

Working Paper Series

Villanova University Charles Widger School of Law

Year 2008

“Militant Judgement?: Judicial
Ontology, Constitutional Poetics, and
‘The Long War’”

Penelope J. Pether
1567, pether@law.villanova.edu

MILITANT JUDGMENT?: JUDICIAL ONTOLOGY, CONSTITUTIONAL POETICS, AND “THE LONG WAR”

*Penelope Pether**

Law is the one . . .

To-morrow, yesterday, to-day.¹

[T]he truth is always produced by someone. . . .²

I would like this book to be read, appreciated, staked out, and contested as much by the inheritors of the formal and experimental grandeur of . . . the law, as it is by the aesthetes of contemporary nihilism, the refined amateurs of literary deconstruction, the wild militants of a de-alienated world, and by those who are deliciously isolated by amorous constructions. Finally, that they say to themselves, making the difficult effort to read me: that man, in the sense that he invents, is all of us at once.³

This Article uses Badiou’s theorizing of the event and of the militant in *Being and Event* as a basis for an exploration of problems of judicial ontology and constitutional hermeneutics raised in recent decisions by common law courts dealing with the legislative and executive confinement of “Islamic” asylum seekers, “enemy combatants” and “terrorism suspects,” and certain classes of criminal offenders in spaces beyond the doctrines, paradigms, and institutions of

* Professor of Law, Villanova University School of Law. Thanks are due to Jonathan Charnitski, Villanova University School of Law J.D. 2008, and Luke Wilson, George Washington University Law School J.D. 2009, for able and resourceful research assistance; to Villanova School of Law Faculty Services Librarian Amy Spare and Law Library research assistant Leona John for their unfailing ability to locate obscure sources; and to Villanova University School of Law Dean Mark Sargent and Associate Dean for Faculty Research John Gotanda for research support. This article is dedicated to my former student Chas Licciardello, of *The Chaser*, for his militant commitment to both being and event in the context of “post-9/11” constitutionalism.

¹ W. H. AUDEN, *Law Like Love*, in *ANOTHER TIME* 5 (1940).

² LUCE IRIGARAY, *THINKING THE DIFFERENCE: FOR A PEACEFUL REVOLUTION* 30 (Karin Montin trans., Routledge 1994) (1989).

³ ALAIN BADIOU, *BEING AND EVENT*, at xiv-xv (Oliver Feltham trans., Continuum 2006) (1988).

the criminal law. The Article proposes an ontology and a poetics of judging equal to the demands of “the long war,” or of “post-9/11 constitutionalism,” on subjects serving on Western Anglophone common law constitutional courts.

I am an unlikely Badiouian, finding, as I do, at least a partial and useful knowledge in thinking through the problem of the judicial subject in terms of bodies and words,⁴ or at least embodied subjects and discourses, and the institutions and disciplines with which they are imbricated, in and through which they are formed, and which they form in turn.⁵ As that sentence might suggest, another aspect of my work on the “subject(s) of law” that might strike a discordant note with Badiou’s philosophy of being and event is its debt to Pierre Bourdieu’s constructivist⁶ account of subject formation, especially in the professions,⁷ although I have attempted to fissure Bourdieu’s frequently (but not, I think, necessarily) essentializing account of subject formation, suggesting the usefulness of reading it through the lens of the iterative difference of law work and praxiological legal subjectivity.⁸ Next, in the larger project of which this Article forms a comparatively early part, which seeks to generate a poststructuralist ethics of judging practice, I have found both Emmanuel Lévinas’s work on intersubjective ethics,⁹ and feminist scholarship which has applied and developed his “ethics of alterity,”¹⁰ to be particularly fruitful.

And finally, worker that I am in the industry that the U.S. philosophical establishment experiences as outsourcing philosophy,¹¹ truth claims make me just as nervous as do totalizing accounts of

⁴ See, e.g., Penny Pether & Terry Threadgold, *Feminist Methodologies in Discourse Analysis: Sex, Property, Equity?*, in *CULTURE & TEXT: DISCOURSE AND METHODOLOGY IN SOCIAL RESEARCH AND CULTURAL STUDIES* 132 (Alison Lee & Cate Poynton eds., 2000).

⁵ See, e.g., Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 *ARIZ. ST. L.J.* 1, 60-63 (2007).

⁶ A characterization that Bourdieu would likely have contested. See *PIERRE BOURDIEU, IN OTHER WORDS: ESSAYS TOWARDS A REFLEXIVE SOCIOLOGY* 123 (Matthew Adamson trans., Stanford University Press 1990).

⁷ See, e.g., Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 *HASTINGS L.J.* 805 (Richard Terdiman trans., 1987).

⁸ See, e.g., Pether & Threadgold, *supra* note 4, at 134-35.

⁹ See, e.g., EMMANUEL LÉVINAS, *ALTERITY AND TRANSCENDENCE* (Michael B. Smith trans., Continuum 1999) (1995); EMMANUEL LÉVINAS, *OUTSIDE THE SUBJECT* (Michael B. Smith trans., Stanford University Press 1994) (1987).

¹⁰ See, e.g., ELIZABETH GROSZ, *SEXUAL SUBVERSIONS: THREE FRENCH FEMINISTS* (1989).

¹¹ I am drawing here on a symposium given at Haverford College on September 29, 2007, titled “Outsourcing Philosophy: Who does the work?” which was described as “[a] symposium highlighting philosophical work done outside the discipline of philosophy and the conditions of its circulation.” See Swarthmore Dep’t of Philosophy, *Outsourcing Philosophy: Who Does the Work*, Greater Philadelphia Philosophy Consortium 2007-2008 Program of Events, Sites of Philosophy, <http://www.swarthmore.edu/x14857.xml> (last visited Apr. 23, 2008).

“philosophy.”¹² This last probably owes as much to the business of professing (common) law, particularly when one’s scholarly practice owes much to Peter Goodrich’s account of legal rhetoric and hermeneutics; one’s scholarly focus is on judging practices; and one does that work in a nation and at a time when intellectually impoverished hysterical *doxa*¹³ comprises judicial and much scholarly constitutional epistemology and hermeneutics, as it does to Foucault, and a politicoscholarly and (ontologically) constitutional “precommitment” to critical theory.

But this article constitutes an enquiry, itself a species of intervention in the sense proposed in *Being and Event*,¹⁴ not a critique. It is set in train by differing legal “solutions,” practiced across the Anglo-American constitutional world, to what is at once the doctrinal challenge posed to pre-9/11 constitutional regimes of criminal and immigration law,¹⁵ and as Michel Rosenfeld has argued, also to the law of war, criminal law, and police powers models of responding to emergencies and “others,”¹⁶ and the displacement, evidently experienced as politically “necessary,” or at least as expedient, by neo-

¹² I should note here that to regard Badiou’s philosophy of being and event as being reducible to a totalizing systematics of truth is to neglect Oliver Feltham’s insight that the “global consequences” of the propositions at the heart of *Being and Event* “are an explorative dethroning of philosophy, the infinite unfolding of a materialist ontology, and the development of a new thought of praxis” Oliver Feltham, Translator’s Preface to BADIOU, *supra* note 3, at xvii.

¹³ PETER HALLWARD, BADIOU: A SUBJECT TO TRUTH 3 (2003).

¹⁴ BADIOU, *supra* note 3, at 201-11.

¹⁵ A detailed analysis of the blurring in post-9/11 common law jurisdictions of the boundaries between these doctrinal areas (which extends beyond what is currently referred to as the phenomenon of “crimmigration”) is beyond the scope of this Article. In his *EIGHT O’CLOCK FERRY TO THE WINDWARD SIDE: SEEKING JUSTICE IN GUANTÁNAMO BAY* (2007), Clive Stafford Smith has documented the imbrication of eviscerating asylum and refugee law with the pragmatics of managing the paradigmatic jurisdiction of exception, Guantánamo Bay, in particular when it has come to repatriating detainees, noting both that “[t]oday, some politicians spit out the phrase ‘asylum seeker’ as if it were sour milk. There have been many casualties of the War on Terror, and among the most tragic has been the Refugee Convention, which lies seriously injured, close to expiring,” *id.* at 252, and that “[i]n recent times this attitude [of ‘singl[ing] out as a threat to the nation asylum seekers, the tiny fraction of people fleeing from one country to another to avoid persecution?].” *Id.* at 253. He continues:

In recent times this attitude seems to have taken hold first in Australia, where pictures of boat people flooded the news. Many of those being excluded by Prime Minister John Howard were fleeing Afghanistan at precisely the moment that Australian soldiers were trying to expel the intolerant Taliban regime. More recently, Tony Blair has turned the spotlight on those seeking asylum in Britain, calling on the tabloids to man the barricades. . . . The cynical attitude of the British government to the plight of such people is pitiful and the ramifications of these policies reached deep into Guantánamo Bay, where British refugees waited in vain for assistance.

Id. at 253-54.

¹⁶ Michel Rosenfeld, *Judicial Balancing in Times of Stress: Comparing the American, British, and Israeli Approaches to the War on Terror*, 27 CARDOZO L. REV. 2079 (2006). Stafford Smith identifies both the U.S. treatment of alleged “enemy combatants” in the War on Terror and such examples of the treatment of asylum seekers as examples of “the politics of hatred.” STAFFORD, *supra* note 15, at 252.

imperial executive governments,¹⁷ of Anglo-American (post?) national anxiety onto others experienced as inhuman and threatening the integrity of the nation state: the “Islamic” man and the “sexually violent predator.” Although an analysis of the phenomenon is beyond the scope of this Article, these two categories are conflated in a series of recent Australian sexual assault cases, documented in varying degrees of detail in Paul Sheehan’s virulently Islamophobic book *Girls Like You*,¹⁸ and more mutedly in debates surrounding the much-publicized successive Nebraska prosecutions of Pamir Safi, an Afghanistan-born¹⁹ member of the U.S. armed forces, for the alleged rape of then-college student, former sorority girl, and Republican activist Tory Bowen.²⁰

This Article will focus on two subsets of the cases referred to above. The first is English cases addressing the constitutionality of the detention and surveillance of terrorism suspects who have not done enough to make them subject to criminal prosecution that has any likelihood of success, some of whom, although non-citizens, cannot be deported because of constitutionalist anxieties about likely “human rights” abuses they would experience in receiving countries. The second is Australian constitutional cases framing the indefinite detention without trial of “Islamic” asylum seekers and what in the U.S. context are called “sexually violent predators” in terms of the nature of the judicial power exercised by Chapter III courts.²¹ It will use these cases to attempt to generate an account of common law judicial ontology and of a poetics of judging, informed by Badiou’s thought in *Being and Event* and related writings, equal to what may—or of course may not—be an event: I’m tentatively naming it “post-9/11 common law constitutionalism.” My thinking on this question owes much to Oliver Feltham’s glosses on and modeling of the praxiological uses of Badiou’s thought, in particular his 2004 essay, *Singularity Happening in Politics: the Aboriginal Tent Embassy, Canberra, 1972*.²² It is also

¹⁷ Some of these acts have been done under color of legislative authorization, but the powerful influence of executive government on U.S., British, and Australian legislators in the open-ended “state of exception” that has increasingly come to characterize Western democracies post-9/11 has seen a shifting from formally parliamentary to de facto presidential systems in Britain and Australia, and has shifted the U.S. separation of powers model to a significantly more presidential model. With the recent defeat of the Howard government in Australia, there exists the possibility of national structures of “democratic” governance emerging that are more broadly participatory.

¹⁸ PAUL SHEEHAN, *GIRLS LIKE YOU (FOUR YOUNG GIRLS, SIX BROTHERS AND A CULTURAL TIMEBOMB)* (2006).

¹⁹ Paul Hammel, *Attempts to “Intimidate” Cited in Rape Case Mistrial*, OMAHA WORLD-HERALD, July 13, 2007, at A1.

²⁰ See, e.g., Paul Hammel, *No New Trial in “Rape” Ban Case*, OMAHA WORLD-HERALD, Jan. 4, 2008, at B1.

²¹ The Australian constitutional equivalent of Article III courts under the U.S. Constitution.

