The State of Freedom and the State of Emergency

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At the end of the sixth century B.C.E., the city state of Rome underwent a major political upheaval. Fed up with the cruelty of their seventh and last king, Lucius Tarquinius Superbus, the Roman people expelled him from the city. They then replaced the detested monarchy with a republican form of government, one committed to the principle of freedom—*libertas*—and relying, at least in principle, on the participation of the entire citizenry in public life. But the republic was immediately in peril. Neighboring Latin cities united against it, and the Romans took a drastic step: The appointment of a dictator.[1]

Contrary to the modern connotation of the term, the Roman "dictator" was not a tyrant; rather, he was invested with wide-ranging military and political powers for the purpose of addressing, unhindered, both external and internal threats to the security of the state. Thus, although the very idea of absolute authority was antithetical to the spirit of the republic, an existential danger to the homeland justified, in the eyes of the Romans, the concentration of power in the hands of one individual. Still, the dictator was not omnipotent: He was appointed by a consul on the recommendation of the Senate; his tenure was limited to six months (even less, if he completed his task); his judicial powers were extremely restricted, and did not generally

extend to constitutional matters; and he was forced to rely on other authorities for approval of expenditures.[2] Since Roman history was riddled with wars and violent struggles, the appointment of a dictator was not a rare occurrence; beginning with Titus Larcius Flavius, appointed in 501 B.C.E., the office was held dozens of times until its abolition by Mark Antony after the murder of Julius Caesar in 44 B.C.E.[3]

In the intervening centuries, the word "dictator" took on negative connotations in Western political discourse. Yet the rationale on which the concept was based remains as valid as ever. Indeed, even the most enlightened of today's liberal democracies recognize the special requirements of a state of emergency: The need for a state, under certain exceptional circumstances, to take radical measures—the suspension of the law and the formal rules of justice, for example—to ensure its survival. This is precisely the kind of argument made by some of the democracies currently fighting the global war on terror. Although these regimes identify themselves with the ideals of progress, tolerance, and liberty, they are increasingly prepared to act in an oppressive fashion, even to suspend constitutional provisions, justifying this course of action by arguing that the protection of the lives and well-being of their citizens leaves them with no other choice.

Perhaps the most striking example of this trend is the set of policies undertaken by the United States since the terror attacks of September 11, 2001. In this period, the American government has incarcerated hundreds of people suspected of terrorist activities—officially deemed "unlawful enemy combatants"—in the Guantánamo Bay detention camp and in secret CIA facilities throughout the world, without granting them the right, for example, to take their case to court—considered a basic tenet of common law—and without setting a time limit on their detention.[4] President George W. Bush secretly allowed the National Security Agency (NSA) to wiretap American citizens on American soil, despite the fact that it had in the past been authorized to conduct wiretaps and surveillance only outside the borders of the United States.[5] Confronting the public outcry over these actions, spokesmen for the Bush administration repeatedly claimed that they

were compelled to act in order to protect the essential interests of "national security."[6]

The United States is hardly a special case, however. When faced with similar security concerns, several European countries have taken similar steps. On November 12, 2001, in the wake of the September 11 attacks, British Home Secretary David Blunkett declared a state of emergency in the United Kingdom. This move allowed his government to release itself from the constraints imposed on it by the European Convention on Human Rights, and cleared a path for the passage of laws intended to extend dramatically the powers of the security services.[7] President Jacques Chirac of France also declared a state of emergency on November 8, 2005, in response to riots by Muslim immigrants in the suburbs of Paris and other French cities. This allowed police forces to impose a curfew, to conduct searches without a warrant, to place suspects under house arrest, and to prohibit public assembly. This state of emergency, of a kind France had not experienced since its withdrawal from Algeria in 1962, was officially rescinded two months later, in January 2006, long after the period of unrest had ended.[8]

Against this backdrop, many activists and organizations—particularly those committed to the defense of human rights—have begun to worry about the moral and constitutional state of liberal democracies. Some influential intellectuals have adopted an almost apocalyptic tone, insisting that we are in fact witnessing the transformation of Western democracies into tyrannical regimes, under the guise of a permanent "state of emergency." "Faced with the unstoppable progression of what has been called a 'global civil war,'" writes the philosopher Giorgio Agamben, "the state of exception tends increasingly to appear as the dominant paradigm of government in contemporary politics." According to Agamben, "this transformation of a provisional and exceptional measure into a technique of government threatens radically to alter—in fact, has already palpably altered—the structure and meaning of the traditional distinction between constitutional forms. Indeed, from this perspective, the state of exception appears as a threshold of indeterminacy between democracy and absolutism."[9] Similarly,

neo-Marxist thinkers Michael Hardt and Antonio Negri argue in their book *Empire*—published, it should be noted, prior to the events of September 11—that the old political order, based on nation states, has gradually come to be displaced by a new one, which finds legitimacy for its predatory tactics through the paradigm of a permanent "state of exception."[10] So, too, does Judith Butler, a central figure in the field of gender studies, believe that the phenomenon of Guantánamo is suggestive of things to come:

> The fact of extra-legal power is not new, but the mechanism by which it achieves its goals under present circumstances is singular. Indeed, it may be that this singularity consists in the way the "present circumstance" is transformed into a reality indefinitely extended into the future, controlling not only the lives of the prisoners and the fate of constitutional and international law, but also the very ways in which the future may or may not be thought.[11]

The fear of what Slovenian philosopher Slavoj Žižek calls "the liberal-totalitarian emergency"[12] stems, therefore, from the belief that even countries with a robust democratic tradition may find themselves pulled into a legal black hole from which there is no escape. In view of the revelations of abuse of detainees by Americans and their allies in recent years, this fear may seem to be justified. But is it?

Broadly speaking, it is not. True, while confronted with a tangible threat, democracies are capable of acting brutally and oppressively. But as I shall argue, in the final analysis democratic peoples and governments perceive the state of emergency as more of a burden than a temptation. While democratic regimes may be capable of sustaining it temporarily, over time it presents them with serious problems, resulting from the deep conflict between the state of emergency and the worldview on which both the structure of their government and their methods of operation are based. In what follows, I will focus on this fundamental conflict. I will begin by bringing into relief the animosity displayed by the modern liberal state toward any exercise of extra-judicial power, including that particular kind of violence that is said

to "precede" the rule of law, or to establish it from the outset. I shall then address the role played by the sovereign in the decision to declare a state of emergency and the ways that democratic systems call this kind of authority into question. Next, I will examine the remarkable ability, and inclination, of the liberal-democratic order to handle social discord without resorting to extreme measures. Finally, I will explore the underlying commonality of all these elements, and argue that modern Western democratic culture possesses a distinctive anti-authoritarian impulse, one that allows it to function, to a great extent, as an arena of resistance to government—a quality that, while perhaps not ensuring its full immunity to self-destruction, nonetheless reduces considerably its chances of sliding into a permanent state of emergency, in which the great political and moral advantages democracy has over the despots and terrorists who challenge it are eviscerated.

II

Although the ways in which the state of emergency has been manifest have evolved over the generations, the political and legal logic that drives it remains the same as when it was first instituted in ancient Rome.[13] Indeed, following the Roman example of a limited "constitutional dictatorship," the modern state of emergency is intended to allow a government to exercise power unfettered by customary legal norms.[14] Although such power lies, theoretically, outside the sphere of law, it is not entirely removed from it, since its use is explained by the need to ensure the survival of the "proper order" embodied in that law. In other words, the violence used by a government during a state of emergency is the exception that sustains the rule.[15]

The nature of an extra-judicial power that nonetheless bears some kind of positive association with the law was explored by the German Jewish

thinker Walter Benjamin, whose fairly vague ruminations on the subject have inspired a string of learned discussions among contemporary philosophers. In his essay "Critique of Violence," published in 1921, he differentiates between what he calls "law-preserving violence," which derives its legitimacy from the legal order and is thus bound to its service, and "law-making violence," which is not anchored in any legal sanction or endorsement. Violence of the latter kind is typical, according to Benjamin, of situations of lawlessness, such as war, from which a new order occasionally arises; sometimes, however, it appears in situations where the rule of law is upheld, and as such is suggestive of the primordial abyss that always hides behind the façade of justice. A typical example of such an event is the imposition of the death penalty, whose purpose, says Benjamin, "is not to punish the infringement of law but to establish new law. For in the exercise of violence over life and death more than in any other legal act, law affirms itself."[16]

If we adopt Benjamin's line of argument, we may identify "law-making violence" in the state of emergency. True, authorities acting on behalf of the state are for the most part empowered by a properly instituted legal order. Moreover, their declared intention is the defense of that order from external or internal threats. Nevertheless, in the absence of normal legal restrictions, the extreme measures they employ to that end evoke a primal, explosive, and unrestrained power that *establishes* the rule of law even while it acts outside of it.[17]

This kind of repressive potency is naturally compatible with the tastes of despotic regimes, who rule by fear and by organizing the masses against real or imagined threats. It is no surprise, then, that the creation and establishment of the great totalitarian powers were achieved largely through the imposition of an extended state of emergency. These dictatorships saturated the public discourse with military metaphors, often invoking a "permanent state of civil war" as a pretext for their actions.[18] National Socialism's battle cry, for example, was the struggle against Jewish Bolshevism, while

communism extolled the revolutionary campaign against capitalist imperialism. As British historian Richard Aubrey explains, "in neither system was there ever a period of equilibrium. A sense of crisis, of obstacles to overcome, of social wars and military wars, was used to keep both societies in a state of almost permanent mobilization."[19] Only against the backdrop of enduring crisis were these regimes able to justify their existence and to succeed in carrying out horrific acts against their opponents.

