

Three Eras of Citizen-Rights in Canada: An Interpretation of the Relationship Between
Citizen-Rights and Executive Power

by

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B.A., University of Victoria, 2009

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Supervisory Committee

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Abstract

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In Canada's recent history, the cases of Kanao Inouye, Omar Khadr, and Maher Arar shed light on the relationship between citizen-rights and sovereign power, a problem which this thesis studies through its three-pronged strategy of analysis. First, it takes a postmetaphysical approach to the problem of exceptionality as it has been explored in the works of Jacques Derrida, Gianni Vattimo, and Reiner Schürmann. Their responses to the problem of exceptionality provide a framework that enables this thesis to capture the relationship between citizen-rights and sovereign power in relative detail. Second, it applies Schürmann's epochal theory in order to offer a historical periodization of citizen-rights in Canada that highlights the effect of sovereign power on citizen-rights. Lastly, in light of its philosophical and theoretical framework, it interprets the Inouye, Khadr, Arar cases in order to account for the effect of Charter rights on sovereign power.

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Introduction: The Paradox of Citizen-Rights in the Modern Nation-State and Outline of the Thesis

Vic Toews, Minister of Public Safety, introduced new policy on torture in 2010. While acknowledging that torture “is a fundamentally abhorrent practice that undermines Canada’s reputation as a protector of human rights” (Toews qtd. in Bronskill, 2012), this ministerial directive confirmed that in “exceptional circumstance” CSIS and the RCMP can (1) share intelligence even where there is a substantial risk of torture (July 2011) and (2) use information “that may have been derived from the use of torture or mistreatment” (Toews qtd. in Bouzane, 2013) as a means to reduce any serious risks to life or property (Criminal Law Quarterly, 2012; Canadian Press, 2012a). Toews justified these policy changes by embedding a “norm/exception argument” within a ticking-time bomb scenario:

If we receive information that a bomb was in a certain building in Ottawa and that it came from a country where we know that they have used torture from time to time, although we don’t approve of the use of torture, we couldn’t turn a blind eye to that information and not use it (Toews qtd. in Canadian Press, 2012b).

Toews qualified that “Ignoring such information,” “in such rare circumstances,” “solely because of its source would represent an unacceptable risk to public safety” (ibid.). These policy changes are shocking because they deny questions of morality, legality, credibility and reliability that arise concerning the use of information derived from the use of torture or mistreatment (Bronskill, 2012). Indeed, contemporary history has taught us about the real-life consequences of relying on information obtained through torture. A 2006 Royal Commission into the Maher Arar case found that information derived from the use of torture that was passed onto the U.S. security establishment by the Canadian security establishment led to Arar’s year long ordeal and recommended federal policies be written

so as to eliminate any possible involvement of Canada in torture. The Arar Inquiry followed on the heels of the 2008 “Internal Inquiry Into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou Elmaati and Muayyed Nureddin” which also indirectly implicated Canadian officials in torture “through the sharing of information with foreign intelligence and police agencies” (Canadian Press, 2012b).

These ministerial directives represent a disturbing epochal transformation. The legal prohibition against torture began with the 1689 English Declaration of Rights prohibiting cruel and unusual punishment. Over the course of the next 300 years institutionalized torture was transformed into a universally condemned practice (Bufacchi and Arrigo, 2006). Every comprehensive international human rights instrument prohibits the practice of torture under the right to be free from torture (Lippman, 1979; Bufacchi and Arrigo, 2006). This right has been identified as “a peremptory norm of general or international law from which there can be no treaty derogation” (O’Boyle, 1971: 687). In other words, in theory, the right to be free from torture cannot be withdrawn within the context of a “public emergency which threatens the life of a nation” or “in a time of war, public danger, or other emergency that threatens the independence or security of a state” (Lippmann, 1979: 26). Like prohibitions on slavery and genocide, torture “is absolutely illegal and [...] cannot, under international law standards, be justified” (Thornberry, 1975: 88). Although it seemed to contain no loopholes, the prohibition against torture was sidestepped with fallacious ethical reasoning following the tragic events of September 11, 2001 (Clarke, 2006: 3). Since this time, the norm/exception argument and the ticking time bomb scenario have become the “best known arguments in favour of the legitimate use of state-sponsored torture on terrorists” (Bufacchi and Arrigo, 2006: 355).

This scenario is characterized by three elements: (1) the lives of innocent civilians are at risk; (2) a catastrophic event is looming which necessitate immediate decisions; (3) a terrorist who is presumed to have, but refuses to divulge, information that could prevent said catastrophic event has been captured (ibid.). Hence, some scholars and politicians argue that torturing an alleged terrorist in this context is justifiable (notwithstanding inter/national prohibitions against torture) since it could save the lives of innocent civilians (see for example: Parry, 2003; Dershowitz, 2004; Ignatieff, 2004). In this way, the ticking-time bomb argument is used to strengthen moral and legal arguments *vis-à-vis* an “ethics of lesser evil” which allows for the possibility of torturing (alleged) terrorists in exceptional circumstances (Ignatieff, 2004). Developing the moral argument, some scholars adopt the contradictory view that torture—which is anathema to international and domestic law—is “a legitimate option—*the lesser of two evils*—in rare circumstances” (Parry, 2004: 160). “The evil of torture,” in other words, “must remain illegal, but it should not be utterly precluded as a method of combating the [greater] evil of terrorism—although its use must be rare” (Parry, 2003: 258). Dershowitz simultaneously opposes torture on moral grounds while advocating the institutionalization of “torture warrants” which would legalize the torture of terrorists (under judicial oversight) as strategy to combat terror and eliminate the widespread, illicit use of torture (2004). Although this thesis takes the position that torture can never be justified, whether in theory, or within the context of the most exceptional circumstances of the ticking time bomb scenario, it also recognizes that the derogation of the right to be free from torture, points to a very real problem of “inalienable” and “universal” rights

within the framework of the modern nation-state and responds to this problem by reflecting on the history of rights in Canada (a point which I return to).

The Universal Declaration of Human Rights (UDHR)—premised on the “inalienable” and “inviolable” rights of all persons—was enacted in the aftermath of WWII as a moral response to the victims of the war, especially the Holocaust. By prioritizing citizen-rights above the right of sovereignty of the nations and by limiting the recognition of its right of belligerency (the right of soldiers to kill people without this being considered murder) to cases of self-defense, the UDHR promised to provide “the foundations for peace, justice and freedom in the world” (UDHR, 1948; Lummis, 2006). However, although proclaiming the “inalienability” and “inviolability” of rights, as the UDHR was issued by a body (the UN) that has no executive power, rights require state power to implement them. Human rights, therefore, are only bestowed to the formal citizen—insofar as the citizen does not become an enemy—of the state/country. Hence, when one’s actions against one’s state disqualifies an actor from citizenship, and thus entitlement to rights, the state can exercise force against him or her, notwithstanding the state’s responsibility to protect its citizens, thereby violating their rights while remaining lawful. The conceptual pair “citizen-rights” is throughout this thesis in order to emphasize the rights bearing citizen as a principle of the modern, sovereign, post-Westphalian nation-state (a point which I return to in Chapter 2). The derogation of one’s right to be free from torture is compounded in the case of the use of force by those regarded as “unlawful combatants.” Customary laws of war maintain that for a conflict to be legitimate warfare, it must be between nation-states (Yoo and Ho, 2003). This means that “non-state actors” engaging in warfare are engaged in a form of warfare that is

illegitimate (ibid.). The upshot of this is that whereas the lawful combatants of nation-states are immunized against charges of murder by the recognition of a nation-state's right to belligerency, "unlawful combatants" receive no such protection and are additionally exposed to the lawful exercise of sovereign force against him or her (e.g. torture) which thereby violates their "universal" and "inalienable" rights.

In response to this unequal situation, the paradox which I study and on which I reflect on and which is at the heart of this thesis is precisely how the state, in suspending one's citizenship and thus his or her entitlement to rights, can nonetheless exercise force against him or her with continued legitimacy. To this end, the purpose of my thesis will be to analyze and respond to this paradoxical situation in which the state, in rejecting one's citizenship, and thus entitlement to rights, can nonetheless exercise force against an actor in legitimate manner (or so present itself), while at the same time, upholding and identifying with the hegemonic discourse of rights such that the simultaneous but contradictory acts of suspension and reaffirmation of rights contributes to the legitimacy and necessity of the state. In short, the state will remain legitimate when it can also legitimately discriminate between the acts of citizens with respect to the state.

Canadian examples have been sampled for this investigation because Canada is a country that illustrates the limits of citizen-rights—including the right to be free from torture—within the framework of the nation-state. Thanks to the enactment of the Canadian Charter of Rights and Freedoms (the Charter), Canada has been celebrated as a "just society," and a model at the forefront of promoting human rights and justice upon which other countries continue to build (Kruger et al., 2004; McLachlin, 2007). However, this favorable portrayal of Canada contrasts with another version of Canada (which the

Charter has sought to overcome). This is because in pre-Charter Canada things like systemic violence towards indigenous groups, the Chinese head tax, the continuous journey requirements used to exclude South Asians, the imposition of voluntary emigration on Asians, the interment of Ukrainians and Germans during WWI, the interment of Japanese and Germans during WWII, the interment of Jewish refugees fleeing Nazi aggression and the surveillance of suspected communists during the Cold War under the PROFUNC program were legitimized as valid/legal exercises of legislative and executive power. Such exclusions were difficult to challenge in a court of law since in pre-Charter Canada the reign of parliamentary supremacy meant that the executive branch of government was the ultimate arbiter of the challenges of the citizens to the constitution (state) within the context of a public emergency. In post-Charter Canada by contrast it is possible for the courts measure the constitutionality of legislative and executive actions against Charter rights. Hence, in post-Charter Canada challenges of the citizens to the constitution (state) are resolved by the Courts *vis-à-vis* their power of judicial review. As the Charter places “reasonable limits” on the government’s use of force, this shift from “parliamentary supremacy” to “constitutional supremacy” is by all standards a move forward.

In Canada we have three interesting cases which facilitate an investigation of this paradox of sovereign power. First, *in the case of Inouye in pre-Charter Canada*, a dual-citizen of Canada and Japan who joined the Imperial Japanese Army during WWII, the state of exception was invoked and Inouye's entitlement to citizenship and rights were suspended. In this case, challenging the state's right to exercise force on him—specifically the *imposition of Canadian citizenship* over and above his equally valid claim

to Japanese citizenship as well as the simultaneous withdrawal of his citizen-rights as a British subject—was doomed to fail. Hence Inouye, a dual-citizen of Canada and Japan, who had attempted to renounce his British citizenship at a time when the Japanese in Canada lost theirs, remained bound by British law and was executed for high treason. Second and third, in the Charter era, *the cases of Omar Khadr and Maher Arar* present two possible outcomes of challenging the state's involvement in torture based on citizenship rights. In both cases, the state of exception was invoked and their entitlement to citizenship and rights were withdrawn. Both challenged the state's right to exercise force on them. However, whereas Khadr's challenge was unsuccessful, Arar's challenge ended in the state's apology and redress. Rather than being aided by the Charter *per se*, a crucial factor in the decision of the state to apologize to Arar and compensate him—and which was absent in the case of Khadr—was the public perception that Arar was wrongfully accused (Macklin, 2008a; 2008b). Thus, notwithstanding the success of Arar's challenge, given that the state in suspending one's citizenship and thus his or her entitlement to rights can nonetheless exercise force against an actor with continued legitimacy, the question which I wish to study and reflect in my thesis and which these cases will allow me to explore is *whether the Charter has had any effect on sovereign power exercised in the state of exception*. In answering this question (the primary research question of this thesis), this thesis also answers two research sub-questions in Chapters 1 and 4 respectively: What are the effects of executive power on rights? How has the development and trajectory of citizen-rights in Canada been influenced by the ability of the executive to suspend rights in times of crisis? In other words, this thesis presupposes that the relationship between citizenship, rights and executive power flows

in two directions in the modern nation-state: executive power has an effect on citizen-rights just as citizen-rights are *supposed* to limit executive and legislative power. Just as the executive or agent acting as sovereign has the power to withdraw rights in times of crisis, formal rights are bestowed to formal citizens—insofar as are not rendered enemy of the state—for the purposes of redeeming the nation-state for the past exercise executive power and limiting executive and legislative power (among other things). As a result, an understanding of the extent to which citizen-rights *actually* limit executive power in the Charter Era is the central objective of this thesis.

The research questions of this thesis are informed by a historical argument that the Bill of Rights and the Charter are documents which attempt to weaken sovereign power and represent a social contract between the citizens and the state. The compromise of citizen-rights (whether the Bill of Rights or the Charter) enabled the state to maintain its hegemony in light of grievances that arose regarding the excessive and often arbitrary use of sovereign power against its own citizens. Although this thesis focuses primarily on the problem of sovereign power (defined below) exercised in the state of exception and thus tends to focus on the treatment of those rendered as enemy by the state at various points of time in Canadian history, it is important to note that the origin of the rights revolution in Canada *cannot* be traced to a single cause. Rather, the Bill of Rights and the Charter are the outcomes of a plurality of causes, processes, contingencies and experiences of injustice. I focus on the problem of sovereign power exercised in the state of exception to highlight the paradox that although most constitutions protect citizen-rights, states are authorized to suspend hard won rights when a public emergency threatens the security of the citizens of the state. In other words, precisely in those

contexts where rights are required to protect the most vulnerable groups—i.e., during states of emergency, periods of war and civil unrest—states are not only authorized to suspend them but can maintain their hegemonic authority while doing so. That in times of crisis the simultaneous but contradictory acts of suspension and reaffirmation of rights contributes to the legitimacy and necessity of the state presents a puzzle for this thesis precisely because the desire for rights documents (which eventually culminated in the Bill of Rights and the Charter) can be traced back to this experience of injustice though not wholly reducible to it.

In this thesis, the sovereign refers to the entity that has the legitimate power to (1) decide that a state of exception exists and (2) to enact, enforce, annul and/or interpret the law within this context. Though sovereign power is limited by contract, treaty or by the subjects of a state *vis-à-vis* the constitution of a given state, the sovereign as such is not a subject of the law since he or she has the sole capacity to enact, enforce, annul and/or interpret the law within the context of a state of exception. Since the power of sovereignty is the privilege of those that can enforce the law, the entity wielding sovereign power is not necessarily the Sovereign, though he or she might be and though sovereign power is derived from the Sovereign. Within the context of Canada's constitutional monarchy, the power of sovereignty is derived from the Monarch and its representative in Canada (the Governor General), is divisible and can be exercised by those wielding executive power (e.g., ministers, the Prime Minister), judicial power (e.g. judges of the Supreme Court of Canada), legislative power as well as other agents of the state tasked with function of carrying out the state's monopoly on the legitimate use of violence. For instance, the exercise of the executive's Royal Prerogative over foreign

affairs and Supreme Court of Canada's decision not to force the Executive to seek the repatriation of Khadr (as discussed in Chapter 5 and 6) are both examples of sovereign power in action.

In order to assess the protective effects of Charter rights against sovereign power exercised in the state of exception, I first establish the theoretical framework of this thesis by reflecting on the topic of exceptionalism through the writings of Agamben, Arendt, Benjamin and Foucault (Chapter 1) and taking a postmetaphysical look at the problem of exceptionality (as it relates to the tension between the universal and the singular) in the writings of Jacques Derrida, Gianni Vattimo and Reiner Schürmann (Chapter 2). In this way, Chapter 1 and Chapter 2 of this thesis provides a vocabulary and framework that enables this thesis to both comprehend and struggle against the arbitrary uses of sovereign power that have been legitimized on the vanishing ground of the contingent event of terror. With its look at the topic of exceptionalism, Chapter 1 also answers the first sub-research question of this thesis: What are the effects of executive/sovereign power on rights? Chapter 3 of this thesis provides the reader with a detailed review of the research process. It reflects on the inspiration for this research, describes the methods, strategies of analysis, their application and broadly outlines the steps taken while writing this thesis. While Chapters 1 and 2 primarily focused on the research problem and its relationship to theory, and Chapter 3 described the research process, Chapters 4, 5, 6 are primarily analytical and interpretative. Specifically, guided by Schürmann's epochal theory, Chapter 4 elaborates on a historical periodization of citizen-rights in Canada and in doing so answers the second sub-research question of this thesis: How has the development and trajectory of citizen-rights in Canada been influenced by the ability of

the executive to suspend rights in times of crisis? Next, Chapter 5 examines the cases of Inouye, Khadr and Arar and reflects on their context within the history of citizen-rights in Canada. Finally, Chapter 6 interprets the cases of Inouye, Khadr and Arar in light of the (1) philosophical and theoretical framework established in Chapters 1 and 2 and (2) the history of citizen-rights in Canada. Accomplishing these two objectives, allows Chapter 6 to answer the primary research question of this thesis: What effects do Charter rights have on executive power? To this end, this thesis can be seen as a part of broader project which aims to assess the extent to which the Charter has overcome (*Überwindung*) and/or weakened sovereign power. As a result, this thesis advances an alternative way of thinking about questions of violence and justice that are not fettered to the framework of the modern nation-state, citizenship or the liberal democratic discourse of rights.

The remainder of this Chapter will explore Giorgio Agamben's concept of the *homo sacer* and state of exception and consider some responses to these popular tropes. While these concepts do not comprise the totality of this thesis's theoretical framework, it is safe to say that they provide this investigation with a vocabulary to explain how citizen-rights, such as the right to be free from torture, can be suspended in the name of national security and so it is crucial that they be discussed at this juncture.

Chapter 1: Homo Sacer and the State of Exception

In both *Homo Sacer: Sovereign Power and Bare Life* (1998) and *State of Exception* (2005) Agamben provides an incisive and rigorous analysis of the vulnerability of “historically contingent symbolic signifiers of harm” (Hier, 2004: 548), to sovereign power exercised in a state of emergency (or state of exception). The central argument advanced in these books, that the exceptional structure of the modern nation-state and its legal system make various forms of social and political exclusion possible, have made Agamben famous. In what follows, I review aspects of these books pertinent to this thesis.

In *Homo Sacer*, Agamben asserts that for the ancient Greeks, life had two meanings: (1) the “way of living proper to an individual or group” (*bios*) and (2) “the simple fact of living common to *all* living beings” (*zoē*) (1998: 1). This categorization of life allowed the Ancients to determine one’s eligibility for entrance into the *polis*. While one’s *bios* indicated that one was capable of living life according to the virtues of the good and justice, the simple fact of living did not (1998: 4). Stated differently, the establishment of “a community not simply of the pleasant and the painful but of the good and the evil and of the just and the unjust” (i.e., politics), is contingent upon the exception of all forms of life presumed not to be capable of conducting themselves in accordance with higher virtues such as justice (1998: 3). Hence, Agamben maintains that, “in Western politics, bare life (*zoē*) has the peculiar privilege of being that whose exclusion founds the city of men” (1998:7).

Using Foucault’s distinction between classical politics and modern biopolitics,

Agamben contends that the bare life that was excluded from the *polis* and confined to the *oikos* as merely reproductive life in the classical paradigm by the Ancients, was included in the *polis* of the biopolitical age as an “inclusive exclusion” and regarded as antagonistic to sovereign political authority. Agamben’s synthesis of Foucault’s reflections on the relationship between citizen-rights and sovereign power and Arendt’s reflections on the bare life the refugee are illuminating in this context.

In *The History of Sexuality*, Foucault famously argued that the modern subject is simultaneously free and subject to sovereign power. The way that the 1793 Declaration of the Rights of Man and Citizen (DRMC) was taken up in the modern nation-state provides evidence of the contradictory status of the modern subject. For Foucault, the DRMC is Janus-faced, marking both the passage of royal sovereignty from the *ancien régime* to the modern nation-state and the ever-tightening hold of sovereign power over the free subject/citizen *vis-à-vis* modern biopower. Paraphrasing Foucault, Agamben writes:

It is almost as if, starting from a certain point, every decisive political event were double sided: the spaces, the liberties, and the rights won by individuals in their conflicts with central powers always simultaneously prepared a tacit but increasing inscription of individuals lives within the state order, thus offering a new and more dreadful foundation for the very sovereign power from which they wanted to liberate themselves. (1998: 121)

Rather than liberating the free subject, the DRMC revealed the affinities between “absolute state power and the Rights of Man” *vis-à-vis* the citizen as the subject of the rights of man (Rancière, 2004: 300). With the DRMC, Agamben argues, birth (i.e., bare life) is transformed into the “immediate bearer of sovereignty” (1998: 128) and the principles of natality and sovereignty (formerly separated in the *ancien régime* where birth signified the emergence of a subject) are “irrevocably united in the body of the ‘sovereign subject’ so that the foundation of the new nation-state may be constituted”

(ibid.). Stated differently, within the context of the (new) Westphalian nation-state, birth became an event signifying the start of a biopolitical relationship between subject and sovereign in the form of the citizenship of a subject whom is included in the nation-state relation of sovereignty by the fact of being born within its territory (ibid).

The suspicion that the subject of the DRMC (“man”) is merely an abstraction, was first articulated by Edmund Burke who observed that the only “real” rights were the rights of citizens and therefore that “natural rights” are metaphysic because the historically and culturally contingent rights of the citizen are the only rights that exist (Arendt, 1968). This concern was subsequently revived in *The Origins of Totalitarianism* (1968) in which Arendt analyzed the concrete situation of post-First World War refugees in Europe as a means of reflecting on the “abstractedness” of the rights of man. Refugees were excluded from “universal” and “inalienable” rights because they were not recognized as citizens and therefore had no national community to protect those rights. In this way, the refugee illustrates that “inalienable” and “universal” rights are contingent upon the protection of sovereign nation-states by sovereign power *vis-à-vis* citizenship.

Based on the formulations of Arendt and Foucault, Agamben argues that the sovereign decision (on the exception or enemy) and the suspension of citizen-rights in a state of exception, signifies both the *withdrawal* of the protection and security the law affords to citizens in the form of rights, and the inscription of bare life in the juridical order. Agamben captures this process with the concept of the “sovereign ban” which refers to the inclusive exclusion of bare life in the juridical order as a subject without rights. In the act of withdrawing its protection, sovereign power affirms its authority over all citizens. The figure of the *homo sacer* (sacred man) coincides with the sphere of the

sovereign ban and refers to the bare life that has been included in the *polis* through its exclusion from the law. As one excluded from the law, the *homo sacer* is abandoned in the liminal zone between the sacred and the profane and between life and death and can be killed “without committing homicide” (Agamben, 1998: 83). This means that the sovereign and *homo sacer* exist in a continuous relationship with one another and constitute the two faces of sovereign power: “the sovereign is the one with respect to whom all men are potentially *homines sacri*, and *homo sacer* is the one with respect to whom all men act as sovereigns” (Agamben, 1998: 84). According to van Munster, this means that “the social contract that brings the sovereign into being masks the fact that sovereignty essentially operates through a ban: the originary relation of law to life is not application but abandonment” (2004: 143). Rights, in other words, are a ruse through which the sovereign maintains its hegemony (a point which I return to throughout the thesis).

Within the “the camp”—the empirical site that corresponds with the sovereign ban—bare life is abandoned in a state of exception and exposed to unmediated power. The camp, in other words, is inhabited by actors banished from the *polis* stripped of their citizenship and therefore of their “universal” and “inalienable” rights; it is only in this context where we can speak about the derogation of the right to be free from torture. In his reflections on the state of exception, Agamben argues that the camp refers to a space where “the normal order is *de facto* suspended and in which whether or not atrocities are committed depends not on the law but on the civility and ethical sense of the police who temporarily act as sovereign” (1998: 174). The idea that actors deprived of “universal” and “inalienable” rights dwell in the camp reminds us that legal restraints such as citizen-

rights have never totally constrained the sovereign power that can be enacted by anyone in the position to exercise it and clarifies the significance of the state of exception as a theoretical concept.

For Agamben, the state of exception declared in response to a perceived state of emergency refers to the moment when the sovereign withdraws citizen-rights. By way of justifying the sovereign's decision on the state of exception, Schmitt contends that natural law regards sovereign exceptionalism as a necessary response to an exceptional event which brings the event under the auspices of the law (Neal, 2007). The sovereign decision on the state of exception, in other words, brings exceptional events (as "legal lacunae") under the scope of established law ("norm") (ibid.). However, as Neal observes, because it conflates (1) the exceptional event ("legal lacunae"); (2) the sovereign decision that the event is exceptional; and (3) the exceptional sovereign response to the event, Schmitt's conception of sovereign exceptionalism (and its authorization) rests on questionable metaphysical premises (ibid.). Hence, Agamben cautions that Schmitt's attempt to conflate the state of exception with the state of necessity elides the fact that necessity is not only undecidable in fact and law but "ultimately comes down to a [*subjective*] decision" (2005: 30). This means that Schmitt's conceptualization of the state of exception and its authorization is premised on circular reasoning: "Sovereign exceptionalism is justified by conditions that sovereign power itself declares" (Neal, 2007:16). The event, just like the state of emergency, is merely an interpretation that has become authoritative and in this way lays claim to objectivity.

If exceptional events (or "legal lacunae")—which loosely refer to situations for which no applicable law exist—can be brought under the auspices of the law *vis-à-vis* an

exceptional sovereign response, this begs the question of whether it is possible to break free of the sovereign dialectic of norm and exception (Neal, 2007). As Benjamin asked, is a “*real* state of exception”—that is, pure unmediated violence outside the law and norm/exception paradigm—possible? Indeed, much like “The Critique of Violence,” the entire purpose of the theoretical project in the *State of Exception* is to reflect on whether it is possible to break free from this sovereign dialectic in which novel attempts to annihilate the law or establish new law are interpreted by the sovereign as exceptional acts of violence against the state that necessitate exceptional sovereign responses in turn. One of the ways Agamben answers this question will be to reconstruct the arguments exchanged by Schmitt and Benjamin in which his primary observation is that: “the state of exception is the device by means of which Schmitt responds to Walter Benjamin’s affirmation of a wholly anomic human action” (Agamben, 2005: 54).

Schmitt’s argument in *Die Diktator* (1921), that it is impossible to escape the sovereign relation between norm and exception, hinges on an analysis of two different types of exceptional political authority—“commissarial dictatorship” and “sovereign dictatorship”—both of which function to protect the juridical order. The constitutional dictatorship is a constitutionally valid interim dictatorship whose purpose is to defend the constitution by temporarily suspending it in a state of emergency such that the law remains in force while its “normal” (day-to-day) application is suspended. Agamben describes this condition as the “force-of-law” to highlight the trace of juridical authority that exists even when the law is suspended and the commissarial dictator’s capacity to conduct him or herself in the name of the law despite (or because of) the fact of the law’s suspension. In other words, within the context of a commissarial dictatorship, the state of

exception denotes a zone where the law denigrates into a sheer violence which enables the law to include the possibility of its own absence (or suspension) as a result (Agamben, 2005: 40). The sovereign dictatorship by contrast refers to the unconstitutional power used to create a *new* constitution. This power can only be legitimized on by the promise that the hypothetical constitution to-come will be more just (Agamben, 2005: 32-40). A sovereign dictator, in other words, makes a sovereign decision on the state of exception in the name of the people for whom the new constitution is established. As a constituent power that maintains a relationship to a constitution to come, the sovereign dictatorship is governed by “the ~~force~~ of law,” a condition of law where the law (norm) applies although it is not officially recognized as law. For Agamben, the possibilities for a commissarial dictatorship or sovereign dictatorship reveals that the state of exception is connected with a more fundamental juridical order: the sovereign’s appeal to just ends and/or legitimate means which in turn justifies the sovereign exercise of the force of ~~law~~ or the ~~force~~ of law.

With the concepts lawmaking violence (which establishes new law) and law-preserving violence (which preserves the existing constitution), Benjamin conceptualizes the dialectic of sovereign power in “The Critique of Violence” (Agamben, 2005). Arguing that an escape from the dialectic of sovereignty is possible, Benjamin hypothesizes a “pure violence” which exists outside the categories of lawmaking and law-preserving violence. Although conceding that the form of pure violence will take is unknowable, Benjamin predicts that pure violence could neither be legitimized by an appeal to a legitimate means, nor an appeal to just ends. By conceptualizing pure violence as a form of violence without any relation to law, Benjamin attempts to suture pure

violence to a post-legal, messianic epoch and thereby hopes to evade the dialectic of sovereignty (Neal, 2007). However, as the reader already knows Schmitt's response to pure violence is the sovereign decision which functions by bringing pure violence (or the exception) back into the gambit of sovereign power *vis-à-vis* the state of exception. In this way, Schmitt links the indeterminacy of pure violence to the uncertain circumstances of the exceptional event as well as to the necessity of a decision on the state of exception. Precisely since pure violence falls outside the legal order, the sovereign must have the ability to make a decision on it.

The concepts developed in *Homo Sacer* and *State of Exception* are widely used in the post-9/11 environment. In this context, several important critiques of Agamben have emerged. In what follows I consider those regarding the state of exception as a juridical void, the norm/exception paradigm, sovereign power, the subject and the status of bare life.

Agamben's characterization of the state of exception as a juridical void has received considerable scrutiny. Agamben writes: "The state of exception establishes a hidden but fundamental relationship between law and the absence of law. It is a void, a blank and this empty space is constitutive of the legal system" (Agamben qtd. in Raulff, 2004). "Far from a space of utter lawlessness," some scholars retort, the state of exception "is filled to the brim with law and legal administrative regulation," expertise, policy and procedure (Johns, 2005: 618). They respond that this characterization obscures that what matters "is not the distinction between exception and law, but what practices are deployed and how" (Aradau, 2007a: 491). In the post-9/11 environment, the strength of this critique is its ability to show how the law has become "a technique of government,

no longer constituted with respect to universal principles but with reference to the particular society it claims to regulate” (ibid.). Given that “no constitution exists that does not contain provisions for emergency rule” and the suspension “of fundamental liberties and rights in the name of emergency,” this critique highlights the empirical fact that it is through the law that violent practices taken in exceptional circumstances are authorized (Neocleous, 2006: 206)

In *Precarious Life: The Powers of Mourning and Violence*, Judith Butler claims that the decision to designate alleged terrorists as unlawful combatants is evidence of a legal “black hole” constituted by the suspension of inter/national law (2004). Butler’s assertion—which is identical to Agamben’s—presupposes that the distinctions between (1) normal law and emergency exception and (2) the state of exception and the general norm are not merely analytical distinctions but rather fact. However, some scholars challenge the norm/exception paradigm on the grounds that naming sites like Guantánamo Bay camp as spaces of exception “has led to the endorsement and fortification of the legal space of the norm” (Aradau, 2007a: 491). Since emergency powers emerge within the existing rule of law, the idea that the “state of emergency involves a suspension of the law encourages the idea that resistance must involve a return to legality, a return to the normal mode of governing through the rule of law” (Neocleous, 2006: 207). However, rather than explaining why a return to the norm is impertinent, these scholars reduce all law to violence. As a result they have become *naïve* advocates the use of (counter-) violence as means of resisting the violence of law. Neocleous writes:

If emergency powers are part and parcel of the exercise of law and violence (that is, law as violence), and if historically they have been aimed at the oppressed [...] then they need to be fought not by demanding a return to the normal rule of law,

but in what Benjamin calls a “real state of emergency” [...] *And this task requires violence, not the rule of law.* (2007: 209)

This conclusion is problematic for two reasons. First, based on Agamben’s interpretation of Benjamin’s concept of pure violence, it is clear that Agamben does not regard a return to the norm to be a viable solution to the state of exception. In *Means Without Ends*, Agamben proposes a solution to the state of exception with the concept of “reciprocal extraterritoriality” which is posited as a new model international relations and citizenship (2000). Treating the Arendtian figure of the refugee as a “limit concept” signalling a “radical crisis to the principles of the nation-state” (2000: 94), Agamben argues that it is possible to imagine two political communities existing in the same region and in a condition of exodus from each other. These communities would “articulate each other via a series of reciprocal extraterritorialities in which the guiding concept would no longer be the *ius* (right) of the citizen but rather the *refugium* (refuge) of the singular” (2000: 95). Second, although Agamben locates Benjamin’s pure violence in a post-legal, messianic epoch, I believe that Benjamin understood that the “real state of emergency” would only be a temporary solution to the problem of law. Hence, Benjamin cautions that the dialectic of lawmaking and law-preserving violence “lasts until either new forces or those earlier suppressed triumph over the hitherto lawmaking violence *and thus found a new law, destined to turn into its own decay*” (1921: 251; emphasis added).

