Index

Abortion Decision (FCC/1973) 86–87
Abu Ghraib prison 223–224
abuse prevention, legalization of emergency powers as 142–146
Ackerman, Bruce 118–119
Act on Restriction of the Secrecy of Correspondence (Germany/1968) 173–174
Agamben, Giorgio 112–115, 122, 126, 142
Aliens Act (Germany) 173–174
al-Qaeda 234
Amnesty International 226
ancient Greeks 228
anti-extremism, and politics of fear 147–150
antinomy-dichotomy-tension debate 89
anti-Semitism, of Schmitt 104, 113
Antiterror Law No. 3713 (Turkey) 231
archaeology of gaze (Foucault) 39
Arendt, Hannah 198, 228
Aristotle 227
armed forces, domestic use of 27, 28, 83, 212, 215
association of wills (Willensverband) 70
authoritarian personality type 159
Aviation Security Act (Germany/2005) 130–131, 138, 211–212, 214
Bacon, Francis 153
Basic Law (Germany/1949) Article 1(1) 241
Article 18 81–82
Article 20(3) 92
Article 20(4) 179–180
Article 28 84
Article 68 81
Article 81 80–81
Article 87a(4) 116
Article 91 81–82
Article 103(2) 92
Böckenförde’s model structure of positive-legal exceptional rule and 117–119
breakdown of 176–177
constitutionalizing the exception 82–83
domestic use of armed forces 212, 215
emergency constitution concept 144
emergency law 180
fundamental rights 86–87
Occupation Statute 81, 82
question of justice and 91
separated powers 167
state of defence 82–83
state of tension 82
Beccaria, Cesare 227–228
Belgian Constitution (1831) 98–99
Benjamin, Walter 113, 141, 144
Bentham, Jeremy 39, 40
The Birth of the Clinic (Foucault) 39
Blackstone, William 232
blanket legality 8, 163, 172–174, 183, 204, 239–240
Böckenförde, Ernst-Wolfgang 78, 117
Bodin, Jean 66, 153, 154
Six Books of the Commonwealth 30, 63
Bohley, Bärbel 92
Bonald, Louis Gabriel Ambroise de 107, 111
Bonn Republic 80–83
Bosse, Abraham 34–35, 37
Bredekamp, Horst 34, 38, 42
British House of Commons, symbology 45–47
Political technology and the erosion of the rule of law

Brugger, Winfried 126–128, 129, 223, 241
Bush, George W. 137, 224, 237, 247
Cheney, Dick 224, 247
Cicero 227
citizen sacrifice theory 120, 136–139, 211–215, 218–219, 239
citizenship rights 61
civil desertion 157, 191
Civil Service Act (Germany) 181–182
Clash of Civilisations (Huntington) 121, 136–137
coercive interrogation methods under Bush administration 224–226, 247
CIS methods 247
historical brutality in 227, 229–230, 232, 233, 235–236
political technology as mindset and 5 proportionality principle 244 ‘rescue’ doctrines and 215–216, 242, 251
special police law and 201, 205
terror as manipulative communication 186
as torture 245, 248

cognitive insecurity 157–158
cognitive safety 157, 195–198
combat law (Bekämpfungsrecht) 188
commissarial dictatorship (Schmitt) 144
common good 63
Commonwealth of Independent States, methods of interrogation 247
The Concept of the Political (Schmitt) 101–102, 105, 112, 124, 128
Constitution of the Weimar Republic (CWR) 71–75, 80
constitutional dictatorship 143–144
constitutional enemy 168–169
constitutional loyalty 44–50, 181
Constitutional Protection Act (Germany) 172–173
constitutionalism, early (Germany) 67–68
Cortés, Donoso 102–103, 107, 111
counter-terrorism agenda

