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Emergencies and Arbitrary Coercion

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Résumé

Cette thèse jette un œil sceptique sur plusieurs théories courantes de l'état d'urgence. La plupart de ces théories de l'état d'urgence présupposent que la notion d'une « urgence » est claire, conceptuellement et pratiquement. J'argue que ceci n'est pas le cas et que cette certitude mal placée produit des problèmes pratiques et conceptuels avec ses théories. De plus, cette thèse démontre que cette certitude mal placée dans la clarté du concept de l'urgence mène les autorités gouvernementales à agir arbitrairement plutôt que selon des principes libéraux et démocratiques pendant des états d'urgence. Contre cette certitude mal placée et contre plusieurs théories contemporaines influentes des états d'urgence, j'offre une théorie rigoureuse et analytique du concept de l'« urgence. » Une fois que le concept de l'urgence est défini, et que cette conception est défendue, la thèse démontre les diverses manières dont les malentendus du concept, mènent aux utilisations arbitraires (de la puissance monopole de l'état) en situation d'urgence. En considérant les états d'urgences, comme événements rares, la thèse évite la tentation de les considérer comme événements exceptionnels capable de fragmenter l'ordre politique établi (comme d'autres théories le font). La thèse argue que les mesures prises par le gouvernent pendant l'état d'urgence devraient être compatibles plus généralement avec les valeurs démocratiques et libérales. En rejetant l'idée que les états d'urgence sont des événements exceptionnels, la thèse crée un espace conceptuel dans lequel des propositions plus constructives concernant la gestion des états d'urgence peuvent être entendues. De plus, en analysant les diverses manières dont les autorités gouvernementales utilisent leur forces de façon arbitraire pendant les états d'urgence, la thèse argue clairement pour la supervision institutionnelle accrue en ce qui concerne les procédures d'urgence et leur déploiement pendant des états d'urgence.

En conclusion, la thèse argue que les démocraties libérales n'ont pas besoin de craindre les états d'urgences tandis que les démocraties libérales ont déjà les ressources requise pour administrer les états d'urgence. Contrairement à ce que d'autres théories l'état d'urgence recommandent, les démocraties libérales ont déjà les ressources institutionnelles et conceptuelles pour administrer les états d'urgences.

Mots-clés : philosophie, état, urgence, démocratie, libéralisme, arbitraire, pouvoir, éthique, politique, concept.

Abstract

This dissertation casts a skeptical eye on theories of emergency government. It argues that far from being self-evident, most accounts of emergency government assume that the notion of an "emergency" is clear, both conceptually and practically. I argue that this is not the case and that this misplaced certainty generates both practical and conceptual problems. Further, this dissertation shows that this misplaced certainty in the clarity of the concept of emergency leads authorities to act arbitrarily rather than on principle in times of emergency. Against this misplaced certainty and against many influential contemporary accounts of states of emergency I offer a more perspicuous account of the concept of "emergency." Once the concept of emergency is defined and defended, the dissertation proceeds to show the various ways in which misunderstandings of the concept lead to arbitrary uses of state power in emergencies. By closely examining the work of competing theories of emergency, the dissertation is able to reveal where these other theories go wrong. By viewing emergencies as rare events, the dissertation avoids the temptation to view them as exceptional events that sunder the established political order. Arguing that emergency measures should be compatible with liberal democratic values more generally, the dissertation makes the case for treating emergencies from within the ambit or existing liberal democratic institutional mechanisms as opposed to jettisoning these mechanisms as some other theorist recommend. In undermining the idea that states of emergency are exceptional events, the dissertation creates a conceptual space within which more constructive proposals pertaining to emergency management can be heard. Further, by unearthing the various ways in which state authorities arbitrarily employ power in emergencies, the dissertation makes clear the need for increased institutional oversight as concerns emergency powers and their deployment in emergencies.

In conclusion, the dissertation advances that liberal democracies need not fear emergencies as much as they do and argues for the view that democracies already have the required resources for dealing with emergencies in an institutional manner that is both politically liberal and institutionally democratic. Against those skeptical of these resources, the dissertation offers comprehensive philosophical reasons for abandoning said skepticism.

Keywords : philosophy, state, emergency, democracy, liberalism, arbitrariness, power, ethics, politics, concept.

Table des matières

INTRODUCTION:

TWO PHILOSOPHICAL IDEALS OF LIBERAL DEMOCRACY

When a government declares a state of emergency, it performs two distinct but related actions. In a first instance, the government is signaling that something out of the ordinary has occurred. In a second instance, the government through its declaration gives itself the authorization to act differently than usual. This in the most general sense is what it means to enact a "state of emergency[1]." In the case of emergencies occurring in liberal democracies, the government gives itself the authority and the latitude to act in ways and to employ means, normally prohibited in non-emergencies. Governments are the key social actors in such events, as they are the only social actors that can declare states of emergency. In so acting, governments also do something else. Liberal democratic governments that declare states of emergency, alter established *expectations* about the way liberal democratic governments are expected to act. In what follows, I track changes in these expectations, from a normative perspective. I take it as uncontroversial that a declaration of emergency is a change in the social norms that help define the relationship that exists between citizens in a liberal democracy and their government. Social norms perform many functions in society and the social function that interests me here is the ability of all social norms to generate *predictable* expectations and to consequently ward off arbitrary actions (Bicchieri 2006)[2].

[1] David Dyzenhaus, "States of Emergency," in a *Companion to Contemporary Political Philosophy* (Cambridge University Press 2007) 804-812. Liberal democratic norms uncontroversially include norms of public justification, publicity on the part of the government concerning its actions, and opportunities for meaningful consent on the part of the governed. These norms admit of exceptions, yet in the main, they hold. Governments keep secrets for example, but they do not keep everything they do a secret, nor do they standardly hide the rationale behind the choices they make. Liberalism at its best, strives to guard against the tyranny of the majority and strives (on balance) to protect individual rights from infringement whenever possible. Do emergencies therefore grant the state a right of arbitrary infringement? Do they warrant not informing the public about decisions that directly affect them or is something else at work?

[2] My account of norms is indebted to Bicchieri. Following her, I take a constructivist view of norms, arguing that one best "explains norms in terms of the expectations and preferences of those who follow them" (Bicchieri 2 2006). "The definition of social norm I am proposing should be taken as a *rational reconstruction* of what a social norm is, not a faithful descriptive account of the real beliefs and preferences or of the way in which they in fact deliberate. Such a reconstruction, however, will have to be reliable in that it must be possible to extract meaningful, testable predictions from it" (Bicchieri 3 2006, original italics). Among these predictions are included expectations concerning future actions on the part of other actors (individual and collective).

In our everyday transactions with our social institutions, we act according to established normative expectations and we expect our institutions to do the same, at least to the extent that institutions as aggregates of individuals can act according to predictable rules and hence are capable of exhibiting a predictable form of social agency[3]. The expectations that social norms generate, carry both an empirical and a normative component with them. We act in accordance with tacit rules of social behavior that blur the distinction between empirical and normative by generating both formal and informal rules of conduct. We adhere to these rules of conduct (to greater and lesser extents, depending on context) with the expectation that in return, a significant portion of the population will do the same. We stop at red lights when driving, we wait in line to vote, and when asked to justify our behavior, we refer to rules and regularities that are publicly accessible to justify our actions. As social actors, we adhere to general behavioral rules, which are both normative and empirical at once, expecting other actors (in general) to act as we do in relevantly similar social situations. We do not conform to social rules simply for their own sake, but because norms help *coordinate* our behavior with the behavior of others to produce predictable outcomes, at both the normative and the empirical level. Behavioral coordination of this form creates the expectation that others will follow those same rules and act as predictably as we act and this relation holds even when the "other" in question is the state. Perhaps more importantly, we expect sanctions to befall those who contravene established social rules and often severely reprimand the most egregious rule-breakers among us. Expectations are crucial to living cooperatively in society and behavioral expectations crop up everywhere that social norms exist, even within liberal democratic government. Every social institution makes use of the empirical and normative expectations generated in social actors, by such predictable behaviors. In fact, they could not function otherwise[4]. Moreover, while the normative and empirical elements of that go into social norms can be pulled apart analytically speaking; they cannot be teased apart *practically* speaking.

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[3] Some argue that states cannot be social actors, as only individuals have the capability to deliberate in ways that evince true agency. Against this view, I submit that as aggregations of the deliberations of individual actors, states can (and do) exhibit the required form of social agency.

[4] That social norms all exhibit an interconnected hybrid empirical/normative structure is argued extensively and persuasively by Cristina Bicchieri in her *The Grammar of Society: the Nature and Dynamics of Social Norms* (Cambridge University Press 2006). When human action is involved, all the relevant norms are hybrid, in that they involve *both* empirical and normative aspects irreducibly.

I wish to show that the idea that states of emergency somehow sunder preexisting social norms and expectations (by sanctioning normative exceptions) to be deeply controversial and ultimately incorrect. My analytical focus here is predominantly philosophical and it concerns the normative soundness of the various defenses and criticisms marshaled for and against declarations of emergency in liberal democracy. I assess normative soundness by examining the *rationale* that lies behind the declarations and ultimately behind the actions that they sanction. This however is not a dissertation on the *empirics* of actual emergencies. Rather it is a dissertation about the types of *reasons* often offered for various sets of actions taken in emergencies; actions that otherwise would not be taken in the normal course of affairs. I try to offer a way of thinking about emergencies that squares with the preexisting normative commitments of liberal democracy, commitments that often come to be seen as fungible when emergencies occur[5]. My focus is not on whether governments can restrict rights in emergencies. Clearly, they can and they do.

My focus is instead on another question. What has to be the case in order for a liberal democratic government to derogate the rights it is designed to defend? My answer is that exceptional circumstances need to obtain for this to be the case; but something else must also obtain for the decision to derogate liberal democratic rights to make sense. The derogations in question cannot be arbitrary, nor can the circumstances surrounding the emergency declaration be arbitrary. For if they are, they subvert the function they are designed to perform; namely to protect the public. Emergencies when genuine, may indeed sanction rights derogations, but they do not (and cannot) sanction arbitrary derogation, as this would be to sanction a departure from the expected social and legal norms that authorize the government to act decisively in emergencies in the first place. In other words, while governments do in fact act arbitrarily at times, the fact that they can act arbitrarily does not provide a normative justification for so acting. Norms guide actions, not the other way around. Liberalism and democracy denote forms of government, but they also denote philosophical concepts. Conceptually, liberal democracy has normative commitments, which delineate what it can and cannot do, while still claiming that identity.

[5] There are many forms of liberal democracy but all involve key normative commitments, such as that no person is subject to another's unilateral discretionary power. This restriction includes power employed by groups of individuals. The state in liberal democracy does not have greater moral standing than the citizens do, nor can it nullify rights at will.

Further, emergencies alone do not sanction departures from established social norms; nor do they imply a wholesale rejection of liberal democratic values. For a departure from expected norms to be justified, subsequent reasons to that effect must be offered. A declaration of emergency is not a mandate to sunder existing social arrangements. Rather, emergency declarations in a democracy are typically a bulwark against the further erosion of established social norms. An analogy may make this idea clearer. A patient may require drastic surgery to save their life. However, that decision can only be made after a proper and complete medical diagnosis has argued for its viability and probable success. Why would things be different in the case of emergencies? What reasons do we have to resort to severe derogations, as is often argued by some of the commentators I examine? Is there an empirical record of derogation's success? Do derogations strengthen social norms? The remainder of this introduction will unpack some of the thornier interpretative issues that beset our thinking about emergencies. One such issue, concerns the way we parse what is conceptual from what is empirical when thinking about emergencies. No pure separation between the empirical and the conceptual is possible when discussing emergencies, because many of the philosophical issues addressed are also legal issues and they therefore involve both theoretical and empirical considerations in equal measure much as other social norms do.

Another interpretative issue, concerns the institutional context within which emergency measures are implemented. As with legal issues, institutional issues also display a convergence between what is purely conceptual and what is purely empirical that is hard to parse. Empirical issues dot the landscape of the otherwise largely theoretical literature that I address here and not all of the authors I discuss carefully delineate what is conceptual from what is empirical in their respective accounts. Despite this difficulty, I discuss empirical issues in the main text only to the extent that they help clarify strictly philosophical questions about the nature of our collective democratic reasoning about emergencies in liberal societies. With these interpretive signposts in the background, I will now describe the layout of my project overall. In the next five chapters, I try to answer two related philosophical questions. First, how does one define what constitutes a state of emergency and what does not? Second, what normative consequences follow from the way that liberal democracies in particular define states of emergency?

Each chapter tries to untangle what I take to be conceptual ambiguities at the heart of the way we think about emergencies, ambiguities that threaten to complicate liberal democracy's own relationship to its underlying social norms and political ethics. Chapter 1 tackles liberal constitutional democracy and its uneasy relationship with states of emergency. Chapter 2 deals with the specific legal challenges generated by emergencies. Chapter 3 deals with the distinction between formal and informal accounts of emergency and looks at attempts to normalize emergencies and treat them as everyday occurrences rather than as exceptional events. Chapter 4 addresses the similarities and differences between emergencies, crises, and catastrophes, of varying magnitudes. Chapter 5 looks at the relationship between our institutions, our rights, and the way we think and deal with emergency events, as liberal democrats. Together the five chapters that make up this dissertation examine and analyze the most pressing problems generated by emergencies for liberal democratic political ethics. The dissertation offers what it takes to be a sensible and modest avenue for dealing with the philosophical problems that emergencies create for liberal political philosophy. The main philosophical problem created by emergency is the seeming separation it engenders between keeping people safe in an emergency and protecting their rights. Because of this desire to uphold equal civil and political rights for all citizens, severe emergencies can at times back liberal democracies into a corner. Torn between providing security and protecting rights, liberal democracies appear incapable of doing both, unless significant changes are made to the norms that give liberal democracy its normative identity. And this leads to a paradox; we can increase security at the expense of already assured civil and political rights or we can protect the expectations that attach to these rights, but not both. Yet is this so, or is this only apparently the case? I argue instead that it is our standard way of characterizing and reasoning about emergencies, which forces us into the unattractive position of thinking that liberal democracies must derogate established rights to increase security. While the tension between security and liberty may be real in certain circumstances, I argue that the perceived inevitability of the tradeoff may not be. These types of tensions and tradeoffs are mostly a conceptual matter on my view, since they only arise for political philosophies already notionally committed to equality and to the preservation of individual freedom; two of the hallmarks of contemporary democratic liberalism. Indeed Ronald Dworkin, famously equates liberalism with egalitarianism itself, so deep is the connection for some.

How then does a philosophy that is putatively committed to rights egalitarianism deal with situations that force it to treat some differently than others? In the course of the next five chapters, I show that what constitutes an emergency is not as obvious as it may first seem, as there are many profitable ways to think about nuanced phenomena like emergencies that do not lead to automatically to derogation. Liberal democracy's commitment to establishing and maintaining both a just political order as well as its commitment to establishing and maintaining justice and equality understood more abstractly, make it unique among political philosophies. This twin project of securing a just political order, while also maintaining justice and equality, is itself grounded by two philosophical *ideals*, which I argue give liberal democracy its core. The first normative ideal is a constitutional commitment to *political equality* among all citizens. The second normative ideal is the ideal of *democratic self-government*, understood as rule by the people. Together political equality and democratic self-government define what it means to characterize a political philosophy as one that is both liberal and democratic[6]. Accordingly, I attempt to put forth a philosophical account of emergency that preserves the values of political equality and democratic self-government, rather than a view that subordinates these values to other concerns, as competing accounts often do. I believe that this can be done cogently, even in the face of grave emergencies. Against my view, many theorists of emergency presuppose that either a government can enact emergency measures that will certainly derogate civil and political rights, or that a government can continue protecting these types of constitutional rights, while voluntarily assuming a greater overall risk, during the emergency episode, but that it cannot do both successfully. Little middle ground is usually on offer in standard philosophical accounts of emergency. On most philosophical accounts, either rights are derogated and security is preserved or security is compromised and rights are preserved. My central thesis is that given these presuppositions, neither option is endorsable from the viewpoint of an authentically liberal democratic political philosophy. Derogating rights does not always prevent or minimize an emergency.

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[6] T.R.S. Allan. "Liberal Democracy" and "Rule of Law" in *The New Oxford Companion to Law* 731-732 and 1037-1038 (Oxford 2008). Allan makes clear that these two aforementioned ideals are codified in law in liberal democracies thus making them guiding principles and not simply abstract ideals of liberal democratic government. These ideals moor liberal democracy to law. For a complete treatment of these issues and their role in establishing liberal democratic rule of law, see T.R.S. Allan *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford 2003).

What is more, accruing increased risk while protecting rights is not always a worthwhile strategy either; therefore, neither approach alone works in a liberal democratic setting. Against this apparent paradox, I propose that the most cogent approach to resolving the tension between maintaining rights and increasing security will be a compound view, one that respects the normative character and commitments of liberal democracy, while additionally respecting the need to act to prevent harm in an emergency. My proposed approach is commonsensical, yet it stands in stark contrast with the influential view that emergencies are exceptions to the established order, exceptions that allow governments to alter their preexisting normative commitments as well as their commitments to upholding the rule of law. The other influential view I stand against is the normalist view, which argues that emergencies are not exceptional events, but are instead normal events that occur frequently and that require no additional analysis and no special administration. The normalist view, too quickly discounts the severity of a genuine state of emergency, in my view. It acts as if all dangerous events are cut from the same cloth and all dangerous events can be tamped down in the same way at all times. Unfortunately, this is not the case. A philosophically sound account must break the stalemate between derogation and risk, as the stalemate is the product of poor reasoning and not a fact about either emergencies or liberal democracies. From a philosophical perspective, a proper account must attempt to remain true to the philosophical principles that undergird liberal democratic thought as the norms that help guide liberal democratic decision-making are not epiphenomenal. Their normative content forms the core of what it is for a political philosophy to self-identify as liberal and as democratic rather than as something else and the expectations they generate regarding future conduct, give liberal democracy its distinctive character. Much the same obtains if we look at liberal democracy purely as a system of government rather than as a political philosophy. In this case too, the institutions that give liberal democracy its structure are themselves structured around social norms and expectations that attach to specific rights, which in the main are not subject to derogation except in special circumstances. Liberal democracies are among the most efficient forms of government and in states of emergency, they often show a coercive side of their character not always apparent in other contexts. As a system of government, liberal democracy is frequently justified by its proponents by appealing to the efficiency and attractiveness of its founding (normative) political principles.

Yet in severe emergencies, liberal democracies regularly resort to purely *coercive* measures to maintain order and protect their interests, often to the detriment of these same guiding principles. I take it to be uncontroversial that it is the coercive institutions of the liberal state, which take control in a crisis and not its reflective and more principled institutions, a fact frequently noted by critics of the irenic pretensions of mainstream liberal democracy[7]. Does this imply, as these critics argue, that liberal democracy succeeds because it is more efficient at using coercion than other forms of government? Is it that liberal democracies are simply better at *rationalizing* their use of coercion then non-democracies, as agonist critics also allege, or do liberal democracies truly exhibit distinct norms, principles, and institutions, worth defending during a crisis? Against agonists and others skeptical of the notional compass that guides liberal democracy, I believe that conceptualized correctly, the normative principles and ideals of liberal constitutional democracy are able to meet the challenges posed by emergency government without simply resorting to unprincipled coercion. Their success however rests at least in part, on how we come to understand emergencies as political phenomena, an understanding that I argue is presently lacking because we take the *projective* nature of normative expectations for granted in our reasoning about emergencies. I argue that liberal democracies should deal with emergency events in a principled and philosophically respectable manner and not in the *ad hoc* manner prescribed by proponents of the "norm/exception" view of emergencies. I examine the view that emergencies are exceptions to the normal function of liberal democracies later in the dissertation, as well as the contrary view, which views emergencies as normal events in the life of a democracy. Against both viewpoints, I argue that genuine emergencies are rarer than presumed. I also argue that the dichotomy created by viewing emergencies as either exceptional events or normal events is ultimately untenable on conceptual and normative grounds. To this end, I propose that we begin by examining the *context* in which the problem of emergency occurs and move outward from there.

[7] Carl Schmitt is the most prominent of these critics. Other agonist critics of liberal democracy argue much the same case. Against both, I will argue that liberal democracies can and should stand their ground and do so on principle, and not just act out of coercive expediency, during states of emergency. While all states appeal to coercion in some measure, it is the way that these appeals are managed in liberal democracies that set them apart, or so I will attempt to argue in what follows. For paradigmatic agonist criticisms of liberal democracy see Carl Schmitt *The Concept of the Political* (Chicago 2007) and Chantal Mouffe *The Democratic Paradox* (Verso 2009). Schmitt is the main exponent of the view that the expectations generated by the social norms of liberal democracy are epiphenomenal.

By this, I mean that we should not take it as a conceptual given that emergencies are already well-understood events. Instead, I argue that we should analyze what counts as a state emergency and what does not before presuming to know how they should be addressed. To do this, I will first examine the composition of the concept of "emergency" itself in Chapter 1. I explore the *meaning* of the term "emergency" by examining the way we standardly use the term in established linguistic practice and by then noting deviations from the standard usage. These unsanctioned deviations from the standard usage contribute to the confusion found in discussions of states of emergency in political philosophy and have (so far) not been addressed systematically in the scholarly philosophical literature. I then examine competing accounts of emergency, including institutional accounts that address the question of how best to deal with emergencies when these occur. Finally, I end with a consideration of the differences between emergencies, catastrophes, and disasters. Emergencies are often conflated with disasters and catastrophes, even though these types of events have nothing to do with emergencies in the sense discussed by philosophers. This *concentric* approach, which moves from the best way to conceptualize emergencies (philosophically speaking) to a consideration of similar yet importantly distinct phenomena (crises, catastrophes, and disasters) will require unpacking an alleged paradox at the center of the idea of the state of emergency itself.

The literature on emergencies often characterizes them as paradoxical, because emergencies *legalize* seemingly *illegal* action and authorize the use of *arbitrary* coercive mechanisms, all the while using the instruments of established constitutional law, which itself rests on deep moral commitments regarding rights, and on social norms and expectations. That same body of law enshrines liberal rights and freedoms, acting as a *precondition* for liberal democracy itself to obtain as a form of government. The apparent paradox lies in undercutting the very body of law that protects rights and freedoms, in the name of preserving those same rights and freedoms from erosion and in protecting individuals from harm. In emergencies, we often try to protect individuals, but we do not (puzzlingly) always endeavor to protect the values and norms, which justify this concern and create the expectation of protection in the first place. This undercutting of established law via the use of arbitrary coercion has a corrosive effect and manifests most noticeably

and most paradoxically in courts where arbitrary law slowly comes to replace principles of established law.

The negative influence of arbitrary coercion generally has the potential to effect all social institutions, a point made most saliently in the republicanism of Philip Pettit and Frank Lovett. Drawing on Pettit and Lovett's republicanism, I endeavor to show thru every chapter that liberal democracy has the *normative* resources to resist the pull of arbitrary emergency government, and to do so, on principled *conceptual* grounds. The political philosophy of republicanism places the comprehensive freedom of the citizen at the core of its philosophy and argues that any *arbitrary* deviations from the core set of enshrined political and civil freedoms must be accounted for by explicit *principles* and not by arbitrary decision-making. Therefore, for the republican-influenced liberal, the locus of normative authority is the free democratic citizen and not the state with its varied institutional imperatives, as these imperatives can at times run counter to the real interests of real citizens. While others have attempted to make sense of the nature of emergencies, either by viewing them as exceptions to the rule of law, or as normal events in the life of a democracy, I attempt something different against these influential trends by focusing on what our way of thinking about emergencies tells us about liberal democratic norms and expectations. I try to cast doubt on the coherence of the "norm/exception" view itself (on primarily conceptual and not empirical grounds) while shoring-up a hybrid liberal republicanism as I go. I do this because arbitrary coercion is most pernicious when it authorizes government to act unconstrained by the established principles of the rule of law. Practically speaking, this occurs when liberal democratic courts decide that the government can act without feeling constrained by the edicts of the established law because an emergency is underway. To grant such license from established law, exceptional circumstances need to obtain. Under current conditions, this is just what emergencies do license, according to many liberal democratic governments. In what follows however, I try to cast doubt on whether emergencies merit their exceptional status in all instances and whether they can actually undercut social norms and expectations altogether. I will argue that the reasoning behind granting such norm sundering license is faulty on logical as well as on normative grounds. The next chapter proceeds directly to the elaboration and defense of my central thesis. There I examine what it means for established constitutional law to be

arbitrary in a liberal democratic context and for civil and political rights to be undercut during emergencies, a theme I have foregrounded here.

A normative principle on the view I develop is "arbitrary" when it allows for capricious exceptions and is "principled" when it comprehensively disallows such exceptions in the interest of equal treatment. "Arbitrariness, so defined, arises when there are gaps in the network of effective social conventions (social norms, coordination conventions, laws, etc.) governing the possible exercise of social power."[8] The focus in what will follow is primarily on ferreting out arbitrariness, when arbitrariness affects established liberal democratic norms in our collective reasoning about emergencies. Conceptual arbitrariness more generally is also a concern to the extent that any *decision-procedure* that violates liberal democratic rights capriciously (that is to say, arbitrarily) is an illegitimate use of coercive political power by the lights of established mainstream liberal political philosophy. This conceptual tension between principled and arbitrary exercises of coercive political power is particularly troublesome in states of emergency, where it manifests itself in its extreme form, as we will see[9]. Laws are the rules that govern legitimate exercises of social power in liberal democracies. As with all social conventions rules can change, if the institutions charged with upholding them are lead astray by context, circumstance, or through poor reasoning. Oren Gross, one of the proponents of the "extra-legal" approach to emergency management, has provided a similar definition of emergency to the one I propose here, yet his account nonetheless differs significantly from my own[10]. As will become clear, the overall objective of my dissertation is compound. I aim to cast

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[8] Frank Lovett *A General Theory of Domination and Justice* (110 Oxford 2010). Lovett's term "social power" simply refers to exercises of institutional power as opposed to exercises of individual power. Nothing more hangs on the use of this term. Lovett thinks of social norms and the expectations they generate in much the same terms that Bicchieri and I do. It is not enough for a citizen in a liberal democracy to be able to act without being domination. For Lovett and I, the citizen must also be able to project their freedom forward and be able to make plans for the future without fear of being dominated or coerced arbitrarily by government.

[9] On my view, substantive non-arbitrariness and procedural non-arbitrariness collapse into each other. This is required by the principles that define liberal democratic rule of law. Otherwise, citizens cannot depend on fair outcomes in cases presented to liberal democratic courts. Allowing either substantive non-arbitrariness or procedural non-arbitrariness to obtain, undercuts the constitutional rights of citizens, an unacceptable outcome by liberal democratic lights both philosophical and legal. For more, see Lovett (111-112 Oxford 2010) and Pettit (Oxford 1997). See also, Ronald Dworkin *Taking Rights Seriously* (Chapters 2-4) and *Law's Empire* (Chapters 1-2) as well as H.L.A. Hart *The Concept of the Law* (Chapter 7).

[10] See Oren Gross "What 'Emergency' Regime?" *Constellations* 13, No. 1, 74-88 (Blackwell 2006).

doubt on our standard philosophical way of understanding emergencies overall, arguing that it is internally (logically) incoherent as well as normatively incoherent.

I also wish to defend a particular account of liberal democratic republicanism; one that focusses on the way that arbitrary coercion corrodes the very normative bases that emergency legislation claims to defend. The focus of the dissertation is not on how key institutions of government deal with emergencies *empirically* but rather with the *reasons* that philosophers (and other theorists) provide for the actions these institutions take. The view I put forth in the next few chapters is not Pollyannaish, nor is it essentialist. I do not believe that there is only one right way to define and deal with all emergencies. I do though believe that the reasons that spurn us to action in emergencies can be of greater or lesser cogency and these reasons can either defend our normative expectations or erode them. Those reasons I argue should be explicit, not inchoate. The moral progress attributed to liberal democracy, to the extent that it has evinced such progress, has come in large measure through the recognition that states are normatively answerable to their citizens and that people owe each other (*ceteris paribus*) equal moral consideration in their dealings with each other. Emergencies can be frightening events. They can cost many their lives and can decimate whole states. However, they do not excuse governments or individuals from reasoning carefully about the actions they wish to undertake to end or control an emergency. Whatever course of action we take, we as moral agents are responsible for the consequences and states are no different. The ensuing is a philosophical attempt to spell out what these responsibilities look like from the viewpoint of a liberal democracy's own norms. It is an attempt to view liberal democracy from the *inside* and to see how resilient its founding principles are at guarding against encroaching coercive government. It is an attempt at guarding against the loss of normative coherence often brought on by unclear thinking about what emergencies sanction and what they do not.

CHAPTER 1: CONSTITUTIONAL DEMOCRACY AND THE ISSUE OF EMERGENCY

THE PARADOX OF EMERGENCY:

In *The Constitution of Law: Legality in a Time of Emergency*, David Dyzenhaus argues that states of emergency expose the persistent tension and vulnerability that exists even in the most established constitutional system of law. There, Dyzenhaus also explains that the danger of legal decisions taken during emergency periods is not just that these new laws may be arbitrary, but that they also set precedent and this at the detriment of established liberal and democratic principles. The veneer of constitutional legitimacy imparted to such laws does its own damage to liberal democratic institutions of government, damage that is often irreparable. As Dyzenhaus points out, a law can simultaneously be legal but arbitrary if it accords with all of the legal principles of a given legal order, but is applied arbitrarily or inconsistently in practice within that legal order. By contrast, a principled law is one that accords with all the relevant legal principles of a given legal order, and is applied consistently and predictably in practice. States of emergency for Dyzenhaus blur this key legal distinction, not only at the conceptual level, but also at the level of actual legal practice. Inattention to this fact about arbitrary law, leads to laws that are legal in wording but illegal in application, because they allow the state to contravene the established rights and protections enumerated in the charters and bills of rights of various constitutional democracies. Emergencies facilitate this slide into legalized illegality. In Dyzenhaus's terminology, "rule of law" typically gives way to "rule by law" during emergencies, leading to the formation of damaging legal and political exceptions from established law and political practice. In short, law loses its predictability and its uniformity when anything goes from the state's viewpoint. That is to say that established liberal democratic laws come to be applied arbitrarily, while all the while remaining legal, thus rendering legal rights impracticable (because they have become unpredictable in practice)[11].

[11] The rule of law as a constitutional principle bases itself in part on the existing practices of existing liberal democracies. The rule of law argues that what is done officially by the state must be done in accordance with legal order established and sustained by that selfsame state. For balanced liberal democratic government to exist there must be "a general grant of power" to the various branches of government as well as a bill or charter of rights to protect citizens. Undergirding these agreements is the idea that governments must be able to identify the specific authority under law to act as they do. This is because the tacit legitimacy of liberal democracy as a political system derives in part from the impartiality with which its laws are administered. For the exercise of authority to legitimate that authority in a liberal democracy, the laws invoked to so act need to

The idea of a state of emergency connotes more than that there is an exceptional political situation, which requires an urgent response, one different in nature from normal methods of dealing with political problems. The "state" part of the idea indicates the legally performative, illocutionary nature of the declaration of a state of emergency. A state of emergency is created by the properly formulated speech act of an official with authority to do so. Officials always claim that the declaration responds accurately to the reality of an exceptional situation. But the declaration is supposed to create a new normative order in which governments may act in ways that in ordinary times would be illegal. Thus, the idea of a state of emergency is a legal, even constitutional idea. As such, it is strange to the point of paradox. In declaring a state of emergency, a government claims legal authority to operate outside of the law, if one understands law to mean the rule of law as it applies in ordinary situations. Law is used to suspend its own operation. Legal authority – an idea which presupposes legal limits on what its delegates may do – is invoked to suspend the limits on the delegates (Dyzenhaus 804 2007)[12].

While law is a central element in the paradox of emergency, law alone will not help us resolve the paradox, as law habitually authorizes its own suspension in emergencies. Instead, against the prevailing literature, which accepts the notion of emergency at face value, I argue that we must question the coherence of the notion rather than accepting it. A successful philosophical account of emergency must first address the concept of "emergency" itself and to do this the account must conform to two broad criteria. First, it must provide necessary and sufficient conditions for a political event to count as a state of emergency. Second, if it is to be probative, the account must be wholly compatible with liberal democracy itself. That is, the account must propose a form of rights derogation that accords with both the institutional boundaries and the normative commitments of liberal democracy. It must meet these broad criteria to be persuasive. I aim to provide the substantive framework for such an account here[13].

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be publicly knowable and applied consistently. States of emergency in practice undercut all of these commitments and agreements.

[12] David Dyzenhaus "States of Emergency" 804-812 *A Companion to Contemporary Political Philosophy* (2nd ed.) (Blackwell 2007).

[13] The word "emergency" is used in two ways here. First, it is used generically, to refer to any emergency. In this first sense, emergencies can be local, national, or global, in scope. Second, the primary focus of the dissertation is with what are called "states of emergency." These are political emergencies declared by governments in the face of a specific crisis or political event with which they must grapple to prevent generalized harm. This twin use of the word "emergency" is regrettable but unavoidable, as no synonym conveys its precise meaning. I have tried to be as specific as possible about the intent of my usage throughout. The context in which the word is used makes its sense clear. The focus here is on "supreme emergencies" and "states of emergency" which I argue are genuine emergencies as opposed to being generic crises. Generic crises lack the political overtones carried by supreme emergencies. The majority of the literature on

To deal with states of emergency suitably, we need to consider the available tools fully and not just adopt the most expedient means first. At times, rights may in fact require derogation in the interest of the common good. At other times though, the state may need to assume a greater overall risk in the interest of further protecting individual rights. This dynamic is and should be, *contextual*. Without knowing the specific context in which an emergency unfolds, we cannot know which strategy to employ. In fact, we may not know that it is an emergency at all, as we could be mistaken about the type of event we are experiencing. One emergency may require that a specific right be derogated, such as the right of mobility, while another emergency may require that certain rights be additionally strengthened, such as the right to consult with counsel before standing trial. Only *deliberation* can reveal which is which. One of my main contentions is that emergencies do not absolve states of their responsibilities; in fact, it is just the opposite. It is during emergencies that citizens need their states to function justly and efficiently the most. Because the context in which an emergency occurs is as important as the measures deployed to meet it, we should begin by analyzing the profile of each emergency, before committing ourselves to a given course of action. Democracies need to prepare for eventual emergencies before they occur, otherwise they risk acting ideologically and without certainty as to their aims. What is clear, even at this early stage, is that contemporary liberal democracies need to do better than either of the two options above allow. Laws in a democracy are not fiats. Law must offer *reasons*. Derogation and risk should not be our only options. Emergencies are of varied types and therefore call for more than two modes of administration if we aim to manage them properly and equitably. We therefore need to move away from the austerity of indiscriminate rights derogation on the one hand, while simultaneously moving away from an acceptance of undue risk, on the other hand. Given the myriad threats that face modern states it benefits both governments and citizens alike to establish effective methods of emergency management. Liberal democratic governments need to move toward more viable options; embracing alternatives that guard both the state and the citizen. What then would a better set of options look like? What type of change would allow both governments to retain their authority while simultaneously preserving individual freedoms and citizens' rights?

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emergencies fails to define what constitutes an emergency or offers only circular definitions of emergencies, defining them variously as "crises," "disasters," or "catastrophes." They are none of these.

It cannot be straightforward derogation for that strategy does not always work, as rescinding the rights of citizens does not necessarily end the emergency. It cannot be adherence to a pre-emergency *status quo* either, for emergencies often alter the very conditions of that *status quo*. The fact that severe emergencies can change the existing *status quo* is a salient feature of their character and it forms the basis for my argument that liberal democracies first need to understand what types of events emergencies are before attempting to administer them. This "definitional priority" is essential for ensuring that only the right types of events be treated as emergencies. The definitional step is necessary, as many emergency measures are misapplied to events and situations that are not emergencies, thus causing confusion and leading to large-scale institutional inefficiencies[14]. Once clear on what constitutes a genuine emergency and what does not, the paradox of emergency seems less daunting.

My analysis casts doubt on the way liberal governments define emergencies arguing that "supreme emergencies," emergencies requiring drastic action by the state, are in fact exceedingly rare occurrences, when compared with "conventional emergencies," which do not require any state action whatsoever[15]. Moreover, while supreme emergencies are the severest of all emergencies, not all emergencies fit this profile. In fact, most emergencies do not and this lack of "fit" is crucial to understanding why established emergency measures do not work well. It benefits liberal governments to reevaluate existing emergency measures, which are in large part predicated solely on the scenario of a supreme emergency, to bring these measures in-line with the types of emergencies that states actually confront. Most liberal democracies will never experience a supreme emergency, yet most emergency measures legislation remains engineered to deal with emergencies of the supreme order. The idea behind this form of legislation argues that by reducing the scale of emergency measures intervention, states can deal with smaller emergencies in the same way as they deal with larger emergencies. This idea however is mistaken, as emergency situations are not always scalar in this way.

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[14] I offer examples later that make this clear.

[15] A "conventional emergency" can be a house fire or a localized flood. Local fire departments, municipal works departments, and police forces, can typically resolve these emergencies without special permissions or added resources from state or federal authorities. "Conventional emergencies" are also known as "everyday emergencies" in the emergency response literature.

A qualitative difference exists between an emergency that threatens a natural resource, such as a localized fire that threatens to destroy an old forest, and one animated by political intent, such as a large-scale premeditated act of political terrorism. The first may be a natural occurrence of limited danger to bystanders, while the second is explicitly premeditated and aims to kill civilians and government officials, thus exhibiting a form of intent missing in the first example. The first example is a natural occurrence without malice or premeditation. The second example however exhibits forethought and the intent to threaten and potentially destabilize an established political order. Analyzing scale alone would not illuminate these relevant details about these emergencies, as situational factors play a large role in determining the proper response to an emergency, whereas scale alone is a poor guide. More often than not, it is the presence or absence of intent, which determines how a government will respond to an emergency and which determines whether the emergency is political or not. However, as with all emergencies, exceptions always exist. At times, the scale of an emergency renders it a matter of global concern for authorities, despite the presence or absence of intent, such as when the emergency is so extended in scope that local authorities are outmatched or lacking in the relevant resources. Exceptions aside, the situational details surrounding an emergency matter and always make a difference in the planning of an emergency response. Authorities cannot deal with all emergencies on the same terms, yet often they do. My aim is not to argue that the scale of the emergency is immaterial to the way we think about it. It is not. Instead, I am claiming that the qualitative aspects of an emergency are more salient when deciding policy than its quantitative profile is. Looking solely at the numbers, gives a liberal government only part of a complex picture. Moreover, this simple picture is unduly reductive and forces government into a legislative "either/or" without which they would be better off. Further, a binary interpretation of emergency stands in the way of a more pluralistic form of emergency management, one that I think is better suited to the overall political character of liberal democracy[16].

[16] This commitment to a pluralistic understanding of emergency management is something I share with Nomi Claire Lazar. Lazar however distrusts what she terms "formal" institutional mechanisms. In their place, she champions "informal" institutional mechanisms, which rely on the "informal cultures" at work in key institutions to guard citizens against emergency powers excesses in emergencies. I take this reliance on institutional culture to be positive. Yet I find it an insufficient factor on which to hinge the protection of a citizen's constitutional rights in an emergency. Lazar counters that formal institutional mechanisms have

The traditional measures adopted by liberal governments sometimes suffice to contain an emergency, but this is not necessarily the case, and different governments will approach different emergencies differently. Moreover, while the procedural roadmaps used by liberal governments in an emergency vary greatly, they also share important similarities, particularly in instances where these selfsame emergency measures fail. A given course of emergency management does not always succeed in ending an emergency and when emergency management procedures fail, they typically lead to the adoption of much stricter and less flexible security measures. When emergency countermeasures fail, especially in emergencies that generate copious fear (as in cases of terrorism) liberal governments often find themselves falling back on binary interpretations of what to do[17]. The assumption of this binary policy is that the state can either increase security further, or leave things as they are and incur greater risk, what remains unclear with this way of thinking however is what a government should do if the emergency at hand persists indefinitely.

The possibility of a *persistent* state of emergency is what renders this conventional emergency measures logic unpersuasive, as current technology has made persistent emergency a live reality for governments worldwide. Governments enact emergency measures to contain and arrest states of emergency, however if despite the measures the emergency persists, then one cannot say that the decision to enact emergency measures has succeeded, as the danger the measures are designed to end, continues unabated. Similarly, if states do not enact emergency measures, one would be hard-pressed to argue that the state has taken the emergency in hand, at least so long as the emergency persists. Neither option is particularly well suited to open deliberation or to democratic government, as the first requires derogating rights, and the second involves assuming great risk, nor can either option guarantee positive results. In an emergency, the enemy can be domestic or foreign in nature and at times, they can be both. The uncertainty created by the fact that one's enemy may initially be unknown, renders governments reluctant to use the least intrusive means available during an emergency, as they do not know the scope of the emergency or its duration.

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failed historically and that we are therefore safer with informal mechanisms. Lazar's attack on the binaries of conventional emergency measures planning remains well taken and well argued.

[17] Bruce Ackerman also attacks the binary of "derogation or risk" in his recent work on emergencies. Ackerman shows how corrosive these binary regimes can be to citizens' rights and to the liberal democratic legal system overall. See *Before the Next Attack* (Yale 2006). Like Ackerman, I am committed to an understanding of liberal democracy rooted in a strong normative commitment to egalitarianism.

Persistent attacks by technologically advanced terrorist organizations or by violent domestic dissident groups can easily yield a persistent state of emergency from which liberal states would be hard-pressed to extricate themselves and this places citizens and the institutions of constitutional government at great risk, for the emergency can come from anywhere and (in theory) can involve anyone. Because of this reality, liberal democracies find themselves in a double bind in which they can derogate rights or assume great risk, whichever they chose they remain faced with an emergency requiring a resolution, but lacking an evident way forward. Stricter emergency measures come into play when emergencies get out of control as governments in the wake of an ongoing emergency often aim to reestablish social order, enforce the law, and maximize safety. This is understandable, but achieving this end during an ongoing emergency is an extremely difficult task and it frequently leads democratic governments to adopt mechanisms and measures that are antithetical to established liberal democratic rights. The empirical record on these issues bears this assessment out[18]. The varied mechanisms of emergency management also erode public trust in the institutions of democratic government and make citizens suspicious of the motives of their policymakers and lawmakers, as they cast doubt on the public's ability to vet changes in policy and their ability to place their trust in institutions responsible for maintaining governmental transparency. Keep in mind that few (if any) of these mechanisms are open to public scrutiny and some are not even open to scrutiny by branches of government other than the one that authorizes them. Additionally, the success or failure of aggressive emergency countermeasures can be difficult to predict and this ambiguity can be deeply counterproductive as well. These counterproductive consequences can easily aggravate an already dangerous emergency, particularly in instances in which the established procedures of emergency management fail to produce the intended result of controlling the emergency[19].

[18] Ackerman's *Before the Next Attack*, is instructive in this regard (Yale 2006). See also, "Exceptions That Prove the Rule" by Kim Lane Scheppelle in *The Limits of Constitutional Democracy* (Princeton 2010). Scheppelle's assessment shows how dire the situation is once we expand our purview to the entire globe and include non-liberal democratic countries in the analysis. Emergencies pose real problems for governments.

[19] C.A.J. Coady, *Morality and Political Violence* (Cambridge University Press, 2008) 154-158, 166-167, 174-175, 289-293.

DEROGATION AND COERCION DURING (LIBERAL) EMERGENCIES:

Failures in security are more than institutional limitations faced by states, they serve I argue to reveal an important tension at the center of liberal democratic constitutional emergency government itself. Liberal governments when faced with emergencies turn not to their principles but to arbitrary coercion to resolve the issue. This development is disturbing for many reasons, most of which are addressed in what follows. As governments have a monopoly on the organized use of violence, they are the sole state actors able to punish lawfully and to imprison individuals. When a democracy invokes emergency measures and a state of emergency is declared, the rights that usually protect individuals can be suspended by order of the government. This result is paradoxical because it allows states to violate rights to protect rights. If the rights being protected are different from the rights being derogated there is no paradox, but if as often happens the rights being derogated are the same rights that the state has set out to protect, then a clear paradox emerges. Some will object that we always play rights off each other, yet this misses the larger point. Our everyday tradeoffs are not severe curtailments on our rights, as we typically balance one right off of another in daily life and do so for our benefit. Derogation is another business altogether, as those accused of wrongdoing will face almost certainly legal prosecution and punishment. The same agent responsible for overseeing the legal protections of citizens, namely the state, often suspends those same legal protections in emergencies. Further, states cannot know in advance if the individuals whose rights they have suspended are guilty or not, leaving citizens with little recourse, as their traditional protections for arbitrary prosecution or detention are already suspended. Emergency derogation obtains in all the world's liberal democracies. As such, its use leaves the state in the position of being the only lawfully coercive source in the society, while simultaneously rendering the state the sole arbiter of rights derogation, in effect cutting the people off from all political power and concentrating power solely in the hands of the elected. Far from preserving liberal democracy, derogation threatens it. Without proper control and oversight, rights derogation can easily become undemocratic and illiberal, particularly in cases where states face extended states of emergency. While emergencies do not automatically turn liberal democracies into tyrannies, they do expose the arbitrary dimension of emergency

powers legislation, potentially undercutting the institutional stability of democratic liberalism overall.

Liberal societies characteristically address concentrations of power through institutional means. By establishing competing branches of government, democracies attempt to avoid undue concentrations of influence and coercive power, precisely the types of concentrations of power made attractive in an emergency. Confronted with a mass emergency, it is tempting for states to employ all the means at their disposal and to use all of their force, to end the crisis. Yet the wrong coercive force applied incautiously, can damage the very thing the state aims to protect. While dictatorships have free reign when dealing with a crisis, liberal democracies are not as free. Examining the institutional mechanics of liberal democracies, one can see that during a declared state of emergency, the executive branch of the government customarily assumes greater priority over the other branches, thus making the executive branch the *de facto* arbiter of citizen rights for the duration of the emergency. While liberal courts are free to disagree with the decisions taken by the executive, courts have historically been slow to act to protect rights from derogation during emergency government, preferring to defer instead to the authority of the executive branch[20].

Courts typically side with the executive, and allow severe rights derogations to continue unabated, despite their ability to contest such derogations. Courts defer for four main reasons. They take the executive branch to be privy to classified information, to be able to act quickly, and to be able act without the need for protracted deliberation; courts also take the executive branch to typify the people's democratic will, thus feeling the need to grant the executive freer rein than usual. Much the same occurs with the legislative branches, which also commonly defer to the executive branch and this for similar reasons. Citing the need for immediate action and increased security as motives and by extension loosening their grip on various forms of traditional governmental oversight, legislators are reluctant to block or censure the executive or its actions in an emergency. This problem of acquiescence to the executive branch affects all liberal democracies and the pattern I identify exists worldwide. All liberal democracies are susceptible to such acquiescence and therein lay the problem. Because emergencies are unpredictable and their consequences are

[20] Bruce Ackerman, *Before the Next Attack* (Yale 2006) 101-105.

at times devastating, politicians are reticent to second-guess decisions taken at the executive level.

What concerns me is the fact that rights are simply too easy to derogate in an emergency, with many derogations persisting long after the emergency is over, making the issue a difficult one to ignore for any liberal democracy interested in maintaining its established civil and political rights. The interpretation of emergency measures I have offered thus far is not as idiosyncratic as it may first appear, as many measures that liberal democracies enact in times of emergency are draconian when considered by those democracies own lights. Few of these measures are tolerable outside the context of an emergency and most are unthinkable during peacetime. Consequently, I propose that there exists a disconnection between the way liberal democracy functions in times of peace and the way it functions during a crisis, a disconnection that casts doubt on democratic liberalism's moral and political commitments overall. Are we to accept that in a state of emergency liberal states can discard rights and turn solely to coercive measures, or do we also want to argue for the view that rights matter, perhaps particularly in emergencies?

I argue for viewing both stereoscopically and think that if we take the second option more seriously, then we are all better off as citizens, for reasons that become apparent as we go on. Liberal democracies with written constitutions are normatively committed to a set of constitutional essentials, the purpose of which is the establishment of a common institutional framework. As liberal democratic forms of government, liberal democracies commit themselves to respecting the civil and political rights of their citizens by following the guidelines provided by their constitutional essentials. These civil and political rights are enshrined in the charters and bills of rights that animate the rule of law used in democratic liberal politics and give these societies their overall structure and political character. While provisions for the derogation of select rights exist in all constitutional democracies, charters and bills of rights do not define the *specific circumstances*, under which derogations of rights can take place. At best, the documents allow that derogation is an available tool and that in war many rights are rescindable even if few provisions exist for reinstating rights post-rescission. This explanatory gap is troubling, as no liberal government can claim to be in accord with its own constitutional essentials, if it allows itself to substantively derogate

rights, a right accorded to liberal democracies under existing emergency legislation, or if it derogates them arbitrarily and without democratic foresight.

Even democracies without explicit charters or bills of rights, still evince respect for civil and political rights via the institutional resources of the state, pointing out just how integral rights are to the self-understanding of liberal democracies worldwide. This respect for civil and political rights obtains in constitutional republics and in constitutional monarchies alike. Furthermore, despite the best efforts of elected officials, rights of differing sorts are derogated in emergencies with most being derogated on haphazard grounds, mostly having to do with a government's lack of information apropos the emergency. Moreover, this pattern obtains across many different countries, including politically progressive ones. The pattern of derogation recurs for reasons particular to each jurisdiction but in each case, it is the unpredictability and severity of the emergency that makes it so. And despite their other differences, the overall picture of rights derogation remains strikingly stable across countries and governments. This is due to the simple fact that finer grained tools are not available, which means that states cannot use them. It bears noticing that governments rarely reinstate derogated rights *during* an emergency and few citizens are ever awarded damages for the potential torts committed by the state in an emergency.

Be it through judicial precedent, or through parliamentary safeguards, liberal democratic countries (in the main) create an *expectation* of protection and respect toward established civil and political rights. That is, with one exception. In a state of emergency, the normal parameters of these rights change and they commonly come under attack from the very institutions charged with their protection (i.e., the courts, the legislature, and the executive branch of government) and this is troubling. Faced with a dangerous emergency, liberal governments find themselves with a practical and time-sensitive choice to make, derogate rights in the interest of security, or defend rights and liberties, at the risk of allowing the emergency to worsen. Emergencies it seems create a context for which the constitutional essentials of most liberal democracies are ill prepared or at least a context for which they are unable to provide extensive specifics. The actual choice to derogate is never easy and the procedural and institutional guidelines for instituting emergency government do not cover every potential category of emergency, nor could they. Nevertheless, some

forethought seems in order, though it is sadly lacking at present. Emergencies are particular events in the life of a democracy, each emerging with its own character and profile.