²² Oliver Feltham, *Singularity Happening in Politics: The Aboriginal Tent Embassy*,

assisted by Michel Rosenfeld's insightful 2006 *Cardozo Law Review* article, *Judicial Balancing in Times of Stress: Comparing the American, British, and Israeli Approaches to the War on Terror*.²³

In a series of post-9/11 constitutional cases involving the detention of Islamic terrorism suspects that began with the trial phases of what became *A. v. Secretary of State for the Home Department (A. [No.1])*²⁴, English²⁵ trial courts, and both the Court of Appeal and the House of Lords, have been confronted with the challenge of how English "constitutional law" should guide English "constitutional" courts in contexts where they are asked by the executive²⁶ to be complicit with "human rights-denying" legislation or executive acts. This English constitutional law is a ragtag hybrid of supra-national English law as formed by the Human Rights Act and the European Convention on Human Rights; the "ancient constitution";²⁷ the common law; principles of statutory interpretation developed by English Courts before the passage of the Human Rights Act²⁸ which provided for limited judicial review of legislation circumscribing English constitutional "rights";²⁹ a "thick" account of Diceyan constitutionalism³⁰ based on "regular

Canberra 1972, 37 COMM. & COGNITION 225 (2004).

²³ Rosenfeld, *supra* note 16.

²⁴ [2005] 2 W.L.R. 87. As a result of this case, in *A. v. Sec'y of State for the Home Dep't (A. [No. 2])*, [2005] 3 W.L.R. 1249, the House of Lords addressed the question of the admissibility in British Courts of evidence allegedly obtained by off-shore torturing of detainees by non-British authorities.

²⁵ I am using the term "English" rather than the arguably formally apposite "British" in an attempt to register the varying institutional instantiations of Scottish and Northern Irish self-government, and of Welsh nationalism.

²⁶ Formally Britain is a hybrid constitutional monarchy and parliamentary democracy. The "executive" to which I am referring here is Tony Blair's distinctively presidential Prime Ministership, arguably one among a modern sequence including both the Churchill and Thatcher governments.

²⁷ See, e.g., G. J. A. POCKOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY* (1957). Both sides in the seventeenth century struggles over Royal lawmaking authority laid claim to the phrase, and the authority of what it signified; Sir Edward Coke was a particular adherent of the phrase.

²⁸ See, e.g., TONY BLACKSHIELD & GEORGE WILLIAMS, *AUSTRALIAN CONSTITUTIONAL LAW AND THEORY: COMMENTARY AND MATERIALS* 117 (4th ed. 2006) (noting that "Dicey's view that the common law is a sufficient protector of civil liberties has been superseded in the United Kingdom by the enactment of a statutory Bill of Rights—the *Human Rights Act* 1998 (UK), which incorporates the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 into United Kingdom Law. However the Act still incorporates a significant degree of deference to parliamentary sovereignty: where a statute is found to infringe the European Convention, the only judicial remedy is a 'declaration of incompatibility', which may then trigger a statutory amendment (or, in an extreme case, an interim amendment by executive order, without waiting for Parliament's approval).

²⁹ For an account of this technique, see, for example, Eric Barendt, *Dicey and Civil Liberties*, 1985 PUBLIC LAW 596.

³⁰ For an account of this concept, see Penelope Pether, *Regarding the Miller Girls: Daisy, Judith, and the Seeming Paradox of In re Grand Jury Subpoena*, *Judith Miller*, 19 L. & LITERATURE 187 (2007).

law [T]he law of the Constitution, the rules which in foreign countries naturally form part of the constitutional code, [but which in England] are not the sources, but the consequence of the rights of individuals, as defined and enforced by the courts, . . . the ordinary law of the land”;³¹ international and European human rights law; and more conventional domestic jurisprudence on doctrines relating to judicial power, including but not limited to abuse of process.³²

A brief account of the development of the relevant post-9/11 English constitutional law is in order at this point. In response to the events of September 11, 2001, the Blair government concluded that it would, pursuant to section 14 of the Human Rights Act 1998, derogate from Article 5(3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“the ECHR”) which guarantees “liberty and security of person,” and passed temporary emergency powers, subject to renewal, in Part 4 of the Anti-terrorism, Crime and Security Act 2001 (“the 2001 Act”).³³ Article 5(3) of the ECHR provides, *inter alia*, that “Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article³⁴ shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial.” The reason for the derogation was that there was said to be a “public emergency threatening the life of the nation” within the meaning of the ECHR.

The 2001 Act provided in sections 21 and 23 for temporary or indefinite detention of a person who was not a British citizen and who was reasonably suspected of being an “international terrorist,” and whose presence in the U.K. was believed by the Secretary of State to be a risk to national security, when the Secretary of State suspected that the

³¹ A. V. Dicey, *quoted in* SIR IVOR JENNINGS, *THE LAW AND THE CONSTITUTION* 305-06 (5th ed. 1959).

³² *See, e.g.*, the discussion of comparative common law doctrines developed by courts in the U.S., Ireland, Australia, and Canada on admitting evidence in breach of canons of “fundamental fairness,” in *A. [No. 2]*, [2005] 3 W.L.R. at 1262.

³³ While a detailed comparison of pre- and post-9/11 anti-terrorism legislation in the U.K. is beyond the scope of the present Article, the 2001 Act and its 2005 successor were distinctively different from their predecessor anti-terrorism statutes, the Terrorism Act 2000, the Prevention of Terrorism (Temporary Provisions) Act 1989, and the Northern Ireland (Emergency Provisions) Act 1996, both because those predecessor acts were directed explicitly and exclusively towards “terrorism” connected with the IRA, and related bodies, and because they did not seek radically to circumscribe the conventional protections offered to persons accused of criminal offenses in the ways and to the extent proposed by the 2001 and 2005 Acts.

³⁴ Which provides that “[e]veryone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following case . . . the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent him committing an offence or fleeing after having done so.” European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 5, *opened for signature* Nov. 4, 1950, C.E.T.S. No. 005.

person was a “terrorist who could not be deported because of fears for their safety or other practical considerations.”³⁵ Such detention was authorized by the issuing of a certificate by the Secretary of State.³⁶ Judicial review of such detention was limited by the legislation, initially to review by the Special Immigration Appeals Commission (“SIAC”).³⁷ SIAC could take evidence in a range of ways that raise procedural fairness questions, including those implicated in the right to confront, the right to counsel, the standard of proof, the burden of proof, and the scope of judicial review,³⁸ all in the novel context of what are often but not exclusively “pre-criminal”³⁹ cases.

On December 24, 2004, the House of Lords held in *A. [No. 1]*⁴⁰ that Section 23 of the 2001 Act was incompatible with Articles 5 and 14 of the ECHR. With effect from 14 March 2005 Part 4 of the 2001 Act (which contained Sections 21 and 23) was repealed by s16 of the Prevention of Terrorism Act 2005.⁴¹ The “torture question” raised by the allegations by one of the detainees who brought *A. [No. 1]* that his detention was based on “evidence of a third party obtained through his torture in a foreign state”⁴² was specifically saved⁴³ for the proceedings

³⁵ *A. [No. 2]*, [2005] 3 W.L.R. 1249 at 1249.

³⁶ *Id.* at 1256.

³⁷ *Id.* at 1257.

³⁸ *Id.*

³⁹ My reference here is to the Steven Spielberg film MINORITY REPORT (20th Century Fox et al. 2002), a version of a Philip K. Dick short story of the same name, which depicted the operations of a department of “Pre-Crime” in what looked at that time like a futuristic world. Recent reporting by the BBC has revealed that this scenario, involving as it does the prosecution of crimes by “criminals” before their intended crimes were committed, is today significantly less futuristic: British researchers are presently developing, for the use of the U.S. Department of Homeland Security, biometric software that purports to be able to identify intending terrorists at airports, by means of interpreting their facial expressions, including those coded as expressing rage and disgust. The fact remains that the traditional criminal law process would be a much less contentious means of “disciplining and punishing” those who had done enough under conventional criminal law doctrine to be subjected to such prosecution with reasonable chances of success of conviction, especially given the history of the U.K.’s legislative responses to the activities of the IRA. Thus, as a practical matter, those who are prosecuted under the 2005 Act are likely to be people who are either alleged potential or intending “terrorists” who have not done enough to be caught by traditional criminal accomplice liability or inchoate offense law, and/or persons who are perceived as at risk of committing terrorist acts beyond the geographical jurisdiction of traditional U.K. criminal law, and/or persons against whom evidence gathered in non-traditional ways, for example by torture or illegally or secretly, would either not be admissible in criminal courts, and/or would not meet the criminal evidentiary standard of proof beyond reasonable doubt, and/or would not be desired to be admitted in a way which made the evidence “public” or even available to the defense by the security services who gathered it. The language of sections 2(1)(a), 4(3)(b) and (d), and section 4(7)(a) of the 2005 Act, relating to non-derogating and derogating control orders respectively, which imposes “reasonable grounds for suspecting,” “reasonable grounds for believing,” and “balance of probabilities” standards of proof respectively make this clear, as do the evidentiary standards in section 4(3)(a), and the definitions of “involvement in terrorism-related activity” in section 1(9).

⁴⁰ *A. [No. 1]*, [2005] 2 W.L.R. at 87.

⁴¹ *A. [No. 2]*, [2005] 3 W.L.R. at 1312-13.

⁴² *Id.* at 1249.

in *A. [No.2]*.⁴⁴

The Prevention of Terrorism Act (“the 2005 Act”) was passed on 11 March 2005.⁴⁵ While the 2001 Act only applied to non-citizens,⁴⁶ the 2005 Act applies to both citizens and non-citizens,⁴⁷ and provides for a dual regime of derogating (issued by SIAC)⁴⁸ and non-derogating (issued by the Secretary of State)⁴⁹ control orders over persons both “reasonably suspected” of being or having been involved in terrorist-related activity *and* posing an alleged future risk of terrorism to the public.

Derogating control orders have two additional requirements: they may be imposed where the evidence supporting the making of the control order is of higher quality than it would be in the case of non-derogating control orders, and where the relatively severe restrictions on the liberty of “controlees” that will be imposed on them derogate in whole or in part from rights conferred by Article 5 of the ECHR.⁵⁰ Derogating control orders differ from non-derogating control orders in that the former are “incompatible with the controlee’s right to liberty under Article 5 [of the ECHR] . . . [and] can [only] be made where there has been a designated derogation within section 14 of the [HRA].”⁵¹ Control orders differ from detention in that they impose surveillance and restrictions on freedom, including restrictions that are often practically equivalent to house arrest,⁵² rather than detention in a prison like the notorious Belmarsh,⁵³ where many of those detained under the 2001 Act had been incarcerated, or other government facility.

On the passage of the 2005 Act a number of “suspected terrorists,” who had been detained pursuant to certificates issued under the 2001 Act, were then released and made subject to control orders under the 2005 Act; or were made subject to control orders under the 2005 Act *and* given notice of intention to deport; or voluntarily left the U.K. *and* had their certification under the 2001 Act revoked after their departure; or were confined in Broadmoor (a high security psychiatric hospital which doubles as a “forensic” prison) under the Mental Health Act; or

⁴³ *Id.* at 1255-56, 1318.

⁴⁴ *Id.* at 1255-56.

⁴⁵ Prevention of Terrorism Act, 2005, c.2 (Eng.).

⁴⁶ *A. [No. 2]*, [2005] 3 W.L.R. at 1256.

⁴⁷ Prevention of Terrorism Act, 2005, c.2, § 1(1) (Eng.).

⁴⁸ *Id.* at § 4.

⁴⁹ *Id.* at § 2.

⁵⁰ *Id.* at § 1(2)(b), § 10, §4(3).

⁵¹ Sec’y of State for the Home Dep’t v. *M.B.* (*Re M.B.*), [2006] EWHC (Admin) 1000, ¶ 4 (Eng.).

⁵² Prevention of Terrorism Act, 2005, c.2, § 7 (Eng.), catalogs the control order conditions that may be imposed on a controlee.

⁵³ See, e.g., Denise Winterman, *Belmarsh—Britain’s Guantanamo Bay?*, BBC NEWS, Oct. 6, 2004, <http://news.bbc.co.uk/1/hi/magazine/3714864.stm>.

were confined in Broadmoor under the Mental Health Act, then subsequently released and made subject to a control order under the 2005 Act.⁵⁴ The proposed deportees were detained while deportation proceedings were pending, and as a result the control orders covering them were discharged.⁵⁵ At least some of the persons either not subjected to deportation proceedings, but rather made subject to control orders, or detained pending deportation proceedings, were ones who might be subject to human rights abuses by possible deportation destination nations.⁵⁶ The timelines for these events ran from 2001 to 2005.

