Theorizing Privacy in a Liberal Democracy: Canadian Jurisprudence, Anti-Terrorism, and Social Memory After 9/11

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The creation of new search powers in the Canadian Anti-Terrorism Act post-9/11 to make citizens more transparent to state surveillance was less a new phenomenon than an extension of preexisting tendencies to make citizens transparent to the state, so the risks they pose can be efficiently managed. However, 9/11 brought about a shift in the ways in which the Supreme Court of Canada talked about terrorism; terrorism was no longer placed on a continuum of criminal activity but was elevated to a threat to Canadian values as a whole. I argue that, paradoxically, this shift reconnected the Court to earlier discourses about privacy as an essential element of democratic governance and reinvigorated narratives around the importance of the public-private boundary to democratic relationships by situating privacy within narratives informed by social memory. From this perspective, privacy can be conceptualized as a status claim: as citizens, we are entitled to privacy because privacy is the boundary that creates right relationships between citizens and between citizens and the state. This avoids pitting privacy as an individual right against societal interests in transparency because it more fully actualizes Priscilla Regan's call to theorize the value of privacy as a public good central to liberal democratic governance. This conception also reconnects Alan Westin's original understanding of privacy as an element of liberal democracy to the sociological research he drew on, enriching

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the liberal conception of privacy by locating it in the intersubjective communication of cultural actors living in community.

Introduction

The publication of Alan Westin's *Privacy and Freedom* in 1967 was a seminal moment in modern privacy theory, and his work continues to sit at the base of many of the key debates in the field. Westin's project — grounded in "a deep concern over the preservation of privacy under the new pressures from surveillance technology"[1] — was based on the assumption that privacy is "a prerequisite for liberal democratic societies"[2] because it allows us to negotiate the boundary between publicity as "a control over government" and privacy as "a shield for group and individual life."[3] As such, privacy plays a central role in a liberal democracy because it creates an autonomous sphere in which "those who are governed may give expression to their opinions and political wishes without these being subject to the control of those who govern."[4]

Since the 1970s, academic work examining the relationship between privacy and autonomy[5] and the importance of privacy as a human right[6] has certainly deepened our understanding of democracy in late modernity. However, few scholars have directly explored the relationship between privacy and liberal democracy. Priscilla Regan's work stands out as a notable exception. She argued persuasively in 1995 that privacy is an essential part of a democratic political system: "… because some commonality among individuals is necessary to unite a political community and the development of commonality requires privacy … In a related way, privacy is essential to the development of trust and accountability, which are basic to the development of a democratic political community."[7]

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1 Alan Westin, Privacy and Freedom 3 (1967).

2 *Id.* at 24.

3 *Id.*

4 Bernard Manin, The Principles of Representative Government 6 (1997).

5 *See, e.g.*, Beate Röessler, Privacies: Philosophical Evaluations (2002); Anita Allen, Unpopular Privacy: What Must we Hide? (2011).

6 *See, e.g.*, Annabelle Lever, Privacy, Democracy and Freedom of Expression 162-80 (Beate Röessler & Dorota Mokrosinska eds., 2015).

7 Priscilla Regan, Legislating Privacy: Technology, Social Values and Public Policy 227 (2d ed. 1995).

In like vein, Paul Schwartz linked privacy to the "individual capacity for self-determination"[8] that is a necessary condition for the maintenance of democratic governance: liberal democracy requires a sphere of autonomy for citizens and privacy protects that sphere. Moreover, Schwartz's suggestion that self-determination is an embodied capacity that is rooted in social practices resonates strongly with Regan's insight that privacy is a social value as well as a legal right. Accordingly, the relationship between privacy and democracy is an important area of theoretical inquiry. However, since the late 1990s, this relationship has tended to be assumed rather than interrogated, especially by legal scholars.[9]

This Article takes a first step towards reinvigorating this inquiry by examining Canadian judicial decisions dealing with the *Anti-Terrorism Act* from 2001 to 2007. In doing so, I am taking up Julie Cohen's challenge to reconnect legal discourses about privacy with empirically focused social science methodologies.[10] Rather than conduct a legal analysis of the cases, I use critical discourse analysis to examine the ways in which the judges talk about and construct the meaning of privacy and democracy post-9/11 in order to map the narratives that are at play when we talk about privacy and democracy.

Critical discourse analysis (CDA) approaches language as a social practice that is enacted, through text and talk, by social actors to collectively construct meaning.[11] From this perspective, legal judgments are social artefacts that concretize the discourses of the day and make them available for analysis.[12] CDA is also a particularly useful method to interrogate relationships of power because, as Ruth Wodak and Michael Meyer state, discourse "constitutes situations, objects of knowledge, and the social identities and relationships between people and groups of people."[13] A text is accordingly therefore rarely the work of a single author but represents the negotiation of a variety of discursive differences. As such, legal judgments are "sites of struggle in that they show traces of differing discourses and ideologies all contending and struggling for dominance."[14]

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8 Paul M. Schwartz, *Privacy and Democracy in Cyberspace,* 52 Vand. L. Rev. 1609, 1609 (1999).

9 Regan, *supra* note 7; Julie Cohen, Configuring the Networked Self: Law, Code and the Play of Everyday Practice (2012).