No one set of emergency measures will therefore fit all emergency circumstances, thus leaving the question of which strategy to adopt, an open one. To be fair, at times governments strike the right balance between offering security and preserving rights, but without an explicitly worked out rationale for how to proceed in each case, their results remain on my view deeply arbitrary (at best)[21]. This is because more often than not, the state of balance arrives accidentally and not because of careful institutional planning or impartial reasoning. As a result, the constitutional essentials at the base of liberal democracy become subject to arbitrary (and potentially capricious) revision during a severe emergency, arguably undercutting the very purpose for their existence. This is not surprising when one considers that there is no philosophically satisfactory justification for the myriad ways that liberal democratic governments deal with emergencies. More troublingly still, no agreed upon roadmap exists for the way that liberal constitutional democracies should administer rights when states of emergency appear, let alone a comprehensive and explicit "stand-down procedure" for administering the aftermath of an emergency. At most, we in the West have rules of thumb for deactivating emergency government and for restoring previously derogated rights-statuses, but our makeshift procedures for undoing derogation are, even at their best, unprincipled workarounds. Moreover, they will remain second and third-best solutions to a full-fledged institutional theory of emergency until the *arbitrary* element of their makeup is constrained by an explicit set of political and ethical principles, or so I am arguing. The potentially capricious nature of rights derogation makes it a poor tool with which to conduct policy and its continued use without proper public oversight endangers liberalism and democracy by creating a set of procedures that are immune to public scrutiny, while also being unpredictable in that the varied nature of emergencies seemingly requires sundry forms of derogation. The key distinction here is therefore the fact that rights are not only curtailed in

[21] Philip Pettit's work on Republicanism and non-domination, offers a particularly astute analysis of the ways in which arbitrariness in government, compromises rights, and imperils the status of full citizenship. For more see Pettit, *Republicanism* (Oxford 1997). Richard Bellamy's views on liberal democratic constitutionalism are also important influences in my analysis of states of emergency. See Bellamy on "arbitrary rule" and his critique of judicial review in his *Political Constitutionalism* (Cambridge 2007). Bellamy and Pettit both oppose arbitrary measures enacted and pursued by governments as it substantially undercuts governmental responsibility and accountability and do so on philosophical and normative grounds.

this situation but that they are severely curtailed and this without *predictability*. Faced with a potential crisis, existing emergency measures legislation is often the only choice a sitting government has.

My argument should not be taken to imply that such measures should not exist. My thesis is not an abolitionist one. Rather, the aim here is to show that they do not work well, at either the practical or the conceptual level, and that emergency measures derogations therefore need to be overhauled. This first chapter comments on what it sees as the lack of a coherent normative and empirical story about emergencies, a story that could unite these varied and (at times) unsystematic measures. Subsequent chapters construct a theory of emergency that sidesteps the failures of previous theories by taking the features I criticize here into account.

EMERGENCY ITS CHARACTER AND LITERATURE:

The viability of this project is borne out by the fact that no unified standard with which to judge emergency measures from a normative and philosophical perspective presently exists, at least none that has met with wide acceptance. The failure to provide a comprehensive and normatively compelling theory of emergency is itself explained by the absence of an agreed upon account of what constitutes an emergency as such. The position one holds on these matters is informed at least in part, by the view one takes on the role of government. Further, one's position will also be shaped by the way one defines emergencies, so many of the normative questions triggered by my discussion of emergency also come to touch on questions about how we understand constitutionalism, liberalism, and their relation to public accountability[22]. The very concept of "emergency" itself has been misunderstood I propose and hence measures for dealing with emergencies, find themselves in turn dangerously off the mark. As a result, the emergency measures that do exist are for the time impracticable in their aims. I submit that with a better understanding of the *character* of the emergencies that they seek to contain, we can make these measures

[22] I take it as a given in most of what follows in succeeding chapters that liberal democratic constitutional governments aim to abide by their laws as much as possible. Many critics of liberal democracy writing on emergencies do not value individual civil and political rights as much as liberal democrats do. It is therefore not surprising that their views on emergencies differ starkly from those of committed democrats.

less so. The conceptual lacuna that leads to these problems is itself disturbing, and this as I have indicated, for several reasons. Without an account of what a state of emergency comes to conceptually, it becomes impossible to derogate rights in a consistent, non-arbitrary, and philosophically coherent manner.

Of the many attempts in the literature to provide a coherent account, all fail to address the general phenomenon of emergency in a comprehensive way. So while some accounts deal well with terrorism for example, their recommendations cease to apply when faced with the exigencies of a natural emergency. The main theories in the literature also exhibit serious blind spots, rendering them poor guides to a comprehensive general theory of emergency[23]. Some popular accounts allow states to derogate all individual rights, at least in principle, while other accounts argue against any rights derogation at all[24]. Many existing accounts simply assimilate all emergencies together, neglecting to notice important differences between emergencies. The reason that these disparate accounts remain incomplete on my view is that their focus is tainted by the fact that they take the notion of an "emergency" as a given. Rather than analyzing the concept of "emergency," other commentators have tacitly accepted the idea that all emergencies are alike in some deep sense, making further analysis of the concept unnecessary. This may indeed be the case, but this is a premise that requires sustained argument, and not something we should simply take for granted. Over and against these views, I submit that little unites emergencies in the sense in which they are typically taken to all be alike, save for their *phenomenology*. There indeed there exists an important commonality. Accounts that view all emergencies in the same general light, without specifying what about them makes them alike, fail in the end to be usefully probative. A proper account of emergency government and its relation to liberal democracy needs to be both conceptually and empirically adequate to the phenomena it is trying to describe and address. To date, no account of emergency accomplishes this, as

[23] Nomi Claire Lazar, *States of Emergency in Liberal Democracies* (Cambridge University Press 2009). See also, *Emergencies and the Limits of Legality* (ed.) V. Ramraj (Cambridge University Press 2008) for a comprehensive taxonomy of the available positions in the literature on emergency measures and emergency government in liberal democracy. Ramraj deals with conceptual, legal, and practical issues in his collection, showing the extent to which these are intertwined and inseparable (in practical terms).

[24] Oren Gross's view in *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge Studies in International and Comparative Law 2006) expresses one extreme, while Eric A. Posner and Adrian Vermeule's, *Terror in the Balance: Security, Liberty, and the Courts* (Oxford 2007) expresses the other extreme.

most only deal with one type of emergency and none deals with the general phenomenon of emergency government as it occurs in liberal democracy. A philosophically successful account must first provide necessary and sufficient conditions for an event to count as an emergency.

And if it is to be compatible with liberal democracy, the account must propose a form of rights derogation that accords with both the institutional boundaries and the normative commitments of a liberal democracy. The task of this dissertation then is to untangle the conceptual muddle that accompanies most accounts of state emergency, and to offer a comprehensive account of emergency that is compatible with the overall moral and political goals of liberal democracy. This approach may itself appear controversial, yet I think it to be in line with the political ethics of recent political liberals, who have tried to widen our understanding of liberal democracy, and to provide a normatively satisfying justification of its foundations and key institutions. The present is an exercise in political ethics and not just in political taxonomy. The goal is to do more than categorize various emergencies; it is to do each type of emergency justice, without sacrificing the ethics of liberalism or the institutional benefits of democracy, in the process. The very idea that liberal democracies have normative commitments to their citizens, an idea which was previously a commonplace in liberal political theory, has been thrown into doubt by the spate of emergency declarations of the past few years[25]. In its place, commentators and critics of established liberal democratic safeguards against executive overreach have argued that we now live in the midst of a "new normal." Severe emergencies, these critiques argue, displace traditional liberal safeguards in order to make room for needed new emergency measures. The new measures can (and should, on some views) curtail whatever commitments liberal states are believed to have concerning their citizens. Against this perspective, I submit that democracies owe certain specific rights and freedoms to their citizens *qua* liberal democracies. Those who wish to argue against this view face the burden of proving otherwise, as the history of liberal democracy appears to run parallel with the tendency to enlarge and entrench liberal democratic rights over time and it is difficult to

[25] For the status of egalitarian rights and their connection to liberal democracy, see John Rawls *Political Liberalism* (Columbia University Press 1993) and Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977). For recent events and their chilling effect, see Oren Gross, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge Studies in International and Comparative Law) 42-45, 56-57, and 74-75.

think of the development of one without also thinking of the development of the other. Further, all modern constitutional democracies provide protections to their citizens, even if these protections and liberties do not all assume an identical institutional form. Some states even provide substantial rights to non-citizens.

Because of this, I take it that political and civil rights are settled and legitimate parts of life in liberal democratic countries, requiring no further defense, save for the realization that the history of liberal democracy is the history of these civil and political rights. They are in a way the foundations of liberal democracy herself. Therefore, we should address the vexed issue of their derogation from within the established strictures of liberal democratic thought. We should not view rights (as some have) as troublesome impediments to unfettered state action[26]. Whatever changes emergency situations force liberal democracy to face, constitutional democracies must respond with a set of measures that are consonant with their political values, while taking onboard the demands of the emergencies that they face. My argument against the "new normal" is that if rights are to have a secure purchase in liberal democratic nations then their legal, political, and practical status, cannot vacillate wildly due to the presence or absence of emergencies. Political and civil rights protect all citizens, at all times and new emergencies should not change that, otherwise we allow emergency measures to introduce undue arbitrariness into our constitutional essentials. To respond to the types of challenges I have been describing, we first need to begin by viewing emergencies as political events, and not as just policy issues related one-dimensionally to public safety or to public administration. Citizens in liberal democracies are not apolitical actors and therefore cannot be dealt with as such, for this too oversimplifies the extant relationship between states and their citizens. Citizens in pre-emergency societies have a political voice; it is unclear why they should lose this voice due to an emergency. Such a loss would require a justification and appeals to increases in security in general do not seem to be a sufficient incentive. One way to insure that that political voice is not stifled by

[26] Eric A. Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* (Oxford University Press 2007).

emergency countermeasures is to ensure that rights derogation does not rest solely on arbitrary factors. Recourse of some sort needs to be available to citizens in emergencies[27].

Emergencies help to foreground a relationship between states and their citizens that typically remains unseen and they provide an opportunity to refine the philosophical underpinnings grounding democratic liberalism and to expunge arbitrary elements from these. The state in most cases has the authority to enact legislation that places limits on the civil and political rights of its members. This is typically referred to as the state's "discretionary authority." States can exert authority to the extent that their exercise of this authority is bound by commonly known standards and that the exercise of said power is bounded, in the sense of having limits to its scope of potential application. Rules, procedures, and goals, need to be explicit and stated in advance if the authority exercised by the state is to be considered legitimate, otherwise its actions can be taken to be arbitrary in the pejorative sense already set out here[28]. The state can, if it deems it necessary, employ violence and imprisonment as tools with which to implement the aforementioned legislative agenda but because the state has this latitude, it also incurs the responsibility to use these and other legislative tools with discretion. Otherwise, state actors (judges, legislators, and cabinet members) through their actions, place themselves outside the constitutional bounds of the law and beyond the bounds of "discretionary authority." For power to be exerted properly in this context, it is important for the state to be able act effectively, which is to say, the state must have the actual capacity to do what it sets out to do. "Mere normative standards do not count […] unless they are meaningfully backed by some sort of enforcement mechanism." Otherwise, formal law without effective constraint is of no use. This is equivalent to allowing the police to search people's homes without a warrant (Lovett 96-97 2010). Some, such as Oren Gross, believe that it is appropriate for state actors to use extra-legal measures (in exceptional circumstances) when dealing with a state

[27] I do not possess a complete theory of recourse for wrongdoing done in emergencies. I simply underscore the importance of its existence. There is no reason in principle why such a theory could not exist. Civilian remedies in civilian courts do exist but these only take effect post-emergency. Moreover, not all remedies need to be judicial. Public admissions of wrongdoing by the state may, in some situations, be a sufficient remedy.

[28] Pettit *Republicanism* Chapters 5 and 6 discuss this issue at length (Oxford 1997). Frank Lovett's *A General Theory of Domination and Justice* is also informative on this issue, particularly Lovett 95-99 (Oxford 2010).

of emergency. Others, such as David Dyzenhaus, argue that it is never justified to legislate from outside the law; that is to use the fact that an emergency has been declared as an excuse to legislate in a way that runs counter to established law and precedent. Dyzenhaus thinks that legislating from without law is incoherent, even in cases of supreme state emergency.

Still others, such as Nomi Lazar, favor a third view as regards emergency government[29]. For Lazar, emergency powers provisions of whatever type must conform to and be continuous with the normative commitments of liberal democracy. Her view differs from mine in that Lazar believes that the value of stability warrants the use of "extra-liberal" measures in emergencies, an idea I find unpersuasive and potentially dangerous (Lazar 89 2009). Lazar does not define or elaborate on the nature of these "extra-liberal values" in her account, instead she attacks what she see as the "neo-Kantian" roots of contemporary liberal democratic theory. Lazar addresses the perceived shortcomings of Kantian inspired political liberalism by turning to a Lockean version of liberalism for an alternative. Yet Lazar presents an unconventional reading of Locke's liberalism. For Lazar, Locke's view is superior to Kant's because it is instrumentalist about liberal democracy. Unlike Kant, Locke does not expect individuals or governments to be perfectible and thus his liberalism does not falter when institutions and individuals depart from established law during an emergency. For the Lockean, liberal emergencies are a matter of staying the course and of making sure that the institutions of government are fulfilling their instrumental function, as rights guarantors. There is a problem here however, as Locke grounds his liberalism on a prerogative power granted to kings *pre-politically*. Lockeanism involves the presence of a notion of sovereignty that rises from a hypothetical state of nature unlike anything extant in present liberal democracies. Whatever the merits of this interpretive maneuver, it is not completely persuasive to argue as Lazar does, that existing liberal democracies are rooted solely in either a "neo-Kantian" form of liberalism or a "Lockean" one. The history of liberal democracy is much more complex that either of these alternatives allow. Further, the failure to explicate just what "extra- liberal" measures come

[29] Nomi Claire Lazar, *States of Emergency in Liberal Democracies* (Cambridge University Press 2009). I am in broad sympathy with Lazar's analysis but disagree with her proposed resolution to the problem of emergencies. For the full panoply of available views on the theory of emergency government, see *Emergencies and the Limits of Legality* (ed.) V. Ramraj (Cambridge University Press 2008).

to, along with the interpretative overreach of claiming as Lazar does that liberal democracy is grounded solely and exclusively in neo-Kantianism or neo-Lockeanism is worrisome (Lazar 13-5 2009). Lazar herself notes the weaknesses and dangers of employing "extra-legal" norms during emergencies[30].

Moreover, the roots of what becomes liberal democracy extend far further back in history than neo-Kantianism and neo-Lockeanism as Hobbes's views, which are distinct from both, predate both and serve as an important counterweight to Lazar's interpretation of Lockean liberalism. The contractarian tradition that Hobbes creates also contributes to the tradition of liberal democracy via the route of republican theory, which Lazar contentiously chooses to label a form of exceptionalism similar to that offer later by Schmitt (Lazar 20-21 2009). While Lazar's is not a historical treatise, the history of these debates has helped shape them and needs to be attended to more carefully if Lazar is to make good on her claims against Lockeans and Kantians. In addition, numerous neo-republican writers influenced by Quentin Skinner and Philip Pettit have reinterpreted Hobbes and some Roman republican writers with a view toward contemporizing their views and comprehensively refuting the idea that republicanism warrants the limiting of rights arbitrarily. If anything, the entire thrust of this emerging literature turns on the belief that arbitrary rule is never permitted. Therefore, the idea that republicanism would sanction the enactment of extra-legal measures during emergencies is hard to square with the overall tenor of present day republican theory. If anything, on the view of neo-republicans, the

[30] "The external or extra-legal strategy, which is almost as old as formal, internal emergency measures, purports to solve the problem of contamination by keeping emergency action from legal 'sanctification,' while tacitly supporting illegal action. But, as we saw in Chapter 2 on the origins of exceptionalism, such tacit support suggests a two tier ethics that discourages accountability, while creating few incentives for good behavior. At the same time, there is nothing in this strategy that establishes that political officers are in fact above normative considerations, and many theorists of external powers, Gross included, offer models that are strictly reliant on the assumption that political actors would have no such exemption. But, while external emergency powers are not in fact states of exception, they may appear to be such to the political officers themselves, who are apparently tacitly excluded from the absoluteness of law. It then remains within the purview of the people or other state mechanisms to attempt to rein them in through informal means" (Lazar 140 2009). This is not a ringing endorsement of the extra-legal measures model. My criticism that all existing emergency models discourage accountability on the part of those in power is present here. I believe that Lazar does not take this threat seriously enough in her own account.

people's rights come first always and the sovereignty of the king or of the state is only an instrument via which the will of the people is to be channeled[31].

It is also doubtful that Kant can be (comprehensively) read as Lazar reads him, as his view is more complex than she sometimes seems to allow. As concerns instrumentality, it is unlikely that people will give away their rights solely for promises of security, that security needs to be tangible and quantifiable, two factors not met by any of the existing theories of emergency I have so far discussed. Whatever view one favors in the end, I venture that it is worth considering the effect that emergencies have on the way liberal democratic polities conduct politics, regardless of political ideology or interpretative preference. Part of my overall argument is that states of emergency disrupt and distort the normal functions of liberal democracy, so relying on established interpretations of the liberal tradition will ill serve us[32]. Among other things, I attempt to show that those who disagree with my characterization of emergency government fail to consider the subtle ways in which emergencies redraw the boundaries of our political and civil rights through the mechanism of rights derogation. I also argue later that whether critics disagree or not, they still owe us an account of the proper relationship between emergency and liberty, as this is a key point of tension.

EMERGENCIES AS A CONCEPTUAL PROBLEM:

[31] Contrast this with Lazar's reading of republican emergencies, which has little to do with contemporary emergency government. "Thus, the emergency exceptionalism of Rousseau and Machiavelli is a republican exceptionalism. Soul and city are not so distinct. Rousseau and Machiavelli exemplify a position in which the existence of the state is necessary to certain kinds of ethics, where these ethics have the character of republican ethics, and where 'normal' or 'quotidian' ethics, embodied by and upheld within the state, are dependent upon a secondary mode of ethics, which I have called 'existential.' But because the state is constantly in danger, the split between these different ethics, between (quotidian) norm and (existential) exception is not temporal but individual. There must always be someone who is not bound by quotidian norms because crisis could arise at any moment. In Rousseau, these exceptional figures generally have the character of wise and contemplative men and things move slowly in Rousseau's political universe. We have the impression of a parent watching a playing child from a window. Lackadaisical as it may be, supervision is constant. In Machiavelli, for whom politics in all of its gory minutiae was more of a delight and a calling, parenting is no idyll. The exceptional intrudes permanently on the normal in a more immediate and explosive way" (Lazar 35 2009).

[32] This is a point made forcefully by conservative commentators and is not given sufficient credence by liberal writers. The conservatives are right to emphasize the changes wrought by emergency on my view.

I offer a *conceptual analysis* of emergency, underscoring my earlier claim that genuine emergencies are exceedingly rare events and arguing against the uneven emphasis that emergencies (and emergency measures) have received of late in the philosophical literature. Looking at some of Michael Walzer's work, I propose that much of the current debate over emergency powers provisions is blind due to a fixation on the scope of these powers, to the exclusion and detriment of the more important question of who authorizes emergency powers and for what benefit. Walzer is right to focus on the role of the political community in an emergency for it is the political community and by extension the citizenry, that after all comes under mortal threat during a supreme emergency and not just the apparatus of the state.

The state is an outgrowth of a political community Walzer argues, not the other way around, and we should therefore respect the *explanatory priority* of political community over state action. It is the political community in the end, which emergency measures provisions aim to defend, and therefore any attempt to harm or severely abridge the legitimate and hard-won political entitlements of this community, in the interest of some amorphous form of "security," deserves to be resisted under a liberal democratic system of government[33]. Political power ultimately resides with the people in a democracy and their oversight is therefore not available for derogation, not matter what the threat. States' rights after all do not typically trump citizens' rights in liberal democracies. There are many competing accounts of what constitutes a proper response on the part of a liberal democratic government to an emergency, but all of these accounts share certain common traits. That is to say, there are features of liberal democracy that are useful for cobbling together a theory of emergency response that is suitable to this specific form of government. Using these common traits, one can ascertain that a liberal democracy is a system of government with at least the following features, each of which is at least potentially compatible with a liberal democratic emergency response. Democratic liberal constitutionalism describes any political system that has free elections, a multiplicity of political parties, a set of institutional mechanisms for making political decisions through an independent legislature, access to an independent judiciary, and a state monopoly on law enforcement. One may wish to add the caveat that all existing Western constitutional

[33] Michael Walzer, "Emergency Ethics" reprinted in *Arguing about War* (Yale Note Bene, 2006) 33-50.

democracies guarantee civil and political rights through the mechanism of a constitution, an explicit bill of rights or charter of rights, and a judiciary that respects these rights, either explicitly or through respect for explicit legal precedent. Any state that does not exhibit these traits in some measure is not a full-fledged liberal democracy. So while Great Britain does not have an explicit bill of rights for example, it nevertheless exhibits respect for rights of this nature, in part through judicial precedents and in part through legislation. While the configuration of these common elements may differ from nation to nation, a nation's willingness to observe and respect these institutional mechanisms renders that nation, a liberal democratic and constitutional territory. A genuine liberal democracy will stray from the enforcement of these constituent elements of its makeup, in only a few circumstances.

The declaration of a state of emergency by the state is one such circumstance and it is a limit-case of what a liberal democracy can tolerate (and importantly of what it cannot). State emergencies therefore place constitutional democracy in an awkward position with regard to the way they will administer rights and other entitlements. As political events, states of emergency compel governments into action by making heavy demands on their resources and by forcing the legislative, judicial, and executive branches of government, to coordinate their activities in a bid toward meeting the impending danger. Despite efforts at coordination, governments founded on a constitutional separation of powers often find such demands difficult to accommodate in practice. Empirically speaking, democratic governments committed to independence among their official branches, have a mixed record when it comes to meeting the specific challenges posed by emergency government[34]. Committed to the legal preservation of individual rights and liberties, liberal democracies regularly find themselves pressured from within to constrain rights, while at the same time finding themselves pressured to react, from without. This dual responsibility helps place constitutional democracy on unsure footing, by forcing it to continue ensuring security, while also respecting the rights and liberties it has conferred to its citizens under the law. This seeming inconsistency has led many commentators to conclude that the responsibilities of the liberal state change during an emergency. Yet this view has not met

[34] Richard A. Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* 17-51 (Oxford University Press, 2006).

with widespread approval in part because some commentators worry about sacrificing rights for little gain, while others argue that a dangerous legal precedent will have been set[35]. Each of these perspectives has something to recommend it, yet each misses something salient, namely the regrettable fact of political life that unforeseen events often set the rules for their own engagement, so it is with state emergencies as well, as they often arrive with little warning. When a severe emergency occurs, rights typically become the first causalities of any move toward emergency government. This cycle of rights contraction occurs regularly and this is for good reason.

To contain an emergency, states need to be able to control three key factors related to the emergency: the flow of information, the flow of materials, and the flow of people. As timeliness is a key component of emergency management, states typically find themselves left with only two broad strategies at their disposal. The state can allow for a free flow of information, materials, and people, or it can limit information, materials, and mobility, by derogating various rights at various levels. This "time crunch" places states at the center of an unenviable dichotomy, and it sets the stage for much of the discussion over terrorism and emergency that has preoccupied recent political philosophy. In cases of extreme emergency, leniency is rarely an option, as large-scale emergencies can sometimes begin affecting previously unaffected populations in short order. This is what occurs, for example, in cases of dispersed terrorist attack. Contemporary technological advances have made it easier for terror groups to stage repeated attacks, over a large territory, and to control both the duration and the intensity of the attacks. Other times, emergencies simply get worse as time progresses, as in cases related to epidemics, floods, or industrial disasters. In all these cases, if the state is truly caught off-guard, it will find itself at a distinct organizational disadvantage, scrambling to outpace the ongoing disaster and unable to contain any fallout. Many have argued that the only way to regain the organizational advantage is for the state to clamp down on rights and liberties (i.e., to stem the free flow of people, things, and information). While a tempting and understandable strategy, wholesale

[35] This is a point often made by William E. Scheuerman in *Between the Norm and the Exception: The Frankfurt School and the Rule of Law* (MIT Press 1997). John P. McCormick (et al.) make similar points in Carl Schmitt's *Critique of Liberalism: Against Politics as Technology* (Cambridge University Press 2008), *Confronting Mass Democracy and Industrial Technology: German Political and Social Thought from Nietzsche to Habermas* (Duke University Press 2002), and in *Weber, Habermas, and Transformations of the European State* (Cambridge University Press 2009).

derogation of this type is usually a reactionary strategy and one that yields little tangible benefit in the end. Liberal democratic states owe their citizens better and will be more successful in managing states of emergency if they plan comprehensively for contingencies rather than relying (as they do) on the dull instrument of derogation to do the bulk of their organizational work. Derogation of itself does not yield security and is not a substitute for advance planning. It also does not get states out of the epistemic bind they find themselves in during an emergency. The state must still identify and treat the relevant threat if it is to end the emergency. Derogation cannot absolve states of this requirement, as its use is tied to the wider question of determining the nature of the emergency being faced, to say nothing of formulating a response to the challenges posed by the emergency. The suspension of one's rights is a serious legal, moral, and political matter, as there is little recourse if one's rights are derogated during an emergency period.

The use and abuse of derogation is also a conceptual issue, as the way one defines and conceptualizes derogation will shape how one sees emergencies and how one views the conduct of liberal democracies during emergencies. What one values defines what one will accept as reasonable, politically speaking[36]. For this and other reasons, states of emergency are more than just abstract procedural puzzles to be resolved by applying established political rules; the empirical immediacy of an emergency renders protracted debate unfeasible and can make standard parliamentary (or congressional) procedures appear ineffective in the eyes of both citizens and legislators. As Bruce Ackerman has argued, we must take into account the psychological dimension of an emergency when formulating a theory of emergency, as psychology weighs heavily on both the public and the politicians charged with dealing with the emergency. Terrorism in particular, with its potential for large-scale causalities, can unduly influence even the most sober of politicians by replacing reason with fear. When lives are at stake, governments must take action. Regrettably, emergencies are often met with blunt remedies, which too often trample rights without tangibly increasing long-term security. Moreover, the literature shows that states of all

[36] Even more so in emergencies as Lazar points out. We cannot elide values in political discussions or calculations. "Those derogations of civil and political rights that states of emergency allow are *justified on the basis of countervailing values related to order*. Rights are derogated for the sake of order every day, too. It follows from this that *liberal values are not alone in providing moral animation to political life*. I will argue for a kind of ethical-political pluralism that obviates the need for the logical gymnastics of some recent philosophical liberals who wish to recognize the value of culture or patriotism" (Lazar 6 2009 [Italics mine]). I give liberal democratic values greater weight than Lazar does.

stripes (liberal democratic and other) often abuse the additional powers sometimes granted to them by emergency legislation, resulting in arbitrary uses of power.

EMERGENCIES DEFINED VIA MINIMALIST CRITERA:

States can also exaggerate or otherwise manipulate crises to serve the narrow political agendas of those in power. Being able to distinguish what makes one situation an emergency rather than another at the conceptual as well as the practical level helps to mitigate the risks associated with political manipulation or exaggeration. Failure to distinguish between genuine emergencies and mere disturbances leads to fear mongering and ultimately to the misuse of legislative and policing powers.

In this mitigating spirit, I propose a minimalist standard, as I believe that real emergencies can (in principle) be distinguished from apparent emergencies, by the explicit use of three simple criteria. A genuine emergency is by definition: a **sudden** and **unforeseen** event (or series of events) that requires **urgent** attention or immediate interference. For an event to qualify as an emergency, I propose that it must at least exhibit these three characteristics (i.e., suddenness, urgency, and limited foreseeability). States of emergency for their part require an additional caveat, on my minimalist view. To be authentic, states of emergency must place citizens and/or key public institutions in grave imminent danger. Failing these explicit and minimalist criteria, I submit that an emergency fails to obtain and that the deployment of the mechanisms of emergency government should not be required or enacted by a liberal democratic government. My minimalist view will of course have its critics. Some, such as Adrian Vermeule and Eric Posner, argue that emergencies are unforeseeable (even in principle) and that policymakers should therefore be free to act as needed to save lives and this with only minimal legislative oversight[37]. While Posner and Vermeule focus mostly on the legal aspects of emergency in their definition of the term, looking mostly at what a judge would do in an emergency, they still manage to capture what many envision by an "emergency situation." Against their legalist view, I argue for a simpler and more direct view, which dispenses with many of the unargued for assumptions represented by

[37] Eric A. Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* (Oxford University Press, 15-18 2007).

accounts of emergency such as Vermeule and Posner's. My view is intentionally constricted whereas theirs is designed to be as expansive as possible, encompassing all of government in its purview. Their argument in broad outline runs as follows. (More substantive engagement with their particular view comes in later chapters).

Several characteristics of the emergency are worthy of note. First, the threat reduces the social pie—both immediately, to the extent that it is manifested in an attack, and prospectively, to the extent that it reveals that the threatened nation will incur further damage unless it takes costly defensive measures. Second, the defensive measures can be more or less effective. Ideally, the government chooses the least costly means of defusing the threat; typically, this will be some combination of military engagement overseas, increased intelligence gathering, and enhanced policing at home. Third, the defensive measures must be taken quickly, and—because every national threat is unique, unlike ordinary crime—the defensive measures will be extremely hard to evaluate. There are standard ways of preventing and investigating street crime, spouse abuse, child pornography, and the like; and within a range, these ways are constant across jurisdictions and even nation-states.

Thus, there is always a template that one can use to evaluate ordinary policing. By contrast, emergency threats vary in their type and magnitude and across jurisdictions, depending heavily on the geopolitical position of the state in question. Thus, there is no general template that can be used for evaluating the government's response. In emergencies, then, judges are at sea, even more so than are executive officials. The novelty of the threats and of the necessary responses makes judicial routines and evolved legal rules seem inapposite, even obstructive. There is a premium on the executive's capacities for swift, vigorous, and secretive action. Of course, the judges know that executive action may rest on irrational assumptions, or bad motivations, or may otherwise be misguided. But this knowledge is largely useless to the judges, because they cannot sort good executive action from bad, and they know that the delay produced by judicial review is costly in itself. In emergencies, the judges have no sensible alternative but to defer heavily to executive action, and the judges know this (Posner and Vermeule 18 2007).

This view, while widespread, is unbalanced and impracticable. It accepts the idea that all emergencies are unforeseeable events uncritically, and is incorrect, as not all genuine emergencies conform to Vermeule and Posner's model. Further, it is not obvious that there are no templates for dealing with emergencies and even if this were true, this does not hinder us from attempting to construct such a template. There is also the issue of assuming rather than showing that emergencies are events distinct from and irreducible to other forms of social unrest such as street crime or other forms of political disorder such as the disorder that erupts after a large scale terror attack. What makes emergencies hard to handle, from the point of view of liberal democratic states, is not just the fact that they can never been foreseen and planned for (although this is a salient feature of emergencies) rather it is the

compression that emergencies generate between the available reaction time, and the consequences of taking no action whatsoever. This "time crunch," as stated above, is what generates much of the problem that Posner and Vermeule describe. Granted, it is implausible for a democratic government to ignore a grave emergency as the price of such disregard would be high and would be paid for in lives and votes lost and by other damages accrued. Yet with little time to react, governments often do make rash and heavy-handed decisions about the best way to deal with an emergency, frequently rescinding liberties and political rights during an emergency, in a bid for greater security and efficiency. It bears noting that these goals are not always achieved and that citizens sometimes end up losing rights and liberties that they already had before the emergency was declared. Many of the battles against terrorism and political extremism that liberal democracies are supposed to be winning are in fact simply being paid for by sacrificing rights.

In fact, much emergency planning amounts solely to a decision over how many citizens are going to lose their rights and less about the best way to mitigate and militate against future emergencies. Underneath this economy of rights derogation and rights preservation, lurks a basic set of questions. Are severe crises measurable in any politically and philosophically meaningful way, and are we to believe as some have it, that all emergencies are the same at bottom? More importantly, does the way we describe an emergency prejudice the actions we think appropriate in dealing with the emergency. If emergencies are exceptional, can a state not therefore employ exceptional means in dealing with it, or is the idea that an emergency constitutes a profound break from business as usual, itself not simply a widely accepted overstatement? Are emergencies exceptional events, that is to say events outside the normal course of life in a constitutional democracy, or are they commonplaces, events that are different in intensity but not different in kind, from any other events that a democracy might face? As the need to define emergency has grown, this interpretative quandary has emerged as one of the thornier issues surrounding the philosophy of emergency ethics. I suggest that the answers we give to these sets of questions, delimit what we will come to take as reasonable or unreasonable actions in the face of an emergency. The work of sorting through both the nature and the consequences of emergency therefore needs to be performed at two distinct levels (as previously argued) The first is a conceptual sorting, while the second is an accounting of the consequences that

will emerge, if one particular course of state action is preferred to another. This dual structure is the reason I propose a two-tiered philosophical account of both the character of state emergencies and a defense of the right way to respond to such emergencies. Other authors have endeavored to do much the same thing, with mixed results. My approach differs from theirs in that I do not take most declared states of emergency, to be anything of the sort. Most so-called states of emergency do not conform to the three main criteria listed above, as few state emergencies are truly unexpected, only some emerge suddenly, and even fewer possess the empirical urgency often attributed to them by authorities. Most of the paradigm cases of a state of emergency in the literature are eminently preventable and in many cases wholly amenable to conventional emergency management techniques and to standard forms of procedural democratic debate.

I differ from those that see all states of emergency as chimerical, because I do take what are called "supreme emergencies" to be genuine instances of emergency, albeit while harboring certain reservations regarding the alleged frequency of these forms of emergency. Events that conform to our three (barebones) criteria for establishing the authenticity of a state of emergency do exist. It is just that they are exceedingly rare.

THE MISUSE OF EMERGENCY LEGISLATION:

It also needs to be said that many declarations of emergency are unfortunate institutional shortcuts, aimed at resolving non-emergencies via emergency measures legislation. In February 18 2009, the town of Port St. Lucie in Florida, a once prosperous boomtown, attempted to declare a state of emergency within its borders, due to a severe economic downturn, which involved severe unemployment and home foreclosures. Port St. Lucie was the first US municipality to attempt such a declaration of emergency on manmade economic grounds. The aim of the town's mayor and city council was to free up 20 to 30 million dollars allocated by the federal government for natural disasters and other non-economic emergencies. When this measure did not pass, the mayor and city council simply turned their attention to other elements within the Port St. Lucie budget. In the end,

a local nuclear power plant was expanded in size, decades before federal authorities scheduled its expansion, to infuse the town with new capital. There is no question that what the mayor and city council did violated the spirit and letter of the emergency laws they employed to secure this new funding, as the emergency measures in question were specifically earmarked for non-economic emergencies[38]. Other violations of emergency measures occur routinely as well, having nothing to do with security or with economics. On June 28 2011, an activist was ejected from a city council meeting in Quartzsite in Arizona for asking the council a question during a public comment session. When she did not receive an answer, the woman turned to the public in attendance and asked her question again, turning her back to the council.

Local police were then instructed by council members to eject her. The mayor of Quartzsite objected to the expulsion at the time, requesting that the police leave the woman (Jennifer Jones) alone, stating that she had the right to speak and that the expulsion was a violation of the city council's rules of order. A video of the altercation was made public and generated a public outcry in the town. The mayor was called to attend a new council meeting held to address the issue a few days later. Once he arrived, he found the meeting already underway, without public supervision and with the council chamber's doors locked (a violation of the council's rules of conduct). At the meeting, several city councilors voted to have the mayor relieved of his duties, which subsequently occurred. The mayor in turn stated that the officers involved in the altercation had defamed the city and that they were therefore relieved of their duty. Further, much of the police force he felt was under the sway of select city councilors whom he charged with corruption and with acting against the interests of the public. The mayor then placed the remaining police force under house arrest. This left the town in a state of self-inflicted paralysis with no police force, no functioning city council, and no acting mayor, until August 8 2011 when a superior court judge reinstalled the suspended officers, who in the interim had been fired.

[38] National Public Radio news report: "Hard-hit boomtown considers emergency measures" www.npr.org/templates/story/story.php?storyId=100824167. TCpalm "Population around St. Lucie nuclear plant fastest growing in nation" www.tcpalm.com/news/2011/aug/04/population-around-st-lucie-nuclear-plant-fastest/ updated here: https://www.tcpalm.com/news/2012/oct/26/nrc-to-present-findings-of-inspection-at-st/ (Last accessed on November 8, 2012). The NRC's findings were negative surrounding issues of safety.

On December 14 2011, the Arizona Attorney General found that federal emergency laws had been circumvented inappropriately in this instance[39]. These two examples show the randomness with which many emergency statutes are deployed and the chaos they can create. Examples such as these proliferate, with "full-blown" states of emergency arising from terror attacks or other similar events rarely faring any better, as there too, passions run high and coercive measures get routinely misused. This is due, I submit, to laxity with which emergencies are defined. If my account of emergency is successful, it may give liberal democracies pause as regards the criteria by which they declare emergency events. If the argument goes through, it will be able to explain what makes supreme emergencies (emergencies that threaten the very political community that our institutions have been developed to protect and further) problematic, while also holding on to the idea that states of emergency are rarer than it is commonly supposed.

Disparate events are often labeled "emergencies" when in fact they fall squarely within established parameters and do not require exceptional measures to bring them under control. States declare emergencies too often in cases where even the minimal criteria fail to obtain, and these small-scale crises, require disentanglement from genuine emergencies (like supreme emergencies). More explicit criteria, will make it easier for officials to sort out genuine emergencies from matters of more local import, and in the process will make the task of responding to severe emergencies all the easier. Large-scale emergencies are a concern, but they are not all of the same type and they do not all make the same moral and political claims on us. The type of emergency that concerns us here is one of a political and legal form. One in which the representatives of the state declare the emergency. This type of emergency is of particular interest because the state actors in question are presupposed to have the legal, moral, and political authority, to declare such an emergency. Consequently, they ought to be held accountable for governmental abuses of power that occur during the emergency they have declared. This dynamic between a liberal democratic government's authority and its responsibilities to citizens during an emergency is still poorly understood

[39] azcapitoltimes.com/news/2011/08/08/judge-halts-firing-of-quartzsite-police-officers, nytimes.com/2011/07/16/us/16quartzsite.html, kswt.com/story/15133005/quartzsite-puts-most-of-its-police-officers-on-house-arrest, parkerpioneer.net/articles/2011/12/14/news/doc4ee8c9e8a37f7495316453.txt (Last accessed on November 8, 2012).

and it brings to light a persistent contradiction at the center of the way emergency government is analyzed in liberal democracy.

EMERGENCIES, RULES, AND PARAMETERS:

To hold authorities to account for their behavior during a state of emergency, is to hold them to the established rules and parameters that obtain when the state is functioning normally, that is, when it is not engaged in an emergency. Yet many theorists, influenced by Carl Schmitt, have claimed that emergencies suspend the established order and along with it, its sets of procedures, leaving governments and citizens in a grey area with regard to governmental accountability and making the contours of emergency government evermore opaque. The opacity of current emergency government, I argue is a direct result of a misunderstanding of the nature of the underlying emergency itself. Genuine emergencies are limit-cases. They are the instances in which citizens need their government the most. Yet despite this, governments often threaten citizens rather than aiding them, and this points to a salient failing with the way we understand emergencies.

Emergencies are not events that sunder all previous political agreements, for if this were the case, there would be no need for the state or its representatives to do anything, the state would have no preexisting commitments to citizens, as these would have been undone by the onset of the emergency. As this is not the case and liberal democratic states typically keep their commitments to their citizens, even in the worst catastrophes, it is therefore reasonable to assume that there is a relationship between citizen and state, that runs deeper than a mere abiding by the *status quo*. In a democracy, the state is made up of elected representatives drawn from the citizenry and as such, the government and the people are in the end, substantially one in the same. This dissertation argues for the view that emergencies are the arena in which the responsibilities and limits of the state are most clearly seen because this is where they are placed under the most stress. Rather than marking the endpoint of liberal commitment, states of emergency are where state responsibilities are the most fleshed out. Committed to various charters, bills of rights, laws, and other legally and morally binding compacts, states (in particular, liberal states) are tasked primarily with defending citizens from attack and harm, and not, as Carl Schmitt

and other theorists would have it, committed to craven self-preservation over all else[40]. The only instance in which the state can act to preserve its own privileged position of political power, that is its putatively legal monopoly on violence, is the supreme instance. Supreme emergencies obtain when a state faces its own assured annihilation, either from warfare or natural disaster, and by extension faces the potential annihilation of its citizens, who are its authors and charges. The notion of supreme emergency, whose formulation here I again owe to Walzer's account of emergency ethics, is to my mind both persuasive and (critically) exceedingly rare. Few instances in history show us genuine cases of a state reneging on its founding compacts in order to save itself from extinction in the face of some overwhelming enemy or threat. Tactics that are more moderate are more common, if history is to be any guide, and these usually help to resolve the emergency moment without resort to the draconian measures that many theorists envision. But because it is a possibility, I grant the notion of supreme emergency a special standing in my account, even though I doubt that it is applicable (or generalizable) to other (so-called) states of emergency. The question of whether a state can act unilaterally in a supreme emergency remains an open question.

Unlike Posner and Vermeule who have a well worked out conservative alternative to emergencies, I do not wish to narrow the potential options as quickly as they do. However, I do not wish to take emergencies at face value as Bruce Ackerman does either. Even though Ackerman's view is the most carefully crafted response on the liberal side of the emergency debate, it too proceeds too quickly toward the conclusion that emergencies exist, that they are something like commonplaces, and that we need to act to meet them head on. I agree with Lazar and against Posner, Vermeule, and Ackerman, when she says that emergencies are not as evident as they are taken to be. Yet I do not accept her view in its entirety either. Vermeule and Posner lay out the most popular options by framing the debate in terms of *legal remedies* and *political remedies*. Nevertheless, their dualist view is too orderly to do justice to the chaos of actual emergencies. Further, they themselves do not stick to the ground rules they establish, drawing distinctions that undercut their own view, and admitting that emergencies are multidimensional events. They also offer robust theories

[40] Carl Schmitt, *The Concept of the Political, Crisis of Parliamentary Democracy*, and *Political Theology* (University of Chicago Press 2007, MIT Press 1988, and University of Chicago Press 2006).

of government and law, despite claiming not to, and treat a multidimensional topic in a solely reductive and dualist manner.

Despite repeated claims that theirs is simply a comparative norm-free analysis of how emergencies unfold, nothing could be further from the truth as concerns Posner and Vermeule's account, which relies on an extensive series of dualist distinctions between emergency and non-emergency judicial review. Regardless of whether one shares Posner and Vermeule's view that emergencies are exceptional situations to be dealt with exceptionally, their overall depiction of the dichotomy between those who want to protect rights and those who seek their derogation is accurate, as is the rationale for preferring one set of options over the other. Judicial review and policymaking crisscross each other in ways that all four authors (i.e., Posner, Vermeule, Ackerman, and Lazar) underestimate and oversimplify in their respective accounts. The pressures presented by genuine emergencies confound even the most carefully laid out plans. This is why it is imperative to plan for the advent of emergencies; keeping in mind that they do not all conform to easy categorizations. It is unclear what states, particularly liberal democratic states, can do to bolster security when the result of such actions will be a straightforward reduction in citizens' rights, without a tangible guarantee of increased security. While many of the issues surrounding emergency government, seem commonsensical from a distance, closer up they are immensely complex.

In part, this is because it is difficult to tell when a particular policy has had the intended effect. Liberal democracies do not have an explicit baseline against which their overall security can be measured. We are always more or less safe than we could be, and are never in either total peril or in total security as citizens. These are issues of degree and are hard to quantify accurately, becoming even more so in the midst of an unfolding emergency. We should therefore be cautious about uncritically accepting either the alarmist view, which would give the executive branch of government (or some other branch, for that matter), unfettered power when dealing with emergency, or the halcyon view, which thinks (somewhat counter-intuitively) that disastrous events do not threaten state stability or individual security. Rather we should examine the nature and character of emergency itself, using its conceptual boundaries as a guide to future legislation.

THE ARBITRARY NATURE OF EMERGENCY AND ITS NEGLECT:

The true danger posed by a state of emergency is its authorization of arbitrary rule and law, I have argued. Puzzlingly, this is not the characteristic that has drawn the most critical or philosophical attention. From the point of view of many political philosophers, the main issue to do with emergency is whether government should deal with it according to *established* norms or whether government should treat it as an *exceptional* situation. This "norm/exception" reading of emergency has come to dominate the debate and this for the worst. There is a sense in which emergencies are deviations from the established institutional and procedural norms of conventional liberal democratic society, unlike other deviations however, emergencies bring with them an air of randomness, and it is this random feature of emergency that should concern us most, for it is the most dangerous of its attributes. Unfortunately, arbitrariness has received scant discussion as concerns emergency. Despite this elision, it is never clear from the outset what the consequences of a given emergency will be, as there is no guarantee that even the most severe measures enacted by a government, will succeed in ending an emergency. This brute fact about emergencies and the way we deal with them deserves more analysis than it has so far received. As citizens, we are asked to place our trust in a set of legal and deliberative procedures, many of which will reduce our existing rights, and many of which will not achieve their intended aim.

This dubious bargain rightly worries some political and legal scholars. Two of the other main liberal protagonists, David Dyzenhaus and Oren Gross, both agree with this overall assessment of the conceptual field, but each does so from his own perspective. Dyzenhaus views emergencies as internal events, whose issues should be debated within the judicial apparatus of liberal democratic states[41]. Gross thinks of emergencies as exceptions to the judicial and deliberative mechanisms championed by Dyzenhaus. For Gross, emergencies must be dealt with using exceptional provisions and tactics; they need to be dealt with by the state, but not in the usual deliberative and judicial manner. Instead, Gross proposes, emergencies open a new avenue, a space of exception, in which liberal

[41] David Dyzenhaus, *The Constitution of Law: Legality in a time of Emergency* (Cambridge University Press 2006).

democracies can selectively use (illiberal) tactics that would normally be out of bounds. These exceptional tactics, which include extraordinary rendition, preventative detention, and techniques of severe interrogation, are (in some cases) acceptable tactics argues Gross, but only if they are guided by explicit rules delimiting their application.

These rules are to be decided on *before* the emergency occurs. Additionally, Gross argues for a stand-down procedure through which liberal democracies, once safe and out of danger, could return to governance via the established rules of conventional liberal judicial and political rule. Against both the liberal variant and the conservative variant of the debate stands Lazar, who like me takes emergencies to be events occurring infrequently, and for this reason adopts a more skeptical posture toward the debate. In their place, Lazar recommends focusing on the *informal cultures* at work within these varied institutions of government, arguing that the informal relationships between these institutions tell us more about how an emergency will be handled than their formal counterparts can. I agree with Lazar, that emergencies are uncommon events, but think that she lets the formal institutional structures of liberal democracy off the hook too easily. Informal institutional cultures can only tell us so much, as they too are constrained by formal rules and laws guiding their behavior. Understanding the informal culture of the key social and political institutions of a society, can tell us only little about the way these will deal with emergency management.

The informal aspects of liberal democratic government cannot address the fact that many declared emergencies are not (on reflection) genuine emergencies, and that they therefore should be treated in a conventionally legal and straightforwardly liberal democratic way. We need to get clear on what emergencies are, before we begin constructing theories about how to best deal with them, whether formally or informally. This is especially true as regards theories that advocate the jettisoning of key liberal democratic procedures and oversights. These cannot be tossed aside without some cogent argument for so acting, and an examination of the professional cultures of these key institutions on the model of Lazar, gets us no closer to this goal. The rule of law serves to fix acceptable and unacceptable actions within a liberal democracy. In invoking a state of

emergency, do liberal governments also (necessarily) establish a state of exception, a state of affairs outside the rule of law? The legal and philosophical literature on emergency government has mostly seen these two elements as coextensive, emergency government is exceptional it is argued, and is therefore able to underwrite actions that would normally be considered illegal or otherwise disproportionate.

Yet is this common assumption true? What specifically is "exceptional" about a state of emergency? Why would an exceptional set of circumstances countenance a wholesale departure from established law, rather than an extension or an amendment, to established liberal democratic practices? In these debates, as we have seen, the executive branch of government is taken to be more dynamic than the other branches, and privy to confidential or otherwise sensitive information that cannot be made public, for reasons of security. This theme, as regards the executive, appears repeatedly in the literature. For this and other reasons, the executive branch of government is often allowed, chiefly by the legislature and courts, to make (arbitrary) decisions that contravene and skirt existing constitutional law. The reasons marshaled in favor of these exceptional powers are wanting in part because they undercut important liberal democratic values in part because they are often arbitrary and hence potentially circumvent the rule of law, and in part, because they are misapplied. Are there truly no other institutional arrangements available to democratic constitutional governments, save for exception? I find the idea that not only individual rights need to be derogated, but also the idea that overall institutional oversight (at the government level) requires derogation in an emergency, to be heavy-handed and ill argued.

Yet this dynamic, remains a guiding assumption in much of the literature on states of emergency. Much of the debate over the proper way to handle states of emergency turns on the issue of state *sovereignty*, which forms the bedrock of many accounts of emergency. If states are fully sovereign then they have the right to defend themselves by any means they see as reasonable, or so this type of view argues. One's stance on state sovereignty has important implications for one's views on emergency and leads to subsequent questions. Is governmental sovereignty *pre-legal*, for example, as Dyzenhaus and Schmitt propose? Hans Kelsen and others argue that the sovereign, in this case the modern nation-state, is constituted by and through law and hence cannot be extra-legal. Is the state of exception a new state of nature, as some have implied, or is it a workaday feature of constitutional

government? Only careful attention to the reasons we give for enacting emergency government can aid us in better classifying these important issues, but such an account has yet to be formulated. Further, any account must also answer the basic question that underlies our present study. Namely, what is the relationship between liberal democracy and the ways in which it understands and deals with emergencies?

Without attempting to answer this question, the conceptual bottleneck that leads to these tensions in the first place, remains unaffected. The goal of clarifying the conceptual bottleneck over the philosophical nature and philosophical place of genuine emergencies in liberal democracies aims at securing greater internal coherence both conceptually as well as practically when possible, by making institutional action more focused (by in turn circumscribing its aims, during an emergency). Conceptual clarity can at times lead to greater clarity at the level of practice, and this is particularly so when we are discussing social norms and the expectations they generate, but there is no guarantee of this symbiosis. What is true is that social norms and expectations attach to institutions in modern societies and courts, law enforcement, local and state governments, need to be committed not just to physically protecting citizens, if liberal norms are to survive in emergencies, the established *rights* of citizens need robust protection as well. They need to protect "the right to have rights," as the saying goes, and do this impartially and fairly if they are to remain true to liberalism and to democracy. Therefore, the challenge is as much a normative challenge, as it is an institutional challenge, to my mind.

The rationale for Gross's "exceptionalist" argument argues that instead of deforming the law and with it the constitutional essentials that give law its form in liberal democracy, it is better not to respond to emergency situations through the established instruments of liberal democratic law. Gross's "extra-legal measures model" argues that public officials may respond extra-legally when they "believe that such action is necessary for protecting the nation and the public in the face of calamity, provided that they openly and publicly acknowledge the nature of their actions." His central claim is that the extra-legal measures model best preserves the "fundamental principles and tenets" of liberal

democratic constitutional order (Gross 1023-4 2003 and Dyzenhaus 805 2007)[42]. Gross's model comes with a set of caveats however. Public officials who employ extra-legal measures must disclose their activities and are subject to "direct or indirect ex-post ratification" through the traditional avenues of courts, the executive branch, or via a decision on the part of the legislature (Gross 2003 and Dyzenhaus 805 2007).