All of the challenges to control orders under the 2005 Act have related to non-derogating control orders, and as of June 2007, seventeen control orders had been issued under the 2005 Act, and a number of persons subject to them had absconded.⁵⁷ Between June and September in 2007, a further two control orders were issued,⁵⁸ subsequent additional challenges to more recently-issued control orders to those discussed *infra* have been made.⁵⁹

As indicated *supra*, *A. [No. 2]* concerned a provision of SIAC's procedural rules that allowed "evidence that would not be admissible in a court of law"⁶⁰ to be received by SIAC, and allegedly involved reliance by the Secretary of State on evidence produced by third party torture conducted in a foreign state.⁶¹ The House of Lords held that evidence inadmissible on a range of "constitutional" grounds, dividing on the question of the burden of proof on appellant and government, on the standard of proof to be applied by SIAC when considering whether evidence before it had been obtained by torture in a foreign state, and on the appropriate response by SIAC to questions about whether the evidence had been obtained by torture.⁶²

While the majority of the House of Lords held that evidence obtained by torture in a foreign country is inadmissible in proceedings in U.K. courts, it also held that express statutory words would be

⁵⁴ *A. [No. 2]*, [2005] 3 W.L.R. at 1258.

⁵⁵ *Id.*

⁵⁶ Home Office Security News and Publications, *Control Order Quarterly Statement (June 11- Sept. 10, 2007)*, Sept. 17, 2007, <http://security.homeoffice.gov.uk/news-publications/news-speeches/494245>.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ These relate to control orders issued after the initial group discussed in this Article. *See, e.g.*, *Sec'y of State for the Home Dep't v. A.F.* [2007] EWHC (Admin) 651; *A.F. v. Sec'y of State for the Home Dep't* [2007] EWHC (Admin) 2001; *Sec'y of State for the Home Dep't v. E.* [2007] EWHC (Admin) 233; *Sec'y of State for the Home Dep't v. E.* [2007] EWCA (Civ) 459; *Sec'y of State for the Home Dep't v. E.* [2007] UKHL 47. A.F.'s appeals were consolidated with those of M.B., discussed in text *infra*.

⁶⁰ *A. [No. 2]*, [2005] 3 W.L.R. 1249 at 1257.

⁶¹ *Id.* at 1255-56.

⁶² *Id.* at 1250.

required before SIAC could admit evidence obtained by torture, effectively making it possible for the U.K.'s "sovereign parliament" to render it admissible, at least before SIAC, which, although it is constituted as a court of record, can comprise of "persons holding or having held high judicial office, persons who are or who have been appointed as chief adjudicators under the Nationality, Immigration and Asylum Act 2002, persons who are or have been qualified to be members of the Immigration Appeal Tribunal and experienced lay members," that are "appointed by the Lord Chancellor";⁶³ at least in proceedings that do not involve the adjudication of criminal guilt, but rather lie at the "interface" of the criminal law and executive acts;⁶⁴ and at least under the 2001 Act.⁶⁵ That is, within the framework of the judicial review conventionally permissible in English constitutional doctrine, the legislature would have explicitly to limit "human rights" before the courts would interpret a statute as having that effect, and the relevant provision of the SIAC's rules of procedure "could not be interpreted as authorizing displacement of [the exclusionary rule barring evidence procured by torture]".⁶⁶

The majority in the House of Lords further held that because of the limited evidentiary information available to detainees in these proceedings about the basis for their proposed detention, their burden was to raise a plausible reason that evidence might have been obtained by torture, and that SIAC bore the burden of initiating inquiries into the matter; that if on the balance of probabilities SIAC determined the evidence had been obtained by torture it was bound to exclude it. However, (over three dissents) the court held that where it was doubtful about whether the evidence had been obtained by torture it should admit the evidence, bearing the doubt in mind when weighing its probative value.

On 12 April 2006, Justice Sullivan of the Queen's Bench Division of the High Court of Justice (Administrative Court) held in *Secretary of State for the Home Department v. M.B.*⁶⁷ that "the procedures in section 3 of the 2005 Act relating to the supervision by the [High Court of Justice] of non-derogating control orders . . . were incompatible with the . . . right to a fair hearing under Article 6(1) of the [ECHR]." This declaration was made pursuant to section 4(2) of the HRA. The particular provisions of the 2005 Act challenged related to the High Court's following a "special procedure, involving closed material⁶⁸ and

⁶³ *Id.* at 1257.

⁶⁴ *See, e.g.*, the judgment of Lord Nicholls of Birkenhead, *id.* at 1289-90.

⁶⁵ *See, e.g., id.* at 1291.

⁶⁶ *Id.* at 1250.

⁶⁷ [2006] EWHC (Admin) 1000.

⁶⁸ That is, secret evidence, not made available to the terrorism suspect nor to his counsel. Similar issues have arisen in post-9/11 constitutional cases in the U.S.

the use of a Special Advocate [to review evidence not made available to a defendant or his counsel], that is similar to” SIAC’s procedure. The use of secret evidence not available to the controlee was one basis for Sullivan’s decision; he wrote, “[t]he basis for the Security Service’s confidence [M.B. was engaged in terrorism-related activity] is wholly contained within the closed material [not available to M.B.]. Without access to that material it is difficult to see how, in reality, the respondent could make any effective challenge to what is, in the open case before him, no more than a bare assertion.”⁶⁹ Justice Sullivan’s decision also involved the High Court’s application of “principles applicable on an application for judicial review” in supervising non-derogating control orders under the 2005 Act in considering “whether any of the any of the decisions of the Secretary of State in relation to the making of the control order was flawed.” Here Justice Sullivan concluded that the scope of judicial review was limited to assessing the reasonableness of the Secretary of State’s decision based on the material available to the Secretary when he made the decision to issue a control order, excluding evidentiary material developed subsequent to its issuing; that “[t]he function of the court was to review the decision of the Secretary of State, not to form its own view of the merits of the case;⁷⁰ and that “[i]n performing its [judicial review] function, the court was required to apply a particularly low standard of proof.”⁷¹

Justice Sullivan, the trial judge, was clearly additionally exercised both by the question of whether at least in some circumstances control order proceedings could be properly characterized as criminal rather than civil,⁷² and by the entrusting to the British “Executive Branch” of a decision that might properly be regarded as necessarily judicial.⁷³ He determined that because of the circumscription of the ambit of judicial review of Executive decisions to impose non-derogating control orders, the provisions for judicial review of non-derogating control orders under the 2005 Act were inadequate to provide for judicial review that was procedurally fair.⁷⁴ He concluded:

To say that the [2005] Act does not give the respondent. . . against who a non-derogating control order has been made by the Secretary of State, a fair hearing n the determination of his rights under Article 8 of the . . . [ECHR] would be an understatement. The Court would be failing in its duty under the [Human Rights Act, 1998] . . . , a duty imposed upon the court by Parliament, if it did not say, loud and clear, that the

⁶⁹ *Re M.B.*, [2006] EWHC (Admin) 1000, ¶ 67.

⁷⁰ *Sec’y of State for the Home Dep’t v. M.B.*, [2006] EWCA (Civ) 1140, ¶ 31.

⁷¹ *Id.*

⁷² *Re M.B.*, [2006] EWHC (Admin) 1000, ¶¶ 36-41.

⁷³ *Id.* at ¶¶ 43-50.

⁷⁴ *Id.* at ¶¶ 100-103, 104.

procedure under the [2005] Act whereby the court merely reviews the lawfulness of the Secretary of State's decision to make the order upon the basis of the material available to him at that earlier stage is conspicuously unfair. The thin veneer of legality which is sought to be applied by section 3 of the Act cannot disguise the reality. That controlees' rights under the Convention are being determined not by an independent court in compliance with Article 6.1 [of the ECHR], but by executive decision-making, untrammelled by any prospect of effective judicial supervision.⁷⁵

On June 26 2006, Justice Sullivan held in *Secretary of State for the Home Department v. J.J.*⁷⁶ that non-derogating control orders imposed on the six defendants were incompatible with their right to liberty under Article 5 of the ECHR, and that the appropriate remedy was to quash the control orders. The control orders, inter alia, confined the controlees to the interiors of their residences, which in all but one case were one bedroom apartments provided by the government in which the detainees had not lived prior to their detention, and located in areas where they had not lived prior to their detention, except for the hours between 10 a.m. and 4 p.m. each day.⁷⁷ Their movements in the six hours excepted from the curfew were extremely constrained, as was their ability to receive visitors.⁷⁸

On 1 August 2006, the Court of Appeal handed down two judgments, one in *Secretary of State for the Home Department v. M.B. (Re M.B.)*⁷⁹ and one in *Secretary of State for the Home Department v. J.J. (Re J.J.)*⁸⁰. In the former judgment the Court of Appeal held that reliance on secret evidence is permissible "on terms that appropriate safeguards against the prejudice that this may cause to the controlled person are in place."⁸¹ It reasoned that "the provisions of the PTA for the use of a special advocate, and of the rules of court made pursuant to paragraph 4 of the Schedule to the PTA, constitute appropriate safeguards [regarding non-disclosure of evidence]"; and that Justice Sullivan was "in error in holding that the provisions for review by the Court of the making of a non-derogating control order by the Secretary of State do not comply with the requirements of Article 6" of the ECHR, which prescribes "fair" judicial review of infringements of civil rights.⁸² In its judgment in *Re J.J.*, the Court of Appeal dismissed the

⁷⁵ *Id.* at ¶ 104.

⁷⁶ [2006] EWHC (Admin) 1623.

⁷⁷ *Re J.J.*, [2006] EWCA (Civ) 1141, ¶ 4.

⁷⁸ *Id.*

⁷⁹ [2006] EWCA (Civ) 1140.

⁸⁰ [2006] EWCA (Civ) 1141.

⁸¹ *Re M. B.*, [2006] EWCA (Civ) 1140, at ¶ 86.

⁸² *Id.* at ¶ 87.

Secretary of State's appeal and affirmed Justice Sullivan's judgment.⁸³

Appeals from the *Re J.J.*⁸⁴ and *Re M.B.*⁸⁵ cases (the latter in a joint opinion dealing with further aspects of the *A.* case that inaugurated these tests for British constitutional judging (and another related case, *Secretary of State for the Home Department v. E.*)⁸⁶) were heard by the House of Lords in July 2007, and judgments in those cases were handed down on October 31, 2007. They reveal, among other things, a House of Lords (and indeed a British Judiciary) radically and profoundly troubled by,⁸⁷ and often split on,⁸⁸ issues including the scope and nature of judicial review of executive action in issuing control orders; when the terms and conditions of a control order will be so extreme as to amount to a deprivation of liberty, and thus in whose jurisdiction lawful deprivation of liberty lies; how to characterize control order proceedings—as civil or criminal; and what fairness or “justice”⁸⁹—acting in a judicial way—in this novel context requires of judges. The question left unanswered in *A. [No. 2]*: whether the U.K.'s sovereign legislature could legislate to make evidence obtained by torture admissible in a court performing “judicial” functions, perhaps constitutes the paradigm case of this crisis of judicial ontology and ethics, which is a crisis of equality: is the democratic governance, of which the “rule of law” is a fundamental part, a question of majoritarian tyranny and law as state power, or is it egalitarian, oriented towards justice; is the judge equal to judging others as his equals?

The strategy of the Bush government of using Guantánamo Bay, other “secret” offshore prisons, and extraordinary rendition, to bolster legislative jurisdiction-stripping of the Federal Courts' power of judicial review of “enemy combatant” detention has meant that U.S. enemy combatant jurisprudence has not as directly addressed the issues of judicial ethics and ontology, the nature of judicial power, as has been the case in the United Kingdom.⁹⁰ This has been exacerbated by the

⁸³ *Re J. J.*, [2006] EWCA (Civ) 1141, at ¶ 27.

⁸⁴ [2007] UKHL 45.

⁸⁵ [2007] UKHL 46.

⁸⁶ *E.* appears to have been the only one of the detainees who brought *A. [No. 1]* who was only subject to a control order under the 2005 Act and not subjected to additional deportation proceedings or Mental Health Act proceedings.

⁸⁷ In both the subjective and objective senses.

⁸⁸ They are *ad idem*, however, on the likely obligation of the British authorities under the regime established by the 2005 Act to prosecute someone whom it is sought to make subject to a control order for a crime where there are “realistic prospects” of “successfully” doing so, and on holding that a conclusion as to realistic prospects of prosecution is not a condition precedent to the making of a valid control order

⁸⁹ *Re M.B.*, [2007] UKHL 46, at ¶ 14.

⁹⁰ The U.S. Supreme Court has approached these cases rather from the perspective of formal separation of powers analysis and conventional constitutional hermeneutics, or from a range of procedural perspectives, ranging from the narrow question of the formally correct parties to a habeas corpus action to the rights of non-citizen detainees to the prerogative writ of habeas

present thinness of Article III power jurisprudence, and the contemporary ascendancy of modes of constitutional interpretation including an etiolated version of proportionality review and the privileging of a majoritarian imperative that reflexively defers to executive fiats clothed in legislative authority. However, similar issues to those troubling the English Courts have arisen in two sets of post-9/11 constitutional decisions issued by the Australian High Court.