10 *Id.*

11 Ruth Wodak & Michael Meyer, *Critical Discourse Studies: History, Agenda, Theory, and Methodology*, *in* Methods of Critical Discourse Studies 1, 6 (Ruth Wodak & Michael Meyer eds., 3d ed. 2016).

12 Jay L. Lemke, Textual Politics: Discourse and Social Dynamics (1995).

13 Wodak & Meyer, *supra* note 11.

14 *Id.* at 14.

I have chosen to focus primarily on the Supreme Court of Canada decisions dealing with terrorism between 2001 and 2007[15] because terrorism is a "hungry exception" to privacy rights.[16] The constraints placed on the liberal democratic state's powers to invade citizens' privacy are deeply connected to the position that police powers to investigate crime must be curtailed because it is the best way to protect individual liberty.[17] Terrorism tests our commitment to this principle precisely because national security is implicated; terrorism cases are accordingly a site where the "resiliency of our democracies and the limits of our constitutional guarantees [of privacy] … have been tested"[18] to the fullest extent.

The texts of each judgment were coded using an abductive process, where the analyst moves back and forth between theory and data to ensure that the theoretical conclusions are informed first and foremost by the data.[19] I began by locating the discursive traces in the written decisions that dealt with privacy and democracy and identifying themes in the discussion. I then expanded the coding to capture traces dealing with publicity as the rhetorical obverse of privacy. The final coding focused on the rhetorical positions given the subject of the discourse as evidenced through "we" and "they" statements, and the use of historical exemplars to shift the discourse within the we-they dynamic.

In keeping with CDA methodology, in Part I, I start the Article with a brief overview of pre-9/11 ways of talking about privacy to ensure that my analysis fully integrates the historical context of the texts themselves.[20] I argue that Canadian judges shifted away from talking about privacy as an element of liberal democratic governance in the 1980s to talking about the types of procedural protections needed to enhance government efficacy and risk reduction in the 1990s. Privacy in this later narrative was constructed as a technocratic exercise that privileges information stripped of its context over social situatedness. The general assumption of the 1970s — that citizens require privacy to create a space for autonomous action free from state

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15 After 2007, the Supreme Court reverted to a more technical legal analysis of the issues. I accordingly end the sample at that time because I am interested in the discursive shifts in the exceptional period that began in 2001.

16 Lisa M. Austin, *Surveillance and the Rule of Law*, 13 Surveillance & Soc'y 1477 (2015).

17 Stanley A. Cohen, Privacy, Crime and Terror: Legal Rights and Security in a Time of Peril 50 (2005).

18 *Id.* at 49.

19 Martin Reisigl & Ruth Wodak, *The Discourse-Historical Approach (DHA)*, *in* Methods of Critical Discourse Studies 23, 32 (Ruth Wodak & Michael Meyer eds., 2016).

20 *See Id.*

interference and that the state must be transparent so citizens can hold the state to account — was reversed; citizens must be made transparent to the state so the state can identify risky persons and the state's procedures must be opaque so risky persons cannot hide from scrutiny.[21]

As such, the creation of new and broader search powers in the *Anti-Terrorism Act* post-9/11 to make citizens more transparent to state surveillance was less a new phenomenon than an extension of preexisting tendencies to make citizens transparent to the state, so the risks they pose can be efficiently managed.[22] However, in Part II, I demonstrate that 9/11 brought about a shift in the ways in which the Supreme Court of Canada talked about terrorism; terrorism was no longer placed on a continuum of criminal activity but was elevated to a threat to Canadian values as a whole. I argue that, paradoxically, this shift reconnected the Court to earlier discourses about privacy as an essential element of democratic governance and reinvigorated narratives around the importance of the public-private boundary to democratic relationships by situating privacy within narratives informed by social memory.

In Part III, I conclude the Article with a discussion of how to mobilize the strength of social memory in our understanding of the relationship between privacy and liberal democracy. I suggest that privacy can be conceptualized as a status claim: as citizens, we are entitled to privacy because privacy is the boundary that creates right relationships between citizens and between citizens and the state. From this perspective, privacy is not a negative right asserted by an atomistic individual, but a marker of the relationship between the citizen and the liberal state. This avoids pitting privacy as an individual right against societal interests in transparency because it more fully actualizes Regan's call to theorize the value of privacy as a public good central to liberal democratic governance. This conception also reconnects Westin's original understanding of privacy as an element of liberal democracy to the sociological research he drew on, enriching the liberal conception of privacy by locating it in the intersubjective communication of cultural actors living in community.

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21 Priscilla M. Regan & Deborah G. Johnson, *Policy Options for Reconfiguring the Mirrors*, *in* Transparency and Surveillance as Sociotechnical Accountability 162 (Deborah G. Johnson & Priscilla M. Regan eds., 2014).