Gross favors this model because he believes that ex-post ratification will lead to an increase in public deliberation at large, as well as to individual accountability for the government officials who employ extra-legal mechanisms in an emergency. Because the officials do not know what the outcome of ex-post ratification will be, this feature of the model is supposed to act as "a brake on public officials' temptation to rush into action" (Dyzenhaus 805 2007). A problem for the extra-legal measures model is that its adoption, as a prescriptive set of considerations for officials who must administer an emergency, allows the officials in question the opportunity to anticipate (and anticipate correctly, in the eyes of Dyzenhaus) the probable legal response to their extra-legal activity. After the emergency is over, government officials are free to argue that their actions should be seen as "acts of indemnity" or the legal equivalent, and that they be granted immunity from prosecution after the fact, rendering the claimed oversight of the Gross model inert in actual practice (Dyzenhaus 805 2007). Further, large-scale attacks often create the presumption among some in government that the nation is in the midst of an indefinite emergency, a presumption under which the standard mechanisms of oversight and accountability, arguably become obsolete. In a permanent or indefinite emergency, standard government is suspended and emergency government takes its place.

If a liberal democratic government can be persuaded that an emergency event is not isolated but rather part of a permanent and ongoing emergency situation, then not only will emergency measures not suffice, but war measures may be in order, thus rendering a response that lies "outside of the ordinary limits of the rule of law beside the point" (Dyzenhaus 805 2007). There are always several ways to respond to a crisis or to an emergency, but the under-theorized notion of emergency remains one that governments treat ineptly, with part of this ineptitude resulting in an overly simple view of the proper

[42] Oren Gross, "Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?" in the *Yale Law Journal 112* (2003) 1011–34 and David Dyzenhaus, "States of Emergency," in a *Companion to Contemporary Political Philosophy* (Cambridge University Press 2007) 804-812.

way to react to a large-scale emergency. In thinking of 9/11, Roach remarks "different leaders could have reacted by stating that the attacks were heinous crimes, that the criminals would be pursued with the full force of the law, and that the state would pour more resources into the kind of intelligence gathering essential both to pursue the perpetrators and to prevent future attacks." Instead, liberal democratic governments the world over treated this event (i.e., 9/11) as if it were a war against a competing nation state, and not as it was, namely a confrontation against a decentralized transnational criminal organization.

The failure was not one of force or sufficient derogation. It was a failure to capture the genuine meaning of the concept of war (Roach 2005 and Dyzenhaus 809 2007)[43]. Al Qaeda has no capacity to invade or destroy any of the liberal democracies they have attacked. While their terrorism is bound up with political and religious themes, the threat Al Qaeda pose is not unlike the threat of a large well-armed street gang or organized crime family. All that differentiates them from these groups is that their attacks focus on causalities and not on profits or short-term territorial gains. Their aim is ideological, but the threat they pose to Western democracy and liberalism is not. The most credible threat terrorists pose to liberal democracy is a material threat, as they do not have any serious political influence in liberal societies, nor do they have the means to overtake these societies in any other significant way. Terrorism, which is a common theme in emergency theory literature, is not the same type of threat as the threat presented by the nation states of the old Eastern Bloc, for which many of our war and emergency measures were devised and refined. Dyzenhaus agrees with Gross in thinking that the established constitutional model of emergency may be irrelevant in certain respects.

Dyzenhaus however is careful to underscore the idea that not all emergencies are marshal in nature and argues in turn that the constitutional model of emergency "could come back into favor as a response to an emergency which comes about because of the threat of a global flu pandemic, just because the threat might be temporary. However, if current emergency practice is considered successful, it might supplant the constitutional model even when emergencies arise for which the constitutional model seems well suited." A quick

[43] Kent Roach, "The Criminal Law and Terrorism," in *Global Anti-terrorism Law*, (ed.) V. Ramraj, M. Hor and K. Roach (Cambridge University Press 2005) 129–51. Also quoted in Dyzenhaus, "States of Emergency," *Companion to Contemporary Political Philosophy* (Cambridge University Press 2007) 804-812.

examination of the "legislative model" is instructive for three reasons. First, this legislative model is the mechanism by which most liberal democracies dealt with emergencies pre-9/11, so it is well established. Second, the legislative model uses statutes to authorize officials to enact emergency measures *in advance* of any credible threat, and this in itself is extremely telling (Ferejohn and Pasquino 2004)[44]. Third, as Dyzenhaus points out models of emergency response are *fungible*. Therefore, the aura of "necessity" one finds in Schmitt and others is drastically undercut. Once again we have an emergency management model that claims to know *beforehand* how best to deal with an emergency. Yet nothing in the legislative model offers precise information on the emergency in question. There are no explicit selection criteria. Further, there is no mechanism *within* the ambit of the model capable of delivering such information to lawmakers or government officials. It is emergency management by *stipulation*.

> As we have seen, an insistence on an authorizing statute raises questions about both the scope of the authorization – what the executive is permitted to do – and about the extent to which the executive, whatever it is permitted to do, is subject to the rule of law, as policed by judges. Government claims that there is a state of emergency, will play a role at two levels: at the level of *scope*, especially if the scope includes measures that are in conflict with constitutional or international commitments; and at the level of the *evaluation* of executive action, where governments argue that judges must defer to executive judgment during emergencies. In contrast, in legal orders where there is explicit provision for derogations from and limitations of fundamental constitutional values, a more nuanced approach, one more conducive to the rule of law, can be adopted. The idea of derogation and the idea of limitation both [however] presuppose a public justification in terms of criteria that are amenable to judicial review (Dyzenhaus 809 2007 [Brackets and italics mine]).

The point is clear. Whichever model one prefers, whether it is the "legislative model" put forth by Dyzenhaus, Ferejohn, and Pasquino, or the "extra-legal" model of Gross, the underlying presuppositions undergirding these models, still require careful examination.

The obligations a government undertakes during an emergency cannot violate other obligations or commitments held under the law by that government, save in cases where extra-legal measures, such as those proposed by Gross, are in effect. Liberal democracies are particularly beholden to respecting the constitutional essentials that give these systems their legal form. Dyzenhaus once again, provides a nice example of the way that even

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[44] John Ferejohn and Pasquino, P., "The Law of the Exception: A Typology of Emergency Powers". *International Journal of Constitutional Law 2* (2004) 210–13.

international laws, can serve to bind a liberal democratic government to respect for civil and political rights. "Thus when the UK government derogated from Article 5 of the European Convention on Human Rights in order to detain indefinitely aliens whom it considered security risks but who could not be deported, it relied on the criteria set out in Article 15 (1) of the European Convention, which require that the measures taken in response to an emergency are those 'strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law'"(Dyzenhaus 810 2007).

Against both Gross and Dyzenhaus, I propose that if a government's actions are proportionate to the threat in question it will have an easier time justifying its behavior to its citizens than if that same government acts using a different standard of legitimacy. Of course, proportionality is not enough. There must also be institutional transparency of a kind that liberal citizens have come to expect from democratic governments. Information can also be apportioned proportionately in times of emergency as not all information needs to be revealed all at once but if all the relevant information is distributed as required then both the emergency can be put down and the citizenry can feel that its rights and liberties have been protected. There is no sense in trampling over these in the name of security when the net result will be a distrustful citizenry. Two of the key issues at stake in the debate over emergency measures are arbitrariness and proportionality, with "arbitrariness" being understood as capricious non-rule governed behavior on the part of authorities, and "proportionality" being understood as a set of institutional actions that are (ideally) neither more severe than necessary, nor too lenient. Emergencies create a space within which established institutional procedures can be sidestepped, ostensibly in the interest of increasing security. Yet in so doing, emergencies introduce a great deal of arbitrariness into what in pre-emergency periods is a relatively stable institutional environment. Decisions usually made only before courts or under the strictures of judicial review come to be made on the fly, and at times in secret, by elected officials.

The shift from courts to representatives would be potentially defensible were it not for the secrecy that has accompanied these shifts. Furthermore, both executive and representative branches of government have shown a lack of proportionality when dealing with emergencies. Combined, arbitrary decision-making and blindness toward

proportionate responses to emergency events, lead to a wholesale disequilibrium among the various branches of most liberal democratic governments. Moreover, this twin threat, renders most of the proposals but forth as alternatives to extant emergency measures procedures unconvincing. Measures like the "extra-legal measures model" or the modified "judicial intra-legal model" proposed by Dyzenhaus, both fail to account for the degree of arbitrariness that creeps into emergency measures decision-making, and both fail to point out the lack of proportionality that afflicts most attempts to rein in emergencies. An arbitrary action or decision can be defined as any action or decision that fails to track the interests of the people concerned with the said acts or decisions[45]. Lazar's mediating view, which argues that we can tame emergency through an analysis of the informal structures and cultures of the various institutions of liberal government is appealing, but I want to argue that it too does not take the deep threat posed by arbitrariness and lack of proportionality seriously enough. Lazar is correct to dismiss the prevalent logic of "norm and exception" that currently dominates the literature on emergency, but falls short when she fails to address the dangers posed by arbitrarily dismissing the interests of those affected by governmental policies of emergency management. Her view, probative as it is, also sidesteps the lack of proportionality seen in existing policies concerning emergency. As we have seen so far, the major options for dealing with emergencies force liberal democracy to compromise its legal, political, and moral principles. They also rely on controversial premises about emergency and fail to consider the nature and character of democratic liberal communities.

A SUMMARY OF CRITICISMS:

[45] See P. Pettit, *Republicanism* 55 (Oxford University Press, 1999). See also, Boudewijn De Bruin, "Liberal and Republican Freedom" 427 in *The Journal of Political Philosophy* (Volume 17, No. 4, December 2009).

The major approaches to thinking about emergency, I have been arguing ignore the arbitrary manner in which many rights derogations when in place, fail to track the interests of citizens and fail to take seriously the established social norms of political communities. When one considers the disproportionate responses we have witnessed in the past decade following 9/11, such as the panoply of rights derogations aimed at individuals who upon examination turned out to be innocent, it becomes easy to see why many harbor doubts about the way thinking about emergency intersects with the actual politics of contemporary liberal democracy[46]. Extraordinary rendition and the like are but the extreme forms of rights derogation. Many subtler forms of derogation are enacted every day and they show that there is a practical failure to take the norms that bind us in political community seriously in our collective reasoning about what emergency government sanctions. These practical reasons, aligned with the conceptual misgivings enumerated previously, are the reasons that lead me to conclude that a new philosophy of emergency is required. One that tracks the interests of those affected while also taking considerations of *scope* and *enactment* seriously. So long as our political ethics do not concord with our emergency measures, we will fail to be effective in our bid to minimize the damages caused by emergencies, including the erosion that emergencies cause to rights and political liberties via the instrument of derogation. In her *States of Emergency in Liberal Democracy*, Lazar points to the tension between justice and order, arguing that the tension between these two liberal values come to a head during emergencies[47]. The reason for the tension is multifaceted yet the aspect that interests us here is the connection between law, morality, and the liberal democratic government. Both Dyzenhaus and Lazar argue that for law to be law it cannot make exceptions of the kind that emergency measures legislation require. Their misgivings are grounded in a conviction that law, which grants governments exceptions compromises not only itself, but also compromises the moral standing of the rights and liberties of liberal citizens when it is arbitrary. While sympathetic to the tenor of their overall views, I have strived to state the overall problem somewhat differently.

[46] Maher Arar is one such individual. *Arar v. Ashcroft*, the case brought against the US government by Arar, demands among other things, an admission that the actions of the US government against him were illegal and that they violated several established rights held by Arar as a Canadian citizen and an innocent individual.

[47] Nomi Claire Lazar, *States of Emergency in Liberal Democracy* 1-2 (Cambridge University Press, 2009).

It is not that law can never provide exceptions to established rules, or that courts can never derogate constitutional rights, rather it is that the present system of derogation proves to be baseless on examination. The decision to derogate a right is often taken arbitrarily, with only an appeal to circumstantial evidence to help ground the decision. Derogation in the face of solid evidence, that is supporting evidence that undergirds the circumstantial evidence that may be available to courts or governments, may at times be legitimate. To mitigate the adverse effects of arbitrariness, established procedures need to be formulated and made public; moreover, the evidence used in arriving at a decision to derogate cannot be wholly *circumstantial* in nature. There is little gained by denying the severity of some emergencies yet there is also little gain in indiscriminately derogating rights. Neither approach makes liberal democracy any safer as each approach has its own downside.

The most promising way forward appears to lie with a hybrid view, one that allows for derogations, but that places strict and explicit limits on what forms of conduct count as offences worthy of derogation. All the same, no matter how carefully we design our statutes of derogation, they will do no good unless the criteria by which we distinguish emergencies from non-emergencies are also cogent. Otherwise, courts and governments in liberal democracies will never be able to break the cycle of rights contraction and rights expansion that accompanies a severe emergency. During the emergency, rights are derogated while after the emergency, emergency measures are scaled back, creating a vicious cycle that serves to undermine liberal democracy and that further reinforces the tension between order and justice that Lazar takes issue with. A normatively and conceptually cogent account of emergency needs to be more than taxonomy, it needs to do more than simply allow authorities to break the law in the interest of increased security, and it must provide institutional guidance of the type that minimizes the normative/institutional buck-passing that often accompanies an emergency. Countermeasures are part of emergency management but they cannot be the whole story. There is more to dealing with emergency than detention, derogation, or at the extreme, targeted killing.

TOWARD PROGRESSIVE JUDICIAL AVENUES: AGAINST THE STATUS QUO

The rights of individual citizens are as legitimate as the state's concern with national security. Therefore, the debate over emergency and state responses to emergency cannot be couched solely in terms of legitimacy. As both individual rights and national security are pivotal, they should not be in play, instead it is the circumstances and contexts within which detention, derogation, and targeted killing are to occur, which require careful elaboration. Keeping in mind my skepticism regarding the frequency of state emergencies, we can nonetheless look at the conditions under which drastic measures may need to be taken. One way to do this is to ensure that there is a robust program of judicial review both *pre-emergency* and *post-emergency*. Judges must be able to review decisions taken (or planned) by the executive branch regarding derogation, detention, or targeted killing, and be free to scrutinize these measures before they are acted on. Two obvious targets that these tactics will have to meet will be accordance with the law (to the extent possible) and overall efficacy. If found severely wanting on these two initial counts, then federal courts should rule these actions out of bounds and ineligible for action. Should the proposed measures pass, then they should made party to some other form of oversight, after the fact. While many will object that even these criteria are objectionable, it is important to remember that on my view each proposed action on the part of the state is subject to review each time it is proposed. That means that there is no blanket authorization from the courts that allow a liberal democratic state to carry out targeted killing, for example, in perpetuity. Each derogation request, just like each request for detention or targeted killing, must be scrutinized and authorized individually. Looking at derogation more closely, we can see that my proposal differs from "indefinite detention," whose legitimacy has been called into question by many courts. In its place, I endorse Amos Guiora's account of "administrative detention."[48] Indefinite detention has been found wanting, in part because it needlessly derogates away constitutional rights and because it imperils the standard use of *habeas corpus* in trials, which is a serious failings. Administrative detention tries to rectify these failings, while retaining some of the force of indefinite detention. The idea behind detention

[48] Amos N. Guiora, "Not 'By All Means Necessary': A Comparative Framework for Post-9/11 Approaches to Counterterrorism". This article appears in the *Case Western Reserve Journal of International Law, Vol. 42*: 2009, 1-3.

is that some suspects remain a live danger even when the authorities are alerted to their plans or actions.

The challenge therefore is to reduce this danger in a specific and precise manner without however endangering or casting doubt on the entire system of constitutional rights. This means that under administrative detention, a suspect may keep some of her rights intact, while losing rights having to do with the planning and execution of a potential attack. For example, the suspect can retain counsel and have unfettered access to this person but still be denied access to communication with others. Administrative detention targets individuals who may come to be detained. It seeks to set out general guidelines for the detention and treatment of said individuals. A common difficulty with indefinite detention, the competing paradigm, is that it is unclear in its scope and purpose. Much like our earlier discussion of the nature of emergency, indefinite detention *conflates* two different forms of law enforcement regimes. Many suspects detained indefinitely are detained on criminal grounds, meaning that they are thought to have committed criminal offences and are thus subject to the rights and penalties laid out by the constitutional essentials of the political system in which they being arraigned. These rights and penalties are specific to criminal law and differ greatly from other forms of law.

The second form of indefinite detention usually practiced, derives from a war paradigm according to Guiora, this means that the individual detained is charged or suspected of committing crimes that constitute an act of war against the state. Here the derogation of rights is more severe than in the criminal case. A declaration of war, via a specific act such as an act of terrorism, is a more serious offence than a simple criminal act under the law of most liberal democracies. There are criminal acts than can cause great harm but in the main acts of war are taken to be the more serious of the two paradigms. There exist hybrid views as well, views that combine the criminal and war paradigms, yet I make no use of these in my analysis, as I do not find them persuasive or sufficiently internally coherent. To flesh out the view of administrative detention above, we need to look at the specific recommendations that the view makes. The first recommendation is that detention procedures be separated into two types: criminal or war. Once the type of offense is established, we then move to the issue of scope. Are the actions in question acts that threaten the national security of the country or are they more local than that? The criteria

under which a suspect is detained must also be fleshed out though I will address that issue later. For now, it is enough to add a third feature to our account of administrative detention.

A crucial step in formulating this alternative account of detention is the specification of the form of judicial review responsible for auditing the detention procedure overall. At present, most detentions are audited in an *ad hoc* manner and usually only after the fact. This is not a very perspicuous standard and it allows for serious gaps and abuses in the system. To combat such potential abuse, it may be necessary to form judicial review boards that deal exclusively with cases of emergency administrative detention. Another failing of the current indefinite detention regime is its inability to demarcate which suspects will be prosecuted and which will not in a timely and coherent manner. Often, large groups of suspects will be detained when only some of these suspects are prosecutable, either due to a lack of sufficient evidence or for other reasons germane to their potential for prosecution. Lastly, the issue of where the suspects are to be kept needs to be explicated. Are they to be held in federal prisons intended for criminals or are they to stay in military prisons intended for combatants[49].

What procedures need to be in place when either suspects are released due to a lack of evidence, or due to a mistake, or simply once their sentence has expired (assuming that they are allowed to be free)? Far from providing answers to these vexed questions, much of our existing detention regime blurs the lines that it should instead be clarifying as regards sentencing, detention, and oversight. Add to this the lack of clarity that I have diagnosed as concerns the nature of emergency itself, and it is easy to see that much analytical work remains to be done on these issues. Emergencies and the institutional safeguards that administer them are part of the same phenomenon. We cannot have a comprehensive theory of one, without having a theory of the other, as too many of the questions from the one domain reappear in the other. The criminal law system provides the best approach for dealing with administrative detention. It provides robust protections to the accused while allowing the public a measure of information about the proceedings, something they would be denied in military style tribunal, as prosecuting potential terrorists under the paradigm of acts of war, limits the oversight that the public and the government (outside of the

[49] Amos N. Guiora, "Not 'By All Means Necessary': A Comparative Framework for Post-9/11 Approaches to Counterterrorism." *Case Western Reserve Journal of International Law* (Vol. 42, 2009: 1-3).

executive) can have in a liberal democracy. This of course creates another problem. In many terror trials confidential information is often introduced into evidence and governments may quite reasonably not wish to divulge the origins of such information.

A way out of this impasse presents itself if we allow the evidence against a suspect to determine the judicial venue in which that suspect is arraigned. Criminal evidence gathered through traditional policing can remain in the criminal justice context. This still leaves the problem of dealing with evidence gathered proposed by covert means. Here too there may be a way to offer a provisional answer. Guiora advocates for a national security court, a distinct court separate from traditional criminal and military courts, which would deal with indeterminate cases or cases in which evidence is classified and cannot be revealed to the public. Following Guiora's lead, we can envision a judicial mechanism that can tailor itself to the evidence. Of course, the issue of credibility and scope are not obviated simply by looking at prosecutorial evidence. To detain a suspect there needs to be enough proof that the suspect presents a risk to the nation. Otherwise, we do not have a national state of emergency. Assuming that that hurdle is met and that a state of emergency does apply, the credibility and reliability of the evidence in question needs to be vetted.

If the evidence is unreliable or incredible then the case against the suspect should, all things being equal, be dropped and the suspect released from custody. The procedures above assume that suspects are detained lawfully, despite the fact that existing emergency measures often circumvent the existing criminal law and detain suspects without a lawful hearing of the evidence or an explicit statement of the charges. However, for the moment, I only concentrate on the measures that would need to be met minimally in order to have a set of judicial procedures friendly to liberal democratic percepts. The type of judicial review that Guiora recommends and that I am echoing here requires an active and sustained effort on the part of judges and courts to uphold an active form of independent judicial review in emergency measures cases. Suspects are not the only ones who require protection under the law during a potential emergency, the law enforcement personnel, and intelligence officials, who gather the information used by these independent courts to decide if (and when) a suspect will be administratively detained, require a robust measure of protection as well. Their safety needs to be part of the overall institutional design of judicial overview for emergencies. Another important consideration is whether a suspect

can reliably be shown to be actively plotting to commit a future act of terror or other similar emergency inducing action. If so, then a six-part test is activated.

"The evidence must meet a six part test of reliability, credibility, validity, viability, time-relevance, and the inability to be presented in open court because of the over-arching requirement to protect an intelligence source" (Guiora 4, 2009). Administrative detention, which is downstream from a mere finding of evidence of potential illegality, has a different structure. First, an administrative hearing would be held in order to establish the veracity of the threat and the acceptability of the proposed emergency countermeasures. This would be held before a national security court. Second, a more detailed hearing would be held with a senior judge in either a military or civilian court context. This second level acts as a buffer. Here the state needs to make its argument persuasive so that it connects the proposed measures in an explicit way to the alleged threat. In other words, the state must make the case that these countermeasures are the optimal measures in this situation. Lastly, the two previous levels of vetting must be sanctioned by the Supreme Court or some other high-ranking court that is independent of the overall investigation up to that point; if an order for detention is granted it can be carried out but only with the caveat that it be renewed if necessary on a regular basis.

Consequently, if a suspect is detained for a year, the next year his detention comes up for review and the two processes above are repeated. So all six criteria are reexamined and all three levels of vetting are repeated. The linchpin of Guiora's argument for administrative detention is the idea that authorities will be able to predict a suspect's involvement in future terrorist activity or other malfeasance reliably. Authorities must base their inquiries on strong evidence, preferably of a physical nature, and be able to make some of their findings public. This ensures a level of institutional transparency that would otherwise be absent. As previously noted, in exceptional cases the investigators can keep their evidence shielded from public view by presenting their case for detention (or prosecution if the evidence is overwhelming) before a military court with a specific national security mandate. The caveat Guiora adds, quite sensibly, is that military charges must be met with evidence that corroborates the legal military code, similarly for criminal

evidence presented to a criminal court under the criminal law paradigm. The advantage of Guiora's view for our inquiry is that if applied, it does away with the nebulous question of whether a suspect can be detained and tried. The answer Guiora provides is affirmative, they can be; but only if the authorities charged with his detention and prosecution are willing to submit their evidence to specialized judicial review.

Gone are the carte blanche mandates for detention without evidence or corroboration on this scheme. Another caveat Guiora proposes is one of proportionality, which is understood as a midway point between preserving the rights of the accused and preserving the right of the state to protect itself and its citizens. The detention of a subject must be proportionate to the threat he is believed to pose. If there is not enough evidence to jail the suspect but enough to merit administrative detention then a dangerous individual can be detained without totally derogating his rights. The suspect is still offered the protections of the national security court which would function according to liberal democratic principles of jurisprudence (*habeas corpus*, retention of political and civil rights, an opportunity to face one's accusers in court, etc.) while also enabling liberal democratic governments an opportunity to fend off certain types of emergencies (primarily but not exclusively terrorist threats) before they occur.

Guiora's view is a net benefit for thinking through the intricacies of detention and represents a middle course between the authoritarian measures favored by Posner and Vermeule on the one hand and the overly sociological account of emergency measures we find in Lazar. It may also be able to quell Dyzenhaus's misgivings about emergency government. In all of these cases, it is assumed that the suspect (or suspects) are citizens or resident aliens of the country in which they are accused of plotting to cause damage. The issue of how best to deal with non-citizen led emergency threats exceeds the scope of this dissertation. Instead, I concentrate only on issues regarding the way the institutions of a well-ordered and functional liberal democracy society should treat those who seek to harm it. It is too easy to derogate rights without tangible benefit and the empirical record of such initiatives does not inspire confidence in its efficacy. It is important for commentators on emergency government to acknowledge that there can be gradations when it comes to rights derogations and that it is always better (on balance) to work with the available evidence than it is to derogate too broadly or to plan for supreme emergencies that never arrive. The

extant facts of an emergency should guide our response and the context in which the emergency occurs (or is set to occur) should guide our attempts at protecting the public and incarcerating the guilty. Not every case will be clear-cut, but every case demands that liberal democratic principles be observed, be it at the judicial or the legislative level.

It is acceptable to monitor a suspect for example without apprehending them, and it is acceptable to use other surveillance measures to gather information and prevent attacks, as this strategy is preferable to arbitrary detention without robust constitutional oversight. The measures used to prevent emergencies from happening need to be consonant with the underlying logic of liberal democratic governance and they should seek to minimize harm and arbitrary coercion wherever possible. Not all situations will be amenable to such nuanced treatment but those that are should be taken advantage of. Subsequent chapters aim to provide additional support for this claim, as well as for the other substantive claims made in this first chapter, via a closer reading and analysis of the persistent issues unearthed here.

CHAPTER 2: LAW & THE CONCEPT OF EMERGENCY

LAW'S ROLE IN EMERGENCIES:

The most common way of dealing with the outbreak of an emergency is through the apparatus of law. This is particularly so in contemporary liberal democratic societies, where rule of law acts as a baseline for ensuring that there is institutional coherence among the different branches of government. This initial appeal to law and legal precedent gives way to specific rights derogations, which in turn lead to authorizations for the use of greater and more restrictive force, or at least this is the case in severe emergencies. While each state deals with emergencies differently, all more or less follow the pattern described above and move from precedent to derogation and finally to a use of lethal force. The response initiated by the government is usually proportionate to the severity of the perceived emergency. This chapter examines the two most prevalent methods for dealing with emergency under the constraints of liberal democratic law. The first approach is called the judicial "accommodations model," while the second approach is called the "extra-legal measures model."

Which approach one finds most compelling has a lot to do with how one views jurisprudence, the role of the state in public affairs, and one's conception of the nature of liberal democracy overall. I focus on two well-known proponents of these popular models: David Dyzenhaus and Oren Gross. Dyzenhaus defends a version of the "accommodations model," while Gross defends the "extra-legal measures model." The second chapter will proceed as follows. First, I will explicate the two views. Then, I will examine the role that the concept of emergency plays in each. The chapter ends with a defense of my contention that emergencies (as typically construed) do not exist. This denial includes the class of emergencies that most occupy Dyzenhaus and Gross, namely "states of emergency." As illustrated in the first chapter, the notion of an emergency is poorly understood at the conceptual level and this leads to problems at the practical level and in policy-making. Moreover, emergencies of a scale requiring state intervention prove on closer analysis to be largely chimerical, as they do not conform to the accepted criteria for being emergencies. That is, they are almost never events that appear suddenly, that require immediate action, that pose an imminent threat, or that were wholly unforeseen.

Most so-called "emergencies" are not even definitional "emergencies" in that they do not conform to the lexical criteria for so counting. Emergencies as argued in chapter one, are sudden and unforeseen events with severe material consequences. They therefore require criteria that most "state emergencies" fail to exhibit. Consequently, the argument over which model best captures the exigencies of emergency is somewhat misplaced in my view as it is being rehearsed at the wrong analytical level. Emergencies are not catastrophes or common misfortunes and should not be confused with them; they are their own manner of event and merit distinct examination. Most of the events that we popularly consider emergencies are foreseeable and therefore fail to exhibit the characteristics required of a genuine emergency. In contemplating emergency, discussion often turns to catastrophic events, but as noted catastrophes are not emergencies in the straightforward sense that I have presented, as a genuine catastrophe cannot be administered. Catastrophes are events in which people are killed and places are destroyed haphazardly and without viable recourse. While governments and lawmakers can make provisions for mitigating such events, these are strictly speaking half-measures.

No amount of planning or deliberation can forestall or elide a large-scale catastrophic event like a tsunami, earthquake, or volcanic eruption. Moreover, there is no agency in a catastrophe, in that no person is responsible for the devastation; save in cases like flooding, where there can be space for administrative negligence. Therefore, negligence aside little can be done to stop catastrophic outcomes. Emergencies however are different. We can mitigate emergencies by preparing for and managing them constructively, in a way that reduces causalities and damages. Nevertheless, we will not be successful in this goal so long as diverse events are lumped together haphazardly and described collectively as "emergencies." Emergencies differ from each other in their specifics, but they nonetheless share distinct qualities that render them similar in important respects and we should focus on these in thinking through emergency measures. To be effective in emergency planning we first need to understand what emergencies are yet few theorists dealing with emergency events have bothered to do so preferring instead to take the issue as settled. There is yet no rigorous analysis of emergency and that is what this chapter aims to rectify, if only in part. By examining Gross and Dyzenhaus on emergency, I aim to aid in acquiring a better understanding of the phenomenon than either author provides alone.

I also hope to create a path toward a better form of emergency management and administration by provisionally removing conceptual obstacles to such an improved understanding. I now turn to their respective models.

THE EXTRA-LEGAL MEASURES MODEL:

Oren Gross's extra-legal measures model proceeds from the assumption that "public officials who believe that the law is so fundamentally unjust as to be devoid of both legitimacy and legality may exercise their discretion and refuse to apply, or seek to actively undermine, such law". "Officials having to deal with extreme cases may consider acting outside the legal order while acknowledging openly their actions and the extra-legal nature of such actions and accepting the possible consequences" (Gross 60, 2008)[50]. Gross's model concerns emergency powers legislation and is aimed squarely at officials who find themselves in the midst of an emergency in which they are responsible (because of their position in government) for formulating an institutional response.

The official in question is responsible for putting into action a set of procedures for which they will be responsible both individually and institutionally. By endorsing and enacting a set of emergency powers, public officials explicitly legitimize those procedures, and therein lay the problem according to Gross. Extreme circumstances may necessitate that officials authorize actions that in less trying times would be seen as illegitimate, criminal, illiberal, or wholly undemocratic. What then are public officials to do? Gross's model attempts to introduce some measure of discretion into the choices available to public officials. Yet the latitude introduced by the extra-legal measures model causes its own problems. Dyzenhaus, Gross's principal critic, has argued that the extra-legal measures model (henceforth, ELM) creates a legal void in practice, in which public officials can act as they wish during an emergency. The issue with ELM, as Dyzenhaus sees it, is that it allows liberal democratic governments to void their legal and constitutional responsibilities. "ELM undermines, and is incompatible with, law's claim to authority, legal theory's central

[50] Gross, Oren. "Extra-legality and the ethic of political responsibility" in *Emergencies and the Limits of Legality* (ed. V. Ramraj). (Cambridge 2008).

assumption that the state can only act with authority when it acts within the limits of the law, and the commitment to democracy."

Conceptually, matters are even worse Dyzenhaus argues, because "if we accept, as he perceives ELM to do, that the sovereign has the authority to suspend or to violate the law in order to preserve the state in an emergency, then we accept that the state's authority derives, at the end of the day, not from a legal constitution but from a political constitution" (Gross paraphrase of Dyzenhaus 61, 2008)." For Dyzenhaus, ELM tacitly grants a point of political "realism." ELM supports the contention, made by Carl Schmitt and others that the state is founded on and governs, not through the authority of the law, but by fiat and with raw power. "In the state of exception or emergency, law recedes leaving the state to act unconstrained by law" (Dyzenhaus 50, 2006)[51]. Without rule of law, Dyzenhaus argues that only sectarian political power remains. This conclusion is one that Gross wishes to avoid. He charges, against Dyzenhaus's critique, that ELM perpetrates and endorses no such legal void. Gross counters by arguing that ELM has the opposite intent. "On the contrary, it [ELM] seeks to preserve the long-term relevance of and obedience to legal principles, rules, and norms. It suggests that going outside the law in appropriate cases may preserve, rather than undermine, the rule of law in ways that constantly bending the law to accommodate emergencies and crises will not" (Gross 62, 2008)[52].

ELM is not simple lawlessness Gross argues, because it does not allow law to be suspended at random or with foresight. Only if the situation merits can officials depart from accepted legal and political practice when faced with an emergency. "The model [ELM] rejects the possibility of *ex ante* lawful override of concrete legal rules and principles or of rule of obedience (to law) itself. Under extreme circumstances public officials may regard strict obedience to legal authority as irrational or immoral because of a contextual rebalancing of values which takes place at a level that is antecedent to the relevant legal issue itself, that is, the level of the rule's underlying reasons or similar first-order content-dependent reasons that relate to obedience to obedience to the rule" (Gross 63, 2008).

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[51] David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency*. (Cambridge University Press 2006).

[52] David Dyzenhaus, "The compulsion of legality" in *Emergencies and the Limits of Legality* (ed. V. Ramraj). (Cambridge University Press 2008).

Gross's rebuttal to Dyzenhaus illustrates the issues in play and underscores many of the themes addressed in chapter one. Crises and emergencies of a scale necessitating deviations from the standard principles, rules, and norms of liberal democratic constitutional law, are taken to exist in both accounts.

Both Dyzenhaus and Gross take it as a given that severe emergencies can exact pressure so extreme on public officials and on the state that the very workings of the legal and constitutional order can come to be altered, and both accept this presupposition without any further examination of its merits. As Lazar has pointed out, it is far from obvious that emergencies unfold in the manner described by Gross. While Dyzenhaus is more careful in his treatment of emergency, he too accepts the existence of severe emergencies as a basic premise of his version of the "accommodations" view. There is reason to believe that both are mistaken and that emergencies are not as transformative or exotic as each has made them out to be. Further, there is good reason to resist the removal of existing law as institutional benchmark, as previously noted. Without such benchmarks, it becomes difficult to discern where exceptions begin and were regularities end, a distinction that is central to the coherence of the ELM view itself. Gross believes that his view is recommended by the fact that a public official following his guidance cannot know in advance how her actions will be judged. He emphasizes that basic legal rules and principles still apply, even in an emergency, and that the decision to depart from these rules and principles can still result in legal punishment.

He writes, "Rule departures constitute, under all circumstances and all conditions, violations of the relevant legal rule. Yet, whether the actor would be punished for her violation remains a separate question" (Gross 63, 2008). The benchmark for assessing whether the official in question will be punished or not remains the existing law on Gross's view, therefore what is "extra-legal" is the official's act itself, which breaks with established law in an extreme situation of emergency, but which remains within the normative sphere of established liberal constitutional law otherwise. Acting through elected officials, citizens are expected to voice praise or condemnation at the "extra-legal" act and to register a verdict, again through their representatives, as to whether the official who acted "extra-legally" should receive punishment or not. If the actions of the official are taken to have been justified they can be ratified by the people, Gross argues. If not, they can

censor or punish any such future activity. Where Gross believes that his model excels is in the flexibly that it provides to lawmakers and to public officials. Because ELM allows for multiple modes of (*ex post*) ratification Gross rejects the charge leveled by Dyzenhaus which argues that extra-legal measures lead inevitably to lawlessness on the part of public officials and unaccountability under law overall (Gross 64-5, 2008).

By allowing for both formal and informal ratification of extra-legal measures, Gross wishes to side step the charge than ELM if adopted, creates a legal void. Gross is clear that the public can also maintain the *status quo* and rule that extra-legal actions remain illegal and punishable under the existing law. "A public official who acts extra-legally may be exposed to having a claim brought against her and to being found liable for damages to persons whose constitutional rights were violated by her actions. Such threats, even if practically remote, play a role in providing added deterrence against acting extra-legally." "By requiring a process of *ex post* ratification (or rejection), ELM emphasizes an ethic of responsibility not only on the part of officials, but also of the general public" (Gross 65-7, 2008). While Gross grants that some of this accounting is unlikely to be utilized by the public, he nonetheless believes that its presence can act as a viable deterrent to lawlessness during an emergency. Via the extensive existing information technology infrastructure of most liberal democracies, the public can be heard on issues of extra-legality, therefore making its use difficult to abuse according to Gross. Gross justifies his promotion of the ELM model on the basis of guardianship.

Public officials act as stand-ins for the citizens themselves in an emergency and make decisions that they believe to be advantageous to the citizenry, despite not being authorized to act in this custodial manner. The process of ratification that Gross endorses, allows citizens to then endorse or reject the actions taken on behalf of the officials. By endorsing the measures, citizens claim responsibility for the actions of the officials or reject the acts as not having been representative of their interests. As previously noted, all ratification or rejection occurs after the fact. During an emergency, public officials can act as guardians of the public interest without subsuming their actions to ratification, or so ELM argues. Officials do so, once again, against the background of existing non-emergency law and therefore are cognizant that their actions may be rejected and they themselves punished, censured, or imprisoned (Gross 66-67, 2008). While Gross

acknowledges that ELM could fail in practice, either due to public apathy or simply due to a lack of good public judgment, he nonetheless believes that ELM offers the best protection against lawlessness available in an emergency. "Government agents must decide whether or not to act extra-legally in times of crisis. They must face that question as moral agents. But their grappling with the question should then be followed by an assessment of that same question by an informed public.

In this instance, however, the answer carries not only moral significance, but also the potential for very real and tangible legal effects in the form of sanctions that would be imposed on the actor when the public rejects her illegal actions" (Gross 68-9, 2008). Perhaps the weakest element in Gross's argument is his optimism regarding an informed public, privy to undistorted information. There is little reason to think that such conditions will flourish either during, or in the immediate aftermath, of a self-styled crisis. For the moment, I grant Gross his assumption regarding information and deliberation within the public at large. The most common criticism of ELM is that it legalizes illegality. Gross argues against this common interpretation of his view by pointing out that ELM has a long history. The use of extra-legal measures in the past has not resulted in the wholesale legalization of illegal activities in the jurisdictions in which the measures were invoked and used. His prime example is Rome, where Cicero put down a coup attempt by the forces of Catilina, by executing those responsible for staging the coup. Although Cicero saved Rome from a coup, he had nonetheless acted outside the existing law by executing Roman citizens (coup members) who had previously been in good standing among Roman lawmakers and officials.

Cicero was therefore impeached and forced to exile himself from Rome for a time. Upon his eventual return, much of Cicero's old life had been sundered and the stigma of his actions remained, despite no further legal sanction or explicit punishment (Gross 69-71, 2008). Cicero's failure to accord the coup leaders a fair Roman trial was reason enough for him not to be forgiven by lawmakers and the public. The point of Gross's Roman tangent is to set a precedent for ELM's plausibility. He wants to argue against his critics that "extra-legal actions and constitutionally permissible acts are not equal in obligation and force under the constitutional scheme. The former are not made legal or constitutional as a result of the necessity of the situation. The very fact that an action is branded 'extra-legal' raises

costs of undertaking it." Further, Gross understands the dangers involved in acquiescing to the reasoning of "state emergency" uncritically. "Indeed, if a state of emergency permits stepping outside the legal system, no limits – certainly no legal limits – can be set on how far such deviations would go and how wide in scope they would be. Even if such limitations are conceivable, the scenario in which the unlawful becomes lawful *ex post* undermines ELM's claim that it upholds the rule of law" (Gross 71, 2008).

Despite his acknowledgment of the dangers of inherent in deviating from established legal frameworks, Gross nonetheless maintains that there is a stark difference between extra-legal measures and limitless power being placed in the hands of public officials and state authorities. Extra-legal measures can be reined in after the fact he believes, whereas limitless power is by definition, free from constructive oversight. Officials should welcome ELM and its focus on *ex post* ratification of extra-legal action according to Gross because from the historical perspective, indemnity has often been granted to officials who were found to have acted correctly during a crisis. While indemnity, like ratification, only come along after the fact, that is after the emergency or crisis has passed, Gross believes that the prospect of rectification resulting in indemnity is high for officials and that it therefore minimizes the uncertainty that critics like Dyzenhaus feel ELM introduces into law. Dyzenhaus remains unconvinced, arguing against Gross "if ELM were public, as it must be if it is to promote deliberation, the expectation would be generated of after-the-fact validation of illegal official acts. In an atmosphere of fear that expectation would likely be met rather easily, especially when the threat is, or is claimed to be, a constant one and the government successfully manipulates public opinion" (Gross 73, 2008).

Gross recognizes the severity of Dyzenhaus's criticism, but thinks that it can be met with a strong response, one that shifts the focus away from the public, which he acknowledges can be and is often led astray or misinformed, and onto the specific officials who make the decision to adopt ELM during an emergency incident. What he does not take seriously is Dyzenhaus's caveat that an emergency crisis can last in perpetuity, if it is of the right form. A terror campaign against a liberal democratic state can in theory, last for an indefinite amount of time, and can claim untold casualties. Such a campaign would generate an endless state of emergency. The point Dyzenhaus wishes to make *contra* ELM

is that there is no *ex post* moment on the horizon of such events. At no point will deliberation of the type Gross wants be available or possible. Moreover, while terror campaigns in practice are constrained by material limitations and other considerations, they do nonetheless last for generations, in some cases. Wars exhibit much the same problem for Gross, as they too can last for a long time and without apparent end. His response to this line of attack is as follows. The uncertainty of these types of situations bolsters ELM rather than harming it, Gross claims.

If the rules by which ELM functions are sufficiently flexible, then ELM can turn the uncertainty of these crises into a positive element of institutional restraint. "The more uncertain are the substance and the operation of the decision rules – which are, in the context of the model [ELM], directed at the general public as the *ex post* decision-maker – and the greater is the personal risk involved in wrongly interpreting either of those, the greater the incentive for individual actors to conform their action to the conduct rules – primarily the rule of obedience – and eschews the urge to act extra-legally" (Gross 74, 2008). The net result of these checks and balances, which Gross takes to be internal to ELM, would be over-deterrence, not excess use, of extra-legal measures. Many other critics of ELM, he counters against Dyzenhaus's charge, think that it would lead to a "hyper-legislation of warfare" and that this hyper-legislation would delay action at critical moments instead of supplying officials with tools to prevent or contain emergencies. Further, Gross points out that the actual terms of indemnity for those who do employ extra-legal measures in an emergency remain undetermined. Civil proceedings may be brought against the official even if indemnity is granted *ex post*.

Alternately, the opposite might happen, and criminal prosecution may be available as a punishment but civil penalties may not be. In each case, Gross thinks that indemnity acts as an additional restraint against unchecked uses of ELM. Compensation and reparations for those victimized by the misuse of ELM during a crisis may also be on offer Gross states, even without formal ex post ratification, so the introduction of ELM into the toolkit of emergency countermeasures does not ensure that these new measures will be abused. There is no certainty in this area and so those who criticism him because of what will happen if ELM because the dominant method of emergency response do not do so legitimately, according to Gross. Once the focus shifts to the international legal sphere,

Gross's case for the restraint that accompanies ELM becomes even stronger, or so Gross believes. "A world in which domestic courts show willingness to exercise universal jurisdiction and in which international tribunals such as the International Criminal Court become active, exacerbates the uncertainty faced by public officials under ELM. Furthermore, to the extent that the relevant actions violate the nation's international obligations, especially obligations and undertakings under the major international human rights conventions and are not covered by an appropriate derogation (or are in violation of non-derogable rights), state agents who engage in such acts expose their government to a range of possible remedies under the relevant international legal instruments and possibly in foreign jurisdictions as well. Indeed by recognizing what has occurred, a domestic ex post ratification may facilitate international remedies" (Gross 77, 2008). The lesson to draw from this hypothetical situation of Gross's is that ELM poses significant burdens on public officials in liberal democracy who would be quick to use it as a tool of political convenience. By making the price of its use high, but not unapproachable, Gross believes that he has produced a flexible standard for public officials faced with an emergency. Against Dyzenhaus, Gross advances that even if public officials are informally instructed by their respective administrations to act outside the law during an emergency (by using ELM as a guide) the cost to them individually remains high enough to act as a serious deterrent. There is no guarantee he reiterates that the official will protected from prosecution after the fact. Gross insists that there is an important difference between an *ex ante* authorization to break the law and the indemnity that *ex post* justification can provide. Because the executive branch of government is often the first to take action and is consequently often the most visible branch in an emergency and Gross thinks that this counts in ELM's favor.

His optimism on this score stems from his conjecture that the other branches of government will of necessity react (either pro or con) to the executive's actions during an emergency. This necessity of reaction he argues, spurs government as a whole to be transparent during emergencies. Otherwise, the executive opens itself to criticisms of opacity and triggers a cascade of criticism from opposition parties and from other branches of government, not to mention the public. This element of Gross's defense of ELM is not terribly convincing as it begs the question in an important sense. There is no institutional

guarantee that the executive branch will always be forthcoming and transparent in an emergency. Nor is it guaranteed that the opposition would necessarily dissent from the executive's viewpoint. Often emergencies breed conformity and Gross himself realizes this. He writes, "In parliamentary systems the government is supported by a majority in parliament. In fact, times of acute crises may also lead the opposition to mute its criticisms of the government or even join the government itself as part of a coalition of national unity" (Gross 83, 2008). ELM as presented does not seem to offer a way out of this sort of complication. To Gross's credit, he admits that another potential weakness present in ELM is the model's inability to rule out certain measures.

During an emergency, any conceivable measure could in theory be endorsed and enacted by a public official, an executive, or a government as a whole. While practical considerations of feasibility limit these potentially limitless options, only the endorsement of substantive elements within the model can ensure that the measures available to public officials are hemmed-in. "One way around this challenge is to incorporate into the model substantive elements, such as Bruce Ackerman's entrenchment of fundamental rights against constitutional revision and amendment or John Hart Ely's protection of certain minority groups. Yet, if we accept the possibility, in extreme cases, of governmental actions that are extra-legal so long as they are taken to advance the public good, there can be no constitutional or legal limitations on such governmental exercises of power" (Gross 84, 2008). Gross thinks that ELM's use of *ex post* deterrents is preferable to the *ex-ante* restrictions favored by most of his critics. To counter the normalization of emergency measures critics of ELM like Ackerman propose escalating supermajorities as checks on the power of government to introduce and employ extra-legal measures. On Ackerman's view, representative supermajorities would be required in order to enact the type of measures recommended by ELM.

In the event of a prolonged emergency, the supermajorities would need to be escalating, meaning that authorized measures would expire and would need to be voted on again, although with each new round of voting, a new larger supermajority would be required. Gross counters this suggestion of Ackerman's by noting a point made in chapter one, emergencies are unforeseen, and therefore cannot be predicted in the way that Ackerman seems to presuppose that they can. The danger that Gross, Dyzenhaus, and

Ackerman, are all trying to avoid is the potential normalization of emergency measures and powers within the jurisdictions in which these operate. If every incident for which the state is directly responsible is escalated into an emergency, then the distinction between an emergency and a non-emergency is lost over time, and the rights of citizens come to be unduly compressed and hemmed-in by ever expanding emergency measures. Where they disagree is over the best way to ensure that emergencies remain exceptional events rather than becoming commonplace. One way that emergency measures could become permanent is by extending their temporary reach into a longstanding statute, or into something semi-permanent. The threat of ever-expanding emergency powers is real because as Gross notes, circumstances that can endanger safety are potentially infinite (logically and empirically).

Because institutions can create roadblocks to effective emergency management, Gross thinks it better to err on the side of his *ex post* ELM view than risk granting government sweeping *ex ante* powers. The different institutional dynamics at work with government would only serve to undermine the efficacy of standard emergency measures, he argues. The dispersed nature of emergency management and regulation fits uneasy according to Gross with the actual nature of emergency, and is a bad fit for *ex ante* proposals, like Ackerman's super-majoritarianism. "Institutional proposals such as ECS (escalating cascade of supermajorities) come with a clear vision of emergency regulation that may not prove realistic. ECS sees to reduce the possibility of emergency powers becoming entrenched and 'normalized' by insisting on the temporary nature of such measures and making extensions thereof increasingly harder. But how, then, would ECS achieve that goal if one considers such possibilities as legislative accommodation through modification of ordinary laws or the various forms of interpretative accommodation, i.e. forms of accommodating for proclamation of emergency powers, without, necessarily, invoking the need for an 'official' proclamation of emergency or for special emergency legislation" (Gross 89, 2008).

The danger that Gross identifies here, is that legal provisions that originally arise out of a need to deal with an emergency eventually find their way, as an empirical fact, into "ordinary" legislative avenues, becoming part of the ordinary legal system. The emergency over time alters the shape of the pre-emergency legal framework, distorting it in unpredictable ways. Gross goes further and argues that *ex ante* emergency measures (like

ECS) alter everyday law in other ways also. By adopting *ex ante* methods "existing constitutional provisions, as well as laws and regulations, are given new understanding and clothing by way of context-based [judicial] interpretation without any explicit modification or replacement. These forms of 'dispersed emergency regulation' are not easily, if at all, amenable to mechanisms such as ECS" (Gross 89, 2008 [Original brackets]). On Gross's view, no form of *ex ante* legislation can meet the challenge of emergency management, not even ECS. Only an *ex post* solution will do. Government agents and public officials must be accountable for their actions, and because of this requirement, Gross believes that ELM is the most cogent approach to dealing with emergencies that require state intervention. It is not enough he argues, to explain one's actions *qua* public official, one must also explain the rationale for the decisions taken.

Moreover, that type of explanation, the explanation of one's rationale, can only come after the emergency has subsided, because until then, the agent or official has no way to know what they will need to do to end the emergency.

THE JUDICIAL ACCOMMODATIONS MODEL:

David Dyzenhaus views emergencies differently than Oren Gross does and draws different conclusions about the relationship between the liberal state and emergency management. Emergencies for Dyzenhaus expose not just the limits of existing law, but also the limits of existing political theories of liberal democracy. One necessitates the other on his view, because liberal democracy on his understanding relies on and is committed to the rule of law, which acts as one of its guiding institutional principles. States of emergency undercut this reliance because as Gross argued; severe emergencies push public officials to act in ways that place them squarely with the margins of what is legally acceptable in a liberal democratic system (Dyzenhaus 33, 2008). While granting that Gross's ELM model offers some advantages to the current method for dealing with emergencies, Dyzenhaus nonetheless remains skeptical of its overall value criticizing what he sees as the two dire consequences of accepting ELM as the preferred method for managing emergencies. On the one hand, Dyzenhaus believes that ELM leaves all political decision-making in the hands of the political elite, further undercutting the democratic aspect of liberal democratic

government. On the other hand, even if we avoid the first pitfall, Dyzenhaus argues that a second side pitfall of ELM adoption remains. If we concede with Gross, that extra-legal measures are sometimes in order, then Dyzenhaus believes we also tacitly concede that the liberal state rules based on coercive force, and not as most would have it on a basis of respect for rule of law. If the state is not bound by rule of law then it is neither liberal nor democratic Dyzenhaus argues, as "rule of law" and "rule by law" are not equivalent. Under ELM, state agents and public officials can act against the political interests of citizens, so long as their actions are deemed legal by some unspecified *ex post* procedure. These two concessions if made, render liberal democracy arbitrary, as law is then grounded in force and not in principle. Without some additional institutional buffer, it will be political power alone that actually justifies measures like ELM, Dyzenhaus argues, not legality.

