19–21; trans. by Heller-Roazan in Agamben, *Homo Sacer*, p. 16.

⁴² Dick Meyer, "Bush: The Decider-In-Chief. Dick Meyer On the Biggest Kid of All,"

as plausibly hear it as a vernacular echo of Schmittian decisionism, which someone in Bush's entourage (possibly from the Justice Department, whose constitutional experts had been advancing since September 2001 a similar view of executive power and privilege)⁴³ may have attempted to expound to him.

Nor was this the first or only statement by Bush that resonates with Schmittian doctrines. "I'm the commander," he told one journalist in mid-2002: "See, I don't need to explain [. . .]. Maybe somebody needs to explain to me why they say something, but I don't feel like I owe anybody an explanation." To another journalist who asked in mid-December of the same year about the decision to invade Iraq, he replied: "There's only one person who is responsible for making that decision, and that's me." And to a third, on the same subject, a fortnight later: "I'm the person who gets to decide, not you."⁴⁴

Schmitt's statement about the imposition of order on chaos implies a kind of creation-myth, which we may recognize as sharing the voluntaristic resonances of a classic meditation on the Christian creation story — the one in which Goethe's *Faust*, revising Luther's translation of the opening words of the *Gospel of St. John* ("Im Anfang war das Wort"), arrives finally at "Im Anfang war die Tat!" — "In the beginning was the Deed!"⁴⁵

But Schmitt's implied myth is not the standard one of creation *ex nihilo* (for prior to the establishment of judicial and social order by a Schmittian sovereign power there must exist a disordered aggregate

CBS News.com (20 April 2006), <http://www.cbsnews.com/stories/2006/04/20/opinion/meyer/main1523934.shtml>.

⁴³ See for example Jay S. Bybee, "To: Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§2340–2340A" (August 1, 2002), in Greenberg and Dratel, eds., *The Torture Papers*, p. 204: "both courts and prosecutors should reject prosecutions that apply federal criminal laws to activity that is authorized pursuant to one of the President's constitutional powers." These powers make "the security of the nation" the president's foremost objective; Bybee quotes Alexander Hamilton's argument that since "the circumstances which may affect the public safety" are not "reducible within certain determinate limits," it follows "that there can be no limitation of that authority [. . .] in any matter essential for its efficacy" (p. 205). The passage from Hamilton had previously been used by John C. Yoo, "Memorandum Opinion for Timothy Flanigan [. . .] The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them" (September 25, 2001), in *The Torture Papers*, p. 4.

⁴⁴ Mark Crispin Miller, *Cruel and Unusual: Bush/Cheney's New World Order* (New York: Norton, 2004), p. xxi.

⁴⁵ Johann Wolfgang Goethe, *Faust*, ed. Hanns W. Eppelsheimer (1962; rpt. Munich: Deutscher Taschenbuch Verlag, 1973), line 1237.

of people). It resembles, rather, Milton's version in *Paradise Lost*: a story of creation through the imposition of order upon chaotic matter that is not-yet nature, a "wild abyss" of warring "embryon atoms," the domain of a personified Chaos — out of whose "dark materials" the "Almighty Maker" fashions a cosmos⁴⁶ which includes hell, the place of "torture without end" into which he casts Satan and the other rebel angels.⁴⁷ For Milton, this primal matter is not passive, but effectively resistant to the imposition of order: once Satan has found his way out of hell, Chaos, the "Anarch"⁴⁸ or non-ruler of the abyss of disorder that lies outside hell's gate, gives him directions to the new world, hoping he will ruin it and return it to its prior condition.⁴⁹ And the sequence of creation indicated by Chaos to Satan appears significant: the sovereign power made "First Hell, / Your dungeon, stretching far and wide beneath; / Now lately Heav'n and earth, another world / Hung o'er my realm. . ."⁵⁰

Schmitt, analogously, sees sovereign power as creating order out of a resistant social chaos, and doing so precisely through the sovereign's primal capacity to resort to unregulated force by deciding on a state of exception or emergency — which Giorgio Agamben has suggestively described as the creation of "a space devoid of law [. . .] the creation of a zone of anomy in which all legal determinations find themselves inactivated."⁵¹

Spatialized accounts of Schmitt's state of exception, or of the theologians' hell (which becomes a condition of perpetual separation from and punishment by the sovereign power), are of course metaphorical. As the devil Mephistophilis informed one transgressive inquirer, Christopher Marlowe's Dr. Faustus, hell, "Where we

⁴⁶ John Milton, *Paradise Lost*, Book II, lines 910 ("wild abyss"), 900 ("embryon atoms"), 895, 907, 960 ("Chaos"), 915–16 ("Almighty Maker," "dark materials"), in *The Annotated Milton: Complete English Poems*, ed. Burton Raffel (New York: Bantam Classics, 1999), pp. 199–202.

⁴⁷ *Paradise Lost*, Book I, line 67, p. 137.

⁴⁸ Book II, line 988, p. 202.

⁴⁹ Book II, lines 1007–09, p. 203.

⁵⁰ Book II, lines 1002–05, p. 203.