22 David Lyon, Surveillance After September 11 (2003).

I. Setting the Stage — Competing Notions of Privacy Before 9/11

In the 1990s, Canadian policymakers tended to talk about privacy in two distinct ways. The dominant perspective assumed that corporations and governments need access to information in order to carry on business efficiently and to manage risks. Privacy was accordingly a set of countervailing procedural protections that give the individual the right to see what information has been collected and how it is being used.[23] From this perspective, the social context tends to disappear from view, because the information is disembedded from the immediate interaction in which it was disclosed,[24] and is then used for secondary purposes that ostensibly serve the common good, like commercial innovation or the policing of welfare fraud. The connection between privacy and democracy also recedes because privacy is located in the informational choices of the individual.[25] As Regan notes, this "individualistic conception of privacy does not provide a fruitful basis for the formulation of policy to protect privacy . . . If privacy is also regarded as being of social importance, different policy discourse and interest alignments are likely to follow."[26]

Some policymakers — typically in the minority — articulated this alternative view. For them, privacy was a democratic value that is inherently tied to conceptions of human dignity and human rights.[27] From this perspective, privacy is inherently social — real people negotiate their privacy by collectively negotiating the boundary between themselves and others. Privacy is accordingly not the possession of an atomistic liberal self that exists in tension with the collective. Instead, privacy is something people create through intersubjective communication and social interaction. Rather than being pitted against the

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23 Task Force on Elec. Commerce of Industry Canada and Justice Canada, The Protection of Personal Information: Building Canada's Information Economy and Society(1998); Colin Bennett & Charles Raab, The Governance of Privacy: Policy Instruments in Global Perspective (2d ed. 2006).

24 Helen Nissenbaum, Privacy in Context: Technology, Privacy and the Integrity of Social Life (2009).

25 Valerie Steeves, *Reclaiming the Social Value of Privacy*, *in* Lessons from the Identity Trail: Anonymity, Privacy and Identity in a Networked Society 191 (Ian Kerr, Valerie Steeves & Carole Lucock eds., 2009).

26 Regan, *supra* note 7.

27 Standing Committee on Human Rights and the Status of Persons with Disabilities, Privacy: Where Do We Draw the Line? (1997), https://www.priv.gc.ca/media/1957/02_06_03d_e.pdf; Canada. Senate. 37th Parliament, 49-50 Elizabeth II. 2001a. Bill S-21, *Privacy Rights Charter*, http://www.parl.ca/DocumentViewer/en/37-1/bill/S-21/first-reading.

social, privacy is a boundary that is constructed through social interaction with others; a boundary that enables us to experience a sense of identity and to enter into social relationships with relative autonomy.[28]

From this perspective, private-sector surveillance was seen as problematic because it collapses the boundaries between the social roles we assume in our interactions with each other, and makes us accountable to the unseen watcher for all our actions, independent of the context or the role we are playing at the time, and without any opportunity to collectively determine the meaning of the interaction. Privacy, as the corrective to surveillance, was conceptualized as the reinsertion of a social boundary that respects the subject's need for dignity and autonomy.

These competing conceptions of privacy had been in play at least since the passing of the *Universal Declaration of Human Rights* in 1948 and the emergence of data protection laws in Europe in the early 1970s.[29] However, the second conception of privacy — which was mobilized in Canada (albeit unsuccessfully) in the context of private-sector privacy legislation — was limited to relationships between consumers and corporations, leaving debates about the impact of surveillance on democratic governance mired in the narrower framework of individual privacy as informational control.

Much of the inability of privacy advocates to mobilize this richer, social meaning of privacy as a democratic good rested in the emphasis placed by policymakers on efficacy and risk reduction. For example, when Canadian legislators were debating the merits of private-sector data protection legislation in the early 2000s, Justice Canada's Senior General Counsel told the Senate Committee on Social Affairs, Science and Technology that, although the Department of Justice is "sympathetic" to the democratic value of privacy, legislation that sought to protect privacy *as* a democratic value

> . . . would create a good deal of uncertainty and quite possibly may pose obstacles to many government programs and policy . . . [It] would potentially require [the government] to defend its information gathering and sharing activities in court . . . while [such legislation] can be praised

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28 Steeves, *supra* note 25.

29 Valerie Steeves, *Now You See Me: Privacy, Technology and Autonomy in the Digital Age*, *in* Current Issues and Controversies in Human Rights 461-82 (Gordon DiGiacomo ed., 2016); G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); Council of Europe, Comm. of Ministers, Resolution (73) 22 on the Protection of the Privacy of Individuals vis-à-vis Electronic Data Banks in the Private Sector (Sept. 26, 1990); Council of Europe, Comm. of Ministers, Resolution (74) 29 on the Protection of Privacy of Individuals vis-à-vis Electronic Data Banks in the Public Sector (Sept. 26, 1974).