One of the most important critiques of Agamben concerns the conceptualization of sovereign power. Following Schmitt, Agamben asserts that “sovereign is he who decides the state of exception.” For critics, the word “sovereign” (rather than sovereigns or those wielding sovereign power) implies a total God-like centralization of executive power. It evokes images of a lone (transcendent) Sovereign thundering down commands

to docile subjects and deciding the fate of bare life. Yet, from an empirical standpoint, when one observes how executive powers are enacted when law engages in an act of self-suspension, it becomes clear that the singular *Sovereign* is often in the dark when it comes to the powers enacted in their name. Indeed, this is precisely what Agamben meant when he observed that within the camp the police temporarily act as sovereigns.

Neal's primary concern with Agamben's work concerns the theorization of sovereignty as "pure constitutive nominalism." For Agamben, according to Neal, sovereignty "produces bare life and the fictitious lacuna of the state of exception in order to maintain a totalizing relation even to the spectre of its own absence" (2007: 21). However, although Agamben acknowledges the constitution of the modern subject as both free and subject to sovereign political authority in modernity, Agamben ignores the constitution of modern sovereignty itself (2007: 22). As a result, Neal asks:

Sovereignty may constitute, but how is it constituted as that which may constitute? Under what conditions of possibility does the sovereign have the capacity to decide the exception? How must sovereignty be constituted in order for sovereignty to have the capacity to decide upon the enemy or the exception? (2007: 21-22)

In this regard, not only does Agamben erase the historical-political conditions under which forms of sovereign authority can be constituted by reifying the modern sovereign nation-state, he erases the "long and bloody history of the establishment of the nation-state as the universal unit of organization in political space" (Neal, 2007: 25). The nation-state and its principle of sovereignty are merely idealizations of political authority, which, in turn, are the outcomes of historical and political violence rather than eternal political principles. For Neal, this raises questions about the dialectic of sovereign exceptionalism from the perspective of the democratic elements of the state of exception. Neal

hypothesizes that these democratic elements *might* prevent emergency powers from becoming unlimited or even arbitrary (2007: 22).

In relation to Agamben's conceptualization of the state of exception as a state of law which signifies the end of a dialectic between life and law, Neal argues that much like how social action is inseparable from the norms of class, culture, family, ethnicity, etc., within the state of exception life continues to be related and mediated even if only by the memory of the rule (2007). In reducing life within the state of exception to life without relation or mediation, Agamben tacitly presumes the early modern perspective of the subject as an abstract figure, who is devoid of any history, brutally subjected to forces of violence and desire, and who ultimately "amounts to nothing more than his capacity to kill or be killed" (Neal, 2007: 19). However as Neal sharply observes, "it should be no more possible to imagine an unmediated, bare, subject-in-itself in anomie than it is possible to access an unmediated *thing-in-itself* behind the glass wall of perception, representation and interpretation" (2007: 19). As a result, Neal argues that *not all* examples of what might be called bare life "could be considered truly abject 'bare life,' stripped of all qualities other than the simple fact of being alive" (2007: 20). Indeed, that many actors at exceptional sites such as Guantánamo Bay continue to have religious, political, social and political identities, tells us that a politics persists within exceptional sites notwithstanding the loss of citizenship (ibid.).

Chapter 2: Law, Proceduralism and the Politics of Fear

When the catastrophic events of 9/11 were rendered as incalculable future risks it enabled the government to frame decisions to use the state of exception to withdraw citizen-rights as necessary (and just) responses to the radical uncertainties posed by terror. In this Chapter, I discuss how a risk-security complex based on a model of precautionary risk emerged as the primary means to govern radical uncertainty and propose postmetaphysical hermeneutic thought as a lens from which to reflect on the consequences of radical uncertainty for those rendered enemy from the angle of rights. In a time of metaphysical decline where the withdrawal of metaphysics coincides with the reassertion of metaphysics as a means to govern uncertainty, practices of precautionary risk—which necessitate exceptional decisions—pose ethical and legal questions about the appropriate response to radical uncertainty. As the state of exception can be used to withdraw citizen-rights, the question of how rights can be recognized without the possibility of re/introducing the structure by which the law achieves its social and political re/foundation (the principle of sovereignty) is paramount. The chapter ends with a postmetaphysical look at the problem of exceptionality as it has been explored in the works of Jacques Derrida, Gianni Vattimo and Reiner Schürmann. Their responses to the problem of exceptionality provide a vocabulary and framework that enables this thesis to resist the arbitrary and unlimited uses of power that have been legitimized on the vanishing ground of the contingent event of terror.

Event, Risk and Exceptionalism

From terrorist attacks and pandemics, to environmental disasters, food and financial crises, the history of the first decade of the 21st century has revealed itself as an archive of unanticipated and potentially catastrophic events and crises (Dean, 2010). In this situation, the looming risk of a contingent event has introduced radical uncertainty into the future and created a sense of permanent disorder (see: Ewald, 2002; Aradau and van Munster, 2007; Amoore and de Goede, 2008; Aradau et al., 2008; Dean, 2010). Just as this situation of radical uncertainty begs the paradigmatic question of how liberal democracies can manage uncertainty and other forms of nonknowledge, dealing with forms of nonknowledge and other unanticipable events have become the central problem of today's foreign and security policy (Daase and Kessler, 2007; Cavelty and Mauer, 2009).

Conceptualizing the Contingent Events of 9/11

The contingent and exceptional events of 9/11 shook liberal democracy to its core, forever changing the liberal democratic lifeworld. The words “contingent” and “exceptional” highlight the processes at play in the social construction of 9/11 as a “major world event” (Borradori, 2004; Daase and Kessler, 2007). The elements of surprise, contingency and construction are captured in Derrida's conceptualization of the event as that thing which is always-already to-come—an idea which is similar to Heidegger's view of the event as “a happenstance that resists appropriation and understanding” (Heidegger qtd. in Borradori, 2003: 149). The event, stated differently, is radically singular, irruptive, unanticipable and beyond apprehension and representation.

Drawing from Heidegger, Derrida contends that the events of 9/11 resist “virtualization” and media reproduction. In this context, one of the unique characteristics of the event is its ability to simultaneously fascinate and horrify the synoptic impulses of mass media which record just as much as they produce (and reproduce) the singular events of 9/11. This articulatory process reveals the traumatic dimensions of the event (ibid.). As an object of anxiety (like the Lacanian Real), the contingent event resists symbolization, constantly exceeding its own context and representation. In the context of 9/11, the compulsion to repeat traumatic events manifested in the endless portrayal of the twin towers collapsing which in turn revealed that the singular event marks itself on the possibility of its re/inscription (iterability).

From Threat to Risk

Some scholars observed that practices and interpretations of security that were guided by a model of threat prior to 9/11 had come to be determined by a model of “*precautionary risk*” (not to be confused with Ulrich Beck’s thesis of a risk society) following the events of 9/11 (Aradau et al., 2008; Cavelti and Mauer, 2009). The distinction between the model of threat and precautionary risk hinges on the distinction between “present dangers” and “future contingences” and their respective approaches to security. Whereas present dangers (the referent object of the model of threat) refer to occurrences that are calculable and predictable, the exceptional event (in the sense described in the preceding pages) and future contingencies (the referent objects of the model of precautionary risk) are incalculable and unpredictable. The result is that whereas under the model of threat, practices of security are calculated actuarially for the purposes of managing, predicting

and thereby annihilating present dangers, under the model of precautionary risk practices of security function to construct, manage and interpret contingencies and other unknowns situated in the *future* (Aradau et al., 2008; Cavelty and Mauer, 2009). For instance, the administration of vaccinations to prevent the contraction of poliomyelitis is an example of a practice of security directed at a present danger and the issuance of security certificates for the purposes of indefinitely detaining or deporting foreign national or non-citizens (which amounts to the presumption of guilt unless proven innocent) is an example of a practice of security directed against a future contingency—in this case, terrorism. The latter example illustrates that within the context of this future-oriented, event-al understanding of precautionary risk, it is impossible to describe future contingencies objectively. The nebulous quality of future contingencies and the radical uncertainty surrounding the event also means that perceptions, prioritizations and interpretations of risk are numerous and contested between different social groups (van Loon, 2000). As a result, whereas the model of threat—which is “based on the possibility of empirically identifying and assessing threats”—cannot comprehend the radical uncertainties posed by the contingent event of terror and other incalculable events the model of precautionary risk can (Aradau et al., 2008: 150; Aradau and van Munster, 2007). Not only are future contingencies and the event incompatible with the discourse of control characterizing the model of threat, but they also signify the introduction of “uncertainty and the unknowable into the heart of the governing process” (Aradau et al., 2008: 150). Hence, practices of security undertaken in accordance with this model of precautionary risk operate at the limit of knowledge, within a context of technological and scientific uncertainty. Although this model of precautionary risk acknowledges that

catastrophic, contingent events will occur in the future, the exact nature of these events are beyond the scope of established knowledge and science. As the potentially catastrophic event exceeds the thresholds of actuarial science, precautionary risk favours interpretative and constructive techniques that attempt to conjure up, “challenge forth” and imagine how, when and where the catastrophic event might occur. Governed by a fear of uncertainty, these social ordering practices embrace the unpredictability and incalculability of the singular event while simultaneously attempting to overcome it by anticipating and pre-empting it (Amoore and de Goede, 2008: 10-11; Ewald, 2002). Consequently, new global technologies of precautionary risk manage radical uncertainty by obsessively monitoring the future in an attempt to minimize the likelihood of an undesirable event happening in the future (Amoore and de Goede, 2008; Aradau et al., 2008). These strategies, however, are hubristically premised on the assumption that radical uncertainty and contingency can be classified, qualified and predicted. Hence, social technologies of risk attempt to render an inherently *unknowable* future knowable and actionable (Aradau et al, 2008). They represent the delusional belief that order can in fact be imposed on what cannot in principle be ordered. In a context that calls for no risk, pre-emptive strikes, extrajudicial killing, extraordinary rendition, the *use of torture* and indefinite detention are violent manifestations of the application of the logic of precaution to the possibility of terrorism as a catastrophic event. Technologies of precautionary risk overwhelmingly rely on *decision*—in other words, exceptional sovereign responses to events that have been deemed exceptional (see Chapter 1)—as a means to govern uncertainty (Aradau and van Munster, 2007). Projecting and transferring social disorder onto an other/enemy is one of the ways precautionary risk functions as a social ordering

practice (Hier, 2004). Consequently, in response to the rise of precautionary practices of risk, scholars have reframed the risk of terror in the language of exceptionalism to account for the emergence of “legal vacuums” and to make sense of the emergence of exceptional sites such as USA’s detention camp at Guantánamo Bay, Cuba as strategies of governmentality (see Butler, 2004; Johns, 2005; Aradau, 2007; Neocleous, 2008). One of the consequences of these strategies of governmentality is that decisions to suspend “normal” legal processes and “universal” and “inalienable” rights can be justified as actions which protect the collective right of citizens to security by reducing the risk of terror (Dean, 2010). Consider the U.S. President’s decision to interpret the four coordinated attacks on critical buildings in the U.S. capital and its financial district as acts of war undertaken in pursuit of a violent campaign against the U.S. by terrorists and other “enemies of freedom”. After determining that the events of 9/11 placed the United States in a state of armed conflict to which the laws of war apply, the President also decided to render associates of the al Qaeda terrorist network and the Taliban militia “illegal combatants [or unlawful combatants] under the laws of war” (Yoo and Ho, 2003: 207-8). As a result of this decision, “the legal protections and benefits that accrue to legal belligerents” were not extended to those deemed unlawful combatants (ibid.). Bush’s decision to interpret the events of 9/11 as acts of war, coupled with decision to exclude associates of al Qaeda and the Taliban militia from various legal protections illustrates how terrorism was constructed as a danger to national security: An “unexpected” and contingent event, was rendered as an exceptional event by sovereign decision which in turn justified various exceptional responses to the event of 9/11 such as the transformation of other into an enemy, the withdrawal of their citizen-rights and the

establishment of the Guantánamo Bay camp (Neal, 2007). A similar process of tying the event to the exception and constructing a national security crisis as means to suspend the citizen-rights of those rendered as enemy unfolded following the December 7th, 1941 bombing of Pearl Harbor by the Japanese (see Chapter 4). Postmetaphysical hermeneutic thought enables a view of the event, radical uncertainty and these strategies of precautionary risk as ways of falling back into metaphysics and of resisting the loss of metaphysical certainties and cultural pluralization that accompanies it.

I have just accounted for the rise of a risk-security complex characterized by a precautionary approach to risk which functions via the state of exception as the primary response to the radical uncertainties posed by the risk of terror. In what follows, I review the postmetaphysical hermeneutic philosophy of Gianni Vattimo. This philosophy provides a framework that enables this thesis to approach the sovereign's practices of precautionary risk as ways of falling back into metaphysics and to capture the inadequacy of politicians and court of law to respond to situations of radical uncertainty.

The Decline of Modernity, History and Foundational Metaphysics

As the defining value of modernity “progress” presupposes the paradigm of historicist metaphysics: a unilinear view of history that imagines history as a straight line along which society progresses through time. Within this framework—which presupposes a belief in a “unitary significance and direction to the history of mankind”—the “modern” and the “new” are prized as traits that facilitate progress because they represent the overcoming of pre-modern paradigms of thought (Vattimo, 2003: 23). Hence, this unilinear view of history was at the core of modernity, modernization and supplied the

foundation for Western thought's delusional belief in the supremacy of its own civilization relative to all others (Vattimo, 2003: 22). Drawing from Nietzsche's prognostication of "the death of God" and Heidegger's reflections on the hypothetical "end of metaphysics," Vattimo presents two challenges to the historicist-metaphysical view of history, modernity and modernization.

With the death of God, Nietzsche discovered that if the God of metaphysics is *nothing* and if the law enforces itself on the grounds of a God (or a metaphysical principle), then the worst violence has come to pass for *nothing*. Western civilization encouraged such unprincipled violence by way of the colonialism and imperialism that justified itself as a humanizing mission decreed by God. Hence, for Vattimo, the death of God signifies the gradual ruin of the God of the Western philosophical tradition that reigned as the metaphysical foundation of truth and the ground of existence and its unilinear view of history as progress towards civilizational perfection.

For Heidegger, the violence of metaphysics reaches its pinnacle with the technological Enframing (*Ge-Stell*): the technological reduction of being and the world to "standing reserve" and the challenging forth of existence as a totally calculable entity. Although the *Ge-Stell* is a source of extreme danger, Heidegger believes that it also makes another epoch of Being (upon which an overcoming of metaphysics depends) and a different future for the present possible (*Ereignis*) (Vattimo, 2003: 14). Adopting this framework, Vattimo also accepts that the *Ge-Stell* brings with it the possibility of an event (*Ereignis*) that could save Being from near oblivion. However, Vattimo also believes that the possibility of overcoming metaphysics Heidegger described in the *Ge-Stell* only became possible in the digital age of information and communication

technology. In this age, the solitary and ubiquitous image of the world out-there forged by the strong arm of science and technology dissolved into so many images (Vattimo, 2003: 16). In other words, at the close of modernity, the experience of “unlimited interpretability” weakens “the cogent force of reality” (ibid.). According to the weakening principle of reality, as knowledge of the external, universal structure of Being and *episteme* are overturned by interpretation and the historical process of weakening, that which used to be regarded as fact is now acknowledged as interpretation. This is the first explanation Vattimo gives for the erosion of the historicist-metaphysical view of history. Based on the Heideggerian end of metaphysics and Nietzsche’s death of God, Vattimo also argues that the unilinear view of history was discredited as an idealized, phallogocentric reflection of the history of European man by modern theory and by practical events (such as anti-colonial revolts) which brought awareness to alternative histories. According to Vattimo, the refutation of the unilinear view of history coincides with the end of metaphysics that Heidegger hypothesized (Vattimo, 2003). Although the dissolution of ultimate foundations freed hitherto subjugated cultures and their visions of the world, metaphysics finds itself in an enduring crisis in this context. Because the liberated cultures and their visions of the world often come into (violent) conflict, one of the consequences of the end of metaphysics and the loss of foundations is a context of radical uncertainty. Under these conditions, violent reassertions of metaphysics—seeking “once more a stable structure [...] that can fix and stabilize the world”—can be justified as necessary responses to the radical uncertainty of the future (Rose, 2002: 64). Postmetaphysical hermeneutic thought, however, enables a view of these violent reassertions of metaphysics—in our case strategies of precautionary risk that rely on

decision as a means to govern uncertainty—as ways of falling back into metaphysics and of resisting the ethical and legal questions that arise with the loss of metaphysical certainties and cultural pluralization that accompanies it.

Falling Back into Metaphysics

The decision to use the state of exception to withdraw citizen-rights in the “war on terror” captures the inadequacy of politicians and courts of law alike to deal with situations of radical uncertainty without falling backing into the trap of metaphysics. Post-metaphysical hermeneutic thought enables this thesis to distance itself from metaphysics. It enables this thesis to interpret the use of the state of exception to withdraw citizen-rights as an attempt to retrieve “ultimate representations of sovereignty” for the purposes of reinstating and rewriting the foundations of the law (Vahabzadeh, 2007: 16). This process contradicts the secular proceduralism of liberal democracy and its late modern pluralistic interpretation of the law which reflects a culturally pluralistic society (rather than the universal edicts of justice). Since the secular proceduralism of liberal democracy is enabled by “the principle of sovereignty and the sovereign’s unique prerogative to grant itself the state of exception,” this refoundation requires a “politics of fright” to legitimize the transformation of secular proceduralism (Vahabzadeh, 2007: 23). This transformation entails a process wherein, “the secular experience of the law as the embodiment of the protection of right of citizens [...] is gradually replaced by an experience of the law as the measure of absolute values of an uncompromising and fundamentalist, and thus violent, religious interpretation of the law” (Vahabzadeh, 2007: 22). As a result, the political re/foundation of sovereignty is achieved when the other is

transformed into an enemy and rendered as a risk “to the very laws bestow rights and legitimize the sovereign” (Vahabzadeh, 2007). This strategy of precautionary risk relies on *decision* as a means to govern uncertainty. It represents the politics of fright, which, in turn, operates by projecting the risk to the security of the sovereign onto external risks (the other/enemy) (Vahabzadeh, 2007). However, in this situation, the desire for security:

Reflects the *insecurity* of the inside (an ultimacy, no longer able to create representational figurations without resistance), not the security of the outside (which in principle should require from the sovereign to uphold the fair treatment of the other as a universal political principle). (Vahabzadeh, 2007)

As it reduces the plurality of the other both inside and outside the nation-state and masks the “the inner insecurity of an interpretative claim whose claim to ultimacy of representation of certain fundamental grounds can only be maintained through force,” this strategy of precautionary risk is a strategy which falls back into metaphysics as means of governing radical uncertainty (Vahabzadeh, 2007: 20).

The suspension of citizen rights in a state of exception has important implications in the field of law. Ewald argues that the transformation of the other into an enemy is sustained by “the double infinities of risk coupled with the traumatic experience of the event” (2002). As a result, security practices mirror a view of the other as an enemy. This figure is external to the laws of war, unrecognizable by rationalities of risk—though imaginable on the basis of them—unpredictable, bent on catastrophic violence and unable to respect national borders (Aradau and van Munster, 2009; Dean, 2010; Ewald, 2002). As the rationality of zero risk renders the other/enemy potentially dangerous, not only is the riskiness of the other/enemy uncertain and *a priori* to the event but it is also *impossible* for the juridical system to accommodate them due to their ambiguous legal status as an enemy of the state. In this context, the judiciary must make decisions beyond

the horizon of certainty and the burden of proof is on the other/enemy to prove they are not dangerous. Thus, the act of justice is no longer a juridical decision necessitating the careful consideration of proper procedures, evidence and reasoned argument but rather “an administrative decision, where the rule of zero risk takes precedence” (Aradau and van Munster, 2007: 106). Post-metaphysical hermeneutic thought facilitates an interpretation of this process of denying alleged terrorists access to citizen-rights which justifies practices of precautionary risk (such as the use of torture, indefinite detention, house arrest and the creation of legal black holes such as Guantánamo Bay) as ways of falling back into metaphysics that reflect the inability of the law to respond to radical uncertainty (Aradau and van Munster, 2007: 106). The post-foundational thought of Derrida, Schürmann, and Vattimo enables this thesis to avoid falling back into the trap of metaphysics when responding to the ethical questions that arise when catastrophic events exceed the authority of knowledge and power.

Exceptionalism: The Law, Singularity, and the Infinite Deferral of Justice

In the *Force of Law: The Mystical Foundation of Authority* Derrida reflects on the unstable relationship between law and justice, which he argues reflects the antagonism between the singular and the general (or universal). In the essay Derrida opposes his view of justice as singularity to law’s view of itself as universal (universalized law). Even though it pretends to universality, justice which is “infinite incalculable, rebellious to rule and foreign to symmetry, heterogeneous and heterotropic” must address itself to “the singularity of the other” while law as a “system of regulated and coded prescriptions” constituted by virtue of its generality and universality is a system which must adhere to

pre-existing, and calculable rules and procedures (1989: 48). One of the main problems for Derrida therefore is *how* to reconcile the event or act of justice—understood as an event without precedent that is constituted in its singularity—with the norms or rules of the law which “necessarily have a general form, even if this generality prescribes a singular application in each case” (1989: 21).

After establishing the opposition between law and justice, the essay proceeds to deconstruct the unstable distinction between the law, which claims to exercise itself in the name of justice and justice which in turn demands that it be established in the name of a law that must be enforced (1989). Justice, Derrida asserts, is aporetic and exists as an experience of the impossible. Derrida clarifies what he means through the discussion of three aporias (the *Epokhē* of the Rule, the Haunting of the Undecidable, and the Urgency that Obstructs the Horizon of Knowledge), which reflect the impossibility of justice within the justice as law framework.

In “The *Epokhē* of the Rule,” Derrida emphasizes the importance of decision and interpretation in the singular act (or event) of justice (a point which I return to). For a decision to be considered just, Derrida argues, a judge must adhere to and assume a rule of law or a general law. In order to do so, the judge reinterprets the law as if “the law did not exist previously—as if the judge himself invented it in each case. Each exercise of justice as law can be just only if it is a fresh judgment” (1989: 23). Since each case is other, and each decision necessitates an “absolutely unique interpretation, which no existing, coded rule can or ought to guarantee absolutely,” the judge invents rule and principles of law by interpreting them within the context of a singular case (*ibid.*).

In “The Haunting of the Undecidable,” Derrida claims that the law—because of its universality—is the condition of possibility of justice. “No justice is exercised, no justice is rendered, no justice becomes effective nor does it determine itself in the form of law, without a decision that cuts and divides” (1989:24). With the phrase “a decision that cuts in divides” Derrida highlights the paradoxical structure of the law. *The law which establishes itself in the name of justice, enforces itself by means of violence thereby casting a shadow of doubt over its claim to justice.* This violence may be physical or interpretative. A decision worthy of its name is not merely the application of general rules to a case but rather refers to an “experience of the impossible” because the just decision makes it necessary for incalculable justice to be rendered or calculated through the law. Hence, Derrida writes that:

The undecidable remains caught, lodged, as a ghost at least, but an *essential* ghost, in every decision, in every event of decision. Its ghostliness deconstructs from within any assurance of presence, any certitude or any supposed criteriology that would assure us of the justice of a decision, in truth of the very event of decision. (1989: 24)

In the final aporia, “The Urgency that Obstructs the Horizon of Knowledge,” Derrida establishes the relationship between singularity/universality—*vis-à-vis* justice/law—and time. He argues that the demand for the just decision is always immanent. A just decision is urgent and hence because justice is required *now*, one cannot wait for the ideal conditions before rendering it. The *Epokhē* of the Rule, the Haunting of the Undecidable, and the Urgency that Obstructs the Horizon of Knowledge all reveal a remarkable relationship between singular justice and universal law.

What this thesis terms the problem of exceptionality, which hinges on this “undecidable” relationship between universality and singularity, is a central theme of

Derrida's later work which features an "ethical turn" focusing on possible-impossible aporias—paradoxes that afflict notions like mourning, forgiving, hospitality, friendship and justice. In "The Force of Law: The Mystical Foundation of Authority" (1989), the problem of exceptionality refers to the "impossibility" of reconciling "the act of justice that must always concern singularity" with the rules or norms of "justice as law" (Derrida, 1989: 17). Although law and justice are irreducible to each other, the justice as law paradigm *adequates* law and justice thereby ignoring the difference which is constitutive of the symbolic sphere of the "ethico-political-juridical." According to Derrida, while the law belongs to the order of the universal and the metaphysics of presence, justice belongs to the order of the singular, and is never fully present but rather always-already to-come. Because the law applies norms that are general to the singular individual (their singular acts and singular circumstances) or case, the law structurally excludes the singular other by trying to subsume their irreducible particularity under its universal sign. Because the singular other is structurally excluded from the law, the law and justice simultaneously render each other both possible and impossible. In other words, *the law is the condition of possibility and impossibility of justice, and justice is the condition of possibility and impossibility of law*. Let's take a closer look at this relationship.

Justice is the condition of possibility of law

Derrida's assertion that the promise of justice is the condition of possibility of law, hinges on the difference between law and justice. While the law is concerned with the universal (and manifests itself in relations of equality), justice is concerned with the

demands of the singular (and manifests itself in relations of inequality). As a result of the law's universal form, the law structurally excludes and "abjects" the singular other; this is the problem of exceptionality. As that which is structurally excluded from the symbolic order of law, the excluded singular does not respect established borders, positions and rules and draws attention to the fragility of the law. When this exclusion gives rise to a desire for justice, the exception of the excluded singular becomes a causal force behind social movements "to improve the law, that is, to deconstruct the law" (Derrida, qtd. in Derrida and Caputo, 1997: 123). In precisely this way, the lack of, desire for, or promise of justice is the condition of possibility of the law.

Law is the condition of possibility of justice

As the promise of justice makes the law possible, the law likewise renders justice possible. The law provides us with a structure to navigate through perilous times but it demands submission to its procedures and higher purposes. By establishing the rules of fair procedure (procedural rights), which are designed to ensure the fair and consistent application of the law in any case, the law renders justice possible. At least ideally, it is *possible* for the law to grant all persons—even if they are declared enemies of the state—access to "inalienable" and "universal" rights. Second, as a result of the law's universal form and ability to exercise law-preserving violence as means of upholding itself, the law renders justice—which is concerned with the demands of the excluded singular—possible. The law's ability to enforce itself by means of violence renders it possible to uphold just and progressive laws and thereby establish a relation to the excluded singular even in the context of public opposition (e.g. the Ole Miss Riot of 1962). Finally, the

ability of the law to suspend itself also makes justice possible. If justice is concerned with the demands of the excluded singular (and manifests itself in relations of inequality) then justice is contingent upon the transgression of the norm just as much as depends upon the rule of law. The argument that the just decision both conforms to the objective law and suspends it in response to a new situation (i.e., the *Epokhē* of the Rule) is consistent with this (Derrida, 1989). In this sense, the just decision follows the rule of law while simultaneously confirming “its value by a reinstating act of interpretation, as if, at the limit, the law [*loi*] did not exist previously—as if the judge himself *invented* it in each case” (Derrida, 1989: 25). By establishing guidelines to help ensure the fair and consistent application of the law, by sanctioning violence or force as a means for the law to uphold itself and by allowing itself to be respond to new situations through re/interpretation, the law makes justice possible and helps prevent justice from denigrating into blind campaigns for revenge.

Law is the condition of impossibility of justice

As captured by what is termed the aporia of justice, Derrida argues that while making justice possible, the law also makes justice impossible. Justice, which responds to the demands of the excluded singular, requires that a relation to the outside (or the abject) be established *vis-à-vis* the law. However, as a result of its general structure, the law structurally excludes the incorporation of the singular other as other into the law. Derrida borrows this idea from Benjamin’s essay “The Critique of Violence” in which Benjamin cautions that justice (ends) can be appropriated for the purposes of retroactively justifying the violence of the law (means). This same problem also exists in relation to the

foundation of the law (a point which I return to). In this sense, the condition of possibility of justice—the law—is also that which renders justice—as a genuine relation to the outside or the other—impossible. In this way, Derrida argues that justice entails an “impossible experience”: an *impasse* in thinking or acting that can neither be resolved by rational analysis nor dialectical thought. The aporia of justice is encountered in situations where the singularity of a particular case cannot be subsumed under a general rule. In other words, justice entails an experience of the aporia (between the universal and singular) which, in turn, demands responsibility *vis-à-vis* decision. In this way, the aporia of justice signifies the undecidable relationship between the law and justice. This raises an important question: how is one to understand their responsibility to law and to justice when these responsibilities necessarily conflict due to the antagonism between law and justice? Even though the law embodies the promise of justice, the law is intimately connected to two types of violence. First, the law is related to the extra-legal lawmaking violence that establishes new law. There are so few examples in which a law has been established by non-violent means that a law constituted without violence is almost unimaginable (Lummis, 2006). The law is also related to an “interpretative violence” which occurs when lawmaking violence is legitimized/rationalized, after the law is established, based on the law’s promise of justice. This process of *ex post facto* rationalization is captured under what Derrida terms “the mystical foundations of the law’s authority” (1989). In this way, the lawmaking violence that establishes the law is both “singular” and “iterable.” The moment when the law is inserted into the social field is a singular event of justice which ruptures time and makes history. During the singular event of foundation the law violently establishes itself on the promise of justice, which is

the “founding and justifying moment that institutes law” (Derrida, 1989: 12). However, as justice belongs to the order of the event, to claim that the law founded on the promise of justice *is* necessarily and unconditionally just, universalizes justice thereby annihilating it. This has two implications. First, the singular event of justice is, at its very origin, anarchic: it marks itself on the promise of its own re-marking or its own transformative iterability. Second, the iterability of lawmaking violence is a characteristic element of the singular event of foundation in which the law establishes itself on the structure of the to come. The law-preserving violence—the violence that upholds and protects the law—that exercises itself in the name of justice is a reiteration of lawmaking violence. From an analytical standpoint, the possibility of suspending citizen-rights in a state of exception is one of the most important ways in which the law betrays justice and reveals itself as a form of violence. Law-preserving violence exercises itself in the name of justice thereby revealing the law as a manifestation of foundational violence and betraying the law’s original promise of justice. Because the violence that founds the law is iterable, the law cannot fulfill its inaugural promise of justice. Since the law structurally excludes, singularizes the other, and violently upholds itself in the name of justice, the law renders justice impossible.