Ackerman on 118–119
Böckenförde on 117–119
Depenheuer on 136–138
global phenomena 93–96
new security architecture 27, 28, 83, 94–95, 187–189, 212, 215
Schmittian approaches, in torture discourse 126–130
water-boarding 248
wiretapping 28, 148, 158, 170, 177, 180, 191
see also normalization of state of exception, and counter-terrorism criminal law, probable cause 27
cyber-espionage 28
danger invention law 27
data sharing
dragnet investigations 206
surveillance state cooperation 28, 94–95, 187, 201–203, 206
de Maistre, Joseph 107, 111
Declaraton of Rights (England/1689) 62
Declaraton of the Rights of Man and of the Citizen (France/1789) 167
defence torture 236–238
democracy
images of power 42–50
interior design of 45–47
Depenheuer, Otto 124, 136–138
Dershowitz, Alan 244
disciplinary knowledge 232–233
Discipline and Punish (Foucault) 32, 39–40, 42
Discourse Theory of Law and Democracy (Habermas) 90
Dome of the Reichstag, symbology (Berlin) 48–50
double majesty doctrine 59
downing licence see rescue downing
(Rettungsschuss)
dragnet investigations 206, 218
dummy clauses see legal dummies

East Germany (GDR), post-unification
criminal proceedings against
92–93
economy of power 41–42
electro-shocks 233, 248
Elements of Law (Hobbes) 13–14, 16,
24, 30, 36, 38, 59, 78
emergency constitution
(Notstandsverfassung) 82,
144–145
emergency powers, Locke on
Enabling Act (Germany/1933) 26
endangerer (Gefährder), use of term
202–203
enemy criminal law
Jakobs on 121–126, 128, 129, 148,
167–168, 208–210, 215, 218
normalization of state of exception,
and counter-terrorism 208–210,
215
enemy status, in new legal topography
27–28
Engels, Friedrich 32
England see United Kingdom (UK)
etnic total state (Schmitt) 77–78
eudaemonist doctrine of state 65
European Central Bank (ECB) 13
European Commission for the
Prevention of Torture 231
European Convention on Human Rights
(ECHR) 61, 195, 221
European Parliament seating plan,
symbology of 47
executive privilege 58
existential safety 195–198

fear
definition of 155–156
Hobbes/Locke on freedom from
150–151
meta-fundamental rights and law of
179–183
meta-legality and law of 174–178

politico-legal fears 152–160
fear as category of analysis
155–158
fear of the frighteners 153–155
fear reactions 158–160
protest, law-rule and 147–150
Schmittian politics of 100–111
see also political extremism and
militancy of law-rule
Federal Border Police Act (Germany)
170–172
Federal Constitutional Court (FCC)
Abortion Decision (1973) 86–87
on civil disobedience 182
as guardian of constitution 45, 83
legal dummies 88–89
objective value-order doctrine 86–87
party privilege 167–168, 176, 177
on unconstitutionality of rescue
downing 95–96, 131, 138, 214,
218
upholding of rule of law 52–53
Federal Criminal Investigation Agency
(Germany) 153–154
Federal Criminal Police Office
(Germany) 187
Federal Office for the Protection of the
Constitution (Germany) 153,
168–169, 172, 178
Fichte, Johan Gottlieb 123
final and fatal shot (finaler
Rettungsschuss) 210–211
see also shoot-to-kill provision,
special police law
formed society 184
Forsthoff, Ernst 82, 84–85, 87–88,
116–117
Foster, Norman 48
Foucault, Michel
The Birth of the Clinic 39
Discipline and Punish 32, 39–40, 42
on images of power 38–42
method Foucault analysis 20–24, 94,
148, 184, 187, 192, 193,
198–199, 216, 238
political technology and 1
on The Prince 11
Political technology and the erosion of the rule of law