> as intending to enhance the privacy of Canadians . . . *changes could come at the expense of certainty, public safety, operational efficiency and fiscal responsibility.*[30]

Judicial discussions of privacy in the 1990s mirrored this trajectory. In the early days of the *Canadian Charter of Rights and Freedoms*, the Supreme Court of Canada constructed privacy as playing an essential role in the wellbeing of the individual, as well as having a profound significance for democratic governance

> Grounded in man's physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order. The restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state.[31]

From this perspective, the line between private communications and state investigation of crime was a clear one, and could only be crossed if the state first argued successfully before a judicial officer that there were reasonable and probable grounds to believe a crime had occurred.[32] As Justice La Forest wrote in *R. v. Dyment* (1988), privacy "must be interpreted in a broad and liberal manner so as to secure the citizen's right to a reasonable expectation of privacy against governmental encroachments. Its spirit must not be constrained by narrow legalistic classifications…"[33]

Privacy, as such, was cast as part of the democratic relationship between citizen and state. Citizens are entitled to privacy because of their status as autonomous moral actors; the state is required to be transparent by vetting its actions before a neutral judicial officer before it can legitimately invade that autonomous sphere of action. Moreover, La Forest explicitly drew on Westin's conception of privacy in drawing this conclusion: "The foregoing approach is altogether fitting for a constitutional document enshrined at the time when, Westin tells us, society has come to realize that privacy is at the heart of liberty in a modern state."[34]

However, like Westin, La Forest immediately constrained this view by adopting the tripartite division of privacy into three zones: body, territory, and

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30 The Standing Senate Committee on Social Affairs, Science and Technology, Evidence, 37th Parl, No 25 (2001b), https://sencanada.ca/en/Content/SEN/Committee/371/soci/25cv-e?Language=E&Parl=37&Ses=1&comm_id=47.

31 R. v. Dyment, [1988] 2 S.C.R. 417 (Can.), ¶ 17.

32 R. v. Duarte, [1990] 1 S.C.R. 30 (Can.).

33 *Dyment*, 2 S.C.R. 417 at ¶ 15.

34 *Id.* at ¶ 17.

information. Whereas violation of the first two "constitutes a serious affront to human dignity,"[35] the third can be respected by giving the individual a means of controlling the flow of his or her information.[36] This construction of privacy moved away from broad concerns about democratic conditions and focused instead on confidentiality and restrictions on the purposes for collection and disclosure.[37]

By the mid 1990s, in spite of Mr. Justice La Forest's injunction against constraining the spirit of privacy in legalistic definitions, privacy interests were becoming more narrowly classified. "Information" was separated from territorial or bodily privacy, and subjected to a lower standard.[38] In *R. v. Plant* (1993), for example, police were allowed to access electricity records without a warrant because the records were not part of a core of biographical information that tends to reveal intimate details about a person's lifestyle or choices. This was in spite of the fact that the only reason the records were of interest to the police was because they supported an inference about what the accused was doing inside his residence. By changing their language and focusing on information, the court sidestepped more stringent protections for territorial privacy, and legitimized warrantless access to a broad range of informational data.[39]

But perhaps most telling was the Supreme Court's 2000 decision in *Smith v. Canada*.[40] The government of Canada was matching data from the customs database against the unemployment insurance database, to catch "cheaters" who collected unemployment benefits when they were out of the country. When Ms. Smith filled out a Customs Declaration Form on returning to Canada from Florida, the information on the form was routinely disclosed to the Canada Unemployment Insurance Commission, and she was told she must repay the unemployment insurance benefits she had received while she was in the United States. The case was appealed to the Supreme Court on the basis that matching the data without any reason to believe a violation had occurred infringed Ms. Smith's constitutionally protected right to privacy by subjecting her to a search without first establishing due cause before a judicial officer. In a terse three paragraph judgment, the Supreme Court dismissed the appeal, on the grounds that the there was no reasonable expectation of privacy

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35 *Id.* at ¶ 21.

36 *Id.* at ¶ 22.

37 *Id.*

38 Jane Bailey, *Framed by Section 8: Constitutional Protection of Privacy in Canada*, 50 Canadian J. Criminology & Crim. Just. 279 (2008).

39 *Id.;* Valerie Steeves, Privacy and New Media (Leslie Regan Shade ed., 2002).

40 Smith v. Canada (Attorney General), 2001 SCC 88, [2001] 3 S.C.R. 902 (Can.).

"which outweighed the [government's] interest in ensuring compliance" with a government program.[41]

Whether the *Smith* case is right or wrong on the law, what interests me here is the way in which the court did — or rather, did not — talk about privacy. Earlier links between privacy and democracy disappeared, and instead privacy was pitted against the government's need to efficiently manage compliance with its programs. As such, the logic of transparency and efficacy was in place well before September 11, 2001. Provisions in Canada's *Anti-Terrorism Act* proclaimed into force in December of that year that gave the state broader search powers were accordingly less a new phenomenon than an extension of preexisting tendencies to make citizens transparent to the state, so the risks they pose can be efficiently managed.[42] Earlier links between privacy and democratic governance disappeared from the discussion, and privacy was recast as a technocratic exercise in the efficient management of information flow.

However, after 9/11, the court's narrative — at least in anti-terrorism cases — changed significantly, with interesting consequences for the relationship between privacy and democracy.

II. Judicial Discourses in Anti-Terrorism Cases After 9/11

Prior to the passage of the *Anti-Terrorism Act*, the Supreme Court of Canada had rarely mentioned terrorism, in spite of the fact that Canada had experienced two major acts of terrorism by its own nationals. In 1969-1970, the separatist Front de liberation du Quebec was responsible for over 200 bombings and at least 5 deaths, including the murder of Quebec Labour Minister Pierre Laporte. The bombing of Air India flight 182 in 1985 was the largest mass murder in Canadian history, and was the subject of 20 years of police investigation, commissions of inquiry and criminal trials. The Canadian National Day of Remembrance for Victims of Terrorism is held on the anniversary of the flight's destruction.