These two difficulties with ELM have consequences downstream, not the least of which is the ability of deviations from rule of law to fall prey to the vicissitudes of political calculation and to become tools for opportunistic political incentivization. As Dyzenhaus writes, "Not only is the choice to abide by the rule of law a matter of political incentives, the same is true of the choice to use rule by law to achieve one's ends. It follows that the weaker one's relative position, the closer one will find oneself to the normative rule-of-law end of the continuum that stretches between rule by law and rule of law. One who is in a very powerful position will submit to ruling at various points away from the rule-by-law end of that continuum only when it is expedient to do so" (Dyzenhaus 37, 2008). A guiding principle of rule of law itself is the displacement of all arbitrary rule. By making laws public and their rationale stable, governments allow citizens the ability to gauge the state's actions against a relatively stable yardstick. Yet if we concede that what is legal is what public officials say is legal, we run headlong into arbitrary rule, and it is just such a slide from "rule *of* law" into "rule *by* law" that Dyzenhaus detects and criticizes in ELM.

"The liberal aspiration to have the rule of law rather than the rule of men requires not only a political struggle to subordinate politics to the rule of law, but also a political struggle within practice about how that is best done" (Dyzenhaus 38-9, 2008). This aspiration also encompasses emergencies and states of emergency and highlights the respective differences between Gross's view of emergency and Dyzenhaus's view. On Gross's understanding, emergencies create an exceptional space in which deviations from

the law are sometimes required. Dyzenhaus's view precludes this possibility on principle. If we allow emergencies to dictate the terms on which liberal democracies engage them, democracy will succumb inevitably to rule by law, thereby rendering legal rule troublingly arbitrary. It is not enough, Dyzenhaus cautions, to assert the validity of the rule of law that validity must actually obtain and be instantiated in the principles employed by the central institutions of the liberal democratic state. Under Gross's ELM model legal authority is preserved, but at the cost of introducing extensive arbitrariness into law, therefore rendering the cost of adopting ELM too high, according to Dyzenhaus. ELM sees itself as a response to two other competing models of emergency response and management, the conventional model, and the accommodations model. On the conventional model, emergences pose no special problem and require no special treatment. Dyzenhaus refers to this model as the "business-as-usual model."

The accommodations model stands in contrast to the conventional model and to ELM, in that it urges lawmakers and public officials to adapt existing law to the crisis in question or less often, to suspend elements of existing law under preordained circumstances, so as to deal with the emergency. Unlike in ELM, suspensions of established laws or procedures are to be agreed on before the fact as much as possible and *ex post* changes to law or established procedure, are to be avoided on the accommodations model. The conventional or "business-as-usual" model is discussed only briefly, as no one recommends it as a serious response to a severe threat. As such, I leave the question of its unpopularity to the side in what follows. "Gross thinks that one should reject business-as-usual models because they are blind to the fact that true emergencies outstrip the resources of ordinary law. Further, one should reject models of accommodation because attempts to make ordinary law flexible enough to respond to such emergencies lead to disrespect for the rule of law as its content gets diminished and creates the danger of seepage of diminished rule of law into the rest of the legal order, as people become accustomed to its presence. So instead of trying to accommodate the rule of law to emergencies, liberal democratic societies should advise public officials to break the law, if need be, and then candidly confess their illegality, thus throwing themselves on the mercy of 'the people'" (Dyzenhaus 40-1, 2008). Gross recommends ELM because unlike any other competing model, it allows existing law to function as it always has, while also allowing for deviations

into an official form of temporary illegality. Dyzenhaus remains skeptical of this reasoning however, as he doubts ELM's ability to make accurate predictions about the future activities of public officials. Without such predictive power, Dyzenhaus argues that Gross cannot know that ELM will produce the intended consequences when faced with an emergency. Another misgiving of Dyzenhaus's over ELM concerns the extent of real deliberative space made available by the model. How does Gross expect the public to deliberate on the actions taken in their name when the government can tailor the information made available to the public Dyzenhaus wonders. The executive branch is particularly loath to share sensitive or potentially embarrassing information, and ELM alone provides no overriding reason to assume that future executives will act any differently from present executives.

Lastly, Dyzenhaus is concerned that ELM creates a type of precedent for sanctioned illegality, one that could become normalized and accepted over time, thus rendering illegal activity during emergencies the norm rather than the exception (Dyzenhaus 41, 2008). Much turns on the tacit assumption made by many theorists of emergency that states of emergency are also states of exception, and that states of this kind render liberal democratic states legally and procedurally ungovernable, in some unspecified sense. While many commentators (including Gross) seem committed to some variant of this claim at least tacitly, and most at pains to spell out exactly what it is about emergency that is supposed to undercut established liberal democratic procedures. Again, emergencies are not catastrophes and as such, it is unlikely that any single emergency could disable the entire apparatus of liberal democratic constitutional government. So far in this chapter, I have been assuming that the notion of a state of emergency has some limited probative value, but as we will see further on and as I intimated in the first chapter, there is ample reason to doubt that this is actually the case.

In fact, the core argument between Dyzenhaus and Gross can be recast as a debate over the *authority* of law in a liberal democratic system and most often, this is the tact taken by Dyzenhaus in his critique of ELM. As I will show, Dyzenhaus's view is also tethered tightly to the notion of genuine emergency, and in this respect is not in the end a substantial

improvement over Gross's ELM account. In examining the roots of the ELM view, Dyzenhaus notes the need to generalize from a single emergency to a full-blown state of emergency. Without such a generalization, it is difficult to imagine the rationale of a model like ELM. He writes, "An emergency situation is one where I reasonably suppose that I should act illegally in order to deal with some imminent threat. If such threats are widespread, the emergency situations might together amount to a state of emergency, so that not only is it the case that multiple illegal reactions are required, but it is better that the actions be undertaken by public officials in a deliberate and planned fashion. When the emergency is over, the state should respond to the widespread illegality by indemnifying officials who acted appropriately, as we would say today, in a proportionate fashion" (Dyzenhaus 47, 2008). The problem for Dyzenhaus is that on his view, all of the actions described can be authorized beforehand, as there is no benefit in allowing authorities to act in an *ex post* fashion.

Therefore, there is little to recommend ELM over its competitors. While indemnity can be granted *ex post*, there is no reason according to Dyzenhaus, for us to follow Gross in endorsing an *ex post* approach to all emergency measures. It is also questionable if ELM intends to upturn established statutes such as *Habeas Corpus*, which most legal scholars (including Dyzenhaus) see as central to rule of law. In addition, while he grants that under the stress of a severe emergency public officials should be given leeway and a greater margin for error than they could otherwise expect, Dyzenhaus nonetheless finds ELM a troubling concession to potential lawlessness. What makes ELM hard to reconcile with established political and legal practice is its apparent eschewal of the value of advance authorization. By insisting on *ex post* measures alone, Gross makes ELM appear unreasonable by conventional liberal democratic procedural standards and his antipathy for advanced authorization of emergency measures worries Dyzenhaus.

In discussing Dicey's views, some of which serve to underpin ELM, Dyzenhaus notes that "the main point is that if there is no prior authorizing statute [in an emergency], an Act of Indemnity should not [*contra* Gross] purport to provide blanket indemnity for all legal activity, nor should it provide expressly that it covers bad faith acts or acts of reckless cruelty. The Act is meant to secure the rule of law, not undermine it. While the rule of law includes a principle of non-retrospectivity, that principle can be outweighed by other

principles of the rule of law, in this situation, the need to preserve the legal order" (Dyzenhaus 47-8, 2008 [Brackets mine]). To be able to do all the things that Gross wants ELM to be able to do, there must be a mechanism of accountability *internal* to the model itself. Dyzenhaus finds the *ex post* measures recommended by Gross to fall short of the mark as far as accountability goes. Accountability under law requires that procedural safeguards be present at various levels within the law itself. Rule of law "requires observance of other rule-of-law principles, in this context the principles of proportionality which would govern official action, had there been a prior authorizing statute" (Dyzenhaus 48, 2008). Despite this key difference between Dyzenhaus's understanding of rule of law and Gross's, both agree with the proposition that a severe emergency can curtail the range of application of the law. They differ in that Gross thinks that the curtailment can only be specified *in media res*, whereas Dyzenhaus believes that "in a democracy, the rule of law should only be sacrificed for the sake of the rule of law and that condition imposes its own constraints on the sacrifice" (Dyzenhaus 48, 2008).

Another way of looking at the issue of rule of law involves interpreting it through the optic of political accountability, a notion that is explicit in Dyzenhaus's work on states of emergency, but that is less carefully explicated in Gross's work. A public official cannot be said to act legally or accountably in a liberal democracy, if their actions are arbitrary in nature or if they take place in an arbitrary context. This is because accountability in liberal democracy usually turns on the actions themselves being legally warranted, in some capacity. Yet legal warrant is not enough, as there is a representative element to liberal democratic societies. If public officials fail to track the interests of citizens, via elections or some other representative mechanism, they cannot be said to act in a fully democratic or liberal spirit. Thus, there is a connection between *legal* authority and warrant and *political* authority and warrant in liberal democratic forms of government. Dyzenhaus makes the same set of points, albeit in different terms.

"The rule of law, in other words, is a necessary, though not sufficient condition for democracy. It is a necessary condition because it presupposes one kind of political accountability, the requirement that all acts of public power count as such only if they can trace their authority to a legal warrant. It is not sufficient because democracy requires many other forms of political accountability in addition, mainly the accountability of the rulers to

the people through elections. But because the rule of law is a necessary condition of democracy, it is a condition of an assertion of democratic authority that it can show a warrant in both politics and law" (Dyzenhaus 49, 2008). So on Dyzenhaus's analysis, ELM cannot possibly work, as it undercuts the very notion of legal and political authority in a democracy by placing authority outside the acceptable margins of liberal democratic practice. "The idea that there is an extra-legal basis for authority is thus incompatible not only with law's claim to authority, but with a commitment to democracy" (Dyzenhaus 49-50, 2008). The analysis of why ELM fails provided by Dyzenhaus differs from mine in that he takes emergency to be a real threat to liberal democratic law, without analyzing what the concept of "emergency" comes to, something I reject. His belief in the importance of emergencies as political phenomena aside, Dyzenhaus nonetheless offers a prescient critique of the shortcomings of ELM. As we have seen so far, Dyzenhaus thinks that the way ELM deals with issues of accountability is unstable and hence unlikely to work as intended during an emergency or crisis.

The view of accountability presented by Gross is so weak Dyzenhaus believes that he states, "ELM has little to do with emergencies and the constitutional or legislative responses to them. Rather, it is concerned with the most extreme situations imaginable, exemplified in the so-called ticking bomb situation where a public official resorts to torture in a bid to extract urgently required information" (Dyzenhaus 51, 2008). Continuing along this vein, Dyzenhaus further argues that if his depiction is accurate then ELM is no model at all, as it provides no genuine legal resources for dealing with emergencies or why other unforeseen threatening events. So dim is Dyzenhaus's view of ELM that he thinks that all it does in the end is attempt to legitimize what is in a sense unlegalizable behavior on the part of public officials (Dyzenhaus 52, 2008). Gross finds himself with a series of discrete "emergency situations" argues Dyzenhaus, each of which presents its own challenges, but none of which is amenable to a principled response on behalf of lawmakers and officials.

No unified "state of emergency" arises from the description of emergency provided by Gross's ELM model according to Dyzenhaus, because nothing connects the disparate types of events Gross describes to one another. The scattershot nature of ELM stands in sharp contrast to Dyzenhaus's defense of his own "rule-of-law model," which seeks to accommodate emergency as best it can, while remaining true to existing law and legal

precedent. Unlike ELM, Dyzenhaus's model of accommodation strives to keep things as they are as much as possible, while admitting and addressing the challenges posed by emergency. His own description of his proposal is as follows. "A rule-of-law model seeks to show how to go about legalizing prospectively those government acts that are normatively appropriate responses to emergency. How law should react when there is no time to engage in this process is an interesting question, but it is mostly interesting because of the light it sheds on how to craft legal responses when there is time. Thus, when an act is unlegalizable it is, as it were, both legally and morally doomed to take place in extra-legal space. But precisely that fact is what makes examples from that space inapt for model building" (Dyzenhaus 53, 2008). Dyzenhaus also takes issue with Gross's critique of the "business-as-usual" and the "accommodations" models, finding Gross inconsistent in his description of ELM as simultaneously radical in its ability to administer emergencies, and conservative as regards existing law. ELM is neither Dyzenhaus argues, as he finds it unable to deal with emergencies constructively, and parasitic in its use of existing law.

If anything, it is the "business-as-usual model" Dyzenhaus believes, that offers ELM the most plausible grounding. Because the business-as-usual model is inflexible, and provides no middle ground, it suits ELM's focus as it explicitly creates the legal distinction between normal and extra-legal measures that Gross's account relies on. "That the extra-legal measures model is built on the back of inapt examples explains what I perceive to be a deep tension in Gross's position. On the one hand, he argues against both the business-as-usual and accommodations model. On the other hand, he argues for the extra-legal measures model and at the same time, claims that it does not seek to do away with the traditional discourse over emergency powers, nor exclude constitutional models of emergency powers. But it is the business-as-usual model, which provides the strongest basis for asserting something like the extra-legal measures model, since the stance of business-as-usual leads to an all-or-nothing approach. Either officials must act within the law, which means the ordinary rule of law, or they must act illegally. There is no middle ground for discussing adaptations of the rule of law to respond prospectively to emergencies" (Dyzenhaus 54, 2008).

Much of the interpretative debate between Dyzenhaus and Gross turns on the plausibility of "unlegalizable" action, action that in an emergency, state officials would find

themselves compelled to engage in. Gross proposes that such actions are real options for public officials facing a catastrophic emergency, while Dyzenhaus argues that the very idea of an "unlegalizable" action is self-contradictory. Legal action either falls within the letter and spirit of constitutional law or it does not, according to Dyzenhaus. There is no possibility that allows for exceptions to constitutionality. Gross counters that the very fact that there are necessitous circumstances in which public officials may consider actions such as those proposed under ELM, shows that ELM has a role to play in emergency management. Dyzenhaus disagrees, countering that "there is no distinction here between public official and private individuals and that those who so act should be subject afterwards to the tribunal of law and, if they are found not to have met the requirements of the defense of necessity, to the tribunal of politics" (Dyzenhaus 54, 2008). Dyzenhaus's point is that a good legal defense of an act of necessity during emergency does not render the illegal legal. Rather, the defense finds a legitimate explanation for the act and thus renders an illegal act into a legal one by showing where it coheres with established constitutional law.

Dyzenhaus also notes that even if a single illegal act were justified as "legal" in some extended sense of that term, this would be a single exceptional instance, and not as Gross would have it, the basis for a model of emergency legislation. "There can be a brute act of politics that uses law to legalize past illegality because it is considered that, in this exceptional situation, there was reason for society to immunize the individual from legal sanctions. But the point of the exercise is to preclude the idea that from the fact that this individual was immunized in this situation, one can build a principled model." Further, this is a theoretical consideration at best. Dyzenhaus does not think that such an approach to law is viable in practice, as it would authorize all sorts of undesirable exceptions (Dyzenhaus 54-5, 2008). At most, Gross is offering a rationale for punishing wrong doers who act extra-legally, on Dyzenhaus's view. He is not pointing to a fatal flaw either with the "business-as-usual" model or with the "accommodations" model nor is he necessarily following Carl Schmitt in arguing that power and not law actually ground the political sovereignty of government.

In Gross's defense, it is unclear that this is what ELM is attempting to do. His focus appears to be more limited that Dyzenhaus allows. Dyzenhaus does grant that Gross's

critique of other models is valuable, but he himself does not subscribe to ELM. At most, Dyzenhaus believes that ELM argues for the government's occasional ability to refrain from punishing those who sometimes break the law during an emergency. This capacity for selective prosecution is itself grounded in existing law, or at least should be law-governed argues Dyzenhaus, if it is to be effective and fair in its applications. Praising Gross, Dyzenhaus states that "he has powerfully argued against what he calls the assumption of separation between the ordinary and the exceptional and identified perspicuously the problem of seepage of the exceptional into the ordinary which affects all attempts to adapt the rule of law" (Dyzenhaus 55, 2008). Emergencies Dyzenhaus argues are not the only situations in which branches of government attempt to consolidate or expand their powers. These types of "power grabs" occur even in non-emergency situations and therefore we cannot (and should not) assume that emergencies are always exceptions to the normal vicissitudes and rules of politics and law. There is therefore "surely every reason to consider" *pace* Gross's critiques "the feasibility of the rule-of-law controls developed for the regulatory state for executive responses to emergencies" (Dyzenhaus 55, 2008).

Despite his sharp criticisms of Gross and of the ELM model, Dyzenhaus does draw a similar conclusion to the one that Gross draws, as concerns public power and legal authorization. He writes, "indeed, as I have indicated, the very requirement that all acts of public power have a legal authorization might become counter-productive when the kind of power sought is of a kind that either cannot be legally controlled once authorized or is too morally repugnant to be considered for authorization" (Dyzenhaus 56, 2008).

EMERGENCY AS LAW AND IDEA: FOUR CATEGORIES

Gross and Dyzenhaus are in agreement as regards the expanding nature of emergency measures and on the need for principled restraint, yet they disagree on the best way of securing said procedural restraints. The options available to each are rather limited and both Gross and Dyzenhaus have already staked positions at odds with one another, making common ground harder to find. My view of emergency challenges all of the above aspects of emergency management, by arguing against their uniting premise and by casting doubt on the *coherence* of the existing notion of emergency (and emergency preparedness)

overall. Of the options open to Gross and Dyzenhaus, few appear viable without major reconceptualization. The most viable emergency strategies fall into four rough categories. On the first strategy, public officials can act as they wish without fear of legal or political reprisal during an emergency. Adoption of this strategy amounts to ignoring established law. In so doing, one creates a legal black hole for the duration of the emergency within which traditional liberal democratic law ceases to apply. On the second strategy, one can endorse existing law and do nothing exceptional or novel when dealing with emergencies. Doing this robs officials of the ability to design rapid responses but ensures that established law is respected. This amounts to holding on to the *status quo*, thus depriving the emergencies of any special legal status. The third strategy is represented by Gross's ELM model, which allows for retrospective indemnity after the emergency has passed. It encourages rapid responses to emergencies but incurs the cost of potentially legitimizing illegal activities and of eroding rights through derogation or violation. The fourth strategic option, involves initiating a form of specialized administrative law for the duration of the emergency, one that polices both the scope and the actions of public officials charged with administering the emergency.

The advantage of the fourth option is its apparent compatibility with established law, whereas its weakness lays in its seeming inability to accommodate serious deviations from established law or to authorize rapid response initiatives. Dyzenhaus favors something like this fourth strategic option, despite acknowledging that it can potentially hamstring emergency countermeasures (Simester 289, 2008)[53]. Part of the difficulty with analyzing Dyzenhaus's position is his own unwillingness to define and label it clearly. At times, he appears to advocate a *status quo* or "business-as-usual" model, while at other times he seems inclined to accept some version of the standard accommodations view. For my part, I interpret Dyzenhaus as advocating a modified accommodations model, one in which the majority of the administrative decisions for dealing with emergencies have to be taken *ex ante* (and not as Gross would prefer *ex post*). For these administrative decisions to be valid for Dyzenhaus, they need to accord in large measure with established constitutional law, that is to say they cannot depart *in toto* from established liberal democratic procedures.

[53] Simester, A.P. "Necessity, torture, and the rule of law" in *Emergencies and the Limits of Legality* (ed. V. Ramraj). (Cambridge University Press 2008).

Consequently, on Dyzenhaus's version of accommodation, the institutions of liberal democracy remain largely unaltered and their administrative status remains intact, whereas on Gross's view the established institutional safeguards of liberal democracy are temporarily set aside. I chose to focus on Gross and Dyzenhaus because they best represent the available options and because they are the clearest exponents of their respective views. Both see the issue of emergency, rightly in my view as a middle ground between political philosophy and legal theory, as the issues at stake are central to both areas and the determining factors are as much legal as they are political in nature. Gross and Dyzenhaus falter however, in taking the notion of emergency itself to be well defined and clear, despite the fact that it is not. They do this in spite of the important role that their tacit understanding of emergency plays in both accounts. As with many first impressions, that tacit understanding is mistaken. Emergencies are not as monolithic as either Gross or Dyzenhaus would have us believe, nor are they as predictable as their theories anticipate. Gross and Dyzenhaus do not attempt to define or to clearly characterize the nature of emergency in any way, instead accepting that there is a clear view of emergency (at least in principle) on offer somewhere. More disturbingly still, all emergency measures in liberal democracy involve rights derogations, even if they are rarely cast as such.

As Kent Roach has pointed out, debates about emergency measures are always debates about which individuals will have which rights derogated and how, they are never debates about emergencies themselves which as I have argued, are almost always taken as a given with little to no analysis (Roach 229, 2008)[54]. The tendency to slide from rights derogation to emergency is troubling, because it can lead to states of "permanent emergency" where rights are continually contracted due to the persistent threat of terrorism. Such was the case in Northern Ireland for many years, and in Israel and other Middle Eastern nations, security measures remain exceptionally strict due to continuing terror threats. Yet whatever the merits of those measures, a recurrent terrorist threat is not an emergency and cannot plausibly be considered as such. If the threat is constant or near constant, then it is a quasi-permanent issue of national security to be deal with through explicit legislative channels and not an event to be deal with on an *ad hoc* or temporary basis.

[54] Roach, Kent. "Ordinary laws for emergencies and democratic derogation from rights" in *Emergencies and the Limits of Legality* (ed. V. Ramraj). (Cambridge University Press 2008).

Again, the element of permanence (or quasi-permanence) undercuts the element of unforeseeability required by genuine emergencies. Liberal democratic legislatures or governments would never describe a continual war as an emergency; rather they would see it as a distinct and ongoing conflict, complete with its own rules of engagement and administrative laws and there is no reason to threat emergencies any differently. Another problem with existing emergency measures, as these are represented by Gross and Dyzenhaus, is their singular focus on violence and on rights derogations. Not all emergencies require that type of administration and not all emergencies are amenable to mitigation or containment via derogation or coercion. Many also regard natural and economic crises as emergencies, but rarely (if ever) are those types of emergencies dealt with through the mechanism of extensive rights derogations or through some other coercive avenue. It is odd that rights derogations should figure so prominently in the literature on emergency as they are of little help in an economic crisis and are even less relevant during a natural disaster, save for the occasional evacuation or quarantine. Moreover, even in those cases, there are distinct rules that are largely inviolable and that are in place before the crisis occurs. Medical quarantines to take one example do not entitle authorities to derogate beyond a minimum baseline.

Rights can be derogated but only to the extent that derogation contributes to reinstituting the health of the quarantined or to keeping those infected away from the uninfected public. While some will object to my characterization and argue that if severe enough both natural disasters and economic crises could be fertile territory for derogation, I think the plausibility of this type of objection fades as we turn from theory to actual practice. Beyond orders of evacuation and quarantine there is little empirical data to show that natural disasters and economic crises are aided in any way by derogation. There is instead every reason to believe that derogation is often misused and abused and that its use should be spartan when necessary and well delineated. I do not dispute the fact that many natural disasters have led to mass quarantines and evacuations and that these forms of governmental interference can plausibly be cast as derogations of one's rights during an emergency event. Be this as it may, there remains a salient difference between a short-lived evacuation or quarantine and a recurrent derogation of one's rights in perpetuity, a situation that is far more common in emergencies.

Further, quarantines and evacuations are not *extra-legal* in any interesting sense, nor do they exhibit the worrisome *randomness* of some other emergency measures. When one is evacuated from one's home, the cause for the evacuation is clear and the remainder of one's rights as a citizen remain largely intact, as do the expectations carried by the social norms that guide evacuations. Much the same can be said of those forced into quarantine. Notice that existing law can well accommodate these types of events and do so selectively and prospectively. Due to well-enshrined legal precedent, such as that found in *Korematsu v. the United States* and similar court decisions, it is doubtful that the type of wholesale evacuation and deracination experienced by Japanese Americans and other minorities during the Second World War would be permissible by contemporary standards of justice in a liberal democratic setting. The type of emergency Gross and Dyzenhaus have in mind is of a different order. They envision an emergency of such severity that the rights of all citizens regardless of location or proximity could be derogated, a "state of emergency" of indefinite potential duration. I find the core of this idea to be untenable. It is untenable to argue for a state of affairs in which emergencies are at once *permanent* (in the sense of being of indefinite duration) and *random* in nature (in the sense that they are truly *unforeseen* events) all at once.

It seems that the best way to view a crisis of indefinite duration is as a form of war, if it is the work of persons and destructive in nature, or as an act of nature akin to a natural disaster, if there is no agency or person to whom the destruction or danger can be linked. Labeling every crisis an emergency seems simply counterproductive and unintuitive. Catastrophes as I mentioned previously cannot be administered, they are catastrophic in that they occur with overwhelming force and without much possibility for response or planning. Emergencies as standardly understood are different; they can be planned for and administered, to greater or lesser extents. Yet for emergency measures to work they need to be apt to the situation, and most of the doomsday scenarios envisioned in the literature that Gross and Dyzenhaus are responding to, are simply too unclear to allow for action. A nation under threat of terrorist attack has some knowledge of their attacker, their motives, and their agenda. That state can therefore plan its response, should an attack occur, without resorting to gross derogations of rights in the public at large.

However, this information is double-edged, because the state in my example has *foreknowledge* of their attacker and as such, they now find themselves dealing with a security concern and not as Gross and Dyzenhaus would have it with an emergency, as the element of unforeseeability has been greatly reduced. States in this position can and should be selective, because the information they have alters the parameters of the situation they find themselves having to deal with. An unprecedented attack by an unknown foe would be a genuine emergency, whereas a repeated attack by a known foe is not. Only a genuine emergency authorizes a state to derogate rights and this in a piecemeal manner, as not all violent events count as emergencies, and not all rights can be sensibly derogated all at once. Gross in particular is prone to overstating his case, as when he writes that "under extreme circumstances public officials may regard strict obedience to legal authority as irrational or immoral **because of a contextual rebalancing of values which takes place at a level that is antecedent to the relevant legal issue itself**, that is, the level of the rule's underlying reasons or similar first-order content-dependent reasons that relate to obedience to obedience to the rule" (Gross 63, 2008 [Emphasis mine]). Gross in this passage is referring to an element that is present in all liberal democratic deliberations and not to a "rebalancing" true only of emergencies.

The deliberative elements of a liberal constitutional democratic set of institutions (i.e., courts, senates, and congresses) constantly rebalance and realign the values and laws of that constitutional democracy and Gross's assumption that extreme circumstances bring deliberation to an end is ill-founded. Precedent remains a key element in jurisprudence, even during an emergency. This is a point also made by Dyzenhaus against ELM. Gross is free to argue that precedent itself should be suspended during emergencies but he does not show any sign of wanting to commit to that view. Unless we accept a view like Schmitt's in which power is taken to be prior to legal authority there is no basis in ELM for the type of claims Gross makes. Further, Gross himself disowns Schmitt's views and does not argue explicitly for the idea that power is antecedent and necessary for governance during a crisis. He only argues for the view that to preserve existing law (which he presumably takes to be legitimate in some sense) authorities faced with an emergency sometimes need to go outside of its bounds in order to deal with the emergency in question. I take Dyzenhaus to have argued persuasively for the view that this position is unstable. The burden if anything

falls on those who defend and promote ELM to provide a compelling rationale for their view that emergencies exceed the resources of extant law.

Gross's view is the most sophisticated of this family of views, yet all he offers in the end is the contention that severe emergencies incapacitate the established legal order due to their intensity. This is not enough on my view to merit suspending established law. What is striking is the conflation between the legal and legislative framework of emergency management and the operational or policing framework at work in both models (i.e., in ELM and accommodation). Most of the changes that Gross is proposing through ELM are best acted upon at the operational level and not as he suggests at the legal level. Similarly, most of Dyzenhaus's critique of emergency measures takes place at the legal and legislative level but leaves the policing and operational levels largely untouched. This is an important blind spot in both theories and it mirrors other blind spots in the discussion of states of emergency. One such blind spot involves the range of issues that fall under the rubric of a "state emergency." States of emergency are declared for armed insurrections against the state (domestic or foreign in nature), natural disasters, general civil unrest, medical epidemic, financial or economic crisis, or in some cases for long-lived general strikes.

While I do not doubt the potential severity of these events, I do take issue with the fact that one concept (i.e., emergency) is taken to encompass all of these different types of events and activities and to do them all justice both legally and operationally. Despite important differences between these various events all are treated in roughly the same way, through the mechanism of rights derogation. In order to have a coherent and efficient set of emergency response measures both the legal/legislative framework and the operational/policing framework must function in tandem. Otherwise, the two levels function at cross-purpose. Moreover, both frameworks need to respect the edicts of international law when it is relevant, as when certain nations are signatories to international treaties that bar certain extensive forms of derogation. No theorist of emergency tackles these interconnected issues comprehensively and Dyzenhaus and Gross focus on one subsection of each level (the legal/operational level) to the detriment of the other issues generated by emergency.

The danger that both Dyzenhaus and Gross are trying to avoid is the potential for a constitutional dictatorship, the condition under which emergency measures are prolonged into the indefinite future and a situation in which only the executive branch, or some combination of the executive and the courts, will have control over government. This yields the result of shutting out potential criticisms of the government's handling of the crisis, as well as derogating rights *in toto* across the society. While rights may still protect citizens in theory, in practice once a state of constitutional dictatorship has emerged, it is difficult to operationalize these rights, as the government has been given (tacit) discretion over whether they wish to honor or dismiss rights in each case presented before them. Further, governments act through their agents (i.e., through police, courts, judges, etc.) in obtaining and maintaining security during a crisis, and it is the agents who use their discretion when dealing with the population at large. So once the traditional complement of liberal democratic rights have been scaled-back by the new emergency restrictions, it is up to each officer or judge to decide which rights are applicable and which are not during the crisis period. This is much harder to do during a constitutional period of dictatorship, even if this is not what the government itself calls it formally, than it would be in the context of traditional liberal democratic constitutionalism, with its decentered power sharing and rights guarantees.

Consequently, the coordination between operational and legislative frameworks, fought over by Dyzenhaus and Gross, has practical and far-reaching implications. It may be argued that the view I have so far presented is inaccurate. That there are too many safeguards in liberal democratic government to allow for the type of scenario Dyzenhaus and Gross envision. I respond that this is to miss the point of my argument. I argue that properly speaking there exist almost no emergencies of the type that warrant extensive emergency measures of the type on offer in most theories of emergency. By looking at the disadvantages and oversteps found in these theories, I am trying to illustrate their inefficacy. My critique of the ELM and accommodations models, only serves to underpin the dire consequences that one can expect if public officials act as if present emergency measures theories are accurate and sufficient. I do not need the models of emergency management themselves to be accurate or persuasive in order to make my point against emergencies as a concept, as that is a problem for the model's respective authors to address.

My view stands or falls with the contention that the minimalist criteria I recommend for emergencies are not met by any of the phenomena analyzed by Dyzenhaus, Gross, and others.

Faced with a plausible, potential, and relatively well-understood threat, liberal governments should take action to create new policies or to bolster existing policies for dealing with these types of events head on. Terrorist attacks by well-organized groups can be deal with through advanced contingency planning and from within the confines of the existing law. Similarly, natural disasters and medical epidemics can be prevented or at least have the direst of their effects forestalled by planning, education, and organization, as catastrophes do not count as emergencies because they cannot be altered through planning, organization, or proactive policing. One cannot avert a catastrophe but emergencies can be contained and planned for but only if we stop thinking of them as *sui generis* events. Events like emergencies develop from other previous events. These previous events are often of lesser severity and magnitude and therefore are easily amenable to established prediction and control via established administrative methods. There is always a possibility that a sudden, unforeseen, and severe event, will occur. Nevertheless, there is little reason to think that these events are exceptional in any way, save for the fact that they may at times catch the relevant authorities off-guard. Even with these mild concessions in place, it is important to remember that full-scale state of emergencies does not arise from thin air.

There is therefore no reason to adopt extreme measures, measures that sunder previous administrative standards, and that do not in the end make anyone safer. Planning ahead while refraining from derogating rights as a first step to emergency management, is an improvement over models like ELM which overreach prematurely, and can aid in bolstering models like the accommodations models, which while imperfect, at least sees the values in preserving established law rather than allowing illegality to mask itself as law. Another striking aspect of both ELM and the accommodations model is the lip service that each pays to established international legal prohibitions on declaring a state of emergency. Most liberal democratic countries are signatories to one of the two main international conventions prohibiting unlawful derogations of rights. Each of these conventions, the *European Convention on Human Rights and Fundamental Freedoms* and the *International*

Covenant on Civil and Political Rights, lay out the conditions under which rights can be derogated in the event of a state of emergency.

While neither ECHR nor ICCPR are self-executing, meaning that the government of each signatory state must ratify and enact laws based on the conventions, the signatories are expected to act (at least) within the spirit of the conventions, even if each state is allowed to ratify the convention with certain reservations. The essence of each convention must be maintained, despite these reservations. Gross has written about ECHR but he fails to accord that convention's Article 7 sufficient weight in his own account of ELM. In the course of defending ELM, Gross argues that bringing in international tribunals, restrictions, and conventions, into the mix merely muddies the water and renders the discussion over emergency measures interminably complex. Article 7 of the ECHR states that, "no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to the general law recognized by civilized nations." This article seems to clearly undercut the *ex post* elements in ELM, rendering them illegal under international law. Gross can respond that ECHR is a European document that has no binding force in the North American context. The problem with that argument is twofold, in that ICCPR contains similar restrictions on punitive retrospectivity and is binding in North America.

Further, both ECHR and ICCPR rely on the legal principle of *nullum crimen, nulla poena sine praevia lege poenali* (which translates as "no crime, no punishment without a previous penal law") and further limits the viability of ELM while reinforcing Dyzenhaus's version of an accommodations model. Other problems that plague ELM and the accommodations view are issues thrown up by the declaration of a state of emergency itself. These legal/political issues include issues of temporality, exceptional threat, declaration, communication, proportionality, legality, and elements of intangibility. While politicians and other public officials may be free to exercise their discretion as they see fit during an emergency, this is not so in the case of the armed forces of most constitutional democratic nations. They need to respect the seven criteria above, whenever they engage an

emergency. In declaring a state of emergency a government also activates the provisions found in ECHR or ICCPR (or in some cases, the provisions of some other treaty or convention, of which they are a signatory) as well as activating restrictions on armed forces and police.

I will briefly look at these restrictions in turn. Temporality refers to the exceptional nature of the declaration of a state of emergency and to its duration, which as Bruce Ackerman and others have pointed out, needs to be specified (at least provisionally). This can be done via an *Act of Congress* where the executive branch asks for emergency powers for a period limited to six or more months, for example. Next is the issue of exceptional threat. Here the government must present its case, to either a parliament or a congress and argue that the crisis in question presents a real, current, or at least an imminent danger, to the immediate community. The veracity of these claims is legally binding and can be examined after the fact by the other branches of the government. There next needs to be a declaration of a formal the state of emergency and this must be announced publicly, as it informs citizens of the legal situation that they now find themselves in and reduces the possibility of a *de facto* state of emergency, that is a situation whereby the state restricts human rights without officially proclaiming a state of emergency, and it is the situation I earlier referred to as a constitutional dictatorship. Following the above measures there needs to be an act of communication. This is a notification of the measures taken and it must be made to other states and relevant treaty-monitoring bodies.

"For example, if a state is to derogate from its obligations under the ECHR or ICCPR then it must inform the Secretary General of respectively the Council of Europe or the UN of its derogation, the measures it has taken and the reasons therefore, as well as the termination of the derogation" (*States of Emergency*, Geneva Centre for the Democratic Control of Armed Forces 2005)[55]. There are also issues of proportionality to be dealt with, such as the measures taken to counter the crisis that must be proportional to the gravity of the emergency (under the law). This applies to the area of application of the measures taken as well as to their material content and their duration. Over and above the issues I have

[55] "States of Emergency," a military document published by the *Geneva Centre for the Democratic Control of Armed Forces*, which details binding military response measures for states of emergency worldwide among NATO countries and allies. Last accessed on February 5, 2011: http://www.dcaf.ch/Publications/Publication-Detail?lng=en&id=18420).

already listed, there is the fundamental issue and restriction of legality itself. Legality, despite the protests of ELM advocates like Gross, is not derogable in the way that rights are. Governments and public officials are required by law to offer a rationale for their actions and policies and this rationale needs to be compatible with the existing law on emergency, both locally and internationally where relevant.

Civil and political rights and liberties during a state of emergency must respect the limits provided for by the relevant instruments of international and national law. A state of emergency does not imply a temporary suspension of the rule of law (*pace* Gross *et al.*) nor does it authorize those in power to act in disregard of the legal principles by which they are bound at all times. According to the Geneva Centre for the Democratic Control of Armed Forces rules, and other similar rules of armed engagement, there is a zone of "intangibility" as concerns the fundamental rights from which there can be no derogation, on the part of the armed forces and the police, even during times of emergency. This means that certain human rights are non-derogable under any circumstances, no matter what a given theory of emergency stipulates. The ECHR and the ICCPR identify these untouchable or "intangible" rights as follows. The right to life, the prohibition of torture, freedom from slavery, freedom from *ex post facto* legislation and other judicial guarantees such as the right to recognition before the law and to freedom of thought, conscience, and religion. The United Nation's *Human Rights Committee* recognizes that in addition to the non-derogable rights listed above, there are several other humanitarian provisions that must remain legally and operationally inviolable.

Even so-called "enemy combatants" must be humanely treated, as must all persons and none can be deprived of their liberty. Additionally there are strong prohibitions against hostage taking and against unacknowledged incarceration during states of emergency. Add to this the existing protections granted under liberal democratic law which preserve the rights of persons belonging to minorities from persecution and the problems for ELM and similar theories become evident. Less directly related to the treatment that people receive during a crisis, but equally important are prohibitions against overt acts of propaganda (perpetrated by the state or its actors) advocating national, racial, or religious hatred, during the emergency period. Most liberal democratic constitutional polities also have a host of procedural guarantees and safeguards, designed to ensure the integrity of the judicial

system, most of which are too numerous to mention here, save to say that the make it difficult for governments to pass sweeping institutional reforms (even in an emergency) without some type of special dispensation like the one Gross proposes via ELM. Yet even if such special dispensation were granted, it would be ineffective I argue as there are innumerable obstacles in the law that already prohibit changes of the type championed by Gross, and to a lesser extent by others.

The only workaround to this particular difficulty is to argue that the executive branch is sovereign and immune to these laws, as some have argued, including Posner and Vermeule. However, this is not what Gross wants to argue nor is that argument available to him. If anything, Dyzenhaus makes the argument most compatible with both domestic and international law as concerns emergency management, not Gross. So despite his avowal to the contrary, Gross is committed to a much more ambitious restricting of the established law than is indicated by his presentation of ELM. His view requires an entire rethinking of international legal commitments and law. Yet there is a further problem, one that concerns both Dyzenhaus and Gross, as emergency measures legislation functions *hierarchically* and this in a very specific way. It is not up to the executive or some other branch of government to decide arbitrarily how to structure an emergency response. The template for emergency response is remarkably similar in all western democracies and allows for only small variations in the institutional structure of the response. It is of some concern that Dyzenhaus and Gross do not touch on this commonality in their respective defenses of the accommodations and ELM models or only do so in passing. Let us now look at the most generic version of the organization of an emergency response.

First, a special set of emergency powers must be granted to the government in virtue of the constitution or by virtue of some other statutory set of laws. Emergency measures and powers range widely in their scope and they include (but are not limited to): the restriction of press freedom and the prohibition of public meetings, the domestic deployment of the armed forces, the evacuation of people from their homes and workplaces, the searching of homes and other private places at times without a warrant, the arrests at times without charges of individuals, the confiscation of private property (with or without compensation) or its destruction if that is deemed warranted, the regulation of conventionally free private enterprise, the interference with financial transactions and the

tightening of export regulations, and finally the creation of decrees of special legislation to punish non-compliance with emergency regulations[56]. While each country will have its own particular amendments and deviations from these powers, the above list is a good overview of the most common powers ceded to government during a state of emergency.

The United Kingdom allows special judicial bodies to supervise emergency measures and their application, whereas in Germany supplementary or special judicial bodies are forbidden during emergencies. According to most international and domestic statutes, during a state of emergency the responsibility for the day-to-day governance of a polity must remain with the civilian authorities. This retention of *civilian* control over the police and the military obtains at both the national and local level, a salient detail in the debate over which emergency measures model best addresses emergency, but one that remains unaddressed by almost every major theorist of emergency including Dyzenhaus and Gross, who do not address the issue of direct civilian control at all. What is more, most of these same statutes state that military forces are there to assist the civilian authorities, but may themselves only play a subsidiary role in the policing and administration of emergencies. Given that domestic and international law agree on these points, it is odd that a great many of the authors on emergency examined here, with the exception of Bruce Ackerman, fail to draw attention to these structural landmarks in the jurisprudence of emergency management. One can respond that despite what the law says, deviations occur. This is true but largely misses the point. Whatever deviations obtain, they cannot legally alter the basic institutional division of powers that laws on emergency powers set up.

Meaning, that even if the army is in fact given a greater role to play in the administration of an emergency than what the law indicates for example, they nevertheless cannot usurp civilian control over the emergency *in toto*. To do so would be to act in violation of the law and while there is no guarantee in practice that this will not happen; there is every reason to believe that a theory seeking to explain and administer emergencies must take the restriction seriously if it is to be probative and believable. Much the same dynamic repeats itself when we turn out attention to the actual mechanisms of liberal democratic government. Most of the legal systems that structure the processes of

[56] This list of emergency powers is partially adapted from the *Geneva Centre for the Democratic Control of Armed Forces* rules referenced in the document above. Similar documents exist for other NATO countries.

government provide within their statutes and precedents a form of "insurance" against the executive branch having single authority to declare a state of emergency. The "insurance" is provided by parliamentary or congressional ratification of the executive's decision. The vote that authorizes the executive's declaration of emergency can take many forms. Nevertheless, whatever form it takes, it is a procedural necessity and cannot be circumvented. Once the process is set in motion, government must provide a legally persuasive justification for both their decision to declare a state of emergency and for the specific measures that they intend to use to arrest the situation.

Parliament and congress has the power to review the emergency at regular intervals and to suspend emergency measures as they see necessary, a further check on the executive's power. As argued by Ackerman in his own work on emergencies, this parliamentary/congressional brake on executive power is a crucial instrument, particularly when dealing with an extended state of emergency, as without it (or something like) the legal principle of civilian supremacy over the police and armed forces is rendered toothless. Notice that the nature of the emergency is immaterial to the institutional logic of the separation of powers. Whatever the type of emergency faced, the question of institutional responsibility remains, and it is best addressed via a mechanism that assigns both responsibility and accountability to a body capable of public deliberation and sanction. The best candidate for that role appears to be parliament and congress. None of this undercuts my view that emergencies are largely chimerical; it merely shifts the focus onto the bodies of government best able to adjudicate the veracity or falsity of the claimed emergency responsibly. The executive branch is not required to be transparent on issues pertaining to national security and the courts are not authorized in many jurisdictions to create law but only to interpret it.

Consequently, the only viable institutional option appears to be the mid-level parliamentary and congressional mechanism of public debate. The right to investigate the execution of emergency powers falls within the ambit of congressional and parliamentary powers and therefore creates the least disruption to the existing institutional division of labor. While Gross concurs that parliamentary and congressional oversight is crucial in an emergency, he only wants oversight to begin after the fact. Dyzenhaus prefers to count on the courts to sort out the vexed problem of emergency power, fearing that parliament can

too easily be swayed by public pressure. While both views have their merits, particularly once they are incorporated into the overall framework of each author's respective emergency measures model, the ability to investigate the actual workings and rationale behind the executive's decision to declare an emergency, leads me to prefer a parliamentary/congressional view to the other two options.

The ability to launch parliamentary and congressional inquiries into misdeeds is important, as it allows citizens to assess government performance during the emergency and not just after the fact. This mechanism only works however if the deliberations of parliament or congress are public and transparent. Judicial proceedings are not as transparent as public parliamentary hearings and as indicated above the executive need not reveal all of their information to the public during a crisis. This does not mean that courts are immaterial in the institutional matrix of emergency management. The judicial system in an emergency must continue to ensure that attendant rights to a fair trial are maintained even during the crisis period. Liberal democratic courts must also continue to provide individuals with effective means of legal recourse in the event that public officials violate their rights in the course of administering the emergency event. Independent judiciaries guard against potential rights infringements. Their presence ensures that the right to appear before a court remains, even during an emergency. Further, the lawfulness of emergency measures can only be scrutinized by a court and one of the best ways to insure that courts do their job in an emergency is to make sure that they stay protected from the pressures of emergency planning by guaranteeing the independence of the judiciary, a point on which Dyzenhaus and Gross agree.

So despite my preference for a parliamentary approach to deciding whether an emergency obtains, rather that the dominant executive centered version of emergency declaration, courts remain pivotal as concerns examining the legality of declarations of state emergencies as well as in the reviewing of the legality of the specific emergency measures which will be proposed by representatives. Representatives can decide for themselves whether a genuine emergency obtains and consequently can authorize the executive to act as is sees fit to rectify the situation. This way the executive branch remains

tied to the deliberative structure of the parliament or congress, rather than forcing the representatives in those bodies into the either/or of declaring a full-scale emergency. To convince them to authorize an emergency the executive must present a credible case within the guidelines set out in the law. Congress or parliament can then decide what type of actions to authorize. This approach has the benefit of freeing the courts to act as referee of the interaction between the representative and executive branches as well as deciding whether any treaties or international laws have been broken.

This way there is no reason to jump to the conclusion that an emergency has occurred. Each branch is allowed to do what it does best, but none is allowed to cow the others into submission on the issue of emergency. In the unlikely event that an emergency obtains, the existing legal guidelines prescribe what to do. More often than not, the "emergency" will turn out to be less of a danger than advertised because as we have seen, supreme-scale emergencies all but never occur. Proportion is maintained between branches and no one branch predominates. The declaration of an emergency creates a climate of fear on both the state and society. To deal with the emergency effectively, should it be genuine, it benefits governments to cooperate with their citizens. Abuses or unwarranted derogations of rights in such situations undermine cooperation making it more difficult, rather than less difficult, to surmount the challenge of the alleged emergency. States have vital interests in dealing with unfortunate events in accountable and responsible ways, whether they are "emergencies" or not. Therefore, the most viably decentered institutional model of "emergency" management is the best because it would yield the fewest abuses of power, or so it seems to me. Just because models that can potentially accommodate an emergency exist however does not mean that emergency is the right concept through which to understand many of the unfortunate events that occur within the life of a country.

As I have been at pains to argue, more often than not the event a government faces will be much more pedestrian than even the mildest emergency measures model makes out. Because so few events meriting a response from the government are truly unforeseen (or unforeseeable) there are few emergencies. Emergencies also disrupt relations between a state and its neighbors. Such disruptions can have important implications for the international community at large and for international law. Once again, most states have a vested interest in ensuring that the declaration and implementation of states of emergency

are subject to certain strict and clear limitations and that these measures (if implemented) proceed in accordance with international laws and other internationally binding norms and treaties. Nations need to be actively engaged in ensuring that other governments observe the relevant norms as these relate to emergency measures. Speaking practically, the goal between nations should therefore be the minimization of unnecessary conflict and derogation and the maintenance of a *status quo*. This precludes the tendency to create "states of exception" for every unfortunate incident.

Constancy and the restoration of a liberal democratic legal constitutional order, should it require restoration, under which rights derogations are the exception rather than the norm, should be the true targets of our "emergency models." These problems affect all liberal democratic nations as all have emergency measures legislation on the books. As all states have existing legal mechanisms that govern not just the declaration of a state of emergency but also the implementation of the attendant rights derogations, these types of events (which I argue are mislabeled as "emergencies") can be controlled. The mechanism to declare a state of emergency follows three common avenues. On the first, the executive declares the state of emergency and is charged with informing parliament or congress of the decision. Emergency measures commence almost immediately in this the North American version of the emergency declaration. The second avenue, involves the executive branch declaring an emergency that must in turn be ratified by parliament (or congress) before emergency measures can be enacted. This is the dominant model in German liberal democracy. A third variant, involves parliament itself declaring the state of emergency, as in Hungary. Even in the most well thought out emergency measures provisions there lurks a danger. Because a state of emergency empowers the executive to appoint public officials whose job it will be to deal with the emergency there is always the danger that edicts will not be carried out as ordered.

Emergency measures no matter how well contained override the established administrative process that governs administrative rules between government branches in a persistent and grave emergency. This leaves citizens at the mercy of whoever is administering the emergency, regardless of which model one chooses. The difficulty with emergency is not just the limitations found in the dominant models of emergency management (i.e., the ELM and the accommodations models) but also the nature of our

thinking about emergencies itself. Even Canadian law, which travels a middle road between the strict parliamentarianism of some European nations and the executive centered American model, finds itself befuddled by the complex ways one can address an emergency. The type of emergency that most threatens liberal democracy is the "political emergency." The structure of government itself is attacked in this situation. Emergencies of this sort are easier to recognize than general state emergencies that can be triggered by all sorts of non-political factors. A financial meltdown for example may constitute a crisis but it may also be politically inert. Each new emergency must be encountered as it comes and as we have seen, only the truly unexpected event can authentically qualify as a genuine emergency. While the *International Covenant on Civil and Political Rights*, of which Canada is a signatory, allows extensive rights derogations in an emergency, there are limits to event this seemingly sweeping legal authorization overseen by the United Nations. Article 4.1 of ICCPR allows for the abridgment of most rights during what is described as a "public emergency." This form of emergency is one that "threatens the life of a nation" according to the covenant. Yet even here, there are restrictions on how rights can be derogated and for what purpose. Derogation can occur only to the extent required to bring the new situation (i.e., the emergency) back in line with the previous state of affairs (i.e., the pre-emergency state). Each signatory to the ICCPR must inform the other signatories of its derogation of rights and it must provide its explicit rationale for so doing. It is this last point, which interests me here, and it is the reason that I have chosen to look at the ICCPR in these closing pages. In requiring the explicit statement of a government's rationale for a rights derogation to proceed, the ICCPR undercuts the argument that emergencies are exceptional events without precedent requiring drastic action on the part of a government. This "exceptionalist" premise, which is key to the arguments of many scholars including the arguments of Gross, Posner, Vermeule, Schmitt, and many others, is legally untenable, at least with regard to the ICCPR.

Similar requirements however exist in the literature on international human rights law, and few of these requirements allow signatories to act with impunity or on arbitrary grounds when derogating citizen rights. ICCPR also states that emergency measures cannot be in conflict with signatory states other obligations under international law. Further, discriminatory practices such as extensive profiling are forbidden under ICCPR. Even in

the direst of "political emergencies," the state cannot trump all rights no matter how bad the situation gets under international law. Article 4.2 guards the right to life, the recognition of personhood, the freedom of thought and of conscience, against all forms of derogation, even in an emergency. What Article 4 does do for states, is it allows them to (unilaterally) derogate any other rights, as they see fit. The article therefore can allow for the suspension of legal rights, rights of free expression (rather than of thought), rights of association, and the right to privacy. Each of these areas of derogation is construed very narrowly to avoid abuse, but governments nonetheless retain the right to derogate them. Under Canadian law, the *Emergencies Act* sets the domestic ground rules for derogation. The act is clear, emergency measures and rights derogations can only be authorized in accordance with existing law. Therefore, no arbitrary, exceptional, or special provisions are allowed, unless these provisions already appear in the domestic law itself. *Charter* and rights guarantees are left as they are under the *Emergencies Act* and no derogation of these is allowed, save for derogations already allowed for with the *Charter* and *Bill of Rights* already. Despite these safeguards, it is still possible for parliament to extend rights derogations into the future (up to a maximum of five years at a time) if they can show that threat remains live. All they need to do that is to argue for a "real or apprehended war, invasion, or insurrection." A parliament that so acted would cause great disruption to the liberal democratic fabric of Canadian politics. Because of the way we define emergencies today, that same parliament would be acting legally if so chose to act and would be beyond reproach for half decades at a time. A better definition of what we call "emergency" seems desirable, given the scattershot nature of even the best emergency measures provisions and the laws that authorize their use[57].