⁵¹ Giorgio Agamben, "The State of Emergency," lecture at the Centre Roland-Barthes (Université de Paris VII, Denis-Diderot), c. 2005, available online at <http://www.generation-online.org/p/fpagambenschmitt.htm>. The lecture condenses arguments made at greater length by Agamben in *State of Exception (Stato di eccezione)*, 2003, trans. Kevin Attell (Chicago: University of Chicago Press, 2005); and followed up in *Il Regno e la Gloria* (2007) and in *The Sacrament of Language: An Archaeology of the Oath (Homo Sacer, II, 3) (Il sacramento del linguaggio. Archeologia del giuramento)*, 2008, trans. Adam Kotsko (Stanford: Stanford University Press, 2011).

are tortur'd and remain forever [. . .] hath no limits, nor is circumscrib'd / In one self place, for where we are is hell. . ."⁵² It remains the case that in Schmitt's creation, as in Milton's, an ordered cosmos is complemented by an antecedent "space devoid of law" that exists, potentially or in actuality, at the will of the sovereign power — and that can be recognized, once we move beyond Schmitt's abstractions into thinking about the experiential realities of the exercise of power beyond law, as a space or condition of horror and suffering, within which sovereign power is perceived, as by Milton's fallen angels, in terms of "wrath or might."⁵³

5

Much of Schmitt's displaced theologizing could be linked, depending on one's taste or whim, to sources ranging from Søren Kierkegaard (whom he goes on to quote, without naming him, in the first of the passages quoted above from *Politische Theologie*) to Blaise Pascal (whose *Pensées* include meditations on justice and force, among them the radical acknowledgment that "being unable to make what is just strong, we have made what is strong just").⁵⁴ But his closest affinities are with the harshest of the magisterial Reformers, Jean Calvin.

Even prior to any secularizing displacement, Calvin's theology has strong political overtones. Regulating the faithful and society at large were for him aspects of the same issue; and the final chapter of his *Institutes of the Christian Religion* is a substantial treatise on civil government — one of whose first principles is that governance of all kinds must be strict, because in the fallen state of humankind "the insolence of evil men is so great, their wickedness so stubborn, that it can scarcely be restrained by extremely severe laws. . ."⁵⁵ (Schmitt,

⁵² Christopher Marlowe, *The Tragical History of Doctor Faustus: A critical edition of the 1604 version, with a full critical edition of the censored and revised 1616 text*, ed. Michael Keefer (Peterborough, ON: Broadview Press, 2008), II. i. 120–23, p. 209. Milton develops this concept in *Paradise Lost*, Book IV, lines 18–23.

⁵³ *Paradise Lost*, Book I, line 110, p. 138.

⁵⁴ Blaise Pascal, *Pensées*, no. 294, in *Pensées et opuscules*, ed. Léon Brunschvicg (Paris: Hachette, 1961), p. 467: "Et ainsi ne pouvant faire que ce qui est juste fût fort, on a fait que ce qui est fort fût juste." Jacques Derrida comments on this and related passages in "Force of Law: The 'Mystical Foundation of Authority,'" *Acts of Religion*, ed. Gil Anidjar (New York and London: Routledge, 2002), pp. 238–39.

⁵⁵ Jean Calvin, *Institutes of the Christian Religion*, ed. John T. McNeill, trans. Ford Lewis

similarly, argued in “The Concept of the Political” [1927] that any adequate political theory must acknowledge human wickedness and corruption as so deeply ingrained that a strong state is needed to impose order, sternly distinguishing between friend and enemy, both internal and external.)⁵⁶

Calvin, for whom the absolute and unconditioned nature of God’s sovereign power is axiomatic, anticipates Schmitt’s *Dezisionismus* in his claim that “providence is lodged in the act”⁵⁷ — by which he means that will is the primary aspect of this sovereignty: God’s omniscience rests upon the fact that everything that occurs has always already been determined, down to the least particle of its futurity, by his will.⁵⁸ This sovereign power exempts itself from any constraint by its own laws, and also — since its hidden determinations are said to be incomprehensible to human minds — from any possible criticism of deviations from those laws.

Calvin, though a theocrat, is in some respects less willing than Schmitt to theologize politics. He regards “Christ’s spiritual Kingdom and the civil jurisdiction” as “things completely distinct.”⁵⁹ And while preaching obedience to the civil power, as divinely ordained — and even extending God’s sovereign exception to human rulers⁶⁰ — he provides an opening for resistance to tyranny by noting constitutions in which the magistracy includes officials (the Spartan ephors, Athenian demarchs, Roman tribunes, or parliaments of his

Battles (2 vols.; Philadelphia: The Westminster Press, 1960), IV.xx.2, p. 1487. (The pagination in the two volumes of this edition is continuous; vol. 2 begins at III.xx.1.)

⁵⁶ Schmitt, “Der Begriff des Politischen,” *Archiv für Sozialwissenschaften und Sozialpolitik* 58 (1927); *The Concept of the Political*, trans. George D. Schwab (Chicago: University of Chicago Press, 2007), pp. 60–68.

⁵⁷ Calvin, *Institutes*, I. xvi.4, p. 202.