Nonetheless, the pre-9/11 court did not treat terrorism as substantially different from other criminal activity. In *Bolduc v. Quebec (Attorney General)* (1982), a case dealing with a conspiracy to cause persons to enter the United States illegally, the court made a passing reference to "serious international

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41 *Id.* at ¶ 2.

42 David Lyon, *Airport Screening, Surveillance, and Social Sorting: Canadian Responses to 9/11 in Context*, 48 Canadian J. Criminology & Crim. Just. 397 (2006).

crimes ... such as skyjacking, international terrorism and kidnapping."[43] In *Canada (Solicitor General) v. Ontario (Royal Commission of Inquiry into the Confidentiality of Health Records)* (1981), the rule that the police did not have to reveal the names of informants in the course of criminal investigations was noted to apply with even greater justification when the investigation was seeking to protect national security against violence and terrorism, but it was still seen as a matter of regular police investigation.[44] In the *Reference re: Firearms Act (Canada)*, it noted that "firearms may be misused to take human life and to assist in other immoral acts, like theft and terrorism."[45] Terrorism therefore existed on a scale of criminality; it was immoral and serious, but did not require qualitatively different tools for investigation or prosecution.

This shifted significantly in the years immediately following 9/11. Between 2001 and 2007, the court addressed terrorism, democracy, and privacy or, in some cases, secrecy in four cases. In the first, *R. v. Suresh* (2002), the court upheld the constitutionality of a ministerial order declaring the appellant to be a danger to the security of Canada because of alleged ties to the Tamil Tigers.[46] The next pair of cases was decided in 2004. The *Anti-terrorism Act* created a number of new investigatory powers in response to 9/11, the most extensive of which allowed peace officers to apply for an order to compel a person who may have information about a past or future terrorism offence to attend a judicial investigative hearing, and to answer questions.[47] In *Re Application under s. 82.83 of the Criminal Code*, and the companion case, *Re Vancouver Sun*, the Crown had successfully brought an *ex parte* application to compel a named person both to attend a judicial investigative hearing and to answer questions about the Air India bombing.[48] The hearing was held *in camera*, and the proceedings were kept secret from the public. The named person, and the newspaper that broke the story, brought separate applications challenging the constitutional validity of the provision. The last case, *R v. Charkaoui*, struck down the *Immigration and Refugee Protection Act*'s security certificate scheme as unconstitutional.[49] Under the scheme, which was in place before 9/11, the

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43 Bolduc v. Attorney General of Quebec et al., [1982] 1 S.C.R. 573, 582 (Can.).

44 Solicitor General of Canada et al. v. Royal Commission of Inquiry into the Confidentiality of Health Records in Ontario and the Canadian Civil Liberties Association, [1981] S.C.R. 494 (Can.).

45 Reference re Firearms Act, 2000 SCC 31, [2001] 1 S.C.R. 783, ¶ 54 (Can.).

46 Suresh v. Canada (Minister of Citizenship and Immigration), 2002 SCC 1, [2002] 1 S.C.R. 3, ¶ 3 (Can.).

47 Anti-terrorism Act, S.C. 2001, c 41 (Can.).

48 Vancouver Sun (Re), 2004 SCC 43, [2004] 2 S.C.R. 332 (Can.).

49 Charkaoui v. Canada (Citizenship and Immigration), 2007 SCC 9, [2007] 1 S.C.R. 350 (Can.).

Minister was able to declare a foreign national inadmissable to Canada on grounds of security, and to order him detained indefinitely, without providing the detainee an opportunity to review the evidence against him.[50]

In the first three cases, terrorism is no longer seen as part of the criminal continuum; it is something outside the ordinary that threatens Canadian and global values. This is not a legal claim but a claim about what "we" value about ourselves as a society. As the court in *R v. Suresh* puts it, "The issues engage concerns and values fundamental to Canada and indeed the world. On the one hand stands the manifest evil of terrorism and the random and arbitrary taking of innocent lives, rippling out in an ever-widening spiral of loss and fear."[51]

Given the "manifest evil" that terrorism involves, governments must mobilize and do battle against forces that threaten the heart of the political system, but democratic values somehow constrain their ability to do so effectively: "The challenge for democracies in the battle against terrorism is not whether to respond, but rather how to do so."[52] "This is the fate of democracy, as not all means are acceptable to it, and not all methods employed by its enemies are open to it. Sometimes, a democracy has to fight with one hand tied behind its back."[53]

Who the battle is to be waged against is much less defined. What is perhaps most interesting about these first three cases is that the "enemy" appears to have little to do with the appellants before the courts. For example, the incident in the *s. 83.28* and *Vancouver Sun* references involved a terrorist act that occurred in 1985. Throughout the intervening years, terrorism was treated as a criminal offence. But that same act, post-9/11, is transformed into the action of an amorphous and deadly foe that is determined to destroy democracy. The court describes the enemy as having

> . . . no announced point of commencement and may have no end. The enemy is not conveniently dressed in uniforms or arranged in battlefield order. They operate among us in guerilla-style networks, where decisions can be made, adjusted, improvised and implemented in lower level cells. They are, it seems, everywhere and yet they are nowhere to be seen. There may be no dramatic final battle in which victors and losers are made manifest. We are told that there will be a long, slow process

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50 Immigration and Refugee Protection Act, S.C. 2001, c 27, §§ 55-58 (Can.).