Justice is the condition of impossibility of law

The law is not a timeless structure. Since it is responsive to the haunting of an “undeconstructible justice,” the law is always already subject to “deconstruction.” A deconstruction of the law, Derrida argues, is made possible by the undeconstructibility of justice, which refers to the promise of justice—establishing a relation to the excluded

singular(s)—that every law embodies. It is this experience of the aporia between deconstructible law and undeconstructible justice that initiates the process through which discourse of law as well as social and political institutions undergo change. In other words, everywhere the law is in place, the desire for justice is always already in the process of dismantling the law's claim to universality. We have now come full circle. The drive to improve the law is in turn driven by the desire for justice, which as Derrida likes to say is “possible as an experience of the impossible” (1989: 15). In this way, “Force of Law,” also articulates a broader theory of history explaining how the law—driven by the tensions between law and justice and the undecidable relation between the general and the singular— “adapts” to social and historical changes (a point which I return to in Chapter 3). In this sense, justice exceeds the already present horizon of possibilities and constitutes a more radical transcendence of the “to come” (*à venir*). In Lacanian terms justice—i.e., a genuine relation to the excluded singular (or the outside)—is the law’s unattainable object of desire (*objet petit a*). Because of its capacity for arbitrary and unlimited use of violence, the law renders justice impossible. Therefore, justice is never finally achieved but always present in the form of a desire for justice and thus, is always-already to come. Since the law always entails the possibility of violence due to the law’s universalizing and singularizing impulses, and justice requires the force of law to be effective, the law is both the condition of possibility and impossibility of justice and justice is both the condition of possibility and impossibility of the law.

The Conditions of Injustice

The “Force of Law” is a powerful essay because it illustrates how the tensions between singularity and universality play out in relation to law and justice. It is particularly revealing because of its claim that the justice as law paradigm requires one’s submission to incompatible ethical injunctions. With the concept of the “universalizing-singularizing double bind of finitude,” which refers to natality and mortality (the two originary and antagonistic forces of existence that ensnare Being) Schürmann makes a similar observation. Whereas natality totalizes and positions one towards the universal, mortality singularizes, impoverishes and dispossesses life itself of any permanent significance. In the final chapter of *Broken Hegemonies*, Schürmann argues that the “conditions of evil” entail the “tragic denial” of either side of the double bind of finitude—natality and mortality (the universal and the singular):

Evil comes about in an untold move when singularization is cut off from one’s constituted world, when one blinds oneself against it; when in the name of some jealous fantasm capable of subsuming everything that can become phenomenal one “comes down on one side” of the discrepant binds; when such a fantasm is made to command exclusive allegiance; when it integrates doing, acting, and knowing in a frame that can be mastered and in this sense appropriates the world; when expropriation from that world is denied. (Schürmann, 1991: 390)

The double bind of finitude reveals how the law, in universalizing itself, singularizes and excludes the other as other. This concept, coupled with the conditions of evil, also clarifies Derrida’s arguments about law and justice. The double bind of finitude ensnares the subject of the law, rendering them responsible for upholding incompatible ethical injunctions: law is concerned with the universal (and manifests itself in relations of equality) while justice is concerned with the singular (and manifests itself in relations of inequality). Consequently, the interpreter of the law is responsible for ensuring the law is

applied in a way that both maximizes relations of equality (law) and relations of inequality (justice). In this sense, just as natality and mortality remain forever irreconcilable, law and justice are likewise anarchic. What I term the “conditions of injustice” therefore entail the denial of the subject of law’s responsibility for *both* of the ethical injunctions described. This means that the conditions of injustice are met when the law (the principle of universality) is maximized and justice (the principle of singularity) is denied; when the singularization of the other that accompanies the law’s universalizing force is denied.

The Implications of Weak Thought for Ethics, Justice and Law

As the end of metaphysics does not lead to a “truer version of reality” (which would be another metaphysics) but rather to conflicts, violence and assertions of belonging, Vattimo concludes that it should not be approached in terms of *Überwindung* (overcoming) which is already implicated in the ideal of progress (Vattimo, 2003: 32). While metaphysics cannot be *Überwindung* (overcome) in the sense of surpassing or in the dialectical sense of the Hegelian *Aufhebung* (Vattimo 1987: 11), it is possible to *recover* from the violence of metaphysics *vis-à-vis Verwindung* (distortion, resignation, and recovery) and *An-Denken* (recollection)—the two terms Heidegger associates postmetaphysical thought with.

Vattimo’s main assertion is that the possibility of an event (*Ereignis*) outside the *Ge-Stell* is tied to the *Verwindung* of metaphysics. Due its “hegemonic self-internalization” (Schürmann, 1987), it is only possible for one to *recover* from metaphysics as one would with an illness. This idea of recovery is at the core of metaphysics as destiny (i.e., in philosophical deliberations one cannot totally release

oneself from metaphysics). “One entrusts oneself to a metaphysics as to a destiny, one resigns oneself to it” (Vattimo, 1987: 12). *Verwindung* (as distortion, resignation and recovery) in other words is the burden of thought at the culmination of philosophy and history in the form of metaphysics. In this context, Being (as distinct from beings), “cannot be grasped as present, an ‘object,’ and therefore not even as a ‘foundation,’ a ground, or a first principle which we eventually ‘reach’ and upon which we can ‘stand’” (Vattimo, 1987: 13). Thought is no longer the illusion of grasping being as presence but rather as recollection (*An-Denken*), a mode of thought that does not attempt to “make Being (which objectifying metaphysics has forgotten) present again but to recall it as something gone for good” (Vattimo, 2003: 150). Whereas *Verwindung* twists thought free from metaphysics (by resigning thought to its heritage), *An-denken* is thought which releases philosophy from the idea of “Being as foundation” (Heidegger, qtd. in Vattimo, 2012). Together, *Verwindung* and *An-denken* signify one’s acknowledgment of the need to think using the metaphysical categories—albeit without reference to Being as foundation—that have been passed down to us. In this context, Being is no longer thought of as presence but as an event (*Ereignis*), as a happening of disclosures, or as *Ge-Schick* (destination) (Vattimo, 1987). For this reason, Vattimo’s reflections on law and ethics are characterized by what he calls the “weak thought of post-metaphysics,” a framework which views interpretation as a historical process that weakens the violence of the objective structures of metaphysics (Vattimo et al, 2002). The primary tool of weak thought is hermeneutics, an approach to the history of Being in the West that emphasizes the weakening process of interpretation (Vattimo et al, 2002). Inspired by the ontological turn of Heidegger—in which hermeneutics was reoriented to the fundamental conditions

of one's being-in-the-world—Vattimo views hermeneutics as a theory of modernity that corresponds to the event of modernity as the epoch of the culmination of metaphysics. Therefore, hermeneutics recognizes (1) the weakening of the first foundations of knowledge and thereby views “truth as procedure” and (2) the weakening of the historicist metaphysics of the West and its violence (Vattimo, 2003: 21). As a result, thought becomes nihilistic (or weak) and accepts that truth and reason are situated in both historical and cultural contexts (Vattimo, 2006).

The Implications of Weak Thought For Ethics

Part of the task of weak thought is to consider the implications of the loss of Being as foundation for the practice of ethics from the standpoint of modernity as the epoch of the culmination of metaphysics (2003; 2004). Although traditionally viewed as a practice dependent upon “a knowledge of immutable Being,” with the loss of foundations (and thus suprahistorical points of view), ethics has found itself in a unique situation where it most correspond to provenance (its unique historical context at the end modernity) (Vattimo, 2003: 399). A postmetaphysical ethics of provenance which corresponds with the dissolution of ultimate foundations is an ethics without transcendence which signifies the passage from an “ethic of the Other (Capital O)” to an “ethics of the other (lowercase) or the others (plural)” (Vattimo, 2004: 401). While an ethics of transcendence enforces “obedience to rules” deduced from “metaphysical essences and structures” (Vattimo, 2003; 2004), an ethics without transcendence attends to historical context (“provenance”). One of the defining characteristics of an ethics without transcendence is its reflexivity towards the ethical dilemmas that surface in culturally pluralistic contexts.

Another notable feature of the postmetaphysical ethics of provenance is its focus on the “social aspects of moral rules.” In this context, questions regarding decisions are discussed “in terms of the social legitimacy of various behaviours” (Vattimo, 2003: 400). For example, the question of whether the use of torture in “exceptional circumstances” is ethical is generally framed as the question of how an impersonal subject (i.e., the government, military, etc.,) should behave. The willingness of security agents to obey the authority figures instructing them to perform acts that conflict with inter/national laws is typically not a question under debate. Finally, the postmetaphysical reading of the ethical discourse is guided by the principle of the reduction of violence which enables it to criticize the status quo. While an ethics of transcendence enforces “immutable principles that speak identically to all” and thereby amounts to violence by silencing questions, an ethics without transcendence—an ethics of negotiation and consensus—has the effect of reducing violence and reorienting ethics to politics. Stated differently, the dissolution of ultimate foundations means that ethical debates regarding the scope of citizen-rights of and freedoms “take the discursive form of negotiation and consensus” and that the cogency of postmetaphysical ethical principles are measured against the reduction of violence. Vattimo hypothesizes that if put into practice, a postmetaphysical reading of the ethical discourse could enable a reconstruction of laws on the basis of negotiation, consensus, and other agreed upon procedures and democratic rules (Vattimo, 2003; 2004).

The Implications of Weak Thought For Justice

The end of metaphysics also inspires a reconceptualization of law and justice outside the metaphysical framework *vis-à-vis* weak thought (Vattimo et al; Vattimo, 2004). Thinking the concepts of law and justice weakly begins with an attempt to “abolish the sacred aura” and “the ultimate foundational authority of justice” (Vattimo et al, 2002: 454). Justice and law are concepts burdened with metaphysical baggage. The meta-ethical Divine Command Theory, for example, adequates justice with divine law by proposing that what is just is determined by what God commands, and by implication that to be just is to follow God’s commandments. In this regard, a postmetaphysical reconceptualization of law and justice involves the task of revealing the way in which these concepts have been secularized and weakened throughout the history of Being in the West. The death of God throws the metaphysical foundation of the law, i.e., justice, as well as the entire school of natural law into question. In our late modern era situated within the history of Being in the West, justice, Vattimo argues, is the outcome of interpretation: an application of justice to a legal situation “that weakens the violence of the origin [...] does the law justice [...] renders it just where it was violence; and also ‘executes’ it, exhausting its claims to be [...] definitive, stripping off the sacral mask of justice” (Vattimo, 2003: 148). Interpretation, Vattimo maintains, “confers justice on the law to the extent that [...] it adapts the norms of law to the unique set of interests and goals at which it aims in each case” (2003: 141). In this way, Vattimo’s argument is strikingly similar to Derrida’s assertion that a just decision is both regulated by law and responsive to the demands of justice in a singular situation. However, whereas the deconstructive notion of justice precludes any definitive claims about the justice of law (e.g., the law is just, the law has become just, etc.), the framework of weak thought, by contrast, makes it

possible for one to claim that the law has become *more* just overtime from the standpoint of modernity as the culmination of the end of metaphysics. To claim that the law has become more just is not the same as proclaiming that the law *is* just. Indeed, part of the task of weak thought is to illustrate the consequences of the weakening process of interpretation for justice and “the original violence of the non-justice of the law” both of which have been weakened, secularized and stripped of their sacral aura. By revealing the procedural and interpretative dimensions of justice, the practitioner of weak thought executes the law in the sense that while stripping it of its sacred aura, she opens the way to more ‘human’ considerations (Vattimo et al, 2002: 454).

One of the implications of thinking justice weakly *vis-à-vis* *Verwindung* and *An-Denken* is that it subverts the “retributive conception of justice” (i.e., punishment) which is grounded in the metaphysical belief that punishment restores the law which has been broken by crime (Vattimo, 2003: 148). The postmetaphysical view of law and justice does not view the law as constituting a moral order and therefore rejects the argument that punishment restores the law. In doing so, it highlights the external character of punishment and justice. Rather than being tailored to internal needs (such as the need to rehabilitate the offender), justice and punishment are tailored to external pressures such as the victim’s desire for revenge as well as the need to guarantee the security of social life. As a result, Vattimo proposes that *unicuique suum* (“to each his own”) can be used as a basis for understanding the legal conception of justice. As Vattimo writes:

If justice means to give each what he or she deserves, we must admit that what each deserves is more a historical than a natural determination. In other words, such determinations are closely related to, and due to, historical conditions and traditions. (Vattimo et al, 2002: 456)

This is a profound statement, the implications of which I begin to iron out in Chapter 6. Justice, as it turns out, is not a universal and timeless concept. It is subject to epochal shifts and the unique possibilities for thinking and acting therein. Higher than justice stands interpretation.

In this chapter, I (1) accounted for the post-9/11 emergence of a risk-security complex as well as its precautionary approach to risk; (2) introduced the postmetaphysical hermeneutic philosophy of Vattimo as a framework from which to interpret the sovereign's practices of precautionary risk as ways of falling back into metaphysics and (3) explored the problem of exceptionality in the writings of Derrida, Schürmann and Vattimo. Although their conceptions of and responses to the problem of exceptionality will not be explored again until Chapter 6, Chapter 3 draws from these theorists again when it describes the methods, strategies of analysis, and their application in this thesis.

Chapter 3: Journey to Thesis, Inspiration, Research Design, Methods and Application

The Charter sets (“reasonable”) limits on the government’s use of force by expanding rights to every citizen of Canada and placing the administration of justice in the hands of the courts. However, when faced with a public emergency that threatens the security of the citizens of the state, international human rights treaties and many constitutions (including Canada’s) permit states to withdraw rights *vis-à-vis* the sovereign unique right to grant itself the state of exception. Consequently, when actions against the state disqualifies an actor from citizenship (and thus entitlement to rights), sheer force can be exercised against them by the state notwithstanding the state’s responsibility to protect its citizens. The ability of citizen-rights to protect the actor from arbitrary and unlimited uses of sovereign power within the nation-state has important implications for how citizen-rights are evaluated. The use of arbitrary and unlimited sovereign power (i.e., violence) *weakens* what is meant by rights and diminishes and obscures the meaning of the rights revolution. In light of the ability of states to withdraw citizenship-rights as a means to govern the uncertainty that accompanies public emergencies, the purpose of this study was to account for the birth, growth and limitations of citizenship-rights in Canada. Focusing primarily on the relationship between citizen-rights and the state of exception, this investigation asked:

1. What are the effects of sovereign/executive power on rights?
2. How has the ability of the state/sovereign to wield arbitrary and unlimited uses of power in times of crises influenced the development and trajectory of citizen-rights in Canada?
3. What are the effects, if any, of Charter rights on the state of exception?

To address these questions, this study used a combination of case study and historical research strategies. Drawing from the epochal theory of Schürmann, the deconstructive theory of Derrida, Vattimo's post-metaphysical hermeneutic philosophy and various empirical materials, this thesis outlines the history of citizen-rights in Canada. This history, in turn, provides the relevant context to analyze and interpret three cases which present *three possible outcomes of challenging the state based on citizen-rights*, thereby allowing this thesis to examine the consequences of citizen-rights for the state of exception. This "mixed methods" approach is consistent with case study research which hinges on an understanding of the historical and cultural contexts within which a particular case is embedded. I say that this thesis used a mixed methods approach because a number of methods and strategies of analysis have been incorporated into the research design of this thesis. These approaches methods, strategies of analysis and designs are primarily idiographic and include interpretative and hermeneutic methods, comparative-historical methods, case study and radical phenomenology. Although this research cannot be reduced to an overarching paradigm, my research might be said to espouse a post-structuralist or post-modernist worldview. In what follows, I reflect on my journey to this thesis.

The First Phase of Research: Selection of the Cases

The starting point of this research was the cases themselves. During my final year of undergraduate studies at the University of Victoria, I registered in the History of Modern Japan (HIST256). After the first class, I introduced myself to the professor, John Price and told him that my interest in the course stemmed from the limited knowledge I had of

my great-Uncle, a Japanese Canadian, whom was executed shortly after WWII. Dr. Price knew of whom I spoke of: Kanao Inouye (a.k.a. the ‘the Kamloops Kid”) of British Columbia. The knowledge that I had an infamous uncle, whom I knew absolutely nothing about, was at once fascinating and horrifying and thus this meeting inspired a small, personal research project to discover more about my great-Uncle. The limited knowledge I had of my great-Uncle—I wasn’t even aware of his first name—seemed strange. Kanao’s younger sister, my grandmother, Ruth Tsuji (nee: Inouye) moved into our family home and lived with us for twelve years until her death in 2003. During this time, she never uttered a word of her infamous brother. Although personal research project answered certain basic questions about my great-Uncle’s legacy, it raised so many more. Kanao was born in Kamloops, British Columbia in 1916, emigrated to Japan prior to the Japanese bombing of Pearl Harbour and thereby narrowly escaped “internment” (Horne, 2005; Adachi, 1991). During WWII Kanao was conscripted into the *Kempeitai* as a civilian interpreter and stationed at a prisoner of war camp in Hong Kong where he guarded over captured Canadian soldiers (ibid). Kanao has been remembered by these POW’s both for his severe brutality *and* compassion (ibid). At the end of WWII, Kanao was captured, charged with war crimes, and sentenced to death by a British Military Tribunal (Hong Kong’s War Crimes Trials Collection, N.D[b]). For jurisdictional reasons, this verdict was eventually overturned and Kanao was re-charged with high treason under British law, found guilty and executed on August 27, 1947 (ibid.).

It was a stroke of luck that, when I began researching my great uncle, I was also working on an assignment for credit in the course the Social Regulation of Morality (SOC1307) on Agamben’s writings on the state of exception and *homo sacer* which

focused on the case of Canadian child soldier, Omar Khadr. Immediately, I began to draw parallels between these cases which I would develop further over the next few years: Inouye was the first Canadian to have faced prosecution for war crimes, Omar Khadr was the second; Inouye's actions against Canadians during WWII were characterized as treasonous, Khadr's actions against Americans during the "war on terror" were described as treasonous; Inouye's loyalty to the Crown was questioned, Khadr's loyalty to Canada has been questioned; Inouye held citizenship in Canada and Japan, the media dubbed Khadr a "Canadian of convenience"; both cases involved the admission of questionable (i.e. typically inadmissible) evidence; Khadr and Inouye could both be understood as "victims of circumstance" and both had their citizen-rights denied on the grounds of their being rendered enemies of the state.

I began my research by gathering data on Kanao Inouye. A quick search on Google in 2009 yielded no more than six (secondary) sources citing Kanao Inouye. These sources more or less repeated the same information and painted the same caricature of Inouye as a nefarious traitor. After researching the few references cited in these online sources, I managed to locate two books that made cursory references to Inouye either in liner notes or short tangential paragraphs: Horne's *Race War! White Supremacy and the Japanese Attack on the British Empire* (2005) and the late Adachi's *The Enemy that Never Was* (1991). The references in these books eventually lead me to the Canadian Archives in Ottawa which housed the most useful information on Inouye. I was able to locate three archives, two were declassified (as described below) and the third entitled "Inouye, Kanao Security Report" is still not available to the public. The first entitled "War Crimes Trial of Inouye Kanao, the Kamloops Kid –General file" contained one

volume (reference no. RG25-G-2). This archive contained transcripts of Inouye's second trial (for high treason). The second entitled "War crimes investigation, personnel and cases" contained two volumes of detailed notes on Kanao's life history including information about his family in Canada and Japan, the circumstances surrounding his emigration to Japan in 1927, details about his life in Japan pre and post War, testimony and evidence presented against him, etc. Finally, I managed to locate case notes for Kanao's trial for war crimes on an online database entitled Hong Kong's War Crimes Trials Collection, which described the allegations against Kanao, his defence and the outcome of the trial. This information was fascinating and allowed me to question—once and for all—the caricature of my uncle as a monstrous traitor. Indeed, Kanao began to appear in my mind as a misunderstood person, and somewhat of a victim of the times that was caught between the laws of two countries. However, while providing me with valuable insight into some of the details of Kanao's life that were not portrayed in the few online and academic sources that I managed to locate, the tragedy of Kanao's execution was disappeared in the legal discourse. "The legal documentation of this event" decontextualized Kanao's life "by breaking the narrative of defendants into legally imposed codified fragments" thereby detaching his "experience from its living context" (Guha qtd. in Vahabzadeh, 2007: 97).

During my first year of graduate studies I undertook an assignment for credit in a Qualitative Methods class (SOCI515). The assignment required me to write a short 6 page research report on a topic of my choice researched using one of the five qualitative methods reviewed in the course using interviews. Because I wanted to learn more about my uncle's life, I decided the best source of information would come from those within

the Japanese Canadian community who knew of him. After contacting her publisher, I was put into communication with Joy Kogawa, noted Canadian poet and novelist of Japanese Canadian descent, and she agreed to let me interview her. During these interviews, Joy provided me with invaluable information about my uncle. Her perspective of how he was viewed within the Japanese Canadian community was particularly helpful because it helped me to understand why—although I had knowledge of Japanese Canadian internment—I knew so little about my infamous uncle. In the decades following the repatriation of Japanese Canadians, the National Association of Japanese Canadians (NAJC) mounted a vigorous social movement for redress. As Kanao presented a rare—though not unprecedented—counter-example to the overall loyalty of Japanese Canadians during WWII, it was not in the best interests of the NAJC to acknowledge his tragic story. This moreover, helped me to understand why my grandmother never uttered a word about her brother: no one wanted to risk ostracizing themselves after having to endure many years in an environment that was so hostile to the Japanese.

As I was collecting information about Kanao's life, I was compelled to follow the story of Omar Khadr as it unfolded in the media. The data I have gathered on the Khadr case came from numerous sources. Although this thesis relies on secondary source materials on Khadr to some extent (i.e., newspaper articles, scholarly articles by jurists, lawyers, and social scientists), I draw heavily from primary sources especially the legal documents that are available freely online. To this end, the "Khadr Resource Page" published by the Bora Laskin Law Library at the University of Toronto has been extremely helpful. This website archives information about the legal aspects of the Khadr case including background information compiled by Canadian and US lawyers and

advocates, various legal documents (the plea agreement; motions, applications and decision by Canadian courts; evidentiary records by the Canadian courts) selected media coverage, op-eds, etc. On the suggestion of my supervisor (Peyman Vahabzadeh), I also decided to also look into the case of Maher Arar (which I return to). In the height of post-9/11 paranoia, Arar, a dual citizen of Syria and Canada, was extraordinarily rendered by the United States to Syria where he was indefinitely detained for nearly a year, until he was returned to Canada, received a formal apology from Stephen Harper and \$10.5 million in compensation. The Arar case is not only connected to the Khadr case—in that after being subjected to the “frequent flyer program” Khadr erroneously informed Canadian authorities that Arar was a member of al Qaeda—it also provides a unique counter-example to the singular cases of Khadr and Inouye because Arar was redeemed by the Harper Government.

Sampling Strategy

In the selection of the cases and data this thesis took advantage of multiple purposeful sampling strategies including: “convenience sampling,” “extreme case sampling,” “theory based sampling” and sampling for the purposes of literal replications (explored shortly) (Creswell, 2007). Convenience sampling is a nonprobability sampling strategy in which units are selected because they are easily available or accessible (Lewis-Beck et al., 2003). As research began with my decision to learn more about Inouye, the selection of this case could be considered a form of convenience sampling as the research subject was *initially* selected for its convenience. Nevertheless, it would be inaccurate to reduce the selection of the three cases to reasons of convenience entirely. Many of the

connections I established between Inouye's case and Khadr's case were formed because these cases were interpreted through the theoretical lens Agamben established in *Homo Sacer* (1998) and *State of Exception* (2004). Consequently, it can be argued that this thesis also used "theoretical sampling," a strategy where theoretical constructs influence the selection and interpretation of cases (Creswell, 2007) Finally, also used extreme case sampling, a strategy which learns "from highly unusual manifestations of the phenomenon of interest" and usually includes units with special or exceptional characteristics (Creswell, 2009: 127).

Case Study Research

Despite its productive history in the social sciences and humanities, there is much disagreement about the definition of case study research and the many academic attempts to clarify what case study research means has created a "definitional morass" (Flyvberg, 2011; Gerring, 2004). For example, Stake maintains that the decision of what is to be studied defines case study research (1993). This means that choosing an "individual unit of study" and "delimiting its boundaries" is what defines a study as a case study. Whereas Stake's definition allows for the case to be "studied in a number of different ways, for instance, qualitatively or quantitatively, analytically or hermeneutically, or by mixed methods" (Flyvberg, 2011: 301), Creswell defines case study research broadly viewing it as "a methodology, a type of design in qualitative research, or an object of study, as well as a product of inquiry" (2009: 73). Finally, Yin defines case study research even more broadly as a "logic of design," which encompasses everything from the selection of cases, to data collection techniques and analysis (2009). Yin argues that two features characterize case study research as a logic of design. First, it entails an empirical inquiry

of a “contemporary phenomenon in depth and within its real-life context” (Yin, 2009: 18). Second, case study research also encompasses “other technical characteristics, including data collection and analysis strategies” (ibid.). These definitions of case study research, I argue, are not mutually exclusive. The study of *at least one case situated within a bounded system* (e.g., setting, context, history), are the fundamental features defining case study. This connection between case and context, moreover, is a key yet under exploited feature of case study research. This connection means that case study research cannot be divorced from historical research as is all too often done. Indeed, Mahoney and Rueschemeyer argue that the comparative-historical research can be viewed as a series of case studies in conjunction with an explicit cross-unit analysis (2003). Even where a specific case study only entails the examination of one case, rather than hierarchical time-series or comparative-historical designs (Gerring, 2004), the unit of analysis (or case) must nevertheless be framed within a context, which, in turn, cannot be interpreted properly apart from the broader history of which case and context are apart. The case, in other words, refers to an object of study (which could be an event, process, program or several people, etc.,) that is bounded by time and place (Stake, 1995). In this context, it is the job of the researcher to articulate the broader history of in which case *and* its context are embedded, rather than to impose these boundaries.

Case study research was chosen due to its emphasis on case and (historical) context which I felt might facilitate an investigation of the history (context) and limitations of citizen-rights (cases). Due to its emphasis on “context-dependent case knowledge” rather than “context-independent” knowledge and the “vain search for predictive theories and universal laws” (Flyvbjerg, 2011: 304), case study research was

also selected because it corresponds with the theoretical and philosophical framework of this thesis which recognizes that universal truths of all kinds are continually discredited (in theory and practice) in the epoch of accomplished metaphysics.

Research Design: Holistic Multiple Case Study Design

A “holistic multiple case study design” was chosen for this study of the development and limitations of citizen-rights in Canada because it facilitated the generalization of findings across cases, analytical generalization (using particular cases to evaluate the claims of theory) and enhanced the robustness of this study (Yin, 2009). A multiple case study was required as three cases (situated at different times in the history of citizen-rights in Canada) were selected (Creswell, 2007; Yin, 2009). As each case only had one unit of analysis (i.e., the actor that attempted to challenge the constitution based on their citizen-rights), a holistic design—which is “advantageous when no logical subunits [of analysis] can be identified”—was used (Yin, 2009).

Multiple case study designs have unique benefits (and drawbacks) when compared to single case designs (Yin, 2009). Evidence from multiple cases can be regarded as more convincing and thus the overall study may be considered to be more “robust” (Herriot & Firestone, 1983). Multiple case study designs also allow the investigator to implement a “replication design which facilitates the generalization of findings to theory (“analytic generalization”) and enhances the robustness of the study” (Yin, 2009: 53). The logic of replication is analogous to the logic used in multiple experiments (Hersen and Barlow, 1976). Yin writes that:

Upon uncovering a significant finding from a single experiment, an ensuing and pressing priority would be to replicate this finding by conducting a second, third, and even more experiments. Some of the replications might attempt to duplicate

the exact conditions of the original experiment. Other replications might alter one or two experimental conditions considered unimportant to the original finding, to see whether the finding could still be duplicated. Only with such replications would the original finding be considered robust [...] Furthermore, just as with experimental science, if some of the empirical cases do not work out as predicted, modification must be made to the theory. (Yin, 2009: 54)

Guided by the state of exception and *homo sacer* concepts (Agamben, 1998; 2005), this investigation used a replication design to test for literal replication, which is achieved if the case(s) correspond with the theory's predictions (Yin, 2009). Multiple case study designs, which incorporate literal replicates, can advance theory by facilitating analytical generalization (ibid.). In the literal replication approach, cases are selected on the basis that they might predict similar results (ibid.). Because literal replication can be confirmed using 3-4 cases, a few cases with similar settings which are expected to achieve similar results should be selected (Shakir, 2002). The cases in this thesis were selected because they illuminate the effects citizen-rights within the context of the state of exception. What protective effects do citizen-rights have against the arbitrary and potentially unlimited use of sovereign power exercised within the state of exception? Arguably, Agamben's thesis predicts that citizen-rights have *no* effect against sovereign power within the state of exception since the sovereign ban entails a withdrawal of citizen-rights and subsequent exposure of bare life to the potentially *unlimited* violence of those wielding sovereign power. In other words, it would be possible to use this study to evaluate and propose modifications to Agamben's theory of the state of exception because the replication design incorporated in to the multiple case study design of this thesis facilitates analytical generalization. The generalization of findings from cases to theory (and across cases) is perfectly consistent with the post-metaphysical approach of this thesis. Not only are the

findings of this thesis provisional since “the very methods of validity are without exception interpretative” (Vahabzadeh, 2009: 462), the theoretical elaboration and generalizations across the cases make no grand gestures of validity or universal science. Indeed, universal validities are nothing but interpretations that are declared universal.

Enacting Approaches to the History of Citizen-Rights in Canada from an Epochal Theory

As a sociology student, I am well versed on errors that can arise when a single, overarching and deterministic view of history is taken for granted. In an attempt to avoid repeating these errors, this thesis divorced itself from any one single approach to history and incorporated various historical approaches into this case study of the development and limitations of citizen-rights in Canada. In this section I briefly review three approaches to the history of citizen-rights in Canada incorporated into this investigation: Schürmann’s epochal theory; Derrida’s deconstruction and Vattimo’s Heideggerian-Nietzschean history of Being in the West. After reviewing each of these approaches, I discuss their application in this study.

Epochal Theory

As it provided me with a way to understand the cases in relation to the historical development of citizen-rights in Canada (context), the epochal theory of radical phenomenologist Schürmann informs the principle framework of this study and sets it apart from recent constitutional scholarship on the history of citizen-rights in Canada which remains bound to a framework of historicist metaphysics. According to epochal theory, each era in the history of metaphysics in the West arose from founding firsts or

ultimate foundations (*arché*) that legitimize the governing principles (*principium*) of every era as well as the ruler(s) or institution(s) that wield the power to define those principles (*princeps*) (Vahabzadeh, 2003: 113). Together, *arché*, *principium*, and *princeps* constitute “a hegemonic movement towards perceived ends” (ibid.). Stated differently, they constitute the particular “constellation of truth” of an era which, in turn, deem particular modes of action and thought intelligible or necessary (ibid.). The relationship between *arché*, *principium* and *princeps* is not determined in advance. Rather, *arché* (the origin or founding first) is established as the foundation of political authority (*princeps*) which, in exchange, receives its legitimization from the governing principles of the era (*principium*). In this context, the sovereign’s ability to enforce or suspend the law, receives its legitimacy from the principles governing a particular era, and derives from the *arché*. Moreover, epochs are bound by the hegemony of certain constellations of truth that hinge on certain ultimate referents before these founding referents slip into a prolonged period of destitution when the principles governing a particular era are questioned (Vahabzadeh, 2010: xxi).