⁵⁸ See *Institutes*, III.xxiii.6, p. 954: “he foresees future events only by reason of the fact that he decreed that they take place”; and also III.xxiii.7, p. 955, where Calvin, who has elsewhere repeatedly blamed humankind’s wickedness and natural tendency to hate God upon the primal act of disobedience in the Garden of Eden, asks: “whence does it happen that Adam’s fall irremediably involved so many peoples, together with their infant offspring, in eternal death unless because it so pleased God? [. . .] The decree is dreadful indeed, I confess. Yet no man can deny that God foreknew what end man was to have before he created him, and consequently foreknew because he so ordained by his decree.”

⁵⁹ *Institutes*, IV.xx.1, p. 1486.

⁶⁰ In *Institutes*, IV.xx.10, p. 1497, Calvin claims that since no restraint is laid on God’s justice in punishing misdeeds, magistrates are entitled to violate the divine law against killing: “if it is not right to impose any law on him, why should we try to reproach his ministers?”

own time) appointed by the people “to restrain the willfulness” of their rulers.⁶¹

But the important parallel between Calvin’s theology and Schmitt’s *politische Theologie* resides in the fact that both are antithetical to any coherent notion of justice. Although the title of his major work (*Institutio Christianae religionis* in the original Latin) repeats that of the *Institutiones*, the first part of the four-part codification of Roman law attributed to the sixth-century emperor Justinian,⁶² Calvin’s thought is foundationally equivocal: its primary term, subsuming all other categories and agencies, is a sovereign divine will whose attributes — among them mercy or justice — are incommensurable with any merely human understandings of these words. That same sovereign will frustrates any recognition of laws and orders of causality operating within nature, for Calvin ascribes even such regularities as the sun’s daily rising and the fact that our food becomes nourishment to singular and repeated acts of divine will.⁶³ As for the Law of Moses, or for “natural law” (understood by many theologians as a system of ethical injunctions implanted within nature by a beneficent creator): their function, in Calvin’s view, is simply condemnatory — to render us “inexcusable.”⁶⁴

The result is what nineteenth-century historian W. E. H. Lecky called “religious terrorism.”⁶⁵ Calvin understood the Pauline doctrine of election to salvation as necessarily implying a parallel reprobation of the non-elect — who are thus chosen from all eternity for damnation.⁶⁶ Complaints against the injustice of a sentence of endless torture passed upon the unborn receive an answer at once proleptic and *ad hominem*. By the end of their lives, the reprobate will have deserved damnation, because they will have failed to obey the commandments to love and have faith in God (acts possible only for those who have received the arbitrary gift of divine grace.)⁶⁷ And questioning divine justice shows unregenerate hostility to God — a

⁶¹ *Institutes*, IV.xx.31, p. 1519.

⁶² The Latin word *institutio* has a range of meanings relating to disposition, arrangement, instruction, education, and established custom; Justinian’s *Institutiones* is a manual designed to introduce students to the full body of the law, the *Corpus Juris*.

⁶³ *Institutes*, I.xvi.2, p. 199; I.xvi.7, p. 206.

⁶⁴ *Institutes*, I.vi.14–15, pp. 68–69; II.vii.3, p. 351; II.vii.7, pp. 355–56; II.viii.12, p. 377.

⁶⁵ W. E. H. Lecky, *History of the Rise and Influence of the Spirit of Rationalism in Europe* (2 vols.; 1865, rpt. New York: Appleton, 1888), vol. 1, pp. 37–38, 78–82.

⁶⁶ *Institutes*, III.xxi.5, p. 926; III.xxi.7, p. 931; III.xxii.2, p. 934; III.xxiii.1, pp. 947–48.

⁶⁷ *Institutes*, III.xxiii.11, p. 959; III.xxiv.14, p. 981.

sign that the questioner may have been chosen by God's hidden will for everlasting torment.⁶⁸ Calvin indeed belongs among those who, as Lecky wrote, in the period culminating in the sixteenth century "diffused throughout Christendom a religious terror which gradually overcast the horizon of thought."⁶⁹

If Calvin puts himself at odds with justice through his claim that "God's will is so much the highest rule of righteousness that whatever he wills, by the very fact that he wills it, must be considered righteous,"⁷⁰ Schmitt does likewise through his contributions to the Nazi doctrine that the Führer's words have the force of law.⁷¹ One might therefore ask why Schmitt's ideology of the sovereign exception should be understood, any more than Calvin's, as providing leverage for a generalized critique of law.

Like Franz Kafka's haunting parable "Vor dem Gesetz" ("Before the Law"), and the nightmarish novel, *The Trial*, in which that parable recurs, they may indeed provide matter for critical reflection on the systems of law that we actually have.⁷² But one defining feature of any genuinely democratic system of law and any genuinely democratic jurisprudence must be that they do not grant exceptions to the powerful.