Society Must Be Defended 23–24, 32–33
Fraenkel, Ernst 165
France
Constitution (1830) 98–99
Constitutional Assembly (1791) 100
Declaration of the Rights of Man and of the Citizen (1789) 167
Great Revolution 44, 47
Sanctuary programme 186
sovereign, as Nation 31–32, 45
Frederick I (King) 227
Frederick the Great 227–228
Friedrich, Carl J. 143–144
Frisch, Max 149
Gauchet, Marcel 157
General Civil Code for the Prussian States (Preussisches Allgemeines Landrecht) (ALR) (1794) 65
Gerber, Carl Friedrich von 73
German Imperial Constitution (1871) 100
Germany
Act on Restriction of the Secrecy of Correspondence (1968) 173–174
Aliens Act 173–174
Aviation Security Act 130–131, 138, 211–212, 214
Civil Service Act 181–182
Constitutional Protection Act 172–173
Dome of the Reichstag, symbology of 48–50
Enabling Act 26
Federal Border Police Act 170–172
Federal Criminal Investigation Agency 153–154
Federal Criminal Police Office 187
Federal Office for the Protection of the Constitution 153, 168–169, 172, 178
German Imperial Constitution (1871) 100
Model Draft for a Unitary Police Law 211
Narcotics Act 173
Nuclear Power Act 13
presidential emergency powers 71–73
Rechtsstaat principle 51–54
sovereign, as Volk (people) 31–32
torture discourse 237–238
see also Basic Law (Germany/1949)
good governance and statecraft 1–5, 63
Gratian 99
Great Britain see United Kingdom (UK)
Grosser, Alfred 149
Grotius, Hugo 63–64
Guantánamo Bay, U.S. Naval Base 124, 137, 223–244, 247, 249
Habermas, Jürgen 19
Discourse Theory of Law and Democracy 90–91
Theory and Practice 5
Hegel, G. W. H. 133
Heidegger, Martin 138
Heinemann, Gustav 149
Heller, Hermann 74–75, 84–85, 88
Himmler, Heinrich 231
Hitler, Adolph 111
see also Nazism
Hobbes, Thomas
Elements of Law 13–14, 16, 24, 30, 36, 38, 59
enlightened despotism 60
freedom from fear 150–151
influence on Schmitt 102–103
Jakobs and 123
Kant, comparison to 66
law of fear 178, 217
Leviathan 13–16, 30–38, 42, 49, 59
state of exception, as mindset and doctrine 133
techniques of governing 85
Index

Hollar, Wenzeslaus 34–35
Human Rights Act (UK/1998) 61
Human Rights Watch 226
hyper-preventive risk management 28–29, 94–96, 200–203
illegal renditions 248, 249
illiberal security paternalism (Foucault) 20–24
images of power see political technology, images of power
Political technology and the erosion of the rule of law

legal dummies 9, 24, 88–89, 172
legal injustice (gesetzliches Unrecht) (Radbruch) 79
legal positivism
  integration of emergency powers into law of normal state 26
  on state emergency law 141
  state of exception as norm 99
legal technology, shift to disciplining of social processes 8–9
legality in advance 170–171
legalizing ex post facto 169–170
Leviathan (Hobbes) 13–16, 30–38, 42, 49, 59
liberal paradigm, ambivalence of 97–100
liberal regulatory rationalism 98–99
Locke, John 49–50, 59–60, 65, 169
freedom from fear 151
techniques of governing 85
Two Treatises of Government 98, 109, 167
loyalty to state 181–183
Lübbe-Wolff, Gertrude 119–120
Luhmann, Niklas 127–128, 133, 222, 251
Lukashenka, Alexander 12
Machiavelli, Niccolò 11–13
  method Machiavelli analysis 11–13, 57–58, 140, 216
The Prince 11–20, 30
Manow, Philip
  on British King-in-Parliament 45–47
In the King’s Shadow 41
Marcuse, Herbert 184, 251
martial law 58, 72, 98
Marx, Karl 32
Mason, George 225
Massachusetts Constitution (1780) 51–52
Merkel, Angela 13
meta-fundamental rights, and law of fear and 179–183
metalegality and law of fear 174–178
Middle Ages, torture during 226–230, 235, 236
militant democracy concept 80–83, 143
militant law see normalization of state of exception, and counter-terrorism; political extremism and militancy of law-rule
Military Commissions Acts (US/2006) 224
military torture 233–236
Model Draft for a Unitary Police Law (Germany) 211
modern political torture, use of term 231–232
modernity, political symbolism of architecture of the republic 48–50
interior design of democracy 45–47
symbols of societal unity 44–45
Montesquieu 158
Spirit of the Laws 167, 169
moral empire (Stahl) 69–70
Narcotics Act (Germany) 173
national Rechtsstaat (Koellreutter) 76
National Socialist German Rechtsstaat (Schmitt) 76–78, 103–104
Nazism
  Agamben and 112
  emergency powers 76–78
  Enabling Act 26
  legal positivism and 79
  Schmitt and 76–78, 103–104
  total state 84
Neo-Aristotelians, common good concept 63
new legal topography
danger prevention law norms 28
normalization of state of exception and 27–28
new prevention concept 194
new security architecture
cyber-espionage 28
data sharing 28, 94–95
Index