51 *Suresh*, [2002] 1 S.C.R. 3, ¶ 3 (Can.).

52 Application under s. 83.28 of the Criminal Code (Re), 2004 SCC 42, [2004] 2 S.C.R. 248, ¶ 5 (Can.).

53 *Id.* at ¶ 7.

> of attrition. Efforts to counteract terrorism are likely to become part of our everyday existence for perhaps generations to come.[54]

The alleged Tamil Tiger or Sikh militant who is actually before the court is superceded by the Terrorist Writ Large capable of the vast destruction symbolized by the fall of the Two Towers. The narrative is accordingly severed from earlier decisions that treated terrorism as a crime, because the Terrorist is reconstructed to pose an unprecedented threat.

It is precisely the presence of such a new yet enduring and unknowable foe that calls out for efficacious methods of investigation and surveillance. Indeed, the court in *Suresh* juxtaposes the "ever-widening spiral of loss and fear" against the needs of "governments, expressing the will of the people," for "legal tools to effectively combat the terrorist threat": "On the one hand stands the manifest evil of terrorism and the random and arbitrary taking of innocent lives, rippling out in an ever-widening spiral of loss and fear. Governments, expressing the will of the governed, need the legal tools to effectively meet this challenge."[55]

But perhaps in the most interesting twist in the story, this call for effective tools is immediately constrained by a countervailing need for "us" to attend to and protect "our" fundamental values:

> On the other hand stands the need to ensure that those legal tools do not undermine values that are fundamental to our democratic society — liberty, the rule of law, and the principles of fundamental justice — values that lie at the heart of the Canadian constitutional order … In the end, it would be a Pyrrhic victory if terrorism were defeated at the cost of sacrificing our commitment to those values.[56]

And key to those values is the belief that the state must be publically accountable for its actions, that state policy cannot be made and implemented in secrecy.

This use of subject pronouns, like "us" and "we," helps connect the court to earlier discourses about the role that privacy played in constructing a democratic relationship between the citizen and the state. Interestingly, there is not a single use of either in the *Plant* or *Smith* cases. And yet all three of the earliest post-9/11 cases inject a personal subjectivity into the discourse. *Our* notions of justice are being challenged; *our* commitment is being tested; terrorists can damage *us*, but the greatest risk is what *we* may do to *our* own legal and political institutions in response to the threat. The Terrorist Other is given flesh by being everything that "we" are not, but in the

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54 *Id.* at ¶ 115.

55 *Suresh*, [2002] 1 S.C.R. 3, ¶ 3 (Can.).

56 *Id.* at ¶ 4.

process of othering, the court fills out and defines the Canadian subjectivity by paradoxically reaffirming the fundamental role that the private/public divide plays in democratic forms of governance.

As Richard Kearney notes, the concept of "otherness" requires that we determine *who and what we are not*, and we do this by re-grounding our sense of subjectivity in the normative assumptions that we take for granted about ourselves and the social world.[57] This process of defining who we are against who we are not is most important when there is a fundamental value at risk; as the court states in the *s. 83.28* reference, the "enormity of the [terrorism] charges at issue … is what makes this case difficult. It is comparatively painless for a society to support the procedural rights of an accused when the stakes are small. It is when the stakes are high, as here, that our commitment is truly tested."[58] Interestingly, this reconnection with our normative assumptions also signals a return to the language of criminal process as opposed to the language of exceptionality, and The Terrorist is repositioned as a criminal defendant who is also a rights holder. The court explicitly recognizes that this shift is necessary because we are members of a liberal democracy, and as such we must be cognizant of the potential for the majority to use its power to strike out against the minority: "The danger in the 'war on terrorism' lies not only in the actual damage the terrorists can do to *us* but what *we* can do to *our* own legal and political institutions by way of shock, anticipation, opportunism or overreaction."[59] Once this shift occurs, discourses of efficacy quickly fall to the wayside, and the focus is trained on the dangers of state secrecy and the need to affirm the fundamental dignity of the citizen-defendent who is called to reveal himself before the state.

In *R. v. Suresh*, for example, the case was sent back for a new deportation hearing because the appellant was not given the opportunity to examine the evidence against him, in violation of his right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice.[60] Although the secret investigatory hearing provisions in the *Criminal Code* were held to be constitutional, the court reaffirmed the open court principle in the *Vancouver Sun* reference, holding that state transparency is "a hallmark of democracy and a cornerstone of the

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57 Richard Kearney, Strangers, Gods and Monsters: Interpreting Otherness (2005).

58 Application under s. 83.28 of the Criminal Code (Re), 2004 SCC 42, [2004] 2 S.C.R. 248, ¶ 128 (Can.).

59 *Id.* at ¶ 116 (emphasis added).