It is easy enough to see why systems of purported justice and equity which in fact defend invidious disparities of property, class, gender, and race should incorporate notions of legality in which, either mythically or in secularized terms, a foundational space is reserved for the exercise of State power unfettered by legality. But while actual historical polities may undergo clearly demarcated processes of change, some of them convulsive, they do not move in the manner imagined by Schmitt from a prior state of chaos to one of forcibly established juridical order. All human societies have structures of customary law (*nomos*), and while the ethnocentricity and racism of literate people may lead them to scorn oral codifications of law such as the *Kaianereh'ko:wa* (Great Law) of the Haudenosaunee or Six Nations, which work through various combinations of formal recitation, mythic narration, and customary practices, those structures have complexities adequate, in most cases, to the situations for

⁶⁸ *Institutes*, III.xxiii.2, pp. 949–50.

⁶⁹ *Ibid.*, vol. 1, p. 81.

⁷⁰ *Institutes*, III.xxiii.2, p. 949.

⁷¹ Agamben, *Homo Sacer*, p. 184.

⁷² See, for example, Jacques Derrida, "Before the Law," in *Acts of Literature*, ed. Derek Attridge (New York and London: Routledge, 1992), pp. 181–220.

which they were developed.⁷³ While they may encode patterns of inequity and violence, they also typically organize the sharing out, protection, and preservation of common land and resources.⁷⁴ There can in any event be no justification for dismissing them as anomic or chaotic.

Why, then, accept a violently obscurantist origin myth, or confine oneself to a juristic rhetoric that effaces both historical realities and the possibility of emancipatory transformations — unless (as one may suspect is the case with Schmitt) that is the unacknowledged aim of the exercise?

6

‘After 9/11, everything changed’: a tedious cliché. There has in fact been a remarkable degree of continuity in many aspects of the behaviour of the American empire, ranging from torture to what neoconservative journalist Jonah Goldberg approvingly called the “Ledeen Doctrine”: “Every ten years or so, the United States needs to pick up some small crappy little country and throw it against the wall, just to show the world we mean business.”⁷⁵ The rhythm of this state-terroristic violence may have accelerated since the early 1990s when Michael Ledeen entertained an audience at the American Enterprise Institute with these or similar words,⁷⁶ but the coups against democratically elected but insufficiently subservient governments in Venezuela (2002), Haiti (2004), and Honduras (2009) — not to mention military interventions in Panama, Somalia, Colombia, Sudan, Afghanistan, Iraq, Pakistan, Yemen and Libya — have followed long-established patterns.

⁷³ For a brief discussion of collisions between oral law and the legal-coercive apparatus of the Canadian state, see the last section of my essay “The Harper Government and ‘War-on-Terror’ Immigration Policy,” in Hartmut Lutz, ed., *What Is Your Place: Indigeneity and Immigration in Canada* (Augsburg: Wißner-Verlag, 2007), pp. 169–90.

⁷⁴ I have touched on this issue in the concluding pages of my essay “Resisting the Post-National: Canadian Critiques of the Geo/Cultural Politics of Globalization,” in Gunilla Florby, Mark Shackleton, and Katri Suhonen, eds., *Canada: Images of a Post/National Society* (Frankfurt and New York: Peter Lang, 2009), pp. 39–54.

⁷⁵ Jonah Goldberg, “Baghdad Delenda Est, Part Two,” *National Review Online* (23 April 2002), <http://www.nationalreview.com/articles/205187/baghdad-delenda-est-part-two/jonah-goldberg>.

⁷⁶ Goldberg remembered Ledeen, an influential right-wing ideologue, outlining this doctrine in “more or less” these words in a speech at the AEI in the early 1990s.

And yet there have been very significant changes. None of George W. Bush's predecessors publicly echoed Schmittian decisionism in the same manner. And beyond the mere rhetoric lies a dismaying reality: Bush declared a state of emergency on 9/11, which was formally proclaimed three days later, and has remained in effect ever since;⁷⁷ and at the same time his administration took the overlapping step of implementing "continuity of government measures,"⁷⁸ which have likewise apparently not been rescinded.

"Continuity of government," as Peter Dale Scott has noted, is an innocent-sounding but misleading term. Planning carried out under this name since the early 1980s, which was initially intended to ensure that the executive powers of the U.S. government would be able to survive a nuclear attack, morphed quickly into organizing for a state of exception in which constitutional government would be suspended. Not merely was its planning carried forward under conditions of dubious legality — Donald Rumsfeld and Dick Cheney, who were central figures in this planning during the Reagan and George H. W. Bush administrations, continued to be involved in it during the Clinton years, despite being out of public office — but continuity of government has come to mean the supplanting of representative democracy and constitutional law by what is in effect a military dictatorship.⁷⁹

Under continuity of government, the institutions of the American republic remain in place (as was the case in Rome two millennia ago, when the Roman republic declined into an imperial autocracy). But power has shifted decisively into the hands of an executive-military-security apparatus complex, some at least of whose domestic decisions are implemented by the "shadow government" brought into being after 9/11.⁸⁰

⁷⁷ For the most recent extension of the state of emergency, see "Letter from the President on the Continuation of the National Emergency with Respect to Certain Terrorist Attacks," *The White House / President Barack Obama* (10 September 2010), <http://www.whitehouse.gov/the-press-office/2010/09/10/letter-president-continuation-national-emergency-with-respect-certain-te>.