[57] Additional references for this chapter include the following electronic documents:

- Ackerman, Bruce. "The Emergency Constitution" www.yalelawjournal.org/pdf/113-5
- *Handbook on Parliamentary Oversight of the Security Sector* www.dcaf.ch/dcaf/Projects/Details?id=15655&lng=en
- *United Nations Guidelines on Human Rights* www.unhchr.ch/html/menu3/b/hcat39.htm
- *European Convention on Human Rights (E.C.H.R.)* www.hri.org/docs/ECHR50.html
- *International Covenant on Civil and Political Rights (I.C.C.P.R.)* www.ohchr.org/english/law/ccpr.htm

All sites last accessed on December 21, 2011.

CHAPTER 3: LAZAR ON EMERGENCY

SUPREME AND INFORMAL EMERGENCY:

In the previous two chapters, I concentrated on defining the idea of emergency in a philosophically straightforward yet normatively adequate manner, while also noting the incongruous ways that emergencies are thought and dealt with. Chapter 2, dealt with emergency as defined and managed under various aspects of the law and drew parallels between the ways we understand emergencies at the conceptual level and the manner in which emergencies are understood in legal theory more generally. Both chapters, unearthed incongruities between our intuitions about emergencies and the political and legal means and ends we use to come to terms with emergency events when they occur. Emergencies exist in various forms, from large-scale emergencies that threaten the stability of states and other political institutions, to smaller scale emergencies, which typically exhibit threats of a more limited scope. Unfortunately, the differences between different forms of emergency are taken into account only rarely with most genuine emergencies being treated disproportionately to the risk they pose. In the course of examining the difficulties posed by emergency events, I also enumerated my misgivings over the way we conceptualize emergencies overall. This a theme that runs through each chapter, and one that acts as a unifying theme for my overall argument against the laxity with which emergencies are defined conceptually and institutionalized and rationalized in practice, at the cost of liberal democratic rights. Rights have a normative force in liberal democracies, which spills over into the institutional makeup of society. Conceptual failures can ultimately lead to confusion and to empirical problems when one is dealing with institutions (like liberal courts) whose goal is preservation of a distinct set of rights, freedoms, and responsibilities. The widespread practice of severely derogating individual or group rights in the face (of what is taken to be) an impending state emergency, is one such example. Rights typically act as trumps, but they cannot so act, when curtailed from the start. Non-emergencies that are taken to be genuine emergencies, often lead to just such curtailments. Criticisms of the form I offer, aim to explain why events mislabeled as emergencies lead to misdirected initiatives and therefore to reduced overall safety and personal liberty rather than to the increased security and safety which are the goals of emergency management.

A lack of conceptual clarity can additionally lead to a conflation between prosaic events and emergency events, which in turn often result in an imbalanced response on the part of state and local authorities. The main tool of emergency management in liberal democracy (as previously identified) is the mechanism of rights derogation. Given the seriousness of the most common remedy, it is important to get emergencies right, particularly as failure to do so imperils key civil and political rights. Focusing on the necessary and sufficient conditions that must be present for an emergency to be genuine, I expressed concerns regarding the seeming failure of the most popular accounts of emergency to meet even the minimal requirements required for necessary and sufficient conditions to obtain. Examining the views of several authors in previous chapters, I arrived at the conclusion that not only are the necessary requirements left unmet (from a linguistic and logical point of view) by the most prominent accounts of emergency, but also concluded that these influential accounts continue to understand the concept of emergency in a confused and largely impracticable manner. Sufficient conditions for declaring an emergency where also found lacking as most emergency declarations unfold arbitrarily and without the strong oversight that they merit. Turning to some of the legal issues that hinge on the way we understand the concept of emergency, I found much the same situation to obtain. Emergency measures and the laws that undergird their enactment often function at cross-purposes, while the standard description of what constitutes an emergency, leaves much to be desired from a philosophical and analytical point of view. I should note that this is not the same as claiming that there is little oversight or poor oversight of emergency measures once these measures are enacted. This may be true as well, but it is not a claim I make. My view is not that the acts that govern emergency preparedness and response are faulty, but rather that what counts as an emergency is conceptually mistaken. The two claims are not equivalent, even if there is occasional overlap.

WALZER ON SUPREME EMERGENCIES:

The conceptual failing in question is most visible during states of emergency, when governments can lobby for sweeping powers, such as the right to suspend civil rights under the auspices of justifiability and reasonableness.

Much of course turns on how one understands "reasonableness" and "justifiability" in these contexts and (as always) on what one means by an "emergency." If one's view of emergency is misguided, then the derogations enacted because of the emergency are also by extension misguided, potentially illegal, and certainly out of place. Thankfully, not all accounts of emergency succumb to this recurrent set of problems. In fact, the simpler the account of emergency the more likely it is to be cogent. Michael Walzer for example does not have an exhaustive account of what constitutes an emergency or a state of emergency, but he does have an account of what is at stake in one type of emergency situation, that of supreme emergency. Walzer argues (indirectly) for the view that only instances of supreme emergency count as genuine emergencies and that it is therefore this form of emergency that most demands careful investigation. Supreme emergencies are events in which one political actor attacks another political actor with the intent of either destroying the former's form of government or with the intent to take over the existing governmental structure. The conflicts these emergencies usually generate can be conflicts of aggression, of imperialism, of perceived self-interest, or any other number of scenarios.

The point is that despite the vast array of motives that can animate hostile behavior of the sort that necessitates that a state of emergency needs to be declared, the outcome for the attacked party, is always the same. The actor in question is usually a state, but need not be as non-state communities can equally serve as targets. Emergencies of this sort are exceeding rare yet they do happen, even if infrequently. The Axis attacks on Western Europe during the onset of the Second World War are for many the paradigm cases of supreme emergency, situations in which existing governments find themselves in danger of perishing at the hands of competing hostile political actors and must act in response. Walzer is not skeptical of the way in which we discuss emergencies, but he is wary of the tendency to over-classify all potential dangers to some state as an "emergency" regardless of the content of the danger and he is equally critical of the way that civilians are excluded from the logic of emergency planning. States often act as if all emergency measures are open possibilities given the advent of an emergency. Walzer disagrees with this logic, as do I. I argue, following Walzer, that there is a conflation between potential dangers and imminent or emergent dangers, a distinction that is too often elided in practice and in

philosophical discussions of the way we conceptualize and establish social norms around emergency events.

The elision is important for it has the potential to mislead our attempts to come to terms with the dangers of real emergencies by focusing our attention away from the dangers that accompany genuine emergency events (risks to the environment, to lives, and risks to property) and away from the well-known dangers of excessive rights derogation. I now turn to a discussion of the sorts of emergencies that I take to be genuine threats, namely supreme emergencies. "For Walzer supreme emergency involves the presence of imminent danger to an established polity such as a state. The presence of such a danger allows the rule of war that noncombatants not be harmed to be reluctantly overridden. For Walzer the paradigm case for this eventuality in historical terms is the decision by Churchill's war cabinet to bomb German cities in order to minimize the Nazi threat to Europe and especially Britain. (It is important to note here that the bombing referred to, was that aimed at cities such as Berlin in the relatively early stages of the war, rather than the notorious bombing of Dresden late in the European campaign, which Walzer does not consider to be justified.) In Walzer's view, "Nazism lies at the outer limits of exigency, at a point where we are likely to find ourselves united in fear and abhorrence. That is what I am going to assume, at any rate, on behalf of all those people who believed at the time and still believe a third of a century later that Nazism was an ultimate threat to everything decent in our lives, an ideology and a practice so murderous, so degrading even to those who might survive, that the consequences of its final victory were literally beyond calculation, immeasurably awful."[58] The situation Walzer describes is of course generalizable and can apply to threats other than the threat posed by Nationalist Socialism. Many other totalitarian and imperial threats can take the place of the Nazis in Walzer's sketch of supreme emergency. (Even constitutional liberal democracies can wage war against each other under the right circumstances.) Fortunately, these liberal-on-liberal incidents have been the exception so

[58] Walzer quoted by Cathy Lowy (*Democratiya* 13, Summer 2008) see also (Walzer 253 1977). Walzer also characterizes "supreme emergency" through a series of questions. "Can a supreme emergency be constituted by a particular threat - by a threat of enslavement or extermination directed against a single nation? Can soldiers and statesmen override the rights of innocent people for the sake of their own political community? I am inclined to answer this question affirmatively, though not without hesitation and worry. What choice do they have? They might sacrifice themselves in order to uphold the moral law, but they cannot sacrifice their countrymen. Faced with some ultimate horror, their options exhausted, they will do what they must to save their own people" (Walzer 254 2006).

far, rather than the rule. Nevertheless, there is no necessity that makes it so that this remains the case forever. Resource scarcity may make it that case that in the future liberal democracies compete aggressively with each other for them, for example.

Most contemporary large-scale emergencies are in fact generated by terrorist attacks or threats of attack or again due to the presence of dangerous pathogens carrying with them severe risks for widespread infection and epidemic. The causes of large-scale emergency are numerous but the dire outcomes are few. Weapons of mass destruction also remain a constant danger for all states and the threat of their proliferation further underscores the need for a proper understanding of emergencies and their effects. Walzer does not propose a comprehensive definition of emergency, nor does he endorse a three-factored test for emergencies, like the one I offer. My approach, which looks for criteria of suddenness, severity, and unpredictability, sits well with elements in Walzer's own account of what is at stake in a supreme emergency and this despite the fact that Walzer fails to provide a definition and analysis of emergency similar to the one I have offered here. He like many others, takes the definition of an emergency to be more or less a settled matter, yet as I have argued this is not the case. Emergencies are as dissimilar as their principal causes and as vast as their effects. All that unites them when they genuinely obtain is their ability to cause harm and destruction **severely**, **suddenly**, and **unpredictably**.

Simple as this sounds no account of emergency to date considers emergencies from the point of view I recommend. Unpredictability is a particularly vexing requirement as most emergencies are entirely predictable. States spend millions and at ties billions of dollars to secure information that allows them precisely to predict and anticipate potential emergencies. Yet emergencies continue to be presented as *sui generis* events incapable of prediction or management by relevant authorities in many accounts. This is simply a false of view of the profile of most emergencies. Some events are unpredictable but most are anticipatable. Suddenness and severity are genuinely more difficult elements to quantify. However, they too can be accounted for and this with varying degrees of success. As I have throughout, whenever I refer to emergencies in the negative (as either non-existent or non-genuine) I have in mind one of two things. First, the conception of emergency employed by the various authors I discuss or second, the tacit understanding of emergencies employed by authorities in their emergency planning. As I find both situations to be problematic, I target

both in turn throughout the dissertation. The case of supreme emergency is different. As I have noted, it constitutes a real threat, albeit a remote one. Nevertheless, it is an instructive sounding board and a limit-case against which to judge the veracity of other claims of emergency.

I point this out because my thesis is not that emergencies are in some sense impossible events. If this were the case, I would be arguing against a non-existent phenomenon. The idea here is that despite the logical possibility of a supreme emergency occurring, there is in fact very little reason to believe that a supreme emergency will occur. Again, an emergency in this sense, refers to the occurrence of a sudden event that causes widespread harm (and/or destruction) while at the same remaining undetectable (or unpredictable) until it occurs. Further, even in the face of a genuine supreme emergency, liberal democratic practices obtain to a greater degree than is commonly supposed. Lastly, come whatever may, the best chance for administering and weathering the storm wrought by emergency, remains the steadfast reliance on established liberal democratic constitutional practice. At least so I have argued, up to this point.

LAZAR ON INFORMAL STRUTCTURES AND EMERGENCY:

EMERGENCIES REDEFINED

Against this extensive background of authors, theories, and presuppositions, I examine the views of Nomi Claire Lazar who partially shares my skepticism about our current views on emergencies. Despite agreeing in large part with Lazar's views, I offer a more comprehensive critique of emergency than she does and take issue with some of her posits. On Lazar's largely historical view, emergencies are not what we take them to be. That is to say, emergencies are not so much events, as they are temporary imbalances between two salient elements at the heart of every liberal state. They are for her a battle between the requirements of public order and the requirements of social justice. On the Lazarian view, "tensions between order and justice are inherent in any constitutional regime. Order requires constraint and justice suggests rights and freedoms. While the everyday struggles between these two values often escape our notice, they clash

spectacularly in times of emergency" (Lazar 1 2009). The special legal powers that states employ to derogate rights in situations in which order and justice clash constitute genuine tractable emergency events on Lazar's account. Consequently, emergencies for Lazar are expressions of the tensions between order and justice that define what is most distinctive of constitutional liberal democracy.

Emergencies help us (as citizens) decide between the enablement and constraint of power, a key feature of liberal democracy in her estimate. Yet emergencies also aggravate and highlight the tensions that are inherent in any liberal, constitutional, and democratic regime, on her view (Lazar 2 2009). What Lazar finds problematic about emergencies is not their tendency to pit order and justice against each other, as she finds this tension natural and irreducible when dealing with liberal democracies, but rather the dichotomous way that emergencies are thought about and dealt with in political life. She is deeply critical of the binary understanding of emergencies that presently dominates and it is here that my own view and hers find common ground. We both find the dichotomy between the normal functions of a liberal democratic state and the supposed exceptional functions of that same state under emergency to be wholly chimerical. This is because both Lazar and I deny the common assumption that emergencies are "exceptions" to the established liberal democratic order. Emergencies in the main are events to be dealt with from within the ambit of conventional and lawful liberal democratic political practice on our shared view.

Those who have advanced the idea of emergencies as important exceptions to the established order build their collective accounts largely on speculation and misunderstanding according to Lazar. Most often, those who advance such proposals tend to come from the conservative portion of the political spectrum. Vermeule and Posner for example take emergencies to be inherently unpredictable events, arbitrary proceedings with the potential for producing disastrous consequences. Their view of emergency mirrors mine in certain limited respects, yet it also licenses extreme latitude on the part of the authorities dealing with the emergency, to the extent that even severe rights derogations are permitted on their view, a consequence I find unacceptable both on moral and on conceptual grounds. Vermeule and Posner offer no tangible proof the derogation increases safety, and no reason to accept that emergencies are "exceptions," on my reading of them. Despite some overlap in our respective views, in the end I draw the opposite conclusion from Vermeule and

Posner, and instead find the arbitrariness with which most commentators define emergency reason enough to cast doubt on its conceptual coherence, at least as commonly presented in the contemporary literature. On my view and on the view of Lazar, constitutional liberal democratic government is not only a principled and coherent response to the potential arbitrariness of emergency but also a practical and balanced response to the certain arbitrariness inherent in any pluralist political project.

Not all events that occur in social life can be planned out I advance and as such an element of uncertainty is always present, much to the displeasure of Posner and Vermeule, who prefer a view on which the state can enact any measures it needs to maintain order, and this without any mechanism of special accountability. Later, I present Ackerman's view of a "dualist democracy" as a useful counterproposal to the anti-pluralism of the Posner and Vermeule view. The wish to defend liberal democratic political life is not a capitulation to those who would do liberal democrats harm, as Posner and Vermeule have it, but instead is a defense against the terror brought about by emergencies both manmade and natural. One can argue that even supreme emergencies are increasingly becoming historical curiosities, in the sense that they are not everyday occurrences and as such, they make for poor precedents when designing public and emergency policy. Much the same applies to terrorist emergencies. One cannot plan for every terrorist eventuality and open societies face dangers (like the dangers inherent in political terrorism) that closed societies do not, but this is a price most liberal democrats such as Lazar and myself, are willing to pay. The aim of terrorism is to alarm and frighten and it accomplishes its goal if the slightest provocation meets with extensive rights derogations of the form defended by Vermeule and Posner. Supreme emergencies may progressively be becoming outdated, given the realities of contemporary technological advancement and the emerging interconnectedness of nations in Twenty-First Century geopolitical reality. That being said the threat of large-scale attack between nations remains, even if the element of surprise is today greatly reduced. Derogating rights does not change this. Lazar for her part does not take supreme emergency to be significantly different from any other emergency event. She notes the possibility that supreme emergencies may exist but does not concern herself with attempting to foster a response tailored to such threats. She generally adopts a non-accommodationist view toward large-scale emergencies, arguing that such events should be dealt with on a

pragmatic case-by-case basis and that whatever their scope, liberal democracies must continue to preserve individual rights despite them. This assimilation of supreme emergency into the more general category of emergencies emerges largely because Lazar does not believe that emergencies alter what she calls the "existential ethics" to which liberal states are beholden. She writes,

> Emergency rights derogations do not constitute exceptions from liberal democratic values, but are instead the manifestation of countervailing existential values, and in particular the value of order.
>
> Liberal values most visibly govern the day-to-day functioning of states, but states are made possible by existential ethics that relate to order. When a state is threatened its capacity to maintain order is threatened also, but because this ordering function has a moral character intrinsically connected to the rights and civil liberties it derogates, we have a second order obligation to preserve the state's capacity to fulfill its function. A liberal democratic order has no content or actuality without rights or the moral information they carry, and rights have no actuality without order. Hence, order is not a special concern in times of emergency; it functions as a value beyond these exceptional circumstances. The ethics governing the preservation of order are not exceptional but constant (Lazar 81 2009).

While I am in general agreement with the way Lazar frames the issues at hand, I am less satisfied by her assumption that all emergencies are exactly of the same character and profile. I think that supreme emergencies upset the balance between the state's commitment to preserving liberal political ethics and its need to protect its institutions from destruction. I agree also that on the practical day-to-day level, things should proceed largely as Lazar describes in a well-functioning liberal democracy, that being said and reiterating my earlier point that supreme emergencies are rare events, a cogent and comprehensive account of emergency needs to consider their possibility and to come to terms with the destruction and chaos that these specific types of emergencies can cause. It is insufficient to simply state, as Lazar does at times, that liberal rights are sacrosanct and non-derogable, come what may. While her focus is on actual emergency powers and mine is on the normative concept that grounds those powers, the issue of supreme emergency requires greater analytical finesse than it receives from Lazar in various places in her writing. Her view of rights is also unstable as she states that rights can be derogated in some emergency circumstances but not in other emergency circumstances. Lazar does this without always delineating which specific cases call for which form of derogation, resulting in a confusing view of her stance

on rights derogations during emergencies. This is because for Lazar the issue of emergency is subordinate to the issue of the "existential ethics" of the state. It is the tension between order and justice that concerns her, not the state's relationship to emergency.

> Emergency exists at the intersection of law, morality, and politics. We have seen that a focus on any of these to the exclusion of the others yields a lopsided picture with dangerous results. The rule of law alone cannot make us safe. Nor can the pure deductive ethics of philosophical liberalism. For, the identification of 'morality with innocence…would ultimately set the politicians free to disregard morality altogether'. We do not deduce the application of the law from the law and the general case. We do not deduce the moral course of action from the moral law and the general case.
>
> Agency figures also. We must confront and embrace the exceptionalist insight that the law never rules on its own, that agency forms a central part of institutions. However, we must resist the temptation to eschew law entirely when law becomes inconvenient. Instead, we look to the ends of the state and employ means most conducive to those ends, in the light of principles that bound the edges. Our commitment to liberal democratic values can and has survived periods of emergency. From a pragmatic perspective, the arguments I have made offer hope that further empirical and normative scholarship might give liberal democracies assistance to better navigate the rocks and shoals of power concentration and rights derogation in the future. But we have seen that engagement with emergency holds lessons of a more profound character also. Emergency is one manifestation of tensions between order and justice, and between constraint and enablement of power, and it demonstrates vividly the dangers of an innocent engagement with politics (Lazar 161-2 2009).

Lazar grants that difficulties remain with her view, but she does not go far enough in resolving the difficulty posed by supreme emergency for me to be comfortable endorsing her view in its entirety despite the deep affinities between her view and my own. The limitation of rights when they conflict with each other or with further values is a constant element of political life also. It follows from this that the necessity of preserving the state in no way eclipses liberal political obligations. For, if the preservation of the state, however less urgent, is a daily concern, and order is an everyday value, then if liberal political obligations obtain day to day, we would require some special reason why they should cease to obtain under emergency circumstances. If enforcing and upholding order can coexist with rights every day, these varying kinds of values can coexist in emergencies too. This model can maintain a commitment to rights even as it confronts the necessity of emergency powers (Lazar 82 2009). Her view of the political ethics that ground her account of emergency powers is equally compelling if incomplete, as concerns the issues brought

about by cases of supreme emergency, incomplete because the view fails to accord sufficient weigh to the severity of a supreme emergency episode. Political ethics are irreducibly complex and the problems they help us navigate are often permanent and tragic ones. No moral framework could render emergencies and emergency powers perfectly safe, nor could such a framework simply reveal the right course of action. But, in what follows, I clarify the terms of the dilemma in such a way that, thereafter, moral debate, action, and judgment can be clearer, more effective, more accurate, and more trenchant. This in turn can make emergency powers a little safer.

After drawing out some conceptual and ethical problems with the norm/exception perspective, I present arguments justifying the possibility of emergency rights derogations in liberal democracies. I show how this ethical framework is conceptually and ethically superior to a framework based on the norm/exception dichotomy, and what ramifications the argument might have for our understanding of liberalism in general (Lazar 82 2009). It is clear the my disagreement with Lazar is mostly one of emphasis as this passage makes clear, for her intent is to provide an argument capable of showing that liberal can accommodate emergency, whereas my aim is to show that emergencies (with the exception of supreme emergencies) are not what we take them to be. She too takes Walzer's dilemma of dirty hands in the context of supreme emergency seriously as do I, but Lazar stops short of endorsing Walzer's warning against accepting the dangers of supreme emergency complacently and it is here that she and I part company conceptually speaking.

On my view it only makes sense to "accommodate" supreme emergencies, that is to say, we are only justified in derogating rights according to established liberal democratic principles during supreme emergencies. Lazar's view it appears allows for the possibility of rights derogations to occur in non-supreme emergency cases, provided the derogations proceed along liberal democratic lines. So while in some instances Lazar forecloses on the idea of derogations in other places in the same book she appears to allow some derogations to take place as long as they are in keeping with established law. Because values conflict in a liberal democracy with some frequency Lazar proposes that it is acceptable in some cases for rights to be derogated, if their derogation will bring about the most harmonious mix of values from the bundle under consideration (Lazar 90 2009). While I support her pluralism, I think that Lazar is missing something here. In a supreme emergency, it is the state (in its

entirety) that is at risk. This includes all citizens within the state. Therefore, to guard the political community as a whole, authorities may restrict rights, but only in the interest of protecting (imminently threatened) lives. This type of safety-preserving procedure does not involve derogating all rights at will but it does open the door to select rights derogations, a distinction that Lazar does not examine. This is so because not all emergencies are the same and only supreme emergencies imperil everyone at once while also fulfilling our three main criteria for genuineness. As I argued earlier, it is the political community that needs protection, not the state itself.

And so despite their other failures, there is something true about the conservatives' invocation that it is the community, the people, the citizenry, that animate and give life to our liberal democratic institutions. Any account of liberal democracy that occludes this "populist" element misses much of the point of democratic liberalism. Walzer is right to emphasize (with authors like Schmitt) that it is the people and the political communities that suffer most from large-scale acts of terrorism and who perish during supreme emergencies such as those brought about by guerrilla wars. There is a priority between citizens and their institutions one which favors the citizen and one which many liberal accounts like Lazar's, miss in their analyses. Without the citizenry, there are no democratic political institutions. We therefore cannot pretend that widespread terrorism or warfare, of the sort that lays whole communities to waste, does not factor into our conceptions of what constitutes an emergency. This recognition of the priority of the citizen does nothing to undercut the critique of emergency measures that Lazar and I are both committed to. Rather, it helps to better clarify the benefits and blind spots that each approach to the problem of emergency brings in its stead. States cannot derogate all rights arbitrarily but neither should a state allow its own destruction. The problem is largely pluralistic and it calls for a pluralistic answer, much as Lazar herself describes. Her account would be more complete if she brought onboard the view that I advance. Lazar's skepticism over emergency powers and their abuse would be strengthened by emphasizing the difference between so-called "emergencies" (like preventable misfortunes of small scale) and genuine emergencies (like supreme emergencies) where much is at stake. Lazar herself goes some way toward accepting this criticism when she further clarifies her stance on civic rights.

However one conceives of rights, the state is necessary to their fruition, either through their creation, their actualization, or, minimally but critically, through their enforcement. The fact of their description is not sufficient to bring rights into the world, but rather to bring them into a state of potentiality. Rights must be formalized to have weight and enforceability. Rights help delineate the bounds and content of just order and a just order makes rights actual through delineation and enforcement. Whether or not humans are born equal in dignity and moral rights, without the civic rights of a citizen their abstract equality does them little good (Lazar 98 2009).

One might add that without the persistence of a state that protects rights, and the people that respect rights, there is little point to having them. Lazar appears to grant this point further on, when she further unpacks the relationship between states, citizens, and rights.

Citizenship in a state and the liberal democratic character of that state are necessary to the actualization or at least to the enforcement of rights in addition to the catalogue of broader benefits. The moral character of the state, in turn, is constituted by these rights. Order and justice, in this case, are inextricable […] the state plays no small part in enforcing and enabling political ethics. Through its constitution and solemnification of rights in official documents, through public education and public display to make those rights treasured and respected, through the creation of a community in which agency is possible, and through the financing of its courts for rights' protection, the liberal democratic state order constitutes itself by means of these constitutionally identified rights and they stand at its core as its essence. To the extent that a liberal democratic order constitutes a just order, it is justifiable to work for its preservation. Hence, emergency powers themselves take on a moral character when employed within acceptable bounds to preserve a state of sufficient moral worth (Lazar 99 2009).

The dividing line between liberal and conservative views of emergency is therefore not one that principally divides over the rightful place of the People. There remain to be sure salient differences between the way Schmitt, Vermeule, and Posner, view citizens and the way Lazar and Walzer view them. Yet both sides accept that the individual has an irreducible role to play in the balance between state imperatives and individual imperatives. While the conservative view privileges the institutions of state and the liberal view privileges the individual citizen, they appear in agreement that no matter what view one chooses, one or the other will get caught in middle during emergencies. The question then becomes what to do. The answer one gives to the preceding question, not surprisingly, has largely to do with the way one conceptualizes the nature of an emergency. Conservatives tend to view

emergencies as exceptional circumstances as we have seen whereas liberals view emergencies in the main as normal (if destructive) events. Lazar follows many other authors in singling out Carl Schmitt as the architect of what she terms the "exceptionalist view of state emergency" a view echoed by many conservatives including Vermeule and Posner. On Schmitt's view, laws are legitimated by the political power of the institutions that enact them. That is to say, that governments use their political legitimacy to enact laws. If this were not the case, if an illegitimate government enacted a law, then its status as law would be suspect and its directives would (and could) be largely ignored. The consequences that Schmitt and others draw from this fact about legitimacy and law, is however less straightforward, and ultimately unconvincing, if Lazar and I are right.

The downside of Schmitt's view is that in times of emergency the government and its branches must act to preserve the community that elected and legitimizes them. This state of affairs is unproblematic under systems of government that do not function on liberal or democratic principles. For liberal constitutional democracies, this state of affairs is potentially disastrous or so Schmitt argues, because the need for order and security undermines liberal democratic rights. On Schmitt's view, emergencies exemplify a state of exception to the usual order. That is, they short circuit the normal functions of the state and reorient the priorities of government toward a mode of survival and away from individualized rights protection. Rather than protect the rights and liberties of citizens, a state in the grip of a state of emergency must protect its own existence as a political state and has a duty to do this even if it needs to adopt measures that are illiberal and antidemocratic to ensure its continued survival, and these developments have serious consequences for political community, a key element in Schmitt's overall understanding of government. Likewise, the issue of political community is key to Walzer's defense of retaliation in the case of supreme emergencies and it is not simply a matter of coincidence that political community plays a major role on both the liberal view of emergency (represented by Walzer) and on the conservative view (represented by Schmitt).

Many of these recurrent themes were rehearsed above, as well as in Chapter 1. Yet they recur through the debate over the conceptual moorings of the idea of emergency, as states always enact emergency measures to protect *something*: be it a political party, a linguistic community, a set of historical traditions, a group of governmental institutions, or

simply a set of ideals. Emergencies have targets, even if they are not always the work of an agent, such as the case of a natural disaster. For an emergency to be a threat it needs to threaten someone or something, otherwise no action need be taken. Conservatives most often argue that it is the state that is under attack while liberals are more apt to argue that it is individuals that are in peril. These are sensible alternatives but they do not exhaust the field. Lazar and I introduce a third possibility, the possibility that it is the state acting incautiously, which threatens the rights of individuals. On this third view, the threat is real but misplaced, as is the danger. A state that can anticipate an emergency occurring, or deal with its fallout, is not a state in the grip of an emergency event. In addition, in most cases, even perhaps in the case of a supreme emergency, depending on how the former is understood, modern industrialized states can and do anticipate and diffuse emerging threats.

Consequently, it appears that the very notion of an emergency may simply be a placeholder for the authority of states to suspend rights and enact derogations. There remains the question of what to do with catastrophes but that issue is taken up in the next chapter. For now, I remain with the issue of unpacking what emergencies come to on this newer understanding advanced respectively by Lazar and myself. One of the places where liberal and conservative views again crossover is over the idea that legitimate democratic rule must represent and address "the People" in some measure. This "crossover" is significant because it marks an unavoidable commonality between conservative accounts of emergency and liberal accounts and demonstrates the extent to which many of the same assumptions (assumptions regarding state sovereignty, the right of people to unbiased representation, the exceptional character of emergencies) recur repeatedly in both accounts. A cogent examination of emergency cannot simply be an ideological examination as the issue of "community" or the status of "the People" it seems reappears in all democratic political ideologies. A purely ideological analysis of emergencies yields only half the story and leaves out much of the overlap and interplay between the dominant conservative and liberal views.

Failure to represent all impartially for example, is typically seen as failure to be fully democratic, on the understanding of most contemporary political philosophers be they conservatives, liberals, greens, or radicals. This notion of representation and recognition is a regulative idea, not a goal that anyone thinks can be reached empirically, but one that is

worth trying to meet despite our limitations and the limitations of our institutions; and it is a regulative ideal seemingly endorsed by most political philosophers who work on emergency, whatever their political orientation. This can be seen by again taking Schmitt as a case in point. Schmitt too grounds his theory of government on representation and political equality despite his otherwise conservative/authoritarian leanings. Access to political power must be distributed equally argues Schmitt, at least to the extent that this is possible as no individual in a true democracy should have a monopoly on political power. The same holds true for groups; as such political participation according to Schmitt must take place on equal terms especially in cases in which an official is given powers not accorded to other citizens, be these judicial powers, powers of law enforcement and detention, or some other sort of special provision not widely shared.

Officials need to be elected to these positions reasons Schmitt, if the process is to be representative and democratic (Schmitt 255–67 and 280–5 2008). However, Schmitt's recognition of the importance of equality quickly diverges from Lazar's view of it, while remaining close to Walzer's view in many respects. "The political equality that constitutes a political community cannot be based on the non-exclusive equality of all human beings as moral persons. Every political community is based on a constitutive distinction between insiders and outsiders or friends and enemies. A democratic political community, as much as any other, must therefore rest on some marker of identity and difference that can ground an exclusive form of political equality, which will only apply to insiders. Democracy is a political system characterized by the identity of ruler and ruled. Ruler and ruled are identical if and only if the rulers and all the ruled share the substantive identity that the community as a whole, in deciding who its enemies are, has chosen to turn into the basis of its political identity (Schmitt 264–7 2008)[59].

Walzer bases his defense of the ability of liberal constitutional democracies to wage total war (when required) and rescind rights (at times) in part on his account of political community and does this in a manner not unlike the manner employed by Schmitt. The main reason for allowing liberal democracies to declare supreme emergencies on the Walzerian view is that the destruction or subjugation of the liberal state is equivalent to the

[59] Vinx, Lars, "Carl Schmitt," *The Stanford Encyclopedia of Philosophy* (Fall 2012 Edition), Edward N. Zalta (ed.), (http://plato.stanford.edu/archives/fall2010/entries/schmitt/).

destruction of the political community (or communities) that inhabit that nation state. If the state did nothing in the face of assured destruction it would be abdicating its role as a state and undercutting the rights of its citizens as well as undercutting the existence of the communities from which these citizens come. To make good on this populist and "communal" democratic responsibility, states need to act in the interests of citizens, and not in the interest of preserving state institutions come what may. Therefore, emergencies should be analyzed with an eye toward the effect that derogation and other emergency measures will have on the citizenry and not by looking at the effects of the emergency on government itself. At the very least there needs to be an ordering in which the citizen is privileged over the institutions of state. Otherwise, Schmitt's contentions, as odd as they seem, may prove to be right. The state, whatever state, will protect its functionaries and institutions at the expense of individual rights.

This appears correct at least to the extent that states still cleave to an unreconstructed understanding of what emergencies are; once the unsubstantiated view of emergency is jettisoned so too can we jettison the types of derogations that pit citizens against their governments and vice versa. The danger with Schmitt's view and its variants, of which there are many, is that it distorts the democratic process by pitting it against liberal rights, thus driving a wedge between the liberal and the democratic commitments of many liberal constitutional democracies. Schmitt accomplishes this, according to his defenders, by pointing out a persistent tension at the heart of rule-governed democratic politics. Lars Vinx explicates Schmitt as follows.

> If all those who live together as legally recognized citizens of a constituted democratic state happen to distinguish between friend and enemy in exactly the same way, the equal participation of all citizens in the political process and the electoral appointment of officials would indeed be a requirement of democratic political justice. It would be possible, moreover, to identify the outcomes of the political process with the will of the people, and to consider them democratically legitimate, even if some citizens find themselves in a temporary minority. Nevertheless, the reason why it has become possible to identify the outcomes of democratic procedure with the will of the people is not to be sought in inherent virtues of democratic procedure itself. Rather, the identification is possible only in virtue of the prior identity of all citizens as members of a group constituted by a shared friend-enemy distinction. If, contrary to our initial assumption, those who live together as legally recognized citizens of a constituted democratic state do not share a political identity in Schmitt's sense, the identity of the rulers with all the ruled will no longer obtain, and the constituted democratic state will no longer be truly democratic. The

rule of the majority will degenerate into an illegitimate form of indirect rule of one social faction over another. Sovereign dictatorship, then, is still necessary to create the substantive equality that grounds the legitimate operation of constituted, rule-governed democratic politics.[60]

For Lazar, the preceding is a description of how *some* states act but it is not necessarily the best or only available outcome. Unlike Schmitt, Lazar does not think that anything profoundly significant emerges from his view of emergencies as states of exception; save for the fact that emergencies show us where the limits of the law are on her view, whereas Schmitt views "exceptionalism" as a significant fact about all forms of state power and takes its lesson to be that no matter the system of government in place, in an emergency the true face of politics shows itself and it is the face of coercive power and not as liberals would have it, the face of rights and constitutional rights guarantees.

The content and influence of Schmitt's view was examined more fully in Chapter 1 and it forms the backdrop against which Lazar criticizes and ultimately dismisses Schmitt's analysis of emergencies as *necessarily* states of exception. Her reasoning leads her to doubt the veracity of many forms of emergency and to question what she takes to be the tendency of many commentators to see all social and political upheavals through the prism of emergency. Lazar analyzes the "norm/exception dichotomy" employed by most conservative writers on emergency and reveals several incongruities as well as a series of disturbing consequences. Her main target is once again Carl Schmitt but her critique can be addressed to any theorist committed to the norm/exception view.

If absolutism follows logically from danger, must accountability be rendered impossible and exceptionalism prove the rule? On the one hand, exceptionalist logic is flawed and its conclusions dangerous. But on the other, we can take from exceptionalism a powerful challenge to the idea that law can rule on its own. The idea of order and its normal or exceptional functioning corresponds to a conflict between the idea of political order as a mechanism which, once set going, runs itself. But we know that the machine is flawed, and hence that it must be run and maintained by someone (Lazar 50 2009).

Here Lazar locates the authoritarian tendency that animates much of Schmitt's work. It is "authoritarian" in the sense of requiring an absolute authority on which we can count

[60] Vinx, Lars, entry on "Carl Schmitt," in the *Stanford Encyclopedia of Philosophy* (Fall 2010), Edward. N. Zalta (ed.), (http://plato.stanford.edu/archives/fall2010/entries/schmitt/).

during a crisis, a mechanism as she calls it, that ensures that our political system stays the course. This view is part sensible and part caricature. It is sensible to argue that a sound political order is required to face a severe emergency or some other type of large-scale crisis, but the view's plausibility turns on an over-simple caricature of the complexities of modern industrial states and their constituent institutions. Liberal states today do more than ensure order and discipline, and the elements of everyday life for which many states are responsible, are daunting in number. Lazar continues.

> Wherever a thinker or political leader asserts the existence of a temporal norm/exception conception of emergencies, a latent assumption of a permanent two-tier ethics necessarily follows. Hence, emergencies that are conceptualized as states of exception necessarily come to appear as permanent and permanently exempted from oversight. This inquiry shows the extent of the danger inherent in the everyday norm/exception conception. While we cannot do away with emergencies, we can do away with this deeply flawed conceptual framework. Yet this discourse continues to color legal and political work on emergencies. For example, Ferejohn and Pasquino have argued that differentiating normalcy and exception is critical for safety.
>
> But if our eventual concern is the design and implementation of safer emergency powers, it is misguided to draw an ontological distinction between normalcy and emergency while defining emergency as exceptional and emergency powers as beyond the law. We thereby imply emergency might be removed entirely from the purview of rights and other legal and moral norms (Lazar 50 2009).

While I intend to say little about the "ontological" issues that attend emergency, I do take Lazar to be on the right track here. The normal functions of liberal democratic government cannot and should not be held hostage to the occasional disruptions of emergencies. Given my view that only supreme emergencies constitute genuine emergencies, I doubt the veracity of the view described above by Lazar, a view that seems to imply that exceptions occur with some regularity and a view that I consider incoherent. Lazar is correct to call the dichotomy into question as it posits a separation between normal governmental function and exceptional governmental function that simply stated does not exist. There are other important overlaps as well which the norm/exception dichotomy only serves to obscure from view, such as international legal regulations, like those laid out in the *International Covenant on Civil and Political Rights*, which I discussed in Chapter 2.

> We can avoid the horns of this dilemma by coming to recognize the strong continuities between emergency and everyday relationships between order and justice. These continuities work in both directions. Emergency has rarely been lawless. It has long been embedded within its own codified or common law regimes of rights and moral norms.

Necessity does indeed know law. Furthermore, rights derogations have never been confined to emergencies. The criminal law, for example, is a codified regime of rights derogations in the service of order. We systematically violate rights in the service of order every day. As legal and political scholars contemplate the design and development of new legal and constitutional emergency frameworks, it is critical that we not lose sight of these important continuities. For, to assume that norms and exceptions are the conceptual structure of emergency powers shifts our focus from the myriad possible means of constraint, and blinds us to the continuing force of other countervailing moral norms. It also ignores or downplays the existence of positive non-derogable rights that, in contemporary legal frameworks such as the *International Covenant on Civil and Political Rights*, define the ultimate boundaries of acceptable emergency action (Lazar 51 2009 [Italics mine]).

Emergencies are difficult to manage and difficult to think about constructively because they are composites. An emergency is more than an isolated event. There is the event (or series of events) that the state is called upon to deal with, and then there are the twin frameworks within which decisions about how best to deal with the emergency are taken. On the first hand, we need a description of the emergency event itself.

Is it a terrorist attack or a natural disaster? Is the event manmade or not? Does this emergency constitute an act of war on the part of another state or is it simply an accident of no political consequence? These and related questions form a descriptive core. On the second hand, lies a normative framework, a set of questions regarding what the right response to the emergency is. Lazar also identifies a composite structure to emergencies, yet instead of dividing emergencies into descriptive and normative element, she chooses to divide emergencies into essential and existential elements.

I have suggested that the dilemma of emergency is two-pronged. Emergency at its most extreme threatens, on the one hand, the essence of liberal democracy, and on the other, its existence. If rights are derogated and powers concentrated, two essential features of liberalism are overcome. If not, the state or its citizens may succumb to crisis and chaos […] I argued that those who see emergency powers as an exception from norms present an effective challenge to liberals along the second prong of the dilemma. Flexibility and force keep a state safe in times of emergency, but the checks and balances and rights guarantees of liberal government seem to preclude these. Diffuse power can prevent an efficient response even when a threat is immediate and deadly. But even with power concentrated, the constant and ubiquitous functioning of liberal norms means a liberal state would be constrained from confronting an emergency effectively. So, liberal states, on this understanding, would not survive the severest emergencies. The solution that the exceptionalists propose, one that would exempt statesmen from accountability to liberal democratic norms and laws, is not one that we can accept. Political leaders cannot, it seems,

be bound by norms, but they cannot make exceptions either. Hence, the problem of protecting the state and its citizens in a crisis remains a live one. Given the exigencies liberal democracies have always faced and will always face, can such a state maintain itself both essentially and practically, not only as liberal democratic but as functional" (Lazar 52 2009).

It is tempting to dismiss exceptionalism as an overly abstract exercise in authoritarianism. However, the influence of exceptionalist thinking is found in practical settings such as law courts. Much of the "war on terror" proceeds along exceptionalist assumptions. "That exceptionalism is still taken seriously is evident from a great deal of contemporary political discourse. For example, it served as the rationale for the decision of the Fourth Circuit Court of Appeals in *Hamdi v. Rumsfeld* that an American citizen could forfeit his rights if captured in battle. Then Attorney-General John Ashcroft called this decision 'an important victory, which reaffirms the president's [wartime] authority.'

This decision was recently overturned by the Supreme Court in *Hamdi v. Rumsfeld* but exceptionalism got a clear nod in Justice Thomas's dissent" (Lazar 54 2009)[61]. Lazar's overall project differs from mine in important respects, yet as was the case with Walzer, there are resources in her view that I want to avail myself of. Her own view of her project highlights the differences clearly. The most obvious difference has already been emphasized. My account aims to examine emergency as a concept and Lazar's view aims to reform liberalism in a pluralistic direction, to make it better able to deal with emergencies. Her view also includes a discussion of the moral values at stake in the debate between conservatives and liberals, as well as the debate between those who believe that law can accommodate emergencies, and those who do not. Lazar summarizes what she aims to accomplish as follows.

> Our task was to navigate between exceptionalism and strict philosophical liberalism. The aim was to avoid the dichotomy altogether by underlining the role of agency (the space between the law and its execution) in emergency measures and by showing how a plurality of values operates continuously. I have argued that the existence in a functional form of the liberal democratic state constitutes a countervailing moral value that stands as a reason in active moral decision-making, and this resolves many of the conundrums that faced the norm/exception perspective. Because this framework provides

[61] U.S. Department of State, ''Appeals Court Upholds Detention of 'Enemy Combatant'" (http://usinfo.state.gov/dhr/Archive/2003/Oct/09–771737.html) accessed 22 July 2005 (Lazar 54 2009).

for the continued force of liberal democratic norms, even in conditions where urgency and scale heighten the role of norms of order, accountability remains a possibility, or even a necessity. For the same reason, a liberal democracy might remain liberal democratic even while it exercises emergency powers (Lazar 108 2009). The arguments [...] have also clarified the concept of necessity and the slippage between descriptive and normative exception while addressing the incoherence of the idea of a moral law subject to exception. It is now clearer what emergency powers are necessary for. Exercising emergency powers in the name of necessity implicitly invokes the instrumental and intrinsic value of the liberal democratic state as a moral justification. If the existence of the state in a functional form, its capacity to serve the moral aims that constitute its essence is actually under threat, those emergency actions that are demonstrably necessary for the restoration of order can be described as 'morally necessary' in the sense of 'means-necessity.' By making explicit what exactly is threatened and how, it becomes easier to judge the accuracy and moral weight of a statesman's reasons for emergency action. It follows from this how an empirical description of urgent threat might be transformed into ethical information justifying emergency action. While the situation might well be 'exceptional,' exceptionality itself is neither necessary nor sufficient to justify emergency powers. It is not necessary because there are cases where urgency is the norm. It is not sufficient because exceptionality on its own provides no moral information. It is the special moral quality of an urgent threat to order that warrants emergency powers, when they are in fact warranted.

Moreover, these emergency powers are not justified on the basis of an exception from a moral norm, but instead by means of a countervailing moral principle, that of a morally robust conception of order. There is no moral exception required and the descriptive does not slip into the normative haphazardly. Explicitness here can offset the dangers of the rhetoric of necessity and the 'exception.' The conceptual and moral coherence of the pluralist view is also superior to the norm/exception view for the simple reason that, in admitting the existence of countervailing moral principles, rights do not cease to apply either morally or politically. Their violation remains a serious and culpable matter (Lazar 109 2009).

EMERGENCIES, CITIZENS, AND DUALIST CONSTITUTIONALISM:

There is another way to look at emergencies, one that does not make them an object of curiosity and anxiety but rather that assimilates them to the everyday workings of political systems. Bruce Ackerman proposes just such an understanding. In his *We the People: Foundations*, Ackerman presents a "dualist constitution" the aim of which is to allow both people and their political institutions to take part in deliberation and lawmaking but to also preserve the salient differences between the role of citizens and the role played by officials and government institutions. The accommodation of this difference of perspective, between the governed and the governing, Ackerman dubs a "dualist democracy." On Ackerman's view, democratic politics is a two-step process. On the one

hand, we have the political arrangements we agree to during periods of relative stability, this period he terms "normal politics." On the other hand, we have periods of uncertainty, anxiety, institutional and political upheaval, this period Ackerman terms "abnormal politics." This model is relevant to the discussion of emergency because if it is adopted it deflates the enigmatic element that often accompanies accounts of states of emergency. Emergencies are not exceptional events, that is they are not extra-political events that come from without and upset the applecart of politics. Rather emergencies, even state emergencies, are abnormal events occurring within the ambit of normal political life. When normal politics obtain then the citizenry pursue their personal projects, participating in political deliberation and action as they see fit, but not living with the daily burden of administering the state themselves, instead leaving that task to the elected representatives charged with running things. Yet during periods of abnormal politics, citizens are called upon to mobilize, become active, and affirm their rights against derogation.

This activist mode is necessary according to Ackerman because without it there is little chance for a liberal constitutional democracy to survive severe crises. The continued survival of the constitutional democratic model of government often demands that citizens do more than acquiesce to representatives, according to Ackerman. They must represent their own interests against encroachment and defend their rights against arbitrary derogations, the like of which abnormal instances such as emergencies often bring in their train. Ackerman's dualist model is a useful countermeasure to Schmitt's conservative populism and the threat it brings with it. The model shares Schmitt's concerns over *representation* and *expression* on the part of the governed but the dualist model stops short of endorsing full populism and guards against the ascendancy of a tyrannical majority in a way the Schmitt's account cannot. Ackerman describes the process thusly.

"Above all else, a dualist Constitution seeks to distinguish between two different decisions that may be made in a democracy. The first is a decision by the […] people; the second, by their government. Decisions by the People occur rarely, and under special constitutional conditions. Before gaining the authority to make supreme law in the name of the People, a movements political partisans must, first, convince an extraordinary number of their fellow citizens to take their proposed initiative with a seriousness that they do not normally accord to politics; second, they must allow their opponents a fair opportunity to

organize their forces; third, they must convince a majority of their fellows […] to support their initiative s its merits are discussed, time and again, in the deliberative for a provided for 'higher lawmaking'. It is only then that a political movement earns the enhanced legitimacy the dualist Constitution accords to decisions made by the People" (Ackerman 6 1991). While I do not endorse Ackerman's proposal, finding it somewhat cumbersome and too unrealistic to function efficiently during a state of emergency, I propose it here to make a different point. The point is that one can view democratic representation in various ways that do not entail the authoritarian and one-sidedly majoritarianism of Schmitt or of the other conservative commentators examined so far. Further, one need not endorse the muscular form of deliberation that Ackerman endorses either, at least one need not as far as issues related to states of emergency are concerned. It suffices I think to show that the emergency in question is not an emergency in any cogent sense and to show by analysis that the threat it allegedly poses is a pedestrian threat (one dealt with every day by some state or other) capable of being met by standard means.

Should one favor a richly deliberative alternative to Schmitt, Ackerman provides one. Nevertheless, neither view faces the crucial question that I have posed throughout. What are emergencies and what makes them different from other social phenomena. The answer it appears remains, nothing in particular. It is important to discredit the erroneous notion that rights can be derogated or abrogated during an emergency, an idea shared by both liberal and conservative accounts once again, because a state of emergency is an "exceptional circumstance." This "exceptionalist" reading distorts the phenomenon of emergency and renders emergencies resistant to reasoned analysis. Thinkers as different as Richard Posner, William Rehnquist, and Carl Schmitt, all view emergencies as exceptions to the rest of political life, a viewpoint rejected by both Lazar and myself. The sole exception to this remains supreme emergency, which it appears, is becoming less and less probable, given the fractional and sectarian nature of contemporary politics and warfare. It therefore makes little sense to alter the workings of established liberal democratic institutions, be they formal or informal arrangements, in order to deal with events such as emergencies which truth be told pose no special or significant threat over and above the standard dangers faced by all states and nations. While there is common ground between my conclusions and Lazar's our methodologies and outlooks differ greatly. Her focus is on

the Roman dictatorship and on what she takes to be the Roman heritage in political thought that makes the type of dichotomous thinking Schmitt advances possible. For Lazar, defining and understanding emergency properly is a matter of disentangling established political norms from the view that emergencies are a form of exceptional situation in which the political norms that normally obtain fail to do so. My view proceeds conceptually rather than historically, that is on my understanding even if we do untangle the historical muddle between norms and exceptions (as these arise during states of emergency) we are still left with the conceptual problem I have identified throughout, namely that even if we parse normal political conduct off from abnormal or "exceptional" political action (such as severe right derogation or suspensions of government in favor of martial law) the issue of what constitutes a genuine emergency remains. As we have seen, not all political crises can legitimately be considered emergencies at least not if we seek to use that term with any precision or probity. To label all uncomfortable or contentious political phenomena an emergency is to rob the concept of its content and to render it politically and philosophically inert.

Lazar focuses on the Roman view of constitutional government in part because many other writers on emergency have done so, yet she also finds its structure and the ethical and political quandaries that the Roman view gives rise to, to be importantly instructive. "I use the institution of the Roman Dictatorship to illustrate continuity between normal and emergency powers with respect to power pluralism" (Lazar 16 2009). Lazar and I differ in focus, as she is concerned with the relationship between the formal and the informal institutional elements in government and in how these come to be distorted during emergencies. I focus more directly on the conceptual question of whether emergencies of the type that Schmitt, Lazar, Posner, Vermeule, Ackerman, Dyzenhaus, and many others describe actually exist in the way in which they say they do. Lazar's problematic is different.