This investigation applies epochal theory to the history of citizen-rights in Canada. Specifically, epochal theory allowed this thesis to speak of three distinct eras of citizen-rights:

1. The Era of Implied Rights (1867-1959);
2. The Bill of Rights era (1960-1981);
3. The Charter Era (1982-present).

In the era of implied rights, citizen-rights were (theoretically) protected in an implied bill of rights. In the Bill of Rights era, citizen-rights were protected by statutory legislation (“the Canadian Bill of Rights”). Finally, in the Charter era citizen-rights were protected

in “the Charter” and entrenched in the Constitution of Canada by the 1982 Canada Act. In each of these eras, certain modes of thought and action in relation to citizen-rights became possible and were justified by an appeal to a certain theoretical higher ground (a point which I return to in Chapter 4). Because Schürmann’s epochal theory is based on the presupposition that truth is an interpretation, the approach of this thesis—understanding the historical-discursive-legal transformation of citizen-rights across three eras—is not technically an epochal theory though it is derived from it. Hence, this thesis refers to the aforementioned periods as “eras” rather than “epochs” which encompass eras. The strategy is beneficial because the principles of these eras (which take place in the modern epoch of Western humanity) are empirically measurable and legally decipherable (points which I return to in Chapter 4). The dates separating these eras, moreover, are merely symbolic points in history marked by the enactment of specific laws rather than absolute historical points. The application of epochal theory to the history of citizen-rights in Canada helped this thesis to view the rights regimes in each era as part of broader strategy in which the state maintained its hegemony—which involves coercion and consent—over the subject/citizen (Vahabzadeh, 2007). The radical phenomenological concept of ultimate referentiality also enabled this thesis to challenge the foundational link between the nation-state and citizenship as they relate to law (rights) and justice. In doing so, this concept enabled this thesis to assess the development and limitations of citizen-rights in Canada by developing an interpretative conception of justice using the tools of post-metaphysical philosophy and radical phenomenology (see Chapter 6).

Deconstruction

Derrida's "Force of Law: The Mystical Foundation of Authority" (1989) articulates a theory of history (see Chapter 2) which explains how the legal system—driven by the tensions between the universal/singular as reflected in the antagonistic relationship between (calculable) law and (incalculable) justice—"adapts" to social and historical change. This theory of history was used in this thesis alongside epochal theory to explain *why* and *how* new strategies to protect citizen-rights were established. In other words, the deconstructive theory of history enabled this thesis to account for the emergence of the Canadian Bill of Rights and the Charter, in terms of the tension between law and justice. In this way, epochal theory and deconstruction are complementary theories of history which facilitate an understanding of historical and social change in terms of hegemony, law and justice.

The History of Being in the West: the Secularization of Law and Justice

The deconstructive notion of justice as an event which is yet "to come" is limited by the fact that it makes it impossible to make any definitive claims about the justice of the law. One can neither say that the present law is just or even that it has become more just. As Derrida writes: "one cannot speak directly about justice, thematize or objectivize justice, say 'this is just,' and even less 'I am just,' without immediately betraying justice, if not law" (Derrida, 1989: 10). This does not mean that instances of justice are impossible. To avoid the struggle for justice because it cannot be made fully present is just as erroneous as believing that justice has already arrived. Whereas Derrida argues that justice is always already "to come" precisely so as to open logocentric structures and to allow for the passage towards the other, Vattimo envisages Derrida's deconstructive conception of

justice as an apocalyptic-messianic position that echoes “on the ontological plane, the phenomenological cult of the skeptical *epoché*” (Vattimo, 2003: 139). But “what becomes of the interpretation of law, and thus the relationship between law and justice, within the framework that has abandoned foundational metaphysics,” Vattimo asks (2003: 138). With this very question, Vattimo registers his concerns about the attitude towards the law that the deconstructive notion of justice tends to engender:

Thought that recognizes the irreparable unfoundedness that ultimately characterizes the law, baffling every attempt to legitimate it as ‘just,’ may decide that its own task is to reveal this situation by unmasking the imposture of all foundational claims. (Vattimo, 2003: 140)

In this apocalyptic perspective, which Derrida’s deconstructive justice epitomizes, “interpretation functions as a pure unmasking of the nonjustice of the law” (Vattimo, 2003: 139-140). Hence, Derrida’s deconstructive idea of justice entails the reduction of the meaning of the word interpretation to its metaphysical definition: “the decipherment and discovery of what is hidden” and “a form of objective mirroring” (Vattimo, 2003: 140). As a means to avoid falling back into metaphysics, Vattimo asks, “what would happen, if we start to think of law as a mode, analogous to philosophy *vis-à-vis* myth and religion as a form of desacralizing secularization of justice” (2003: 162). The task of thinking the idea of justice as weakening (Vattimo also uses the term secularization and disenchantment to describe the interpretive process of weakening) is on par with his project to think history and metaphysics as weakening. Hence, Vattimo maintains that these projects represent an attempt to reduce the violence of metaphysics (2003).

According to Vattimo’s formulation, interpretation is an application of law that weakens the violence of the origin, it “does the law justice” and “renders it justice against those who accuse it of producing only *summa iniurias*; renders it just where it was violent; and

also ‘executes’ it, exhausting its claims to be peremptory and definitive, stripping off the sacral mask” (Vattimo, 2003: 148). By means of interpretation, in other words, the law becomes an instrument for weakening the original violence of justice (Vattimo et al., 2002). Hence, interpretation progressively reduces the original violence of justice. It confers justice on the law to the extent that with close attention to the specific demands to the singular situation, it adapts the norms of the law to the unique set of circumstances of each *singular* case and aims to produce consensus around a specific application of law. In this regard, Vattimo’s conception of “justice as weakening” provides this thesis with a way to explain, *vis-à-vis* the expansion and entrenchment of citizen-rights in the Charter, how Canadian law has become more just.

I have just described the philosophical and theoretical framework through which this thesis explores the history of citizen-rights in Canada *vis-à-vis* the philosophies of Derrida, Schürmann and Vattimo. The remainder of this Chapter discusses the processes through which data was collected and analyzed for the historical and case study components of this thesis.

Data Collection

Data collection in case study research is typically substantial and draws on multiple sources of information (Creswell, 2007). Although at least six sources of evidence are useful in case study research (Stake, 1995; Yin, 2009), only two sources of evidence were used in this investigation: documents and archival records. Various types of documents and archival records were collected in order to elaborate both the cases, their immediate contexts and the broader history of citizen-rights in Canada. The types of evidence sampled include: newspaper articles, editorials, magazine articles, official press releases,

royal commissions, court judgments, tribunal decisions, statutes and regulations. In the interest of triangulating evidence with multiple sources, this evidence was used to corroborate evidence from other secondary sources. Moreover, although (as mentioned) Joy Kogawa had been interviewed for another research project, because the consent form I was required to have her sign stipulated that the course instructor would retain ownership of these interviews, I was unable to use them without going through the lengthy process of obtaining permission from the owner as well as obtaining ethics clearance through the University of Victoria. Although I could have used interview data as part of my thesis—and in hindsight might have obtained an interview with Maher Arar by contacting him via Twitter—due to my inexperience as a researcher combined with the sensitive nature of the topic of my thesis I decided not to use interview data in this investigation. Pending ethics approval, future research might seek to incorporate personal experiences from key informants such as Joy Kogawa and Maher Arar.

Data collection began before the study questions were defined and finalized. As I proceeded with data collection a detailed description of the cases, their immediate settings, as well as their historical contexts within the history of citizen-rights in Canada emerged. For each case study, a detailed description of the case and its immediate setting was developed. Using multiple sources of data, I developed an in-depth “chronology of events” to describe important events within the timelines of each case. For each case, I offered a life history, describing major events leading up to the arrest of the individual, as well as an account for their attempt(s) to challenge the suspension of their citizen-rights. The history of citizen-rights (Chapter 4) was developed in much the same way. I began with the cases themselves. Comparing the Inouye and Khadr cases, I observed that

whereas the question of rights took center stage in Khadr's case, the infringement of citizen-rights was not addressed in Inouye's case. This observation directed me towards the history of citizen-rights in Canada and the epochal character of citizen-rights. Whereas Khadr's citizen-rights were protected by the Charter, during the period between 1946 and 1947 when Inouye's trial occurred citizen-rights found minimal and uncertain protection in an implied bill of rights (Chapter 4). In this way, rather than using a fixed and linear approach to data collection, this thesis took an iterative approach (Creswell, 2007: 150). This means that in the process of data collection I moved back and forth between the cases, their contexts, and the broader history of citizen-rights in Canada rather than mechanically collecting data for each case, their respective contexts and the history of citizen-rights in Canada. This process continued until data saturation had been achieved (Lewis-Beck et al., 2003; Creswell, 2007). One issue related to data collection as well as the sampling strategy and design of this thesis ought to be addressed at this juncture. Apart from the fact that the purpose of this thesis was to study the Charter, its condition of possibility in the nation-state, its historical development and its effectiveness against sovereign power exercised in a state of exception, this thesis examines rights legislation in Canada precisely because the recognition of rights—whether directly or indirectly—was topical in each case and therefore enabled a basis for comparison. Although this thesis does not directly study citizenship law, it does extensively examine one's entitlement to citizenship *vis-à-vis* international law through the examination of statelessness in Chapter 1. Along these lines, this thesis did not study other bodies of law, such as immigration law, precisely because immigration law was inapplicable in all these

cases for the obvious reason that both Inouye and Khadr were born in Canada. In what follows I describe how the data collected for this thesis was analyzed.

Data Analysis

The aspect of case study methodology that is both the most underdeveloped and time consuming is data analysis (Tellis, 1997). Although the analysis of cases and contexts was an iterative process, in this section I explain the steps taken for the analysis of cases and contexts as if they occurred both separately and successively. In other words, I explain the steps taken for the analysis of the cases first and then explain the steps taken for the analysis of their context. With respect to the cases, data analysis occurred in several phases (Creswell, 2007; Yin, 2009; Stake, 1995). “Thick description” was used to reconstruct the singular “stories” of Kanao Inouye, Omar Khadr and Maher Arar. As presented in Chapter 6, within-case and across-case analytic strategies were used to structure the interpretation of their stories. (Ayres et al, 2003). In conjunction with the within-case analysis that was used to analyze each case for themes (Creswell, 2007), several cross-case analytic techniques were used including: thematic and contextual analysis (Creswell, 2007; Stake, 1995); “pattern matching” (Yin, 2009) and a type of “time-series analysis” using the retrospective and prospective categories of radical phenomenology. However, although an extensive cross-case analysis occurred as described, the reader might form the impression that this research contains too much within-case analysis and not enough cross-case analysis after reading my thesis. This impression, however, is a function of this thesis’ structural organization and not a reflection of how much within-case or cross-case analysis was actually conducted.

Indeed, although chapter 6 devotes 28 pages to the presentation of the results of the within-case analysis for each case and a mere 2 pages to a cross-case analysis based on common themes, because (as described below) most of the cross-case analysis is integrated into a discussion of the history of citizen-rights in Canada and the effects of Charter rights on executive power, the majority of the cross-case analysis is presented in Discussion and Conclusion of this thesis.

The historical analysis of citizen-rights was less demanding than the analysis of the cases. This phase of analysis entailed separating the history of citizen-rights in Canada into three separate epochs as described above *vis-à-vis* Schürmann's epochal theory and chronicling the major event leading up to the inauguration of the Canadian Bill of Rights and the Charter. Following this description, the Charter was examined "retrospectively" and "prospectively" in the Discussion and Conclusion (Vahabzadeh, 2003; 2009). Retrospective analysis entailed an historical interpretation of the "existing social structures and institutions as well as universal models (these sedimentations of past particular actualizations)" (Vahabzadeh, 2009: 461). Prospective analysis entailed identifying "the possibilities that the actual, existing institutions and structures have concealed" (ibid.).

Description of the Cases

I began data analysis by using "thick description" to reconstruct the "stories" of Kanao Inouye, Omar Khadr and Maher Arar. In this investigation, "story" referred to narratives "of events arranged in their time-sequence, such as the 'the King died and then the Queen died'" (Lee Bensen qtd in Megil, 1989: 629). This thesis also used Ponterotto's definition of "thick description" which unites Geertz's and Denzin's formulations of Gilbert Ryle's

philosophical term. (2006: 543). Ponterotto attributes five components to thick description (2006: 543):

1. Thick description entails the description *and* interpretation of social actions within the context in which the social action occurred.
2. Thick description represents *and* contextualizes the “thoughts and feelings” of social actors as well as the “complex web” of relationships among them.
3. Thick description interprets social actions by assigning context relevant “purpose and intentionality” to these actions.
4. Thick description meticulously describes the context of social action to evoke a sense of verisimilitude in the reader.
5. Thick description of social actions in context leads to a thick interpretation of said actions and promotes “thick meaning” of the finding.

As a result in Chapter 5, the stories of Inouye, Khadr and Arar were reconstructed at the level of events using thick description to describe, interpret and bring meaning to small slices of interactions, experiences or actions in context. Each story was presented in chronological order and focused on their life history, detention, withdrawal of rights, and attempt to challenge the state based on rights (Denzin, 1989). As mentioned, this exercise entailed using multiple sources of documentary and archival evidence and other sources of “relatively uncontested data” so as to facilitate a triangulation of evidence (Stake, 1995: 123; Yin, 2009; Creswell, 2007).

Within-Case Analysis

After using thick description to reconstruct the stories of Inouye, Khadr and Arar, a two-pronged strategy of “within-case analysis” was used (Creswell, 2007). This strategy entailed a brief description and analysis of the historical context of each case as well as a search for relevant themes within each case using the philosophical and theoretical framework of this thesis (Creswell, 2007; Stake, 1995; Yin, 2009).

The analysis of “the context of the case” (Merriam, 1988) emphasized the position of each case relative to the broader history of citizen-rights in Canada. The Inouye case occurred in the Era of Implied Rights, while the Khadr and Arar cases occurred in the Charter Era. Hence, in the pre-Charter case of Inouye there is a different expectation as to the rights he (or any other citizen) would have been entitled to than in the Charter cases of Khadr and Arar. This analysis also positioned each of these cases within their *immediate* contexts. The Inouye case occurred within the context of the state of emergency that was declared during WWII after the 1941 bombing of Pearl Harbour, and the Khadr and Arar cases occurred within the context of the state of emergency declared after the events of 9/11. Positioning each case within their immediate context helped me to reflect on the effects of citizen-rights on the state of exception (and the effects of the state exception on citizen-rights) at different points of time in the history of citizen-rights in Canada.

I used the theories and concepts explored in Chapter 1 and 2 of this thesis to guide my analysis of the relevant themes in each case. In order to develop the issues and themes pertinent to each case, information from each case was sorted into “large clusters of ideas” which was then used to structure the analysis of each case (Stake, 1995). This organization of information into themes in turn provided a framework from which to articulate and clarify the theories and concepts explored in the thesis. In this way within-case analysis made it possible to take into account the particular factors that shaped each “story” while taking into account their relationship to the history of citizen-rights as a whole. As a result of this, the analysis of themes was inevitably “rich in the context of the case” (Creswell, 2007: 75).

Cross-Case Analysis

After using thick description to reconstruct the stories of Inouye, Khadr and Arar, as well as the two-pronged strategy of within-case analysis of contexts and themes, a three-pronged cross-case analysis was conducted (Creswell, 2007; Yin, 2009). First, a thematic and contextual analysis was carried out across cases. This analytic strategy entailed the examination of themes across cases in order to discern themes common to and unique to each case (ibid.). Second, “pattern matching logic” was used to compare “empirically based patterns” against patterns predicted within theory (Yin, 2009). Since the sovereign ban necessitates the withdrawal of citizen-rights and thereby exposes bare life to the possibility of *unlimited* violence at the hands of those exercising sovereign power, as argued, Agamben’s predicts that citizen-rights have *no* effect against sovereign power within the state of exception. Using pattern-matching logic, this thesis examined the stories of Inouye, Khadr and Arar to determine the effects (if any) of citizen-rights against sovereign power exercised within the paradoxical state of exception. By allowing this investigation to test for literal replication, the use of pattern matching logic has the potential to enhance the internal validity of this study (Yin, 2009: 41). For instance, if Agamben’s prediction that citizen-rights have no effect against sovereign power within the state of exception holds true across all cases then—assuming that there are no additional threats to validity such as rival explanations—it would be fair to make a (careful) assertion that *this* study had achieved literal replication. Third, a “simple time-series analysis” was conducted in order to compare and contrast the effects of implied rights relative to Charter rights on sovereign power exercised within the state of exception using the retrospective and prospective categories of radical phenomenology

(Vahabzadeh, 2003). What changes occurred as a result of the transformations that occurred between pre-Charter and post-Charter Canada? The sampling strategy of this investigation facilitated this analytic strategy which entails searching for a “match between the observed (empirical trend) and [...] a theoretically significant trend specified before the onset of the investigation” (Yin, 2009:145). The story of Kanao Inouye facilitated an analysis of the effects of implied rights on sovereign power exercised within the state of exception, while the stories of Khadr and Arar facilitated an analysis of the effects of Charter rights on sovereign power exercised within the state of exception.

Assertions and Generalizations

In the final interpretative phase of this study (Chapter 6), assertions, generalizations and “lessons learned” from this investigation were formulated (Lincoln and Guba, 1985). An attempt was made to “make sense of the data” and interpret the data “couched in terms of personal views or in terms of theories or constructs in the literature” (Creswell, 2007: 244). These assertions, in turn, facilitated the development of generalization about the cases in terms of the thesis’ theoretical framework as well as the broader history of citizen-rights in Canada thereby enabling this thesis to answer its research questions in the Discussion and Conclusion.

Chapter 4: Three Eras of Citizen-Rights

Guided by Schürmann's epochal theory, this chapter offers an understanding of the historical-discursive-legal transformations the concept of citizen-rights in Canada. The reader already knows that while Schürmann's epochal theory captures the transmutations of the epochs within the history of metaphysics in terms of "constellations of truth" guided by hegemonic ultimate referents, which Schürmann calls "fantasms," my reading of the history of the citizen-rights here cannot, technically speaking and to be precise, be an "epochal" theory. That is why I call the following periods "eras" rather than epochs. As such, the distinction between an *epoch* and an *era* is that the first encompasses the second, and while the principle governing an epoch has to be extracted interpretively from the dominant "constellations of truth," the principles in an era are empirically measurable and legally decipherable. The three eras identified below still take place within the modern epoch of western humanity.

I propose to understand the historical-discursive-legal transformation of citizen-rights across three eras: (1) **The Era of Implied Rights** (1867-1959); (2) **The Bill of Rights Era** (1960-1981) and (3) **The Charter Era** (1982-present). The dates separating these eras are not absolute historical points but rather the symbolic points in history marked by the passing of specific laws or the like. In doing so, I attempt to show the crucial role that extraneous factors (such as the experience of injustice) have played in the rights revolution that culminated with the Charter as well as the role that the Charter played in re-establishing the hegemony of federal government that had been in retreat since the sixties. Although each era has a specific strategy for protecting rights, each era

also contains a desire for more effective ways to protect rights, which, in turn, reflects changing practical values about rights in an increasingly culturally pluralistic society. The implication is that the Canadian Bill of Rights emerged as an attempt to overcome the deficiencies of implied rights in the first era, just the Charter can be viewed as an attempt to overcome the deficiencies of the Canadian Bill of Rights. In this way, we can also think about the possibilities for protecting citizen-rights in a post-Charter Era. In what follows I describe the structure of the constitution of Canada which frames my presentation of the history of citizen-rights in Canada.

Context: The BNA Act and the Structure of the Government of Canada

The 1867 British North America Act (BNA Act) established the Dominion of Canada as constitutional monarchy administered by a federal system of parliamentary system of responsible government (Cairns, 2005). In a constitutional monarchy a monarch is designated as head of state and acts within the parameters of a constitution (McMenemy, 2001). Hence, in Canada, a sovereign—Queen Elizabeth II—represented by the Governor General acts as head of state and an elected Prime Minister acts as head of Government (ibid.).

Sections 91-95 of the BNA Act distributes powers between the two levels of government (federal and provincial) and thereby restricts the legislative powers of Parliaments (Hogg, 2003). Specifically, provincial legislatures can only enact legislation in those areas reserved to them by the BNA Act (e.g., education). This means that any area outside the jurisdiction of the provinces falls under the purview of the federal Parliament (Dunn, 1995).

The BNA Act also divides power between, and specifies the governing responsibilities of, the Legislative, Judicial and Executive branches of government (ibid.): The purpose of separating powers between the three branches of government is to prevent to the concentration of power and protect political liberty (Hogg, 2003). Hence, the assumption is that each branch is confined to the exercise of its own function and cannot encroach upon the functions of the other branches (ibid.).

Legislative Branch: Sections 17-52 of the BNA Act vests total legislative power in a Parliament comprised of the Monarch (Crown/Queen), the Senate (Upper House) and the elected House of Commons (Lower House), who are charged with enacting legislation and policy in accordance with the “Peace Order and good Government of Canada” (s. 91 BNA Act) (McMenemy, 2001; Hogg, 2003).

Judicial Branch: Sections 96-101 of the BNA Act vest the Courts with the power to adjudicate disputes, interpret and apply the law and to pass judgment on the constitutionality of statutes and executive action (ibid.). The Court system in Canada reflects the division of powers between the provinces and the federal government. Each level of government has their own lower courts (federal court, provincial court) and courts of appeal (federal court of appeal and provincial court of appeal). The Supreme Court of Canada, comprised of nine appointed judges, is the final court of appeals in Canada. Its decisions are binding on all courts in Canada and thus, since 1949 when appeals to the Judicial Committee of the Privy Council ended, this institution has been empowered with the task of deciding the appropriate interpretation and application of law in Canada (McMenemy, 2001).

The Executive Branch, comprised of the Queen, the Governor General, the Privy Council and the Cabinet is established by sections 9-16 of the BNA Act. Besides administering and implementing policy, one of the primary functions of the Executive is to exercise the Royal Prerogative, a power whose specific use is “inherently difficult to catalogue” (Lagassé, 2012: 161). The BNA Act allows the Crown *vis-à-vis* the Executive to retain the Royal Prerogative (a.k.a. quasi-judicial prerogative powers) in areas ranging from the prerogative of mercy (which allows ministers to grant pardons and clemency), to the right to declare war or peace and national security (Lagassé, 2012). In other words, the Royal Prerogative is an important source of Executive power as defined in the Constitution which are recognized by common law as *arbitrary powers* belonging to the Crown that developed from the recognition of the rights and duties of early English monarchs and feudal lords of the Medieval era (Lagassé, 2012; Dussault and Borgeat, 1985; Richardson, 1941). On paper, the prerogative powers of the Crown are unimpressive. They can be “abolished, displaced or limited by parliamentary statute,” “constrained by convention” and their exercise is subject to judicial review to ensure their consistency with Charter rights (Lagassé, 2012: 158). Hence, some argue that the Royal Prerogative is a “residue of monarchical rule” that has been gradually eroded by legislation and the protection rights (Hogg, 2003). However, in practice, Courts have the tendency to enhance rather than check the prerogative power in times of crisis (McMenemy, 2001; Lagassé, 2012). Indeed, as Mansfield observes, the doctrine of Executive power is constituted by ambivalence and thus “the real, practical, informal executive [...] is far more powerful than the supposed, theoretical formal executive” (1993: 4).

(1) The Era of Implied Rights (1867-1959)

Although the BNA Act did not include a written bill of rights, in the Era of Implied Rights the Canadian Supreme Courts, created case law which strengthened the theory that certain basic, unwritten, civil liberties, were protected in Canada's Constitution (Tarnopolsky, 1971; Gibson, 1966). Because it was inconsistent with the doctrine of parliamentary supremacy, the idea that a "hidden bill of rights" was implied "in the language of the British North America Act" was politically unpopular in this era (Gibson, 1966: 498). Advocates of the implied bill of rights, however, argued that the foundation of implied rights (e.g., fundamental freedoms of speech, religion, association and assembly) was provided in the preamble of the BNA Act, which stipulates that the Constitution of Canada is "similar in Principle to that of the United Kingdom" (1867). In this context, the phrase "similar in Principle" means that Canada has a parliamentary system of democratic government, acting under the influence of freedoms of speech, religion, association and assembly (McLachlin, 2008; Gibson, 1996; Hogg, 2003). Hence, according to the theory of implied rights because the fundamental freedoms of speech, religion, association and assembly are essential to the functioning of democratic institutions, they must be implicitly guaranteed as unwritten rights (McLachlin, 2008). In other words, any legislation that hampered the capacity of the citizen to speak, debate, assemble or associate freely might be rendered incompatible with Canada's democratic system of parliamentary government by the courts (*ibid.*). In recognizing the existence of implied rights, the courts overwhelmingly relied on the restrictive interpretation and power allocation techniques to declare legislation infringing implied rights invalid (Tarnopolsky, 1971).

The Restrictive Interpretation Technique

The restrictive interpretation technique is based on the “principle of statutory interpretation”—derived from the division of powers between the Legislative and Judicial branches of government established in the BNA Act—which instructs judges to recognize implied civil liberties when the wording of legislation is *unclear* (Tarnopolsky, 1971). During the era of implied rights, the court only relied on the restrictive interpretation technique to recognize implied rights in two decisions (Tarnopolsky, 1971; Hogg, 1984). First, in *Boucher v. the King* (1951), the judiciary reviewed a criminal charge of seditious libel against a Jehovah’s Witness who circulated leaflets slandering the Quebec government for religious suppression. Because the Criminal Code defined sedition vaguely, the Supreme Court interpreted the offense narrowly, Boucher was acquitted and the implied rights of free speech and religion received recognition thereby restricting the doctrine of parliamentary supremacy. Second, in *Noble and Wolf v. Alley* (1951), the Supreme Court reviewed a restrictive covenant that limited the ownership of a lake Huron cottage to “persons of the white or Caucasian race.” Because the proof of a person’s membership in a racial group was determined to be too vague to define, the Supreme Court ruled that the restrictive covenant was invalid and indirectly recognized a right later included in the Canadian Bill of Rights and the Charter.

The Power Allocation Technique

The Canadian Supreme Courts also advanced implied rights using an interpretative principle derived from the tradition of legal federalism: the power allocation technique (Tarnopolsky, 1971; Gibson, 1966). The technique allows the courts to declare disputed

legislation *ultra vires* (beyond the jurisdictional powers of the Legislative body enacting it as defined by s. 91-92 of the BNA Act) and therefore invalid and of no legal consequence (Gibson, 1966). For instance, if provincial legislation encroached into fundamental freedoms of speech, religion, association or assembly (an area reserved to the federal government by the BNA Act) the courts could declare the law to be *ultra vires*. Since provincial legislation that encroached on the fundamental freedoms could be declared unconstitutional, the courts were therefore able to confirm them as implied rights (McLachlin, 2008). However, the judiciary only relied on the power allocation technique to strike down government action restricting implied rights in a few cases (Tarnopolsky, 1971). In *Union Colliery of British Columbia Ltd. V. Bryden* (1899) the Privy Council deliberated the Coal Mines Regulation Act (1877), a British Columbia statute that banned the employment of “Chinamen” or any “person unable to speak good English” in “any position of trust or responsibility” (*Union Colliery v. Bryden*, [1899] A.C. 580). The Privy Council applied the technique of power allocation in its reasoning and found that the Coal Mines Regulation Act encroached on federal power concerning naturalization and aliens. Consequently, the Privy Council declared the Coal Mines Act *ultra vires* and recognized a right later included in the Canadian Bill of Rights and the Charter and limited Parliamentary supremacy. Second, in the *Reference Re: Alberta Statutes* (1938) the Supreme Court used the power allocation technique to declare a provincial law, restricting the press by obliging newspapers to provide the government with a “right to reply” to criticism of its policies *ultra vires*. In doing so, the Supreme Court also recognized and broadened the implied right of free speech and restricted Parliamentary supremacy. Third, in *Saumur v. Quebec* (1953), the power allocation

technique was used by the Supreme Court in its review of a municipal by-law prohibiting the distribution of religious pamphlets without the approval of the Chief of Police. As a consequence, the municipal bylaw was declared *ultra vires* on the grounds that the censorship of political speech is inconsistent with democratic government and the distribution of powers in the BNA Act. Consequently, the Courts recognized and expanded the implied right of free speech. Finally, in *Switzman v. Elbling* (1957), the Supreme Court held that the Quebec Padlock Act (which authorized the padlocking of any house used for the distribution of Communist or Bolshevik texts) amounted to an exercise of criminal law power, which thereby exceeded the legislative jurisdiction of Quebec Parliament. Through the power allocation technique the Supreme Court declared the Padlock Act *ultra vires* and broadened the implied rights of free speech, assembly, association and religion.

However, the overall effectiveness of judicial reliance on the techniques of restrictive interpretation and power allocation techniques to declare legislation which infringed implied rights to be invalid was marginal and hence the recognition of implied rights was uncertain. On the one hand, the restrictive interpretation technique could not be used “where the statute, or the delegated legislation under it, is clear and unambiguous” (Tarnopolsky, 1971: 441). On the other hand, the power allocation technique was also inapplicable where the disputed legislation “was clearly within the jurisdiction of the legislature” (i.e. *intra vires*) (Tarnopolsky, 1971: 441). In *Cunningham v. Tomey Homma* (1903), for example, the Privy Council declared a British Columbia statute disenfranchising any Japanese person *intra vires*. Although federal government had exclusive jurisdiction over naturalization and aliens, the Privy Council reasoned that

since naturalized citizens were not automatically entitled to the right to vote in provincial elections, the provinces could determine voter eligibility in provincial elections (Magnet, 2003). Hence, as the legislation fell within the proper jurisdiction the Privy Council upheld it. This judgment had the effect of restricting a right recognized in the Canadian Bill of Rights and the Charter and strengthening the power of Parliamentary supremacy.

Although it is important not to examine the past through the lens of the present, the case of *Cunningham v. Tomey Homma* (1903) is interesting. It reveals how the highest courts upheld legislation that express attitudes we now acknowledge as racist and discriminatory in our expansive rights legislation. In the absence of a written bill of rights, when a law abridged an implied right the issue for the courts was not whether legislation infringed rights but that of proper jurisdictional power or proper statutory interpretation. In effect, Parliament—not the Courts—was the ultimate arbiter of what was to be considered a legitimate limit on an implied right. The upshot was that virtually no limit was placed on what Parliament or Provincial Legislature acting within its constitutional jurisdiction *could* do. Hence, if a statute infringed an implied right, and the disputed statute was (1) clear and unambiguous and/or (2) fell within the proper legislative jurisdiction (*intra vires*), then citizen would not have access to legal redress *in* the courts (Hogg, 1984).

Although there is no reason why the limited and uncertain protection of citizen-rights during the Era of Implied Rights should lead to a history of internment, it is important to reflect on internment in Canada before attending to the Bill of Rights Era. As the reader already knows, Agamben provides a framework for understanding the causal mechanisms and processes that made the internment of Canadian-citizens possible:

(1) a threat to the external security of the state is transformed into an internal risk; (2) the other is rendered an enemy of the state; (3) their citizenship is withdrawn; (4) the actor is included in the *polis* as an actor without rights (*homo sacer*); and (5) bare life is abandoned in the camp where it is exposed to unmediated sovereign power. Following WWII, the experience of the sheer violence of sovereign power (of injustice) paradoxically became one of the rallying cries in the movement for universal human rights. Hence, the right to equal protection before the law—regardless of identity—is protected in both international rights covenants (e.g. The Universal Declaration of Human Rights) and national rights covenants (e.g., The Canadian Bill of Rights) even though citizen-rights remain precarious in that all Constitutions permit their suspension in times of crisis.