domestic use of armed forces 27, 28, 83, 212, 215
normalization of state of exception, and counter-terrorism 187–189
screening of communication, public areas, economic transactions 28
surveillance state cooperation 28
see also counter-terrorism agenda
normalization of state of exception, and counter-terrorism 185–220
asymmetry between freedom and security 195–198
excessiveness of security 196–198
normalization of security 195–196
militant law and security mentality, effects of 216–220
from cognitive to existential safety 216–217
costs of risk prevention under emergency law 217–218
risks/effects of shift in mentality 218–220
militant law, as special police law 198–207
erosion of legal checks 203–204
from proportionality to uncontrollable logic of necessity 204–207
rationality of hyper-prevention 200–201
structure of hyper-prevention 201–203
militant law, logic of 192–195
hyper-preventive police law 193–194
rhetoric of legislative militancy 192–193
right to security as basis of combat laws 194–195
militant law, other forms 207–216
enemy criminal law 208–210, 215
rescue downing 211–215, 218, 239
rescue torture 215–216
shoot-to-kill provision 210–211, 215
new security architecture 187–189
normalization of state of emergency 189–192
crisis of law-rule 190–191
threats to mentality of freedom 191–192
terror as manipulative communication 185–187
normalization of state of exception, overview 26–28
normalization of torture as technique of governance 221–251
abuses of torture 245–250
torture by proxy 248–250
virtualization 245–248
domestication of taboo 221–226
historical context 226–230
legal arguments, justifying torture 238–245
invoking state of exception 238–242
new torture and basic rights 244
regulation of torture 242
uncertainty risks of knowledge gained 243–244
new paradigm 230–238
ticking bomb scenario 234–238, 239, 241
rescue torture 233–236, 238–245
North Atlantic Treaty Organization (NATO) 188, 214–215
Nuclear Power Act (Germany) 13
objective value-order doctrine (FCC) 86–87
offenders for principle 209–210
offshore torture 248–250
Ohnesorg, Benno 148
organized peacelessness 155–158
parliamentarianism 73–78
party privilege, FCC on 167–168, 176, 177
Patriot Act (US/2001) 224
Petition of Right (England/1628) 62
political extremism and militancy of law-rule 147–184
freedom from fear and rationality under law-rule 160–166
formal rationality and legislative political technology 161–162

Günter Frankenberg - 9781783472529
Downloaded from Elgar Online at 01/22/2019 03:17:18AM via free access
Political technology and the erosion of the rule of law