Whereas dictatorships exploit—or even create—crises to justify the use of "law-making" power, liberal democracies, by contrast, prefer to downplay their violent origins. Benjamin, who considered himself a Marxist, saw this as a sign of weakness. "When the consciousness of the latent presence of violence in a legal institution disappears, the institution falls into decay," he wrote. "In our time, parliaments provide an example of this. They offer the familiar, woeful spectacle because they have not remained conscious of the revolutionary forces to which they owe their existence."[20] Benjamin's criticism is directed against the very essence of parliamentarianism, against the approach that prefers dialogue and compromise to open confrontation with one's rivals. Of course, the parliamentary mindset, identified primarily with liberal democracy, does not rule out the use of force; it merely prefers to work with the more restrained, domesticated kind of violence found within the rule of law (i.e., law enforcement), rather than resort to "law-making violence" of the sort that seeks to destroy the enemy at any price.[21]

Even if we reject Benjamin's affection for Bolshevik-style revolutions, there is certainly truth in his claim that the liberal worldview tends to forget, or prefers to ignore, the violent origins of the law. This finds clear expression in classical social contract theory, which anchors the legitimacy of the political and legal order in an initial rational consensus.[22] The theoretical narrative of the "founding agreement" is used as a corrective, and sometimes even a substitute, for the blood-soaked history of state-formation through wars, revolutions, or "ethnic cleansing." Moreover, this narrative makes it possible for the law to present itself as the fruit of a collective and voluntary

undertaking, instead of as the exercise of raw, violent power. This willful delusion aroused the anger of the philosopher David Hume, who wrote in response to the political ideas of John Locke in 1748: "Almost all governments which exist at present, or of which there remains any record in story, have been founded originally, either on usurpation or conquest, or both, without any pretense of a fair consent or voluntary subjection of the people."[23]

Today, efforts to locate the source of the social order in some original contract are out of fashion among political theorists.[24] Yet the attitude behind such efforts—a deep-rooted abhorrence of extra-legal, or pre-legal, violence—continues to be a central feature of liberal political philosophy. To radical thinkers like Benjamin, who revere the revolutionary act against the status quo, this attitude reveals the hypocrisy of bourgeois society, forever trying to conceal its oppressive nature and shady past behind a guise of tolerance. Those with a more favorable view of liberalism, however, are likely to believe that its aversion to naked power stems from a crucial value: The rule of law.

The idea that all authority must obey a code of justice and right behavior was not a modern invention; it appears in the earliest civilizations of the ancient world.[25] Yet, only in the last two centuries did there emerge a fully developed ideological paradigm that attempts to subject every mechanism of the state to legal regulation.[26] The aim of this new paradigm is to prevent governments from wielding their power arbitrarily, and in so doing sacrifice the basic rights and liberties of man.[27] In the words of the nineteenth-century jurist Benjamin Constant, the objective was "the union of men under the empire of the laws."[28] Constant, who offered the first liberal critique of the French Revolution, also correctly understood the danger posed to political freedom by the suspension of the law in times of crisis. In an article he wrote in 1814, he warned against the temptation to declare a state of emergency and extend it on various pretexts: "Presented initially as a last resort, to be used only in infinitely rare circumstances, arbitrary power becomes the solution to all problems and an everyday expedient."[29]

Constant's warning is indicative of the deep-seated suspicion held by liberal thinkers and jurists toward the very idea of a state of emergency. While cognizant of the need for "exceptional" governmental powers during a crisis,[30] most reject the argument that such powers are exercised in a legal void.[31] Thus do both international law and the constitutions of many countries demand that authorities be extremely mindful of preserving certain legal norms, even—and perhaps mainly—in times of emergency.[32] The result is that when a government violates these norms, it may find itself in direct confrontation with the legal system.[33] This has been the case, for instance, in the United States, where the president enjoys especially wide-ranging emergency powers. In the last few years, the Supreme Court has demonstrated repeatedly that it is willing to take on the executive branch if it believes that the latter is riding roughshod over basic rights and freedoms. The court ruled, for example, that it has the authority to decide whether foreign subjects are being legally held at Guantánamo Bay;[34] that the special military tribunals set up to try "unlawful enemy combatants" held by American forces are in breach of the uniform code of military justice and the Geneva Conventions;[35] and that the administration is not entitled to deny detainees with American citizenship minimal legal defense, such as the right to challenge their detention before a judge.[36] In this last decision, in the case of *Hamdi v. Rumsfeld*, Justice Sandra Day O'Connor emphasized that "a state of war is not a blank check for the president when it comes to the rights of the nation's citizens."[37]

Though the concept of "the rule of law" can be abused as well, justifying excessive activism on the part of the courts, there is no doubt that it represents one of the most glaring differences between dictatorships and liberal democracies. Tyrants require a state of emergency because it allows them to crush their opponents swiftly and ruthlessly, and to conduct their campaigns unimpeded; to them, it is a permanent working hypothesis. Liberal regimes, on the other hand, see the state of emergency as an infringement upon the proper order of things; from their point of view, the state of emergency is at best a bitter pill, but never part of a healthy diet.

In the totalitarian state, the exceptional replaces the ordinary, and the law retreats in the face of arbitrary power until it is but a formality; for states that adopt the rule of law as a fundamental value, however, the effect is quite the opposite.

III

If the state of emergency is a litmus test for the rule of law, it is because it pits judicial authority against another institutional force: That of the sovereign. Thus any analysis of the state of emergency must also include a discussion of the concept of sovereignty, its nature and its limits. The reverse, moreover, is also the case: If we wish to understand the concept of the sovereign in the modern state, we must focus first of all on its role during crises.

Most discussions of this subject refer to the arguments of the controversial German theorist Carl Schmitt, the "crown jurist" of the Third Reich.[38] Schmitt's *Political Theology* (1922) attempts to redefine the concept of sovereignty in view of its gradual displacement from political and legal discourse by the liberal theory of the state. The classic definition of sovereignty as "the highest power that is not derived from anything" is too abstract, explains Schmitt; if we want to assign it any real meaning, we must focus on its concrete application, namely the question of "Who decides in a situation of conflict what constitutes the public interest or interest of the state."[39] On these grounds, Schmitt argues at the beginning of the book that "the sovereign is he who decides on the exception."[40] He later elucidates:

> It is precisely the exception that makes relevant the subject of sovereignty, that is, the whole question of sovereignty. The precise details of an emergency cannot be anticipated, nor can one spell out what may take

> place in such a case, especially when it is truly a matter of extreme emergency and how it is to be eliminated. The precondition as well as the content of jurisdictional competence in such a case must necessarily be unlimited. From the liberal constitutional point of view, there would be no jurisdictional competence at all. The most guidance the constitution can provide is to indicate who can act in such a case. If such action is not subject to controls, if it is not hampered in some way by checks and balances, as is the case in a liberal constitution, then it is clear who the sovereign is. He decides whether there is an extreme emergency as well as what must be done to eliminate it. Although he stands outside the normally valid legal system, he nevertheless belongs to it, for it is he who must decide whether the constitution needs to be suspended in its entirety.[41]

Schmitt shifts the sovereign authority's center of gravity from the legal to the extra-legal domain, or, more precisely, to the point where the two meet. To him, the sovereign is not the legislator, but rather the one who decides on the suspension of the law and acts in the normative vacuum created as a result. In this respect, the sovereign embodies the naked presence of the state, stripped of the rule of law: "The existence of the state thus demonstrates unshakable supremacy over the rule of the legal norm," emphasizes Schmitt. "The decision is released from any normative constraint and is made absolute in the fullest sense of the word."[42]

Yet, as Schmitt himself points out, in regimes built on the separation of powers and a system of checks and balances, the identity of the sovereign is far from clear. Indeed, in such cases, Schmitt's criterion may no longer be valid, since the authority to decide "what constitutes the public interest or interest of the state" is rarely concentrated in a single body or individual. In the Israeli case, for example, this authority is granted to both the legislature and the executive branch: The Knesset, or parliament, is authorized to declare a state of emergency; if it cannot assemble quickly enough, however, the government is allowed to make this decision on its own. On the other hand, the legislature may cancel a state of emergency at any time, or decide against extending it beyond the date of its automatic expiry, contrary even

to the recommendation and opinion of the executive branch.[43] A similar arrangement exists in other Western countries: In most European democracies, for instance, the law allows the government to declare a state of emergency independently, but, after a predetermined period of time, it must obtain parliament's approval.[44]

The constitutional basis of liberal democracies makes it difficult, therefore, to identify the sovereign on the basis of the authority to suspend the normative legal order. Furthermore, in view of our earlier discussion of the rule of law, Schmitt's attempt to attribute "unlimited" authority to the sovereign subject is, in the case of liberal democracy, more of a theoretical abstraction than a practical possibility. In such countries, the government's decision-making process almost always involves deliberation and negotiation, even in times of crisis. The reason for this can be found, among other things, in the dynamic framework of power relations in a democracy, and in the obscure place that the sovereign occupies within that framework.

The unique configuration of the democratic system has been brilliantly analyzed by the French theorist Claude Lefort. Lefort sees democracy not only as a form of government, but as a way of life that stands in dramatic contrast to the "old order" embodied in medieval monarchies. Following the historian Ernst Kantarowicz, Lefort notes that the political theology of Christian Europe relied on the belief that the sovereign comprised two bodies: One natural and mortal, the other spiritual and eternal.[45] This duality was also evident in the identification of the ruler with his kingdom—that is, the conception of the monarch as the incarnation of the collective "body politic." The king was thus conceived as a link between heaven and earth, his presence imparting a divine legitimacy to the human community at whose head he stands.

All this changed with the advent of modern democracy. The head of the "body politic" was cut off, both figuratively and literally. In the new order, legitimacy was no longer conferred from above, but now from below, from the sovereign people. But the concrete identification of "the people" as such

is highly elusive. Democracy, therefore, cannot hope to fill the void created by the abolition of the monarchy. As Lefort explains, in a democracy,

> Power appears as an empty place and those who exercise it as mere mortals who occupy it only temporarily or who could install themselves in it only by force or cunning. There is no law that can be fixed, whose articles cannot be contested, whose foundations are not susceptible of being called into question. Lastly, there is no representation of a center and of the contours of society: Unity cannot now efface social divisions. Democracy inaugurates the experience of an ungraspable, uncontrollable society in which the people will be said to be sovereign, of course, but whose identity will constantly be open to question, whose identity will remain latent.[46]

The "empty place" of power in a democracy makes it into a locus of interminable conflict as parties, politicians, individual citizens, corporations, interest groups, and governmental authorities jockey for influence, resources, and political advantage. Such interactions are supposed to take place in accordance with established rules, even if at times they assume a violent, destructive character. Yet this disorderly dynamic is in no way considered problematic; it is, rather, a necessary, even desirable, part of the democratic system. Whenever any individual, party, or other group in power purports to embody popular sovereignty in a perfect and tangible way, it paves the way for totalitarianism; a society preserves its democratic character only to the extent that it adheres to that same paradoxical formula according to which power belongs to "the people"—and thus, precisely, to no one.