Canada's History of Internment

On August 22, 1914 Parliament of Canada enacted the War Measures Act which functioned under the “Peace, Order and good Government” clause in the BNA Act as emergency legislation enabling rule by Order in Council (Tenofosky, 1989; Marx, 1970). The Act empowered the Cabinet (Prime Minister and Ministers) to assume sweeping emergency powers in the event of a real or imagined war, invasion or insurrection; suspended normal parliamentary procedure; nationalized the economy and enforced censorship (McMenemy, 2001). In other words, the Act gave the Cabinet the discretionary authority to establish a “constitutional dictatorship” and pass any regulations it deemed necessary for the security, defence, peace, order and welfare of Canada (e.g., censorship, preventative arrest, detention and deportation) (Marx, 1970:

14). As a consequence, during WWI the War Measures Act was used to register, intern and in some cases deport Ukrainians, Austrians, Hungarians and Germans as enemy aliens (Tenofosky, 1989).

After the attack on Pearl Harbor on December 7, 1941 the prevailing discrimination of Japanese Canadians was legalized as fear towards the enemy-aliens of the day culminated with the erosion of their implied rights (Miki, 2005; Sunahara, 1991; Adachi, 1991). Under the auspices of the War Measures Act, the Government of Canada enacted the Defence of Canada Regulations which authorized the refusal of *habeas corpus* and the right to trial, “internment,” confiscation of property, restrictions on political and religious associations, censorship, as well as the indefinite detention of any actor jeopardizing the safety of the state (ibid.). Communists, German Canadians, Italian Canadians and Japanese Canadians—who were viewed, as enemy-aliens—were indefinitely detained under the War Measures Act and the Defence of Canada Regulations (Cairns, 2005; Dhamoon and Abu-Laban, 2009).

In justifying the withdrawal of their rights, the executive, legislative and judicial branches reasoned that the suppression of the implied rights of enemy-aliens was necessary (1) given the dire nature of the crisis facing the nation at war and (2) to preserve the very rights constrained (Marx, 1970; Adams, 2009). From the standpoint of Canadian constitutional law, even the unconditional surrender of Germany and Japan in 1945 did not curtail executive power. Having institutionalized the expansive executive powers of a constitutional dictatorship, the Cabinet continued to govern in peacetime as they had during the war (Adams, 2009). Post-war, the National Emergency and Transitional Powers Act, for instance, extended the legality of wartime regulations and

granted the Cabinet discretionary authority in response to an ongoing national emergency. Using executive Orders in Council, the reigning Liberals mustered the constitutional authority to extend the prohibition of Japanese Canadians from residing in coastal British Columbia, from working in the fishing industry and from voting long after the war's end (Miki, 2005).

The penultimate act of the WWII rights crisis began in 1944 when Prime Minister King unveiled a postwar deportation policy to the House of Commons (Adams, 2009), which authorized the forcible deportation and “voluntarily repatriation” of approximately 4,000 Canadians to Japan (Sunahara, 1981: 143). After the war, King explained, “loyal” Canadians would be permitted to settle in Central and Eastern Canada, while “disloyal” enemy-aliens would be “deported” to Japan (Sunahara, 1981; Miki, 2005). The majority of those that had consented to voluntary repatriation were persuaded to do so near the close of the war following a government tour of the detention camps (Adams, 2009). This tactic was so effective that when Japan capitulated nearly ten thousand Canadians had agreed to voluntarily repatriate to Japan (Sunahara, 1981; Miki, 2005; Adams, 2009).

When controversy arose as many Canadians attempted to rescind their voluntary repatriation requests, the rights crisis finally reached a crescendo (Adams, 2009). In time, the Japanese deportation came to be regarded as an indictment of wartime constitutional practices, offered a subtle challenge to the assumption of unchecked executive power during times of war, the doctrine parliamentary supremacy which had facilitated the expansion of executive power under the War Measures Act and became a rallying cry for the right to equality before the law (Adams, 2009; Cairns, 2005). In the fall of 1945, the controversy over the looming Japanese deportation gained momentum. On the grounds

that the proposed deportation violated the Universal Declaration of Human Rights as well as the implied bill of rights, the Co-operative Committee on Japanese Canadians (CCJC) challenged the constitutionality of deportation at the Supreme Court (Miki, 2005).

In its defence, the Government of Canada used the principle of state sovereignty and the War Measures Act as the legal basis for the deportation of aliens and citizens (*CCJC v. Attorney General of Canada*). The Government of Canada also reached back to the *Chemicals Reference Case*, where the Supreme Court of Canada held that executive Orders in Council advanced under the federal emergency power (the War Measures Act) had the identical legitimacy and constitutionality of any other act of Parliament to defend its actions (Adams, 2009). Although Justice Rand of the Supreme Court deemed the deportation of “natural born British subjects” as an act of “unrecognized legal character” and therefore not a power authorized by the War Measures Act (*Japanese Reference*, at para. 290), on appeal the Judicial Committee of the Privy Council disagreed and upheld the deportation orders in their entirety on the grounds that the legislation was both unambiguous and *intra vires*. In effect, the Privy Council ruled that the sovereignty of Parliament was more important than the rights of individuals during times of crises (*CCJC v. Attorney General of Canada*, 1947). Fortunately, the federal government lost much of its political will regarding deportation and plans to carry it out were abandoned in time (Adams, 2009; Sunahara, 1991). However, the decision of the Privy Council in the *Japanese Reference* was viewed as providing “constitutional cover for thousands of other wartime orders passed under the War Measures Act and continued under the National Emergency Transitional Powers Act” (Adams, 2009: 152). Indeed, in a

Reference as to the Validity of Wartime Leasehold Regulations, the Supreme Court of Canada found that:

Parliament, under powers implied in the Constitution may, for the peace, order and good government of Canada as a whole, in times of national emergency, assume jurisdiction over property and civil rights which under normal conditions are matters within the exclusive jurisdiction of the provincial legislatures. When Parliament has enacted legislation declaring that a national emergency continues to exist and that it is necessary that certain regulations be continued in force temporarily in order to ensure an orderly transition from war to peace, unless the contrary is very clear, which in this case it was not, there is nothing to justify a contrary finding by the Court. (1950: 125)

These decisions tell us that, in the era of implied rights, no limits could be placed on legislative action that was deemed necessary for national security. The roots of the failure to engage with the consequences of war for civil liberties can be traced back to a number of causes. Some of these causes related to the ubiquitous culture of insecurity strengthened by the crisis of war, and others owed to the limited strength of the implied bill of rights relative to parliamentary supremacy and the particularities of Canadian constitutional thought and culture (Adams, 2009; Marx, 1970). In this context where confidence in the government was at stake, the belief that a written Bill of Rights would strengthen “the power of the judiciary to protect civil liberties” and universalize the principle of the equality of all citizens before the law captured the popular imagination (Tarnopolsky, 1971: 442). In precisely this way, the history of internment connects to the Canadian Bill of Rights.

(2) The Canadian Bill of Rights Era (1960-1981)

The denial of rights and the brutalities that came to light in the aftermath of WWII especially in relation to the Holocaust, revealed the shortcomings of the rule of law in the modern nation-state as well as the vulnerability of democratic institutions to their own

power in times of crisis (Cairns, 2005). Inconceivable horrors and transgression of the foundational norms of civil society were not only the consequence of the force of law exercised within the context of a constitutional dictatorship, but also the result of the exercise of Executive power that was upheld by the courts and legislatures alike (Weinrib, 2001). As a result, international rights legislation acknowledging the inherent dignity of the person surfaced as the privileged means by which to secure the basic structure of constitutional democracy and the governments of post-War Canada followed suit in an attempt to redeem themselves (McLachlin, 2008). In this context, as the desire for recognition gained normative weight, the traditional view that a rights document was unnecessary fell into disrepute and the demand for a written guarantee of rights gained momentum (Tarnopolsky, 1971; Cairns, 2005). This shift was almost unthinkable in the period leading up to the war when advocates of written rights were a distinct minority (Cairns, 2005). During this time, the quality and quantity of rights protected proliferated rapidly alongside post-War rights legislation. The provincial legislatures recognized rights shortly after the war (Clément, 2008). In 1947, for instance, Saskatchewan became the first North American jurisdiction to enact rights legislation and over the next twenty-five years, the remaining provinces followed suit enacting their own bills of rights (to protect citizens from governments breaching their rights) as well as human rights codes (to protect individuals from infringement of rights by private actors) (McLachlin, 2008). However, although human rights codes provided effective rights protection in the private sector, statutory bills of rights did not fare so well (*ibid.*). This difficulty is most evident in relation to the Canadian Bill of Rights (1960).

On August 4, 1960, “An Act for the Recognition and Protection of Human Rights

and Fundamental Freedoms” (a.k.a. the Canadian Bill of Rights) was enacted by Federal Parliament in response to the demand for a written bill of rights (Tarnopolsky, 1971; Dunn, 1995). On paper the reach of the Bill was vast relative to the implied bill of rights. The Bill protected fundamental freedoms (i.e., freedom of speech, religion, the press, assembly and association), the rights of the accused (i.e., protections against arbitrary detention and imprisonment, the right to counsel, the right to be free from cruel and unusual punishment, the right to a fair hearing, the right to habeas corpus, etc.) and guaranteed the “right of the individual to equality before the law and protection of the law” (section 1[b]). The Statute also stipulated that every law in Canada should be constructed, applied and interpreted so as not to infringe on any rights unless Parliament declared that a specific legislation would function notwithstanding the Bill of Rights (section 2). However, because the Bill was flawed in several ways and these monumental achievements proved of little or no consequence in the short term (Dunn 1995; McLachlin, 2008; Hogg, 2003; Tarnopolsky, 1971; Cairns, 2005). First, the Bill only applied only to the federal government, which meant that the provinces were not bound by the Bill of Rights. Second, as the Bill lacked constitutional entrenchment, the federal government could always enact corrosive legislation that would erode, hinder or repeal rights protection. Third, due to its “quasi-constitutional status” the courts interpreted it narrowly which meant that unlike its successor the Charter, the Bill did not create new rights (McLachlin, 2008). Indeed, between 1960 and 1982 the Supreme Court of Canada only struck down legislation for breach of the Bill in the 1970 case of *R. v. Drybones*. In this case, section 94(b) of the Indian Act which prohibited “Indians” from becoming intoxicated off the reserve was invalidated by the Courts on the grounds that it violated

“the right of the individual to equality before the law and protection of the law”

(McLachlin, 2008; Hogg, 2003). Finally, the Bill lacked a remedies clause, which would have empowered the judiciary to identify infringements of rights and mandate the measures required to correct them. These failures gave birth to a new wave of reflection on the possibility of rights and forged a path towards the Charter.

(3) The Charter Era (1981-present)

As the shortcomings of the Canadian Bill of Rights came to light, a movement to entrench rights gained momentum and the Liberals began to campaign for an amendment of the Constitution under the direction of Pierre Elliot Trudeau (Tarnopolsky, 1981).

Charter advocates also had numerous rights abuses from the government to draw on: the internment of “enemy aliens” during WWI and WWII, the ambiguous status of indigenous peoples, the denial suffrage to different groups of people, etc. Such injustices were cited as justification for entrenching a rights-protecting instrument into the Constitution of Canada as well as for the Multicultural Policy introduced in 1971 (2008). Charter advocacy, moreover, had increasing salience in a context where “profound relaxation of immigration criteria in response to an anti-racist international climate fundamentally transformed the ethnic demography of the Canadian population” (Cairns, 2005: 181). Indeed, whereas between 1961 and 1971 $\frac{3}{4}$ of Canadian immigrants came from either Europe (69%) or the United States (6%), between 1981 and 1991 70% came from Asia (48%), Africa (6%) and the Caribbean, South and Central America (ibid.).

The political and legal crusade to patriate the Constitution and entrench the Charter began at the 1968 Liberal Leadership Contest when Trudeau described the “Just

Society” as one in which the rights of minorities would “be safe from the whims of intolerant majorities” (Trudeau qtd. in Graham, 1998: 16). Trudeau believed that a Just Society in Canada would only be possible when rights were entrenched in the Constitution thereby removing them from governmental interference (Tarnopolsky, 1981). Following decades of constitutional negotiations between the Federal and Provincial governments as well as a comprehensive consultation with the public on the Constitution, the federal legislature alongside every provincial legislature (except Quebec) called on the British Parliament to patriate the Constitution to Canada (Cairns, 2005; Tarnopolsky, 1981). When the Constitution was finally repatriated in 1982, the Canadian Charter of Rights and Freedoms as well as an amending formula was included in the Constitution Act (1982).

Although the Charter secures many of the same rights included in the Canadian Bill of Rights, it also contains several new rights including a broadened equality guarantee and guarantees of language rights, minority language education rights, multiculturalism, and “aboriginal” rights (McLachlin, 2007). According to Dunn, the Charter “explicitly corrected several perceived gaps in the previous Bill of Rights” (1995: 71). First, Charter rights are entrenched in the Constitution. Not only does this mean that all other legislation must comply with it, but as the supreme law of Canada, neither the Constitution nor the provisions contained within it may be repealed without navigating the extremely difficult process of constitutional amendment (Dunn, 1995). Second, unlike the Canadian Bill of Rights, the Charter applies to both the federal and provincial governments (s. 32). Third, the Charter contains a “remedies clause” (section 24.1), which empowers the courts to both identify infringements of rights *and* determine the

measures necessary to remedy the infringement. Fourth, section 51 of new Constitution (The Canada Act, 1982) directly responded to the issue of parliamentary supremacy evaded by the Bill of Rights stating that “any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect” (Dunn, 1995).

Bolstered by the constitutional entrenchment, the judiciary has given a broad and purposive interpretation to the rights and freedoms guaranteed in the Charter (Morton, 1987). Laws that are found to be inconsistent with the Charter can be rendered of no force or effect to the extent of that inconsistency by the courts (*ibid.*). This means that if the government does not comply with the Charter, then the judiciary can compel it to do so. At the same time, Charter rights do not displace the collective rights of a free and democratic society (McLachlin, 2007). Rather, section 1 of the Charter (“the reasonable limits clause”) Charter rights to any “reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society” (1982). Through an exercise of justification known as “the Oakes Test,” the courts can balance the individual rights of the Charter against societal needs (McLachlin, 2008). Hence, by entrenching the rights of every citizen and protecting them by removing justice from the Executive and Legislative branches of government and placing it in the hands of the courts, the Charter protects individual rights from government legislation that infringe rights. Thus, it involves a substantial shift of power from the Legislative to the Judicial branch of government (Tarnopolsky, 1981; Morton, 1987). By the interpretation of such phrases as “the right not be deprived [of certain rights] except in accordance with the principles of fundamental justice” (s. 7), “unreasonable search or seizure” (s. 8) and “equal benefit of

the law without discrimination” (s 15), courts can directly impose their views on social policy by striking down legislation which they determine to be odious to the vision of the just society upon which the Charter is based. Consequently, by expanding the power of the courts *vis-à-vis* judicial review, the Charter substantially limits the doctrine of parliamentary supremacy (ibid.).

The Possibilities for Justice in the Charter Era

As a consequence of the Charter, in recent years Canada has become a country viewed by other countries as a just society and a model at the forefront of promoting rights and justice upon which other countries have built and continue to build (Kruger et al, 2004; McLachlin, 2007). In the Charter Era, Canada is viewed as a country with an open immigration policy that welcomes immigrants and refugees regardless of ethnicity, race, religion or country of origin (Cairns, 2005; McLachlin, 2007). It emphasizes cultural plurality, democracy and the protection of rights as unique features of “the Canadian identity” (McLachlin, 2007). In the Charter Era, the rights of those detained by the state have been enhanced; the criminal justice has become fairer; the protections of minority language rights are strengthened and under the rubrics of equality and security of the person, a modest measure of accountability in the provision of health care is (more or less) guaranteed (Cairns, 2005; McLachlin, 2007).

However, in the days and weeks following September 11, 2001, the Canadian government quickly proposed a number of national security measures aimed at reducing the risk of future terrorist attacks on Canada. Thanks to the Charter, the government was faced with the delicate task of balancing collective security with Charter rights. Although

the government had many legal tools under the Criminal Code of Canada, the Emergencies Act, the Immigration Act and other statutes, it believed that it was necessary to create additional measures to ensure the security of the country. In the fall of 2001, Parliament enacted the Anti-Terrorism Act (Bill C-36), which permitted extraordinary wide-ranging powers to combat perceived terrorist threats. The Act contains provisions dealing with preventative detention, arbitrary arrest, investigative hearings, listing of alleged terrorist groups, suspension of the right to remain silent, and the principle of innocence until proven guilty (Dhamoon and Abu-Laban, 2009). While there was general support among the Canadian public for improved protections against future attacks, rights advocates voiced concern that too many Charter rights might be limited in the name of national security. Indeed, as Prime Minister Brian Mulroney acknowledged in the Japanese Canadian redress settlement, there is reason to think that as a general matter in times of crisis, security needs will be overestimated at the expense of rights (Miki, 2005). One of the facts of our time is that despite the lessons of history and despite the Charter, the Government of Canada has proven unable to prevent itself from repeating the same error time and again. It is in this context that the question of whether the Charter has had any effect on the state of exception takes on a special significance. It highlights not only the limits of Charter rights in relation to the state of exception and challenges the pervasive “Canadian human rights historiography” in which the Charter is understood as a document which symbolizes that Canada has overcome (*Überwindung*) the injustices of its past governments.

In light of Schürmann’s epochal theory, this Chapter has offered a historical periodization of citizen-rights in Canada. In doing so, it has shown that one of the

purposes of the Canadian Bill of Rights and the Charter is to limit sovereign and legislative powers, especially the sovereign's unique ability to suspend the citizen-rights of those rendered as enemies of the state. Moreover, this Chapter has also explained why, in times of perceived crisis, these rights documents have not limited sovereign/executive power. To shed light on this problem, Chapter 5 and Chapter 6 will describe and interpret the cases of Inouye, Khadr and Arar in light of the theoretical and philosophical framework of this thesis. As the case of Inouye occurs within the Era of Implied Rights and the cases of Khadr and Arar occur within the Charter Era, these cases will allow this thesis to draw some provisional conclusions about the effects citizen-rights on the state of exception. This thesis did not explore a Bill of Rights Era case not only because the Bill of Rights was only used to strike down legislation infringing rights in one case (*R. v. Drybones*). Because the scope of a Master's thesis is limited, it was necessary for me to make certain decisions regarding the selection of cases. The three cases selected were sampled in part as a result of the connections between each *singular* case. The Inouye and Khadr cases are connected because they are the only Canadians to have been prosecuted for war crimes. The Khadr and Arar cases are connected because Khadr's (false) identification of Arar as an al Qa'ida associate to agents of CSIS and DFIAT—a product of torture—was causal in the U.S. decision to extraordinarily render Arar to Syria. Because he was redeemed and compensated by the Harper government, the Arar case, moreover, provides an interesting contrast to the pre-Charter case of Inouye and Khadr both of whom continue to be viewed as enemies in Canadian case law and by the Canadian public. A more comprehensive study of the history of citizen-rights in relation to the state of exception, however, could study, for instance, the October Crisis since

some of the actions taken by the Trudeau government (e.g. warrantless searches, arbitrary arrest and the seizure of property) infringed rights contained within the Canadian Bill of Rights.

Chapter 5: Contexts and Cases

Chapter 5 presents the stories of Inouye, Khadr, and Arar and describes the immediate contexts in which they take place. I begin with a description of the context of Inouye's case followed by the story of Inouye. Next, I describe the context of the Khadr and Arar cases and present their stories.

The Context of Kanao Inouye's Story

The “surprise” attack on the American Naval Base at Pearl Harbour by the Imperial Japanese Navy on December 7, 1941 inflamed decades old fear and resentment towards the Japanese living in Canada as citizens or nationals (Adachi, 1976; Miki, 2005; Granastein and Johnson, 1988). On that same day, Order in Council P.C. 9591 authorized under the War Measures Act required all Japanese nationals (and those naturalized after 1922) to register with the Registrar of Enemy Aliens (Sunahara, 1991). By December 16, 1941 all persons of Japanese origin (regardless of their citizenship status) were expected to register with the Registrar of Enemy Aliens. As early as February 26, 1942, Canadian officials were authorized by the Minister of Justice to warehouse approximately 21,000 people in a livestock building (Conklin, 1996). Under Order in Council P.C. 365, all “persons of the Japanese race” were detained and transported by train to be housed in “ghost towns, chicken coops, and granaries on the Prairies, work camps along the highways and railways, and, if one objected to any of the above, in ‘internment camps’ surrounded by barbed wire and armed guards” (Conklin, 1996: 228). Their property (vehicles, personal possessions, homes, businesses) was confiscated, they were excluded from the “protected area” covering 100 miles inland from the West Coast (Order in

Council P.C. 365) and their movement, communications, associations, speech and expression were regulated and controlled under Order in Council P.C. 1486 (Sunahara, 1981; Miki 2004). Shortly thereafter, the British Columbia Security Commission (BCSC) was instituted to oversee the evacuation and resettlement process (Order in Council P.C. 1665). The BCSC kept extensive records on the enemy-aliens that became pivotal evidence against the government in the National Association of Japanese Canadian's movement for redress (Roberts-Moore, 2001; Miki, 2005; Sunahara, 1991). These records revealed, for example, how the Office of the Custodian of Enemy Property exercised their responsibility over the property of Japanese Canadians: by liquidating any and all assets confiscated pursuant with Orders in Council P.C. 2483 and P.C. 469 (Sunahara, 1991; Roberts-Moore, 2001). On December 15, 1945, internees and detainees were given the option of either "relocating" "East of the Rockies" or being "repatriated" to Japan (Order in Council P.C. 7335). Although more than 10,000 internees "voluntarily" requested "repatriation," on account of mass starvation in post-Hiroshima-Nagasaki Japan, only 3,964 detainees actually emigrated (Conklin, 1996; Roberts-Moore, 2002; Miki, 2005; Adams, 2009). Four years after being implemented, the evacuation and relocation program was cancelled and the former enemy-aliens became citizens of Canada whom enjoyed all the entitlements, privileges and protections offered by citizenship (ibid.). Although to this day some scholars maintain that "there was a credible—if limited—military threat into 1943" (Granastein and Johnson 1988: 119), the *interpretation* most commonly accepted today is that the Canadians of Japanese ancestry living on the West Coast were not a threat to national security in the period leading up to internment. Inouye's case needs to be understood within this narrative of evacuation,

homecoming and redress as well as within the context of the broader history of citizen-rights in Canada.

Kanao Inouye

Kanao Inouye, the youngest of five children and only son of Japanese born parents Mikuma and Tadashi Inouye, was born in British Columbia in 1916 (Government of Canada, 2008b). Tadashi was born in Yokohama, Japan on October 16, 1883, emigrated to British Columbia, Canada in 1905 where he was employed at the Arrow Lakes Lumber Company until 1916 when he enlisted with the 172nd Battalion in Vernon, British Columbia (Government of Canada, 2008b; Adachi, 1991). During the Great War, Tadashi served overseas with the 47th Battalion of the Canadian infantry, was awarded a military medal for “bravery in the field” and ran a profitable import/export business after the WWI until his death in 1926 (ibid.).

Not much is known about Mikuma Inouye except that her father Chotahara Inouye was President of Keio Electric Tramways, member of Japan’s Parliament and House of Peers, director of at least thirty companies and president of Meiji and Nippon universities (Government of Canada, 2008a; 2008b). Thanks to Chotahara’s fortunes the Inouye family, unlike many families of Asian descent at the turn of the century, found relative financial security in their new homeland. Kanao immigrated to Japan on August 24, 1936 after graduating from Vancouver Technical High School that same year (Government of Canada, 2008b; Horne, 2005; Adachi, 1991). However, as a *nisei* (the child of Japanese born immigrants), Kanao was viewed suspiciously as a foreigner in Japan and dreamt of a homecoming to Canada (Government of Canada, 2008b).

Kanao temporarily resided in Chotahara's home while he pursued higher studies at Waseda University in Japan (ibid.). Kanao left Waseda University in 1938, and enrolled in *Aiko* Agricultural School in April of 1940 until May of 1942 when he was conscripted to the Japanese Imperial Army as a civilian interpreter (Government of Canada 2008a, 2008b). Following brief training, Kanao was sent to the *Sham Shui Po* prisoner of war camps in Hong Kong where he was stationed as the warden of Canadian prisoners of war of Canadian military contingent "C" Force (Horne, 2005; Adachi, 1991). In September of 1943, Kanao was transferred to the Japanese Home Islands (Singapore) and stationed at the Headquarters of the Osaka 4th Division—a military unit principally known for its involvement in the Mukden Incident of 1931. During this time he allegedly received training from the *Kempeitai* (military police branch of the Imperial Japanese Army) (Government of Canada, 2008b). Kanao was transferred to Osaka, Japan with the 4th Division in January of 1944 where he worked as a sales associate for steelworks conglomerate IWAI & Company (ibid.). In June of 1944, Kanao was transferred to Hong Kong where he was stationed at *Kempeitai* headquarters (ibid.). The following year, in February of 1945, Kanao was discharged from the *Kempeitai* and began work as a sales associate for *Kuwada & Company* until August of 1945 when, on the heels of Japanese capitulation, Kanao was apprehended by liberated Canadian POW's in Kowloon and arrested for war crimes (ibid.). As Kanao was born in Canada and therefore a British subject, he was tried by a British Military Tribunal for war crimes.

According to the "Case Notes of Kanao's War Crime Trial" at the Hong Kong War Crimes Trial Collection, Kanao was charged with three war crimes "for alleged participation in torture and maltreatment of persons in detention, during his service as

Interpreter in the Prisoner of War Camp Head Quarters” (B: 2). First, it is alleged that on December 21, 1941 Kanao “assaulted Capt. J.A. Norris of the Winnipeg Grenadiers, Canadian Army, by beating him in full view of the Canadian prisoners of war” and verbally humiliating him (ibid. p., 1 and 3). Second, it is alleged that on December 21, 1941 Kanao “assaulted Major F.T. Atkinson, Royal Rifles of Canada, Canadian Army, by kicking him in full view of the Canadian Prisoners of War” and verbally humiliating him (ibid. p., 2-3). Third, based on testimony given by several witnesses it is alleged that between June 15 and November 30, 1944 Kanao “ill-treated” “civilian residents of Hong Kong under arrest” (ibid. p., 2). Witnesses testified that those who had been tortured (beating, whipping, burning, water torture, aero plane torture) “were either severely injured or died soon after” (ibid., p. 3). However, “in its closing submission, the Prosecution acknowledged some of the difficulties in attributing the death of certain civilians as being a logical consequence of the ill-treatment inflicted by the Accused” and remained ambivalent as to whether Kanao actually participated in torture or was merely present while it occurred (ibid. p. 3).

In relation to the first and second charges, Kanao’s lawyer argued that he was compelled to “obey the orders given to him by his superior [Lt. Sakaino]” and thus that “he could not be held primarily responsible as he only followed orders. He also asked the Court to remember the true nature of the Japanese system—how difficult it was for people who were caught in the system to revolt against it” (ibid., 3). In relation to the third charge, his lawyer argued that although some of the civilians that had been arrested eventually died, the “person who had held them in custody should bear responsibility” (ibid.). His lawyer also countered the third charge on that grounds (1) that evidence

against Kanao for this particular charge was insufficient, (2) that “some witnesses actually acknowledged the kindness and help of the accused” and (3) that Kanao was prevented from calling any witnesses of his own (ibid.).

On May 27, 1946 Kanao was found guilty of all charges (with one caveat) and sentenced to death by hanging. In relation to the third charge, Kanao was only found guilty of ill-treating “civilian residents of Hong Kong under arrest [...] resulting in the physical sufferings of Enrique Lee, Mrs. M.V. Power, Mr. R.P. Chilote, Dr. V.N. Atienza, Mr. A.E.P. Guest, Mr. G. Sang, Mr. Mohd Yousif Khan, Lam Sik” not murder (ibid. p., 5). According to Roy Ito, who had been in attendance at Kanao’s trial as an interpreter, shortly after the verdict and sentence were handed down “public protests against the severe punishment poured into the office of the *Georgia Strait Times*” (1984: 27). Specifically, on September 13, 1946 the *Georgia Strait Times* opined that: “A British civil court does not sentence one of the most brutal hooligans to death unless he actually kills some one. Why, then, in a case where no accused has been proved, specifically, guilty of murder should a British military court do so” (Ito, 1984: 270). Kanao’s lawyer petitioned the military tribunal’s verdict on the grounds that the British military tribunal had no jurisdiction to try him and that he had a right to be tried by a Canadian court (Hong Kong War Trials Collection B; Government of Canada 2008a, 2008b). Consequently, on November 14, 1946 the military tribunal determined that as a Canadian citizen Inouye could not be tried for war crimes as an enemy soldier (ibid.). However, although Kanao’s conviction for war crimes was overturned, Inouye was charged with High Treason under the 1351 Treason Act and tried in the Supreme Court of Hong Kong (ibid.).

During his criminal trial, the Crown argued that Kanao was “voluntarily” employed with the “enemy regime” as an interpreter for the *Kempeitai* (Military Police Corps) and tortured Commonwealth nationals detained in Hong Kong (Hong Kong War Crimes Project, A; Government of Canada 2008a). Despite Kanao’s previous assertion that he was a British subject in the War Crimes Court, the Defence countered that Kanao was not (*ibid.*). Reaching back to cases from the 1370s, the Defence reasoned that as a person who owed no allegiance to the British Crown, he could not have committed treasonable acts and therefore could not be convicted of treason (*ibid.*). Aside from this jurisdictional challenge, the Defence also argued that Kanao’s participation in a counter-espionage unit was not treasonous (Hong Kong War Crimes Project, A). Indeed, as Kanao believed the English King was enemy, it was not “wrong to work for the Japanese empire” (*ibid.*, p.1).

In his closing remarks to the jury the Judge (Sir Henry Blackhall) emphasized that the jury should not regard Kanao as a Japanese subject. Blackhall reasoned that “the registration of the Accused’s birth with the Japanese Consulate did not necessarily mean he was a Japanese subject” and that “the fact that he could not be a voter or hold any official position in Canada did not mean he was not a British subject” (*ibid.*, p. 2). The Judge also advised the jury about the “law of nationality” under which Kanao would be considered a dual-citizen. The Judge instructed the jury that although dual-citizens can abandon their British nationality if they make a “declaration of alienation,” such a declaration “did not apply when the country to which he wished to belong was at war with His Majesty” (*ibid.*). Finally, the jury was instructed to decide whether Kanao believed that “he was doing right, with a purely patriotic motive to carry out a legal or

moral duty” or whether in assisting the King’s enemies he was guided by purely “evil motives” and nursing a grievance against the Anglo-Saxon race (ibid.). The jury was instructed that if they agreed with the former then Kanao must be acquitted and if they agreed with the latter then Kanao must be convicted (ibid.). After a brief deliberation the jury found Kanao guilty of high treason and on August 27, 1947 he was hung at the Stanley Prison gallows.