⁷⁸ *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States* (New York: Norton, 2004), p. 38; see also p. 326: "Contingency plans for the continuity of government and the evacuation of leaders had been implemented."

⁷⁹ See Peter Dale Scott, *The Road to 9/11*, pp. 183–245, for a detailed account of the evolution of continuity of government planning, and its implementation after 9/11.

⁸⁰ Barton Gellman and Susan Schmidt, "Shadow Government Is at Work in Secret," *The Washington Post* (1 March 2002), <http://www.washingtonpost.com/wp-dyn/content>

Even without knowing of or recognizing the implications of continuity of government protocols, commentators on post-9/11 American domestic and foreign policies have accurately summed up what has occurred. Gore Vidal, for example, remarked in 2002 that “it does seem fairly plain to many civil libertarians that 9/11 put paid not only to our fragile Bill of Rights, but also to our once-envied republican system of government . . .”⁸¹ In 2007, Barbara Olshansky wrote that

post September 11 America is a country governed by politicians who seek unchecked power to pursue their ‘global war on terror’ and who express a chilling disregard for human rights and the rule of law in that pursuit. [. . .] In the name of subduing [fear of outside forces], we have given the executive branch free rein to adopt secret policies that disregard the separation-of-powers principle and weaken our system of checks and balances. In its pursuit of unfettered executive power, the Bush administration runs roughshod over the constitutional foundations of our democracy.⁸²

Many aspects of the implanting of authoritarian governance do indeed appear to have been carried out in secret by the Bush regime. Steven Aftergood, writing on behalf of the Federation of American Scientists Project on Government Secrecy, noted in February 2008 that

Of the 54 National Security Presidential Directives issued by the [George W.] Bush administration to date, the titles of only about half have been publicly identified. There is descriptive material or actual text in the public domain for only about a third. In other words, there are dozens of undisclosed Presiden-

/article/2006/06/09/AR2006060900891.html, quote one participant as saying that “the shadow government has evolved into an indefinite precaution,” and note that “Only the executive branch is represented in the full-time shadow administration.” See also Francie Grace, “‘Shadow Government’ News to Congress,” *CBS News* (1 March 2002), <http://www.cbsnews.com/stories/2002/03/01/attack/main502530.shtml>.

⁸¹ Gore Vidal, *Dreaming War*, p. 11. Vidal adds that the republican system of government had “taken a mortal blow the previous year, when the Supreme Court did a little dance in 5–4 time and replaced an elected president with the oil-and-gas Cheney-Bush junta” (p. 12).

⁸² Barbara Olshansky, *Democracy Detained: Secret Unconstitutional Practices in the U.S. War on Terror* (New York: Seven Stories Press, 2007), pp. 1–2.

tial directives that define U.S. national security policy and task government agencies, but whose substance is unknown either to the public or, as a rule, to Congress.⁸³

However, the supplanting of constitutional government by an unconstrained sovereign power ruling in a state of exception has not been entirely secretive or lawless: it has also been a matter of Congressionally-approved bad law driving out good. As John W. Whitehead writes, the USA PATRIOT Act

has driven a stake through the heart of the Bill of Rights, violating at least six of the ten original amendments — the First, Fourth, Fifth, Sixth, Seventh and Eighth Amendments — and possibly the Thirteenth and Fourteenth Amendments, as well. The Patriot Act has also redefined terrorism so broadly that many non-terrorist political activities such as protest marches, demonstrations and civil disobedience are considered potential terrorist acts [. . .].⁸⁴

There appears to have been an ongoing implementation of continuity of government measures,⁸⁵ whose effects seem unmistakable. Barbara Olshansky quotes from the U.S. Supreme Court's judgment in *Hamdi v. Rumsfeld* (2004):

We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Na-

⁸³ Steven Aftergood, "The next president should open up the Bush administration's record," *Nieman Watchdog* (7 February 2008), http://niemanwatchdog.org/index.cfm?fuseaction=ask_this.view&askthisid=00321. (I am indebted for this reference to "Investigation into Whether America is Still a Constitutional Government," <http://constitutionally.blogspot.com>.)

⁸⁴ John W. Whitehead, "A week in the life of a police state," *ColdType* 57 (June-July 2011), p. 50, <http://www.coldtype.net/Assets.11/pdfs/0611.CT57.pdf>. It should be remembered that the Patriot Act was passed under the duress of anthrax attacks on the offices of the Democratic Party's congressional leadership — attacks which, given the implausibility of the FBI's lone-mad-scientist scenario, invite classification as instances of state terrorism or state crimes against democracy.

⁸⁵ For evidence that the process is indeed ongoing, see Peter Dale Scott, "'Continuity of Government' Planning: War, Terror and the Supplanting of the U.S. Constitution," *The Asia-Pacific Journal*, 21-2-10 (24 May 2010), http://japanfocus.org/-Peter_Dale-Scott/3362; and "Is the State of Emergency Superseding the US Constitution? Continuity of Government Planning, War and American Society," *The Asia-Pacific Journal*, 48-1-10 (29 November 2010), http://japanfocus.org/-Peter_Dale-Scott/3448.

tion's citizens. Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.