material rationality and executive political technology 162–163
violence, legal certainty and politics of fear 164–166
Hobbes, Locke and freedom from fear 150–151
law of fear and meta-fundamental rights 179–183
loyalty to state 181–183
maintaining political status quo 179–180
manipulation of legislative governance techniques 166–174
blanket legality 8, 163, 172–174, 183, 204, 239–240
enemy concept 167–169
legality in advance 170–171
legalizing ex post facto 169–170
meta-fundamental rights, metalegality and myth 183–185
metalegality and law of fear 174–178
politico-legal fears 152–160
fear as category of analysis 155–158
fear of the frighteners 153–155
fear reactions 158–160
protest, law-rule and fear 147–150
political quietism 159, 178, 184, 219
political technology, critique of 1–29
good governance and statecraft 1–5
as instrumentalism mindset 5–7
method Foucault analysis 20–24
method Hobbes analysis 13–17
method Locke analysis 17–20, 25, 45
method Machiavelli analysis 11–13
negation vs. juridication of state of exception 25–26
normalization of state of exception 26–28
as security technology 28–29
in shadow of hierarchy 7–11
political technology, images of power 30–50
Foucault, on images of power 38–42
Hobbes, on images of power 30–42
Leviathan, symbolism of 34–38, 42, 49
from sovereign to constitutional
loyalty 42–50
architecture of the republic 48–50
interior design of democracy 45–47
symbols of societal unity 44–45
Political Theology (Schmitt) 104–108, 110, 112, 117–119, 132
politics of fear (Schmitt) 100–111
aesthetics and politics of privileging the state of exception 109–111
apocalyptic scenario 101–104
primacy of the exception 104–109
prerogative state (Fraenkel) 165, 177, 194
Presidio Modelo in Nueva Gerona (Cuba) 41
preventive state, global formula 93–96
The Prince (Machiavelli) 11–12, 30
privatization of public authority 53
of torture 248–250
probable cause, diminishment of 27
proportionality principle 204–207, 244
protected democracy, reinventing state of exception 80–83
protest, law-rule and fear 147–150
Pufendorf, Samuel 63–64
Putin, Vladimir 12
racial profiling, institutionalization of 204
Radbruch, Gustav 79
Radicals Decrees (Radikalenerlasse) (1972) 148, 168–169, 176, 181, 183
random checks and surveillance 206, 218
rational-normative Rechtsstaat (Forsthoff) 84–85
Rechtslehre (Kant) 65
Red Army Faction (RAF) 117, 123, 147, 208, 218
relational power (Foucault) 23
renegade aircraft, rescue downing of see rescue downing (Rettungsabschuss)
Index

rescue downing (*Rettungsabschuss*)
rescue torture
normalization of state of exception, and counter-terrorism 215–216
normalization of torture as technique of governance 233–245
Schmittian approaches, in torture discourse 126–136
use of semantic camouflage 27, 247–248
risk society concept 93–96
Roman Republic, and torture 228–230
Rossiter, Clinton 143–144
Rousseau, Jean-Jacques 41, 65–66, 88, 90, 133, 151
*Social Contract* 2
St. Paul’s Church Constitution (*Paulskirchenverfassung*) 71
Scharpf, Fritz 88–89
Schäuble, Wolfgang 249
Schily, Otto 213, 238
Schmidt, Helmut 154
Schmitt, Carl 142
Agamben, comparison to 112–115
anti-Semitism of 104, 113
on commissarial dictatorship 144
*The Concept of the Political* 101–102, 105, 112, 124, 128
on emergency law 75–76
Hobbes influence on 102–103
on liberal individualism 138
National Socialist German
*Rechtsstaat* 76–78, 103–104
politics of fear 100–111
Schmittian approaches, in torture discourse 126–130
on speech of Hitler 111
on tyranny of values 84, 86
secret detention prisons 249
securitization 29
security regimes
information technology and 10
new legal topography 27–28

use of military means in domestic settings 27
security state
as global phenomenon 29, 93–96
legalization of emergency powers as abuse prevention 142–143
semantic camouflage 27, 247–248
shoot-to-kill provision, special police law 170, 210–211, 215
*Six Books of the Commonwealth* (Bodin) 30, 63
social communication and processes, extra-judicial control of 8–9, 93–96, 145, 148
*Social Contract* (Rousseau) 2
social order 58–59
social *Rechtsstaat* (Heller) 74–75, 84–85
societal unity, symbols of 44–45
*Society Must Be Defended* (Foucault)
23–24, 32–33
Sophists 11
special police law
innocent individuals and 131
judicial review, erosion of under 205–206
legality in advance 170–171
normalization of state of exception, and counter-terrorism 198–207
erosion of legal checks 203–204
hyper-prevention approach 94–96
logic of militant law and 193–194
from proportionality to uncontrollable logic of necessity 204–207
rationality of hyper-prevention 200–201
structure of hyper-prevention 201–203
shoot-to-kill provision 170, 210–211, 215
*Spirit of the Laws* (Montesquieu) 167
Stahl, Friedrich Julius 69–70
state as victim concept 134
state intelligence techniques 201–203
state of emergency, normalization of 189–192
crisis of law-rule 190–191