The Contexts of the Khadr and Arar Cases

Following the events of 9/11 the U.S. took several measures to enhance national security and combat the perceived threat of terrorism at home and abroad. On September 14, 2001 President Bush evoked the National Emergencies Act to declare a state of emergency in relation to the events of 9/11 (“Declaration of a National Emergency by Reason of Certain Terrorist Attacks”). Then on September 18, 2001, Congress enacted “Authorization for the Use of Military Force” which empowered the President to use force against those regarded as accountable for the events of 9/11. On October 26, 2001, Congress enacted the USA Patriot Act, which gave the Executive broad and sweeping powers to withdraw citizen-rights of citizens and residents (e.g., the Act authorizes the indefinite detention of immigrants as well as warrantless searches). On November 13, 2001 President Bush issued a Military Order (“Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terror”) which provides for the trial by an *ad hoc* military commissions of non U.S. citizens (or U.S. citizens rendered enemy combatants) suspected of participating in terrorist organizations (Fisher, 2006). Finally, after a series of executive decrees established Guantánamo Bay Detention Camp as a detainment and

interrogation facility in the War on Terror, at least 660 prisoners (ranging from children to the elderly) were transferred to Camps X-Ray, Delta and Iguana at Cuba's Guantánamo Bay Naval Base in January of 2002 (Steyn, 2004). Moreover, as described (Chapter 2), the President designated members of al Qa'ida and the Taliban illegal combatants [or unlawful combatants] under the laws of war and thereby excluded them from the most basic legal protections afforded to legal belligerents (Yoo and Ho, 2003).

Back in Canada, the Canadian government swiftly enacted a series of national security measures aimed at reducing the risk of future terrorist attacks on Canada. Thanks to the Charter, in order to justify these measures the government was compelled to portray itself as "balancing" collective security with individual civil liberties. Although the government had many legal tools to combat the perceived threat of terrorism (e.g., under the Criminal Code of Canada, the Emergencies Act, the Immigration Act), it took the position that it was necessary to create additional measures to ensure the security of the country. Specifically, in December, 2001 Parliament adopted the Anti-Terrorism Act (Bill C-36), which permitted extraordinary wide-ranging powers to combat perceived terrorist threats (Dhamoon and Abu-Laban, 2009). The Act contains provisions dealing with preventative detention, arbitrary arrest, investigative hearings, listing of alleged terrorist groups, delisting of charitable organizations, suspension of the right to remain silent, and the principle of innocence until proven guilty (*ibid.*). The Canadian government has also made a number of changes with respect to Border Security (including the use of anti-terror watch lists) and Immigration (including the use security certificates and preventative detention) in order to combat the perceived risk of terror which have the effect of diminishing hard won citizen-rights (Wark, 2007). The cases of

Khadr and Arar, I argue, must be seen within this particular context as well as with the context of the broader history of citizen-rights in Canada.

Omar Khadr

In this section, the story of Omar Khadr is presented through three overlapping narratives. The first describes Khadr's early life and his capture by U.S. Forces on July 27th, 2003. The second describes Khadr's indefinite detention at Bagram Airfield and Guantánamo Bay. The third describes Khadr's struggles in the justice system, with specific focus on his request to have the Executive request his repatriation to Canada.

Omar Ahmed Khadr was born in Toronto, Canada on 19 September 1986 to Egyptian born Canadian citizens Ahmed Said Khadr (an alleged senior associate of Osama bin Laden and financier of al Qa'ida) and Maha el-Samnah. Omar spent his first two years in Scarborough, Ontario under the care of his maternal grandparents until relocating to Peshawar, Pakistan where his father worked for Human Concern International (a humanitarian organization that supposedly raised money for al Qa'ida) and spent the majority of his childhood there (Vincent, 2002; Tietz, 2006).

Ahmed Khadr was arrested by Pakistani Intelligence for his alleged involvement in the November 19th, 1995 bombing of the Egyptian Embassy in Pakistan which killed sixteen people (Shephard, 2008). Maha el-Samnah successfully pleaded with Jean Chrétien, who in turn used to diplomacy to help secure Ahmed's release (ibid.). It is alleged that after Ahmed was released from Pakistani detention (and cleared of all charges), he and his wife sent Khadr to train in bomb-making, marksmanship and combat under al Qa'ida (Tietz, 2006; Shephard, 2008). On July 27, 2002, U.S. Army Special

Forces captured then 15-year-old Omar in a raid of a residential compound in Ayub Kheyl, Afghanistan where Omar was allegedly living with a group associated with alleged senior leader of the al Qaeda movement in Afghanistan, Abu Laith al-Libi (ibid.). Shot twice in the chest and permanently blinded in his left eye from shrapnel, Khadr was taken into U.S. custody and detained at Bagram Airfield in Afghanistan where he received lifesaving treatments.

Over the next three months Khadr was repeatedly tortured. Although Khadr was not charged until November 2004, he was detained on the pretence that he threw the grenade that killed U.S. medic Sgt. Christopher Speer (Shephard, 2008). Shackled and fitted with various objects to ensure sensory deprivation, Khadr was transferred and indefinitely detained at Guantánamo Bay Detention Camp on October 28, 2002 (Macklin, 2008; McGregor, 2010). Khadr was tortured again at Guantánamo Bay. He was shackled in painful stress positions, beaten by guards, urinated on, threatened with extraordinary rendition, placed in solitary confinement for weeks on end, deprived of sleep and force fed after participating in a lengthy hunger strike (McGregor, 2010).

Although Khadr was charged under the Military Commissions Act with murder, attempted murder, conspiracy and aiding the enemy in November, 2004 when the U.S. Supreme Court invalidated the military commissions as a system contrary to national and international law, Khadr's charges were withdrawn (Woo, 2010). Khadr was subsequently recharged under the new system established by the 2006 Military Commissions Act in February, 2007 (Macklin, 2008c). These new charges were again withdrawn after a Military Commissions judge determined that the Military Commissions did not have the jurisdiction to try Khadr as an "unlawful combatant" based on his past

classification as an “enemy combatant” by the Combatant Status Review Tribunal (Woo, 2010). The U.S. government appealed this ruling to the Court of Military Commissions Review, an appellate body established by the government to review the dismissal of Khadr’s charges (ibid.). After determining that the Combatant Status Review Tribunal could determine the legality of a detainee’s status, the Court of Military Commissions Review reinstated the charges against Khadr on September 9, 2007 (Macklin, 2008c). Khadr was finally charged with murder in violation of the laws of war, attempted murder in violation of the laws of war, conspiracy, providing material support for terrorism under the 2006 Military Commissions Act.

In 2003 and 2004, agents from CSIS and DFIAT interrogated Khadr at Guantánamo Bay Detention Center with the knowledge that he had been subjected to “enhanced interrogation techniques” (*Khadr v. Canada*, 2008 FC 807). The intelligence obtained from these sessions allegedly confirmed that Khadr threw the fatal grenade that killed Speer, participated in an al Qaeda training camp in Kabul, worked as a translator for al Qaeda to co-ordinate landmine missions and collected information on U.S. convoy movements. CSIS and DFIAT shared the intelligence obtained from these sessions with U.S. authorities, which, in turn, used this intelligence as the evidentiary basis for their case against him (ibid.). That CSIS and DFIAT interviewed Khadr with the knowledge that he had been subjected to various “enhanced interrogation techniques” and shared this intelligence with U.S. authorities who used that intelligence to build a case against Khadr, became the focus of a series of landmark cases in the Canadian courts.

Based on the reasoning that a causal connection could be established between the actions of DFIAT and CSIS and the mistreatment Khadr by the American military, in

2008 the Supreme Court of Canada ordered the disclosure of documents which implicated CSIS and DFIAT the “cruel and unusual punishment” of Khadr (*Canada [Justice] v. Khadr* 2008 SCC 28). This case opened the door to a series of trials which culminated with the judicial review of the “ongoing decision and policy of the Government of Canada *not* to seek the repatriation of Khadr to Canada” in Federal Court (*Khadr v. Canada* 2009 FC 405 at para. 8). Using the documents disclosed after the decision in *Khadr v. Canada* 2008 SCC 28 (as described above), the Federal Court found that the actions of CSIS and DFIAT infringed Khadr’s right to “life, liberty and security of the person and the right not to be deprived thereof accept in accordance with the principles of fundamental justice” under section 7 of the Charter. To remedy this infringement, the Federal Court ordered the Government of Canada to request “the U.S. to return Mr. Khadr to Canada as soon as practicable” (*Khadr v. Canada*, 2009 at para. 92).

After lengthy debates in the House of Commons, the Government of Canada asked the Federal Court of Appeal to reverse the order that it must seek the repatriation of Khadr (*Canada [Prime Minister] v. Khadr*, 2009 FCA 246). Although denying that Khadr’s rights had been infringed, the Government argued that had Khadr’s rights had been infringed, such an infringement could be “saved” under section 1 of the Charter, “the reasonable limits clause”. On August 14, 2009, a majority of the Federal Court of Appeal rejected the Government appeal by a margin of 2 to 1. In doing so, it agreed with the finding of the Federal Court that Khadr’s section 7 rights had been infringed and that the Government of Canada must actively seek his repatriation.

The dissenting judge (Justice Nadon) reiterated the Government's position that a court order to seek repatriation is an "improper judicial intrusion into the Crown prerogative over foreign affairs" thereby legitimizing the exercise of Executive power against Khadr (at para. 62). Nadon reasoned that:

Ordering Canada to request the repatriation of Mr. Khadr constitutes [...] a direct interference into Canada's conduct of its foreign affairs. It is clear that Canada has decided not to seek Mr. Khadr's repatriation at the present time. Why Canada has taken that position is [...] not for us to criticize or inquire into. Whether Canada should seek Mr. Khadr's repatriation at the present time is a matter best left to the Executive. In other words, how Canada should conduct its foreign affairs including the management of its relationship with the U.S. and the determination of the means by which it should advance its position in regard to the protection of Canada's national interest and its fight against terrorism, should be left to the judgments of those who have been entrusted by the democratic process to manage these matters on behalf of the Canadian people. (*Canada [Prime Minister] v. Khadr*, 2009 FCA, at para. 106)

On August 25, 2009 the Government appealed the decision of the Federal Court of Appeal to the Supreme Court of Canada. As it presented the highest appellate court with the opportunity to respond to a recurring post-9/11 constitutional issue—that is, *whether Charter-rights have an effect on the Royal Prerogative*—the Supreme Court agreed to hear the appeal. In *Canada [Prime Minister] v. Khadr*, 2010 S.C.C. 3, the Supreme Court unanimously upheld the finding of the lower courts and issued a "declaratory order" (McGregor, 2010) stating that "as established on the evidence before us":

Through the conduct of Canadian officials in the course of interrogations in 2003-2004 [...] Canada actively participated in a process contrary to Canada's international obligations and contributed to Mr. Khadr's ongoing detention so as to deprive him of his section 7 rights contrary to the principles of fundamental justice. (at para. 48)

The Supreme Court, however, disagreed with the remedy imposed by the lower courts. First, by ordering the Government to seek Khadr's repatriation, the Supreme Court reasoned, the lower courts gave "too little weight to the constitutional responsibility of

the executive to make decisions on matters of foreign affairs in the context of complex and ever-changing circumstances, taking into account Canada's broader national interests" (at para. 39). Second, the Supreme Court disagreed with the lower courts that the U.S. would agree to repatriate him. Third, the Supreme Court disagreed with the remedy imposed by the lower courts on the grounds that only the Executive branch (and not the judiciary) had the complete record from which it would be possible to understand "the range of considerations currently faced by the government" in assessing the repatriation request (at para. 44). For these reasons, the Supreme Court ruled that the judiciary did not have the power to impose a remedy and it held that:

The prudent course at this point, respectful to the responsibilities of the Executive and the courts, is for this court to allow Khadr's application for judicial review in part and to grant him a declaration advising the government of its opinion on the records before it which, in turn, will provide the legal framework for the Executive to exercise its functions and to consider what actions to take in respect of Mr. Khadr, in conformity with the Charter. (*Canada [Prime Minister] v. Khadr*, 2010 SCC 3 at para. 47)

On February 3, 2010 the Associate Director of Communications for the Prime Minister issued a press release stating that the Government would not be seeking the repatriation of Khadr, these statements were reviewed by the Federal Court in *Khadr v. Canada* 2010, FC 715.

Citing the Supreme Court's declaration that Khadr's section 7 rights had been infringed, the Federal Court determined that the efforts of Government to remedy the infringement of Khadr's rights were inadequate (ibid.). Justice Zinn of the Federal Court ordered the Government to draft an inventory of potential remedies and advise Khadr's lawyers and the Courts within seven days regarding the most suitable remedy. Zinn went so far as to proclaim that the government's *failure to comply would force the court to*

order the government to request his repatriation (even if such an order involved a judicial review of the Executive's Royal Prerogative over foreign affairs). A judicial review of the Executive's Royal Prerogative in this context is something which has never been done (*Lagassé, 2012*). In response, the Government applied to the Federal Court of Appeal for a stay of the Federal Court's order (*Canada [Prime Minister] v. Canada, 2010 FCA 199*). Chief Justice Blais of the Federal Court of Appeal used a three-part test to balance the potential harm to Khadr and the "interest of justice and the constitutional responsibility of the executive to make decisions in matters of foreign affairs" should the stay be enforced (or denied) (at para. 33). The first part determines the severity of the issue before the court. Justice Blais determined that the question of whether the Court can review exercise of the Crown's prerogative over foreign relations is a serious issue (at para. 14). The second part of the test establishes whether irreparable harm would arise if a stay were not granted. Blais held that an "improper interference [...] in the conduct of foreign relations" would cause irreversible damage to the government and effect the balance of power between the executive and the court (at para. 19). The third part of the test is to establish which party would suffer the most harm if the stay were granted (or refused). Justice Blais held that, due to the uncertainties surrounding "[h]ow the Canadian evidence might be used (if at all) in the U.S. trial [against Khadr] and if remedies could potentially be available later on in the process," he could only evaluate the potential harm to the government (*Canada [Prime Minister] v. Khadr, 2010 FCA 199* at para. 26). Hence, Blais determined that while the harm to Khadr is uncertain, the harm to the government would be "*unequivocal if the Crown's discretionary power in foreign affairs and national security were to be usurped by the judiciary*" and it "ought to therefore be

assumed to be contrary to the public interest” (at para. 28). After balancing the potential harm to Khadr with the potential harm to the Executive and its constitutional responsibility over foreign affairs, Blais concluded that the “balance of convenience and the interest of justice favour the Appellants [the Government]” (at para. 33) and the government’s position that decisions in matters of foreign relations should not be “restrained [...] by the monitoring capacity of the court” (at para. 32). This meant that the Court would not force the government to offer any additional diplomatic assistance to Khadr unless the Supreme Court overturned Zinn’s decision in *Khadr v. Canada* 2010, FC 715. However, although the Supreme Court agreed to review this case, Khadr’s fate was decided on October 25, 2010 when he plead guilty to all charges against him under a plea deal that would see him serve one more year at Guantánamo Bay Detention Center after which he would be eligible for repatriation to Canada. On September 29th, 2012 the final Westerner detained at Guantánamo Bay was finally repatriated to Canada and detained at Millhaven maximum-security prison in Bath, Ontario and will be eligible for parole in 2013.

Maher Arar

In this section, the story of Maher Arar is presented through three overlapping timelines which describe Arar’s (1) emigration to Canada and classification as a “person of interest” by the RCMP; (2) deportation to and imprisonment in Syria and repatriation to Canada; (3) quest for apology and compensation.

(1) From Canadian Citizen to “Person of Interest”

Maher Arar was born in Syria (1970). In 1987 he immigrated to Canada with his parents where he was “naturalized” as a Canadian citizen at the age of 21. After being awarded a BEng (McGill) and an MA in Telecommunications (University of Quebec) Arar was hired by a high tech firm and relocated with his wife (Monia Mazigh) to Ottawa in December 1997. According to the Report of the Events Relating to Maher Arar: Factual Background vol. 1 (hereafter “Factual Background”), on December 27, 1998, Arar listed Abdullah Almalki—a Syrian born Canadian citizen with whom he was casually acquainted—as his “emergency contact” on a rental application (95). However, unbeknownst to Arar, since 1998 CSIS had been monitoring Almalki regarding Almalki’s relationship with Ahmed Khadr (Report on the Events Relating to Maher Arar: Analysis and Recommendations [hereafter “Analysis and Recommendations”]). Until April 1994, Almalki worked as a volunteer in Afghanistan for the NGO (Human Concern International) managed by Ahmed Khadr (Pither, 2008).

Growing out of a 1997 project established to monitor Ahmed Khadr, the RCMP established Project A-O Canada—a Toronto based anti-terrorism investigation—shortly after the events of 9/11 to gather intelligence and information (Analysis and Recommendations). Arar’s association with Almalki—who was considered a “serious threat by the RCMP” due to his association with Ahmed Khadr—lead to Arar’s classification as a “person of interest” by Project A-O Canada because “they believed he had a relationship with their target Abdullah Almalki” (Factual Report, 294-5).

(2) To Syria and Back Again

On September 26, 2002, Arar who had been vacationing with his family in Tunisia, returned to Canada by plane via Switzerland and the United States. After landing in Zurich, Arar boarded an American Airlines Flight which arrived at New York's John F. Kennedy International Airport. Based on (false-) intelligence supplied to the U.S. Immigration and Naturalization Services by Project A-O Canada and the RCMP, Arar was declared inadmissible to the U.S., fingerprinted, photographed, shackled, strip searched, denied sleep and food, and indefinitely detained in solitary confinement for thirteen days by U.S. officials (Analysis and Recommendations, 54). Arar was interrogated by U.S. officials for twelve arduous days and accused of belonging to al Qa'ida by U.S. Immigration and Naturalization Services (Abu-Laben and Nath, 2007). During these interrogations, Arar was asked to voluntarily repatriate to Syria. He repeatedly stated his desire to return to Canada and feared that he would be tortured if brought to Syria (Center for Constitutional Rights, 2010; Macklin, 2008b).

As a result of these interrogations and the intelligence supplied to U.S. Immigration and Naturalization Services by Project A-O, the RCMP and DFIAT, as well as Omar Khadr's (false) identification of Arar as a member of al Qa'ida (on October 7, 2002), on October 8, 2002 Arar was shackled, blind folded and taken to an airport in New Jersey where he was transported by private jet to Amman, Jordan and then taken Syria (ibid.). Arar spent the next ten months indefinitely detained by Syrian Military Intelligence at the reviled Palestine Branch of the Syrian Prison Network. A small crack in the middle of the ceiling of the 2m x 2m x 1m cell was the only source of light in the dank basement cell he later described as his grave (Macklin, 2008b). While in detainment, Arar was beaten, whipped with an electrical cable, threatened with "the

chair,” “the tire,” electric shock, forced to hear others being tortured, held in solitary confinement, interrogated for 18 hour intervals—in part about his relationship with Almalki—and coerced into signing a (false-) confession that he had trained in Afghanistan with al Qa’ida, although he had never been there (Macklin, 2008b; Abu-Laban and Nath, 2007).

Arar was held in Syrian prison until his October 5, 2003 release which came on the heels of substantial public pressure from his lawyer, Canadian diplomats, Ambassadors, Members of Parliament, the Foreign Affairs Minister, the Prime Minister, human rights groups, the popular news media and his wife, Monia Mazigh who launched an active public media campaign in an attempt to secure her husband’s release (Abu-Laban and Nath, 2007; Macklin, 2008b). A review of the media’s motives for “keeping Arar in the public eye and endorsing the call for a public inquiry” is beyond the scope of this thesis. Suffice it to say that the RCMP’s investigation of journalist who was the recipient of “leaked, false and allegedly classified information” on Arar by an anonymous government official and their attempt to violate the confidentiality of journalistic sources had an appreciable effect on the substantial and more-or-less positive media coverage that Arar and his family received during the entire ordeal (Macklin, 2008b: 19).

The Redemption and Compensation of Arar

Over the next three and half years the public’s perception of Arar was transformed. During this time, Arar was labeled as a terrorist and cleared of all charges against him (Abu-Laban and Nath, 2007). Arar’s case also became the subject of three inquiries (the Commission for Public Complaints Against the RCMP, the Security Intelligence Review

Committee's investigation on the role Canadian Security Intelligence Service, and the Royal Commission headed by Justice O'Connor) and Arar personally received three sets of apologies (from RCMP Commissioner Giuliano Zaccardelli, the House of Commons and the Government of Canada represented by Stephen Harper) (ibid.). This thesis focuses almost exclusively on the Royal Commission of Inquiry and Stephen Harper's apology to him.

After his return to Canada questions began to emerge regarding "the role Canadian officials might have played in relation to his detention in the U.S, his removal to Syria and his imprisonment and treatment in that country" (Analysis and Recommendations, 10-11). In response to mounting public and political pressure, on January 28, 2004, Deputy Prime Minister and the Minister of Public Safety and Emergency Preparedness mandated a Royal Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar" (hereafter, "Arar Inquiry") under the *Inquires Act* (1985). The Arar Inquiry consists of a "Factual Inquiry" (which reviews the actions of Canadian officials in relation to Arar including his detention in the U.S., his extraordinary rendition to Syria and mistreatment there, his return to Canada and other relevant circumstances) as well as "Policy Review" (which considered the policy implications of the Arar case) (Analysis and Recommendations, 10).

The methods of the Factual Inquiry were rigorous, complex and detailed. The Commissioner "heard from 83 witnesses over the course of 75 days of in camera and 45 days of public testimony" (Analysis and Recommendations, 295), and "the government produced approximately 21,500 documents, of which some 6,500 were entered as exhibits" (Analysis and Recommendations, 10). The fact that some of the relevant

evidence presented needed to be kept confidential “to protect national security and international relations interests” added to the complexity of the project (Analysis and Recommendations, 10). In addition to finding no evidence indicating that Arar committed an offence or that he posed any risk to national security, (Analysis and Recommendations, 9), the Commissioner acknowledged that the RCMP provided U.S. officials with intelligence about Arar that was “inaccurate,” “portrayed him in an unfairly negative fashion” and “that failed to comply with RCMP policies on screenings for relevance, reliability and personal information” (Analysis and Recommendations, 13). Furthermore, the Factual Inquiry found that the RCMP increased the risk that the intelligence would be used for “purposes the RCMP would not approve, such as sending Mr. Arar to Syria” because it was given to U.S. officials “without attaching written caveats, as required” (ibid.). Discrediting the RCMP’s description of Arar and Mazigh as “Islamic Extremist individuals suspected of being linked to the Al Qaeda terrorist movement” (ibid.), Justice O’Connor emphasized that U.S. officials likely relied on this unfounded description “to make their decision to remove Arar” (ibid.) and that Arar’s reputation was damaged as a result of DFIAT’s decision to distribute a statement made by Arar that was obtained through torture (Analysis and Recommendations, 15-16). Based on these findings, the Inquiry broadly concluded that the actions of Canadian officials (RCMP, CSIS, DFTIAT) in relation to Arar were causally linked to his detention in New York and his extraordinary rendition to Syria (Macklin, 2008b: 18). The Commissioner also found that these actions were “enabled by institutional, cultural, and administrative defects in the Canadian security establishment” (ibid.).

Based on the conclusions of the Factual Inquiry, the Policy Review section of the Arar Inquiry made several recommendations. First, the establishment of an independent review agency and process for the RCMP and other agencies involved in national security was recommended. The need for an independent review agency and process stems from the condition that majority of the “RCMP’s national security activities are conducted in secret and receive little, if any, judicial scrutiny, yet have the potential to significantly affect individual rights and freedoms” (Analysis and Recommendations, 18). The purpose of this agency would be to receive complaints and initiate inquiries into the RCMP’s compliance with law, policies, ministerial directives and international obligations (Macklin, 2008). Second, a review of RCMP and CSIS policies “governing the circumstances in which they supply information to foreign governments with questionable human rights records” was recommended (Analysis and Recommendations, 367). The Commissioner stressed that information should never be shared with “foreign countries where there is a credible risk that it will cause or contribute to the use of torture” and that policies should be drafted so as to “eliminate any possible Canadian complicity in torture” (ibid, 367-8). Third, although cautioning that the deterrent effects of compensation “would not produce the changes to prevent similar failures in the future,” Justice O’Connor recommended that the Government of compensate Arar in light of the findings of the Inquiry. Arar and his family received an official apology and compensation package of 10.5 million dollars four months later thereby setting a remarkable precedent.

Chapter 6: Interpretations and Implications of the Inouye, Khadr and Arar Cases From the Standpoint of the History of Citizen-Rights in Canada

Using the philosophical and theoretical framework of this thesis, this Chapter presents the results of the (1) within and (2) cross-cases analyses of the Inouye, Khadr and Arar cases.

Within Case-Analysis: Kanao Inouye

Nearly 75 years later, the story of Kanao Inouye continues to be interpreted as evidence of the injustices inflicted upon “Caucasians” during WWII by Japanese Canadians. Two recent citations of the case illustrate how this story functions as a vessel of anti-Japanese sentiment. First, on August 4, 2001, *The Vancouver Sun* printed an article which controversially concludes that Japanese Canadians ought to compensate and apologize to Canadian “Caucasians” for acts of treason and torture (Lanning). The article’s conclusion, which is based on the premise that Japanese Canadians posed a national security threat during WWII, cites the case of Inouye as evidence:

Japanese-Canadians also turned traitor—and worse—although you’ll never hear it from David Suzuki. Kanao Inouye, “the Kamloops Kid,” was a Japanese-Canadian who went to Tokyo in 1936. At the outbreak of war, he betrayed Canada and served Major Shiozawa of Japanese intelligence, and is accused of torturing prisoners. In *Hell on Earth* (McGraw-Hill Ryerson), war veteran Dave McIntosh describes how Inouye “beat, or participated in the beatings of, Canadian prisoners of war.” Japanese-Canadians never apologized to the Caucasians and never offered any compensation [sic]. (Lanning, 2001)

Lanning’s statements on Kanao reflect a lingering resentment over the fact that the Allied Forces were not redressed for the injustices inflicted on them during WWII by the Japanese (a point which I return to). The hyphen in “Japanese-Canadian” used to identify Kanao in the article, infers that Japanese Canadians (the preferred name in acknowledgement of the group’s shared history of oppression, geographical origin and

political destiny) have split identities; that they are not completely Canadian like everyone else (Giampapa, 1991). Within the context of Kanao's story, keeping this meaning of "Japanese-Canadian" in mind, Schürmann's concept of the "universalizing-singularizing double bind of finitude" is particularly insightful. It enables a rigorous interpretation of Kanao's position and disposition by British law, which in turn universalized itself by rendering Kanao a particular subject/citizen, while at the same time singularized him as an enemy of the state. This double movement of universalization and singularization, Schürmann would argue, reflects the two mutually exclusive laws (or contraries) inherent in the origin itself which signify that the event of Being is always other than itself. Although "the force of law as a common noun is always at work positing its thetic reality" it is always at the same time "being undone by the [counter-] force of law of the singular" (Schürmann, 2003: 437). As a Japanese Canadian, born in the Dominion of Canada, and residing in Japan as a citizen from 1936 onwards, Kanao was ensnared in the double bind of finitude owing both an allegiance to Britain and Japan as subject/citizen. From the standpoint of British law, Kanao's birth in Canada rendered him a *particular* British subject, entitled to all the rights, privileges and duties conferred upon the subject/citizen *vis-à-vis* citizenship. At a time when Britain and Japan were at war, Kanao's Japanese citizenship *singularized* him from the standpoint of universal British law to which he was bound as a citizen by virtue of birth. On the one hand, Kanao was interpellated by British law as a subject/citizen and thereby prohibited from committing treason against the Crown as a result of the social contract. On the other hand, at a time when the citizen-rights of the Japanese in Canada were withdrawn (Chapter 4, 5), Kanao also identified as a Japanese citizen. In this context, both

hegemonic authorities—although commanding contradictory forces of law—are equally normative and forceful. Consequently, when Kanao was conscripted into the Imperial Japanese Army he was held hostage by two mutually incompatible laws in a double bind of finitude, owing both an allegiance to British and Japanese laws. British law prohibited him from conscripting into the Japanese Imperial Army with the crime of treason.

Kanao's double allegiance to British and Japanese law is particularly compelling in this case because, at the time of his enlistment, the citizen-rights of the Japanese in Canada were withdrawn by Executive decree. Hence, Lanning's remark that "[a]t the outbreak of war" Kanao "betrayed Canada" by serving for "Major Shiozawa of Japanese intelligence" is specious. It fails to consider Kanao's double allegiance to British law as well as Japanese law (at time when these nations were at war) *and* the exilic status of British subjects/citizens of Japanese ancestry in Canada at the time. In this context, it is only possible to interpret Kanao's decision to enlist as an act of betrayal if the fact that he was also a subject/citizen of Japanese law is denied. Kanao's universalization (as a British subject/citizen) and singularization (as an enemy-alien, Japanese citizen, residing in Japan and employed by the enemy army at a time when these nations were at war) represents the singularizing undertow of the counter-force of law Schürmann describes. Kanao challenged the "universal" hegemonic authority that British law claims over all subjects/citizens by virtue of their birth in Canada. In this way, the universalizing-singularizing double bind of finitude helps us to show, via the figure of the dual-citizen, that the conditions of possibility of citizenship in the modern sovereign nation-state are anarchic—in the sense that the foundation upon which the laws of the land are (claimed to be) based, are simply gestures, claims, myths, in short, non-foundational, and that the

subversion of the hegemonic principles is always already underway by the anarchic undertow within every archic foundation. A singular case, in our case Kanao, is the anarchic moment in which the undertow reveals itself. Accordingly, although we cannot escape the universalizing impulse of the law as such, the case of Kanao shows that the principle of universal citizenship is always already in the process of being undone by the possible allegiance that the citizen/subject owes to another realm of law. This possibility corresponds with what Schürmann labels the (counter-)force of law of the singular that refers to this double allegiance, which destroys the presumed authority of the law in advance. In doing so, the figure of the singular and the (counter-) force of law reveal that the two principles (laws, or forces) inherent in the foundation of the nation-state are anarchic.

Lanning's statement that "Japanese-Canadians" "turned traitor—and worse," in combination with his reference to Dave McIntosh's book which claims that Inouye "beat, or participated in the beatings of, Canadian prisoners of war," leaves the impression that Inouye was a torturer. Even though Kanao is only referenced in a few sources, his actions are overwhelming portrayed as if they *actually* contravened the Third Geneva Convention (adopted in 1929 to establish rules in relation the treatment of prisoners of war) which prohibits "physical or mental torture" as well as "any another form of coercion" (article 17-20). While after reviewing numerous primary and secondary sources, it seems certain that Kanao was physically abusive to some of the POWs under his charge, the impression that these acts contravened the Third Geneva Convention must be rejected as false because Japan was not a signatory to this treaty until after WWII. I am cautious here because I am not condoning the mistreatment of political prisoners or

the use of torture under any circumstance. What I reject is the framework inherent in such statements because it mistakenly views the past through the lens of the present. Although it may be impossible to avoid passing moral judgments on the past, it is important to remain aware that anachronistically imposing present-day, ideas, perspectives and principles onto depictions, representations or interpretations of the past is to commit the fallacy of presentism and to involve oneself in the historicist metaphysics which views history as a “continuous cumulative progression of knowledge leading to the present” (Seidman, 1983: 79).