60 Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 7 (U.K.).

common law."[61] In the *s. 82.38* reference, the right against self-incrimination — the right to withhold information from the state — was held to be key to the "principle of individual sovereignty and as an assertion of human freedom."[62]

There may be little to celebrate in these cases from a civil liberties point of view — the court in *Suresh* came dangerously close to holding that deportation to torture is not unconstitutional — but they do mark a return to earlier discourses in which the line between public and private was an important way of negotiating a democratic relationship between citizens and the state. Moreover, these earlier discourses are brought into play by a call upon our shared historical memory.

First, the long roots of common-law conceptions of private citizenship are referenced: "The principles of fundamental justice are shared assumptions upon which our system of justice is grounded. They find their meaning in the cases and traditions that have long detailed the basic norms for how the state deals with its citizens."[63] In other words, our social memory of who we are is nested in the historical narratives that define our origins; we are who we are because of who we remember ourselves to be in the past.[64] The court expands on this narrative by saying, "This principle emerged in the era of feudal monarchy, in the form of the right to be brought before a judge on a motion of *habeas corpus*. It remains as fundamental to our modern conception of liberty as it was in the days of King John."[65] The privacy embedded in this conceptualization — "the basic norms for how the state deals with its citizens" — is accordingly not a right belonging to an atomistic individual, but a function of the historically grounded relationships that support the rule of law and democratic governance. This repositions privacy at the center of the deeply political battle between individual autonomy and government efficacy, and reconnects privacy directly to questions of power.

Second, specific moments of Canadian history are recalled in which "we" overrode the interests of private citizens, violated norms of private property, and took away liberty from a class of citizens because of fears over security, and the unjust, if efficient, ways that we protected that security:

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61 Vancouver Sun (Re), 2004 SCC 43, [2004] 2 S.C.R. 332, ¶ 23 (Can.).

62 *Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 S.C.R. 248, ¶ 70.

63 *Id.* at ¶ 68.

64 Carole L. Crumley, *Exploring Venues of Social Memory*, *in* Social Memory and History: Anthropological Perspectives 39 (Jacob J. Climo & Maria G. Cattell eds., 2002).

65 Charkaoui v. Canada (Citizenship and Immigration), 2007 SCC 9, [2007] 1 S.C.R. 350, ¶ 28 (Can.).

> Every legal system has its not-so-proud moments when in times of national upheaval or wartime emergency, civil rights have been curtailed in ways which were afterwards regretted. One need look no further than to mention the wartime treatment of Canadians of Japanese descent, upheld in *Reference Re: Persons of Japanese Race* [1946] S.C.R. 248.[66]

The "other" against whom excessive power is used is re-humanized by retelling the narrative of past state abuse. The "other" is accordingly brought back into the democratic fold of the "we," and the dangers of populism — where the majority uses its power to repress the minority — are bracketed. In this context, the role of the judiciary as the guardians of the public-private boundary between the autonomous citizen and the liberal state is reaffirmed, because "The place of the judiciary in such investigative contexts is to act as a check against state excess."[67] This allows the court to recommit itself to the proper relationship between citizens and state as it has been co-created by real social actors across historical time.

In the last case, *R. v. Charkaoui* (2007), the court struck down provisions that enabled the government to detain permanent residents and foreign nationals indefinitely on a security certificate issued under the *Immigration and Refugee Protection Act*.[68] Although the court continues to speak of the "stark realities" that confront governments with respect to terrorism, the narrative of "newness" has given way to more historically grounded discourses in which the court seeks to uphold the notion of the state transparency that is the counterpart of citizen privacy: "The realities that confront modern governments faced with the challenge of terrorism are stark… *But these tensions are not new*."[69] "Fundamental justice requires substantial compliance with *the venerated principle* that a person whose liberty is in jeopardy must be given an opportunity to know the case to meet, and an opportunity to meet the case."[70]

Moreover, as social memory reminds us, this is necessary because it is part of the fairness that is at the center of the relationship between citizen and state: "This is not the first time Canada has had to reconcile the demands of national security with the procedural rights guaranteed by the Charter. In a number of legal contexts, Canadian government institutions have found ways to protect sensitive information while treating individuals fairly."[71] Once that

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66 Application under s. 83.28 of the Criminal Code (Re), [2004] 2 S.C.R. 248, ¶ 128 (Can.).

67 *Id.* at ¶ 140.

68 Immigration and Refugee Protection Act, S.C. 2001, c 27 (Can.).

69 Charkaoui, [2007] 1 S.C.R. 350, ¶ 69 (Can.).

70 *Id.* at ¶ 61 (emphais added).

71 *Id.* at ¶70.

right relationship is reasserted, the strength of the efficacy argument that the citizen must be transparent to the state, which can then make a claim of secrecy regarding that information, is effectively challenged. This continues to be the case even when countervailing societal needs are pressing, even in the exceptional case of terrorism: "Yet the imperative of the protection of society may preclude this… This is a reality of our modern world. [However, if the Charter] is to be satisfied, either the person must be given the necessary information, or a substantial substitute for that information must be found."[72]