One of these groups of Australian post-9/11 Constitutional cases involves the legality of executive detention of “Islamic” asylum seekers; the other involves the “preventive detention” of persons who in U.S. parlance would be labeled “sexually violent predators.” Doctrinally, Australia’s hybrid of a thin Diceyan and entrenched written constitution (although without a Bill of Rights), explicitly modeled on the U.S. original, has meant that these issues have been framed in terms of the nature and incidents of Chapter III judicial power. The signal divide on the court has been between (recently retired) Justice Michael McHugh, an assiduous if selective student of U.S. Constitutional jurisprudence and theory, and Justice Michael Kirby, the Gleeson Court’s increasingly isolated dissenter. Justice McHugh has called the plight of the indefinitely-detained asylum seekers, in the absence of a written Bill of Rights, a matter for the tragedian rather than the jurist,⁹¹ and in a mode becoming characteristic of the Gleeson High Court in passing judgment on “others,” has used narrow legalist and textualist strategies effectively to deny jurisdiction to intervene to limit indefinite executive detention.⁹² Justice Kirby, on the other hand, has theorized Article III courts’ jurisdiction to protect substantive as well as procedural rights⁹³ in terms that evoke “the other Coke,”⁹⁴ Lord Cooke of Thorndon,⁹⁵ who framed common law constitutional judicial power in the following terms, questioning “the extent to which in New Zealand even an Act of Parliament can take away the right of citizens to resort to the ordinary

corpus. U.S. trial court judges who have tried post-9/11 terrorism suspects thus far have been markedly less troubled than their English brethren about the use of evidence allegedly obtained by torture, although there are at present before the Federal courts challenges to the use of secret evidence that have the capacity to produce different outcomes than those achieved thus far in the “torture” cases.

⁹¹ *Al-Kateb v. Godwin* (2004) 219 C.L.R. 562, 581 (Kirby, J., dissenting).

⁹² *Id.* at 584-86.

⁹³ *Id.* at 618.

⁹⁴ I refer here to Coke’s judgment in *Doctor Bonham’s case* that “in many cases, the common law will control acts of Parliament, and sometimes adjudge them to be utterly void; for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void.” 8 Co. Rep. at 11a; 77 E.R. at 652.

⁹⁵ A judge and later President of the New Zealand Court of Appeal, Sir Robin Cooke, who became Lord Cooke of Thorndon and a member of the Privy Council, and sat in the House of Lords.

Courts of Law for determination of their rights.”⁹⁶ Signally for my purposes in this Article, Justice Kirby has repeatedly and explicitly invoked challenges posed to constitutionalism by the reverberations of the Third Reich in domestic, comparative, transnational, and international law contexts in accounting for the Gleeson Court’s now characteristic deference to legislature and executive.

At the heart of Justice Sullivan’s judgment in *Re M.B.*, and also of the dual regime of derogating and non-derogating control orders established by the 2005 Act, as with the U.S. “enemy combatant” litigation⁹⁷ is a question of a judicial method that goes to the heart of constitutionalism, understood as the theory of accommodation between state interests and “rights”; and which derives from those events that took place in Germany from 1933 to 1945 that give rise to both modern comparative constitutional law and modern human rights regimes including both the Universal Declaration of Human Rights and the ECHR: so-called “proportionality review.” As Lorraine Weinrib notes,⁹⁸ proportionality review forms part of a mode of judicial review called “justification analysis” and it involves first legality and then legitimacy analysis.⁹⁹ Legality analysis is overtly formalistic: it asks whether the law has been made in a way that is legal for positive law-making in that nation, including “principled elaboration of common law.” The mode of legitimacy analysis is called proportionality analysis, and its purpose, for all that its commitments are arguably formal¹⁰⁰ rather than normative, is to maintain the “primacy of respect for human dignity.”¹⁰¹

⁹⁶ *N.Z. Drivers’ Ass’n v. N.Z. Road Carriers*, [1982] 1 N.Z.L.R. 374, 390 (C.A.). In *Fraser v. State Services Comm’n*, [1984] 1 N.Z.L.R. 116, 121 (C.A.), he opined that “it is arguable that some common law rights may go so deep that even Parliament cannot be accepted by the Courts to have destroyed them.” See also *Taylor v. N.Z. Poultry Bd.*, [1984] 1 N.Z.L.R. 394, 398 (C.A.).

⁹⁷ See, e.g., *Rosenfeld*, *supra* note 16, at 2081-84, 2089-95, 2102-18.

⁹⁸ Lorraine E. Weinrib, *Constitutional Conceptions and Constitutional Comparativism*, in *DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW 3* (Vicki C. Jackson & Mark Tushnet eds., 2002).

⁹⁹ *Id.* at 17-18.

¹⁰⁰ The steps in proportionality analysis are as follows:

- Consider objective of enactment or action under review.
- Ask if the objective of the enactment or action is of sufficiently high importance to warrant superseding a constitutional guarantee.
- Consider if the State has established that law or decision under review forwards its objective directly (needs rational connection to stated objective).
- Consider whether encroachment on right intrudes on the right only to the extent necessary to meet its objective.
- Ask whether the desired and actual benefit of the enactment or action exceed the detriment effected by the infringement of the right.

See *id.* at 18.

¹⁰¹ *Id.* at 18.

As with Badiou's own trenchant excoriation of relativism, which he characterizes as a "thoroughgoing skepticism which reduced the effects of truth to particular anthropological operations,"¹⁰² Justice Sullivan's judgment in *Re M.B.* manifests a situationally equally fundamental mistrust of the relativism that characterizes proportionality review, evident in his dis-ease about, and what is his resistance to or a breaking from the ethos of proportionality review¹⁰³ and a drawing on what I will tentatively call a common law judicial ontology¹⁰⁴ to generate a new post-9/11 common law constitutional jurisprudence. Badiou's characterization of institutionalized human rights culture of the kind arguably encoded in proportionality review as "flabby reactionary philosophy" and "moral philosophy disguised as political philosophy,"¹⁰⁵ might be useful in beginning to characterize the regime of judicial review established by the HRA and the 2001 and 2005 Acts as they are interpreted by Justice Sullivan, and both the ideologically fractured and frequently incoherent jurisprudence of the House of Lords judgments in the English cases surveyed in this Article, and the radically decontextualized judicial power jurisprudence of the majority on the Gleeson High Court.

Badiou's brief synopsis of his project in *Being and Event* offers a way of framing the crisis of judicial ontology and constitutionalism facing the common law constitutional judiciary post-9/11, one that might assist us in identifying the jurisprudential praxis of Justice Sullivan. "A truth," Badiou writes, "is solely constituted by rupturing with the order which supports it. . . . [T]his type of rupture which opens up truth [constitutes] 'the event.'" "The infinite work of truth is. . . that of a 'generic procedure'. And to be a Subject. . . is to be a local active dimension of such a procedure"; "an active fidelity to the event of truth. . . a militant of truth."¹⁰⁶ Additionally, Badiou's praxiological commitments¹⁰⁷ in *Being and Event* to the unpredictable and limitless instantiation of truth procedures¹⁰⁸ suggest a peculiar aptness of his thinking about ontology and generic procedures for evental sites which

¹⁰² BADIOU, *supra* note 3, at xii.

¹⁰³ *Re M.B.*, [2006] EWHC (Admin) 1000, ¶¶ 60, 74, 79, 80.

¹⁰⁴ Following Goodrich's account of common law in *THE LAWS OF LOVE: A BRIEF HISTORICAL AND PRACTICAL MANUAL* (2006), and proceeding from Peter Hallward's account of Badiou's ontology:

At the operational foundation of Badiou's ontology we find neither revealed word nor reconstituted thing but the subject in its purest form. What comes first is the decision and the decider, the subject who asserts the axiom: the subject who decides questions beyond proof who affirms the inconsistent medium of being and who takes another step in the (endless) pursuit of ontological consistency.

HALLWARD, *supra* note 13, at 76.

¹⁰⁵ BADIOU, *supra* note 3, at xi.

¹⁰⁶ *Id.* at xii-xiii.

¹⁰⁷ Feltham, *supra* note 12, at xxi-xxii.

¹⁰⁸ *Id.* at xx.

post-9/11 constitutional law—or constitutionalism—in Western Anglophone common law systems might encounter. Further, Feltham’s application of Badiou’s philosophy of being and event to contemporary Australian race relations, specifically in the relations between indigenous and invader subjects, suggests both the utility of Badiou’s method for thinking through general and abstract questions of the relationship between judging, constitutionalism, and others, and that like contemporary Native Title jurisprudence in Australia, that relationship’s recent refiguring in terms of Chapter III judicial power might likewise be usefully framed in terms of Badiou’s thinking on ontology and on truth procedures. Of specific relevance to my project here, Feltham’s analysis of indigenous politics in Australia is an especially helpful model for applying Badiou’s thought in *Being and Event* to those aspects of the jurisprudence of exception that I am concerned with in this Article.

Feltham anatomizes Badiou’s “theory of structural change through praxis,” noting that [a]ccording to [Badiou’s] . . . theory, for a practical procedure to transform the basic structure of a situation . . . a number of factors must always be at work.”¹⁰⁹

An abnormal event has occurred which interrupts the functioning of the situation.

This event occurs at a specific point within the situation, a sort of weak point or stress fracture, which the dominant representative powers of the situation do not fully understand or control; an ‘evental site’.

Instead of rejecting the event as an anomaly, someone recognises it and names it as belonging to the situation. This is called the ‘intervention’.

The intervention is followed by actions which explore and develop the consequences of the event’s belonging to the situation or the nature and structure of that situation. It is these actions—‘enquiries’—which make up what Badiou calls a ‘procedure of fidelity’ to the event.

This series of actions must not conform to any preestablished program for political action; this non-conformity guarantees the newness—the ‘generic’ nature—of the procedure.

If procedure of fidelity is generic, it does not recognize established distinctions of hierarchies within the situation. Consequently it bears both a universal address: this event happened *to* and *for* everyone in the situation; and what Badiou terms an “immanent axiom of equality”—everyone is equal in their response to the event.¹¹⁰

¹⁰⁹ Feltham, *supra* note 22, at 231.

¹¹⁰ *Id.* at 231-32.

I would locate the “abnormal event” of post-9/11 common law constitutionalism in the necessity for constitutional courts in the face of executive and legislative responses to 9/11 and waging of the War on Terror to address their role in the face of a radical—because apparently open-ended—state of exception. Significantly, it came in the wake of the “Human Rights revolution” that began in 1945, and was symptomized by the making of laws that proceeded in opposition to the ethos of international human rights law¹¹¹ inaugurated by that revolution, effectively by implicitly¹¹² or explicitly¹¹³ denying the humanity of “others.”

Next, Michel Rosenfeld’s analysis of the early post-9/11 jurisprudence of the Israeli, U.K. and U.S. constitutional courts, which argues that post-9/11 constitutional jurisprudence emerges from what he calls *conditions of stress* rather than conditions of crisis or emergency,¹¹⁴ that a jurisprudential “paradigm of the war on terror” is “emerging,”¹¹⁵ and that the existing “law of war,” “criminal law,” and “police powers” paradigms are inadequate to the challenges of post-9/11 constitutionalism,¹¹⁶ suggests that post-9/11 common law constitutional outsider jurisprudence manifests the characteristics of an evental site: a “structure of immanent exception,” to which present “representational mechanisms” characteristic of commerce, the media, and government, are inadequate classify, analyze, or synthesize.¹¹⁷

What of the intervention, the recognition of the evental? In the case of specifically indigenous Australian politics in the context of Australian politics more broadly conceived of, Feltham argues, there is no capacity to recognize an indigenous political subject, and the symptom of this “immanent exception” is the discourse of excess and lack that characterize “Australian” conceptions of indigenous peoples:

¹¹¹ While there had been some post-Human Rights Revolution circumscriptions of criminal procedural protections for those accused of terrorism in the English government’s campaign against the IRA, for example, the control order jurisprudence is distinctively different not merely because its abolition of procedural protections is vastly more radical than its pre-9/11 predecessors, but also because it postdates the fundamental change in the English constitutional structure marked by the passage of the HRA. The capacity for the relegation of criminal procedural “due process” to the realm of statute is fundamentally changed by the HRA.

¹¹² Detainees in both the British and Australian regimes discussed in this Article are constructed as lacking the markers of citizen-subjectivity, of conventional criminality, or of conventional alienage.

¹¹³ Sexually violent predators are represented in the Australian jurisprudence as lacking humanity, see discussion of *Baker*, *infra*; there are also egregious examples of this phenomenon in the literature on Guantánamo detainees, see, for example, John Shiffman, *Mission: Fairness*, PHILA. INQUIRER, Dec. 9, 2007, at A1 (reporting that staff at Guantánamo and the U.S.-based head of the military prosecuting team for the prison had a saying, “don’t pet the terrorist”).