Lefort rejects the very possibility of recognizing a sovereign subject in democracy, at least the way that concept was articulated by philosophers such as Jean Bodin, Thomas Hobbes, or Schmitt. But even if we accept Lefort's claim, it can still be argued that the lack of an identifiable sovereign does not rule out the possibility of a sovereign *decision* concerning the exception. The Israeli philosopher Adi Ophir maintains, for example, that "In no way should we use the unified characterization of the term 'sovereignty'

to describe the workings of the government itself… the exception is never a miraculous event as Schmitt imagined it, radiating from the place occupied by the sovereign, but rather a governmental decision enmeshed in a tangle of different power centers."[47] The picture Ophir draws is more complex than the one proposed by Schmitt: The decision to enact a state of emergency, in his view, is not a clear and decisive order issued by the sovereign, but rather the result of interaction among different players in a dynamic, complex system. It needs no soloist; it can be produced, in most cases, by a choir.

Ophir is correct, in principle, to emphasize the decentralized nature of the sovereign decision. But there is a very important consequence to this which he appears to underplay. Any policy adopted by a decentralized regime will naturally be more sensitive to fluctuations in power relations among the different players than one issued by a superior authority whom no one dares challenge. Thus is the power wielded by a democracy in a state of emergency largely trapped in a web of uncertainty and impermanence, and therefore incapable of achieving the stability and coherence needed to establish a durable oppressive order.

One striking example of the inherent deliquescence of the democratic state of emergency is the incarceration of Japanese Americans in internment camps during World War II. This episode, which represents a far more serious violation of human rights than what is happening today at Guantánamo Bay, constitutes one of the moral low points of American history. Following a presidential order issued by Franklin Delano Roosevelt on April 19, 1940, shortly after America entered the war, upwards of 120,000 Americans of Japanese descent—two-thirds of them American citizens by birth—were sent to ten internment camps in the Western United States. Although authorities at the time cited national security concerns as justification, it seems clear today that they were motivated to a great extent by anti-Asiatic bigotry—a racism that permeated the highest levels of the military and the Roosevelt administration.[48]

This incarceration of Japanese Americans continued until the order was finally rescinded on January 2, 1945. What is especially noteworthy here is

how the policy changed even though the conditions that initially allowed it were still in effect: The war in the Pacific was still raging; anti-Japanese sentiment among the American public was still rampant; the Supreme Court had upheld the constitutionality of the detention; and Roosevelt himself, who had been elected for an unprecedented fourth term, had no desire to see the camps shut down. How, then, to account for the change? From archival documents, we discover a combination of factors, including concerns in the administration that the internment was no longer necessary, that the judiciary might intervene to stop it (which it did not)[49], or that it constituted an intolerable violation of the rights of American citizens.[50] A formal admission of guilt came only four decades later, when President Ronald Reagan signed the Civil Liberties Act of 1988, granting compensation to those who had been interned in the camps, and stating explicitly that the administration's actions against Japanese Americans were based on "racial prejudice, wartime hysteria, and a failure of political leadership."[51]

The case of the Japanese-American detention shows that even a democratic government with a proud constitutional tradition is capable of exposing its own citizens to extremely abusive state power.[52] And yet, because of the decentralized and dynamic nature of the democratic system, such a government will necessarily find it difficult to maintain a permanent state of emergency, which demands the continuous cooperation of all those organs entrusted with the security of the public and the representation of its interests.[53] One can understand why despots and terrorists might see this as a sign of weakness. But democracy, as we will see, has its own internal mechanisms that effectively protect it from threats that have toppled more monolithic and centralized regimes in times of crisis.

IV

We have suggested that the incompatibility of the ideological and institutional structure of liberal democracies with the specific demands of the state of emergency makes it especially difficult for this type of regime—as opposed to authoritarian ones—to maintain such a state over the long term. But how, then, may we account for the remarkable ability of Western democracies to prevail in the face of all manner of military, political, economic, and social crises, triumphing over their great (and well-armed) ideological rivals in the hot and cold wars of the twentieth century? Perhaps the answer lies in the very tenuousness of the hold democracies have over their citizens: They are better suited to survive upheavals and crises precisely because they allow for a greater degree of internal disorder under normal conditions, and therefore are less likely to perceive it as a threat that demands the suspension of norms in the first place.

The democratic tolerance for disorder reveals a great deal about the difference between liberal democracies and totalitarian regimes, the latter being incapable of tolerating even minor expressions of social discord. This is because totalitarian societies are founded on a desire to institute a perfect order, one that will resolve all the tensions within the collective and recreate it as a single, united community.[54] To achieve this, the state must eliminate those who will not submit to its grand vision; and, because the totalitarian fantasy is inherently unattainable, the regime constantly seeks out individuals and groups to blame for its failure.[55] Hannah Arendt remarks in this context that the identity of the "objective opponents" singled out by the Nazis on the one hand and the Bolsheviks on the other changed according to the prevailing circumstances, "so that, as soon as one category is liquidated, war may be declared on another."[56] These enemies—by turns Jews, communists, the bourgeois, wealthy peasants, homosexuals, intellectuals, and countless others—are placed outside the law and stripped of all legal defense against

the violence of the sovereign. They are sent to hellish realms, where only brute power rules: To the gulags of the Soviet Union, the extermination camps of the Third Reich, or the killing fields of Cambodia.

Liberal democracies, on the other hand, work according to an entirely different political logic. They are not driven by a messianic desire to cure the world of its ills; and as Lefort stressed, they do not perceive their societies as collectives in need of unification. Instead they permit, even endorse, competition and disagreement—even if they thereby run the risk of undermining social solidarity and encouraging unrest. This latter concern has dogged democratic thinking from the outset, as is echoed, for example, in *The Federalist*. In its tenth article, James Madison discusses the danger of faction and its potential to tear the young United States apart. He describes two means of neutralizing the causes of this danger—the suppression of freedom and the promotion of unanimity—and rejects both on moral and practical grounds. "The *causes* of faction cannot be removed," the author concludes. "Relief is only to be sought in the means of controlling its *effects*."[57] Whereas classic constitutional theory gave unimpeded authority to the majority, at the cost of the rights of the minority and increased hostility among camps, Madison recommends, among other things, expanding the number of autonomous actors in the public arena. "Extend the sphere," he writes, "and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other."[58] The strategy outlined by Madison is based on a careful and deliberate nurturing of disorder within the system so as to keep it from tearing apart. The most effective way to prevent the anarchy of revolution or civil war, according to this line of thought, is to permit the moderate unruliness of the marketplace.

With this dynamic in mind, we can also see the advantages of civil society for a liberal-democratic order. The expression "civil society" normally refers to the totality of a nation's organizations and voluntary activities that

are not subject to the direct authority of the state, the connections of family, or the interests of the market.[59] Included in this category are religious institutions, labor unions, support groups, relief organizations, and sports clubs. Attachments in this sphere are public, and, no less important, freely chosen; as such, they also lack permanence. The identity of the actors and the interactions among them are subject to unending processes of construction and dissolution, expansion and contraction. It is a scene of restlessness, and the power relations within it are only very occasionally marked by order and stability.[60]

Nonetheless, a strong and vibrant civil society generally also boasts a solid normative core around which all of its elements unite, however much they might disagree with each other on other matters.[61] The presence of this shared political, legal, or cultural foundation is a necessary condition for the prevention of chaos in public life. In the United States, for example, this role is filled by the Constitution, seen by Americans as the common ground upon which their multifarious nation stands. Alexis de Tocqueville described the importance of this constitutional consensus to the unity of America's restless civil society in 1835, in his *Democracy in America*:

> There is nothing more striking to a person newly arrived in the United States, than the kind of tumultuous agitation in which he finds political society. The laws are incessantly changing, and at first sight it seems impossible that a people so variable in its desires should avoid adopting, within a short space of time, a completely new form of government. Such apprehensions are, however, premature; the instability which affects political institutions is of two kinds, which ought not to be confounded. The first, which modifies secondary laws, is not incompatible with a very settled state of society; the other shakes the very foundations of the Constitution, and attacks the fundamental principles of legislation; this species of instability is always followed by troubles and revolutions, and the nation which suffers under it is in a state of violent transition.
>
> Experience shows that these two kinds of legislative instability have no necessary connection, for they have been found united or separate,

according to times and circumstances. The first is common in the United States, but not the second: The Americans often change their laws, but the foundation of the Constitution is respected.[62]

The propensity of civil society to coalesce around certain shared ideals explains why it can—despite its ostensibly clamorous nature, and even though it sometimes takes the form of opposition to the power of the state—end up reinforcing the existing order, and protecting it from collapse.[63] The contribution of civil society to the durability of the democratic state was pointed out by the Marxist theorist Antonio Gramsci, who identified it as the primary reason for the tarrying of the "imminent" proletarian revolution in Western nations. In the notes he wrote during his incarceration in an Italian prison in 1929 and 1930, he explained that the power of bourgeois democracy relies not only on the state's coercive apparatus, but also, and mainly, on the formation of a consensus within the intricate system of civil society, which "operates without 'sanctions' or compulsory 'obligations,' but nevertheless exerts a collective pressure."[64] Because consensus is reached through persuasion and negotiation, democratic societies benefit from an inner strength that enables them to absorb the hardest of blows. A direct revolutionary challenge of the kind that brought down the authoritarian regime in czarist Russia could not be as effective against this type of political and economic order. As Gramsci writes:

> The superstructures of civil society are like the trench-systems of modern warfare. In war it would sometimes happen that a fierce artillery attack seemed to have destroyed the enemy's entire defensive system, whereas in fact it had only destroyed the outer perimeter; and at the moment of their advance and attack the assailants would find themselves confronted by a line of defense which was still effective. The same thing happens in politics, during great economic crises. A crisis cannot give the attacking forces the ability to organize with lightning speed in time and in space; still less can it endow them with fighting spirit. Similarly, the defenders are not demoralized, nor do they abandon their positions, even among the ruins, nor do they lose faith in their own strength or their own future.[65]

Gramsci understood something that is lost on many critics of democratic regimes: That the close-knit and dynamic networks that constitute civil society, while sometimes appearing to be a bedlam of conflicting wills and interests, are in fact capable of serving as "shock absorbers."[66] In times of crisis, it is actually the organized disharmony of liberal democracy that proves a more reliable mechanism of defense than anything offered by the centralized power of the autocracies.