But “[d]espite the Supreme Court’s rulings,” Olshansky comments, “the administration has stubbornly and purposefully refused to deviate from its itinerary of operating outside the rule of law.”⁸⁶ (There is some irony to the Supreme Court being treated with contempt by the regime it installed through the stunningly lawless *Bush v. Gore* decision.)

Glenn Greenwald sums up the implications of a lawlessness that appears to have engulfed the American judiciary as well as the executive power:

Not a single War on Terror detainee has been accorded any redress in American courts for the severe abuses to which they were subjected (including innocent people being detained for years, rendered and even tortured), and worse, no detainee has been allowed by courts even to have their claims heard. After the U.S. Government implemented a worldwide regime of torture, lawless detention, and other abuses, the doors of the American justice system have been slammed shut in the face of any and all victims seeking to have their rights vindicated or even their claims heard. If an American citizen can't even sue political officials who lawlessly imprison and torture him in his own country — if political leaders are vested with immunity from a claim of this type — what rational person can argue that the rule of law or the Constitution binds our government officials?⁸⁷

⁸⁶ Olshansky, *Democracy Detained*, pp. 4–5, quoting from *Hamdi v. Rumsfeld*, 542 U.S. 535 (2004).

⁸⁷ Glenn Greenwald, “U.S. justice v. the world,” *Salon.com* (18 February 2011), http://www.salon.com/news/opinion/glenn_greenwald/2011/02/18/justice/index.html. For evidence that these facts should be understood within the context of an ongoing dismantling of international law, see Philippe Sands, *Lawless World: Making and Breaking Global Rules* (2nd ed., London: Penguin, 2006); and Afua Hirsch, “Ministers move to change universal jurisdiction law,” *The Guardian* (30 May 2010), <http://www.guardian.co.uk/2010/may/30/change-universal-jurisdiction-law>.

7

In an essay written in 2006 to justify torture, neoconservative journalist Charles Krauthammer moves from the standard ticking time bomb argument to the “far from hypothetical” case of Khalid Sheikh Mohammed:

He not only was the architect of the 9/11 attack that killed nearly three thousand people in one day, most of them dying a terrible, agonizing, indeed tortured death. But as the top al Qaeda planner and logistical expert he also knows a lot about terror attacks to come. He knows plans, identities, contacts, materials, cell locations, safe houses, cased targets, etc. What would you do with him?

Krauthammer proposes that it would be “a gross dereliction of duty” if any government that held this man a prisoner failed to torture him,⁸⁸ using measures of a “level of inhumanity [. . .] proportional to the need and value of the information.”⁸⁹

One rhetorical peculiarity of these maneuvers may escape the casual reader. Krauthammer has put the question of what to do with this prisoner into the present conditional tense — and yet everything he knows about him stems from the fact that Khalid Sheikh Mohammed had *already* been subjected to grueling tortures, the ‘intelligence’ from which had been uncritically incorporated into the *9/11 Commission Report* — a text that, two years later, Krauthammer has evidently read. His present tense elides this epistemic loop, and with it the fact that he is using ‘intelligence’ derived from torturing KSM to justify torturing KSM — in search, presumably, of something like the implausible confessions to terrorist ventures of all kinds, real and imaginary (including a planned operation against a Washington state bank that wasn’t built until long after KSM’s arrest), that would be entered into evidence in the 2006 trial of the putative ‘twentieth

⁸⁸ Charles Krauthammer, “The Truth about Torture,” in Levinson, ed., *Torture*, pp. 309–10. Krauthammer tries to fudge the issue, speaking first of keeping the prisoner “isolated, disoriented, alone, despairing, cold and sleepless, in some godforsaken hidden location,” and then substituting the term “coercive interrogation” (p. 310). He means “torture.”

⁸⁹ *Ibid.*, p. 313. The information in this case would be “high value” and urgently needed, which would presumably justify extreme inhumanity.

hijacker,' Zacharias Moussaoui,⁹⁰ and would reappear in 2007 in a judicial review of KSM's "combatant status" by a Guantánamo military tribunal.⁹¹

Even were we to discard the evidence, alluded to at the outset, which suggests that the real architects of 9/11 were people highly placed within the American state, the fact remains that Krauthammer's rhetoric mirrors the tactics used by 16th century apologists of witch-persecutions — who knew that suspected witches must be tortured to reveal evidence of their wicked conspiracies with Satan, because witch-hunters already had copious evidence, derived from the torture of suspected witches, of the horrifying reality and destructive power of that Satanic alliance.⁹²

We encounter in this example a structure that has already recurred throughout this essay — in which a violence exercised by sovereign power that exempts itself from the constraints of legality (in this case, the constraints of existing U.S. and international law) is represented, whether discursively or mythically, as the enabling condition of public order and safety.

In Milton's *Paradise Lost*, the creation of hell precedes that of heaven and earth; in Calvin's theology, the judgment by a sovereign will that all of humanity (thanks to the divinely willed fall of our first parents) deserves the torments of hell is conceptually prior to the arbitrary grace which partially reverses that judgment by creating

⁹⁰ See David Ray Griffin, *The New Pearl Harbor Revisited: 9/11, the Cover-Up, and the Exposé* (Northampton, MA: Olive Branch Press, 2008), pp. 216–17.