¹¹⁴ Rosenfeld, *supra* note 16, at 2081.

¹¹⁵ *Id.* at 2149.

¹¹⁶ *Id.* at 2093.

¹¹⁷ Feltham, *supra* note 22, at 232.

excessive consumption of government money; excessive demands for land; an apology, perceived as per se excessive; inadequate civilization (of indigenous peoples); inadequate resources (to do justice to indigenous dispossession.)¹¹⁸

The discourse of excess and lack is critical to recognizing the existence of an evental-site, intervening to name the occurrence of an event. Discussing the problematics of “whether one can securely identify evental-sites,” Feltham suggests that “[t]his suggests that it is undecidable whether a site is evental in the absence of an event”:

The method for the ontological analysis of situations thus cannot follow a verificationist model; we must accept that it will be heuristic and pragmatic. . . . I have argued that indigenous politics in Australia constitute a generic truth procedure, and the indigenous peoples themselves constitute an evental site in the situation of Australian politics. In Australian governmental discourse the indigenous peoples are always said to be either excessive or lacking: excessive in their political demands, their drain on the public purse, their poverty; lacking in their recognition of the government’s ‘good intentions’, in their community health standards, in their spirit of enterprise and individual responsibility, etc. It is possible to generalize these structural characteristics of excess and lack by arguing that inasmuch as the state has no measure of the contents of an evental site, the site will continually appear to be radically insufficient or in excess of any reasonable measure. *One can thus adopt the criteria for the existence of an evental-site that it marks the place of unacceptable excess or lack in the eyes of the state.*¹¹⁹

So too in the post-9/11 Australian asylum-seeker jurisprudence, asylum-seekers are increasingly represented by the majority on the High Court as placing demands on the law—specifically on the courts and the judges—that are excessive; and, in the paradigm of catch-22, as lacking appeal to the majority who might protect them from executive overreaching by statute. In *A. [No. 2]*, the U.K. detainees are constructed as invoking an excessive supra-national constitutional structure.

As to the enquiries that constitute a “‘procedure of fidelity’ to the event,”¹²⁰ and the development of generic procedures of judging equal to it, the detail of Feltham’s application of Badiou’s theory of the event and of militant political subjects merits discussion, as does an account of what his thesis about Australian indigenous politics has to tell us about what I argue is a new crisis in the theory and practice of common law judging of others.¹²¹ This is the case despite histories of both

¹¹⁸ *Id.* at 233.

¹¹⁹ Feltham, *supra* note 12, at xxv-xxvi (emphasis added).

¹²⁰ See *supra* text accompanying note 110.

¹²¹ I should note at this point that I register and largely do not differ from Peter Hallward’s argument that September 11th *itself* is productive only of “non-generic procedures of fidelity.”

making constitutional exceptions for others in “emergencies,” for example in the governmental acts that gave rise to *Korematsu*, and in the legal regime that constituted part of British governmental response to the IRA; and in founding modern nations on principles of hierarchy and exclusion that circumscribe the reach of law’s protective aegis, and/or carve out zones for selective applications of legal violence, as, for example, in the denying of what I will carefully call the status of subjects to indigenous Australian and enslaved African-Americans. The difference derives, as my discussion of the abnormal event that is post-9/11 common law constitutionalism suggests, in two things: first, the transformation of the logic of emergency in the contemporary, distinctively postmodern Western Anglophone common law systems’ post-9/11 engagement between nation and others because of what is experienced and indeed constructed as its infinitude; and in the parallel development of a law for “others” since the middle of the 20th century that defies the period’s dominant Whig historical accounts of the progress of the discourses of egalitarian democracy, of “human rights,” and human dignity. To give an example of that latter phenomenon, contrast the discourse of the Australian High Court in the *Mabo* decision about being frozen in age of racial discrimination with the Gleeson Court’s formalist hermeneutics of frank racism.

Another example might be found in Lyndon Johnson’s unacknowledged invocation of the Anglo-American poet W. H. Auden,¹²² in his turn invoking W.B. Yeats, in the “Daisy” advertisement for the 1964 presidential election: “These are the stakes. To make a world in which all of God’s children can live or to go into the dark. We must either love each other or we must die.”¹²³ Johnson carried that

See Feltham, *supra* note 22, at 240.

¹²² Or rather, the invocation of Bill Moyers, his speechwriter.

¹²³ This invocation of equality in the form of love was quoted in the *Philadelphia Inquirer* by *Inquirer* journalist David Aldridge in an article about the crisis of the killing of (and often by) black men in the U.S., a crisis that bears all the signs of a constitutional crisis, albeit one that presently goes unrecognized. Aldridge characterized the advertisement, which featured a mushroom cloud, that predecessor image of the crumbling twin towers, as “otherwise demagogic.” David Aldridge, *Time to Stop All the Dying*, PHILA. INQUIRER, Nov. 29, 2007, at D4. A day earlier, in a televised debate between candidates for the Republican nomination for presidential candidacy, against the backdrop of the discourse about illegal migration by across the symbolic (southern) border, with its attendant fantasies of one, Southern, impermeable continent-spanning fence, Senator McCain had said, “We must recognize [illegal immigrants] are God’s children as well. They need our love and compassion, and I want to ensure that I will enforce the borders. But we won’t demagogue it.” Editorial, *The Immigration Tussle: My Fence Is Bigger*, PHILA. INQUIRER, Dec. 2, 2007, at C6. Both in the U.S. as in France, it might be suggested, where at the time of writing this Article riots by impoverished black and Muslim youths in immigrant ghettos in the *banlieu* had erupted for the second time in two years, the denial of the exclusion of the black and/or Muslim other, no matter how much formally a citizen, from the equality before the law that citizenship promises, are constitutional crises that go unrecognized because of an official discourse of colorblindness and an ingrained cultural tolerance of racial and religious inequality and intolerance. See Jenny Barchfield & John

election in the wake of the assassination of John F. Kennedy; the passage of the Civil Rights Act of 1964; and the March on Washington. The subsequent passage of the 1965 Voting Rights Act, in the wake of the March(es) on Montgomery, made the U.S. formally a democracy for the first time. Contrast with this the recent flurry of legislative and constitutional amendments in the U.S. “denying rights” to sexual minorities who seek the ability to marry in a way that is recognized by domestic law, or in the alternative legal intimate partnership status. Or what is or may be (in the spirit of the undecidability of the occurrence of the event) the Roberts Court’s inaugural defining decision on constitutions and others, the *Seattle School District* case, in which the majority decision rendered inequality invisible, forgot the nation’s history of racial inequality, reverted from the normative equality of *Brown* to Chief Justice Taney’s orientation to others in *Dred Scott*.

Feltham identifies the rendering invisible and thus in some sense “absent” of the indigenous inhabitants of “Australia” indigenous inhabitants at the moment of colonial invasion, English colonial and “Australian” constitutional law “inaugurated a fundamental dislocation between Australian politics and the land itself,”¹²⁴ as, one might equally say, between the land and the nation eventually there constituted, or between Australian constitutional law and indigenous Australians. He identifies this as an event, in Badiou’s terms, “that is, an anomalous disruption which occurs at a structural flaw in a situation and inaugurates an infinite process of explorative change,” and locates “indigenous politics faithful to the Tent Embassy as the sole political practice capable of addressing the fundamental dislocation of Australian politics; hence the singularity of this practice.”¹²⁵

Feltham identifies the successive policies and practices visited by a series of Australian government since 1788 on indigenous Australians as “reflecting erasure and exclusion.” He also notes the risks of what he posits as the only political action that “can address the fundamental dislocation of the Australian body politic,” that is, “the action of an indigenous politics”: it “risks its own dislocation due to the unending processes of colonization exercised by the Australian body politic.” He proposes that Badiou’s account of “generic process of fidelity” to the event can provide a way to think through such recuperative colonization, to estimate the chances of escaping it.¹²⁶

Why has the crisis of common law judicial practice and ontology

Leicester, *A Color-blind Country?*, PHILA. INQUIRER, Dec. 2, 2007, at A2. At the same time, in Timor Leste, riots provoked by inequality, an exclusion from the full meaning of citizenship, are framed by the media as explicitly constitutional events and as crises that threaten the nation.

¹²⁴ Feltham, *supra* note 22, at 225.

¹²⁵ *Id.*

¹²⁶ *Id.* at 226.

that is my focus evental, rather than one of a challenges posed by series of acts of bad faith by states, a species of business as usual?¹²⁷ Why is the orientation towards judging practice and judicial ontology that it has engendered to some extent in Justice Sullivan and, as I will go on to argue, in its most developed form in Justice Kirby, properly identifiable as a generic truth procedure? My tentative answer is that it is because their post-9/11 constitutional jurisprudence reveals that the contemporary common law constitutional judiciary can evidently no longer pretend that constitutional inequality is either exceptional or an artifact of a benighted but recuperated history anterior to the emergence of international human rights law norms in the wake of the Third Reich. There is, rather, the emergence of a judicial recognition of constitutional inequality as the other self of the rule of (constitutional) law, always imminent, always encroaching, always requiring vigilance to discern when it becomes constitutional. The radical egalitarian commitments of this new jurisprudence inhere both in its insistence on egalitarian relations between state and citizen, state and other, and citizen and other, and in the egalitarian address of the militant judge to those he judges. Drawing on and making analogies with Feltham's analysis of indigenous politics in Australia,¹²⁸ contemporary constitutional inequality has of course been recognized in sites beyond constitutional courts—in academic discourse, in the frequent skepticism of those marginalized in a constitutional culture about rights or citizenship. It has, however, been “structurally null and void”¹²⁹ for postmodern common law constitutional courts themselves.

Let me turn to analysis of Justice Kirby's post-9/11 constitutional jurisprudence. Feltham registers that for Badiou an evental site can only be recognized as such “once an event occurs at its location.”¹³⁰ The “first act of an intervention,” capable of transforming “action into . . . event”¹³¹ is its “naming.”¹³² Thus Justice Kirby, for example, dissenting in *Al-Kateb*, the case of a stateless Kuwaiti-born Palestinian, detained after his unlawful entry into Australia, and unable to be deported because of his statelessness, whose indefinite detention the High Court's majority held authorized, identifying World War II as a watershed in the history of judicial review to protect “others”¹³³ against

¹²⁷ *Id.*

¹²⁸ *Id.* at 233 (noting that “indigenous political subjectivity is [not] null and void per se,” and arguing that “in alternative situations such as that of international indigenous politics, and that of various academic networks, indigenous political subjectivity is both present in many ways.” But that “[i]t is solely within the situation of Australian politics that indigenous peoples constitute an evental site in terms of their political capacities.”).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 234.

¹³² *Id.*

¹³³ *Al-Kateb v. Godwin* (2004) 219 C.L.R. 562, 621 (Kirby J., dissenting) (asserting that “I do

“[e]xecutive assertions of self-defining and self-fulfilling powers,”¹³⁴ and asserting common law constitutional law-making powers.¹³⁵ This meets with incomprehension and consternation (which Feltham labels “confusion”)¹³⁶ on the part of the state, which cannot “understand—classify and dominate—the relationships between this new name and these previously unknown elements of its situation.”¹³⁷ The event is, then, “undecidable.”¹³⁸ State responses of this kind might be located in threats made by a Bush government functionary against law firms acting pro bono for Guantánamo detainees, encouraging their paying commercial clients to exact a form of economic sanctions against them for this apparently transgressive behavior,¹³⁹ or the labeling of lawsuits brought in response to the Bush government’s secret electronic surveillance program unpatriotic,¹⁴⁰ while at the same time recognizing the role of the Federal Courts in intervening in rights-based challenges to governmental action both in using Guantánamo, secret CIA prisons, and “extraordinary rendition” to escape the jurisdiction of those Courts, and in instituting NSA surveillance beyond that apparently authorized by statute and reviewable by the secret FISA Court.

If I am right, and the post-9/11 crisis of common law judging of others has produced on the part of the state reactions that situate judicial resistance of legislative and executive commands that others are beyond the jurisdiction of the courts, and thus in a fundamental sense of the law (courts may be conceived of as distinctively legal institutions; legislatures are political as well as legal institutions)—then the event is complete when the judicial militant rejects “the non-place assigned to”¹⁴¹ the courts in intervening in relations between state and subject.

not doubt that if Australia were faced with challenges of war today, this Court, strengthened by the post-War decision in the *Communist Party Case* and other cases since, would approach the matter differently than it did in the decisions which McHugh J has cited with apparent approval. Respectfully, I regard them as of doubtful authority in the light of legal developments that occurred after they were written.”).