The resilience of "bourgeois" democracy became clear to many other radicals a generation later, in the wake of the events of May 1968 in France. From the Left's point of view, the affair started on a promising note: Clashes between students and authorities at the University of Paris at Nanterre led to its closure, and students at other academic institutions soon joined in. The intervention of the police only escalated the situation, and soon the city's Latin Quarter became the scene of violent clashes with students. On May 13, the labor unions declared a general strike in sympathy with the protesters, nearly bringing the country to its knees. Hundreds of thousands of demonstrators thronged the streets of Paris, and everywhere could be heard slogans of the approaching revolution and the downfall of the hated bourgeois establishment. The government of Charles de Gaulle was on the brink of collapse; the president himself, who had found temporary refuge in an air force base in Germany, dissolved the National Assembly and announced that new elections would be held in June. In a speech broadcast on May 30, de Gaulle demanded that workers return to their jobs immediately, and threatened to declare a state of emergency.

But then the crisis passed as swiftly as it had begun: Workers returned to their posts and the students returned to the classrooms, and police regained control of the streets. In the general elections in late June, de Gaulle's party and its allies won a resounding victory. Dreams of a new social and political order evaporated.

What caused the dissolution of the closest thing to a popular rebellion a Western country has faced in the last fifty years? Any answer to this question will have to take into account the willingness of the government to reach a

compromise with the demonstrators; the support granted to the regime by the lion's share of the public, which loathed the anarchy in the streets; the veiled threats by the government to unleash the army; and the reservations of the Communist Party itself.[67] However, as Lefort remarks, "The best explanation of the survival of the regime" lies in the fact that "the development of the strike… was embedded in a dynamic of conflict which… is always inherent in democracy."[68] The French Republic's success in overcoming the turmoil of 1968 without declaring a state of emergency can be attributed to the fervent nature of the democratic system. This does not mean that the disorder characteristic of free societies is tantamount to anarchy. In fact, the liberal paradigm that has developed since the eighteenth century is precisely an attempt to *manage* disorder; that is, to create a society that is at once free and properly organized.

The organizing principles and methods of liberalism were addressed at length by French thinker Michel Foucault, who devoted a considerable part of his critical work to an analysis of power relations in modern society. In a lecture delivered at the Collège de France in 1978, Foucault described the historical appearance of an art of government that he calls "governmentality,"[69] which he identifies primarily with liberal thought. Unlike the sovereign authority, which endeavors to ensure the obedience of the citizens by subjugating them, governmentality is not dependent on direct coercion and does not derive from a single source.[70] It is, in fact, an extremely complex pattern of procedures, institutions, analytical methods (mainly statistics and demographic research), and tactics, the objective of which is the regulation of the population in order to ensure its health, welfare, and security, and the ability to monitor and control it from a distance. In a society that respects individual freedom, this objective is achieved primarily by encouraging individuals to discipline *themselves*, and to modify their behavior according to accepted norms. As a form of power and knowledge, governmentality has become the dominant mode of Western politics. According to Foucault, "this governmentalization of the state is a singularly paradoxical phenomenon, since if in fact the problems of governmentality

and the techniques of government have became the only political issue, the only real space for political struggle and contestation, this is because the governmentalization of the state is at the same time what has permitted the state to survive."[71]

At this point, the contrast between the two governmental models we have compared throughout the discussion becomes even more striking. The concept of the state of emergency is based on the assumption that the best way to deal with a threat to the stability of the political and legal order is to enforce a more strict and oppressive order, by means of centralized, sovereign violence;[72] on the other hand, the administrative paradigm of liberal democracy strives to preserve a social structure that is largely characterized by flexibility and impermanence. Liberal democracies are not terrified of disorder; instead of trying to deny or conceal it—which is impossible—they work to manage and administer it.

This is not meant to suggest that democracy has no need for the state of emergency. In extreme cases, especially when society is threatened by an external enemy or wide-ranging terrorist activity, there may be no alternative. The ability to handle social discord does not make the state immune to the extreme violence of a determined enemy. Yet liberal democracies will always look first to other strategies for handling crises, strategies that do not entail the open negation, however temporary, of the ideological and institutional infrastructure on which they rest.

V

In recognizing the different ways liberal democracy differs from authoritarian regimes—the aversion to extra-legal violence, the "empty place" of power, and the ability to tolerate, even encourage, a certain amount of internal disorder—it is important to recognize that these are not simply

discrete, unrelated principles. Rather, they are all anchored in a single, remarkable, and fundamental feature of democratic society: Its powerful anti-authoritarian impulse, which reacts against *all* governmental power, including that which is legitimately wielded by elected leaders.

The key to understanding this important aspect of liberal democracy lies in the tension between the reality of its political life and its highest ideal. This kind of tension is not unique to democracy, of course; it is typical of every social organization that cultivates an image of the ideal order. Indeed, the legitimacy of most political regimes, both in their own eyes and in those of their subjects, depends to a great extent on their ability to embody this ideal, or at least to appear to be moving toward it. The oligarchies and monarchies of the old order, for instance, were founded upon the belief that they faithfully reflected the harmonious cosmic order and the natural hierarchy of creation. So, too, have modern regimes that adopted utopian ideologies, such as Jacobin democracy or Soviet Communism, purported to "correct" a faulty reality so as to bring about the establishment of a perfect society on earth. In all of these cases, the ideal—the political fantasy, if you will—was considered an attainable objective in the present or near future.

In the case of liberal democracy, however, the picture is more complicated. This form of government depends on the successful combination of two different worldviews—that of democracy and that of liberalism. Although today we often mention them in the same breath, the difference between the two is significant. Democracy means, first and foremost, the rule of the people, or *demos*. In theory, this type of rule exists everywhere free and general elections are held. Liberalism, on the other hand, deals less with the identity of the rulers and more with how they rule. It aims to defend the rights and dignity of the individual against unjustified coercion and external interference. Democracy might invest majority rule with absolute power; liberalism strives to preserve the rights of the minority and to circumscribe the authority of government. The combination of the two is not always comfortable; often it is fraught with inner conflict. In some cases, they exist

altogether independently of one another.[73] However, they do share a common denominator of crucial importance: Each ideology understands its vision of the perfect society to be *unattainable*.

The liberal fantasy, for example, is of a world in which people are perfectly free to manage their own affairs without impinging on the rights of others. In such a world, there is no need for government. This anarchic utopia recalls, not coincidentally, the description of the "state of nature" in the writings of John Locke, the father of modern liberalism:

> To understand political power right, and derive it from its original, we must consider, what state all men are naturally in, and that is, a state of perfect freedom to order their actions and dispose of their possessions and persons, as they think fit, within the bounds of the law of nature; without asking leave, or depending upon the will of any other man. A state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another.[74]

It is difficult not to discern a note of longing in Locke's words. Unlike Hobbes, Locke regards the state of nature as principally positive, painting it in almost pastoral colors. Nevertheless, he recognizes that even in the Garden of Eden there are serpents; thus, absent a guarantee of security, people are prepared voluntarily to forfeit the unrestricted autonomy they enjoyed in their natural state for the formation of a political community whose purpose is to protect them and their property from injustice.[75] This concession is not unconditional, however. Membership in the community might involve a suspension of natural human freedom, but not its outright abolition. That is, if the government should fail or refuse to realize the goals for which it was established, the people are entitled to act against it on the strength of their fundamental rights.[76]

The state of nature described by Locke is far from perfect, and precisely for this reason it requires the institution of a government. Yet it nonetheless reflects the deepest sentiments of classical liberal philosophy, and its distrust of any kind of political authority. Liberalism does not promote an

anarchistic agenda, and has no delusions about the "end of all rule." Rather, it regards government, in the final reckoning, as a necessary evil—even when it executes its task in the best possible way.[77] Thus the effort to expand the domain of the rule of law is aimed at reducing the price that such a necessity extracts by *curbing* the government's power and subjecting both rulers and ruled to the very same code. As the Austrian philosopher and economist Friedrich Hayek remarked: "When we obey laws… we are not subject to another man's will and are therefore free."[78]

The democratic ideal differs from the liberal one. In short, it is a vision of a society in which there is an identity of the governors and the governed. In a "pure" democracy, like that which existed in the city state of Athens, all citizens take an active part in the political decision-making process on a permanent basis, and do not require intermediaries or representatives. Modern democracy, in which representatives are elected by the public, is obviously far from this model. Some philosophers indeed viewed, and in fact still view, the representative order as a distortion of the democratic ideal. Jean-Jacques Rousseau, for example, bitterly attacked English parliamentarianism and denounced it as a fraud:

> Sovereignty, for the same reason as makes it inalienable, cannot be represented; it lies essentially in the general will, and will does not admit of representation: It is either the same, or other; there is no intermediate possibility. The deputies of the people, therefore, are not and cannot be its representatives: They are merely its stewards, and can carry through no definitive acts. Every law the people has not ratified in person is null and void—is, in fact, not a law. The people of England regards itself as free; but it is grossly mistaken; it is free only during the election of members of parliament. As soon as they are elected, slavery overtakes it, and it is nothing. The use it makes of the short moments of liberty it enjoys shows indeed that it deserves to lose them.[79]