⁹¹ "Verbatim Transcript of Combatant Status Review Tribunal Hearing for ISN 10024" (10 March 2007), available online at http://i.a.cnn.net/cnn/2007/images/03/14/transcript_ISN10024.pdf. This 26-page document provides an interesting glimpse of the normalizing of torture in U.S. military 'justice'. The text gives no indication of the contents of a written statement supplied to the tribunal by KSM "regarding alleged abuse" (p. 7). Asked by the presiding officer whether statements he made to his interrogators between 2003 and 2006 were "made as the result of any of the treatment you received during that time frame," KSM replied: "CIA peoples. Yes." Rewording the question about torture, the presiding officer receives a second response (partially censored) that is suggestive of mental confusion, and drops the issue (pp. 14–15). The document then incorporates a confession statement (pp. 17–19) in which KSM admits direct responsibility for every actual, projected, or merely rumored operation ever associated with al Qaeda — including a planned attack on the Plaza Bank in Washington state, built three years after KSM's capture, and others that seem wholly imaginary, such as "the operation to destroy Heathrow Airport, the Canary Wharf Building, and Big Ben on British soil" (p. 18).

⁹² For a key example of this tactic, see Jean Bodin, *De la démonomanie des sorciers* (Paris: Jacques du Puys, 1580). Bodin was a political philosopher of major stature as well as a fanatical witch-hunter.

an ordered community of faith; and in Schmitt's political theology the primary attribute of the order-imposing sovereign power is its capacity, at its own whim, to suspend the workings of law in order to exercise unconstrained violence.

9/11 complicates this structure. According to the orthodox political theology of 9/11, a nation that already approached perfection in its devotion to liberty was attacked, because of its very goodness, by forces of evil; a gloves-off or "dark side" suspension of legality in a global war on terror has been required to fend off those forces and defend liberty. Yet as we have seen, a primary motive of the resort to the "dark side" was to generate fraudulent torture-based 'intelligence' that would support this orthodox fiction.

In the very different story to which other — untainted — evidence points, the "dark side" is not just incidental, a matter of evil tactics used against the powers of evil: it is, rather, the *arche* and the *telos* of 9/11, the event's starting point and its goal. The hijacking attacks were facilitated and enabled by a multi-faceted suspension of many of the normal functions of military, intelligence, and civilian officials — which, since the functions of these servants of the state are legally mandated, was also an effective suspension of legality. The goal appears to have been a lasting "state of exception" in which the militarized state, while continuing to project a mythology in which it defines itself as the guarantor and protector of an increasingly abstract "freedom," in fact suppresses the limited freedoms announced within the state's own foundational legal documents, its Constitution and Bill of Rights.

* * *

In the concluding chapter of his book *Black Bloc, White Riot*, A. K. Thompson brings together several thinkers whom I would also like to consider (if to somewhat different effect).⁹³

Thompson quotes Jean Baudrillard's claim, in *The Spirit of Terrorism*, that the attacks of 9/11 radicalized both "the world situation" and "the relation of the image to reality": "Whereas we were dealing before with an uninterrupted profusion of banal images and a seamless flow of sham events, the terrorist act in New York has resuscitated both images and events."⁹⁴ Observing that "[t]wo accounts of

⁹³ A. K. Thompson, *Black Bloc, White Riot: Anti-Globalization and the Genealogy of Dissent* (Oakland and Edinburgh: AK Press, 2010), pp. 157–69.

epistemic and political resolution seem to be at work” in this claim — one in which “the disjuncture between signifier and signified is resolved in catastrophe,” so that “things and their names once again become inseparable,” and another in which the image “consumes the event entirely” — Thompson argues that these are in reality “only two phases of a single process by which the image is reenergized as a modality of representational politics.” For, following a momentary “short circuit in the representational sequence,” the meaning of the terrorist act becomes evident: “It’s an action in excess of the law that serves in the end to reaffirm the law itself,” and to revitalize “constituted power.”⁹⁵

A more cautious return to the images and events of 9/11 might suggest that the crucial “short circuit” — one that is by no means merely momentary — is to be found, not in the representational sequence as such, but rather in its implicit causality. The unforgettable central images of 9/11 — the impacts of the two hijacked aircraft, followed by immense deflagrations of jet fuel, and the violent disintegration of the twin towers into pyroclastic dust clouds that enveloped most of lower Manhattan — appeared to viewers of that appalling spectacle to constitute a causal sequence: from impact, to building fires, to collapse. But that impression of causality (together with NIST’s shabby attempts to give it scientific credibility) is refuted by the evidence I cited in the first part of this essay, which reveals both the insufficiency of impact damage and the ensuing fires to produce the observed effects, and also the presence of other intervening causes.