Günter Frankenberg - 9781783472529
Downloaded from Elgar Online at 01/22/2019 03:17:18AM
via free access
threats to mentality of freedom 191–192
state of exception, as mindset and doctrine 97–146
ambivalence of liberal paradigm 97–100
decapitation of law-rule and Locke 136–139
potential worst-case scenarios 120–136
enemy criminal law 121–126
international terrorism 121
mindset of the extraordinary 132–136
rescue downing 130–136, 138
Schmittian approaches, in torture discourse 126–130
repressed state of exception 115–120
Schmitt, and politics of fear 100–111
from Schmitt toward Agamben, bare state of exception 112–115
state impotence/abuse as fixed points 139–146
fear of abuse and renunciation of emergency laws 141–142
lawless necessity 139–140
legalization of emergency powers as abuse prevention 142–146
written state emergency law 141
state-will positivism (Staatswillenspositivismus) 70, 73–74
student riots (Schwabinger Krawalle) 147–148
surveillance state 93–94
cognitive insecurity due to 157–158
data sharing 28, 94–95, 187, 201–203, 206
intelligence techniques 201–203
special police law 204–207
symbols of power see political technology, images of power
Taguba, Antonio M. 247
Theory and Practice (Habermas) 5
Thoma, Richard 74
ticking bomb scenario
Brugger on 128, 241
global security state 29
normalization of torture and 234–238, 239
state of exception, as mindset 132–136
threats to mentality of freedom 191–192
as worst-case scenario 121
torture under Bush administration 137, 224, 237, 247
defence torture 236–238
during Middle Ages 226–230, 235, 236
military torture 233–236
modern political torture, use of term 231–232
offshore torture 248–250
see also normalization of torture as technique of governance
torture discourse 27, 126–136
trivialization of deviance from democratic law-rule 27
Turkey, counter-terrorism practices 231, 235
21st Century Statecraft program (US State Department) 2
two bodies of the king doctrine (British) 59
Two Treatises of Government (Locke) 98, 109, 167
UN Convention Against Torture 246
UN Universal Declaration of Human Rights (1948) 221
unconstitutionality of rescue downing (FCC) 95–96, 131, 138, 214, 218
United Kingdom (UK)
Declaration of Rights (England/1689) 62
enemy criminal law 210
House of Commons, symbology 45–47
House of Commons, symbology of 45–47
Human Rights Act (1998) 61

Günter Frankenberg - 9781783472529
Downloaded from Elgar Online at 01/22/2019 03:17:18AM
via free access
Index

intelligence techniques 201–203
King/Queen-in-Parliament 44–45
Petition of Right (England/1628) 62
two bodies of the king doctrine 59
United States of America (US)
  Bush administration and torture 137,
  224, 237, 247
enemy criminal law 210
Founding Fathers 45
intelligence techniques 201–203
Massachussetts Constitution (1780)
  51–52
sovereign, as ‘we the people’ 31–32
torture discourse 236
US Army 249
US State Department
  21st Century Statecraft program 2
video surveillance 28, 94, 146, 187,
  201, 206
voting rights 66, 74–75
water-boarding 248
Weber, Max 10–11, 31, 89, 188
Weimar Republic 168
  Constitution 71–75, 80
welfare state, form vs. substance
debates 83–91
West Germany
  militancy against 1960s protesters
  147–148
Radicals Decrees (Radikalenerlasse)
  (1972) 148, 168–169, 176, 181,
  183
wiretapping 28, 148, 158, 170, 177,
  180, 191
Wolff, Christian 63–64
World Soccer Association (FIFA)
  13