In the reality of the modern state, however, Rousseau's vision of direct democracy is impractical, just like the return to the ideal state of nature,

in which individuals are not subject to any external authority. Indeed, the Italian political theorist Norberto Bobbio dismisses it as an "absurd" idea.[80] According to Bobbio, "the inadequacies of direct democracy become obvious when one considers that the mechanisms available to direct democracy in the true sense of the word are twofold: The citizens' assembly deliberating without intermediaries and the referendum. No complex system like a modern state can function with either of these alone, or even with both in conjunction."[81] The kind of public decision-making process that Rousseau envisaged could only have worked in small political communities, such as that of fourth- and fifth-century-B.C.E. Athens; in states with tens of millions of citizens, such a model is simply unrealizable. Nor can a referendum solve the problem: As a means of making decisions, it is suitable only for exceptional circumstances—and even then it functions with great difficulty. It is impossible, and even undesirable, to manage a country by continually asking the public's opinion.[82]

But the reason modern democracy distanced itself from its "pure" predecessor is not merely technical; anti-populist motives also played a considerable part in the process. The authors of *The Federalist*, for example, adopted a republican model in order to restrict the tendency of the masses toward "turbulence and contention."[83] Madison, who did not consider himself a democrat in the classic sense of the word, preferred to pin his hopes on "a chosen body of citizens, whose wisdom may best discern the true interest of their country."[84] This kind of elitism, which remains highly influential to this day, wishes to release the elected from submission to the will of their electors, so that they may use their own judgments in the execution of public duty. As the Austrian economist Joseph Schumpeter remarked, the political function of citizens ends at the ballot box; they must understand that "once they have elected an individual, political action is his business, not theirs."[85]

Democracy and liberalism therefore share an acknowledgment of an unbridgeable gap between political fantasy and reality. This recognition is an essential feature of liberal democracy. The legitimacy of this form of

government is based on its proximity to the two visions on which it is based—it is democratic to the extent that it offers people, from time to time, the opportunity to have their say; and liberal insofar as individuals enjoy basic freedoms—and yet it perceives them as symbolic coordinates, which can be approached asymptotically but never met.

The pragmatic compromise in which liberal democracies are anchored, however, is also the source of their permanent discontent. Since no government can fulfill either liberal *or* democratic fantasies, the trust bestowed upon them by the public is necessarily limited, conditional, and prone to erosion. In a liberal democracy, the ruling power suffers from a kind of "legitimacy deficit" that is likely only to increase over time (although it can shrink no farther than a certain point). Liberal discontent increases whenever the state uses coercion to impose its rule on the individual, while democratic frustration grows in the face of the refusal or inability of the people's representatives to function as slavish instruments of the electorate's will. "The more democracy is believed to be the *demos* of getting what it wants, the more intolerable its frustration seems to be," writes Kenneth Minogue, a political scientist at the London School of Economics. "The more the people develop opinions on public topics and demand action, the more inevitable will be the disappointment. Politics then becomes an oscillation between the democratic will and the inevitably unsatisfactory outcome."[86]

Public dissatisfaction is obviously not an exclusive characteristic of democracy. Other types of regimes, too, sometimes provoke opposition among their subjects, particularly if they function poorly. Liberal democracies are unique, however, in that the rejection of authority—or at least distrust of it—is an inexorable part of their essence, regardless of their governments' accomplishments. In this respect, liberal democracy can be described not only as a government that tolerates disorder, but as a disorder that tolerates government.

Confronted with constant resistance in the public sphere, the democratic state must devote enormous efforts and resources to maintaining the eroded legitimacy of its existing order. Thus both overt and covert

mechanisms operate incessantly to "manufacture consent," but their effectiveness does not nearly achieve the levels described by democracy's radical critics.[87] By far the most effective means of reanimating the wearying democratic body is holding elections. True, from a practical point of view, elections only rarely lead to real changes in the status quo; nonetheless, they are of profound symbolic significance. In every election, the government is either "executed" by the voting public and replaced with another, or "reborn"—that is, granted new vitality and power—as the embodiment of the popular will. The electoral mechanism acts, then, as a switch that restarts the system through a temporary return to a quasi-ideal situation in which the people are given the opportunity to act as a democratic sovereign, or, if we adopt the liberal point of view, as a group of individuals freed from coercion.

The marked anti-authoritarian tendency of modern democratic societies explains their natural aversion to the state of emergency. While these societies are in any case plagued by chronic discontent, the declaration of a state of emergency—even when circumstances justify it—puts them to a severe test. Such a dramatic distancing from its founding ideal, albeit on a temporary basis, is liable to exacerbate the legitimacy deficit of the ruling government to the point of near intolerability. Naturally, in such a state, the government will find it immensely difficult to function effectively for a long period of time. Moreover, since liberal democracy regards itself as a final state—unlike regimes with a utopian ideal, which are constantly "on the way" to their longed-for final stage—it has difficulty justifying oppressive policies as purely temporary expediencies. Every serious infringement of human rights, every exercise of state violence, is viewed by parts of the public as a direct threat to their freedom and welfare, precisely because it ostensibly creates a permanent reality. Thus while an immediate threat to the country's security may justify such action in the eyes of most citizens, in the absence of such a threat, democratic government would most likely prefer to revert as quickly as possible to a state of "normalcy," however contentious the public's understanding of that term may be. The alternative, after all, is running the risk of losing popular support and political authority altogether.

VI

It would seem, then, that the concern that the democratic world might descend into a perpetual state of emergency seems radically overstated. Of course, the possibility does exist, and not only on paper: History has shown that liberal democracies do not enjoy complete immunity from the temptations of despotism, and the declaration of a state of emergency may provide those with an authoritarian agenda the opportunity to change irreversibly the rules of the political game.[88] However, an established democratic tradition, a strong civil society, and broad public recognition of the importance of the rule of law—all typical of most Western societies—considerably reduce the dangers of such a scenario, assuming that there is no dramatic change for the worse in these countries' standard of living and state of security.[89]

With this in mind, we should take note of the fact that the state of emergency does not always require the suspension of the normal legal order; it may also exist alongside it, in areas under state control but not direct sovereignty. After World War II, for example, the British made frequent use of the apparatus of the state of emergency to quell rebellions and revolutionary disquiet in their colonies and protectorates in Asia and Africa.[90] More recently, the United States used similar logic to justify stripping detainees held at Guantánamo Bay of their legal rights, claiming that the camp was on foreign soil, and therefore outside the jurisdiction of American courts.[91] In today's post-colonial, "globalized" age, however, the opportunities to enforce an extra-territorial arrangement of this sort are becoming fewer, on account of both the internal checks to which the democratic state is subjected by both civil society and the courts, and the pressures exerted upon it by the world media and the international community. It is extremely doubtful, for example, that Britain would have been able to maintain a state of emergency of the type that it imposed in Malaya for twelve years between

1948 and 1960 if it had been forced to cope with extensive and critical media coverage, the vociferous protests of human rights organizations, hostile international opinion, and lawsuits in international courts.

In effect, if the democratic world faces a danger of corruption, it does not stem from the possibility of a state of emergency suspending the legal order for an unlimited period of time. If anything, it stems from the blurring of the borders between these two spheres: Under a real threat to the country's security and the welfare of its public, the law itself may be defiled by statutes that negate individual freedoms.[92] This is, in fact, a far more realistic scenario than that of the dreaded, apocalyptic vision of a permanent state of emergency, since the transition from a relatively open and free political order to a repressive regime is likely to come about gradually, practically unnoticed, and under the guise of a formal "rule of law."[93]

Unfortunately, it does not take a great deal of imagination to envision this kind of process; in fact, it may be happening today. On October 17, 2006 President Bush signed the Military Commissions Act, which had been passed by both houses of Congress the month before. The law, intended to regulate the authority of military tribunals to try "unlawful enemy combatants," determines that detainees who are described as such, and who are not American citizens—it makes no difference for this purpose whether they are legal residents or not—have no right to challenge their confinement in United States courts.[94] This legislation has far-reaching implications: It denies these detainees the privilege of requesting that a judge issue a writ of habeas corpus, which has the power to enact a cancellation of their internment if it does not comply with the law's requirements. A writ of habeas corpus, it is important to note, is one of the pillars of common law tradition, and is considered one of the most ancient and effective legal means of ensuring the freedoms of the individual. Thus the American Constitution specifically states that the privilege of the writ will not be suspended "unless when in cases of rebellion or invasion the public safety may require it"[95]—conditions that, it would be safe to say, did not exist when the Military Commissions Act went into effect.

The recent legislative development taking place in the United States may mark a worrying trend toward dissolution of the division between the normal legal order and the state of emergency. In Israel, by contrast, no such division ever existed. Indeed, the Law and Administration Ordinance passed immediately after the declaration of independence in 1948 granted the Provisional Council of State the authority to declare a state of emergency and to introduce regulations that could be used to "alter any law, suspend its effect or modify it, and may also impose or increase taxes or other obligatory payments."[96] Only four days later, a state of emergency was declared in the Jewish state that has never been formally rescinded. Although according to the second version of the Basic Law: The Government, passed in 1992, the state of emergency is supposed to end automatically one year after it is declared,[97] the Knesset has re-extended its validity every few months.[98] As if that were not enough, Israeli law grants the prime minister wide emergency powers, some of which have their origins in the British Mandate, and some of which are the result of newer legislation.[99] Nor are these powers only executive; the government is entitled, for example, to introduce "emergency regulations" without the approval of the legislature and in conflict with its laws—an arrangement that runs contrary to basic principles of the modern democratic system.[100] The Israeli jurist Menachem Hofnung notes in his book *Israel: Security Needs vs. the Rule of Law* that "a variety of emergency means that were adopted in 1948—most of which have remained in effect ever since—created a system of emergency legislation that gave the executive and its civil and military regional branches powers over and above those of the legislature and the judiciary. The balance among the authorities never existed in Israel: The checks and balances on the executive were few from the start and were dependent mainly on voluntary governmental curbs and restraints."[101]

Israel is without doubt a legal anomaly, a country that has no choice but to maintain a continuous state of emergency and yet, at the same time, abides by the basic rules of liberal democracy—a not inconsiderable achievement, under the circumstances.[102] Indeed, it is highly doubtful whether countries that ever enjoyed "normalcy"—that experienced, in other

words, something other than a state of emergency—would have succeeded in performing in this manner for such a long period of time. Yet this accomplishment is hardly cause for celebration: As numerous recent scandals involving Israel's top political figures have made clear, governmental culture in Israel is extremely unhealthy. Surely the time has come to reconsider some of the wide emergency powers granted to the country's leaders; after all, such powers might be used not only against Israel's enemies, but also as a means of oppressing political opponents.