¹³⁴ *Id.* at 616.

¹³⁵ *Id.* (responding to Justice McHugh’s assertion, *Al-Kateb*, 219 C.L.R. at 595, that “the justice . . . of the course taken by the Parliament [in legislating to provide for indefinite immigration detention] is not examinable in this or any other domestic court” because “[i]t is for not for courts . . . to determine whether the course taken by Parliament is unjust or contrary to basic human rights”).

¹³⁶ Feltham, *supra* note 22, at 234.

¹³⁷ *Id.*

¹³⁸ *Id.* at 235.

¹³⁹ See, e.g., Bob Egelko, *Law Firm Boycott Call Raises Ethical Issues: Experts Differ on Whether Defense Official Broke Rules*, S.F. CHRON., Jan. 19, 2007, at A6 (quoting Bush Administration Official Charles “Cully” Stimson, who advocated corporate clients firing commercial law firms who provided pro bono lawyers for Guantanamo detainees).

¹⁴⁰ Morning Edition: Senate Mulls Immunity for Telecoms (NPR radio broadcast, Nov. 8, 2007) (quoting Sen. Jon Kyl, identifying as unpatriotic to fail to do what the government tells you to do).

¹⁴¹ Feltham, *supra* note 22, at 235.

The response of Justice Kirby to another such manifestation of “undecidability”—the varying attempts of Australian state governments to place the indefinite detention of certain criminal defendants beyond the jurisdiction of courts to review¹⁴² while “using the forms of judicial procedure to mask the reality of the legislative decree,”¹⁴³ and the increasingly permissive, deferential to Legislature and Executive,¹⁴⁴ and narrowly positivist responses of his brother judges to the Howard government’s analogous strategy of detaining “Islamic” asylum seekers in extremely harsh and isolated conditions,¹⁴⁵ in some cases indefinitely¹⁴⁶—was just such a militant rejection.¹⁴⁷

Justice Kirby’s militant intervention began with his dissent in *Al-Kateb*, discussed *supra*, in which he additionally invoked Chapter III judicial power as a source of “unenumerated rights,” specifically those of procedural and substantive due process.¹⁴⁸ In that case, Chief Justice Gleeson and Justice Gummow joined him in dissent, both joining him in citing as a ground for their decision that *Al-Kateb*’s appeal against his indefinite detention should be allowed on the traditional basis for judicial review in Parliamentary states: that statutes are to be interpreted by “not imput[ing] . . . to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language.”¹⁴⁹ Justice Gummow’s dissent additionally invoked the nature and incidents of Chapter III judicial power, an explicitly constitutional doctrine, holding that there were limits on the power of the legislature to authorize the executive to indefinitely detain, beyond which it would be unconstitutionally intruding on judicial

¹⁴² See *Baker v. The Queen* (2004) 210 A.L.R. 1; *Fardon v. Attorney-General (Queensland)* (2004) 210 A.L.R. 50.

¹⁴³ *Baker*, 210 A.L.R. at 6 (Gleeson, C.J.) (characterizing Baker’s argument that the legislation assigned to Chapter III courts functions incompatible with Chapter III judicial power).

¹⁴⁴ Which in the Australian Constitutional context lack practical separation of powers, despite the formal separation articulated in Chapters I and II of the Australian Constitution, because of the *de jure* Executive Government’s contemporary practice of deference to the *de facto* Executive Government constituted by the Prime Minister, who is by convention the leader of the party which controls the House of Representatives, the lower house of Australia’s bicameral Parliament.

¹⁴⁵ See *Behrooz v. Sec’y of the Dep’t of Immigration and Multicultural and Indigenous Affairs* (2004) 219 C.L.R. 486; *Re Woolley; Ex parte Applicants M276/2003* (by their next friend G.S.) (2004) 210 A.L.R. 369.

¹⁴⁶ See *Al-Kateb v. Godwin* (2004) 219 C.L.R. 562 (Kirby J., dissenting); *Minister for Immigration and Multicultural and Indigenous Affairs v. Al Khafaji* (2004) 219 C.L.R. 664.

¹⁴⁷ See Feltham, *supra* note 22 at 235 (contrasting the reaction of the Australian state to the event constituted by the Tent Embassy with the militants’ “reject[ion] . . . [of] the non-place assigned to indigenous peoples within the situation of Australian politics” by declaring “separate sovereignty” and “a stake in the very land that the Australian government had assumed was uniquely its own to legislate upon.”)

¹⁴⁸ *Al-Kateb*, 219 C.L.R. at 616-18.

¹⁴⁹ *Id.* at 577 (Gleeson, C.J., dissenting).

power.¹⁵⁰

In his dissent in *Behrooz*, Justice Kirby insisted on the power of judicial review of the conditions of immigration detention;¹⁵¹ invoked the nature and incidents of a robust uniquely *judicial* power informed by international law,¹⁵² and the vibrancy of common law constitutional judging comprising ancient common law “unenumerated” rights of the kind reflected in the Universal Declaration of Human Rights¹⁵³; and articulated the requirement that Australian law be interpreted and applied such that it is in conformity with international law, including the especially the International Covenant on Civil and Political Rights (“ICCPR”) and its First Optional Protocol, to both of which Australia is a signatory.¹⁵⁴

In *Minister for Immigration and Multicultural and Indigenous Affairs v. Al Khafaji*,¹⁵⁵ handed down the same day as *Al-Kateb*, Justices Gummow and Kirby likewise dissented from a majority decision allowing an Iraqi national who had fled Iraq for Syria and whom the Australian government had not been able to deport to Syria. Justice Gummow again relied on Chapter III constitutional grounds.¹⁵⁶ Agreeing with Justice Gummow on the constitutional grounds for dismissing the Minister’s appeal, Justice Kirby emphasized the relevance of international law to detention cases, while framing his analysis in terms of the traditional narrow ambit of judicial review in Parliamentary systems:

The interpretation of the Act favoured by Gummow J has an added attraction for me. It is supported by the presumption that Australian statutes (such as the Act) are to be interpreted and applied, as far as their language permits, so as to be in conformity with international law, including the international law of human rights and fundamental freedoms. This principle ensures that Australian law is construed so that it is not needlessly in breach of the obligations binding upon Australia under international law. Since the earliest days of this Court, the latter principle has been one that has helped to guide this Court in the construction of Australian legislation.

International law, like the common law of Australia, has a strong presumption in favour of individual liberty and against a power of indefinite detention by the executive government. Certainly, that is how an ambiguous statutory provision in this country is to be read. This case affords no exception. In relevant respects, the Act is

¹⁵⁰ *Id.* at 609-14 (Gummow, J., dissenting).

¹⁵¹ *Behrooz v. Sec’y of the Dep’t of Immigration and Multicultural and Indigenous Affairs* (2004) 219 C.L.R. 486, 503.

¹⁵² *Id.* at 517-20, 522-26.

¹⁵³ *Id.* at 524.

¹⁵⁴ *Id.* at 522-26.

¹⁵⁵ (2004) 219 C.L.R. 486.

¹⁵⁶ *Id.* at 524.

ambiguous. In such circumstances, this Court should certainly uphold an interpretation that denies to the Executive what is effectively a self-defining and self-fulfilling power of indefinite detention of the respondent. Such a power would be incompatible with Ch III of the Constitution. It would also be inconsistent with past decisions of this Court that have declined to extend such self-determining powers to the Executive.¹⁵⁷

*Baker v. The Queen*¹⁵⁸ was the first of the 2004 High Court cases dealing with challenges to “preventive detention” of sexual offenders based on the Chapter III judicial power grounds first articulated by the Brennan High Court in *Kable v. Director of Public Prosecutions (N.S.W.)*.¹⁵⁹ *Kable* held unconstitutional a statute purportedly conferring jurisdiction on the New South Wales Supreme Court to issue preventive detention orders to detain an individual named in the statute after the expiry of his sentence for the manslaughter of his wife, on the grounds of “incompatibility with the essence of [federal] judicial power,”¹⁶⁰ which it held had been exercised by the Supreme Court in the case. Justice Toohey, a member of the *Kable* majority, wrote:

Preventive detention under the Act is an end in itself. And the person so detained “is taken to be a prisoner within the meaning of the Prisons Act 1952”. It is not an incident of the exclusively judicial function of adjudging and punishing criminal guilt. It is not part of a system of preventive detention with appropriate safeguards, consequent upon or ancillary to the adjudication of guilt. . . . In the present case the Act requires the Supreme Court to exercise the judicial power of the Commonwealth in a manner which is inconsistent with traditional judicial process. . . . The function exercised by the Supreme Court under the Act offends Ch III which . . . reflects an aspect of the doctrine of the separation of powers, serving to protect not only the role of the independent judiciary but also the personal interests of litigants in having those interests determined by judges independent of the legislature and the executive. The function offends that aspect because it requires the Supreme Court to participate in the making of a preventive detention order where no breach of the criminal law is alleged and where there has been no determination of guilt.¹⁶¹

His sister judge, Justice Gaudron, also a member of the *Kable* majority characterized the preventive detention proceedings as “proceedings [not] otherwise known to the law.”¹⁶²

In *Baker* itself, the majority of the High Court rejected a challenge

¹⁵⁷ *Id.* at 527.

¹⁵⁸ (2005) 225 C.L.R. 513.

¹⁵⁹ (1996) 189 C.L.R. 51.

¹⁶⁰ *Id.* at 96.

¹⁶¹ *Id.* at 98.

¹⁶² *Id.* at 106.

to N.S.W. state legislation that had the effect of radically circumscribing the availability of parole for offenders sentenced to life terms.¹⁶³ The legislation was passed after Baker's co-accused in the highly-publicized abduction, torture, rape and murder of Virginia Morse, who like him had been convicted and sentenced to life imprisonment with a non-release recommendation, had successfully applied for the fixing of a minimum non-parole period.¹⁶⁴ In the parliamentary debates accompanying the passage of the legislation a number of persons convicted of particularly heinous rapes and murders, including Baker himself, had been identified as the intended objects of the legislation.¹⁶⁵ One aspect of the challenge concerned the statutory requirement that the Supreme Court find "special reasons" before it would permit an offender who had been made the subject of a life sentence with a non-release recommendation at sentencing to apply for a determination of a minimum non-parole period. Invoking *Kable's* constitutional doctrine, Baker argued unsuccessfully that the requirement of "special reasons" was "devoid of content, . . . illusory . . . [and] involved the Supreme Court in a charade," because "[t]he legislature was using the forms of judicial procedure to mask the reality of the legislative decree, which was that these people were never to be released."¹⁶⁶ Additionally, he argued unsuccessfully that the exercise of this function involved the Court in making determinations of a kind foreign to judicial power.¹⁶⁷

Justice Kirby's dissent was as scathing as it was wide-ranging. Characterizing the legislation as an attempt to undermine "the integrity of the judicial power,"¹⁶⁸ to "'dress up' as a judicial function the making of orders which, in truth, are designed to implement the clearly-stated parliamentary objective that the named 'animals', including the appellant, 'never see the exit sign at the prison gate.'"¹⁶⁹ He characterized the legislation as analogous to that found unconstitutional in *Kable*: "an attempt to involve the judiciary in the performance of punitive decisions effectively already determined by parliament itself."¹⁷⁰ He further found that the legislation was ad hominem,¹⁷¹ retroactive in effect,¹⁷² "seriously arbitrary and discriminatory,"¹⁷³ and that in context the requirement for a judicial finding of "special reasons" for the determination of a non-parole period was "included to permit the

¹⁶³ BLACKSHIELD & WILLIAMS, *supra* note 29, at 753-54.

¹⁶⁴ *Id.* at 753.

¹⁶⁵ *Id.* at 754 (quoting Paul Whelan, New South Wales Minister for Police).

¹⁶⁶ *Id.* at 754.

¹⁶⁷ *Baker*, 223 C.L.R. at 533-34.

¹⁶⁸ *Id.* at 546.

¹⁶⁹ *Id.* at 547.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 548.