It is interesting that *Charkaoui* is the only case in which the appellants are allegedly connected to al-Qaeda. And yet it is the only case in which the terrorist is not othered. The mutually defining connection between the Terrorist Other and the Canadian subject in the earlier three cases is key in explaining the shift. Tolerance and multiculturalism are central to the construction of the Canadian identity within the narratives that constitute Canadian social memory.[73] And yet government mismanagement of information about Mahar Arar led to his deportation to Syria and subsequent torture. Government secrecy around the alleged evidence against Arar also slowed both his return to Canada and the process by which he was able to publicly clear his name. The court mobilizes this collective knowing to support its decision to prioritize democratic governance over insecurity:

> The potential consequences of deportation combined with allegations of terrorism have been under a harsh spotlight due to the recent report of the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar. Mr. Arar, a Canadian citizen born in Syria … was tortured and detained under inhumane conditions for over 11 months. In his report, Commissioner O'Connor recommends enhanced review and accountability mechanisms for agencies dealing with national security, including not only the Royal Canadian Mounted Police, but also Citizenship and Immigration Canada and the Canada Border Services Agency.[74]

Just as there was deep symbolic significance in the court referring to the internment of Japanese Canadians during World War II in the *s. 82.38* reference, there is also deep symbolic meaning in the court's reference to the Arar case in *Charkoui*. Linking Arar to the remembered abuses of the Japanese internment creates a strong social foundation to reject similarly draconian actions based on fear because, as Hobsbawm notes, "To be a member of any

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72 *Id.* at ¶ 61.

73 *See* Geoffrey Cubitt, History and Memory (2013).

74 *Id.* at ¶ 26.

human community is to situate oneself with regard to its past, if only by rejecting it."[75] Social memory accordingly not only retrenches the importance of privacy within our remembered political history, but also helps us retell the narratives that constitute us as a 'community of memory'[76] by reminding us what in our past we reject for our present.

In many ways, judicial discourses in post-9/11 cases are a morality tale that reminds us of the abiding relationship between democracy, publicity, privacy and secrecy. Interest in efficacy as a countervailing model waned, as the court struggled to reassert the democratic elements of the public-private boundary in judicial discourses about terrorism. Ironically, one of the more enduring legacies of 9/11 may be the reinvigoration of that public-private boundary and its importance to human dignity and democratic relationships.

III. Towards Theorizing Privacy as a Democratic Value

The narratives at play in the above anti-terrorism cases were not a complete corrective. Certainly, in the years since then, the Supreme Court has continued to vacillate between discourses of efficacy and discourses that are rooted in the democratic value of privacy, especially in decisions dealing with search and seizure.[77] However, these narratives do provide some light on the role that privacy plays in democratic governance, and how that role can be mobilized to push back against surveillance.

Most notably, privacy is not conceptualized as an individual right, but as part of the relationships between citizens and between citizens and the state, precisely because social memory of privacy failures is rooted in the lived experiences of real social actors living in community. The democratic importance of privacy is therefore nested within the notion of citizenry, the "we" that is mobilized to place all citizens — regardless of where we are each socially situated — in right relationships with each other and with those who govern. The collective commitment to this notion of community is what calls us back from the real and previously experienced dangers of categorically stripping the status of private citizen from classes of "us" to create "them": the categorically suspicious, who are not entitled to the same privileges of

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75 Quoted in Jeffrey K. Olick & Joyce Robbins, *Social Memory Studies: From 'Collective Memory' to the Historical Sociology of Mnemonic Practices,* 24 Ann. Rev. Soc. 105 (1998).

76 *Id.* at 122.

77 James A. Fontana & David Keeshan, The Law of Search & Seizure in Canada (10th ed. 2017).

citizenship as everyone else. Social memory tells us to reject this approach because it leads to an abuse of power and wrong relationships.

Privacy as a democratic value reasserts right or proper relationships and acknowledges that those relationships are co-created by real social actors living in community over time. Privacy from this perspective is not an individual right that acts to trump the interests of the collective;[78] it is part of the relationships of care that enable all of "us" to thrive. This resonates with Cohen's application of the capability approach developed by Martha Nussbaum, and situates privacy as a necessary element for the assessment of individual and collective wellbeing. It also avoids the dichotomous approach that sets privacy against publicity, and underscores Regan's insight that privacy and publicity are co-created and exist in a dynamic relationship.

To assert a privacy interest is accordingly to make a status claim: I am a citizen among citizens and as such am entitled to certain relationships with others and with the state. When the citizen is positioned as a potential risk and *prima facie* suspicious, the nature of the democratic relationship between citizens (who need privacy to enjoy liberty) and the state (which needs to be transparent to the citizen so it can be held democratically accountable) is inverted. Our social memory reminds us that privacy as such is not about risk or information; it's about community and equality.

Seeking to protect privacy through the implementation of "fair" rules that focus on informational control is accordingly insufficient because it fails to acknowledge that the claimant is a citizen who is mutually constituting the polity through his or her relationships with others and with the state. The corrective is to reassert strict limits around what the state can and cannot do to invade the private realm because — as social memory tells us — privacy is the boundary that creates and protects the democratic relationships that are central to us as a community. This approach strengthens the commitment to due process protections for privacy because it reinserts privacy at the center of liberal democracy. And that lesson is perhaps best told through our memories of those we failed in the past.

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78 Ronald Dworkin, *Rights as Trumps*, *in* Arguing about Law 335 (Aileen Kavanagh & John Oberdiek eds., 2009).