In normal and emergency circumstances, power and its constraint are as much *informal* as *formal*, and hence we ought not to concentrate on the rule of law exclusively. In normal times, the rule of law is only one of a number of means of constraining and enabling. While the balance may shift, formal and informal power and constraint are continuous and not exceptional under emergency with respect to normal conditions. Both those who praise the suspension of the rule of law in emergencies and those who reject it begin their account of crisis government with reference to the Roman Dictatorship. From

Rousseau to Ackerman, theorists cite its speed, flexibility, and decisiveness to illustrate the shift from the rule of law to individual emergency rule. But this emergency institution is ill-understood and its use in the history of political thought serves to make a broader point about the study of crisis government" (Lazar 16 2009 [My italics]).

A concern of Lazar's borne out of her analysis of the way emergencies play themselves out in the real world is her worry that collective institutional decision-making will be replaced by individual decision-making. This she worries undercuts the democratic checks and balances of institutional liberal democracy and installs in its place an executive branch of government that acts without supervision or oversight. Beyond this initial concern, there is a second concern that structures Lazar's arguments against the standard way of dealing with emergency. This second concern is illustrated by her insistence that the informal interactions between liberal democracy institutions count as much as the formal interaction do, at least as concerns emergency management. This informal aspect of institutional design matters to Lazar because she believes that institutions, particularly in their informal aspects, respond to important moral imperatives. She gives the following explanation.

> Britain and many of its former colonies, for instance Canada and New Zealand, have diverse foundational [legal] documents that are separate from any formal constitution, but still address the issues of procedures and boundaries on government action. In Israel, for instance, where there is no formal constitution, there are laws that are designated as basic. For our current purposes, we need not worry excessively about whether the rights or moral proscriptions in question are formalized in a treaty, in a law, or in a constitution, as rights or otherwise. The important thing is the underlying moral claim regardless of how this claim is manifested (Lazar 11 2009).

This is what Lazar intends by an "informal" institutional (or legal) relationship. A relationship is not necessarily codified in law but remains a crucial element in understanding the conduct of various institutions during an emergency. Therefore, the tendency of senates and congresses to yield power to the executive branch of government during a severe emergency is not necessarily an extant element of law in every instance in which such transfers of power occur. While some governments do have such provisions, not all governments do, but many liberal democracies in fact do actually yield decision-making power to the executive branch of government during an emergency. The reason for yielding power in this way was covered in Chapter 1 and it has principally to do with the executive branch's alleged ability to act more swiftly than either congress or senate. The

supposed decisiveness and speed of the executive are thought to be determining factors in according it priority over other branches, even if these are largely suppositions unsupported by either compelling empirical or conceptual evidence. Lazar finds these types of informal institutional dynamics an important window into understanding how emergencies unfold. By taking certain suppositions as true, the normal institutional rhythm of liberal democracy is upset. Once the institutional rhythm is upset, we truly find ourselves in an "exceptional" position, but not one generated by a genuine emergency, but rather a situation generated by faulty suppositions. All countries experience emergencies but not all constitutional democracies rely on excessive executive power to resolve the situation, chiefly because there is not overwhelming reason to prefer one branch acting in isolation to the concerted efforts of all branches functioning in concert to abate the emergency. This is a point made by Dyzenhaus and Ackerman among others. While I do not doubt Lazar's conclusion concerning the key role of informal institutional behavior during the unfurling of an emergency event, I am skeptical of its ability to clarify the concept of emergency, which I have already argued remains ill-conceived and mostly misunderstood. Emergencies are more than the institutions that deal with them; they are also more than the informal habits, and actions of those who run said institutions.

Emergencies must be authentic for the measures that are intended to police them to be effective. Sadly, most emergency measures rely on a faulty and "inauthentic" account of emergency, one that fails to meet my proposed tripartite criteria. If an alleged emergency event is not sudden severe, and unexpected, then it is not a true emergency. Exceptionalism, the dominant interpretation of emergency, is on my view an incorrect doctrine and one that both Lazar and I discount as a serious accounting of emergency. "Exceptionalism is the doctrine that the usual norms cease to apply in emergencies. To the question 'how could emergency powers in liberal democracies be morally justified?' an exceptionalist would reply, 'Emergency powers need no justification because norms apply only to the normal circumstance.' If a rule does not apply, we cannot violate it" (Lazar 12 2009). To Lazar's skepticism over the moral compass and coherence of exceptionalism I add my skepticism over the coherence of the idea of an "emergency" so severe that it sunders all previously agreed upon legal, political, and moral accords in a society. The exceptionalist or agonist view is the view made popular by Schmitt and endorsed under many different forms by

writers as different as Richard Posner, Bruce Ackerman, Adrian Vermeule, and Eric Posner, among others.

While some of these writers endorse exceptionalism only to the extent that they take it to be a dominant interpretation of thinking about states of emergency, this is the case with Ackerman for example, they nevertheless fail to analysis and dismiss exceptionalism as the incoherent view I take it to be. By assuming that exceptionalism is true, even if only for the sake of argument in some cases, they tacitly reinforce the view that exceptionalism is conceptually probative and that it reveals something important about the structure of emergencies, a claim I deny. Emergencies can serve as exceptions to the established liberal norms of democratic government only if there is something truly exceptional about the emergency in question. As we have seen, few if any emergencies meet even the slimmest conditions for counting as exceptional circumstances, that set of conditions I have proposed following Walzer and others is reserved for supreme emergencies. Given the rarity of supreme emergency, it is doubtful that full-scale exceptions to the established law of the land and derision of established political customs and practices are appropriate. Schmitt and those who follow his lead are wrong to suppose that the rudimentary crises faced daily by liberal democracies around the world constitute grave emergencies that necessitate the abandonment of the aforementioned practices and laws.

There is simply no basis for this claim. Lazar reinforces the basis for my skepticism when she writes the following.

> Emergency is the permanent condition of humankind, whether potentially or actually…their politics and political ethics follow accordingly. Exceptionalists reject the idea that political order is a mechanism that, once set going, runs itself. Instead, this mechanism is flawed. It breaks. It is unpredictable. It may confront objects it was not originally designed to confront, and hence it must be run and maintained by someone. Exceptionalism poses a powerful challenge to liberal democratic regimes because it raises the question of whether the law can rule on its own. To the extent that exceptionalism negates the possibility of accountability by negating moral criteria against which a public official could be judged, we should be cautious in understanding emergency powers in these terms. Exceptionalism entails, and is entailed by, assumptions that are antithetical to liberal values. We should look to possible alternatives (Lazar 13 2009).

Exceptionalists can respond that they are merely stating an empirical claim about how governments and people respond during an emergency and that whatever norms emerge from this behavior are not the result of mistaken theoretical commitments on their part, but are rather offshoots of the actual practices engaged in by liberal democracies themselves. This rebuttal while appropriate misses the mark, for it fails to concede the main point, norms and exceptions are not the only lenses through which to view emergencies. Norms generate expectations that need to be taken into account. Moreover, the issue of the authenticity or inauthenticity of the types of state emergencies envisioned by exceptionalists remains an open question and not something that they can take for granted in the defense of their view of emergency. Lazar and I also agree that "a conceptual framework of norms and exceptions obscures the phenomena" rather than clarifying the nature of emergencies. "The fate of the rule of law during states of emergency is a common concern among those who study emergency powers from a liberal or libertarian perspective," writes Lazar. We differ over her characterization that "both in normal and emergency circumstances, power, and its constraint are as much informal as formal, and hence we ought not to concentrate on the rule of law exclusively. In normal times, the rule of law is only one of a number of means of constraining and enabling. While the balance may shift, formal and informal power and constraint are continuous and not exceptional under emergency with respect to normal conditions" (Lazar 16 2009).

While I respect Lazar's viewpoint and see its considerable Lockean merits, I chose to concentrate more squarely on the conceptual issue of what constitutes an emergency (philosophically speaking) as I consider this issue to be *logically* prior to the issue of how best to deal with emergencies. If I am right and states of emergency do not in fact obtain as often as has been claimed, then the issue of how best to deal with them (formally or informally) becomes a moot point. Again, few situations merit the label of "state of emergency" and even fewer still rise to the level of an "emergency" *simpliciter*. Constitutional liberal democratic governments and jurisdictions cannot make wholesale changes to their operations or severely derogate rights simply because of appearances and conjectures, there needs to be a genuine threat, one that meets explicit and coherent criteria, in addition to being empirically accurate. Otherwise, exceptionalists such as Schmitt are correct when they argue that emergencies merely expose the power politics at the core of

liberal democracy. On Schmitt's view, there is no moral basis for the rights that liberal citizens enjoy they are a mere convenience for the state and allow it to better manipulate political factions and maintain overall social order.

If liberal democracies can declare emergencies without emergencies obtaining, the Machiavellian nature of politics assumed by Schmitt seems justified. Lazar recognizes this risk but tackles the issues involved informally rather than formally, meaning that she locates the problem at the level of agents and not at the level of formal institutions. While conceding that large-scale institutions address most state emergencies, she maintains that it is the informal interactions and expectations of the state actors within these institutional structures that actually succeed or fail to administer emergencies properly. Her view is that laws, norms, rights, and other "formal" devices of law and order, can only go so far in preserving liberal democratic values. The rest of the battle needs to be fought at the informal agential level of practical quotidian decision-making. There are in other words no short cuts or algorithms for dealing with emergency events, for emergencies are unpredictable by nature. Once again, it is not that I disagree wholeheartedly with Lazar's views, but rather that our difference of focus yields a different view of emergency and of the viability of emergency management measures that place rights derogation at the center of our collective emergency response strategy.

States of emergency have the result of concentrating political power around a small group of political elites, typically the executive branch and senior cabinet of the parties in power and of derogating the rights of citizens. Emergency powers and rights derogations are ever-present in liberal democracies and emergency government exists in all liberal constitutional democratic nations. However as we have seen, the justification and nature of emergency itself remains unwell and incompletely understood. Lazar relies on a pluralist conception of political ethics and political power in her attempt to show how to avoid the dangers and confusions inherent in the norm/exception approach that dominates both historical and contemporary debate over emergencies since Schmitt. Lazar argues (somewhat inconsistently) that liberal democratic values should never be suspended in an emergency; in fact, her argument relies on the view that liberal values should never be derogated, no matter what. This is because without these values and their associated legal

rights states cannot guarantee that oversight and accountability remain live possibilities during emergency government.

I am sympathetic to this view but maintain that the logical possibility of a supreme emergency makes the notion of non-derogable rights hard to defend on Lazar's informalist terms. This is one of the reasons that prevent me from adopting her informalist perspective; I do not see how rights can be guaranteed during an emergency save procedurally. My view casts doubt on the entire enterprise of emergency derogations along with the very idea of emergency. My view therefore sidesteps some of the concerns that plague Lazar view of derogation and emergency. On her view emergency powers and emergency derogations can be justified (at times) by referring to laws and norms that operate outside of emergency. Using laws and norms that obtain during peacetime authorities can make a case for some forms of rights derogations according to Lazar. While she is skeptical of this move, she grants that standards used in times of normalcy can be used to derogate select rights during an emergency, if authorities deem this appropriate. This is because the laws and norms in question are not derived from the emergency situation itself and therefore are not prey to the faulty reasoning of the norm/exception schema Lazar wishes to dissuade us from adopting. In trying to emphasize the continuity between normalcy and emergency, Lazar attempts to substantiate (and ground) a proper set of norms for crisis government.

We differ on this last point, because I do not see a substantial difference between rights and their institutional instantiations, as these are to be found during peacetime and rights, and their institutional instantiations during a crisis or an emergency. Given my comprehensive skepticism about the very coherence of the idea of a state of emergency, I doubt that any salient (conceptual) difference can be identified between my rights as a citizen pre-emergency and my rights as a citizen post-emergency. Further, if I am correct and emergencies as conceived turn out to be chimerical then the issue of rights derogation during moments of emergency government, also turn out to be a largely chimerical. If emergency government can be given a coherent account and one that we should worry about, outside of the unlikely supreme emergency scenario discussed earlier, one would still owe an account of why citizens in liberal democratic constitutional states should offer

up their rights for derogation. It is unclear to all, save for those who continue to advance the norm/exception view of emergency management, how derogations make citizens safe, or how they help mitigate emergencies. The overall thrust of Lazar's views on emergency can be stated as follows.

As ends in themselves, citizens (as persons) should not be thought of or treated as mere instrumental means. Governments and the varied institutions that make them possible therefore have a responsibility to preserve and enhance the welfare of individuals. This responsibility persists on Lazar's view even in emergencies. On her understanding emergency powers provisions, should be made more responsive rather than less responsive to the welfare of citizens. The legal and political norms that guide present day emergency government do not respond adequately to this welfarist need, as these norms tend to interpret emergencies through the prism of the norm/exception view advanced by Schmitt and others. Lazar like me wants to do away with the norm/exception view of emergency. Despite this shared goal, differences remain. Lazar wants to promote a particular welfarist conception whereas I wish to (simply) do away with emergency as a meaningful institutional category and set of policy initiatives, as I find these ineffective. Lazar also focuses on the behavior of elected officials, arguing that their behavior (both formally and informally) plays a much bigger role in the way that emergencies play out than norms and exceptions do. This behavior will be framed by the institutional powers and constraints that public officials find themselves embroiled in once an emergency is declared. Lazar's key innovation lies in seeing that laws alone cannot secure the welfare of citizens.

Consequently, legal norms and legal exceptions are not sufficient for citizen welfare, as more than this is needed. It is the agency behind the laws that counts for Lazar and this she sees as bedeviled by the false alternative of either following established laws during an emergency (namely, following established norms) or eschewing the established legal norms and acting according to new rules tailor made for emergencies (which are assumed to be exceptional situations, unbounded by established norms). "People are ends in themselves and states and institutions are means to their well-being," argues Lazar. Yet we have tended to think of emergency institutions in terms of legal norms and exceptions, on her view. Here Lazar lays out her rationale for favoring informal approaches to dealing with emergencies as well explaining her view of the connection between the value of individual

well-being and institutional responsibility. Emergencies are a sort of litmus test for her; they represent a worst-case scenario for individual rights. Against wholesale rights derogation (of the type discussed in chapters one and two) Lazar proposes the retention of established liberal democratic civil and political rights, even during severe emergencies. She bases her account in part on agency and its relation to informal power.

> Agency, the central element of informal power [on her view], has traditionally been associated with *arbitrariness* and opposed to the rule of law. Correlatively, agency is associated with a prudential mode of politics while the rule of law is associated with a principled mode. But agency is a necessary part of all institutions, both logically and normatively. Because circumstances are always variable and people unpredictable, without the benefit of flexibility which agency provides, institutions and laws could not do the moral work we set for them. The dangers of centralizing individual agency and informal power mean we must be conscious not only of enabling flexibility but of constraining it also, which in turn will also require attentiveness to the informal aspects of power if such constraint is to be effective (Lazar 156 in Ramraj 2008 [My brackets and italics]).

Lazar and I differ in emphasis and this leads to a divergence of perspective on how to best dissolve the issue of emergencies as exceptions and to forestall the heavy-handed use of rights derogations. Whereas Lazar places great weight on the institutional predicament that emergencies place liberal democracies in, I look at emergencies from a more purely conceptual standpoint. On my accounting, states of emergency do not designate coherent states of affairs and while I take the institutional dimension of emergency as seriously as Lazar does, I do not think that an institutional analysis can solve the problem.

Citizens will be treated unfairly if their institutions act incorrectly, but the reason that liberal democratic institutions often find themselves at loggerheads is not because emergencies render them so. It is rather because the phenomenon that these institutions are trying to manage does not in fact conform to their tacit description of it. Lazar signals agreement with something like this sentiment when she writes, "each of these alternative modes of understanding liberal institutions – the view that institutions are means to serve principled ends and the view that institutions are embodiments of first principles – has long roots in the history of political thought which reflect the history of our confusion on the subject of emergencies" (Lazar 159 in Ramraj 2008). On my view, until the conceptual/descriptive question is resolved there is little prospect of resolving the

institutional challenges posed by emergencies. Emergency management and emergency powers seek (in general) to achieve a fourfold goal. They seek to "(1) secure the state (as itself a means to the promotion and protection of moral ends) and (2) its individual citizens, without (3) itself causing excessive harm to citizens, and without (4) causing excessive damage to other values which define the ends of the state" (Lazar 165 in Ramraj 2008).

Whatever one's view on the relationship between the state and the promotion or non-promotion of moral ends, the set of difficulties faced by liberal democracies is clear. Any state finding itself embroiled in an emergency situation must protect itself, protect its citizens, and do this without damaging either its own institutions, or its citizens' welfare, in the process. This fourfold set of goals however is complicated by the three-factored analysis I have offered, as it is unreasonable to ask the state to protect itself from an event it cannot adequately predict and cannot adequately manage or mitigate; alternatively if a state can predict and manage an emergency then the emergency cannot be properly defined by the current criteria, as this would violate the unpredictability posit in my definition. I may of course be wrong about the best way to define emergencies yet an alternate account would still be required and none of those on offer manages to meet the objections that I have raised. If emergencies are easily "tractable" then there is no need to derogate rights in as blunt a manner as we do. If however states cannot render emergencies tractable, for whatever reason, then rights derogations once again appear to be off the table as we do not even know what we are dealing with, and we should therefore proceed cautiously. This entails not derogating rights prematurely, as premature derogation only causes more damage.

Much the same case obtains as regards keeping citizens safe to keep them safe the state must first be able to grapple effectively with the event that threatens its citizens' welfare. If my analysis is correct, then most states in most circumstances cannot do this effectively or efficiently, because they do not understand the phenomenon they are attempting to deal with. For a genuine emergency cannot be wholly predicted, as it must be sudden and severe in nature if it is to be a real emergency, accordingly few contemporary "emergencies" meet these criteria. These observations are justified by the fact that an event (or set of circumstances) that was wholly predictable, that emerged gradually, and that had little chance of causing much damage or loss of life, would not count as an "emergency" on

most definitions of the term. How then can liberal democratic states derogate key political and civil rights and liberties, through the apparatus of their institutions, without these criteria obtaining? It seems that they cannot. Therefore, emergencies are (legitimately) exceptional events and not as Schmitt, Vermeule, Posner, and others would have it, simply a set of exceptions to the established rule of democratic and liberal law.

As such, the pragmatic thing to do is to stick with our established liberal democratic practices and traditions of law, and not as many recommend, entering into uncharted and uncertain territory led by the pyrrhic promise of rights derogation as the road to safety and security. Nothing like this is supported by the available arguments. The final myth regarding emergencies is that they are all catastrophic in nature. I do not find this to be a convincing supposition. The next chapter deals exclusively with this issue and tries once again to show that emergencies, even severe emergencies, are not equivalent to catastrophes. Emergencies allow those affected the possibility of responding in a way that catastrophes do not. Truly catastrophic events leave little to no room for response. They are hopeless in a way that emergencies are not, the idea of catastrophe implies a level of destruction and harm, which far exceeds what is traditionally meant by the term "emergency." Much has been made recently of the ethics of catastrophe and I will attempt to sort through the idea that emergencies and catastrophes are in some sense the same phenomenon, an idea I take to wrongheaded. I leave that analysis to the next chapter[62].

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CHAPTER 4: CATASTROPHE AND EMERGENCY

CRISIS, CATASTROPHE, AND EMERGENCY DISTINGUISHED:

The previous three chapters have, through their examination of the concept of emergency, attempted to isolate a particular type of failing that befalls liberal democracies when states of this kind face a crisis. The failing is one of assuming that all severe crises are potential state emergencies. My definition of emergency shows why this assumption is false. Wedded to an examination of what actually happens when an emergency is declared I have attempted to outline the negative consequences of proceeding with this assumption. Examining the use to which emergency measures provisions are standardly put, my analysis casts doubt on the proposed benefits of existing emergency provisions and their deployment, arguing that they are in fact ineffective, excessive, and in many instances, unconstitutional. These combined failings, I argue further, are due to an overreliance on institutional mechanisms of rights derogation during emergencies. Instead of planning for emergency events *before* their occurrence, most states rely on an unstable mixture of planned measures and *ad hoc* solutions when trying to bring an emergency under control. The resulting instability exacerbates the panic engendered by emergencies further, a panic that affects not only citizens, but also politicians and other officials charged with emergency administration[63]. Panic alone is not the only factor liberal democracies need to address during an emergency, as the institutional instability engendered by the emergency, can also frustrate attempts to retain law and order. Constitutional democracies are political communities bound by many factors, including a relatively strict adherence to rule of law principles. Principles are often shaken in the face of a severe crisis. Fear however makes for poor public policy. In order to preserve the political community and legal order that constitutes them, liberal democratic political institutions must steel themselves against the trauma of emergency[64].

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[63] For an in depth discussion of the role of panic in the emergency decision-making process of liberal democracies, see Bruce Ackerman *Before the Next Attack* (105, 108, 136, 2007). Ackerman is equally skeptical of the successes attributed to the widespread derogation of individual rights seen in most emergencies. He also worries about the corrosive effects of wanton imprisonments and interrogations during emergencies.

[64] In using the term "emergency" here, I maintain my earlier Walzer influenced usage, in which "emergencies" are always "supreme emergencies." For Walzer, as for myself, emergencies are relevant to liberal democracy in part because the political community that makes democracy possible (i.e., the demos) is under threat in such situations and as such, must be protected if the state is to persist post-emergency. Unlike

To be effective in this endeavor, constitutional democracies need to able to distinguish clearly between genuine emergencies other types of events, such as crises which do not meet the requisite criteria for emergency status. From the perspective of the dominant literature, there are two ways of dealing with emergencies available to constitutional democracies that seek to retain liberal political principals during a crisis, the first avenue involves treating emergencies as exceptional events, that is as events that lie outside of the legal purview of established constitutional democratic practice. On this "exceptionalist" view, the state authorizes the temporary employment of emergency provisions and measures, provisions that the state (by its own lights) acknowledges as unconstitutional, undemocratic, and illiberal, were they to take place outside of a crisis situation[65]. The rationale for establishing "exceptional" powers is usually one of efficiency or security, yet the empirical record is soft on the actual effectiveness of these tough-minded approaches to emergency. Those within government agitating for exceptional emergency powers argue that to deal with an emergency swiftly and decisively exceptional legal leniency is required. Different states administer these types of departures from the legal/constitutional norm differently; some commonwealths even take the matter into their own hands, altogether eschewing federal oversight in select instances. What is striking about this feature of emergency management is that this type of legal departure from conventional federal strictures appears to obtain only in the case of emergencies. By declaring a state of emergency, a state or province can temporarily suspend constitutional or charter guarantees without federal oversight and without stipulating an end date. While not events that occur frequently, declarations like these leave citizens without their main tool of protection from arbitrary state interference; that is without many of their central civil and political rights.

Schmitt and other conservative writers, I do not however take the state to be an end in itself, and therefore do not view the survival of the state as paramount. The citizenry makes up the state and it is they that require protection and not the state qua state. States are on my understanding nothing more than the varied and overlapping communities that constitute them.

[65] The term "crisis" is appropriate for widespread generic usage, on my view. Crises occur on all scales and involve all sorts of risks and dangers. Therefore, it is fair to call an emergency a crisis and to call a generic misfortune, such as a landslide, a crisis if the use of the term "crisis" does not occlude or otherwise cloud the relevant distinctions that make emergencies the distinct types of legal/political events that they are. I do not rehearse these fine distinctions here as I have analyzed them in preceding chapters. Suffice it to say, that the relevant necessary and sufficient criteria remain in effect. Any emergency must be sudden, severe, and unpredictable, if it is to count as a genuine emergency. It appears that only supreme emergencies meet these criteria uniformly and in each instance.

For example, the commonwealths of Massachusetts and Arizona allow their legislatures to vote on the enactment of emergency measures without having to wait for any federal approval[66]. Other commonwealths make similar allowances. This discretion marks a departure from the constitutional oversight conventionally exercised by federal authorities over states in non-emergencies. Other jurisdictions allow for similar "exceptional" emergency provisions and powers of differing scopes and at different levels of government. Canada's *Emergencies Act* for instance, allows for the enactment of states of emergency and emergency powers at *every level of government* and in all provinces and territories, albeit with some federal oversight as regards what counts as an emergency under Canadian law[67]. These departures from the established constitutional legal order are gainsaid by the need to defend against the threat posed by the emergency, so long as an emergency situation obtains, partisans of this legal "outsider" view maintain, the state is entitled and encouraged to act wholly outside of the law if it needs to. The second avenue championed in the literature on emergency argues the contrary view, its partisans arguing that emergencies be addressed solely from *within* the established legal and constitutional order. If this cannot be done with laws and statutes as they stand, then those laws and statutes should be changed to bring emergencies in line with the key institutions of liberal democratic government, or so argue legal "insiders".

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[66] The respective Constitutions of the Commonwealths of Massachusetts and Arizona allow such measures to be enacted by legislative vote. The executive branches of those Commonwealths also have access to emergency powers under the same state constitutions. *Declarations of Emergency Power* need to specify which regions of the country, state, or province, they affect under most jurisdictions. All such declarations must specify a location under American and Canadian law respectively. Not all need to specify duration however and all allow for extensions to already enacted emergency powers. What constitutes the end of an emergency is not stated explicitly anywhere, save for "sunset clauses" which place time limits on powers. Note that this is different from conceptualizing a return to a non-emergency state of affairs.

[67] In Canada, all levels of government can declare an emergency, from the municipal to the national level. All jurisdictions in Canada however base their emergency plans and procedures on the federal *National Emergencies Act*. The *Charter* defines a national emergency in the *National Emergencies Act* as "an urgent and critical situation of a temporary nature" that exceeds a province's ability to cope and that threatens the welfare of Canadians and the ability of the Canadian government to preserve the "sovereignty, security, and territorial integrity of Canada." The Prime Minister and his Cabinet can declare national, as opposed to local, emergencies as well. Under present Canadian law, a state of national emergency can last up to ninety days, at which point recursion can extend it. The government may, during a national emergency, and at its discretion: regulate or prohibit travel when they deem it necessary for health and safety reasons, remove people and their possessions from their homes, use or dispose of non-government property at its discretion, authorize and pay persons to provide essential services that they deem necessary, ration and control essential goods, services and resources. They may also authorize emergency payments, establish emergency shelters and hospitals, and assess and repair damaged infrastructure. The Canadian Government can convict or indict those who contradict any of the above at will. (http://www.cbc.ca/news/background/stateofemergency/) and (http://laws.justice.gc.ca/en/e-4.5/text.html).

"Insiders" want to constitutionalize emergency, whereas "outsiders" argue that this is impossible as the nature of emergency renders it wholly unpredictable and hence ungovernable by constitutional means. My own view has strived to complicate this oversimplified picture. Emergencies I argue are neither ungovernable nor wholly predictable philosophically speaking. The problem does not lie with the phenomenon but rather with our misunderstanding of its meaning and therefore of its practical contours. Emergencies are real events, with an internal logic of their own, but they are not as commonplace or as unpredictable as the literature surrounding them has strived to make them. Both sides of the debate have valid insights yet neither side operationalizes these insights into a coherent approach to emergency management. Outsiders and politically conservative commentators are correct to emphasize the need for in action in an emergency. They are also correct in emphasizing the dangers posed by supreme emergencies and in underscoring the role that coercive measures play in emergencies. The error of the conservative/outsider view is in its overemphasis on executive action, its readiness to sacrifice individual rights for only marginal gains in security, and its failure to appreciate the communal nature of democratic government.

Liberal/insiders err in believing that all emergencies can be dealt with peacefully and through legal channels, in underemphasizing the aleatory elements of emergency, and in an unwillingness to take supreme emergencies seriously. Yet there is a more salient failure shared by both viewpoints and challenged by neither. Despite their respective differences in emphasis and in proposed strategy, both "outsiders" and "insiders" take the phenomenon of emergency at face value. Neither view, adopts a critical stance toward either the concept of emergency or the empirics surrounding emergencies, neither viewpoint is able to admit that its conception of emergency is partial (and therefore mistaken) and neither appreciates the complex interplay of factors that render genuine emergencies dangerous. Both "insiders" and "outsiders" tacitly accept that emergencies exist, that they are dangerous, and that they should be dealt with (in some sense) in the manner prescribed by the theory of emergency management (or of executive power) respectively favored by each. However, just what *constitutes* an emergency is not a question addressed by either of two dominant views; instead, they each prefer to defer to

established law. This deference to established law is doubly problematic, because no legal code (of which I am aware) actually defines emergency with any perspicacity or detail.

Emergencies are therefore both *de jure* and *de facto*, whatever legislatures say they are, as courts themselves rarely (if ever) produce detailed decisions on such conceptual *cum* legal issues. International law makes some headway in this respect, by laying out what states may and may not do during an emergency, but here as well, nothing like a clear legal definition of emergency itself, exists[68]. In addition, if a state is not a signatory to a binding international treaty dealing with emergency, then the international law will have little to no bearing on domestic law. The indeterminacy surrounding the concept of emergency renders it vulnerable to careless description and definition and to quick assimilation to neighboring concepts such as "disaster" and "catastrophe." Yet these concepts pick out a different set of events and fail to convey the *intent* that often accompanies emergencies. Disasters and catastrophes are not emergencies, at least not in the constricted sense of emergency that I have developed in previous chapters, that of emergency as "supreme emergency." My view presents a more perspicuous understanding of emergency, one that relies on the necessary and sufficient conditions for an emergency obtaining. The view I have proposed here dispels some of the misapprehension and exaggerated fear surrounding emergency, hopefully placing emergency in a more tractable and constitutionally compatible form.

DISASTERS AND CATASTROPHES:

Disasters and catastrophes are not emergencies because the necessary and sufficient conditions for their existence are different from those that make emergencies possible. A disaster is an event that causes great destruction, great loss, or other misfortune. Disasters

[68] Continuing with Canada, a province or territory can declare a state of emergency if conditions exist which threaten the sovereignty of that region and the safety of its citizens. The declarations can last for unspecified periods and can be extended via recursions as situations merit. Different emergency plans exist for municipalities in different provinces and territories, each with its own quirks. As with federal and provincial levels of government, municipal and local governments, base their emergency plans on the outlines of the *Emergencies Act*. Typically, the head of local government, usually a mayor, enacts the declaration after consulting with members of a city council. The local government then takes whatever actions are necessary to eliminate the threat. Canadian law indicates nothing more specific, either federally or provincially. It is assumed that authorities will honor legal precedent but that caveat is not explicit in the relevant jurisprudence. References: (http://www.cbc.ca/news/background/stateofemergency/) and (http://laws.justice.gc.ca/en/e-4.5/text.html)

do not however need to be sudden to exist, they do not "emerge" as it were, in the same manner that emergencies do.

They have more in common with catastrophes than they do with emergencies in that like catastrophes, disasters are *irremediable* in a way that emergencies are not. Emergencies often devolve into catastrophic or disastrous situations but this does not make them the same thing conceptually. Catastrophes are very similar to emergencies in that they are often sudden and always severe types of events, but they are not *remediable* in the way that many emergencies are. Even a supreme emergency, in which an aggressor aims to destroy or otherwise overtake their victim, can be righted if the victim triumphs over the aggressor. The same cannot be said for catastrophes, which allow for no remediation, or for disasters, which do not involve the same pointed intentionality that supreme emergencies do. Moreover, while many forms of supreme emergency can exist, historically supreme emergencies are paradigmatically experienced by two nation-states warring with each other. The political dimension of supreme emergency, along with its definitional characteristics, makes it different and distinct from both disaster and catastrophe, which typically stand apart from war and warfare. One can argue that war is catastrophic and disastrous by nature, but this adds little to the analysis and obscures more that it clarifies, as one can ask what one means by the terms "catastrophic" and "disastrous" in this context. Emergency, disaster, and catastrophe, while neighboring concepts, are not therefore synonyms, substitutes, or otherwise replaceable, with one another[69]. Each has its own meaning and position within logical space, despite the insistence of emergency theorists that they are interchangeable. Because of this tacit presumption of interchangeability, traditional accounts of emergency are either over-inclusive or under-inclusive, in their description of emergencies. They are over-inclusive to the extent that the term "emergency"

[69] Intentions and purposes are different. I want to claim therefore that emergencies can be triggered both purposefully and with intent in a way that disasters and catastrophes cannot. A state of emergency is a political event; one based a series of political calculations and considerations. Nothing like this exists when dealing with a disaster or a catastrophe. Catastrophes do not admit of alteration. They are misfortunes that we cannot alter and this is what renders them "catastrophic." Disasters are more complex but they too rarely admit of intent and of purpose in just that same way as emergencies. These are not idle distinctions. Under law, the distinction between "purpose" and "intention" is a key determinant in determining *Mens Rea* for example. Bonnie Honig raises similar points in her *Emergency politics: paradox, law, and democracy* (56, 2009) as does Daniel Bryan Yeager in his *J.L. Austin and the law: exculpation and the explication of responsibility* (31-37, 2006). The term "crisis" can however be used both inclusively and exclusively, both expansively and in a contracted sense, without incoherence or contradiction, as its grammar allows for such usage when the semantic context permits. Almost anything can be a "crisis" but not just anything can be an "emergency" or "state of emergency" as these are legal categories.

can be used to describe the any outcome that is not intentionally, purposefully, or deliberately caused.

Yet these accounts are also under-inclusive in that they allow the term "emergency" to also describe any *after the fact* set of events that makes it look like the state (or some other relevant agent) took all necessary precautions *before* the emergency to protect its citizens. A sober assessment of emergency cannot allow the conflation of over-inclusive and under-inclusive attitudes toward emergency to go unnoticed or allow the grammar of "intention" and "purpose" prevalent in the literature, to go unexamined. Over-inclusion and under-inclusion are both mistaken approaches to conceptualizing emergency properly, despite their popularity among theorists of emergency. I owe the distinction between over-inclusion and under-inclusion to Daniel Yeager's *J.L. Austin and the law: exculpation and the explication of responsibility*, which deals with issues concerning the conceptual clarity of common legal terms (31-37, 2006). There is a continuum upon which we can place emergencies, disasters, and catastrophes, to better illustrate their differences from one another. A first difference is that of raw magnitude. On this measure, emergencies are the least powerful events, with disasters somewhere in the middle, and catastrophes at the end. This way of measuring emergencies is common in analyses that deal exclusively with disaster planning and response.

The reason that disaster responders rank emergencies so low on the continuum is because in terms of sheer magnitude there can be an emergency that affects only a single individual. These types of emergencies, which are often called "local emergencies," are not part of my focus here, as they are not political events in any interesting sense. A local emergency is any sudden event that puts the life or welfare of at least one person in jeopardy and that can be dealt with adequate by local authorities (i.e., a fire dealt with by the local fire department). A disaster, on this disaster-response understanding, is a more serious event than a local emergency as it involves multiple persons, and cannot be dealt with by local authorities alone. That is the event exceeds the resources and capabilities of local disaster responders. From the legal standpoint, this type of disaster calls for help from outside of the jurisdiction in question. Perhaps aid from another municipality is in order if the disaster is to be dealt with adequately. In this case, a responsible agent from within the jurisdiction within which the disaster is occurring contacts responders from a neighboring

jurisdiction for additional aid. Notice however that in this case the authority remains within the jurisdiction in which the disaster is unfolding. Further, no derogation of rights is in effect despite the potential for serious loss of life.

Disasters that involve multiple responders also require greater coordination between responders further complicating the task. Next on the continuum of magnitude used by disaster-responders is catastrophe. Disaster-responders do not have a distinct concept or definition of catastrophe. Instead, they prefer to employ a mixture of the two previous definitions to arrive at a conception of catastrophe. That is to say, catastrophes on this understanding are mixtures of local emergencies and disasters. The reason for this is that from the point of view of disaster response, "the response is from so many jurisdictions, levels of government, and different kinds of organizations, and the needs of the affected population so diverse and spread out that no single entity can coordinate it all." Finally, at the end of the disaster-response continuum is what is called an "Extinction Level Event" (7-8 Oliver 2010).

In this final case, no possible response is possible and no useful intervention obtains. No humans can survive events of this form according to disaster-response protocols[70]. Oliver grants that from the perspective of emergency/disaster management, the distinctions between these concepts often run together in the field. Our interest in Oliver's continuum is illustrative. I use it to show that the way one defines and categorizes events colors how one views them. Moreover, there remains no agreed upon method for categorizing emergencies, disasters, and catastrophes. Oliver's "continuum of magnitude" is of limited use for our legal and political examination of states of emergency. While these are similar events in some respects, they are not events declared and maintained by a government, like states of emergency. The questions of responsibility and agency thrown into relief by emergency are largely absent in the case of disasters and catastrophes, where there may be no human agency at all and hence no dimension of blameworthiness. Oliver's continuum does show just how jurisdictions crisscross and become *definitive* of what is

[70] This continuum is common throughout the disaster-response and emergency-responder literature. While it does not mirror my own political conception of emergencies, it is instructive in that it locates some of the fault lines that political conceptions of emergency fall in to due to inattention. "Jurisdiction" and "harm" are two areas passed over too quickly in some philosophical discussions of emergencies. See *Catastrophic Disaster Planning and Response* by Clifford Oliver (CRC Press, 2010).

(and what is not) one type of event or another. The same holds true under my political conception of emergencies.

CONSTITUTIONS, SOCIETIES, AND EMERGENCIES:

For a constitutional order to have a valid claim to democratic legitimacy, it needs to act as prescribed by law, whenever possible. Otherwise, law and the civil and political rights that are attached to it become optional features of the liberal democratic constitutional state, rather than being its central and defining features. Liberal democracies are so-called in part because of this commitment to law and order conceived and defended on liberal democratic grounds. It is therefore very difficult to decouple constitutions from the social order they are intended to preserve and defend. The call to abandon established constitutional order in cases of emergency needs to be accorded the weight it merits, as it asks government agents (such as elected representatives) to vitiate the protections from derogation (within the constitution) for some proposed greater good. I do not think that my advice that this "greater good" in fact obtain, is as radical as some proponents of derogation think it is[71]. Security matters, but not to the exclusion of every other legal, political, and ethical consideration, faced by democratic states. If citizens are being asked to trade

[71] Posner and Vermeule often write in this vein. They argue in *Terror in the Balance* that those who stand in the government's way when it proposes emergency measures legislation can be seen as contributors to the harms caused by emergencies when these occur. What they never consider is the parallel possibility that one can equally view those who champion the too quick derogation of individual rights as agents of harm. They argue, "Civil libertarians claim, in many cases, that the government's policies are bad for security as well as bad for liberty or that there is a less restrictive alternative to the policy the government has chosen. But usually the government disagrees, and the judges know that they may do great harm if they erroneously side with the civil libertarians, especially in times of emergency…the thought seems to be that if government restricts civil liberties before experimenting with alternatives, it might miss out on less restrictive alternatives and choose a policy below the frontier. This view, however, essentially attaches zero weight to the opposite risk: an obligation to exhaust all alternatives might cause great interim harm before government is allowed to adopt a liberty restricting policy that is, indeed, located at the frontier. The hard question is what the interim policies should be while government searches for optimal policies, and it begs the question to say that the interim policy must be a regime that does not restrict civil liberties. If the risk of interim harm is sufficiently great, it is hardly obvious why this should be so. The same point holds if the focus is on judicial review rather than non-judicial politics. The hard case, for judges, arises when government claims that time is of the essence, that experimentation with alternatives would be foolhardy, and that the interim risks are sufficiently great that restrictions of liberty are warranted. It would be a bold judge who would require the government to exhaust all other alternatives in such a posture, and quite sensibly our judges have not been so bold" (Posner and Vermeule 34-35 2007).

something they have (i.e., some of their existing rights) for something they do not yet have (i.e., potential greater security) then some concrete measure of proof, other than the government's word, seems reasonable. The opposite view however is not as credible as its defenders think it to be. It is incredible to argue that I should give up an important right because this *may* make everyone safer at some undisclosed future time.

Moreover, it is important that the measures employed by the government and the courts be *effective and proportionate* to the threat being faced. This concisely is what is wrong with the expensive and unhindered understanding of emergency employed by both "insiders" and "outsiders;" it allows too much to count as an emergency and gives away too many rights for too little actually existing security. Lastly, it gets emergency wrong and would therefore not make citizens safer, as this understanding of emergency does not differentiate or discriminate between types of disasters, choosing instead to assimilate all misfortunes together, somewhat in the manner recommended by Lazar. For this and other reasons already argued for in previous chapters, the view I advance dissents from the assessment that emergencies are self-evident events, which require little analysis and which are easily assimilated to catastrophes or other sorts of disasters. The view I propose dissents from this conclusion chiefly because the types of events that we call "emergencies" rarely have much in common with each other with regard to their actual empirical features.

In attempting to define emergency in the preceding chapters, I attempted to render clear a concept that is used often in law and government, yet that remains definitionally and theoretically unclear, particularly as concerns the derogation of existing rights during "emergency" events. This lack of clarity, I have argued throughout, misleads our best efforts to theorize and come to terms with emergencies at both the practical and the theoretical level, which in turn compromises the ability of authorities to guard against the genuine dangers these types of events pose. Recent social science research by E.L. Quarantelli and others reinforces my contention that emergencies, catastrophes, and disasters are distinct events, each worthy of individual analysis and individual management[72]. One obvious reason for defending this belief is the qualitative and quantitative differences that are apparent between emergencies, catastrophes, and disasters,

[72] *Catastrophes are Different from Disasters: Some Implications for Crisis Planning and Managing Drawn from Katrina*, E.L. Quarantelli: (http://understandingkatrina.ssrc.org/Quarantelli/). Published by the *Disaster Research Center (DRC)* of the University of Delaware, 2006.

as seen in the continuum scale. The scale of any crisis needs to be taken into account in any serious analysis of the crisis, despite the trend in political theory and political philosophy to sometimes occlude scale and simply assume that all crises are in one way or another "emergencies." Here again, I employ the term "crisis" to denote *any* generally destabilizing form of destructive social disorder. A riot on this understanding is therefore a "crisis," even if it is not an emergency.

According to Quarantelli, a first hurdle in parsing out the differences between disasters, catastrophes, and emergencies, involves examining the differing social environment in which each occurs. A second hurdle involves administering the various organizations that are responsible for managing the crisis went it occurs. In a wartime state of emergency, a tightly administered bureaucratic hierarchy takes control with civilian and non-governmental organizations playing no role, at least initially. The great irony of crisis management is that large-scale events, such as wartime states of emergency, are relatively easy to administer in that there are fewer agents and actors involved in the decision-making procedures. Under Marshall Law for example, there is no need to coordinate the military's actions with actions of local volunteers, save to make sure that the volunteers are under military control and supervision. The situation is greatly more complex in the case of what Quarantelli refers to as "everyday emergencies." These "everyday emergencies" or "local emergencies" (which I would instead call "crises") can be anything from industrial fires that threaten residential areas in a city to large snowfalls.

Quarantelli writes, "One study of what was a major but nonetheless community-limited massive plant fire in Canada found that 348 organizations appeared on site. They included seven departments of local government, 10 regional government agencies, 25 entities from the provincial government and 27 organizations from the federal level, as well as 31 fire departments, 41 churches, hospitals and schools, four utilities, eight voluntary agencies, four emergent groups and also at least 52 different players from the private sector" (Quarantelli 2006). Another tension identified by Quarantelli is the tension between individual rights and the collective needs of the community in a crisis. In a state of emergency, the community in question is the *political community* for which the state is responsible. Smaller, more localized communities, fall by the wayside during a state of emergency in a manner that is not replicated in more localized crises. The needs of local

community come to be eclipsed in their entirety during statewide emergencies, unless of course the state of emergency that is declared is local or regional in scope. "Community and crisis-time needs and values take precedence over everyday ones, all groups may be monitored and ordered about by social entities that may not even exist in routine times, or where the destruction of property is accepted to save lives in search and rescue efforts, or in the building of levees or firebreaks" (Quarantelli 2006). Different standards apply to different events and these cannot be run together.

Different performance standards obtain in disasters, which may be of various scopes, than do in states of emergency, which are mostly political events. Similarly, catastrophes have their own standard of success or failure as concerns administration. Catastrophes, which by definition refer to complete and irremediable ruination, have the lowest standard. Little to nothing can be done in cases of catastrophe. Supreme emergencies have high standards, as they tend to follow perspicuous guidelines and have clear goals. The goal of a state of emergency from the point of view of the government that enacts it is to end the emergency. Yet no crises are this straightforward. Crises that are not states of emergency, have more to worry about that retaining social order and ending hostilities. During a severe health crisis for example, emergency-like provisions may be enacted, despite the lack of a full-fledged emergency.

In such pseudo-emergencies, "the normal speed of response and individualized care given to treating the injured is superseded by a need to curtail the level of care given to victims as well as spending time, efforts and resources on more equitably distributing the many victims in the available medical facilities. There is a much closer than usual public and private sector interface. The need for the quick mobilization of resources for overall community crisis purposes often leads to a preemption of everyday private rights and domains. This means that goods, equipment, personnel, and facilities in the private sector are often without due process or normal organizational procedures requisitioned by public agencies for the common good. Everyone, be they individuals or groups, becomes subject to being taken over by governmental groups" (Quarantelli 2006). We see here again the use of derogation to remedy all manner of crisis, be it a genuine political emergency or not, under the cover of "common good." Leaving aside pseudo-emergencies, and returning to disasters, we discover another challenge. Disasters are harder to gauge in terms of

performance standards, as disasters present at all different scales, from the minute to the large, as we saw in Oliver. The best we can do on this score, given the parametric nature of disaster, is to show how disasters differ from catastrophes in politically relevant circumstances. Again, scale and planning will play a decisive role in disentangling the concept of disaster from the concept of catastrophe. Catastrophes target all of society; disasters may target some or all of a society, and finally emergencies (understood as supreme emergencies) target state and political institutions alone.

For both Quarantelli and me, "the differences that appear between disasters and catastrophes can be especially seen at the organizational, community and societal levels." What Quarantelli's research shows is the erratic nature with which authorities deal with crises of all forms on the ground. The empirics do not conform to the definitions and categorization found in most of the literature from political philosophers dealing with emergency. Rather what we find is a motely of seemingly *ad hoc* measures and missteps, as when a natural disaster cripples the infrastructure relied upon by authorities to administer said disaster, leaving them defenseless. Other findings reveal an inability to define perspicuously the events they seek to manage. Compressing these various characteristics together, Quarantelli comes up with six general factors that differentiate catastrophes from disasters and consequently from states of emergency. In each case, the state is a principal actor (unlike in Oliver). Below are the six factors that obtain in catastrophes but that do not obtain in disasters. In a catastrophe:

1. Most or all of the community built structure is heavily impacted. For example, Hurricane Hugo destroyed or heavily damaged more than 90 percent of all homes in St. Croix. That made it impossible, for instance, for displaced victims to seek shelter with nearby relatives and friends, as they typically do in disaster situations. In contrast, only parts of a community are typically impacted even in major disasters. For instance, in the Mexico City earthquake of 1985, considered a major disaster, at worst less than two percent of the residential housing structure stock was lost, with only 4.9 percent of the population in a *DRC* survey reporting that there was great damage to the building in which they lived. Those forced out of their homes went to live with friends and relatives in the metropolitan area. In addition, in catastrophes, the facilities and operational bases of most emergency organizations are themselves usually hit. After Hurricane Andrew in southern Florida, many structures that housed police, fire, welfare, and local medical centers were seriously damaged or destroyed, making work operations in them impossible. While in a major disaster some such facilities may be directly impacted, the great majority typically survive with little or no damage. The heavy damage in New Orleans and towns on the Mississippi coast in Hurricane Katrina was of a catastrophic nature with 80% of the city being flooded.

Likewise, as a result of the flooding many key organizational work places were made inoperable. Even most high-rise buildings in the city, although structurally surviving almost intact, were not useable because of the flooding in their basements and first floors and the lack of electric power.

2. Local officials are unable to undertake their usual work role, and this often extends into the recovery period. Related to the observation just made, local personnel specializing in catastrophic situations are often unable for some time, both right after impact and into the recovery period, to carry out their formal and organizational work roles. This is because some local workers either are dead or injured, and/or unable to communicate with or be contacted by their usual clients or customers and/or are unable to provide whatever information, knowledge or skills, etc. they can usually provide.

For instance, in some recent catastrophes in developing countries such as Indonesia in the 2004 tsunami disaster, practically all medical personnel in some towns were fatalities. In impacted Florida communities after Hurricane Andrew, many social workers had no way of communicating with or being reached by past or possible new users of their services. The general inability to provide usual professional or technical services happens, if at all, only on a very small scale in major disasters, and if it does, lasts only for relatively short periods of time. One overall consequence is that because local personnel are casualties and/or usual community resources are not available, many leadership roles may have to be taken by outsiders to the community. Planning which assumes that local community officials should and will take an active work role in the immediate post-impact periods of a major disaster is very realistic and a valid view. This can be assumed. However, if there is no place to work in or activities cannot be carried out, the motivation to do one's job may exist, but cannot be realized in catastrophic occasions. A negative consequence from outsiders having to come in is that the local-outsider organizational friction that only occasionally arises in disasters can become a major problem in a catastrophe. In Hurricane Katrina, the above and related problems have and are surfacing. There was certainly a great deal of work-family role conflict in key emergency organizations. At least anecdotal stories suggest that only about two-thirds of police officers reported for and remained on duty (that there were no such reports about the fire department may indicate additional organizational problems in the police department). Local mental health and welfare agencies also became inoperative. As outsiders move more and more to the front, there will be inevitable clashes between the locals and those from outside the local community.

3. Help from nearby communities cannot be provided. In many catastrophes not only are all or most of the residents in a particular community affected, but often those in nearby localities are also impacted, This has often happened in the typical typhoons that hit the Philippines, and this also occurred in many areas around Chernobyl after the accident at the nuclear plant there. In short, catastrophes tend to affect multiple communities, and often have a regional character. This kind of crisis, for instance, can and does affect the massive convergence that typically descends upon any stricken community after a disaster. In a disaster, there is usually only one major target for the convergence after a disaster. In a catastrophe, many nearby communities not only cannot contribute to the inflow, but they themselves can become competing sources for an eventual unequal inflow of goods, personnel, supplies, and communication. For example, under other circumstances, the devastated small cities in southern Mississippi after Hurricane Katrina could have

anticipated a convergence of help and assistance from the major metropolitan city in the area, but of course, there was none at all.

4. Most, if not all, of the everyday community functions are sharply and concurrently interrupted. In a catastrophe, most if not all places of work, recreation, worship, and education such as schools totally shut down and the lifeline infrastructures are so badly disrupted that there will be stoppages or extensive shortages of electricity, water, mail, or phone services as well as other means of communication and transportation. This could be seen in many communities after Hurricane Andrew where in southern Dade County more than half of the homes were totally destroyed and/or suffered major damage. In such kinds of situations, the damage to residential areas tends to be correlated with similar destruction of nonresidential areas. Among other things, it means that there are far more "social" facilities and activities that need to be restored to "normal" functioning after a catastrophe than after a disaster.

Even in major disasters, there is no such massive-across the board disruption of community life even if particular neighborhoods may be devastated, as happened in the Mexico City earthquake of 1985 when life in many contiguous areas went on almost normally. Similarly, this was true of the Northridge, Los Angeles earthquake of 1994; for instance, 12,000 people went as usual to the horseracing track in that California area the afternoon of the earthquake. In Katrina, there was across-the-board and almost total disruption of community functions. In the absence of systematic studies that will take months to appear, we can only have educated guesses about what happened in the face of the massive disruption. It appears that one of the earliest consequences was that there was much decentralized decision making, particularly of an emergent nature. This could be seen in the evacuation of the hospitals, in the preparations for impact in many hotels, and in much of what happened in the French Quarter in New Orleans. As the crisis evolved, decentralized decision-making continued to be the norm in entities ranging from households to organizations. And this continued as the immediate crisis lessened, and different social entities and categories started to return to New Orleans. The idea that there could be any centralized control imposed on these disparate decisions and varying community activities flies in the face of what researchers have found occurs in crises.