¹⁷³ *Id.* at 552.

conscripted of judges of the New South Wales Supreme Court into a charade pretending to the availability of discretion . . . when in truth it was intended to ensure that the judges could never, in law or fact, order the eligibility for release of any of the named offenders.”¹⁷⁴

Justice Kirby also appealed to judicial consideration of legislation of this kind in the context of both foundational constitutional theory,¹⁷⁵ and international human rights law, arguing both that the legislation contravened the ICCPR because of its retroactive operation,¹⁷⁶ and in respect of one of the named targets of the legislation, who was 14 when he committed the offence for which he was convicted, also contravened Article 37 of the Convention on the Rights of the Child, because it had the effect of subjecting that offender to “life imprisonment without the possibility of release.”¹⁷⁷ He urged independence of Constitutional Court judges from the response of public opinion to their decisions,¹⁷⁸ made it plain that in his view the Article III judicial power doctrine was critical for the “protection of fundamental rights.”¹⁷⁹ “Subject to the Constitution,” he wrote, “only the courts of this country stand as guardians of . . . the avoidance of serious excesses and departures from . . . human rights.”¹⁸⁰

In this series of cases, then, we see Justice Kirby insisting on and invoking a law above and beyond the positive law made by organs of the state, whether legislature or executive, intervening when the state visits its institutional violence on others in ways that instantiate constitutional inequality. In *Fardon*, the penultimate case in this series, he went further.

Fardon, once again, saw Justice Kirby in sole dissent when the Court rejected a challenge to a state statute providing for preventive detention of serious sexual offenders after the completion of their sentences. Finding the legislation unconstitutional on Chapter III judicial power grounds, he invoked the “fundamental principle [of liberty] that lies deep in our law,”¹⁸¹ asserting that “[i]n Australia, we formerly boasted that even an hour of liberty was precious to the common law,” and asking, rhetorically,

[h]ave we debased liberty so far that deprivation of liberty, for yearly intervals, confined in a prison cell, is now regarded as immaterial or insignificant? Under the Act, just as in the law invalidated in *Kable*,

¹⁷⁴ *Id.* at 558.

¹⁷⁵ *Id.* at 536 (calling for interpretation of the legislation “from the standpoint of substance, not mere form,” of a kind appropriate for interpreting a “*Dog Act*”).

¹⁷⁶ *Id.* at 560.

¹⁷⁷ *Id.* at 559.

¹⁷⁸ *Id.* at 542-43.

¹⁷⁹ *Id.* at 561.

¹⁸⁰ *Id.* at 539.

¹⁸¹ *Fardon v. Attorney-General (Queensland)* (2004) 210 A.L.R. 50, 91.

the prisoner could theoretically be detained for the rest of the prisoner's life. This could ensue not because of any *past* crime committed, but because of a prediction of *future* criminal conduct.¹⁸²

Most significantly for my purposes here, he relied upon another fundamental principle of constitutionalism as of Badiou's theory, equality:

Protection of the legal and constitutional rights of minorities in a representative democracy such as the Australian Commonwealth is sometimes unpopular. This is so whether it involves religious minorities, communists, illegal drug importers, applicants for refugee status, or persons accused of offences against anti-terrorist laws. Least of all is it popular in the case of prisoners convicted of violent sexual offences or offences against children. Yet it is in cases of such a kind that the rule of law is tested. As Latham CJ pointed out long ago, in claims for legal protection, normally, "the majority of the people can look after itself": constitutional protections only really become important in the case of "minorities, and, in particular, of unpopular minorities." It is in such cases that the adherence of this Court to established constitutional principle is truly tested, as it is in this case.¹⁸³

Militant, he also asserted the legitimate role of constitutional courts in judicial review of legislative and executive action, once again naming the "confusion and refusal"¹⁸⁴ of the Australian government in the face of that assertion, and employing a generic procedure of truth in formulating a robust Chapter III judicial power jurisprudence:

Recent, and not so recent, experience teaches that governments and parliaments can, from time to time, endeavour to attract electoral support by attempting to spend the reputational currency of the independent courts in the pursuit of objectives which legislators deem to be popular. Normally, this will be constitutionally permissible and legally unchallengeable. However, as *Kable* demonstrates, a point will be reached when it is not, however popular the law in question may at first be. The criteria for the decision are stated in *Kable* in general terms. Yet such is often the case in constitutional adjudication. Evaluation and judgment are required of judicial decision-makers responding, as they must, to enduring values, not to immediate acclaim.¹⁸⁵

In the final case in the series, *Re Woolley; Ex parte Applicants M276/2003 (by their next friend GS)*,¹⁸⁶ in the face of increasing

¹⁸² *Id.* at 93-94.

¹⁸³ *Id.* at 87-88.

¹⁸⁴ Feltham, *supra* note 22, at 235.

¹⁸⁵ *Fardon*, 210 A.L.R. at 87.

¹⁸⁶ (2004) 225 C.L.R. 1. Justice Kirby has more recently dissented in the first High Court control order case, *Thomas v. Mowbray*, No. M119/2006 [2007] H.C.A. 33 (2 Aug., 2007), available at <http://www.austlii.edu.au/au/cases/cth/HCA/2007/33.html>, which held interim

evidence of his isolation on the Court, Justice Kirby took a different tack, and one which, while intervening with a militancy as sharply marked as—if differently framed from—his earlier jurisprudence on constitutional inequality, suggested an evolving strategy in the work of egalitarian constitutional change. Arguably his agreement with the other members of the court in rejecting the children's application for release was rendered inevitable by *stare decisis*, as he indicated,¹⁸⁷ and by the way the action was brought on behalf of Afghani children subjected to immigration detention, on habeas and other prerogative writ grounds.¹⁸⁸ Unlike Behrooz, they were not alleging that they had been deprived of the opportunity to prove their detention factually inhumane, but rather that the immigration detention of minors was *per se* inhumane, and thus constituted "punishment" that it was improper for the legislature rather than a court to impose.¹⁸⁹

In any event, he held that the legislative mandate was too unambiguous for the challenged detention to be read in such a way as to bring it into harmony with international human rights law norms,¹⁹⁰ and this, he concluded, deprived him of grounds for using the hermeneutic strategy in his *Behrooz* and *Al-Kateb* dissents of yoking together a conventional technique for judicial review in sovereign parliamentary systems, the normative commitments of International Human Rights Law, constitutional common law doctrines, and Chapter III judicial power doctrine.¹⁹¹ Arguably, too, the challenged legislation here did not embroil the Courts in legitimizing detention as did the legislation challenged in *Baker* and *Fardon*. All that said, however, it seems possible that Justice Kirby might have held on constitutional common law grounds—of the kind he had invoked in *Behrooz*—that the Court, in exercising *parens patriae* powers, had jurisdiction to grant the writs sought on the children's behalf. And perhaps interpreting the authorizing legislation as unsalvageable by a reading in harmony with non-positivist constitutional law—what he called "the general principle of Australian law that statutes are read so as not to offend international law, and not to derogate from fundamental rights, unless the words of the statute are clear"¹⁹²—was less inevitable than Justice Kirby suggested. This conclusion is in turn suggested by his reliance on successive Australian governments' failure to *amend* the challenged

control orders constitutional, *inter alia*, on Chapter III grounds. Justice Hayne likewise dissented on the issue of whether giving federal judicial officers the responsibility to decide to issue such orders conferred on non-judicial power on a federal court in breach of Chapter III.

¹⁸⁷ *Re Wooley*, 225 C.L.R. at 72.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 65.

¹⁹⁰ *Id.* at 71.

¹⁹¹ *Id.* at 71-73.

¹⁹² *Id.* at 69.

legislation in the face of “repeated parliamentary and official reports”¹⁹³ and his concession that there were “differentiated provisions in the Act relating to adults and children,”¹⁹⁴ which an apparently unexceptionable resorting to certain canons of statutory interpretation might have suggested could yield a different outcome.

In the event, Justice Kirby’s jurisprudential approach to the “work of change”¹⁹⁵ was a different—and apparently strategic—one. He named the inadequacy of the traditional narrow form of judicial review in the context of states with sovereign Parliaments: not enforcing rights-denying legislative or executive acts in the absence of a clear intent that this was what was intended. He thus made a powerful implicit case for his repeated appeals to law beyond the limits of positivism. Further, taking the intransigence of successive Australian governments about asylum detention and indeed about various mandates for the constitutional inequality of others at its word—which denies the courts the role of protectors of the human rights of those subject to constitutionally unequal treatment while frequently attempting to use the courts to legitimate that treatment—he named the result of state lawlessness, placing back on the citizen-subjects who elected governments deaf to non-positivist law and on those governments their responsibility for constitutionalism. Or for its absence:

In the light of this history and on the face of the public record of the Parliament, the suggestion that there has been some oversight, mistake or a failure to consider the immigration detention of children in Australia is fanciful. Detention is the deliberate policy of the Australian Parliament, repeatedly affirmed. In default of a constitutional basis for invalidating it, it is the duty of this Court to give effect to the Act, whatever views might be urged about the wisdom, humanity and justice of that policy.

Human rights requirements: International human rights treaties to which Australia is a party contain provisions relevant to the detention of children. Such provisions apply to conditions of restraint such as “immigration detention”. The requirements of such treaties were considered in *B*. The most specific and important of such provisions appears in Art 37 of the United Nations Convention on the Rights of the Child (“UNCROC”). More general provisions are contained in Arts 2.1, 3.1, 3.2, 7.1, 9.1, 18.1 and 19 of the International Covenant on Civil and Political Rights (“ICCPR”).

Australia has signed the First Optional Protocol to the ICCPR. Pursuant to the accession to that treaty, a communication was taken to the United Nations Human Rights Committee (“UNHRC”), complaining that the provisions of the Act, specifically as they relate

¹⁹³ *Id.* at 69-70.

¹⁹⁴ *Id.* at 69.

¹⁹⁵ Feltham, *supra* note 22, at 235.

to children, contravene the obligations accepted by Australia under international law in consequence of its ratification of the ICCPR. The UNHRC upheld that complaint. It did so over the contrary arguments made on behalf of Australia. Other international bodies have also criticised Australia in respect of the provisions of the Act obliging universal mandatory detention.

However that may be, assuming that there is a breach of international law established by the failure of the Act, and the administration of the Act, to comply with the treaties binding Australia, such a breach does not, as such, affect the validity of the provisions of the Act or the duty of this Court to give effect to those provisions as part of a valid law of this nation. In construing any ambiguities in such law, it is legitimate for a court to interpret the law, so far as its language permits, to avoid departures from Australia's international obligations. However, where, as here, the law is relevantly clear and valid (and is the result of a deliberately devised and deliberately maintained policy of the Parliament) a national court, such as this, is bound to give it effect according to its terms. It has no authority to do otherwise.¹⁹⁶

What might a militant procedure of common law constitutional judging of others involve? Such a practice of judging will be heteroglossic,¹⁹⁷ like the accounts of an English constitutionalism that renders evidence obtained by torture inadmissible in the seriatim opinions in *A. [No. 2]*. It will be at once egalitarian and relational, situating the judge in a relationship of equals with those others on whom she passes judgment, rather than positing a judicial "identity-in-itself" because "[t]here are only identities-*for*-themselves-and-*for*-others inasmuch as any identity is structurally the product of a *web of relationships* clustering around the single point designated by a proper name."¹⁹⁸ Robust accounts of Chapter III judicial power are examples of such an egalitarian and relational praxis. And it will resist what Feltham calls canalization, or capturing by the ordinary institutions of government¹⁹⁹: in the context of developing a theory of judging this might involve resisting claims like those made by Justice Scalia about the antidemocratic nature of the common law, or claims for finding judicially-recognizable norms in the actions of legislatures.

Let me gesture towards what applying this analysis to post-9/11

¹⁹⁶ *Re Woolley*, 225 C.L.R. at 70-71.

¹⁹⁷ See Feltham, *supra* note 22, at 228 (writing of an indigenous politics that does not "effac[e] . . . the diversity of its voices").

¹⁹⁸ *Id.* at 229 (generating this account of identity in addressing an indigenous political critique of discourses on "aboriginality" appropriated for racist purposes, and identifying a "way . . . of speaking or thinking an indigenous politics *without* effacing the diversity of indigenous voices, *without* getting caught up in the trap of identity-in-itself, and *without* getting caught up in governmental procedures").