At the end of the day, the state of emergency may best be defined as a necessary evil, and should be treated as such. Democratic governments should take care to make use of this apparatus only if they have no other, equally effective, means at their disposal to deal with the dangers confronting their countries. They must maneuver carefully between two equally undesirable options—enforcing a permanent state of emergency, and incorporating its norms into the law itself—and maintain as far as possible the essential tension between the "enlightened" rule that prevails in peacetime and the oppressive exception employed in times of crisis. Yet, more than any other form of government, liberal democracy is capable of coping successfully with this challenge, since, as we have seen, aversion to the state of emergency is ingrained in its political and legal substructure. This inclination may render liberal democracies more vulnerable in the face of determined enemies—but it demonstrates, too, that they are an end worth fighting for.

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Notes

1. See Titus Livius, *The Early History of Rome*, trans. Aubrey de Sélincourt (Middlesex: Penguin, 1994), pp. 101, 124-125.

2. Nomi Claire Lazar, "Making Emergencies Safe for Democracy: The Roman Dictatorship and the Rule of Law in the Study of Crisis Government," *Constellations* 13 (April 2006), pp. 506-521.

3. The last two dictators, in a formal sense, were Lucius Cornelius Sulla and Gaius Julius Caesar. Unlike their predecessors, they were both declared dictators for life and ruled Rome as despots. As such, they contributed significantly to the decline of the republic and helped usher in the rule of the emperors.

4. On November 13, 2001, President George W. Bush issued a Presidential Order for the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism." Under this order, American security organizations began to arrest people suspected of belonging to organizations such as the Taliban and al-Qaida, the majority of whom were in Afghanistan, and a minority in places like Egypt, Bosnia, Indonesia, Thailand, and Gambia. The administration defined these suspects as "unlawful enemy combatants" who were not entitled to the protection of the Geneva Convention, since they do not belong to a regular army. (In June 2006, the American Supreme Court rejected this interpretation. See note 36 below.) Most of the detainees are held in the military camp in Guantánamo, Cuba, and therefore do not even enjoy the rights accorded to prisoners in jails in United States territory. In October 2006, MSNBC reported that out of 775 detainees taken to Guantánamo, about 340 had been released and returned to their countries, 110 were being considered for release, and slightly more than 70 would stand trial. According to these data, then, about 250 men are still being detained for an indeterminate period. "In Limbo: Cases Are Few Against Gitmo Detainees: Only About 70 out of 775 Will Face Military Trials," MSNBC, October 24, 2006. Likewise, the existence of secret CIA installations, where those suspected of terrorist activities are being held, was exposed by the *Washington Post* on November 2, 2005. These installations, also known as "black sites," are scattered all over the world—in Asia, the Middle East, Africa, Europe, and the Indian Ocean. According to the *Washington Post*, the CIA held around 100 detainees in eight "black sites," but the precise number remains unknown and may well be higher. Dana Priest, "CIA Holds Terror Suspects in Secret Prisons," *Washington Post,* November 2, 2005. For a comprehensive discussion of the topic, see also the Amnesty International website: http://web.amnesty.org/library/index/engpol300032006.

5. The secret Presidential Order that President Bush signed in 2002 allows the NSA to tap the conversations and read the international correspondence of American citizens in the United States itself, without requiring a court order. "Bush Lets U.S. Spy on Callers Without Courts," *New York Times*, December 16, 2005, p. A1.

6. See, for example, a speech President Bush gave on September 6, 2006, in which he officially admitted the existence of the secret detention installations operated by the CIA. "Bush: Top Terror Suspects to Face Tribunals," CNN, September 7, 2006.

7. In this context, see the Human Rights Watch report on developments in Britain in 2001: http://hrw.org/wr2k2/europe21.html.

8. See "Riot Emergency Brings Back Curfew Laws of the Colonial Age," *Times Online UK*, November 9, 2005, at www.timesonline.co.uk/article/0,,135091863895,00.html; "Troubled France Still Ill at Ease," *BBC News*, January 4, 2006, http://news.bbc.co.uk/2/hi/europe/4581332.stm.

9. Giorgio Agamben, *State of Exception*, trans. Kevin Attell (Chicago: University of Chicago, 2005), pp. 2-3.

10. Michael Hardt and Antonio Negri, *Empire* (Cambridge, Mass.: Harvard, 2000), p. 38. This theme was further developed, in light of the American war against terror, in their second book, published in 2004: *Multitude: War and Democracy in the Age of Empire* (New York: Penguin, 2004).

11. Judith Butler, *Precarious Life: The Powers of Mourning and Violence* (London: Verso, 2004), p. 92.

12. Slavoj Žižek, *Welcome to the Desert of the Real: Five Essays on September 11 and Related Dates* (London: Verso, 2002), p. 107.

13. Contrary to the commonly held view that draws a parallel between the modern state of emergency and the Roman institution of a constitutional dictator, Agamben locates its sources in two other legal provisions from the period of the republic: The *senatus consultum ultimum*, a Senate decree that gave the consuls unlimited power to quell rebellion, and the *iustitium*, which initially marked the suspension of legal business (and later a period of public mourning). Agamben, *State of Exception*, pp. 41-51.

14. In this article, I have chosen to focus on emergency powers of an executive nature. According to this model, the law empowers the executive to take any actions necessary to defend the country against clear and present dangers, such as invasion, rebellion, or economic crises, but does not permit it to make new laws. For the difference in principle between executive emergency powers and emergency legislative powers, and for a historical review of the institutions of the state of emergency, see Menachem Hofnung, *Israel: Security Needs v. the Rule of Law* (Jerusalem: Nevo, 1971), pp. 33-49 [Hebrew].

15. The relationship between the rule and the exception is the focus of *Homo Sacer*, perhaps the best-known work by Giorgio Agamben. The focus of his attention is not only the exceptional state, but also the act of exclusion that strips individuals or groups of the defense of the law, and exposes them as "bare life" to the

sovereign's violence. Agamben defines this status as *homo sacer*, a term he borrows from ancient Latin law. *Homo sacer* was originally someone who had committed certain offenses and whose punishment was to be excluded from the community and branded as one who could be killed without any sanction (although not sacrificed to the gods). Agamben's claim is that the bare life of *homo sacer* is now the condition of all those refugees, detainees, exiles and *Muselmänner* living within the camps, "which are, it would seem, the real paradigm of government, both totalitarian and democratic, in the modern era." Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford: Stanford University, 1998).

16. Walter Benjamin, "Critique of Violence," in Peter Demetz, ed., *Reflections: Essays, Aphorism, Autobiographical Writings*, trans. Edmund Jephcott (New York: Harcourt Brace Jovanovich, 1978), p. 286.

17. Agamben presents a similar argument when he writes that "the juridical order does not originally present itself simply as sanctioning a transgressive fact but instead constitutes itself through the repetition of the same act without any sanction, that is, as an exceptional case. This is not punishment of this first act but rather represents its inclusion in the juridical order, violence as a primordial juridical fact (*permittit enim lex parem vindictam*: 'for the law allows equitable vengeance')…. In this sense, the exception is the originary form of law." See Agamben, *Homo Sacer*, p. 26.

18. Richard Overy, *The Dictators: Hitler's Germany, Stalin's Russia* (New York: Norton, 2004), p. 459.

19. Overy, *Dictators*, p. 60.

20. Benjamin, "Critique of Violence," p. 288.

21. In a lecture he devoted to an analysis of Benjamin's text, the French theorist Jacques Derrida clarified the argument thusly: "Parliaments live unmindful of the violence from which they sprang. This forgetful denial is not an indication of psychological weakness; it is part and parcel of their status and even their structure. Accordingly, instead of reaching decisions of dimensions proportionate to this violence of government and appropriate to it, they deal with the hypocritical politics of compromise. The concept of compromise, the rejection of open violence, the reliance on latent violence—all these belong to the spirit of violence, to the mentality of violence… that strives to accommodate the opponent's constraints in order to prevent the worst happening and simultaneously they also tell themselves, with a parliamentary groan, that it is not ideal and could certainly have been better otherwise, and yet it was impossible to do otherwise. Parliamentarianism is therefore dogged by the violence of authority and abandonment of the ideal. It fails to find solutions to political disputes in discussion, debate, and non-violent consultation, or to sum up—in the application of liberal democracy." Jacques Derrida, "Force of

Law: The 'Mystical Foundation of Authority,'" trans. Mary Quaintance, in Drucilla Cornell, Michel Rosenfeld, and David Gray Carlson, eds., *Deconstruction and the Possibility of Justice* (New York: Routledge, 1992), pp. 47-48.

22. On this point, it is worth addressing a fundamental distinction: Whereas John Locke's theory is considered the cornerstone of liberal philosophy, and some scholars identify pre-liberal elements in Thomas Hobbes' theory, Jean-Jacques Rousseau's ideas, which extol the "general will" of the people, belong to a political tradition that paved the way for totalitarianism. See in this regard Jacob Talmon's classic work *The Origins of Totalitarian Democracy* (New York: Fredrick A. Prager, 1960), pp. 38-49.

23. David Hume, "Of the Original Contract," in Eugene F. Miller, ed., *Essays, Moral, Political, and Literary* (Indianapolis: Liberty Fund, 1994), p. 469. Similarly, the French philosopher Michel Foucault ironically remarks that Thomas Hobbes "rescued" the theory of the state by presenting the social contract as the precursor of every war and every conquest: "And that is of course why the philosophy of right subsequently rewarded Hobbes with the senatorial title of 'father of political philosophy.'" Michel Foucault, *Society Must Be Defended: Lectures at the Collège de France, 1975-1976*, trans. David Macey (London: Penguin, 2004), p. 99.