5. The mass media system especially in recent times socially constructs catastrophes even more than they do disasters. All disasters evoke at least local mass media coverage. Some major disasters can attract attention from outside the community media, but usually only for a few days. Even reporting on 9/11 dropped off considerably after a few weeks except in the New York City and Washington, D.C. metropolitan areas. In catastrophes compared to disasters, the mass media differ in certain important aspects. There is much more and longer coverage by national mass media. This is partly because local coverage is reduced if not totally down or out. There is a shift from the command point of view that prevails in disasters to an Ernie Pyle approach ("six feet around the foxhole") in catastrophes, especially by the electronic media. There is even more of a gulf between the content of the electronic media and the print media (with the latter focusing on looting and other dramatic visuals). There is far less of the normal filtering and screening of stories especially in the electronic media. Some of the more important consequences of these kinds of media activity were that in Katrina there was far more diffusion of rumors than occurs in disasters. While looting did occur, which is atypical for disasters, the anti-social behavior

was widely depicted as typical when the pro-social behavior was by far the norm (it should also be noted that a catastrophic situation is only one condition necessary to have mass looting). The question of "who is in charge? was reiterated over and over again, as if it was a meaningful question, reflecting the command and control model that disaster research has indicated does not work well in disasters, much less in catastrophes.

6. Finally, because of the previous five processes, the political arena becomes even more important. All disasters of course involve, at a minimum, local political considerations. But it is a radically different situation when the national government and the very top officials become directly involved. Even in very major disasters, a symbolic presence is often all that is necessary. In catastrophes, that symbolism is not enough, particularly for the larger society. Part of this stems from the fact that catastrophes as happened in Katrina force to the surface racial, class and ethnic differences that are papered over during routine times. It is easy to take partisan political advantage of such uncovering especially when they go against widely held cultural values and norms in democratic societies.

Another reason is that organizational weaknesses of responding organizations come even more to the surface. The structural weakness of the *Federal Emergency Management Agency (FEMA)* as a result of its subordinate position in the *Department of Homeland Security (DHS)*, as some disaster researchers had predicted for at least three years, became a major problem in the response. The considerable expertise that still existed in the lower level professional ranks in *FEMA* could not make up for the badly organized *FEMA-DHS* interface. Even competent social actors are limited in what they can do in a structurally flawed social system. Have we discussed all already observed differences and more that may be subtler in catastrophes than disasters? No, we have not. Still more differences can be surfaced and found by looking at local community planning and asking what was assumed as being in place at impact time, keeping in mind that it is disasters and not catastrophes that are almost always assumed.

From my viewpoint, Quarantelli gets the distinctions about right. He fails to properly emphasize the shifting scope of disasters, which can be of seemingly endless scope, but is correct in his description of catastrophes. Quarantelli is also an important corrective to the triumphalist view of some commentators who seemingly believe that a sufficiently large bureaucracy can manage all catastrophes and that all states of emergency can be handled via the stringent derogation of individual rights. These commentators fail to see that a truly catastrophic event vitiates all such bureaucracy, rendering moot much of the reason for its establishment. Catastrophes are more like Oliver's "Extinction Level Events" and less like Posner and Vermeule's bold Presidential actor. Empirically speaking, the most important differences between emergencies, catastrophes, and disasters, emerge at the level of institutional planning and legal jurisdiction. Quarantelli and Perry describe how these events typically unfold below.

Citizens very seldom panic, family or household units mostly undertake evacuation, and neighbors help one another. However, at the organizational level, there are more differences in catastrophes compared with disasters and generally; they will lead to a poorer response in the former compared to the latter kinds of occasions. For example, in catastrophes there will be even slower organizational assessments of the problems in the situation. There will be poorer and more inaccurate information flows between agencies in catastrophes. There will be substantially greater difficulty in coordinating the organized response in catastrophes than in disasters that make an incident command system (which is a dubious arrangement even for disasters) even less appropriate for a catastrophe (Quarantelli 2006).

This last point is telling, as the "incident command system" proves to be the favored tool of emergency management for both emergency "insiders" and emergency "outsiders." Both groups want command and control systems set up to deal with emergencies, despite the fact that empirically, *ICS* management does not yield impressive results.

In fact, it is no better, on empirical terms, than standard everyday reactions to small-scale crises at the local level. All that separates "insiders" from "outsiders" in the end is where they wish to locate authority during an emergency. "Insiders" track the empirical evidence more closely, in wanting to use existing institutions of government and oversight to administer emergencies, whereas "outsiders" who want to set up extra-legal and extra-constitutional channels of emergency management have to contend with greater empirical anomalies[73]. While I view disasters as more flexible sorts of events then Quarantelli does, I do share his view of catastrophe and his contention that over-preparation and over-derogation do not substantially improve actual emergency outcomes when dealing with crises of these kinds. What Quarantelli's research makes clear is that many of the administrative and managerial principles and practices that hold for large-scale disasters are also hold for catastrophes, provided that the principles and practices in question respect the differences between disasters and catastrophes laid out in Quarantelli's six factors. If they do not respect these differences and instead attempt to treat disasters and catastrophe alike,

[73] For the negationist view that attempts to define terms like "disaster," "emergency," and "catastrophe" is futile, see Ronald W. Perry's "What is a Disaster?" in the *Handbook of Disaster Research* (1-5 Springer 2007). Perry also discusses Hemple's distinction between *real* and *nominal definitions* in this regard. Hemple argues that terms like "emergency" and "disaster" are "class terms," terms that are intended to preserve some significant measure of ambiguity within the definition itself. Greater clarity is neither required nor requisite for us to use "class terms" properly. I concur with Hemple in this respect. My attempt is not to offer a strict *definition* but rather to offer an outline of the proper *conditions* required by a polity to enact a "state of emergency." Issues of definition are secondary to this main task of providing reasonable conditions for declaring an emergency in a liberal democracy. These conditions have both an institutional and a conceptual character, as I have argued throughout.

they will fail the empirical test, as well as failing my conceptual conditions test. Quarantelli argues, as do I that "it is probably still true that crisis-time planning for a disaster or even a catastrophe ought to be as close as possible to everyday, traditional ways of doing things. Everything else being equal, the less citizens and groups are asked to act in unfamiliar or non-everyday ways, the better the response will be. Also, planning from the ground up rather than from the top down, while good for disasters, is even better for catastrophes" (Quarantelli 2006). Quarantelli concludes his account with the following set of distinctions between catastrophes and disasters.

> The qualitatively different demands and needs that surface in catastrophes compared to disasters means that innovative and creative actions and measures will be required far more in the former than the latter. Actually, any kind of crisis requires imagination in responding. But the most is required by a catastrophe because there will be more contingencies and unusual aspects in such occasions as could be seen in New Orleans at the time of Hurricane Katrina. And there were many such responses in that catastrophe, ranging from the household and neighborhood level to the organizational and institutional level. We have discussed primarily consensus situations and not conflict ones, that is such happenings as riots and terrorist attacks. These kinds of happenings are willful actions with the intent of major participants being to hurt others and/or damage property. Was 9/11 disaster or a catastrophe? While some scholars see such conflict occasions as also having distinctive characteristics, others think they can be categorized as disasters. No one as far as we know has yet conceptualized that maybe some of them might be catastrophes, although at the operational level a biological or nuclear terrorist attack seems often to be thought of as being possibly catastrophic (Quarantelli 2006).

EMERGENCIES ON THEIR OWN TERMS:

The principal way of addressing emergencies when they occur, remain the institutional mechanisms made available by existing law. At least this is the case in the liberal democratic countries that my theory specifically seeks to address. In law as in philosophy, definitions and conceptual clarity matter and they matter greatly to the extent that it is exceedingly difficult to orient oneself with regard to a concept or set of practices if one misunderstands the concept or misunderstands the point of the practices in question. Something like this has happened to our understanding of emergency I wish to argue, chiefly because the conditions that need to obtain for a genuine emergency to obtain are rarely considered in most research on emergencies. The legal and institutional mechanisms at our disposal for dealing with emergencies routinely focus on the wrong set of features

and conditions, leading governments to label all manner of "local emergencies" as genuine emergencies. Placing the conceptual analysis of emergency at its center, my account differs significantly from the accounts of the other key authors I have examined in several important respects[74]. One key difference that I have highlighted is their collective inability to properly define what an "emergency" is at the conceptual level. That is, to offer a convincing account of the way we use the term "emergency," one that does not distort the salient characteristics attendant to genuine emergencies, when these occur.

Some writers attend to the use of the term "emergency," while others attend to the way authorities and government officials employ the term "emergency," but no one so far brings the two perspectives together. My own definition has been purposefully basic; wishing to address only what is particular to "emergency" (understood always as a state of emergency enacted by a government) and leaving to the side other properties that "emergency" might have in common with other similar concepts or in everyday speech. These generic emergencies we have already addressed in our discussion of "local emergencies" above. As my interest is not solely with emergencies but with the way liberal democracies deal and understand emergencies, my definition and analysis is explicitly informed by these conditioning factors. All the same, I take my definition to be clear and useful in a way that some other definitions are not. By way of illustration, consider the fact that all emergencies involve harm, but that not all harms are automatically emergencies because of this connection. Much the same obtains I argue between the concept of "emergency" and other similar concepts, such as "disaster" and "catastrophe." The fact that these three concepts (i.e., emergency, disaster, and catastrophe) share similarities does not authorize one to use them interchangeably or as synonyms of each other.

Each concept has its own meaning and its own ambit within which it operates; therefore using them interchangeably is not just a simple grammatical error, as when one uses a term incorrectly, but also a conceptual and practical error, in the sense that each concept recommends a different way of acting in each situation. Efficiency requires not

[74] Here, I have in mind the following authors: Adrian Vermeule and Eric Posner, Nomi Lazar and David Dyzenhaus, Richard Posner and Bruce Ackerman, and also Carl Schmitt. Legal theorists like Victor Ramraj and Oren Gross have also proven pivotal in the establishment of an emerging philosophical literature on emergencies. Even so, much of the literature remains wedded to a false dichotomy, between extra-legal and intra-legal measures for emergency administration, and to a tendency to run different sorts of events (disasters, catastrophes, acts of god) together.

only having the manpower required to help those in need or to stop the next attack, efficiency also requires one to act appropriately in each encountered emergency situation. If one wants to act efficiently, then one needs to know precisely what type of event one is dealing with. Many theorists of emergency make just such a claim of efficiency for their views, while also using the term "emergency" haphazardly. States cannot coordinate their resources or deploy their troops if they do not know what type of event they are supposed to be dealing with. Every term of art has conceptual underpinnings that mark it off as that term and not some other term. Each term calls for and reflects a different set of administrative priorities and hence of potential actions on the part of the state charged with administering emergencies. In a mid-level disaster, one can flee if the damage is severe enough, or can rebuild if most of the damage is of a material kind.

A catastrophe however calls for a different response, as catastrophes are by definition more severe than disasters, in many cases nothing whatsoever can be done when facing a sufficiently serious catastrophe, let alone an "Extinction Event." Note also that catastrophes are often assessed retrospectively, because the scale of the damage may be too large to comprehend or catalogue at first sight. Emergencies for their part can differ in scale and size and allow for the most maneuverability (in terms of their potential magnitude) but remain nonetheless more specific types of events than disasters. An emergency requires some harm to befall someone, whereas a disaster has no such explicit requirement. A disaster can befall a natural treasure such as the Grand Canyon, but it makes little sense to say downstream from this, that the Canyon has suffered harm. What are "harmed" are the aesthetic qualities or material qualities of the Canyon. Yet, here as elsewhere, sense matters. The type of "harm" that befalls the Canyon is a disruption.

Elements of the landscape that make the Canyon what it is, have come to be disturbed (or otherwise altered) by the disaster, this "disturbance" changes the makeup of the Canyon and therefore alters its aesthetic and material qualities, therefore "disturbing" the order of elements that obtained before the disaster. However, there is no tort here, as the sense of the term "disaster" changes with the context in which it is used. No right was infringed or life ended by the hypothetical disaster at the Grand Canyon in my example. So when we say that the Canyon was damaged by a natural disaster we usually intended something very different from what we intend in discussions about harm in ethics and in

law, where individuals persons typically form the focus of our inquiries. Similarly, when we address emergencies I want to argue, it is just as important to look at the context, as it is to settle on a plan of action for dealing with the emergency (if it actually is an emergency). The one however cannot come without the other, as sense and action need to be conjoined closely if emergency management is to be successful and cannot be successful if we give in to the tendency to treat different events as being one in the same. This is easier to do with some concepts rather than others. Catastrophes are relatively straightforward in this respect, as all catastrophic events are of great magnitude, even when they are localized to single (small) area.

Otherwise, they are not really catastrophes, but disasters of some sort instead. Issues of accountability and responsibility (as before) are useful for demarcating emergencies off from catastrophes and disasters, because we can have a catastrophe or a disaster for which no one is either responsible or accountable, such as a natural disaster or catastrophe. This lack of accountability or responsibility is much harder to imagine in emergencies, particularly in supreme emergencies, which have an explicitly political character and hence a political and juridical backdrop that makes them the types of events they are. The emergencies examined here are principally states of emergency which are emergencies declared by a state with the purpose of protecting itself as well as protecting its citizens. In this, it is a wholly political phenomenon and should not be confused with "local emergencies" more broadly, of which it is a class. I do not use the terminology of "local emergency," however it is a central part of the broader discussion of emergency found in the first-responder literature. No similar political form of designation exists for catastrophes and disasters, and extinction events are so powerful, that no political response is even possible, so they too lack the political component that makes an emergency (in our political sense) an emergency. There is no "state of catastrophe" or "state of disaster" in the way that there exists an internationally recognized "state of emergency" provision[75]. An area can be

[75] Governments often declare a state a "disaster area" or some similar thing, but this is a purely descriptive act by the government, in that there is usually no prescriptive element at work in such a declaration. The disaster is already passed by the time the government labels a state a "disaster area." All that remains is reconstruction or disaster relief, but in neither of these cases are wholesale rights derogations on the table as viable post-disaster strategies. During Hurricane Katrina, authorities allowed residents to stay in their homes, even when so doing resulted in certain death for the citizens affected. This was not an oversight. Authorities recognized

declared a "disaster area" by government authorities, but this is not because we care about the area. Rather it is because we care about the harm that can befall persons or valued resources within that area.

My barebones view has the advantage of making some distinctions, like the distinction between the event that creates the emergency and our political reactions to that same event, more apparent, rather than obscuring these events by running together ideas and situations that are in many respects, entirely dissimilar. Of the authors examined, only Lazar comes close to offering a similarly basic conception of emergencies, but her account ends up endorsing an expansive interpretation of emergency, conceived of on the model of the Roman senate. Lazar herself takes notice of the inconsistent and contradictory ways that emergencies are thought about, remarking that many who write about emergency "are willing to make exceptions for exceptions." Even Ronald Dworkin who has a well worked out theory of rights endorses the view that "a catastrophe can trump the trumps that are rights" (Lazar 2009 55). What does this mean and in what sense is a right a "trump" if it is overridden by a catastrophe, which is an event that often admits of no intentional content whatsoever.

Catastrophes allow for no recourse, yet we are asking citizens to sacrifice rights, all the while knowing that there is no recourse, which could make good on such derogation. Catastrophes as we have seen are not typically political events. They often occur in a political vacuum or occur in such a way that no political solution is required, save for medical relief. Why then does a citizen make her rights available for "trumping" when the situation at hand does not require such a sacrifice? Even Lazar is prone to these types of lapses, writing "if a power grid disaster shuts down all the hospitals so that […] others cannot receive care, it becomes a matter of emergency for the government, at whatever

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and respected the rights of these citizens even when great harm has certain to befall them. The same is true of catastrophes. A government may certainly declare Marshall Law in both disaster areas and in catastrophes, but the developmental element at work in an emergency is largely absent in catastrophes or disasters. Again, emergencies are a type of disaster, but not all disasters therefore rise to the level of emergencies. More to the point, no disaster or catastrophe, forms a "state of emergency" in which expansive rights derogations become the principal tool of intervention and management. Even in cases of large-scale quarantine, as in epidemics, the bulk of one's rights remain intact, with only rights to mobility being restricted in the majority of the cases. Even hard cases conform to this schema. If a citizen were "force immunized" against a pathogen by coercive means and against her will, a political component would still be missing, in that her political rights remain untarnished in such an incident, as do many of her other civil rights. Only if we agree with Lazar that all threats are emergencies and vice versa can we take the notion of catastrophes, disasters, and emergencies being coequal, seriously. Emergencies have a political component that the other two notions lack.

level of jurisdiction. While the focus in much recent work has been on terrorist emergencies, there is no principled reason to make an ontological distinction between terrorist threats and other kinds of threats. Infrastructure disasters, epidemics, floods, earthquakes, indeed anything that poses a real and urgent threat on a grand scale is an emergency, insofar as one aspect of a government's job is to keep its citizens safe" (Lazar 2009 8). While I understand the insight in her point, strictly speaking Lazar is mistaken. It is true that a liberal democratic government is constitutionally bound to protect its citizens. What is off the mark is the equation of all urgent threats with emergencies.

Earthquakes, tsunamis, landslides, asteroid strikes, and many other events in which there is no discernible human agency at work, are not strictly speaking emergencies of a type that a government can be held constitutionally responsible for, in the sense of having to protect citizens from events such as these, come what may. Much will turn on what one means by "protection" if one wishes to make this expansive Roman notion of protecting citizens, stick in some tractable and intelligible way. Yet no matter what one means, emergencies are not just any grave threat, because more than the emergence of the potential for a grave threat is required, for an emergency to obtain. Actual harm must be in evidence before a government can act in the serious and comprehensive manner that emergency measures standardly call for, at least this is the manner in which events unfold in most liberal democracies. Lazar's proposal seems to strip emergency measures of any identity they have, assimilating them instead to a general class of large-scale "threats," vaguely understood. Lazar's reason for offering this expansive "threat based" understanding of emergency is her distrust of explicit rules.

She believes that emergencies are dealt with best via the informal social dynamics at work within various institutions, not through an explicit set of rules, which can be misapplied or misunderstood. By infusing the ethos of liberal democracy into the institutional cultures that exist in the various branches and agencies of government, Lazar believes we have a better chance of saving liberal democracy when an emergency hits. While I do not disagree with Lazar's enthusiasm for promoting a liberal democratic ethos within the informal institutional cultures of governmental agencies and institutions, I do not

see what this promotion brings to our understanding of emergency. Nor do I see how it makes us safer; save in the sense that democratically inclined agents of the state may prove to be more liberal in their use of the mechanism of rights derogation during an emergency. This however is pure conjecture and is not gainsaid by anything in Lazar's own analysis, with the exception of her contention that this is how the Roman senate used emergency. Whether that senate was efficient at forestalling or at dealing with emergencies, I do not know but it appears largely irrelevant either way. The threats we face today differ greatly from the threats faced by the Romans, as do our institutions of government. The technological advances and dangers of the twentieth and twenty-first centuries alone make plain the error of looking solely to Rome as a source of institutional guidance.

While not an "insider" on emergencies, in the sense that Lazar does not want to constitutionalize emergencies, she is nonetheless more comfortable with the idea of viewing disasters, catastrophes, and emergencies, as of a piece, than I am. My misgiving is conceptual, as we have seen, and rests on the fact that these events are distinct and cannot be run together, but I have another reason for dissenting from Lazar's understanding of emergency management, despite being in broad agreement with her important work in other respects. While disasters and catastrophes can be seen as being largely the same thing, if one stretches their definitions enough, emergencies cannot. Further, Lazar is confident that tiered emergency response legislation can block all potential abuses of emergency powers, whereas I am not as certain as she is. All government is hierarchical to some extent and all legislation is open to abuse. My lack of faith in her informalist solution, stems from the fact that on Lazar's own account, as well as on the accounts of every other author so far considered, the most often used tool in the arsenal of emergency powers is the mechanism of individual rights derogation, and this regardless of the magnitude in question. As an empirical and conceptual matter, even when governments are accorded tiered powers, meaning that they can "ratchet up" or "ratchet down" their powers of derogation in degrees, governments as a fact do not "ratchet down" in any significant respect, preferring instead to derogate the rights of individual citizens, who turn out on balance almost always to be innocent bystanders and not active participants or otherwise actors in the emergency

situation itself[76]. Therefore, the notion that tired power is innocuous is not valid, just as the idea that all threats can be assimilated together, be they natural catastrophes or manmade emergencies, is invalid. Both moves lead to undesirable outcomes and to severe derogations that yield no relevant results or increases in security. Lazar comments on Canada's "tiered" system of powers as follows.

> Canada's legislative emergency powers framework, for example, provides specific provisions for different kinds of scenarios with regard to rights derogations. The provisions vary in weight from public welfare emergencies to war emergencies. The former are natural or health-related disasters such as droughts, floods, or epidemics, and they warrant rights derogations that include restrictions on movement, evacuation, and so on. If security is seriously and immediately threatened a public order emergency may be declared, which enables 'limitations on free assembly, travel, and the free use of property,' and provides for forced labor. An international emergency will mean the declaration process is streamlined and the range of derogable rights widened: removal of nonresident aliens for security purposes, control of industry, home searches when there is 'an emergency involving Canada and one or more other countries that arises from acts of intimidation or coercion or the real or imminent use of serious force or violence and that is so serious as to be a national emergency'. And finally a war emergency can be declared when armed conflict is imminent or immediate, and goes yet further. This kind of tiered legislation provides a safety buffer against abuses of rights not strictly necessitated by the circumstances (Lazar 144-5 2009).

Tiered legislation is preferable to less fine-grained legislation but in practice, it does not protect citizens from *unwarranted* derogations to their constitutional civil and political rights, a dimension of the problem that Lazar and others fail to address repeatedly. That a municipal emergency will entail lesser derogations of my rights, all things being equal, than a declaration of national emergency is true but largely beside the point, in both instances, both locally and nationally, I as a citizen am at risk of having my rights severely curtailed without any net increase in my security or safety (particularly in a disaster or a catastrophe). My rights are therefore derogated without purpose and inefficiently. It is not enough for governments to attempt to protect citizens; they must also strive to do so efficiently. If efficiency is the benchmark for other services provided by government, why should security be any different? Lazar also confirms my contention that rights derogations

[76] The language of "ratcheting" is due to Posner and Vermeule who associate it with Bruce Ackerman's view of emergency power, unfairly in my view. Despite protests to the contrary, the most often employed instruments of states in an emergency are derogations. Few other measures are even considered, save for war, which has been the other favored option when the actors in question are state sponsored.

increase exponentially as emergencies appear to worsen, yet nowhere is there any evidence that security is increased or that threats are lessened by such expansive derogation. Many of these tiered proposals do nothing when the event that threatens citizens is non-political or of too great a magnitude and many of the threats Lazar wants to guard against, strike large installations and buildings first, with disasters and catastrophes often disabling government facilities all at once. This is the irony of emergency planning as often one's best defense is first to go, as the social science literature discussed above illustrates. Therefore, the tradeoffs citizens are asked to make need to make sense across the board and the exceptions that are often made for disasters, catastrophes, and emergencies, do not fit the bill as they authorize severe rights derogations without contributing to safety. Where Lazar and I rejoin company is over our approval of newer constitutions that incorporate *ICCPR* guidelines in the establishment of their emergency measures. Lazar notes:

> Many newer constitutions contain specific limitations borrowed almost verbatim from the chief document in international law pertaining to emergency powers, the *International Covenant on Civil and Political Rights (ICCPR)*. Article 4 of the *ICCPR* explicitly allows for derogations to *some* of the rights contained elsewhere in that document for the purpose of bounding emergency powers within a human rights framework. This article sets out a number of rights that can *never* be derogated, and thereby sets definite limits and a clear definition of abuse. It was the decision, however contentious, of the international community that safety was on the side of openness and specificity about emergencies" (Lazar 144-5 2009 [original italics]).

This recognition that some rights *qua* human rights are non-derogable in most situations is a step in the right direction, for it concretizes the legal protection offered by constitutional rights by also providing limits to what governments can do even in emergencies. The dangers of derogation are not solved by a single document or treaty. So long as the notion that governments can do as they please during an emergency remains a live option for governments there will be illegitimate uses of those powers. Lazar further corroborates this worry:

> Not everyone shares this opinion. For one, there is empirical evidence that signing on to the *ICCPR* is no guarantee that political leaders will actually be governed by its articles. Zambia, for example, declared a state of emergency in 1993 that fairly clearly violated the requirements of the convention, despite the fact that Zambia is a signatory. A lack of informal pressure from the international community, coupled with domestic support, sometimes means political leaders face much stronger incentives to violate than to respect the law and international agreements with respect to emergency. We can see this in the cases of Egypt (for most of the twentieth century) and India (1975–77) as well. Both

had sophisticated legal and constitutional provisions governing emergencies, but political considerations made these formal constraints far less effective. Law is not enough. Recent scholarship has emphasized other potential dangers of formally enabling crisis government. Gross's 'extra-legal measures' model of emergency powers, for example, grows from a concern that crisis can, and often does, continue for decades and decades such that it becomes the norm. This blurs the distinction between descriptive normalcy and descriptive states of exception. If emergency powers are legally sanctioned, this leaves open the possibility that serious emergency action could continue indefinitely, while failing to draw public notice or concern. Gross has argued that 'Allowing the constitution to prescribe its own suspension confers a false sense of legality and legitimacy on these exceptional measures and facilitates the breaking down of the demarcation lines between normalcy and emergency.' On this view, a set of legally mandated emergency powers courts disaster and, even with such powers, there may be extreme cases, such as the temptation to torture, that we would wish never to flirt with legality (Lazar 146 2009).

The intertwining of political calculations with emergency measures results in unsavory results that can often cost people their rights if emergency measures are not properly administered as well as costing them their lives[77]. It is therefore crucially important not to confuse disasters in which natural forces have created chaos with emergencies that exhibit a manmade political component. The two are not remotely the same. Administering each as if it were the mirror of the other, leads to inefficiencies in administration, to injustices in cases of unjust derogation, and to death in cases where aid diverted, never distributed, or misapplied in some other way. The consequences are wholly practical even if the distinctions between catastrophes/disasters and emergencies appear at first to be overly abstract grammatical wordplay. Lazar locates the historical weakness of liberal democratic governments to deal with emergencies properly in what she alleges is their Kantian heritage. Quoting Kant, she argues that the preservation of the individual is merely a relative duty whereas the protection of the state is a necessary duty. For failure to protect the state, results in "catastrophe" in some unspecified sense of that term. "For instance, it might be necessary for a person to betray someone, even if their relationship

[77] "In the United States, historically, access to funds for disaster relief through the *Federal Emergency Management Agency (FEMA)* only becomes possible when a state declares an emergency. Similarly, in Canada, federal funds and other aid, such as the provision of army labor, are made available only when a province or municipality declares an emergency. The incentives thus provided should be examined and alternatives sought. Finally, a federal structure like that of the *European Union with its Court of Human Rights* might serve as an effective constraint both for informal political reasons and through formal mechanisms of accountability. Federalism matters in emergencies" (Lazar 158 2009).

were that of father and son, in order to preserve the state from catastrophe. This preservation of the state from evil is an absolute duty, while the preservation of the individual is merely a relative duty (i.e., it applies only if he is not guilty of a crime against the state). The first person might denounce the second to the authorities with the utmost unwillingness, compelled only by (moral) necessity[78]" (quoted in Lazar 63 2009). I do not view constitutional democracy as being wedded to a deontological conception of duty that forces it to sacrifice the individual to the state in a crisis. While Lazar's point is a historical one, in that I do not take her to be arguing that this is the way states today function, I nonetheless demur from her conclusion, preferring a consequentialist reading of both the duties of states as well as of citizens' rights.

Further, many deontological inspired political philosophies are individualist in focus, and do not include any provisions for "sacrifice" of the type Lazar finds in Kant. Lazar and other commentators fail to consider another possibility first considered by Machiavelli and then revived by Schmitt and his followers. States can bring "disaster" upon themselves by following the letter of the law while neglecting the spirit of the law. This legal overreach is a "disaster," but one that is tractable in terms of blame and responsibility, and not as many would have it, a "disaster" without an agent. Sanford Levinson and Jack Balkin illustrate this possibility in their essay "Constitutional Dictatorship: Its Dangers and Design". Focusing on the consequences of what they term "hyper legality" from a consequentialist and Republican viewpoint they write,

> First, republics can come to ruin by stubbornly 'obeying their own laws' even when these laws prevent measures necessary to save the country. This creates what we have elsewhere called a Type Two constitutional crisis—in which political leaders follow the law (as they understand it) strictly and manage to drive the political order over a cliff. Far more commonplace is a Type One constitutional crisis, in which political leaders, faced with exigent circumstances, publicly announce that they must break the law to save the republic. Machiavelli identifies this as the second cause of ruin: 'break[ing laws] in order to avoid' disastrous consequences. The problem is that if one is willing to break laws in urgent circumstances, this creates a precedent for breaking them again where the urgency is more controversial (or nonexistent); moreover it encourages political leaders to retain unconstitutional norms even after the emergency has passed. What start as emergency measures may become normalized. Ultimately, recourse to suspending the laws eats away at the foundations of republican government. That is why Machiavelli argues, 'in a

[78] Immanuel Kant ''Theory and Practice'' reprinted in Kant's *Political Writings* 81. Cambridge University Press 1991.

republic, it is not good for anything to happen which requires governing by extraordinary measures.' We must, Machiavelli teaches, be aware of the possibility of crises and exigent circumstances when we design a constitution, and include ways of responding to emergencies that do not require political leaders to choose between Scylla and Charybdis: the disaster caused by hyper fidelity to legal constraints or the destruction of republican government by recourse to out-and-out illegality. Contrast Machiavelli's approach, which locates dictatorship squarely within the ground rules of constitutional government, with the thought of John Locke, whose *Second Treatise on Government* has been central to the American political tradition and surely influenced the Founding generation. The central focus of the *Second Treatise* is a theory of limited government; nevertheless, a crucial part of Locke's argument was a theory of the monarch's 'prerogative' power. According to Locke, the king always retained the prerogative power to suspend the law by fiat whenever he thought it in the public interest. Locke did not spell out the details of his approach, and he did not draw on historical examples of good and bad practices, as Machiavelli had done. As a result, Locke's notion of 'prerogative' is far less developed and far less helpful to anyone interested in constitutional design. Locke seems relatively sanguine about the King declaring the power to suspend the law. In contrast, what concerned the republican theorist Machiavelli was the rise of an extra constitutional dictatorship in cases where the constitution lacked a procedure for appointing a dictator and ending the dictator's reign (Sanford and Balkin 12-3 2010).

The contrast between Machiavelli and Locke mirrors the contrast between theorists who assume without sustained argument that states can suspend laws and rights by fiat because an emergency is afoot and those like me who see no basis for this type of leniency regarding individual rights. States can suspend rights only under certain circumstances and those circumstances, as we have seen are exceeding rare, if we accept the strict definition of emergency. We need not accept my proposed stricter definition of emergency as exclusively supreme emergency. However, failure to tighten up the distinction between emergencies and other crises (of greater or lesser magnitudes) leads to more confusion I submit and to great losses in efficiency and overall security during a crisis. The tradeoff between clear criteria for emergency and less clear criteria appears to favor clarity on balance, or at least that is what I am trying to argue. Further, duty to the state's survival I want to argue is not enough (on its own) to ground the derogation of rights, more than this needs to be said, to make the derogation case compelling.

One can easily argue, as Walzer and I do, that the state's duty is firstly to protect the political community that makes its existence possible, namely its citizenry. Without citizens in a democracy, there is no state, no state institutions, and no courts. Therefore, the notion that the state must be saved come what may, whereas citizens and their rights and freedoms

can be expropriated as the state sees fit, is not only undemocratic and illiberal but a self-defeating proposition for most modern constitutional democracies. The ability to achieve large-scale derogations over long periods is also overstated by some commentators, as they fail to note that many states now have professional militaries whose corps is constituted by volunteers. Professional soldiers in volunteer armed forces have many duties, but none of these explicitly involves undermining the very rights that give them the right to serve (or not serve) in their respective nation's armed forces. There is an archaic view of state sovereignty at work in much of the literature on states of emergency, which assumes tacitly that the sovereign can act as it wishes. Schmitt for all his failings is at least explicit in his belief that states of exception reveal who is the true sovereign. Other theorists are less explicit about this, yet many seemingly still hold to the view that a democratic state can order its agents (be these military officials or government officials) to undermine the very rules and regulations that grant them the authority they have in the first place. Somehow, this appears to be a wrongheaded understating of the logic of liberal democratic constitutionalism and a misrepresentation of its limits and weaknesses.

Liberal democracies are strong because they protect their people and their systems of laws, not weak because they are sometimes open to attack or injury. Schmitt and those influenced by him, over-prioritize executive power while under-prioritizing social and institutional stability in their accounts of state sovereignty. An unstable state no matter how powerful will have a more difficult time defending itself during an emergency siege than a weaker but more internally stable state. As Richard Posner remarks, constitutions are not suicide pacts, but they are not a license to act lawlessly either. There needs to be a reciprocal relationship between the methods governments use to stop emergencies and the institutional values that the state is attempting to preserve by stopping the emergency. Emergency measures are wholly consequentialist in nature. They exist simply to arrest states of emergency and to restore order and not as some have it, to create a "new normal." The corrective I offer aims to bridge this gap between what we take emergencies to be and what we aim to do to stop them once they are underway.

The corrective is twofold in that it offers a conceptual analysis of the meaning of the term "emergency" that seeks to explain the nature of emergency on the hand, while also saying something about the proper response to emergencies when these occur, on the other.

In this, the account differs greatly from accounts found elsewhere in the literature, most of which as I have noted previously, simply take the clarity of the notion of emergency for granted or otherwise assimilate emergency to some neighboring concept (such as disaster, catastrophe, or war). Emergencies, I hope I have argued persuasively, are none of those things. In fact, disasters and catastrophes can grow into states of emergency, if the underlying conditions are right, whereas the opposite is rarely (if ever) the case. There is a definitional and conceptual priority between emergency and these other related concepts (like "disaster" and "catastrophe") but this does not mean that they have the same meaning or that they share the same conceptual structure all the way down. Similarity is not identity. So to the extent that other authors get large-scale emergency wrong, then non-supreme emergencies as I have described them, do not exist save for the types of events that Quarantelli calls "local emergencies." Exceptions from established law should be granted only in exceptional circumstances and the only circumstance exceptional enough to bear the name is that of supreme emergency as conceived along the lines put forth by Walzer and myself. The history of state sovereignty bears out this analysis.

In the late half of the twentieth century, many new and novel legal restrictions were enacted specifically to curtail what states could do to individuals in the name of sovereignty. The return to a strong sovereign state with expansive executive powers is in this respect a step backwards as concerns international jurisprudence and not as its supporters would have it, a new more secure order. The *Universal Declaration of Human Rights* is one such curtailment. Many of the new restrictions contained therein are non-binding in that they do not have a mechanism by which to curtail the sovereignty of the states who have signed the *Declaration*. Yet the restrictions themselves reflect dissatisfaction with untrammeled state sovereignty. The aim of declarations like the *Declaration of Human Rights* is to constrain what sovereign states may do to persons residing within their borders as well as tying states to commitments broader than their own interests. Over time, these rights gained in strength, limiting the overall coercive actions available to states who wish to avoid censure or other legal recourse for violating their obligations as signatories[79]. Liberal democracies that aspire to protect liberal democratic

[79] "One of the most robust human rights conventions, one that indeed curtails sovereignty, even if mildly, through its arbitration mechanisms, is the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, formed in 1950. Roughly contemporaneous, signed on December 9, 1948, was the

rights and freedoms can only answer the question of what emergencies commit them to, or what emergencies require liberal states to do more broadly, by first discovering which situations count as genuine emergencies and which do not. One upshot of my approach to emergencies is that it provides a straightforward decision procedure as a first step toward weeding out genuine emergencies from other types of events and from non-genuine emergencies, it does not recommend enacting emergency measures first and worrying about rights second, as many other views do. Proceeding this way, the question of which rights will be derogated during emergency government, is always front and center, rather than being an afterthought. The account I offer however does a bit more than this. It also provides public administrators and political theorists and philosophers with a heuristic interpretation of emergency.

My analysis of emergency, makes it is easier to examine the obligations that liberal states have toward their citizens during an emergency, by showing not only what a genuine emergency looks like, but also by explicating what actions are permissible and impermissible for states to pursue in an state of emergency. It is clear that states that severely derogate individual political and civil rights when facing a non-genuine state of emergency act wrongly, for the point of emergency government is the safe restoration of the status quo. Similarly, democratic states that fail to adopt the appropriate measures for securing the safety of their citizens in a supreme emergency also act wrongly, as these are two sides of the same coin. The responsibility to protect is of a piece with the responsibility to end the emergency as efficiently as possible. In stating this, I am in agreement with all the writers discussed here. Further, any account that does not stipulate that the role of emergency government is to *end* the emergency is concerned with something other than emergencies or so it seems.

Even sovereignty, the central issue in much of the literature around emergency management and administration, exists (on the liberal view) solely for protecting

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Genocide Convention, committing signing states to refrain from and punish genocide. Then, in the mid-1960's, two covenants — the *Covenant on Civil and Political Rights* and the *Covenant on Economic, Social and Cultural Rights* — legally bound most of the world's states to respecting the human rights of their people. Again, the signatories' constitutional authority remained largely intact, since they would not allow any of these commitments to infringe upon their sovereignty. Subsequent human rights covenants, also signed by the vast majority of the world's states, contained similar reservations" Philpott, Dan. "Sovereignty," *The Stanford Encyclopedia of Philosophy* (Winter 2010 Edition), Edward N. Zalta (ed.), (http://plato.stanford.edu/entries/sovereignty/#Rel).

democratic institutions, and by extension for protecting the populace. States and governments in liberal democracy are not ends in themselves; they are tools for the furtherance of liberal and democratic principles and practices. Therefore, the view found in Schmitt, but also disturbingly found at times in Lazar and other "liberal" writers, that state sovereignty in some way trumps individual rights is deeply undemocratic, illiberal, and counter to the republican tendencies of most liberal states. I have not offered criteria of rightness or wrongness so far, choosing instead to rest my arguments on the existing commitments of established liberal democratic political and legal practice. Any state that violates the constitutional or charter rights of its citizens via recourse to emergency measures, acts rightly only if it acts proportionately to the threat in question, if that threat constitutes a legitimate and genuine emergency. Nevertheless even here, there are limits to what states may do or at least there should be, if my argument stands. Faced with an extinction event, it makes little sense to violate all existing rights to try to save the government or the citizenry, when certain death is inevitable. If irremediable catastrophes do not make it right to suspend all rights, why then should states of emergency, which are less severe?

THEMATIC REVIEW AND SUMMARY:

Against the more permissive view that argues that derogation is always an available and sensible strategy, I have argued here that the conceptual borders between catastrophes, disasters, and emergencies, be outlined remedially and not expansively. This can be done by asking what would warrant a return to the *status quo*, that is what set of conditions are necessary for rights to be reinstated post-derogation and post-emergency. Notice that proportionate and remedial action (of the type I propose) does not allow for the trampling of established rights, as such trampling only serves to undercut the state's authority and to diminish trust between citizens and state institutions, both of which are unacceptable outcomes in a liberal democratic system based on the consent of the governed. Therefore, as a heuristic the present account wants to emphasize what is most salient about emergencies on the rare occasions when these occur, to help guide our collective responses to emergencies. Given the checkered history of rights derogation among liberal democracies during crises, I submit that the incremental improvements suggested by my view be seen as a welcome development. Emergencies, as I conceive them, concern the

state and the citizens that abide by the decisions and actions undertaken by the state during the emergency. In cases where no genuine emergency pertains, then the relation between the liberal state and its citizens remains unproblematic. In emergencies, states should be called upon to respect their commitments to citizens and to act according to established rules and institutional norms and while this is an ethical and not a strictly political requirement, it remains a reasonable requirement nonetheless[80]. The notion that emergencies are exceptional has been found wanting and muddled in previous chapters and as such serves as a poor basis upon which to base executive privilege, or any other departure from the constitutional separation of powers, that exists in most liberal democratic systems of government. Supreme emergencies, which are also genuine emergencies, authorize the derogation of rights on the part of the state but need to do so only to the extent allowed by existing (non-emergency) laws and procedures and this is different from constitutionalizing emergencies; in fact, it is a rejection of the very idea.

This is because there is nothing in the makeup of supreme emergency that calls for deviation from established liberal democratic practices. Recall that on Walzer's view (which I endorse) supreme emergencies are situations in which the population of a given state or territory is being threatened by coercive force of such magnitude that its very survival is at stake. In fact, this targeting of citizen populations is what gives supreme emergency its special status. Like other emergencies, supreme emergencies are sudden, unforeseen, and severe events, causing death and destruction, yet unlike generic emergencies or "local" emergencies, supreme emergencies involve the potential destruction of the state as well as the potential destruction of the populace at large. It is for this reason that Walzer and I allow for derogation and for emergency measures to be enacted in supreme instances of emergency, but always with the caveat that existing law remain the guiding principle in these matters, and understanding that all derogation be proportionate the threat encountered and the information available.

[80] A hypothetical state that is liberal and democratic in all respects but this one could exist. During emergencies, my hypothetical state can stop being liberal democratic and return to liberal democracy after the state of emergency is over, but I know of no liberal democratic constitutional state that is so ordered in the real world. I merely entertain the notion for the sake of argument. Such states would experience a type of ideological schizophrenia that would ultimately undercut social cohesion, if they existed.

Given the rarity with which supreme emergencies occur, it is unlikely that these measures will ever be enacted, but it is important to allow for the possibility, and to make provisions for protecting the populace first, and the state second, in such instances. Lazar's account of emergency by contrast, does not allow for this possibility, underplaying the danger of supreme emergency uniformly. Yet her conclusion I believe is a mistake as is her overreliance on informal institutional rules which she maintains will keep state institutions from overreacting should a crisis emerge. The circumstances in which crises occur help to give a crisis its character and without paying attention to this panic-driven character there is no reliable and ethically sensible way for government officials to gauge the severity or profile of a given event[81]. Yet little attention is paid to the circumstances, contexts, or characteristics, displayed by the events my interlocutors respectively label "emergencies." In the case of Vermeule and Posner, they go so far as to claim that emergencies are whatever events or developments the executive branch of a given federal government deems worthy of the title. However, this is not so, either legally or philosophically.

Emergencies must display the characteristics I have described in order to be genuine, and adding the sitting government's acknowledgment to the situation does not make is so, any more than a government refusing to declare a state of emergency renders the danger posed by a genuine emergency any less severe. Emergencies exist as far as they display the characteristics required, regardless of anyone's willingness or unwillingness to take them seriously. My skepticism toward those who advance expansive definitions of emergency, definitions under which almost any misfortune counts as a full-blown emergency, stems from the recognition that unforeseeability rarely plays a role in their respective definitions. Schmitt for example counts any event that threatens state sovereignty as an emergency. On this definition, any severe economic downturn counts as an emergency; save that, the principle tool of emergency government, namely the derogation of individual rights, will do nothing to rectify an economic downturn, no matter how draconian the derogations come to be. Similar examples can be cited for each of the authors I have examined.

[81] Remember Ackerman's analysis of fear as a great determinant of actual government action in emergencies, a conclusion shared by Richard Posner and David Dyzenhaus, but one not shared by Eric Posner and Adrian Vermeule or by Carl Schmitt.

By bypassing the importance of unforeseeability, they leave their accounts open to paradoxical counterexamples. Lazar's view is more carefully thought through and does not fall into this category. Yet she still does not consider supreme emergencies as genuine threats. More importantly, she fails to address the modal character of emergency. States enact emergency measures where appropriate, because they owe their citizens protection; at least they do if they are democratic and liberal in institutional structure. Emergency measures, when enacted correctly and as a method of last resort, serve as a contract between the state and citizen. It is a future promise to return things to normal after the emergency is over, and for this reason emergency measures cannot undercut or sacrifice the rights and liberties that they are designed to defend and protect, save on pain of self-contradiction and of institutional incompetence. Little to nothing is said about this modal dimension of emergencies in the writers presented in the previous chapters. Most of the emphasis is on the pre-emergency and the post-emergency moment, without any attention to the modal purpose for which emergency measures are enacted. Schmitt appears to write as if perpetual emergency is an end in itself, while Posner and Vermeule write as if the executive alone is tasked with enacting or deactivating emergency measures, neither analyzes the future oriented nature of emergency measures legislation, which again aims at restoring the pre-emergency *status quo*, not at abolishing it.

The object or target of emergency measures legislation is normality, not emergency or derogation for its own sake. This fourth chapter dealt with the relationship between catastrophes and emergencies. Catastrophes and emergencies are often equated with each other particularly in the media, where they are often portrayed as being one in the same. This however, I hope to have shown, is not the case. While similar in some respects, catastrophes and emergencies differ along several important dimensions. The greatest area of difference involves a cluster of factors, chief of which are agency, responsibility, and intention. Catastrophes do not usually lend themselves to explanation via recourse to appeal to the acts of agents, thought there are exceptions to this observation, as in cases where agents act negligently and thus aggravate or perpetuate a catastrophe. Equally, agents are rarely responsible for the occurrence or the consequences of catastrophes, save for instances of negligent action, as previously noted. Finally, emergencies involve and address the intentions of the relevant actors in the emergency, in a way that catastrophes typically

do not. Further, emergencies are amenable to administration and to management in a way that catastrophes seldom are due to the irremediable nature of catastrophe.

Emergencies involve an element of expectation that catastrophes mostly lack; one can plan for a catastrophe but one cannot manage a catastrophe. Catastrophic events like tsunamis, while perhaps anticipatable with the right technology and labor, are therefore not as easy to control as emergencies are, or at least so it seems *prima facie*. A tsunami of sufficient scale and force cannot be halted, because the physical means to arrest the tsunami do not exist, but a responsible and sensible liberal government may still want to alert people of the danger so they can attempt to get to safety. Tsunamis and similar catastrophic phenomena can only be avoided, by fleet or via mass pre-emptive evacuation of at risk populations. Disasters come in all varieties and are both manageable and unmanageable, as we have seen, depending on the exact nature of the disaster, its magnitude, and its localization. Emergencies however are different. They are often administered and managed, as we see in cases of violent conflict that eventually subside. Where a small border skirmish between two opposing states can escalate into a war, the escalation in question, while certainly an emergency for those threatened by the oncoming war, remains nevertheless manageable and tractable as a phenomenon. This manageability criterion is true of all states of emergency; otherwise, they would not be emergencies but rather some other more serious type of phenomenon, less amenable to administration.

We understand for example how conflicts in most cases escalate into wars, even if we cannot always stop their advent. It is important to remember that there are intentions and motives involved in the decision to go to war, even if the war itself (once begun) escalates into a catastrophe that then spins out of control. Catastrophes that are not manmade are by their nature are different. We do not know enough about the forces that produce severe natural disasters and catastrophes to say without controversially that we understand catastrophes the way we understand the factors that lead to the emergence of war, at least not in the consequentialist sense in which I intent the word “understand”. Conflicts can be prevented from escalating into full warfare by managing expectations and by resolving the underlying social and political tensions that typically fuel such conflicts. On this level, we can be said to “understand” how wars get started. The same does not apply to catastrophe. Knowing how earthquakes and tsunamis occur provides only minimal

protection from them and provides no surefire method for managing or mitigating them, save for avoiding them in the first place.

One is tempted to say that the enormous scale of most catastrophes leads us to deal with them is different ways than the ways we would deal with an emergency. As we have already established earlier in the dissertation, many of these issues are issues of degree and each emergency and each catastrophe is best judged and appraised on its own merits, and with attention to the specific context, in which each occurs. That said, some general points can be made as concerns the generic definitional and conceptual differences between disasters, catastrophes, and emergencies, and that I have tried to do here. Because catastrophes are sudden and widespread forms of crisis, they are often assimilated with emergencies, which also can be seen as crises (of a sort). This tendency toward assimilation, I have argued, should be resisted. Emergencies are different in several important respects (conceptually speaking) and this realization is an important step toward understanding them. "Crisis" is the generic term I have used for all three phenomena throughout, but "disorder" can equally well be used as a generic descriptor. An emergency is a sudden event, that is unforeseen, and which has severe consequences. They often involve intent as in supreme emergencies where one nation attacks another as an act of war. Catastrophes on the other hand, are sudden and widespread crises, which lack intentionality or purpose.

So at first blush, catastrophes lack some of the attributes that make emergencies what they are, even though an emergency that remains unaddressed can escalate into a catastrophe. Catastrophes can certainly be sudden, they can be unforeseen, and they can have serious consequences, but they do not admit of intention (in most cases) in the way that emergencies do, because no one is directing them. These small differences make all the difference, as concerns management and the attribution of agency and responsibility. As noted, the scale of catastrophes, which is typically several orders of magnitude larger than the scale on which emergency operates, does not allow one to ascribe responsibility, accountability, or even direct intentions, as easily as one can ascribe these elements in a "local emergency" or in a "state of emergency." Thinking of the principle that "ought implies can," one begins to see the difficulty with ascribing responsibility for catastrophes to the types of agents we usually ascribe responsibility to in times of turmoil. The "ought

implies can" principle is an apt principle to invoke here, because it illustrates well the difficulty with laying blame in situations in which only one outcome is possible, and in which no human agent is responsible for generating the catastrophic situation in question.

Consequently, a government faced with an impeding earthquake of catastrophic strength can warn the public, can stage evacuations, and can prepare for the earthquake's aftermath, but what they cannot do is bear responsibility for the earthquake itself. Unless of course that same government's past actions, have lead in some way to the occurrence of the earthquake itself. Repeat testing of atomic weapons in the same location for example, can in some cases lead to increased earthquake activity. A government that undertakes such testing in populated areas, knowing the risks, acts culpably. While gauging differences between emergencies and catastrophes in terms of ascriptions of praiseworthiness and blame may appear negligible, it is I argue a significant difference between the two phenomena, and perhaps the most salient difference dividing the two types of events. For catastrophes too can be sudden, unforeseen, and severe, but only emergencies admit of intentional ascriptions (and therefore of praise or blame) in the specific sense I have laid out here. Another way of distinguishing emergencies from catastrophes is by looking at our everyday criteria for deciding which is which. An event is considered a catastrophe only retroactively, whereas an emergency can sometimes be perceived as an emergency during its development or shortly after its unfolding. Disasters again fall somewhere in between.

This is to say that we can only know that an event was catastrophic after the fact, after we have had the chance to quantify and qualify the damages caused. It makes little sense to say that something that has yet to transpire is catastrophic, save in a purely rhetorical sense. Emergencies can be localized or global in scope and can be relatively large or relatively small, whereas catastrophes do not admit as easily of these gradations since they are usually very large in scale or casualties. Disasters once again remain harder to categorize, as they are more generic and more amorphous in their scope and intensity than the other two phenomena. This is why it is odd to say that something was a "small catastrophe" save in the sense of not being entirely literal, just as it is odd to think of localized catastrophes. Catastrophes are "local" only in the sense that they may only affect a specific geographic area or less commonly a specific group of people. More often than not, catastrophic events disperse widely and standardly affect great numbers of people. This

extensional component is part of what gives a catastrophe its "catastrophic" character. Emergencies to the contrary can be local, global, group-wide, or individuated events. An individual shot accidentally by crossfire is in the midst of an emergency, not in the midst of a catastrophe, albeit in the midst of a "local emergency" and not a "supreme emergency."