¹⁹⁹ *Id.*

constitutional judging might suggest: that the dis-ease of the British judiciary and inadequacy of traditional British constitutional methods to what, drawing on but to some extent differing from the work of Michel Rosenfeld,²⁰⁰ I'll suggest is a new type of constitutional crisis, specifically in the splits opening between appellate judges in these cases, suggest that the confluence of post-9/11 and supra-national constitutionalism in Britain is a "necessary but not sufficient"²⁰¹ ground for a generic truth procedure which we likewise see in the Gleeson High Court's jurisprudence of and for others. Justice Kirby's militant judicial intervention,²⁰² his emergent praxis of post-9/11 constitutional judging, marks a distinctive break with comparative constitutional law's orthodoxy of proportionality, a break that is "capable of redressing the fundamental dislocation"²⁰³ of existing discourses and practices of constitutional judging by state lawmaking post 9/11. That is, that his "enquiries"²⁰⁴ constitute a "generic procedure of fidelity." To quote Feltham in another context, Justice Kirby's genuinely philosophical account of Chapter III *duty* "thinks local thoughts of justice."²⁰⁵

Feltham goes on to argue that "only those political, scientific, artistic and interpersonal situations which comport evental-sites may give rise to a situation-transforming truth procedure," that "[f]or Badiou, it is the structure of historical sites alone that provides a possible location for an event and for the unfolding of a praxis," and that "the existence of an evental-site is not enough to ensure the development of a praxis; for that, an event must occur." "Events," he writes, "happen in certain times and places which rupture with the established order of things," and "[i]f they are recognized as harboring implications for that order, then a transformation of the situation in which they occur may be initiated."²⁰⁶ And "the concept of a rupture and an ensuing structural change of a situation could be compared to the notion of an epistemological break."²⁰⁷

What is left to the militant judge of common law constitutionalism post-9/11, in the era of "the long war," is a "long slow process of supplementation,"²⁰⁸ which we might identify in the development of the jurisprudence of what is proper to courts, whether framed in terms of

²⁰⁰ One of stress rather than either emergency or ordinary conditions. See Rosenfeld, *supra* note 16. I differ from his analysis both in relation to the differential treatment of subject/citizen and others, and in suggesting that emergencies may often be at least in significant part, internally rather than externally-created, as in contemporary Pakistan, or the Third Reich.

²⁰¹ Feltham, *supra* note 22, at 241.

²⁰² *Id.* at 232.

²⁰³ *Id.* at 224.

²⁰⁴ *Id.* at 232.

²⁰⁵ *Id.* at 241.

²⁰⁶ BADIOU, *supra* note 3, at xxvi.

²⁰⁷ *Id.* at xxvii.

²⁰⁸ *Id.* at xxviii.

the nature and incidents of Chapter III judicial power, or that of due process, or that of abuse of process, or indeed of any form of common law constitutional discourse, not Romantic or avant-garde invention,²⁰⁹ which one might analogize to naïvely decontextualized discourses on “human rights” and “human dignity” on the one hand, or the frankly instrumental substantive due process jurisprudence that produced the increasingly fragile reproductive rights jurisprudence of the U.S. Supreme Court and the heteronormative sentimentality of *Lawrence v. Texas* rather than insisting on radical equality, which for my purposes, as for Badiou’s, is manifest in love.

Other aspects of Badiou’s thought that are of use in the project of theorizing a judging practice equal to a militant engagement with the emergent “jurisprudence of exception” in comparative common law constitutional contexts, and the militant judicial ontology that might be equal to this eventual rupture, are his characterization of the “entirely corrupt representative and electoral form” of late 20th century “democracy,”²¹⁰ his teasing reference to “what, among the differences, legitimately matters to subjects,”²¹¹ and his identification of the critical limits of the power of language, the excess of a materialist ontology over “the powers of language to define and differentiate it.”²¹²

Feltham’s insights into how Badiou radically rethinks the relations of subject and language suggest a special aptness, too, of Badiou’s work for thinking through the ontology and truth procedures of the militant common law constitutional judge. “[b]ecause [Badiou’s conception of praxis] . . . includes a certain use of language . . . it is *transmissible between subjects*. This is what allows Badiou, when removing the determinism of the Marxist model, to avoid embracing some form of mysticism or a spontaneous participation in truth on the part of an initiated elite.” Such a “generic truth procedure,” a praxis of common law judging, a “subjectivization in a truth procedure,”²¹³ which “takes time . . . [and] unfolds according to principles—an operator of fidelity, the names generated by the enquiries,” and its “[transmission] from subject to subject . . . thus remain[ing] . . . the property of no one in particular,”²¹⁴ might be equal to the post-9/11 crisis of common law constitutional judicial ontology confronted with its obligations to judge the other in the face of claims legitimating jurisdictions of exception.

And finally—or rather gesturing towards “the sense of an ending,” given that Badiou confines truth procedures to the realms of art, politics,

²⁰⁹ *Id.* at xxvii.

²¹⁰ *Id.* at xii.

²¹¹ *Id.*

²¹² Feltham, *supra* note 12, at xxiii.

²¹³ *Id.* at xxix.

²¹⁴ *Id.*

science, and love²¹⁵—where might we locate jurisprudential truth procedures? My suggestion is that jurisprudential truth procedures ought properly be located in the realms of love and of poetry. To place law in the realms of either science or politics²¹⁶ is on the one hand to deny that law—and the judges—have ethical choices that affect both how they develop as judicial subjects, in their ontological project, and in how they judge others, and on the other to deny the distinctiveness of the institutions, discourses, subjects and practices of law from those of politics, and thus to accede to the purely political majoritarianism epitomized by the deference of courts to state power of the kind that Michael Kirby has named.

By contrast, Badiou identifies the radical alterity within the loving subject that the encounter with the other in love produces: “[I]t is in love that thought frees itself from the powers of One, and is exercised according to the law of the ‘Two.’”²¹⁷ And a practice of judging that is a generic truth procedure in the domain of love requires a radical precommitment to justice, which I will call equality of judge and other, a “[belief] without knowing why,”²¹⁸ or, as Peter Hallward glosses it “[f]idelity to love implies attestation before justification.”²¹⁹ Poetry, paradigm of the literary genre, forcefully asserts the uncertainty of interpretation as the methodology of truth: “[P]oetry makes truth [*fait vérité*] of the multiple as presence come to the limits of language. It is the song of language insofar as it presents the pure notion of ‘there is’ [*il y a*], in the very erasure of its empirical objectivity.”²²⁰

Oliver Feltham powerfully identifies the radical and transformative praxiological potential of *Being and Event* in the radical uncertainty that this philosophy both implies and depends on, its “anxiety, obsession and desire”²²¹:

The fundamental source of the ‘practicality’ of Badiou’s theory of praxis is his placing it under the signs of possibility and contingency: there *may* be an evental site in a situation, an event *may* happen at that site, someone *may* intervene and name that event, others *may* identify an operator of fidelity, series of enquiries *may* develop, and finally, at a global level, these enquiries *may* be generic.²²²

The necessary uncertainty of the subject as to the occurrence of an event is at the heart of what might be the virtues of Badiou’s account of being and event for a theory of post-9/11 constitutional judicial

215 *Id.* at xviii.

216 *See id.* at xviii (discussing logical positivism).

217 HALLWARD, *supra* note 13, at 186 (quoting Alain Badiou).

218 *Id.* at 187.

219 *Id.* at 187.

220 *Id.* at 197 (quoting Alain Badiou).

221 Feltham, *supra* note 12, at xxviii.

222 *Id.*

ontology and militant judging, given the manifest inadequacy of existing legal subjects and theories of judging and of constitutional law to deal with the exigencies of judging the other in post-9/11 constitutionalism. A text that suggests what such an anxious, obsessed, desiring judicial subject, engaging in a principled way with “particular praxes which *may* be generic,” “slowly transform[ing] and supplement[ing] a historical situation”²²³ in which the common law constitutional judiciary finds itself, guided only by the “*immanent imperatives*” deriving from “the actual inquiries” made by “the operator of fidelity,”²²⁴ might be found in the increasingly anguished, and increasingly militant, jurisprudence of Michael Kirby, “unfold[ing] . . . new structures of being and . . . writ[ing] . . . the event into being,” “cast[ing] . . . himself out of his] outside . . . recogniz[ing] and ‘naming’²²⁵ an event,” recognizing both the constitutional judge’s—and constitutionalism’s—other, and in judging those on whom he passes judgment his equals, inscribing equality,²²⁶ becoming equal to the event:²²⁷

History evidences many patterns of unacceptable intrusions by other sources of power into the independence of the judiciary. These should not be dismissed as irrelevant to Australia. They have occurred in “highly civilized” countries, with strong legal and judicial traditions. . . . One pattern of intrusion into judicial functions may be observed in what occurred in Germany in the early 1930s. It was provided for in the acts of an elected government. Laws with retroactive effect were duly promulgated. Such laws adopted a phenomenological approach. Punishment was addressed to the character of the criminal instead of the proved facts of the crime, . . . [and meted out on] “criminal archetypes,” . . . those who harmed the nation. . . . In the *Communist Party Case* . . . Dixon J taught the need for this Court to keep its eye on history, . . . so far as it illustrated the over-reach of governmental power. . . . I dissent from the willingness of this Court, having stated the principle [of judicial independence of Chapter III courts], now repeatedly to lend its authority to its confinement. . . . This has been done virtually to the point where the principle itself has disappeared at the very time when the need for it has greatly increased. . . .²²⁸

I began this Article with an epigraph drawn from W. H. Auden’s *Law Like Love*, a poem that registers both the capacity of law to be no more than state force, and the possibility of law’s end, as well as our incapacity to identify or describe or locate it with certainty—it’s

²²³ *Id.* at xxx.

²²⁴ *Id.*

²²⁵ Feltham, *supra* note 22, at 234.

²²⁶ *Id.* at 240.

²²⁷ *Id.* at 239.

²²⁸ Fardon, 210 A.L.R. at 101.

interpretability, if you like. The poem closes in analogizing law and love as unpredictable, powerful, difficult—qualities of the evental and of the militant:

Like love we don't know where or why,

Like love we can't compel or fly,

Like love we often weep,

Like love we seldom keep.

In the spirit of Peter Goodrich's invitation to "reconstruct . . . a case law of love,"²²⁹ a law that "challenges the law of masters," whose "radical sources and practices . . . include . . . the rebels, critics, marginals, aliens, women and outsiders,"²³⁰ I will end with a quotation from another Auden poem, one that revived its existing readership and found a new one in the wake of 9/11, *September 1, 1939*. Auden rewrote its most famous line when the poem was anthologized in 1955, after postmodernity had learned many but evidently not all of the lessons made available by the "state of exception" that effected the end of law in the Third Reich.

Auden changed that line from "[w]e must love one another or die" to "[w]e must love one another and die," because of his sense of the inadequacy to truth of the original, or what we, following Badiou and echoing Auden himself, might call its Romanticism. For my purposes here the alteration might be read to bring into being a radical uncertainty that keeps both meanings in play, invoking the imperatives of love and of death, and thus suggesting the choice that the call to a militant—or heretical²³¹—life demands. Common law constitutional judges bear a responsibility, in the event, to determine what version of "Democracy" we and others will experience, whether others will experience a rule of law like love, or as no more than raw state power clothed in the rhetoric of legality. Their choice is between deferring to dictators, acquiescing in their mandate to do evil to others, or in the alternative to respond to Equality's call, which is that of Love, in crafting just messages, messages of "truth and courage,"²³² "destined for everyone"²³³:

I and the public know

What all schoolchildren learn,

Those to whom evil is done

²²⁹ GOODRICH, *supra* note 104, at 11.

²³⁰ PETER GOODRICH, *LAW IN THE COURTS OF LOVE: LITERATURE AND OTHER MINOR JURISPRUDENCES 2* (1996).

²³¹ GOODRICH, *supra* note 104, at 215 (noting that after "the Church banned Capellanus and the *Treatise on Love* in 1277," "[t]he courts of love . . . belonged in the heretical tradition").

²³² HALLWARD, *supra* note 13, at 202 (quoting Alain Badiou).

²³³ *Id.* at 197.

Do evil in return.

Exiled Thucydides knew
All that a speech can say
About Democracy,
And what dictators do,
The elderly rubbish they talk
To an apathetic grave;
Analysed all in his book,
The enlightenment driven away,
The habit-forming pain,
Mismanagement and grief:
We must suffer them all again.

Into this neutral air
Where blind skyscrapers use
Their full height to proclaim
The strength of Collective Man,
Each language pours its vain
Competitive excuse:
But who can live for long
In an euphoric dream;
Out of the mirror they stare,
Imperialism's face
And the international wrong.

The windiest militant trash
Important Persons shout
Is not so crude as our wish:
What mad Nijinsky wrote
About Diaghilev
Is true of the normal heart;
For the error bred in the bone
Of each woman and each man
Craves what it cannot have,
Not universal love
But to be loved alone.

From the conservative dark
Into the ethical life
The dense commuters come. . . .

All I have is a voice
To undo the folded lie,
The romantic lie in the brain
Of the sensual man-in-the-street
And the lie of Authority
Whose buildings grope the sky:
There is no such thing as the State
And no one exists alone;
Hunger allows no choice
To the citizen or the police;
We must love one another or die.

Defenceless under the night
Our world in stupor lies;
Yet, dotted everywhere,
Ironic points of light
Flash out wherever the Just
Exchange their messages:
May I, composed like them
Of Eros and of dust,
Beleaguered by the same
Negation and despair,
Show an affirming flame.