24. Modern theories of the social contract do not purport to provide either a historical or quasi-historical narrative, but rather to propose a theoretical context that makes it possible to answer questions relating to social justice, the legitimacy of the political order, or the meaning of political commitment. See, for example, John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard, 1971); David Gauthier, *Morals by Agreement* (Oxford: Oxford, 1986); and Thomas M. Scanlon, *What We Owe to Each Other* (Cambridge, Mass.: Harvard, 1998).

25. In the context of Mesopotamia, see, for example, Moshe Weinfeld*, Social Justice in Ancient Israel and in the Ancient Near East* (Jerusalem: Magnes, 1995); in the context of Pharaonic Egypt, see Anna Mancini, *Ma'at Revealed: Philosophy of Justice in Ancient Egypt* (New York: Buenos, 2004).

26. For a discussion of the history of the idea of the rule of law from Plato and Aristotle to our own time, see John Morrow, *History of Political Thought: A Thematic Introduction* (London: Macmillan, 1998), pp. 274-295.

27. The classic formulation of this notion appears in the writings of English jurist Albert Venn Dicey. According to Dicey, the rule of law means "in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government." Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 1961), p. 202.

28. Benjamin Constant, *Political Writings*, ed. and trans. Biancamaria Fontana (Cambridge: Cambridge, 1988), p. 292.

29. Constant, *Political Writings*, p. 135.

30. The subject was considered, for example, by the father of liberal theory, John Locke. In the second treatise, Locke discusses the prerogative—an exceptional authority held by the ruler during an emergency: "This power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it, *is* what is called *prerogative*. For since in some governments the law-making power is not always in being, and is usually too numerous, and so too slow, for the dispatch requisite to execution: And because also it is impossible to foresee, and so by laws to provide for, all accidents and necessities, that may concern the public; or make such Law, as will do no harm, if they are executed with an inflexible rigour, on all occasions, and upon all persons, that may come in their way, therefore there is latitude left to the executive power, to do many things of choice, which the laws do not prescribe." John Locke, *Two Treatises of Government* [1690], ed. Peter Laslett (Cambridge: Cambridge, 1988), second treatise, p. 375.

31. For a review of recent liberal theoretical literature on the problem of the state of emergency in light of the paradigm of the rule of law, see William Scheuerman, "Emergency Powers and the Rule of Law after 9/11," *Journal of Political Philosophy* 14:1 (2006), pp. 61-84.

32. Kim Lane Scheppele, "Law in a Time of Emergency: States of Exception and the Temptations of 9/11," *University of Pennsylvania Journal of Constitutional Law* 6:5 (May 2004), pp. 1001-1083.

33. It must be admitted that conflicts of this sort did not happen frequently in the past, but the very potential for them to happen can sometimes act as a deterrent from the executive's point of view. See in this context George Alexander's research on the disappointing conduct of the courts during states of emergency in eight countries identified with common law tradition: England, the United States, Canada, New Zealand, Australia, India, Ireland, and South Africa. George J. Alexander, "The Illusory Protection of Human Rights by National Courts During Periods of Emergency," *Human Rights Law Journal* 5:1 (1984), pp. 1-65.

34. *Rasul v. Bush*, 542 U.S. 466 (2004), upheld June 29, 2004.

35. *Hamdan v. Rumsfeld*, 548 U.S. ___ (2006), upheld June 29, 2006.

36. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), upheld June 28, 2006.

37. For a full discussion of the decision, see http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=000&invol=03-6696&friend.

38. With the rise of Hitler to power in 1933, Carl Schmitt, a renowned jurist and former adviser to the governments of the Weimar Republic, joined the

National-Socialist Party. His involvement in the party ended in 1936, when the S.S. journal exposed the anti-Nazi stance he held before 1933 and denounced him as an opportunist. After World War II, Schmitt was forbidden to teach in Germany and concentrated on independent research and writing until his death in 1985 at the age of ninety-seven.

39. Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Cambridge, Mass.: MIT, 1985), p. 6.

40. Schmitt, *Political Theology*, p. 5.

41. Schmitt, *Political Theology*, pp. 6-7.

42. Schmitt, *Political Theology*, p. 12.

43. See Article 38 of the Basic Law: The Government, dealing with a "Declaration of a State of Emergency."

44. See in this context a memorandum submitted by John Bell, an expert in comparative and European law at the University of Cambridge, to the Committee on Constitution of the House of Lords of the British Parliament in December 2005: www.publications.parliament.uk/pa/ld200506/ldselect/ldconst/236/5120706.htm.

45. Ernst Kantarowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* (Princeton, N.J.: Princeton University, 1957).

46. Claude Lefort, *The Political Forms of Modern Society: Bureaucracy, Democracy, Totalitarianism*, ed. John B. Thompson (Cambridge, Mass.: MIT, 1986), pp. 303-304.

47. Adi Ophir, "Between the Sanctity of Life and Its Forfeiture: In Place of a Preface to *Homo Sacer*," in Shai Lavi, ed., *Technologies of Justice: Law, Science, and Society* (Tel Aviv: Ramot, 2003), p. 377 [Hebrew].

48. See in this context Arnon Gutfeld, "Eagle Against the Sun at Home: Japanese-American Detention Camps in the United States During World War II," *Zmanim* 52 (Spring 1995), pp. 67-79 [Hebrew].

49. Supreme Court decisions on the question of the internment were generally supportive of the American government's policy. In the most famous—and deplorable—decision, in the case of *Korematsu v. United States*, the court ruled, by a majority of six to three, that the president and Congress did not overstep their authority when they ordered the expulsion and isolation of Japanese Americans, and that the need to defend the nation against espionage overrode the civil rights of Fred Korematsu, an American of Japanese descent who refused to vacate his residence in California. For the full text of the decision, see http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=323&invol=214.

50. A detailed description of the discussions and conflicts regarding this issue in the American administration can be found in Greg Robinson, *By Order of*

the President: FDR and the Internment of Japanese Americans (Cambridge, Mass.: Harvard, 2001).

51. Civil Liberties Act of 1988. For the full text, see www.civics-online.org/library/formatted/texts/civilact1988.html.

52. There was obviously a vast difference between the reality of life in the American internment camps and the conditions in the Nazi concentration camps. The Japanese residents in the camps were able to study, work, or even join the army; although life in the camps was difficult, there was no hunger, and no atrocities were committed by the authorities. Gutfeld, "Eagle Against the Sun at Home," p. 77.

53. Judith Butler maintains that following the suspension of the rule of law in the name of the war on terror, sovereignty has reemerged as "an anachronism that refuses to die." At the same time, she admits, almost reluctantly, that it is not really sovereignty, but only delegated power in the hands of a "managerial official." Reading her gives one the impression that the difference is not so dramatic—but this would be a mistake. An elected representative or an appointed official, powerful as he may be, cannot be considered "sovereign" in a democratic state, because his authority is not absolute and does ground itself; rather, he derives legitimacy for his actions from a different source. Butler, *Precarious Life*, pp. 54, 62.

54. Such a vision can even instruct a society that considers itself democratic. According to the famous distinction made by the historian Jacob Talmon, whereas liberal democracy of the type that developed in England and the United States "regards political systems as pragmatic contrivances of human ingenuity and spontaneity," totalitarian democracy, as it was practiced in France after the revolution, "is based upon the assumption of a sole and exclusive truth in politics," and "postulates a preordained, harmonious and perfect scheme of things, to which men are irresistibly driven and at which they are bound to arrive." Talmon, *Origins of Totalitarian Democracy*, pp. 1-2.

55. The Slovenian theoretician Slavoj Žižek proposes in this context a psychoanalytical description of the process that enables the "socio-ideological edifice" to preserve its consistency by means of nurturing the "fantasy" that demands the sacrifice of an imagined obstacle. According to him, " 'fantasy' designates an element which 'sticks out,' which cannot be integrated into the given symbolic structure, yet which, precisely as such, constitutes its identity… the illusion of the sacrifice is that renunciation of the object will render accessible the intact whole. In the ideological field this paradox finds its clearest articulation in the anti-Semitic concept of the Jew: The Nazi has to sacrifice the Jew in order to be able to maintain the illusion that it is only the 'Jewish plot' which prevents the establishment of… society as a harmonious, organic whole." Slavoj Žižek, *Enjoy Your Symptom! Jacques Lacan in Hollywood and Out* (New York: Routledge, 1992), pp. 89-90.

56. Hannah Arendt, *The Origins of Totalitarianism* (New York: Meridian, 1958), p. 425.

57. Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* [1788], ed. Isaac Kramnick (Middlesex: Penguin, 1987), No. 10, p. 125. Emphasis in the original.

58. Hamilton, Madison, and Jay, *Federalist*, No. 10, p. 127.

59. The expression "civil society" has undergone a number of metamorphoses through the generations, and appears in various guises in the works of thinkers such as Locke, Montesquieu, Adam Smith, Hegel, de Tocqueville and Marx. For our purposes, its use in this article is based on its prevailing meaning since the middle of the nineteenth century. For a comprehensive survey of the idea of civil society and its philosophical and sociological history, see, *inter alia*: Michael Edwards, *Civil Society* (Cambridge: Polity, 2004); Adam B. Seligman, *The Idea of Civil Society* (Princeton, N.J.: Princeton, 1992); John Ehrenberg, *Civil Society: The Critical History of an Idea* (New York: New York University, 1999).

60. Adi Ophir writes that "civil society… is not another system of attachments and communications but an arena for attachments and communications managed in networks whose structuring is unstable and their intertwining has a relatively random and ephemeral character…. The existing networks in the civil society and the arenas of conflict within it have no clear external limit that is antecedent to the activities of attachment and communications and determines them from outside; nor do they have any clear internal rules that predetermine objects of conflict and prizes in competitions, hierarchy of positions, mechanisms of exclusion, legitimate horizons for the exercise of power, and so forth. These constraints obviously exist, but they are not imposed on the interaction in advance; rather, they are determined during it. " Adi Ophir, "Civil Society in the City that Never Sleeps," in Yoav Peled and Adi Ophir, eds., *Israel: From Mobilized to Civil Society*? (Jerusalem: Van Leer Institute, 2001), p. 147 [Hebrew].