Thompson notes in passing Guy Debord’s view, expressed in his *Commentaires sur la société du spectacle* (1988), “that the state itself invented terrorism as its representational negation, the enemy that confirms it.”⁹⁶ In rejecting the false causality of the spectacle of 9/11, we can permit ourselves to cite Debord at greater length. “Such a perfect democracy,” he wrote with acid irony,

constructs its own inconceivable foe, terrorism. Its wish is *to be judged by its enemies rather than by its results*. The story of terrorism is written by the state and it is therefore highly instructive. The spectators must certainly never know every-

⁹⁴ Jean Baudrillard, *The Spirit of Terrorism* (London: Verso, 2002), p. 27; quoted by Thompson, p. 164.

⁹⁵ *Ibid.*, pp. 164–65.

⁹⁶ *Ibid.*, p. 65.

thing about terrorism, but they must always know enough to convince them that, compared with terrorism, everything else must be acceptable, or in any case more rational and democratic.⁹⁷

Thompson refers as well to the great German critic, Walter Benjamin — but to an early and unsatisfactory essay, the “Critique of Violence.”⁹⁸ More relevant to my subject are remarks from one of Benjamin’s last texts, “Theses on the Philosophy of History,” written shortly before his death in 1940:

The tradition of the oppressed teaches us that the ‘state of emergency’ in which we live is not the exception but the rule. We must attain to a conception of history that is in keeping with this insight. Then we shall clearly realize that it is our task to bring about a real state of emergency, and this will improve our position in the struggle against Fascism.⁹⁹

But what would it mean, in a post-9/11 world where lawlessness and torture are being institutionalized, to speak of bringing about “a real state of emergency”? One would like to hope that the fatuous Baudrillardian game of pretending to resist capitalism by acceding to its demands to spend oneself silly has been abandoned; the folly of playing to the strength of those who have long since possessed an

⁹⁷ Guy Debord, *Comments on the Society of the Spectacle*, trans. Malcolm Imrie (London: Verso, 1998), p. 24. (In the preceding pages, Debord remarks on the scandalous freedom from scandal, in contemporary democracies, of the tyrannical ventures of such groups as the Italian “parallel government, P2, *Potere Due*” — on which, see p. 22 and also p. 53.)

⁹⁸ Dating from the early 1920s, this essay is disabled by two facts: it was composed in silent dialogue with early texts of Carl Schmitt, some of whose preconceptions it accepts; and it confuses the central issue by defining strike action as incorporating “extortion” and the use of “force in attaining certain ends,” and hence as a form of violence. See Walter Benjamin, *Reflections: Essays, Aphorisms, Autobiographical Writings*, ed. Peter Demetz, trans. Edmund Jephcott (New York: Schocken Books, 1986), p. 282.

⁹⁹ Benjamin, “Theses on the Philosophy of History, VIII,” in *Illuminations*, ed. Hannah Arendt, trans. Harry Zohn (1970; rpt. London: Fontana, 1973), pp. 248–49. This text is also available as “On the Concept of History,” in Benjamin, *Selected Writings*, ed. Michael W. Jennings et al. (4 vols.; Cambridge, MA: Harvard University Press, 1996–2003), vol. 4. One might prefer, in the present context, to speak of a struggle against “proto-fascism,” which is diagnosed by Henry Giroux in *Against the New Authoritarianism* (Winnipeg: Arbeiter Ring Publishing, 2005), pp. 30–82.

effective monopoly on violence, whether legal or extra-legal, should be no less apparent. Is Benjamin here participating in a tendency to idealize and aestheticize violence that Luigi Fabbri had analyzed and stringently criticized in his 1917 essay, “Bourgeois Influences on Anarchism”? Violence, Fabbri acknowledges, may be unavoidable, but he objects on ethical grounds to any glamorizing by bourgeois writers of its intrinsic ugliness, and on political and philosophical grounds to the resulting displacement of attention from goals to actions.¹⁰⁰

Or can we perhaps give Benjamin credit for an irony analogous to that of Debord’s “perfect democracy”? Might it not be a “real emergency” for the advocates of a state of exception to find themselves confronted by a growing non-violent and egalitarian movement for radical democracy, calling not just for a full restoration of prior rights and freedoms, but for the implementation of an ongoing project to which, more than three and a half centuries ago, the Digger activist Gerrard Winstanley gave the resonant name of “the law of freedom”?¹⁰¹

¹⁰⁰ Fabbri writes that “literary poseurs [. . .] offend fallen anarchists” even in praising them, “because their eulogies draw their force and motive precisely from that which, according to anarchist principles, is painful and deplorable though perhaps a historical necessity.” While rejecting Tolstoyan pacifism, Fabbri insists that violence “is always an ugly thing, be it individual or collective,” asserting at the same time that the subject distracts us from something more important: “But we’re not dealing with this, but with the tendency, derived from bourgeois influences, of ignoring goals and making actions the primordial preoccupation.” Fabbri, “Bourgeois Influences on Anarchism,” trans. Chaz Bufe, *anarkismo.net* (25 September 2009), <http://www.anarkismo.net/article/14544>.

¹⁰¹ Gerrard Winstanley, *The Law of Freedom in a Platform or, True Magistracy Restored* [1652], ed. Robert W. Kenny (New York: Schocken Books, 1973).

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