It is now possible to evaluate Lanning’s conclusion that “Japanese-Canadians” should apologize and compensate “the Caucasians.” Lanning’s conclusion is consistent with a revisionist movement seeking to discredit the experiences of injustice articulated by Japanese Canadians during the period between 1942 and 1949 when their citizen-rights were withdrawn that has again taken root in the post-9/11 environment (see J. L. Granatstein and A. Johnson, 1988). These revisionists controversially claim that “there were military and intelligence concerns that, in the face of the sudden attack on Pearl Harbor, could have provided Ottawa with a justification for the evacuation of the Japanese Canadians from the West coast” (Granatstein and Johnson, 1988: 120). Although within the context of this revisionist history the case of Inouye appears to provide support for Lanning’s conclusion, it remains an indisputable fact that Inouye was a rare counter-example to the *near* total loyalty of Japanese Canadians during WWII (Miki, 2005). In this sense, it seems fair to look upon Lanning’s conclusion with a cautious skepticism. Indeed, much like the tension between justice and law, this desire for redress from the Japanese, reminds us that “unconditional forgiveness” is heterogeneous

and in this way distinct from any juridical, legal or political calculation (Derrida, 2001).

Forgiveness, justice, reconciliation are not necessarily achieved with the events of apology, redress or compensation.

The second example of how the story of Inouye functions as a vessel of anti-Japanese sentiment can be found in a 2007 issue of *The Beaver: Canada's History Magazine* which reports the results of a study in which a panel of historians identify Kanao as one of the top ten worst Canadians. David Bercuson, historian and former Dean of Graduate Studies at the University of Calgary, wrote a short piece on Kanao for the magazine:

Inouye, Kanao was the son of Japanese immigrants. He was born in Kamloops, British Columbia, sometime in the late 1920s, and grew up in the British Columbia interior. He moved to Japan prior to the attack on Pearl Harbor and joined the Japanese Army. Kanao was assigned as a translator and guard for Canadians who had been taken prisoner at Hong Kong and were incarcerated at *Sham Shui Po*, a POW camp in Hong Kong Territory. Kanao was among the most brutal of the men the Canadians encountered there. He took particular relish in beating and otherwise mistreating the prisoners and taunting them in his perfect English. He told them that his conduct was “payback” for the way he had been treated as a child of Japanese immigrants in Canada. When the prisoners found out where Kanao was from, they dubbed him “The Kamloops Kid.” Kanao was taken prisoner at the end of the war. Unlike many other Japanese camp guards, an international tribunal in Japan did not try him, because he claimed that he was a Canadian citizen. He was instead sent back to Canada, where he was tried for treason, found guilty and hanged. (Bercuson, 2007)

This short piece is saturated with factual errors and omissions. Kanao was born in 1916 (not “the late 1920s”); tried at the International Military Tribunal for the Far East found guilty and sentenced to death; and tried by British court in Hong Kong (not in Canada) where he was found guilty for treason and executed at Stanley Prison in Hong Kong. The claim that Kanao was tried in Canada gives the impression that Kanao actually received his procedural and legal right to a fair trial—an essential right of all countries respecting

the supremacy of the rule of law as opposed to arbitrary power—which, for instance, includes the presumption of innocence, hearing by an independent and impartial tribunal, the right to call witnesses, due process and the protection from double jeopardy (Stavros, 1992: 348). Because Kanao found himself in a state of exception, his right to a fair trial was not recognized. His citizen-rights, including the legal right to a fair trial, were withdrawn because he was rendered an enemy of the state. Agamben's concepts of *homo sacer* and the state of exception are useful in this context. His rendering as an enemy of the state, and the withdrawal of his (citizen-) right to a fair trial, implies that Kanao became the bearer of the sovereign ban (*homo sacer*) and was included in the juridical order through the decision to exclude him. As a result, although Kanao's original conviction for war crimes and sentence to execution at the Military Tribunal for the Far East was overturned (on the grounds that as a Canadian citizen by birth the Military Tribunal did not have the jurisdiction to try him), he was nonetheless re-charged with the crime of treason (under British law), convicted on the same evidence and executed on August 27, 1947. In this sense, his conviction and execution for treason needs to be contextualized in a situation where his rights to a fair trial—which in theory are supposed to provide the subject/citizen with safeguards against double jeopardy (a procedural defence prohibiting the retrial of a defendant on similar charges after they have been legitimately acquitted or convicted)—were violated. Kanao's execution is also suspect on the grounds that his citizenship ought to have been *de facto* revoked following his decision to enlist with the Imperial Japanese Army, especially since it would have been impossible for Kanao to have accomplished this formally in Canada. This is precisely what Kanao and his lawyers attempted to argue during his second (criminal) trial for

treason. However, the judge presiding over Kanao's criminal case held that only if Inouye had gone through the proper procedural channels would his citizenship have been revoked in the eyes of the law. The argument that Kanao's Canadian citizenship ought to have been revoked given his decision to enlist with the Imperial Japanese Army, is even more forceful in this context.

Within Case Analysis: Omar Khadr

After reviewing the three (interrelated) arguments often advanced in *defence* of Omar Khadr in the popular press (Bush, 2012), I draw on Derrida, Agamben and Schürmann to explain why each of these interpretations, while accurate, fails to engage with the conditions of possibility under which Khadr's rights could be withdrawn leaving him defenseless against sovereign power exercised under the cloak of national security.

As the first child soldier convicted of war crimes since WWII, and given Canada's advocacy of child soldiers, Khadr's story is exceptional (Manzigh, 2012). Canada is a signatory of the Convention on the Rights of the Child (UNCRC) and the Optional Protocol to the UNCRC on the Involvement of Children in Armed Conflict (McGregor, 2010). These multilateral human rights treaties designate anyone under the age of 18 a child (Article 1). Hence, advocates argue that Khadr ought to be treated as a child soldier since "the acts he is alleged to have committed and the beginning of his detention occurred when he was a minor" (McGregor, 2010: 488). Although many of the legal rights enshrined in domestic law (including the Charter) as well as international human rights conventions and treaties (Woo, 2012) are rearticulated in the UNCRC, it also includes special provisions for children. Article 39, for instance, requires member-states to "take all appropriate measures to promote the physical and psychological recovery and

social reintegration” of child soldiers and/or victims of torture. Hence, the child soldier defence also leads to the conclusion that that Khadr ought to have been repatriated, rehabilitated, re-educated, and reintegrated into Canadian society.

Khadr’s extrajudicial detention at Bagram and Guantánamo was initially justified on the pretense that he threw the fatal grenade that killed U.S. medic Sgt. Christopher Speer. However, consonant with Heidegger’s view of the event as a “happstance that resists appropriation and understanding” (Borradori, 2003: 149), every attempt to objectively describe the events of that day has been compromised by rival interpretations (Koring, 2011). The official story of the U.S. military is that Khadr—the sole survivor at the Ayub Kheyl compound—savagely faced U.S. soldiers until—after throwing the grenade that killed Speer—he succumbed to his injuries. Yet, a series of government and military reports leaked to the press have cast doubts upon this story (Williamson, 2012; Macklin, 2008a). Some allege that the fatal grenade “was thrown by the Mujahadeen” and that the original “report was later changed to implicate the captured child” (Williamson, 2012). Others speculate that “another combatant might have thrown the grenade or that Sgt. Speer was killed by friendly fire” (Macklin, 2008a). These alternate scenarios, moreover, seem consistent with medical evidence indicating that Khadr could not have thrown the fatal grenade because shrapnel had blinded him (Williamson, 2012).

Although there are many unknowns in this case, it is well-established that during Khadr’s time at Bagram and Guantánamo Bay he was tortured for the purposes of obtaining a confession, incriminating evidence against him and intelligence about other persons of interest. According to one account, while recovering from life-threatening injuries at Bagram, Khadr was:

Pulled off his stretcher onto the floor; his head was covered with a bag while dogs barked in his face; cold water was thrown on him; he was forced to stand for hours with his hands tied above his head and to carry heavy buckets of water to aggravate his wounds. He was threatened with rape; bright lights were shone in injured eyes. (Woo, 2010: 3)

This account was substantiated by Mozzam Begg, Khadr's former cellmate, who lamented that Khadr was singled out by prison guards seeking revenge "for killing one of their own" (Begg, qtd. in Shephard, 2008: 90). "They would make him perform Sisyphean tasks, such as stacking heavy boxes and crates that the guards would knock over when he had finished and then forced him to start again" (Begg, qtd. in Shephard, 2008: 90). Confirming Agamben's thesis that the *homo sacer* designates a life that can be killed without committing murder, Sgt. Joshua Claus (Khadr's chief interrogator at Bagram) was convicted of maltreatment and assault for killing Diliwar, a 22-year old Pashtun taxi driver who died of "blunt force injuries to the lower extremities" (Gibney, 2007; *Toronto Star*, 2008). In exchange for his testimony against Khadr, Claus was awarded immunity from prosecution for his torture. Khadr endured a similar fate at Guantánamo. Woo reported that he was:

Pressed against a wall until he passed out, shackled in painful stress positions for hours, exposed to extreme temperatures, threatened with rendition and sexual violence, forced to urinate on himself, then used a human mop to clean up the mess and denied clean clothes for two days as well as being subjected to a sleep deprivation technique known as the 'Frequent Flyer Program' that was recognized as torture. (Woo, 2010: 3)

Apart from its classification as a non-derogable right (a right which, in principle, cannot be withdrawn), the practice of torture as a means to gather intelligence (or worse, confession) is extremely problematic. Experts agree that torture leads to false testimony, which in turn can cause more torture (Williamson, 2012). FBI Special Agent Robert Fuller testified that on October 8, 2002 (one day before Arar was extraordinarily rendered

to Syria) Khadr claimed not only to have seen Arar at an al Qaeda “safe house” “on several occasions” but that he “might have seen him” at an al Qaeda training camp as well (Ottawa Citizen, 2009). The connection between the torture of Khadr and the extraordinary rendition of Arar illustrates the unreliability of testimony obtained through torture and the injustices that inevitably arise with its use.

In a brief entitled *The Legal Inadequacies of the Military Commissions* (2007), Macklin argues that the Military Commissions framework established to try “alien unprivileged enemy belligerents” such as Khadr are routinely condemned for their legal inadequacies. By admitting evidence obtained through torture, unreliable hearsay evidence, and restricting the right to counsel, the Military Commissions prevents due process (ibid.). The Military Commissions Act also has the effect of limiting the right to be free from unlawful detention: it prevents one’s right to have the lawfulness of their confinement reviewed (via a *writ of habeas corpus*) and withdraws safeguards in the U.S. Constitution which protect actors from indefinite detention (Dorf, 2006; Macklin, 2007). The Military Commissions Act also creates new substantive crimes and applies them retroactively thereby violating the prohibition on the creation of *ex post facto* laws (ibid.). For instance, many of the acts defined under the MCA (including every charge against Khadr) have never been regarded as war crimes under domestic or international law. Indeed, *until the case of Khadr, unlawful enemy combatants had only ever been tried for the killing or attempted killing of an enemy soldier under the domestic criminal law of the nation-state in which the act occurred* (Bush, 2012). The MCA’s restriction and elimination of procedural and evidentiary rules—to ensure conviction or admission of guilt by defendants tried under this shockingly unjust framework—also constitutes *ex*

post facto law (Macklin, 2007). Finally, because it stipulates that “no alien unlawful enemy combatant subject to trial by military commissions [...] may invoke the Geneva Conventions as a source of right,” the Military Commissions Act restricts the application of the Geneva Conventions thereby undermining the rule of law (Dorf, 2006; Macklin, 2007). By allowing the President to decide the meaning and application of the Geneva Conventions, the Military Commissions Act prevents the courts from carrying out its proper role in the division of labour in the modern nation-state (interpreting and applying domestic and international law) thereby collapsing the separation-of-powers at the highest order and constituting a space for executive action that is not subject to judicial review.

Khadr’s torture for the purposes of obtaining evidence against him and confession as well as his subjection to an unjust extra-legal court, needs to be factored into the evaluation of Khadr’s “decision” to enter into a pre-trial agreement after maintaining his innocence for so long. Perhaps as Arar put it, “after maintaining his innocence for 8 years, Omar Khadr saw no hope of being cleared by that sham process and decided to plead guilty” (2012: 267). The fact that of the seven defendants that have been convicted in the military commissions (David Hicks, Salim Hamdan, Ibrahim al-Qosi, Omar Khadr, Noor Uthman Muhammed, Majid Khan and Ali Hamza al Bahul), all plead guilty in exchange for a reduced sentence, except Ali Hamza al Bahul who received a life sentence for refusal to cooperate with his trial, strengthens the argument that “the military commissions have had more of a symbolic value than practical effect” (Alexander, 2012: 11-14). Indeed, it is significant that even after defending the necessity of the military commissions due to the “extreme dangerousness” of the defendants that the U.S.

government entered into plea agreements with the majority of them in exchange for drastically reduced sentences (Alexander, 2012: 14).

I have just described the three interrelated arguments often advanced in defence of Khadr. The child soldier defence raises doubts not only to the validity of the charges against Khadr but questions the justice and legality of the ongoing policy of the Executive not to seek his repatriation to Canada. The innocence defence raises doubts as to whether he actually threw the fatal grenade, thereby vindicating Khadr with argument that he is innocent of the most serious charges against him: murder and attempted murder in violation of the law of war. The procedural defence raises doubts as to the legal validity of Khadr's plea-trial agreement, or any conclusion of guilt, given the legal inadequacies of the Military Commissions Acts, his repeated torture and indefinite detention. Each of these interpretations, however, fails to explain *how* Khadr's "universal" and "inalienable" rights were withdrawn. They are limited because they obscure the uncertain effects that citizen-rights (explored below) have against the arbitrary and potentially unlimited violence sovereign power exercised under the rubric of national security. The case of Omar Khadr illustrates perfectly the meaning of Derrida's claim that justice is always to come. As the reader already knows (Chapter 2), the problem of exceptionality refers to the "impossible possibility" of reconciling acts that must concern singularity with universal rules or norms. It arises as a result of the universal form and homogenizing force of the law, which structurally excludes the singular other. The law's exclusion of that which does not conform to its particular notion of the universality, in other words, is *a priori* deducible from the very notion of the law itself. As Vahabzadeh observes, the rights of citizens can only be recognized insofar as

“the actors are reduced to the specific hegemonized subjects that accord with liberal democratic polity” (2007: 22). This reduction is contingent upon the codification of citizen-rights through rational-legal proceduralism (the technical codification of grievances and rights) which in turn detaches “the struggles for civil or individual rights (which are eventually realized in the laws) from the original experience of injustice that instigated the struggle” (Vahabzadeh, 2007: 23). Hence, liberal democratic proceduralism is amnesic: it replaces the experience of injustice that instigated the desire for justice (eventually realized with the legal recognition of new rights) “with a certain secular experience that is highly technical” (Vahabzadeh, 2007: 23). This is perfectly consistent with the theory of history which I argued (Chapter 3) frames the arguments about law and justice advanced in the “Force of Law” (a point which I return to). Khadr’s alleged acts and ties to al-Qai’da—which *precluded* his recognition as a hegemonized subject of liberal democracy and thereby the recognition of his citizen-rights—*singularized* him (Schürmann) and positioned him outside the law as an other/enemy. That Khadr’s abjection from the law as a singular other meant that he could neither be reduced to the particular hegemonized subject that corresponds with the liberal democratic nation-state nor have his citizen rights recognized is on par with what Agamben argues when he claims that the inclusive exclusion of bare life is the foundation of sovereign power in the biopolitical age. That Khadr’s categorization as an alien unprivileged enemy belligerent—a legal designation which refers to an actor who (a) is not a citizen of the United States and (b) is not entitled to prisoner-of-war status under the Third Geneva Convention—under the Military Commissions Act functioned to legitimize the withdrawal of his rights is evidence of this (Yoo and Ho, 2003). At the moment of

Khadr's birth in Canada, the principle of nativity and the principle of sovereignty were united in his body. His bare life (a vanishing signifier) was erased/substituted when Khadr the sovereign subject was designated a citizen by virtue of his birth in Canada. At the time of his birth, Khadr the citizen/subject—at least hypothetically—was entitled to various rights under the Convention of the Rights of the Child, the Third Geneva Convention, the Charter, etc. In short, as a subject/citizen of Canada, many of his legal, civil, political rights, and the rights he claims as a child were more or less guaranteed. However, when—following the events of 9/11, terrorism was deemed as risk to national security which necessitated exceptional sovereign responses—Khadr's rights were withdrawn, his so called “universal” and “inalienable” rights revealed themselves, to be (to quote Bentham) “nonsense upon stilts.” In this way, the withdrawal of Khadr's “rights” as alien unprivileged enemy belligerents revealed the contingency of his “universal” and “inalienable” rights on citizenship and the protection of sovereign states by sovereign power. With the decision to brand Khadr as an alien unprivileged enemy belligerent, Khadr was “banished,” his rights were withdrawn and he was inscribed into the juridical order as bare life (Agamben, 1998). In defense of this designation, post 9/11 neo-conservative jurists (such as the reviled John Yoo) often take the position that certain conditions need to be met if one is to be recognized as a lawful enemy combatant (ibid.). Since war must be between nation-states, al-Qai'da and the Taliban militia are non-state actors who are “engaged in a form of warfare that is illegitimate” (Yoo and Ho, 2003: 215). As a result, members are not immunized from “committing acts that would otherwise be criminal under domestic or international law” (Yoo and Ho, 2003: 221). Confirming Weber's thesis about the state's monopoly on the legitimate use of force, this

means that although members of al Qa'ida are bound by the laws of war, they are “not automatically [...] entitled to the privileges and benefits of the laws of war” such as prisoner-of-war status under the Third Geneva Convention (Yoo and Ho, 2003 215). As a result, unprivileged enemy belligerents do not have the “right to engage in hostilities and enjoy no immunity from prosecution for their military activities, nor do they receive protections afforded under the laws of war to captured prisoners of war” (Yoo and Ho, 2003: 222). Hence, although “killing a soldier in the course of war when your country has been invaded and is occupied” (i.e. in self-defense) has never been considered a crime, Khadr was charged with murder in violation of the laws of war for allegedly throwing a grenade that killed medic Sgt. Speer. As a result of his designation as an alien unprivileged enemy belligerent Khadr was indefinitely detained at Guantánamo Bay Detention Center from 2002. Although repatriated in the fall of 2012, as an excluded singular Khadr continues to wait for a justice which remains impossible. A lack of (or desire for) justice haunts the case of Khadr. It is a spark, and an unrealized promise, which forces us to deeply reflect on the law and its relationship to both violence and justice. The case of Khadr encourages us to reflect on the meaning a law which is connected to banal everyday violence rather than to justice. As an exception to the law's universality (which paradoxically confirms the law's universality), Khadr has spent more than half of his life waiting for a justice that never arrives.

Within-Case Analysis: Maher Arar

Although the Arar story is often represented as a case of guilt versus innocence, that the spectre of guilt still haunts Arar indicates that this is not a simple story of a wrongfully

accused who was vindicated and fairly compensated by his government. Indeed, Abu-Laban and Nath (2007) argue that the Arar story is structured by three binary oppositions: guilt/innocence; Canadian citizen/dual-citizen; the force of law/rule of law. Whereas Arar's dual-citizenship status took center stage when he was judged as guilty, Arar's status as a Canadian citizen was the choice descriptor when his "potential innocence, right to due process of the law, and deservingness of Canadian protection" were of issue (Abu-Laban and Nath, 2007: 21). A transmutation in the discussions about the rule of law and the force of law (which should be more accurately described as the force of ~~law~~) in the period between Arar's rendition to Syria and his repatriation to Canada is also evident (Abu-Laban and Nath, 2007). Whereas prior to October 2003, Arar found himself positioned in a "void of law" where he was indefinitely detained and tortured, Arar's homecoming was "marked by the rule of law and due process" (Abu-Laban and Nath, 2007: 29). On the one hand, after Arar was repatriated to Canada, the American legal discourse began the long (and contested) process of recoding his extraordinary rendition to Syria as lawful thereby awarding torture with "the full force and legitimation of the law" (ibid.). On the other hand, back in Canada the Arar Inquiry firmly launched the case into the realm of the law. Following the guidelines established in the Inquiries Act (1985), the Arar Inquiry utilized a procedure emphasizing the importance of establishing facts; adhering to rules of evidence and due process; measuring the balance of public disclosure against national security interests and measuring the protection of citizen-rights against national security (Abu-Laban and Nath, 2007: 32).

However, some scholars are critical of the Arar Inquiry's focus on issues of innocence and guilt rather than "on structural violence in the form of racialization and

exception” (Abu-Laban and Nath, 2007: 32). While these commentators are correct to observe that the Arar Inquiry failed to reflect on structural violence arising from the sovereign’s unique ability to grant itself the state of exception, they are wrong to wholly reduce the Arar case to structures of racialization and exception. Drawing on Agamben and Schmitt, it is possible to see the two types of states of exception (commissarial dictatorship and sovereign dictatorship) and two forces of law (the force of ~~law~~ and the ~~force~~ of law) at play in the story of Arar. Apart from being a perfect illustration of the contrast Agamben draws between the force of ~~law~~ (within the context of a commissarial dictatorship) and the ~~force~~ of law (within the context of a sovereign dictatorship), the Arar case is also consistent with Derrida’s and Vattimo’s reflections on justice.

As described (Chapter 5), in response to mounting public pressure, the Privy Council established A Royal Commission of Inquiry Into the Actions of Canadian Officials in Relation to Maher Arar through Order in Council P.C. 2004-0048 under the Inquiries Act (1985). Section 2 of the Inquiries Act empowers the Governor in Council to use an Order in Council to “cause inquiry to be made into and concerning any matter connected with the good government of Canada” (section 2). The use of an Order in Council to establish a public commission of inquiry to judicially review the exercise of sovereign power in the case of Arar (i.e., the derogation of his citizen rights including the right to be free from torture and the suspension of the principle of the presumption of innocence) illuminates the distinctions Schmitt and Agamben drew between the sovereign dictatorship governed by the ~~force~~ of law, and the commissarial dictatorship governed by the force of ~~law~~. As we know, Schmitt’s concept of the “sovereign dictatorship” refers to a democratic institution in which a sovereign decision on the state

of exception is made in the name of the people. Along these lines, Agamben added that the sovereign dictatorship is governed by the *force* of law which “represents a state of law in which the law is applied, but is not formally in force” (Agamben, 2005: 32). This means that within a sovereign dictatorship, the rule of law applies, although it is not recognized as being *formally* in force or having jurisdiction. Although Schmitt presumed that the sovereign dictatorship only covers those (democratic) situations where a sovereign dictator attempts to *create a new constitution* in the name of the people, the case of Arar would seem to suggest a broader reach for this concept. I submit that the decision of the Governor in Council to establish a commission of inquiry to review the actions of Canadian officials in relation to Maher Arar (an exercise of sovereign/executive power) can be understood as exercise of the *force* of law within the context of a (sovereign) state of exception. Incidentally, this is also how we should interpret Benjamin’s definition of sovereign violence at the end of “The Critique of Violence” that: “Divine violence, which is the sign and seal but never the means of sacred dispatch, may be called ‘sovereign’ violence” (1921: 252). What is significant about this case is that *the Arar Inquiry brought the rule of law (vis-à-vis judicial review) to a zone where the law was previously suspended* due to the RCMP’s (mistaken) belief that Arar was a member of al Qa’ida. Although a “new constitution” did not result from this particular exercise of the *force* of law, the establishment of the Arar Inquiry nevertheless represents the creation of new law due to the quasi-judicial status of Royal Commissions of Inquiry and the extremely broad and expansive powers of Commissioners appointed under the Inquiries Act. Indeed although not legislation, royal commissions of inquiry wield, the legitimating power of legal discourse and the law.

Whether or not the government of the day accepts and implements the recommendations of any particular inquiry, this *ad hoc* quasi-judicial process, serves the functions that Schmitt attributed to the sovereign dictatorship: to permanently suspend and/or substantively replace the established order with a different, more just rule of law. Rather than endorsing the status quo where Arar's rights were suspended based on the belief that he posed a risk to national security, the Arar Inquiry made of serious of recommendations. With the exception of the recommendation to apologize to and compensate Arar (which I discuss below) all of these recommendations were designed to bring the rule of law to the domain of national security. This domain is often described as being governed by the force of law and thus, characterized as a context where the day-to-day application of the law (especially in the form of rights) has been (permanently) suspended.

As a result of the Arar Inquiry, Harper announced that the government of Canada had concluded its settlement with Arar who had sought \$37 million in compensation and an official apology in court in January 2007 (CBC News, 2007). After reading a letter of apology which formally apologized for Canada's role in his wrongful detention, Harper also declared that the Government of Canada had accepted all 23 recommendations of the Arar Inquiry. Moreover, although Harper conceded that these recommendations would not allow the government to "go back and fix the injustice that occurred" he remained hopeful that implementing the Commissioner's recommendations would "lessen the likelihood that something like this will ever happen again" (Harper qtd. in CBC News, 2007). In this sense, both the Arar Inquiry and the government's decision to apologize and compensate Arar are perfect examples of Vattimo's and Derrida's reflections on

justice. The Factual Inquiry which found that there was “no evidence indicating that Arar committed an offence or that he posed any risk to national security” (Analysis and Recommendations, 9) vindicated Arar of the allegations that he was a member of al Qaeda. These findings causally implicated Canadian officials by their actions in the U.S. decision to extraordinarily render Arar to Syria. These actions, the Factual Inquiry emphasized, were enabled by “institutional, cultural, and administrative defects in the Canadian security establishment” (Macklin, 2008b: 18). In its conclusion that the exercise of sovereign power (i.e. by the RCMP and DFIAT) was not only unjust but had disastrously violent consequences for Arar, the Arar Inquiry confirms Vattimo’s argument that justice is an interpretation of the law that renders it just where it was once violent. While the Factual Inquiry highlighted those areas where the law not only failed to do justice but denigrated into violence, the Policy Review section (attempted) to render the law more just by offering policy recommendations with the rationale of reducing the violence of the law. This is precisely how I interpreted Vattimo’s assertion that our impulse to reflect on the relationship between law, justice and interpretation arises from our observations that “the law often fails to do justice” (Vattimo, 2003: 144). This failure stems from the inability of the interpreter of the law to keep abreast of “new problems, new rights, and new situations that need to be regulated juridically” (ibid.). The need for “just justice” arises precisely in this context where “the interpretative component of the administration of justice” becomes obvious (ibid.). Judges are not “objective” interpreters of the law and at the highest echelons of power a clear separation between executive and judicial power is not always obvious (a point which I return to). Interpreters of the law are subject to the profound cultural and ideological differences typical of a culturally

pluralistic society. The law (and the interpretation given to it) “are always contingent, always historically and culturally conditioned” (Vattimo, 2003: 144). Hence, when evaluating the Arar case it is important to position it not only within the contemporary “post 9/11” situation (where citizen-rights have become uncertain) but also to contextualize it within the broader history of citizen-rights in Canada. Since the struggle for citizen-rights (which eventually culminated with the Charter) was instigated (at least in part) in response to the ability of nation-states to suspend citizens-rights (injustice), by interpreting the Arar case within this context it is possible to see such actions as part of a larger pattern (which I return to).

The Arar Inquiry is also more or less consistent with Derrida’s reflections on the aporias of justice. With the “*Epokhé* of the Rule,” Derrida emphasized the importance of decision and interpretation in any act or event of justice. In this sense, the Arar Inquiry is an example of a just decision because it entailed “absolutely unique interpretation”—a fresh judgment—which came about as the Commissioner of the Inquiry interpreted the law within the context of a singular case of Arar. Insofar as the procedures governing royal commissions of inquiry are regulated under the Inquiries Act and the Inquiry addressed itself to Maher Arar, the Arar Inquiry is also a perfect illustration of Derrida’s assertion that the just decision is both regulated by the law and addresses itself to the singularity of the other (“The Haunting of the Undecidable”). Finally, the Arar Inquiry is also consistent with Derrida’s argument under the third aporia (“The Urgency that Obstructs the Horizon of Knowledge”) that the just decision belongs to the order of event and therefore is finite and temporal. At a press conference on January 26, 2007, Arar reflected that although no amount of money could compensate him for what he and his

family had endured, the official apology and compensation package he received would allow him to “put more time into being a good father [to my children], and to being a good husband and to rebuilding my life” (Arar qtd. in CBC, 2007). In this finite moment, Arar was redeemed, officially cleared of all charges against him by the Prime Minister of Canada and compensated for the violence inflicted on him at the hands of the state. Yet, this experience of (impossible) justice was fleeting. To this day Arar has yet to receive an apology from the United States government (or Syria), remains on the U.S. No Fly List, and continues to suffer the psychological consequences of his yearlong nightmare (Gatehouse, 2011). Recent ministerial directives (i.e., the torture memos, Chapter 1) and prospective legislation indicate that the Government of Canada was not serious when it pledged to implement the recommendations of the Arar Inquiry. In February 2013 for instance, Bill C-425 (“An Act to Amend the Citizenship Act, Honouring the Canadian Armed Forces”) received its second reading (Wattie, 2013; Kilian, 2013). Bill C-425 would empower the Executive to revoke the citizenship of dual-citizens “deemed to have [...] engaged in an act of war against the Canadian Armed Forces” (Bill C-425 qtd. in Kilian, 2013). Raising the spectre of Khadr in response to these rebukes, Minister of Immigration Jason Kenney qualified that “A Canadian taking up arms against Canadian Forces or committing a serious act of terrorism should be recognized for what they are obviously doing: violently severing the bonds of loyalty essential to citizenship” (Wattie, 2013). Although commentators, have argued that Bill C-425 would be subject to a Charter challenge because it regards the citizenship of dual nationality Canadians differently than single nationality Canadians, bases a crime around the term “an act of war” (although Canadian law has yet to define it) and opens the door to the possibility of

rendering certain actors stateless contrary to international conventions (Kilian, 2013; Wattie, 2013), the Supreme Court of Canada's decision in *Prime Minister v. Khadr* (2010) raises the question as to whether a Charter challenge in this context would be effective at all. I suggested (Chapter 5) that the major determining question in *Prime Minister v. Khadr* (2010) was whether the remedy ordered by the lower courts (that Khadr's repatriation be requested as soon as practicable) infringed on the Executive's exclusive Royal Prerogative power over foreign affairs. The Prerogative Power, according to the Supreme Court of Canada, is "a residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the crown" (*Prime Minister v. Khadr*, 2010 at para. 34). As an arbitrary authority, the Supreme Court of Canada noted that judicial oversight of the prerogative is minimal. As a result the judiciary only has a "narrow power to review and intervene on matters of foreign affairs to ensure the constitutionality of Executive action..." (ibid., at para. 38). Thus, although the Supreme Court of Canada determined that repatriation was an appropriate and just remedy that would redress the violation of Khadr's rights (para. 27-47), the repatriation order was denied. Since the courts only have a narrow power to review Executive action, forcing the repatriation order might have sparked a Constitutional crisis had the Executive branch failed to comply (Macklin, 2008a). Hence, it appears that the SCC rejected the remedy requested by Khadr on the grounds that the power that it would have to enforce the order is *uncertain*. Based on this precedent, it is unclear whether a Charter challenge of Bill C-425 would have any effect at all.