61. Yael Yishai, *Civil Society in Israel* (Jerusalem: Carmel, 2004), p. 28 [Hebrew].

62. Alexis de Tocqueville, *Democracy in America* (New York: Knopf, 1994), p. 419.

63. See, for example, Jeffrey Isaac, "Civil Society and the Spirit of Revolt," *Dissent* 40:3 (Summer 1993), pp. 356-361.

64. Antonio Gramsci, *Selections from the Prison Notebooks* (London: Elecbook, 2002), p. 502.

65. Gramsci, *Selections*, p. 104.

66. For this reason, Gramsci believed that the oppressed classes in Western capitalist society must first engage in trench warfare within civil society in order

to achieve a cultural and moral "hegemony"—a concept that plays a central role in his thinking—and, from this position, bring about the downfall of the political regime.

67. A fascinating and ironic study of this historical affair can be found in David Caute, *The Year of the Barricades: A Journey Through 1968* (New York: Harper and Row, 1988).

68. Lefort, *Political Forms of Modern Society*, pp. 308-309.

69. Governmentality—a word formed from the combination of "government" and "mentality."

70. Though Foucault views governmentality and sovereignty as two distinct forms of power, and suggests that the former postdates the latter, he also claims that they can coexist: "Sovereignty is far from being eliminated by the emergence of a new art of government… on the contrary, the problem of sovereignty is made more acute than ever." Michel Foucault, "Governmentality," trans. Rosi Braidotti and revised by Colin Gordon, in Graham Burchell, Colin Gordon, and Peter Miller, eds., *The Foucault Effect: Studies in Governmentality* (London: Harvester Wheatsheaf, 1991), p. 101.

71. Foucault, "Governmentality," p. 103.

72. It is important to emphasize that the space in which the state of emergency is declared is not devoid of order. The opposite is true: When the law withdraws itself from this space, the naked power of the state rules it with greater force. Carl Schmitt understood this when he wrote that "Because the exception is different from anarchy and chaos, order in the juristic sense still prevails even if it is not of the ordinary type." Schmitt, *Political Theology*, p. 12.

73. On the tension between liberalism and democracy, see, for example, Fareed Zakaria, *The Future of Freedom: Illiberal Democracy at Home and Abroad* (New York: Norton, 2003).

74. Locke, *Two Treatises*, Second Treatise, p. 287.

75. Locke, *Two Treatises*, Second Treatise, pp. 350-353.

76. Locke, *Two Treatises*, Second Treatise, p. 427.

77. This distinction applies to classical liberalism, which aspires to minimize the authority of the state. Thinkers identified with this tradition are John Stuart Mill, Isaiah Berlin, Friedrich Hayek, and Robert Nozick. Modern liberalism, on the other hand, adopted a social-democratic agenda and designates wider authority to state institutions in order to serve the cause of distributive justice. It is identified mainly with the thought of John Rawls, Ronald Dworkin, Bruce Ackerman, and Thomas Nagel.

78. Friedrich August von Hayek, *The Constitution of Liberty* (Chicago: University of Chicago, 1960), p. 153.

79. Jean-Jacques Rousseau, *The Social Contract and Other Later Political Writings*, ed. Victor Gourevitch (Cambridge: Cambridge, 1997), p. 114.

80. Norberto Bobbio, *The Future of Democracy: A Defense of the Rules of the Game*, ed. Richard Bellamy, trans. Robert Griffin (Oxford: Polity, 1987), p. 44.

81. Bobbio, *Future of Democracy*, p. 53.

82. Bobbio, *Future of Democracy*, pp. 53-54.

83. Hamilton, Madison, and Jay, *Federalist*, No. 10, p. 126.

84. Hamilton, Madison, and Jay, *Federalist*, No. 10, p. 126.

85. Joseph Alois Schumpeter, *Capitalism, Socialism, and Democracy* (London: Allen & Unwin, 1976), p. 295.

86. Kenneth Minogue, "Democracy as a *Telos*," in Ellen Frankel Paul, Fred D. Miller Jr., and Jeffrey Paul, eds., *Democracy* (Cambridge: Cambridge, 2000), p. 213.

87. The expression "manufacturing consent" is identified mainly with the ideas of the radical intellectual Noam Chomsky, who maintains that the media in the West serve as a propaganda tool in the hands of the hegemonous powers in those countries, mainly the government and large corporations. See Noam Chomsky and Edward S. Herman, *Manufacturing Consent: The Political Economy of the Mass Media* (New York: Pantheon, 1988).

88. In addition to the most famous examples of such a political transformation—the collapse of Italian democracy in 1922 and of the Weimar Republic in 1933—one might also mention the sad fate of regimes set up in Eastern Europe after World War I, most of which became dictatorships and police states. The failure of democracy in Central and Eastern Europe between the two wars can be attributed to a number of factors, the main one being the infectious fear of the rise of communism, which acted as a catalyst for the ascendancy of non-democratic powers, deep social schisms, an inappropriate system of political representation, and a corrupt bureaucracy. Unfortunately, some of these conditions still prevail in Eastern European countries after the collapse of the Soviet bloc, and continue to threaten the democratic future of the region. See Hugh Seton-Watson, *Eastern Europe Between the Wars, 1918-1941* (New York: Harper, 1967); and Karl J. Newman, *European Democracy Between the Wars*, trans. Kenneth Morgan (Notre Dame, Ind.: University of Notre Dame, 1971).

89. The threat of global terror with which the democratic West is currently contending has still not reached a level at which it can be considered a "dramatic

change for the worse," and its influence on daily living conditions in the United States and Europe is still not significant. However, if one of the apocalyptic scenarios sometimes mentioned by security officials or the media actually occurs—for instance, the possibility of a terrorist organization obtaining weapons of mass destruction—this evaluation, and its practical consequences, are subject to change.

90. For the synthesis between the critical theory of the state of emergency from the school of Agamben and post-colonial discourse, see Yehouda Shenhav, "Victims of Sovereignty, the Exceptional, and the State of Emergency: Where Did Imperialist History Disappear To?" *Theory and Criticism* 29 (Autumn 2006), pp. 205-218 [Hebrew].

91. This contention was rejected by the American Supreme Court in the *Rasul v. Bush* decision. See note 34 above.

92. My opinion on this point is very close to the arguments raised by Oren Gross, a jurist at the University of Minnesota, who published a number of essays on the legal problem of the state of emergency and of the danger posed to the rule of law by its inclusion in the legal order. See, for example, Oren Gross, "Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?" *Yale Law Journal* 112 (2003), pp. 1011-1134.

93. Some of the factors we dealt with in this article, such as the decentralized structure of government in democratic society and its ability to tolerate disorder at a certain level, can also be used as checks on the gradual destruction of the legal order. Their effect, however, will be less than the one they have on the state of emergency, because the process will be labeled legitimate by the law and will happen gradually, dulling the sting of the legal and moral trauma it will entail.

94. The United States Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (October 17, 2006). For the full text, see the Library of Congress site: http://thomas.loc.gov/cgi-bin/bdquery/z?d109:S.3930.

95. United States Constitution, Article 1, Section 9.

96. Article 9(b) of the Law and Administration Ordinance of 1948.

97. According to Article 49 of the second version of the Basic Law: The Government. In the third version of the law, passed in 2001, the restriction of the duration of the state of emergency to one year only was anchored in Article 38.

98. At the time of this writing, the current state of emergency, last renewed on May 31, 2006, should expire on June 13, 2007.

99. To cite a number of outstanding examples: The Prevention of Terrorism Ordinance of 1948; The Emergency Powers (Detention) Law of 1979 (granting the minister of defense the power to order the administrative detention of anyone who endangers the security of the state); the Control on Commodities and Services

Law of 1957; and The Emergency Land Requisition (Regulation) Law of 1949. The executive can also use, when necessary, the Defense (Emergency) Regulations of 1945, introduced during the British Mandate and incorporated into Israeli law under Article 11 of The Law and Administration Ordinance of 1948. The regulations included, among other things, the authorizing of military tribunals to try citizens without the right of appeal; authorization to conduct wide-ranging searches; restrictions on migration; closure of areas; and the imposition of curfews and administrative arrest for an unlimited time. The Knesset has repealed some of these regulations over the years, but they have not been completely removed. In fact, they were used during the imposition of martial law on Israeli Arabs between 1949 and 1966, and after the Six Day War they became a means of enforcing order by the Israeli security authorities in the occupied territories. See in this context Hofnung, *Israel: Security Needs vs. the Rule of Law*, pp. 50-105; Amnon Rubinstein and Barak Medina, *The Constitutional Law of the State of Israel*, vol. 2 (Jerusalem: Schocken, 2005), pp. 936-977 [Hebrew]; and Yuval Yoaz, "State of Emergency: 57 Years and No End in Sight," *Haaretz*, June 19, 2005.

100. See article 39(b) of the Basic Law: The Government: "Should the Prime Minister deem it impossible to convene the Knesset, given the existence of an immediate and crucial need to make emergency regulations, he may make such regulations or empower a Minister to make them." And article 39(c): "Emergency regulations may alter any law, temporarily suspend its effect or introduce conditions, and may also impose or increase taxes or other compulsory payments, unless there be another provision by law."

101. Hofnung, *Israel: Security Needs vs. the Rule of Law*, p. 100. The wide compass of emergency legislation in Israel and the fact that it also applies to areas of activity that are not directly connected to national security was discussed by the Supreme Court in 1999, in response to an appeal submitted by the Association for Civil Rights on the subject. The decision, which expressed dissatisfaction with this state of affairs, ordered the state to prepare a detailed working plan to regulate constitutional matters that could and should be distinguished from the means used in a state of emergency. Until now, however, this demand has been only partially met. See *Association for Civil Rights in Israel v. Knesset and Government of Israel*, Supreme Court decision 3091/99. The full text of the last Supreme Court decision on the subject, in August 2006, can be read at http://elyon1.court.gov.il/files/99/910/030/t28/99030910.t28.pdf.

102. It may be assumed that the Supreme Court's willingness to intervene in the government's discretion and to restrict its actions was a decisive force in the policy of relative self-restraint that the executive imposed on itself concerning the use of emergency powers—at least inside the country's borders. See Rubinstein and Medina, *The Constitutional Law of the State of Israel*, p. 942.