Thus far, Chapter 6 has presented a detailed within-case analysis of the Inouye, Khadr and Arar cases in light of the theoretical and philosophical framework outlined in

Chapter 1 and 2 of this thesis. In the analysis of the case of Inouye, Schürmann's concept of the universalizing-singularizing double bind of finitude and Derrida's figure of the excluded singular of the law (Chapter 2) were deployed in a discussion the two contraries at the foundation of the law and the anarchic conditions of possibilities of citizenship within the nation-state; Vattimo's critique of historicist metaphysics was mobilized to consider whether Kanao's actions against Canadian POWs contravened the Third Geneva Convention and Agamben's conception of the state of exception was used to account for Kanao's *homo sacerization* and the withdrawal of his implied right to a fair trial and due process of law. In the analysis of the Khadr case, I reviewed the three arguments often advanced in defence of Khadr, the child soldier defence, the innocence defence and the procedural defence. Next, drawing on Derrida's conception of justice; Schürmann's conception of singularization and Agamben's conceptions of the state of exception, *homo sacer* and the sovereign ban, I reflected on the implications of Khadr's conviction for war crimes and explained how Khadr's rights as a child soldier, as well as his rights to a fair trial and right to be free from torture and arbitrary detention were suspended. Finally, in the analysis of the Arar case I reflected on the three binary oppositions that structure the Arar case (guilt/innocence; Canadian citizen/dual-citizen; force of law/rule of law) and reflected on the implications of the Arar Inquiry using Agamben's and Schmitt's conceptions of commissarial and sovereign dictatorships, Derrida's conception of the aporias of justice and Vattimo's framework of postmetaphysical justice and interpretation.

Apart from its complexity, what made this interpretation particularly painful was that it needed to be accomplished in a limited amount of space. These cases presented so

many different themes and points of interest that each case on its own could have been the topic of a thesis. Nonetheless, it is possible to distil one significant point of interest from each case. The case of Inouye represents the anarchic moment of the law, which reveals that the conditions of possibility of citizenship in the modern sovereign nation state are anarchic, because the foundations of the law are always already in the process of being dismantled by the anarchic undertow embodied within the (nonfoundational) foundations of the law. The case of Arar is significant because it serves as a reminder that both *violence* (force of law) and *justice* (force of law) are potentialities embodied by law. On the one hand, in the case of Arar, the law's potential for violence (force of law) revealed itself when Arar was rendered an enemy of the state and extraordinarily rendered to Syria where his right to be free from torture was withdrawn. On the other hand, the law's potential for justice (force of law) revealed itself when the Government of Canada accepted the findings of the Arar Inquiry, officially exonerated Arar of all charges against him, apologized, and offered him substantial monetary compensation. Moreover, that the Minister of Public Safety has recently confirmed that CSIS can use information that may have been derived from torture or mistreatment in exceptional circumstances to protect the security of the citizens of the state confirms the finitude of the event of justice. Finally, the case of Khadr is significant because it reveals an entire sphere of action (the Executive's Royal Prerogative over foreign affairs) where Charter rights have no force or effect. It is also interesting that in justifying its refusal to enforce Khadr's Charter claims against the Executive the courts relied on a method of reasoning used in the Era of Implied Rights: the power allocation technique. Although the case of Khadr appears consistent with the claim that Courts tend to enhance rather than check the

prerogative power in times of crisis (McMenemy, 2001; Lagassé, 2012), Khadr's rights were not suspended *per se* since the Supreme Court recognized that Canadian officials infringed Khadr's section 7 Charter right to "life, liberty and security of the person." In this sense, the Khadr case suggests that it is uncertain which branch of government, the Executive or the Judiciary, is the final arbiter on issues that fall within the scope of the Executive's Royal Prerogative over foreign affairs.

Cross-Case Analysis

This section examines themes across the Inouye, Khadr and Arar cases using the philosophical and theoretical framework of this thesis in order to develop the issues commons to all cases. The reader should be aware that this section is particularly brief because the process of developing issues which characterizes the analysis of themes in a within-case analysis (Stake, 1995) continues in the Conclusion and Discussion (below) when the cases are positioned and interpreted within the context of the history of citizen-rights in Canada and when I discuss the implications of this thesis.

Because each case is unique and has features which are not present in the other cases, I have described the cases examined in this thesis as "singular." For example, whereas both Khadr and Arar were indefinitely detained, Inouye was executed. Whereas Inouye and Khadr have not been redeemed, the Arar Inquiry officially exonerated Arar. Lastly, the Khadr case is unique in that he is the first child soldier to be convicted of war crimes since WWII, the last Westerner detained at Guantánamo Bay Detention Center and the first unlawful enemy combatant to have been held accountable for war crimes for the killing or attempted killing of an *invading*, enemy soldier. Yet in the face of all these

divergences, the cases of Inouye, Khadr and Arar converge on a single vector. Both the (1) Inouye case and the (2) Khadr and Arar cases occurred after an exceptional event— Pearl Harbour in the case of Inouye and 9/11 in the cases of Khadr and Arar—was deemed exceptional by the sovereign and constructed as a risk to national security thereby necessitating exceptional sovereign responses such as their rendering as an enemy and the subsequent withdrawal of the rights attached to citizenship. In a process which aided in the political re/foundation of sovereignty *vis-à-vis* the politics of fright Inouye, Khadr and Arar were transformed into enemies of the state and regarded as risks to the very laws that simultaneously grant rights and legitimize the sovereign. In other words, the cases of Inouye, Khadr and Arar show how “the insecurity of the inside” (i.e., the sovereign as an ultimate referent) can be transformed into an external threat to the citizens of the state and thus to citizenship as one of the foundational principles of the nation-state (Vahabzadeh, 2007). The figure of the other/enemy—which represents an actor that has been abandoned by the protective powers of law—embodies such a risk to the security of the citizens of the state. As a result, it reveals a paradoxical situation where by rejecting one’s citizenship, and thus entitlement to rights, the state can nonetheless present itself as legitimately exercising force against those rendered enemies of the state while at the same time, upholding and identifying with the hegemonic discourse of rights. That the simultaneous but contradictory acts of suspension and reaffirmation of rights contributes to the legitimacy and necessity of the state forces us to critically reflect on the role of rights within the history of the modern liberal democratic nation-state.

Discussion and Conclusion

The final section of this thesis evaluates the impact of Charter rights by looking retrospectively, prospectively and transitionally at the Charter, considers the empirical, theoretical and methodological implications of this thesis and considers future paths of inquiry.

Using Radical Phenomenological Categories to Assess the Impact of the Charter

In what follows, I use the retrospective, prospective and transitional categories of radical phenomenology (Vahabzadeh, 2003, 2009) to evaluate the impact of the Charter.

Retrospectively, I summarize “Chapter 4: Three Eras of Citizen Rights” which subjected the Charter to historical interpretation by considering the three eras of citizen-rights in Canada. Prospectively, I question whether the Charter has solved one of the fundamental problems that justified its enactment. Transitionally, I reflect on the possibility of a post-Charter Era and consider the possibility for rights and justice outside the framework of the nation-state, sovereignty and citizenship.

Retrospective Analysis

By applying Schürmann’s epochal theory to the history of citizen-rights in Canada, Chapter 4 interpreted the history of the Charter retrospectively and described three eras of rights in Canada. During Era of Implied Rights, citizen-rights were protected in the unwritten, implied bill of rights which only covered basic civil liberties. Selected rights activists within the judiciary recognized the implied bill of rights using the techniques of restrictive interpretation and power allocation. However, if the language of the disputed legislation was unambiguous and if it was enacted by the appropriate jurisdiction (i.e.,

intra vires), the courts would enforce the disputed statute(s) even when it contravened the implied bill of rights (Tarnopolsky, 1971). On account of these difficulties and because implied rights were unwritten, interpreted narrowly and often came into conflict with parliamentary supremacy (Weinrib, 2001), the protection of rights was minimal and uncertain in the Era of Implied Rights. During the Bill of Rights Era (1960-1980), “universal” and “inalienable” rights received statutory protection in the Canadian Bill of Rights. Although this Era marks a period of development in the area of rights, since the Canadian Bill of Rights was interpreted narrowly, and left the power of parliamentary supremacy untouched, the recognition of rights remained uncertain (Dunn, 1995; McLachlin, 2008; Hucker, 1997). During the Charter Era (1981-present) citizen-rights were entrenched in the Constitution of Canada in the Charter. As Chief Justice of Canada Beverly McLachlin (2008) explains, since all laws must be consistent with the Constitution (the supreme law of Canada), all laws must conform with the Charter. This is the doctrine of constitutional supremacy and it functions to limit parliamentary supremacy. Since the courts interpret Charter rights broadly, and since Charter rights have strengthened the court’s power by expanding the scope of judicial review, end of history status is often (problematically) attributed to Charter rights. In other words, in the Charter Era it is presumed that constitutionally entrenched rights receive reliable protection and will only be subject to the “reasonable limits” that can be “demonstrably justified in a free and democratic society” as the Charter’s preamble states (1981).

In this thesis I have attempted to locate this history of the Charter in *both* the constitutional thought and culture that first propelled rights and fundamental freedoms to the forefront of the Canadian legal imagination as well as the articulated experiences of

injustice which gave rise to the need for written rights in the first place. In doing so, I have endeavoured to refrain from reifying the metaphysical historiography that frames the “official” history of rights and the Charter. This metaphysical version of the history of citizen-rights in Canada portrays the Charter as a document which symbolizes that Canada has overcome (*Überwindung*) the injustices of its past governments. Moreover, I approached the history of citizen-rights in Canada with the understanding that although the past cannot be reconstructed objectively, the past can be represented and interpreted. To these ends, the theorists that comprise this thesis’ philosophical and theoretical framework have been indispensable in the potential of this thesis to distance itself from metaphysics. As the reader knows, epochal theory enabled this thesis to speak of three distinct eras of citizen-rights. Epochal theory also enabled this thesis to account for the historical-legal-discursive transformations that occurred between (1) the Era of Implied Rights and the Bill of Rights Era and (2) the pre-Charter Era(s) and the Charter Era. First, between the Era of Implied Rights and the Bill of Rights Era the relationship between citizens and the state was dramatically transformed by the articulation of written rights. Although the implied bill of rights protected a number of rights that are essential to democracy, these rights tended only to be extended to white men (this is uncontroversial). By contrast, the Bill of Rights (and the Charter) recognizes that one’s race, national or ethnic origin, colour, religion, sex, age or physical or mental disability are unconnected to how they should be treated, especially within the context of our legal, political and social institutions. This idea of “equality before and under law and equal protection and benefit of the law” is a relatively new idea which could not be taken for granted in the Era of Implied Rights. A noticeable transformation in the conception of lawmaking as regards

the relationship between the state and the citizen also occurred between the pre-Charter Era(s) and the Charter Era. Whereas in pre-Charter times (under the implied bill of rights and/or the Canadian Bill of Rights), the executive/legislative branches of government were responsible and would ultimately resolve—for better or worse—the challenges of the citizens to the constitution (state), in the Charter era, the judiciary has assumed this role. As the Charter places “reasonable limits” on the government’s use of force, this shift from “parliamentary supremacy” to “constitutional supremacy” is by all standards a move forward.

The theory of history articulated in Derrida’s essay the “Force of Law: the Mystical Foundations of Authority,” allowed this thesis to understand why new strategies for protecting rights were required. Derrida’s assertion that: “deconstruction takes place in the interval that separates the undeconstructibility of justice from the deconstructibility of the law” (1989: 35) means not only that justice and deconstructibility are the conditions of possibility of the law, but that justice (which is always to come) is what a deconstruction of the law is supposed to achieve. When applied to the history of citizen-rights in Canada this means that the enactment of the Canadian Bill of Rights and the Charter can be understood as documents which deconstruct and reconstruct the law for the purposes of making the law more just by including excluded singulars and thereby restoring the hegemonic authority of the law. That the Canadian Bill of Rights attempted to remedy the deficiencies of the implied bill of rights, and that the Charter attempted to remedy the deficiencies of the Canadian Bill of Rights is evidence of this. Although Derrida’s reflections on justice and law preclude the possibility of characterizing the enactment of new law as just—a strategy which is consistent with Benjamin’s

observations that justice can be appropriated for the purposes of retroactively justifying the law—Vattimo’s attempt to think justice, law and interpretation from a “postmetaphysical” framework endorses no such preclusions. His two-fold argument applies to the history of citizen-rights in Canada. On the one hand, Vattimo (2003) points to a legal-administrative secularizing trend in late modern culturally pluralistic societies in which the state has assumed a “monopoly on the legitimate distribution of rights” (Vahabzadeh, 2007). On the other hand, Vattimo also acknowledges that the enactment and interpretation of rights has the effect of rendering the interpretative component in the administration of justice visible. This also has the effect of desacralizing and secularizing justice (and law) and weakening the violence of the origin in turn. The history of Charter rights is consistent with Vattimo’s sociological observations about this secularizing process in which “the process of weakening and the slackened grip of stable foundations have caused our laws to shift away from representing presumably more fundamental moral principles to reflecting the emerging, myriad forms of communal life and identity politics [...]” (Vahabzadeh, 2007: 15). In this situation, our laws have “become a reflection of our changing practical values which in turn shape our moral codes” (ibid.). Indeed, the Charter is a text that reflects our movement away from the homogenizing and violent forces of our ethnocentric past towards the multicultural present (and future) characterized first and foremost by its irrefutable cultural plurality. In this context, the promise of rights is necessary for the law to maintain its hegemony even if in practice rights are neither universal nor inalienable.

The cases of Inouye, Khadr and Arar are illuminating in this context. As an enemy of the state, not only would Inouye’s implied rights have been suspended, implied

rights would not necessarily have been extended to “persons of the Japanese race” in the Era of Implied Rights. Hence, after facing two trials—the first for war crimes by military commission and the second for treason by British criminal court—and after being denied due process of law, Inouye was convicted and executed in 1947 making him and Louis Riel the only citizens to have been convicted and executed for treason since 1867.

Although an execution of a Canadian citizen would be unthinkable today—another indication that our laws have become more just—the subjection of a citizen to a retributive conception of justice—think of the case of Khadr—is not.

Vattimo’s injunction to think justice as a concept, which has been secularized and desacralized, encourages us to abandon our metaphysical conceptions of justice. The event of justice is not a moment of grand Deliverance, fulfillment, presence, reconciliation, *Aufheben*, the realization of a just society (or law) nor the instantiation of utopia at the end of history. Insofar as it is none of these things, justice, as in the act of establishing a relationship with the excluded singular, is rather banal. As the case of Arar illustrates, the act of justice—in his case redemption, apology and compensation (much like Japanese and Chinese redress)—although tremendously symbolic in terms of amnesty and reconciliation, cannot heal the permanent wounds inflicted under the guise of national security.

Prospective Analysis

Although the Bill of Rights and the Charter were borne (at least in part) as a reaction to sovereign power exercised against the perceived enemies of the day, that nation-states ought to acknowledge the rights of their enemies is a principle that requires

justification because it runs counter to the status quo. As this thesis has attempted to show *vis-à-vis* the cases of Inouye, Khadr and Arar the ability of the Executive to transform the other into an enemy is at the foundation of the liberal democratic state in which the sovereign has the unique ability to proclaim the state of exception for itself. Especially in a context of metaphysical uncertainty (Chapter 2) where actions can easily be construed as posing a risk to very foundations of the law, it is all too easy for the sovereign to render any actor an enemy and withdraw their rights in the name of the public good. In this sense, the expansion of rights to “the enemy” and the removal of derogation clauses is just one of many areas where the rights revolution remains incomplete and warrants further study. For guidance in this matter, this thesis now looks *prospectively* at the history of citizen-rights in Canada to see what possibilities the Charter conceals. This thesis has only reflected on the implications of two major events in terms of citizen-rights: the Attack on Pearl Harbor on Japanese Canadians and the events of 9/11 for those identified as Arab or Muslim. But there are so many more examples of the expulsion and exile of groups regarded as the enemy in British/Canadian history: the Great Expulsion of the Acadian people from the present day Maritime provinces by the British during the Seven Years War (1755-1763); German Canadian Internment during WWI and WWII; the Internment of Jewish refugees in 1940; the Internment of Italian Canadians during WWII; the Internment of ethnic Ukrainians and Austro-Hungarians in forced labour camps during WWI. *These cycles of history follow a similar pattern.* A threat from a far is rearticulated as a risk to national security. As the external threat is transformed into an internal risk, the other is transformed into an enemy, which, in turn, culminates with the denigration of their status as citizens and the withdrawal of their procedural access to

substantive rights. The paradox is that the transformation of the actor into an enemy is not permanent. It must feed off a perceived threat from afar (Vahabzadeh, 2007). This is why I quoted Hier (Chapter 1) when I described the enemy as a “historically contingent signifier of harm” (2004). In this context, the singularization of the other continues until a new civilizational enemy emerges and another people or group is targeted. From the standpoint of the history of citizen-rights in Canada, the catalogue of gross miscarriages of justice (which in the Scandinavian languages literally means the murder of justice) and legal vacuums (i.e. situations where an injustice is uncorrected) is not too long to recount once we take account of these cycles of history though beyond the scope of this thesis. What is clear, however, is that terrible injustices have been carried out in the name of (the collective right to) national security and justice. The collective right to national security, which the state often evokes to justify the exercise of Executive power, entails an implicit recognition of the principle of sovereignty and an affirmation of the central role of the sovereign, the state and the citizen (in order of importance) in the international system of states that emerged in 1648 after the Thirty Years War. In hindsight, the government of the day has almost-always come to acknowledge that the exercise of unchecked executive/sovereign power during periods of crisis was unjust because it occurred without a credible risk to national security. *Hence, one of the lessons of this thesis must be that in times of uncertainty, the cloak of national security ought not to be used as a safeguard to protect the Executive from the power of judicial review.* This statement does not imply that there is a clear or complete separation of power between the executive and the judicial branches. Indeed, as the reader already knows based on this thesis’ description and analysis of the case of Khadr, when questions of law are raised in the area

of the Executive's Royal Prerogative over foreign affairs, at the highest echelons of power the separation between the executive and judicial branches becomes fuzzy and judicial independence all but disappears as members of the court exercise their power to decide the state of exception. This statement also does not imply that processes of judicial review are not in place within those security intelligence agencies that deal with the practical questions of national security. For instance, according to the Immigration and Refugee Protection Act (IRPA), in exceptional circumstances, the federal government (via the Canada Border Services Agency) can issue security certificates to detain or remove permanent residents or foreign nationals that are deemed to pose a risk to Canada's national security or the safety of any individual. These certificates are written by CSIS and signed by the Minister of Public Safety and the Minister of Citizenship and Immigration after which a federal court judge reviews the evidence prepared by CSIS and determines whether the security certificate is reasonable (in which case the certificate becomes a removal order) or the certificate is not reasonable (in which case the certificate is revoked). Although this process of issuing and enacting security certificates and removal orders does contain an inbuilt mechanism of judicial review since a judge reviews the reasonableness of a certificate based on evidence, this process is quasi-judicial process and as such is not the type of judicial review one would expect in a court setting. To safeguard national security: hearsay evidence is admissible; evidence can be heard in secret (meaning the subject does not have to be informed of the allegations or evidence against them); key terms within IRPA are not defined (i.e. "national security") and appeals are difficult to obtain when removal orders are issued. Rather, this statement means that Canada's rights revolution cannot be understood without reference to the

experience of unchecked executive/sovereign power in times of perceived crisis. Indeed, one of the central if unstated assumptions in this thesis has been that we cannot understand the history of citizen-rights in Canada without reference to the experience of injustice that arose from these experiences of expulsion and exile and the inability of neither rights nor redress to overcome (*Überwindung*) them. Although it is not my intent to reduce the history of rights to such occurrences, these experiences of injustice have shaped Canadian history and given sustenance to the rights revolution. This is especially true when one understands how the rights revolution in Canada was fuelled (at least in part) by the post-World War II rights movement that culminated with the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and other similar documents. These rights documents emerged as moral reactions to major events in WWII such as the Nuremberg Laws that split Germans into “citizens with full rights and citizens without political rights,” the problem of mass statelessness and the Holocaust (Agamben, 2008: 91).

Although Arar was eventually redeemed and compensated, his rights were also infringed. When the RCMP and DFIAT shared intelligence with U.S. officials, they became causal agents in his extraordinary rendition to Syria by the United States. Although the Supreme Court of Canada recognized that Canadian officials had infringed Khadr’s section 7 rights, the judiciary maintained that they only had a narrow power to review the Royal Prerogative and the exercise of executive power over foreign affairs. *Hence, when we reflect on the cases of Khadr and Arar we see that in both cases the effect of Charter rights on sovereign/executive power exercised in the state of exception is uncertain.*

This thesis has described the Charter's effects against sovereign power exercised with the context of the Executive's Royal Prerogative over foreign affairs as uncertain precisely so as to highlight the vulnerability of Charter rights to a subjective, sovereign decision on a state of exception. Although rights are never absolute, inalienable nor universal in practice in certain scenarios one can predict with near certitude that citizen-rights will be recognized. By contrast, the recognition of citizen-rights within the context of the Executive's Royal Prerogative are radically uncertain meaning unforeseeable, unpredictable and indeterminate. This uncertainty is attributable to the condition that the decision to recognize (or deny) the Charter rights of those that have been rendered enemies of the state comes down to the decision of members of the Executive (e.g., the Prime Minister, the Justice Minister) and/or the Judiciary (e.g., members of the Supreme Court of Canada). Moreover, that the recognition of the Charter rights of citizens that have been rendered enemy of the state is uncertain implies that these singular cases present an opportunity for an event of justice—which would entail the recognition of Charter rights against the state—or for an act of foundational violence—which would entail the denial of Charter rights against the singular—as described in Chapter 2. The decision to recognize, and endow with the force of law, the Charter rights of those rendered enemy of the state (or the decision to deny said rights) in turn reinforces the claim that the capital "S" sovereign is not the sole agent that can make decisions on the state of exception. A judge acts as sovereign when he or she decides to recognize or deny Charter rights just as members of the executive act as sovereign when they actively seek to deny the rights of those they deem enemy. This uncertainty also refers to the undecidability and the experience of impossibility (*aporia*) (Chapter 2) that haunts each

decision to recognize or deny rights in such singular cases due to the paradoxical structure of the law. The event of decision ensures that incalculable justice (that addresses itself to the singularity of the other) will be rendered and calculated by the law which applies general, pre-existing and calculable rules and procedures to singular cases thereby universalizing itself and banishing the event of justice to the realm of the temporality.

Both Khadr and Arar challenged the state's right to exercise force on them. However, whereas Khadr's challenge was unsuccessful, Arar's challenge ended in the state's apology and redress. Rather than being aided by the Charter *per se*, a crucial factor in the decision to apologize to Arar and compensate him—which was absent in the case of Khadr—was public's perception “that Arar was an innocent man who was wrongly labeled an extremist and terrorist affiliate” (Macklin, 2008b: 20). That Khadr's challenge was unsuccessful—even though the highest court acknowledged that his section 7 right had been infringed by the RCMP and DFIAT and that this infringement was not in accordance with “the principles of fundamental justice”—indicates that there is an entire sphere of action (the state of exception) where rights have an uncertain effect. Charter-rights have an uncertain effect against the Royal Prerogative over foreign affairs, a power which belongs exclusively to the Executive branch of government. Evidence can be found in the (failed) attempt of the lower courts to use the power allocation technique to declare executive actions in relation to Khadr unconstitutional. In this context, Charter-rights are mere abstractions. This is not to say that abstracted rights have no force (although they lack the force of law). Rather, abstract rights exist as guidelines (not determinates) of action. In this sense, not only can we question the separation of power between the judiciary and the executive branch—the Khadr case illustrates how the

Executive branch can justify infringements of rights by appealing to the Royal Prerogative—but we can also (prospectively) envision a period in the future (a post-Charter Era) where the powers of judicial review and citizen-rights have expanded to cover this area.

Transitional Analysis

The question of whether the Charter has had any effect on the state of exception is not simply a question of the legitimacy or foundation of sovereign power/force. Rather, given that since WWII, rights were supposed to provide “the foundations for peace, justice and freedom in the world,” that the state can nonetheless exercise force on an actor whose actions against one’s state disqualifies one for citizenship rights and thus entitlement to rights is also a question of the experience, interpretation and possibility of justice to come (*l’avenir*) and the affirmation of the future, of those who are yet to come (*arrivants*) (Derrida, 1994). It is when we are forced to reckon with the call for justice articulated by singulars that have been rendered enemies of the state that we are confronted with the post-metaphysical task of learning how to think justice beyond the foundational categories of the nation-state, the citizen and sovereignty. In other words, the cases of Inouye, Khadr and Arar provide us with a point of departure for thinking “transitionally” (Vahabzadeh, 2003) about the possibility of justice and rights beyond their foundational marriage to the nation-state and the citizen taken for granted by the hegemonic liberal democratic discourse of rights. When either citizens or the nation-state are presumed to be the only pertinent subjects of justice or rights, it becomes all too easy to justify the exercise of force against non-citizens who are deemed enemies of the state. Enjoying the exclusive rights and monopoly on legitimate force (Weber, 1919), the state is able to

transform an act that would ordinarily horrify us into a banal act. Hence, doubting the right of the state to use force against those rendered as enemies of the state threatens the foundations of political science, international law, just war theory, the Westphalian system, not to mention the society, the nation-state and the hegemonic discourse of rights. Specifically, it provides us with the insight that, as a question of just and responsible justice, and in response to state sanctioned violence, citizens and the nation-state can no longer be understood as the only pertinent subjects of justice and rights. What is required in this context is an ethics without transcendence (or a politics of immanence) which “receives its principles from the treatment of an *arrivant*, a foreigner, lost stranger, the immigrant, or an ‘other’” (Vahabzadeh, 2007: 26). In doing so, a “postmetaphysical ethics without transcendence,” to borrow a term from Vattimo, would continually submit the needs of the sovereign to the needs of the other and continually renegotiate the boundaries between self and other (ibid.). A justice exercised in accordance with a postmetaphysical ethics without transcendence would be consistent with the weak messianic power that Heidegger attributes to justice in *The Anaximander Fragment* and the distinction he makes between the ontic justice (which is moral and juridical) and the ontological justice of *Diké* (the primordial name of Being) which has been forgotten:

If it is incontestable that our moral-juridical sense of justice is inherently connected to the ontological commitments of the prevailing epoch [...] and is at the same time connected also to that *other* ‘justice,’ that justice, namely in accordance with which time gives being and holds sway in its presencing, then it must be legitimate for us to ask whether the supervenience of another *Ereignis* of being would not, interrupting history as *Enteignis*, open up at the same time different possibilities for justice in the moral-juridical sense. (Kleinberg-Levin, 2007: 417)

Insofar as the Bill of Rights and the Charter are documents symbolizing an overcoming of past injustices which occurred as a result of the arbitrary exercise of sovereign/executive power, this thesis has alluded to the possibility that a new rights document. Under the auspices of this rights document “to come,” rights would not be fettered to the conditions of citizenship or the nation-state, and would thereby function to weaken the sovereign in a truly post-Charter Era. Consistent with an ethics without transcendence and the weak messianic possibility of the “other justice” that Heidegger speaks of, the rights of those who are neither subjects nor citizens of the nation-state, would be the rights of singulars; these right would not be subject to suspension in times of crisis.

Summary, Implications and Future Paths of Inquiry

Using a three-pronged strategy of analysis, this thesis studied the cases of Inouye, Khadr and Arar which capture the state of exception and *homo sacerization* phenomenon in times of perceived crisis. First, in order to establish the theoretical and philosophical framework of this thesis, I explored Agamben’s research on the *homo sacer* and state of exception (Chapter 1), took a postmetaphysical look at the problem of exceptionality through the works of Derrida, Vattimo and Schürmann (Chapter 2) and reviewed the research process in detail including this thesis’ inspiration, methods, strategies of analysis and their application in the research process (Chapter 3). Second, I elaborated on the three-eras of citizen-rights in Canada by applying Schürmann’s epochal theory to the history of citizen-rights in Canada (Chapter 4). Third, in light of the philosophical and theoretical framework of this thesis, I explored the singular cases of Inouye, Khadr and Arar (Chapter 5) and used within-case and cross case analyses to interpret them (Chapter

6). As a result of this analysis, I argued that Charter rights have *uncertain* effect on sovereign power exercised of the state of exception because it is uncertain whether the Courts can review Executive action to assess its compliance with Charter rights. Finally, the conclusion of this thesis used to retrospective, prospective and transitional analysis to interpret the history of the Charter, and reflected on the possibilities for rights and justice outside the framework of citizenship and the nation-state. In what follows, I briefly reflect on the empirical, theoretical and methodological implications of this thesis and consider future paths of inquiry.

One of the primary theoretical implications of this thesis is the insight that strategies of precautionary risk (such as the transformation of the other into an enemy and the suspension of their citizen-rights) are ways of falling back into metaphysics that re-found sovereignty and in this way resist the secular proceduralism of liberal democracy and its late modern pluralistic interpretation of the law which reflects a culturally pluralistic society in its rights legislation. Moreover, as mentioned in Chapter 3 in light of Agamben's research in *Homo Sacer: Sovereign Power and Bare Life* (1998) and *The State of Exception* (2005) and the replication design of this of thesis I examined the strength of Agamben's prediction that citizen-rights have *no* effect against sovereign power exercised in the state of exception. The finding that citizen-rights have an uncertain effect against sovereign power exercised in the state of exception comprises the primary theoretical implication of this thesis. This theoretical finding is also consistent with my empirical finding that Charter rights have an uncertain effect on the prerogative power of the Executive branch in matters of foreign affairs. As the reader already knows (Chapter 6), that Charter rights have an uncertain effect on the state of exception implies

not only that the Canada's rights revolution is incomplete but that it might be possible to envision a justice system wherein rights are neither fettered to the conditions of citizenship nor the nation-state. Taken together, the empirical and theoretical findings of this thesis are consistent with the opinions of contemporary Charter scholars that both acknowledge the Charter's "significant emancipatory impact in Canada" *and* are sceptical of the Courts claim that they have successfully endowed Charter rights with the force of law (Arvay et al., 2012: 62; Berger and Stribopoulos, 2012). This thesis will have implications on future research in this area of Charter scholarship. Though it is beyond the scope of this thesis to consider them in detail, evidence of the Charter's uncertain legacy is plentiful. Berger and Stribopoulos argue that although the Charter has had important impacts in the realm of criminal justice, its legacy can be best described as one of "continuity in logic and patterns" than one of change (2012: 5). For example, Berger and Stribopoulos observe that Canadian criminal justice procedure in the Charter Era has "ushered in a renaissance for common law police powers" and that Charter rights have unintentionally contributed to the proliferation and institutionalization of draconian policies such as mandatory minimum sentences (2012: 6). Consistent with Derrida's reflections on law as the conditions of possibility and impossibility of justice and vice versa (Chapter 2), the paradox is that although Charter entrenches the revolutionary and emancipatory principles such as justice, freedom, equality, democracy and liberty, they are administered in a system which makes their realization impossible (Bakan, 1997). Hence, Derrida's approach to law and justice is provides a framework which could be used in assessments on the effects of post-World War II rights documents in light of the findings of this thesis. Finally, as a result of this thesis' unique approach to the history of

citizen-rights in Canada *vis-à-vis* the epochal theory of Schürmann, and its in-built ability to critique the metaphysical paradigm, my thesis has potential methodological implications for inquiries in the field of legal history, jurisprudence, socio-legal studies, criminology and the sociology of law. For instance, the research design as well as the philosophical and theoretical framework of this thesis could easily be used in a study of international law and specifically of the history Universal Declaration Human Rights. Moreover, given the empirical finding of this thesis that Charter rights have an uncertain effect against sovereign power exercised in the state of exception, I believe that this approach would be useful in future study which might describe the relationship between the judiciary and the executive within the context of the history of citizen-rights in Canada. Such a study might open the door to a more sustained reflection on the possibilities of rights and justice outside the framework of citizenship and the nation-state.

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