Similarly, an island nation destroyed by a tsunami and unable to evacuate is in a catastrophic situation, not merely confronting an emergency. A catastrophe cannot become an emergency. There is no "downgrade" from a catastrophic situation to a mere emergency, but emergencies can "upgrade" into catastrophes. Therefore, the relationship between these two concepts involves an irreversible priority, marking another key difference between them. Truly catastrophic events sunder their surroundings in much greater magnitude than emergencies do. The only time a catastrophe becomes an emergency is when our initial assessment of a situation proves on reflection or on new evidence to have been mistaken or overblown. Yet changes of this kind are changes to the ascriptions we give of a given situation and not a change in the situation itself. An emergency mislabeled as a catastrophe remains a mislabeled emergency and does not transform into some other type of event because of mislabeling. Yet much of the literature on catastrophes treats catastrophes as ersatz emergencies, which they are not. My purpose here was not to canvass all the ways in which catastrophes differ from emergencies. It was rather to continue elucidating the concept of emergency, which I have presented throughout the previous three chapters by contrasting it to catastrophe.

The reason that this elucidation is even required I have argued is because of the undisciplined manner in which the concept of emergency is used and abused. Disasters for their part have been harder to define. A disaster is "any occurrence causing widespread destruction and distress; a catastrophe." In a second sense, a disaster is simply thought to be "a grave misfortune."[82] Disasters in this dissertation refer to events conforming solely to the first definition, thus bringing disasters into line with catastrophes and with other misfortunes as far as definitions go. What should be clear by now is the haphazard way in which emergencies, catastrophes, and disasters, often run together other accounts. Other

[82] *The American Heritage Dictionary of the English Language* (Fourth Edition). Houghton Mifflin Company. (Updated 2009).

authors have also noted the seemingly arbitrary nature with which disaster and similar concepts are defined in practice. Naomi Zack notes that:

> According to Red Cross/Red Crescent, 'disasters are exceptional events which suddenly kill or injure large numbers of people.' The *Center for Research on the Epidemiology of Disasters (CRED)* in Brussels, Belgium, uses this definition: 'A disaster is a situation or event which overwhelms local capacity, necessitating a request to a national or international level for external assistance.' *CRED*'s stipulation that disasters require external assistance expresses the perspective of policy makers, emergency practitioners, and others who design and implement disaster assistance. The cost to affected individuals and the disruptions to their normal lives, as well as their responsibility before and after being affected by disaster, provide different perspectives. Indeed, once the psychic dimensions of disasters are considered, it becomes evident that the official definitions of disaster are somewhat superficial. *The distinction between disasters and other large-scale calamities with dire consequences for small or large numbers rests on the degree of danger that is acceptable in normal, non-disastrous life.* Such built-in normal danger is now understood to be a matter of risk rather than disaster. For example, the worldwide AIDS epidemic, projected to result in eighteen million orphans in Africa by 2010, is not officially considered a disaster, whereas an Avian Flu pandemic is, or would be. Building on Ulrich Beck's 1992 *Risk Society*, some social critics now distinguish between earlier modern ideas that everything is in principle predictable and current everyday circumstances in which many technological advances have new, undeterminable potential for danger. Such insight recognizes a pervasiveness of risk, although risk is not generally considered to be the same thing as disaster (Zack *Ethics for Disaster* 4, 2009 [Italics mine]).

Zack attempts to come to terms with the various ways that disasters and catastrophes are defined and operationalized in practice, via recourse to the idea of risk, but also identifies the limitations with this approach (in the italicized passages).

While the literature on risk has grown exponentially in recent years, I do not think that risk as conceived by Beck and others fully captures the arbitrary dimension of emergency, catastrophe, and disaster, as these concepts concern us here. The inability to clearly define and deal with the concept of emergency is part of a larger problem, one having to do with the inability of institutions (governmental or other) to come to terms with the arbitrary nature of many of their mandates. The way to deal with an emergency is not to advance an arbitrary definition of what an emergency is and then set about managing the emergency on arbitrary grounds. This approach, which is the dominant approach in practice all too often, simply piles one arbitrary phenomenon onto another. Much the same situation afflicts disasters, catastrophes, and all other similar misfortunes that various social and

governmental agencies need to manage routinely. Arbitrariness renders authorities ineffective, and as Lazar and others have ability illustrated, endangers the rights and liberties of citizens. Risk does not seem to mitigate this serious problem, as it does not differentiate between existing and potential emergencies, disasters, or catastrophes.

From the viewpoint of risk theory, all that exists is the risk presented by these phenomena, not the actual consequences on the ground. Nor can risk theory properly address my concerns over rights. The risks carried by derogating rights sharply can only be calculated if (and only if) the security these derogations are supposed to engender actually obtains. No risk theorist of which I am aware has developed a metric on which this promised (but not delivered) security can be factored in to the overall risk assessment posed by various emergencies, disasters, and catastrophes. The adoption of risk as an explanans for emergencies, catastrophes, and disasters, only serves to underscore what remains a wholly arbitrary set of phenomena, as there exists no unified conception or definition of what constitutes the actual risk posed by a given emergency, disaster, or catastrophe in the real world. In addition, there is little to no uniformity in the measures taken by authorities around the world to deal with emergencies, disasters, and catastrophes. Catastrophic events are not amenable to political will and so one cannot expect or argue governments into taking responsibility for events they cannot alter, like catastrophes. Nevertheless, to the extent that a government can alter the outcome of an emergency or a disaster, then it is required to do so but only in a way that is additive and not subtractive of rights. Otherwise, the state is failing to discharge its responsibilities and commitments if it is liberal and democratic. Zack's own examples and statistics bear this reading out.

Events like the African AIDS epidemic are not classified or treated as disasters, while the potential avian flu pandemic, which has yet to occur, is already a disaster on the Red Cross criteria used by Zack. What the upshot of this type of classification of catastrophes is intended to be is unclear. What is clear is the confusion it generates, due to a combination of conceptual inaccuracy and institutional miscalculation, on the part of political actors. We are presented, as happens often with this literature, with a taxonomy of potential threats rather than with an internally coherent account of the nature and structure of catastrophes or even with a conceptually rich set of institutional emergency measures capable of protecting citizens. Risk as a concept, opens onto an entirely new literature with

twists and turns all its own, the discussion of which would leads us too far afield as its main contribution is to reassert the (unhelpful) claim that probabilistically speaking we cannot know when the next catastrophe is coming. While this may be true in the sense that we cannot predict catastrophes with great certainty, this does not however warrant the skeptical attitude often seen in these types of texts, an attitude that argues that nothing more is to be known about catastrophes.

This is another reason that I avoid the issue of risk, as it is presented in Beck and others, in this chapter. I will however consider a set of related problems proposed by Richard A. Posner in his book *Catastrophe*. There, Posner considers the catastrophic consequences of several extreme scenarios, were they to befall modern industrial societies. Among the scenarios he considers are catastrophes triggered by large-scale asteroid strikes to the earth's surface, the large-scale changes that may be wrought by rapid climatic changes, pandemics of both manmade and natural provenance including bioterror attacks, and (less plausibly) catastrophic outcomes wrought by experiments at the edge of contemporary particle physics. The extremity of Posner's examples, serve to underscore the deep uncertainty at the heart of many of our emergency response programs, a noted and recurring theme in the work of many authors including Posner himself. The cases considered by Posner are truly catastrophic in scope and unlike many other authors; Posner employs the term "catastrophe" appropriately. Posner seems to agree tacitly with the assessment of catastrophes that I have been presenting throughout. He agrees that if sufficiently grave, a genuinely "catastrophic situation" allows for no plausible recourse, let alone for the type of careful micromanagement often described in the risk assessments of many prominent risk theorists.

The intensity and scope of catastrophic incidents renders said incidents impossible to contend with, therefore the drive to "manage" them as if they were inert commodities to be inventoried, is deeply misplaced. Large-scale catastrophes of the variety offered in Posner, would yield much destruction and death, and would allow for almost no recourse on the part of authorities or on the part of the public at large and to view them otherwise is to do nothing constructive to understand or to avoid events of this form. There is a scope of event, in this present case a catastrophe, that is simply too severe to allow for any possible form of management, if management in this context is to be understood as the marshaling

of a workforce to meet the event head on. The message behind this realization however is not that we need better risk assessment, but instead that we need to rank emergencies, catastrophes, and extinction events, on a reasonable and proportionate scale of severity, and eschew the often hysterical and ill-defined risk assessments that litter the literature on risk, which views them solely as mathematical curiosities to be quantified proportionately.

It is important to know how often catastrophes occur but it is not enough to know only this and many theories of risk offer no other information than calculations of probability. Yet probability metrics alone, tell us nothing about what can and cannot be done in the event of a catastrophe, and so the presupposition that statistics alone offer us some type of defense against catastrophes, disasters, and emergencies, is false. My proposed view remains twofold, whereas the risk view is single factored and offers only a set of simplifying probabilities, which often do not differentiate between the three phenomena. A good theory of catastrophe, emergency, and disaster, must concede that not all events of this type can be predicted accurately. Yet more crucially, the theory must also be perspicuous about the conceptual and logical differences between these three types of phenomena (catastrophe, emergency, and disaster). Some, such as Posner, see this distinction clearly. Yet others do not. Good emergency theory acknowledges informational finitude, namely the idea that certain events cannot be micromanaged because their nature makes them too rapid, too intense, or too unpredictable. Catastrophes fall squarely into this latter category, but are not always described or discussed as such by risk theorists, who prefer to treat them as manageable events as we saw in Zack and (more thoroughly) in Quarantelli[83].

A cogent analysis of emergency and catastrophe needs to consider informational finitude, while at the same time offering definitions of catastrophe and emergency that withstand critical scrutiny. Despite the glut of new theories about risk, few pay attention to the differences between catastrophes, emergencies, and disasters. Posner, for his part argues

[83] That catastrophes are endemically misunderstood, and this with dire institutional consequences, is ably argued by E. L. Quarantelli in "Catastrophes are Different from Disasters: Some Implications for Crisis Planning and Managing Drawn from Katrina" (2006). See also, Ron Perry "What is a disaster?" in H. Rodriguez, E. Quarantelli and R. Dynes (eds.) *Handbook of Disaster Research* (Springer 2006). Equally valuable are, Ron Perry and E.L. Quarantelli (eds.) "What Is a Disaster?" in *New Answers to Old Questions* (Xlibris Books 2005). Joseph Scanlon *Convergence Revisited: A New Perspective on a Little Studied Topic*. Published by the *Emergency Communications Research Unit* (Carleton University 1991).

that the risks of a global catastrophe are more plausible, and their potential sources more numerous, that is commonly supposed by both the public at large and by specialists. There is a tension between our technological prowess and its exponential and continuing growth argues Posner and our political ability to control the effects and side effects of this exponential growth. While our collective ability to unleash technological catastrophe on ourselves grows exponentially, at least concerning those catastrophes that are potentially manmade, the social controls on those same expanding technologies (as well as the political will to reign in some of these technologies) is greatly lacking on his view. Posner favors a cost-benefit analysis when it comes to deciding which institutions should be put in charge of guarding against which potential catastrophe.

Correspondingly, Posner thinks that compensation for damages caused by catastrophes and disasters should be decided by a complex set of cost-benefit calculations. Some of these calculations will be conducted and administered by experts while other calculations are better off being left to democratic processes of decision-making. Not wishing to undercut the democratic process and favorably disposed to the give and take of interest group politics, Posner thinks that some disaster and catastrophe planning can be left to the respective invisible hands of markets and party politics to resolve. Familiar with the potential failings of cost-benefit analysis, Posner nonetheless believes that these can be overcome, if experts and politicians are placed in an adversarial (yet constructive) context in which to argue for various disaster/catastrophe prevention provisions. The reason Posner turns to cost-benefit analysis is as a way of cutting through the complexities wrought by the psychology of disaster and catastrophe.

Posner explains, "cost-benefit analysis is invaluable in cutting through the psychological and political fogs that surround and obscure the terrifying possibilities that I canvassed [earlier] but there are a host of obstacles to applying the conventional techniques of cost-benefit analysis to the catastrophic risks [...] the probable costs of the catastrophic risks, when compared with the probable costs of efforts to minimize them, indicate that we are not doing enough." Later he remarks that "a number of catastrophic risks that I have not attempted to subject to cost-benefit analysis, including nuclear terrorism, runaway nanomachines, natural pandemics, and conquest by super intelligent robots. Careful assessment of the costs and benefits of responding to these risks remains a project for

further research" (Posner 2004 196-197). Several things stand out when reading Posner's own description of his account. First, there is an honest admission that cost-benefit analysis in this context is being used reductively (and self-consciously so) by Posner, as a way of discharging the responsibility of providing a realistic psychological and political response to threat of catastrophes and disasters. While such reduction may do when canvassing a large number of potential disaster scenarios, as Posner does in *Catastrophe*, this will not do when actually planning disaster response measures.

The reasons for doubting this reduction are many and are well summarized in pervious chapters as well as by Ackerman and Quarantelli. Panic and psychology are part and parcel of catastrophe, disaster, and emergency, and no serious analysis can obviate them or reduce them to a mathematical model, at least not while simultaneously granting their importance as Posner does. As stated above, calculating probabilities does not prevent harm in a disaster, catastrophe, or emergency situation, and liberal democratic governments are morally bound to protect the safety and bodily integrity of their citizens, as far as feasible. Simply stating that this is complicated and we therefore need to simply and reduce the scope of protections guaranteed by various constitutional and charter mechanisms (as Posner does) is not enough. Second, Posner grants two further incompatible points. He agrees that not enough is being done to offset catastrophic risks, as this is the crux of *Catastrophe*, while also arguing for the inherent indeterminability of forecasting future catastrophes and disasters. This is the same mistake made by many risk theorists and writers on catastrophes, disasters, and emergencies. Like Posner, they do not define or otherwise analyze the concepts they are using instead choosing to take them as well defined. Catastrophes are no more indeterminate than emergencies.

They are simply not the types of events about which we can do much. Disasters and emergencies are unpredictable but they are not random events and they are amenable to some level of management, as they are not as intense or as wide in scope as catastrophes or extinction events. Yet for Posner and others, all of these disparate phenomena are to be run together in one undifferentiated bundle. These concepts refer to different phenomena and thus cannot be treated as synonyms for one another, an issue tackled consistently from the first chapter of this dissertation. Third, Posner's examples range from the probable and the concrete to the fantastical, again eschewing key differences between catastrophes created

by existing technology and technology that has yet to emerge. It is crucial to any cogent account of catastrophe that it be grounded in a bottom up understanding of the genesis and nature of the catastrophe it seeks to understand, rather than proceeding top down by abstracting from the lived situation in which the catastrophe or disaster is experienced into an imaginary realm.

While Posner realizes that there is a difference between manmade catastrophes and naturally occurring catastrophes (a fact he himself flags in his discussion) he nonetheless treats all catastrophes as one in the same, each amenable to a probabilistic and context-free analysis. If decades of disaster response literature have anything to teach us, it is that there is no such thing as a context-free emergency, disaster, or catastrophe. Had Posner adopted a more philosophically ambitious perspective to the questions he treats in *Catastrophe*, he would have acquired a richer understanding of risk than the one he has on offer. Posner psychologizes the catastrophic threats he treats, in that he argues that the enormity of some of the events he describes cloud the public's judgment, as they are events that people cannot fathom accurately, let alone devise contingency plans for, due to the enormity of their scope and the extent of the damage they can cause. This is unsurprising, in that a focus on the panic engendered by traumatic events is a theme that runs through all the literature on emergencies and catastrophe, from Bruce Ackerman's discussion of panic and its role in legislating emergency measures legislation to Posner's warnings about the public's inability to come to terms with both potential and impending catastrophes. This inability to think in such large terms Posner argues, leads to a lack of proper regulatory controls in some areas of potential concerns and to overregulation in other areas.

An odd feature of Posner's account is his assertion that there is no historical record of dealing with such catastrophic events and that therefore it is difficult for individuals to gauge the frequency with which these events occur in actuality making the threat of catastrophe seem unreal, fantastic, or too far off, to elicit concern. Yet Posner aside, we do have a rich historical record of catastrophic events. What is lacking is a history of *technological* catastrophes, of the type described by Posner when he describes manmade pandemics, but this should be no obstacle to thinking historically and constructively about emergencies and catastrophes. (Lazar's treatment of emergency measures for example, is historical in tone and in scope, returning to the Roman senate for inspiration and theoretical

guidance, so this conceptual option is a live possibility). Posner's examples are perhaps therefore better thought of as addressing a more grounded type of reaction to an event, such as his discussion of the choice of many individuals to drive to where they needed to be in the wake of the September 11 terror attacks. Instead of flying to their favored destinations, many Americans chose to drive, seeing this as the safer of the two alternatives.

As Posner notes, driving is inherently more dangerous than flying and many more fatalities can be attributed to traffic accidents than to aircraft misfortunes on a yearly basis. Posner sees this as a concrete illustration of the inability of people to think rationally about what to do in a dangerous situation. While I appreciate the point Posner is trying to make here, I think he is mistaken in choice of example. Many individuals chose to drive to various destinations in the wake of the September 11 attacks not because they believed driving to be safer than flying *simpliciter* but rather because they did not know if there would be subsequent attacks aimed at aircraft or not. Their choice may indeed be unsound and ill-founded but it is neither of these things for the reasons given by Posner. Perhaps Posner wants to argue that deliberative bodies perform as irrationally as the individuals who chose to drive rather than fly after September 11, but this is also a weak argument in the form he offers. A stronger argument can be made by pointing to irrationalities in deliberative planning such as the mistakes enumerated above in Quarantelli. During catastrophic events, often the first facilities to be destroyed are those of the government, thus rendering the deliberative bodies set up to deal with the catastrophe (or the emergency for that matter) inert and ineffectual when the actual events unfold. Posner seems to want to move in this direction but fails to offer a sustained argument for his view.

The unresolved tension in Posner mirrors the tension at work in many treatments of catastrophe and emergency. Posner, like other authors before him, find the existing institutional structures for dealing with catastrophes wanting and ineffectual while arguing that such institutions do no good in the end. My work is related to some of Posner's concerns in that it is an attempt to dissolve this tension by pinpointing the lack of conceptual clarity that plagues accounts of that type. There is simply no way to develop a cogent, coherent, and persuasive account, of either emergencies or of catastrophes without first have a clear conception of what constitutes an emergency or a catastrophe in hand and that can only occur after careful contemplation of the conceptual contours that given

emergencies and catastrophes their respective configurations. Otherwise, one is simply engaging in guesswork. Posner's account, despite its sober assessment of the catastrophic threats we may come to face in the near future, suffers from the shortcomings found in many of the authors I have referenced. He offers no conceptual grounding or definition of catastrophe, choosing instead to take the issue as already clear.

It is also internally inconsistent, in that Posner does characterize catastrophes as indeterminate and indeterminable types of events, events that we cannot predict let alone control. More specifically, Posner argues that catastrophes involve great risk, but offers no metric by which we measure or otherwise come to terms with the threat assessment provided by his analysis. Posner offers no way of knowing whether we are doing enough to guard against potential threats or too much, whether we have adequate safeguards in place or not, and whether expenditures are being used adequately or not. The closest Posner comes to answering questions having to do with catastrophe preparedness is his questioning of the proper level of expenditure with regard to events we take to be potential catastrophes, but there is no standard being appealed to here in terms of what is to be considered a catastrophe and what will evade that categorization, societies are simply supposed to settle on a list of potential catastrophes absent some standard other than common sense. Yet, for all its usefulness common sense is not always the best tool to use when dealing with complex issues, such as those we encounter when attempting to foster plans for emergency or catastrophe preparedness. Posner knows this and attempts to understand the situation in terms of a probabilistic cost-benefit analysis (as previously noted) but this does not address the fundamental problem at issue.

There is nothing wrong with the calculation of probabilities, and it is a useful mechanism for making sense of multifactorial phenomena like catastrophes, but it tells part of the story and not the whole of the story. As Posner himself acknowledges there is often widespread panic when a catastrophe occurs and this panic reflex needs to be factored into the equation, not factored out as it is by the simplifying and overly reductive methods of probabilistic cost-benefit analysis. The issue here, as it was in our discussion of emergencies more generally in previous chapters, concerns the identification and interpretation of those events that are termed "catastrophes" and the task of interpreting and identifying catastrophes is only rendered more difficult by the distorting lens of too crude a

cost-benefit analysis or a too rough calculation of probabilities. Posner acknowledges this failing in his own account but does little to correct it, partially because his is an account seeking to raise the issue of catastrophe (and not to resolve it, per say) and partially because he falls prey to the conflation between emergencies, catastrophes, and disasters I have identified throughout. Posner sometimes differentiates between these concepts and other times runs them together. In this, he is like most of the authors we have reviewed, drawn to conflation. Posner tries to provide and answer to the conceptual question posed here, but ultimately fails to show convincingly, just what constitutes a catastrophe (conceptually speaking). Posner answers only with disparate examples that rarely thread his argument together, leaving the reader with a sense of uncertainty as pertains to what exactly his overall argument is. He prefers to allow the disparate types of events he enumerates to speak for themselves succeeding only in underscoring my thesis that without a cogent conceptual account of what constitutes a catastrophe, we are left as citizens and as policy makers with a motley of institutional recommendations and a set of examples that fit together more or less well. Here is Posner's own characterization:

> None of these disasters […] is certain to occur. But any of them might, with more than trivial probability. The catastrophic asteroid strike and the abrupt climate spirals are part of the earth's prehistory. They have happened before; they could happen again. Should either of the other two megacatastrophes sketched above occur—the world-ending lab accident or the devastating bioterrorist attack—it would be an example of modern technology run amok. So might be abrupt global warming, and not just because internal combustion engines and electrical generation are products of technology; technology affects the climate indirectly as well as directly by its positive effects on the growth of the economy and of world population. Both are factors in global warming and in another of the catastrophe scenarios as well—a precipitous and irreversible loss of biodiversity. All these disasters and more would be catastrophes in the sense the word bears when used to designate an event that is believed to have a very low probability of materializing but that if it does materialize will produce a harm so great and sudden as to seem discontinuous with the flow of events that preceded it. The low probability of such disasters—frequently the unknown probability, as in the case of bioterrorism and abrupt global warming—is among the things that baffle efforts at responding rationally to them. But respond we must; at least we must consider seriously whether to respond; for these events can happen, and any of them would be catastrophic in the sense of cataclysmic rather than the milder sense in which a hurricane or earthquake might be termed "catastrophic" because its unexpected severity caused large losses to property owners and insurance companies.

One definition of "catastrophe" given by *Webster's Third New International Dictionary* is "a momentous tragic usually sudden event marked by effects ranging from extreme misfortune to utter overthrow or ruin." Concentrate on the top of the range ("utter

overthrow or ruin") and you will have a good grasp of how I use the word in this book. The catastrophes that particularly interest me are those that threaten the survival of the human race. Even so lethal an event as the great flu pandemic ("Spanish influenza") of 1918–1919, which is estimated to have killed between 20 and 40 million people worldwide, or the AIDS pandemic, which may well exceed that toll—already more than 20 million have died in sub-Saharan Africa alone, though over a much longer period of time and out of a much larger world population—is only marginal to my concerns. Pandemics are an old story, and can kill substantial fractions of local or regional populations. But they have never jeopardized the survival of the human race as a whole, as bioterrorism may do. I forgo consideration of the moral disasters to which continued technological advances may conceivably give rise. The prominent bioethicist Leon Kass contends that "technology is not a problem but a tragedy." By this he doesn't mean that technology may destroy us physically, which is my primary concern, although enslavement of the human race or its subjection to totalitarian tyranny would be genuine catastrophes even in my austere sense of the word.

He means that "homogenization, mediocrity, pacification, drug-induced contentment, debasement of taste, souls without loves and longings—these are the inevitable results of making the essence of human nature the last project for technical mastery." Kass is the chairman of President Bush's Council on Bioethics, which recently issued a report that warns "of a sex-unbalanced society, the result of unrestrained free choice in selecting the sex of children; or of a change-resisting gerontocracy, with the "elders" still young in body but old and tired in outlook. And there are still uglier possibilities: an increasingly stratified and inegalitarian society, now with purchased biological enhancements, with enlarged gaps between the over-privileged few and the under-privileged many; a society of narcissists focused on personal satisfaction and self-regard, with little concern for the next generation or the common good; a society of social conformists but with shallow attachments, given over to cosmetic fashions and trivial pursuits; or a society of fiercely competitive individuals, caught up in an ever-spiraling struggle to get ahead, using the latest biotechnical assistance both to perform better and to deal with the added psychic stress." Kass is right that technology can have social consequences. Think of how the Internet has given rise to an enormously increased volume of pornography and how the abortion ("morning after") pill may soon write finis to the right-to-life movement. The transformation in the social role of women in the last half century, with resulting effects on marriage and divorce rates, extramarital sex, and the status of homosexuals, is the result to a significant degree of technological progress.

Technological progress has produced labor-saving household devices, safe and effective contraception that interferes minimally or not at all with sexual pleasure, an abundance of jobs that do not require masculine physical strength, and a drastic decline in infant mortality, which has reduced the amount of time that women need to be pregnant in order to be confident of producing a target number of children who will survive to adulthood. The combined effect of these developments has been to reduce the demand for marriage and increase the demand for extramarital sex, the public role of women, the age of marriage and of giving birth, the incidence of births out of wedlock, and tolerance for sexual deviance (a word rapidly going out of fashion), while reducing the overall birth rate and the amount of time that mothers spend with their children. Developments in

communications technology may have had equally profound and, to the conventional-minded, disturbing effects (Posner 5-7 2004).

We see clearly in the previous excerpt all of the failings that afflict standard accounts of catastrophe. There is a constant conflation between disasters and catastrophes, and between catastrophes and emergencies, as well as a constant conflation of disparate events, all of which are run together. The most obvious of these is the conflation of phenomena under our control with phenomena beyond our control. For example, the asteroid strike that Posner envisages is not something that we as a society can alter in any significant measure. Other than attempting to divert or destroy the asteroid, the only other available recourse is resignation. This is much different from the biotechnological difficulties that Posner enumerates via Kass. There, the choice is ours as a society and the risks are plain to see, requiring little to no analysis, as the probabilities are obvious to all who inquire. Not so with the case of the asteroid, which can occur without our knowledge, complicity, or foresight. The rest of Posner's scenarios fall into similar categories; they run together events that have nothing to do with each other, events that are not best understood as "catastrophic" because they are both predictable and within our power to alter, or events that are (properly speaking) "emergencies" or "disasters" but not "catastrophes". In fact, if we use the full resources developed by my account of emergency, we can see that some of the events and scenarios discussed by Posner in *Catastrophe* are what Quarantelli and others call "extinction events" and not catastrophes, disasters, or emergencies, at all. If there is a moral to this particular chapter, it is that it matters what terms we use and that proper understanding of our terms requires more than the stipulation of a lexical priority between them or an arbitrary assignment of definitions to similar phenomena.

Failure to consider this insight, will inevitably lead to failure to act accordingly, when faced with misfortune. Zack and Posner, who skip over the careful conceptual work of delineating catastrophe from disaster and both from emergency, do not aid in this task, whereas Quarantelli does help us, to see and think more clearly. Cost benefit analysis and related approaches, that rely on the calculation of probabilities based on expected outcomes and costs, suffer from the same defect as concerns the analysis and administration of emergencies, catastrophes, and disasters. As with other approaches examined and rejected

here, cost benefit analysis and its cognates takes the issue of what constitutes an emergency, disaster, or catastrophe, to be a matter of settled fact. This is a mistake, which underappreciates the volatile and mercurial nature of these types of events. The rapidity, with which an emergency can morph into a disaster, and a disaster into a catastrophe, is not taken into account in most cost benefit approaches. This does not mean that this type of approach can never take these factors into account, only that at present few do. Further, cost benefit analysis relies heavily on induction from past experience and does this uncritically.

That is to say, past emergencies or disasters are taken to be identical to future emergencies or disasters, and this without proper epistemic grounds. If anything is clear from the literature on emergencies and disasters, it is that they are unpredictable by nature and therefore require a reflective cast of mind if they are to be managed and administered effectively. If the salient features of a situation are misremembered by those drafting the emergency or disaster response protocols, or if the high cost factors singled out by the protocols prove to be in error (either because these are the wrong factors to focus on, or because they costs associated with the factors have been miscalculated) the wrong result will be reached and the emergency or disaster will not be managed effectively. Also, as stated before the idea that a catastrophe can be "managed" (a common theme in public policy literature reared on cost benefit analysis) betrays just how little understood catastrophes are. Emergencies can be managed and administered albeit with great difficultly as they arise very infrequently, but only to the extent that they are understood both conceptually and practically. Disasters fall somewhere in between catastrophes and emergencies but the importance of getting clear on the salient factors that contribute to the profile of a given disaster (or emergency) remain the same. There is simply no shortcut to dealing with these types of phenomena, if one wishes to be perspicuous and efficient in saving lives and reducing damages.

The heuristics employed by Posner and other partisans are very rough, in fact they are too rudimentary to make detailed assessments about what ought to be done in the context of a disaster or emergency by the agents tasked with administering the event. While rough heuristics work in other cases, the speed and scale of disasters, emergencies, and catastrophes, render this heuristic strategy implausible. Posner discusses various forms of tribunal to deal with emerging threats of all sorts, from science tribunals to policy tribunals

of a sort, but he neglects to appreciate that in the heat of the moment, once the emergency or disaster is already underway, there is little that can be done from a deliberative standpoint to alleviate the situation. Further, he acknowledges that time is an essential component when thinking about emergencies and disasters, but does not realize that bias and fear can cloud the judgment of the drafters of the emergency/disaster protocols even if they are drafting disaster/emergency response protocols during a period of relative safety, in which time is less of an issue. In fact, every account surveyed, from Ackerman's to Zack's take note of time and mention panic as two key components of disaster and emergency response. Posner's is the only account on offer that does not.

As Edward A. Parson notes, in his review of *Catastrophe*, Posner's general analytic claims do not hold up to sustained scrutiny, as each of the four catastrophes that make up Posner's four worse case scenarios, have marked differences between them, differences of profile that distinguish each catastrophe from the other and that make a general account difficult to deliver. The salient differences Parson argues, are differences that Posner papers over and this in the interest of saying something general, but ultimately unhelpful (from an analytical and conceptual perspective) about catastrophes.[84] Not all phenomena are easily reducible to probability functions, at least not without distorting their actual unadulterated natures. Emergencies, disasters, and catastrophes, are some of the most random and most dangerous phenomena in existence. Even in their manmade forms, they are inherently unpredictable and unstable, in addition to being poorly understood. Manmade emergencies, disasters, and catastrophes, are even more dangerous in many ways, as we need factor in the intent and cunning of the terror agent (in cases where the event is orchestrated purposefully) and this only adds to the combination of possibilities (and ultimately, probabilities) that would require analysis for a complete theory to emerge.

Nothing of the sort exists at present, if we exclude *ad hoc* attempts such as Posner's to come to terms with disaster, catastrophe, and to a lesser extent emergency. We do not need to compound their inherent dangers by mischaracterizing them further[85].

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[84] Edward A. Parson, "The Big One: A Review of Richard Posner's *Catastrophe: Risk and Response*" Journal of Economic Literature Vol. XLV (March 2007) 147-164 (American Economic Association).

[85] Probability only applies to phenomena that have a certain degree of stability as concerns their relative frequencies or occurrences. Additionally, a true probability calculation must reflect the real modulation and/or

evolution of a given phenomenon as it persists through time. The probability of an event is definite if and only if the set of relevant conditions that define the event are left unchanged. Changes in conditions on the ground change the probability, and consequently the statistical inferences, that attach to a given phenomenon (or set of phenomena). No theorist of emergency, disaster, or catastrophe, has produced anything resembling a cogent "probability calculus" of these types of events, in part because it cannot be done. Reductionism does not alleviate these technical difficulties, as there is no way to predict what will change when, in a crisis. Any one of several factors can change at any time without warning. Also, note that "risk assessments" are different from mathematical models or algorithms that *predict* crises before they occur. A "risk assessment" does not help you survive a crisis, except if it allows one to flee for safety.

CHAPTER 5: INSITUTTIONS, RIGHTS, AND EMERGENCIES

I began my analysis of emergency, by noting the concentric structure that my examination would take. This caveat was intentional and purposive, as we find emergencies themselves at the conceptual center of several interconnected and unavoidable questions in political philosophy. These questions concern the proper use of coercion, and the legal and moral basis of this use, which arise unavoidably as one analyzes what liberal governments can and cannot do in their defense and in the defense of their citizens during emergency events. As concerns the methods and measures that liberal democracies should take when defending themselves (variously) from imperiling threats, potential risks, and imminent attacks, I have tried to provide some answers, grounded in what I take to be a clearer, and intentionally simpler understanding of what a state of emergency commits states to, and what it does not. In this concluding chapter, I aim to bring these various strands together more directly and to show how they bear (and are of a piece) with the analysis of emergencies presented in the previous chapters.

The aim here is not to alter the barebones account of emergency offered earlier, but rather to underscore instead just how thoroughly the idea that emergencies license departures from established liberal democratic social norms has been damaged by my critique and by the definition offered (of emergencies as events that are sudden, severe, and unexpected). There is little to recommend the view that emergencies are "departures" from the normal functions of liberal democratic government. I have tried to show throughout that once the idea of what constitutes an emergency is itself unpacked, there is even less of a basis for believing that emergencies are "exceptions" that sunder previous moral and political arrangements, as these are undertaken by the existing institutions of liberal democracy. State emergencies are real but rare events, and need to be understood as such, as I have argued above. For this reason, we should be cautious about rejecting emergencies outright as Lazar does, while also being cautious about reifying emergencies, in the manner of Schmitt and his followers, as neither view is correct. For a genuine state of emergency to obtain, an existential and credible threat needs to be both *identified* and *identifiable*. It is not enough to have one without the other, as the enactment of a state of emergency automatically involves the derogation of citizens' rights (as things presently stand).

When rights are derogated and no credible threat exists, then the government has acted both illiberally and undemocratically, because they have both suspended individual rights and suspended the possibility for registering a credible democratic grievance, on the part of citizens, so long as the emergency persists. This twin failing is an unacceptable outcome for a liberal democracy, on both political grounds and on philosophical grounds, as both the spirit and the letter of liberal democratic practice is undermined, by such false emergency measures. The collateral issues surrounding emergencies however are not so simple, as they concern questions of institutional design and institutional stability, in addition to facing the existing normative issues surrounding emergencies. Coercive measures, taken on arbitrary grounds by state institutions, lead to illiberal and undemocratic outcomes. The standard argument, that emergencies warrant such departures, is not enough to justify coercive actions of this sort, because they undermine the very justification of these (liberal) state institutions, from the normative point of view. The possibility of an existential threat capable of grievous harm is not chimerical due to its relative rarity, as its occurrence is logically possible and historically factual.

Genuine emergencies have in fact occurred in the past, and the technological advances of the present, make them real possibilities, both practically and potentially. The possibility of a large-scale state of emergency, understood as both a logical possibility as well as an empirical possibility, therefore requires an analysis of its main underlying concept, and that is what I have attempted to unearth here. The conceptual requirement for clarity is also a practical requirement calling for greater institutional clarity in affairs pertaining to emergency measures legislation. For if governments are to plan for emergencies, they must have a clear sense of what type of event they are dealing with, just as if scholars wish to come to terms with emergencies and their aftereffects, it is important that they get clear on what counts as an emergency, and what does not. Neither of these goals will be successful, if the basic characteristics of emergencies continue to be ignored, as they are in many current accounts of emergency government. To now, most of the work on emergencies has consisted of defining them as random events, which I have shown they are not or has consisted of denying the need for the existential threat to obtain in real-time. Work that has avoided these pitfalls has tended (instead) to conflate emergencies with

disasters, catastrophes, and with other varied misfortunes. This also is a mistake, as the distinctions between these events matter, as I indicated previously.

If we evade these distinctions, we will not think clearly about emergencies and therefore will be unable to act decisively and effectively, when they strike. Nowhere is this more apparent than in the failure to discern the presence or absence of credible threats. There is no legitimate possibility that a state of emergency is in effect or that it poses a credible threat to the state apparatus or to the citizenry at large if the alleged threat does not exist in something like a real-time setting. Emergencies cannot be dealt with if they are viewed amorphously. They cannot extend in all directions in space and time without any conceptual restrictions. On my view, the absence of a real-time threat renders an alleged emergency null and void. As I have noted before, if an event does not endanger either the population at large or the state itself (as in occurrences of political terrorism) then the event in question may be a crisis, but it is not a state emergency. The tendency of late has been to conflate all crises with emergencies and to think of disasters, catastrophes, and other similar misfortunes, as being coextensive with full-blown states of emergency. I have shown that this is an error, as state emergencies do not share the same limits, boundaries, or scope, with these other types of events.

Even more striking is the conflation between localized emergencies and statewide emergencies, another disquieting feature present in the literature surveyed by preceding chapters. Small-scale emergencies are local emergencies properly speaking and do not require state intervention or the derogation of individual rights or the resources of the armed forces. That is to say, local emergencies are politically insignificant events, unlike large-scale emergencies which (when genuine) pose a credible threat and which typically require great resources and logistical coordination to arrest. A state of emergency is a type of juridical designation, reserved for these large-scale events, having nothing to do with smaller local emergencies (either conceptually or practically) save in the following respect. All emergencies do share certain phenomenal features, in that the experience of living through an emergency is very similar, whether the emergency is local in scope or statewide in scope. Elaine Scarry makes this phenomenological point in her book *Thinking in an Emergency*. There, she points out that emergencies are (in a sense) the enemies of thought. Emergencies occur quickly and can exhibit great severity, generating grave consequences

in their wake. Because of this fact about their makeup, Scarry argues that emergencies create an overwhelming psychological tendency to *act* rather than to *plan* or to think, in the minds of those who experience them.

Because time is of the essence in emergencies, it is common to make mistakes and more importantly to act in ways that would, in other situations, be literally unthinkable. This point about the relationship between time and severity, tracks nicely with our discussion of fear from earlier chapters, and brings to light another often-neglected element in the story of emergencies. One's perception of the emergency will define the way one acts in the emergency. While inconsequential at the personal level, this phenomenon can be seen as the root of the tendency on the part of governments to derogate individual rights indiscriminately during large-scale emergencies. Fearing doing too little, government overreaches and derogates too much, trying to contain any fallout from the emergency. This phenomenon is widespread and widely reported in the literature. Bruce Ackerman for example makes speed and fear cornerstones of his account of emergency as do Carl Schmitt, Richard Posner, Eric Posner, and Adrian Vermeule. Each of these otherwise different authors centrally invokes time and speed in their respective accounts of how to deal with an emergency. In fact, for many of these writers the rapidity of emergency constitutes its core and is the thing that renders unchecked emergencies so dangerous.

Scarry is right to highlight the fact that despite the psychological temptations to act rather than to think in emergencies (be the actor in question, a government or an individual) there is no reason (strictly speaking) to give into what is simply a psychological compulsion and not a carefully reasoned or thought out policy. We do not allow compulsion to rule other areas of life and politics, why should we allow it to do so in emergencies. It is true that it takes time to plan a cogent emergency response and time to follow the plan during an emergency in which people may already be dying. Yet it is also true *prima facie* that it is better to have a well-ordered response to an emergency than to adopt random measures in the hope of avoiding harm. There is a puzzling disconnect between most theories that deal with emergency and the procedures they recommend. While the theories themselves are painstaking in their detail, the outcomes and procedures they envision appear to fall short, in terms of practicality and normative oversight. Is this failure attributable to an overemphasis on fear and speed (as Scarry argues) or is it due to a misunderstanding of the

concept of emergency itself? I argue that it is both. I concur with Ackerman on the idea that fear and panic have an effect on policymakers who in turn have an effect the institutional arrangements responsible for overseeing emergency response.

Yet I also agree with Scarry in arguing that the overemphasis on fear and speed combine in such a way as to obscure the conceptual ambiguities in my competitors' respective theories of what counts as an emergency and what does not. As has been the case from the outset, it appears that emergencies are more complicated phenomena than they appear and they in turn elicit complex and at times contradictory responses from those charged with thinking about them and charged with drafting legislation to arrest them. The question now becomes, what are we to do about the arbitrary coerciveness that is the stock and trade of so much emergency measures management. As others and I have shown, it is simply too easy to slide from the perception of a possible threat to the wholesale derogation of important civil and political rights, all in the name of some amorphous conception of security[86]. If anything, armed with a better understanding of what genuine emergencies are and what they are not, liberal democracies now have a better chance at guarding their freedoms, but only if previous failings are taken into account. It is insufficient I have argued to consider each emergency as coextensive with every other.

Each emergency event needs to be analyzed and understood on its own merits and this task can be facilitated by using straightforward criteria, like the criteria I have proposed here. Further, even if a genuine emergency is found to be active, there is little reason to turn to the common tool of emergency government (namely, rights derogation) if this tool will not efficiently resolve the problem at hand. I have I think advanced reasons for doubting that wholesale rights derogations, of the type seen all too frequently in the wake of September 11 and other similar "terror emergencies," work well. Amos Guiora's notion of administrative detention, seen in earlier chapters, can perform all of the functions of derogation but without the pitfalls or excesses, and it allows for complex forms of

[86] For a startling overview of the various justifications and techniques of torture employed by the West, see Darius Rejali *Torture and Democracy* (Princeton University Press, 2008). Rejali gives both a contemporary and historical overview of torture techniques and argues persuasively that public outcries against torture have (historically) only driven the torturers and their apologists in government to grow all the more clever, devising ingenuous techniques of "soft torture", leaving no physical marks, thus making it almost impossible to prosecute the wrongdoers after the fact. Rejali also covers the themes of fear, panic, and time, in his wide-ranging analysis of torture and its legacy and persistence among post-industrial Western nations.

governmental and judicial oversight, without making public every detail or every case involving emergencies or other similarly dangerous events (such as potential terror plots). Accounts such as Guiora's however are only as prescient and effective as their key definitional component allows them to be.

If we take all emergencies (genuine and non-genuine) to be cut of the same cloth, we will lose whatever probity is gained by the account. For if, the analyst analyzes the wrong type of phenomena, or the right phenomena in the wrong way, she will miss salient details pertinent to the resolution of the problem she seeks to solve. This is one reason why the painstaking work of conceptual "sorting" is important. Otherwise, we conflate emergencies with disasters and disasters with crises and all three with still other phenomena, having little to nothing to do with the event that may actually plague us. Clarity of the type required to administer emergencies properly, comes only through careful analysis. What I have advanced here is a single step in a much larger project of clarifying the pre-reflective or folk accounts, given to various common phenomena such as states of emergency, that governments find themselves faced with. While not all such phenomena are illuminated by being analyzed conceptually, some do so benefit. Particularly, in cases where liberal democracies find themselves set against their own political and moral principles, for liberalism is both a system of government and a philosophy of government, I believe that it is helpful and fruitful to proceed in this manner.

There remain critics, such as Posner and Vermeule, who will reject my view entirely. They will argue that our institutional mechanisms are in fine order, and that they are effective in crises, despite the shortcomings I attribute to them. What I have been arguing is that they, and critics like them, can make these types of claims only because the notion of what constitutes a genuine emergency is taken as already clear and cogent. Their view relies equally on both judicial precedent, and on an unreflective folk view, of what an emergency is. On the issue of judicial precedent, I again follow Ackerman and others, in thinking that Posner and Vermeule overstate the case for their view that all emergencies can be dealt with in a Schmittian fashion by a "glorious executive[87]." While the accretion of

[87] On this point, see Vermeule, Adrian. "The Glorious Commander-in-Chief" in *The Limits of Constitutional Democracy* (Jeffrey Tulis and Stephen Macedo eds., Princeton 2010). See also, *The Executive Unbound: After the Madisonian Republic* by Eric Posner and Adrian Vermeule for a retrenchment of their view (Oxford 2011).

power to the executive branch of government in times of emergency is worrisome, it is not the most problematic dimension of the Schmitt inspired view of emergency government. What is more worrisome, is that power is accreted for no credible reason, just as individuals civil and political rights get derogated without justification, for the emergency that is said to justify these actions is itself misunderstood, and very often non-extant.

A potential emergency and a genuine emergency refer to different events, and the temptation to conflate them should be resisted, if our aim is safety and effective administration. I take it as uncontroversial that emergencies should not be used for partisan advantage, given the dangers they pose when they represent genuine hazards. From the viewpoint of theorists like Eric Posner and Adrian Vermeule, Dyzenhaus and Ackerman (and other theorists) who emphasize the generality of the principle of the rule of law, miss the larger point, which Posner and Vermeule wish to make on behalf of executive power. Their view differs in emphasis in placing the executive in a privileged decision-making position over and above the citizenry and above other branches of government. Their rationale for this exceptional positioning of the executive branch stems from their understanding of emergencies (seemingly all forms of emergency) as wholly exceptional events. "As against liberal constitutional theorists like James Madison, Bruce Ackerman, and Richard Epstein, and liberal theorists of the rule of law like Albert Venn Dicey, and David Dyzenhaus, we argue that in the modern administrative state the executive governs, subject to legal constraints that are shaky in normal times and weak or nonexistent in times of crisis" (Posner and Vermeule 4 2011).

While Posner and Vermeule distance themselves from Schmitt's view that crises liberate the executive from all legal constraints whatever, they do take Schmitt to be correct as concerns the liberating effects of crisis situations like emergencies, on the legal and normative constraints that would normally constrain executive power (Posner and Vermeule 4 2011). I have argued at length that most hazardous situations do not constitute genuine states of emergency, and that even if they did there is no strong link between this fact, and the view that legal and political norms fall away from the executive branch due to hazards. Despite their insistence, Posner and Vermeule have not shown such a link to obtain in any of their interventions on the issue of emergency government. Emergencies do not logically (or empirically) negate a government's authority or its responsibilities. They

are simply another issue for governments to deal with. In fact, it is unclear that any event (emergency or other) could nullify a liberal democratic government's responsibilities toward its citizens or its various institutions. Posner and Vermeule respond that the rest of the modern administrative state lags greatly behind the forward-looking and forward-thinking executive branch and that for this reason, we should defer to executive power in crises.

Such responses, simply restate Elaine Scarry's well-taken point that emergencies short-circuit our collective ability to reason critically, if we allow them to be cast as rapidly evolving scenarios that are completely out of our rational control. As Ackerman, Lazar, Dyzenhaus, Guiorna, and many others make clear; there is no credible reason to think this is true. Emergencies and other crises are as old as time, and civilizations have endeavored to meet them head-on with planning and courage, from the beginning. What makes genuine states of emergency, of the sort envisaged by Walzer and I terrifying, is the proliferation of contemporary technology, which if employed specifically to do harm, can successfully injury and kill thousands and in rare cases millions of innocents. Yet the partisans of unrestrained executive power never cast this issue as an issue about technology and its uses, which it is at bottom, but rather cast things in terms of power and panic. Posner and Vermeule argue that in the end we "liberal legalists" will not be able to delegate authority quickly or efficiently enough to deal with an emergency and that our view of emergencies is insufficiently existential.

My response to such types of criticisms throughout has been to point out that most emergencies do not pose and existential threat and that many events labeled "emergencies" are better thought of as crises, disasters, or catastrophes, each of which necessitates a different response on the part of authorities than the responses one sees in genuine emergency situations. Their view also misses a salient empirical fact about extreme emergencies. Often it is the government itself, including the executive, which is decapitated or incapacitated by the emergency. This is particularly so in cases where a foreign power declares war, or in cases where the emergency in question, is an act of overt political terrorism. Terror groups and foreign governments can (logically speaking) seek to decapitate a state's leadership apparatus and endeavor to do so via an emergency. This possibility renders Posner and Vermeule's "unbound executive" model inert, as a new

executive would be appointed which would require some (minimal) deliberation and delegation, all of which involves planning and thinking and robs the executive of precious time in the designing of an emergency response. Therefore, the notion of the hero executive does not stand. Neither does the associated view that states alone, through raw coercion, can muscle their way through an emergency if only the rule of law were relaxed.

If the emergency disables large sections of the NSA, the CIA, the RCMP, CSIS, or some similar government body, then their efficacy become a moot point, because it is not the bounds of the rule of law with its procedural hang-ups that brings the agencies down, but rather the emergency itself. Only advance planning, along with interagency and intergovernmental cooperation between branches, can forestall such events. Genuine emergencies are complex events and they cannot simply be defined away or beaten into submission. Nor is law an impediment to the resolution of states of emergency. If anything, legal measures and advance planning are the only tools available for dealing with emergencies in a liberal and democratic fashion. The fact that even the best efforts on the parts of governments often fail in real life emergencies is no reason to eschew legal remedies and restraints and careful advance planning at various institutional levels of government. The idea that individual political and civil rights in a liberal democracy are rendered *fungible* by emergencies is a chimera I have advanced throughout and with good reason.

Just like the view that through extensive derogation of individual rights we as a liberal democratic society can insure safety in emergencies, the view of rights as tradable commodities in times of emergencies, has no legs to stand on. Such views are generally proposed by non-specialists on emergencies and are then sometimes parroted by those who favor accretion of power to the executive (or to the government, more generally) in all situations, not just in emergencies. This view would be credible if it worked, if it kept people safe, and if there were no other options available to us, as a society of free and equal citizens. Yet none of these conditions applies in the case of genuine emergencies. These types of proposals rest on two faulty views; the first, that emergencies are real and widespread and the second, the view that derogating rights makes and keeps people safe.

Both turn out to have been false assumptions, if my analysis turns out to be credible. As I have discussed the first at length, I will say some final words about the second view. The view that rights are fungible in emergencies, has lost ground in legal philosophy of late, given the spate of derogations and imprisonments (not to mention allegations of torture and other wrongdoings) perpetrated by liberal democracies animated by this view. There has been growing dissatisfaction with the interpretation of rights derogation as an efficient and legally defensible tactic, a philosophical and principled dissatisfaction that persists even when dangerous emergencies are underway.

And while various form of administrative detention and warrantless surveillance have withstood legal challenge, harsh derogation has not been a successful legal strategy. As Grégoire Webber notes, in his analysis of the limits and definitions of rights in a liberal democratic and constitutionally governed society, when faced with a limit-case for a certain right (such as an emergency), the right strategy is to defend the right against the encroachment of the limit-case, and not as many have it, to see the right as having been contracted or otherwise infringed. Webber's *The Negotiable Constitution: On the Limitation of Rights* argues convincingly for the view that

> Confronted by such a limitation, one should resist concluding that the right has been defined but is not absolute. Rather, one should conclude that the right remains underspecified and that, once its limitation is properly determined, the right is absolute. But can one maintain the right's absoluteness in all cases? Even in emergencies? Do emergencies not sometimes call for justified infringements? After all, the European Convention, the US Constitution, and the Canadian Charter, among other rights' instruments, all provide for special measures in the case of an emergency. Is this not an illustration that in emergencies, rights (sometimes) give way? I follow Finnis in affirming: 'No, not in any strict sense'. To take his example, if a person's house is blown up to save a community from the spread of fire, that person's right to property has not been violated or justifiably infringed; properly understood, the right to property never extended to a right-claim not to have the house blown up for this purpose, but only (perhaps) to right-claim to compensation. It must be remembered that the person's house is blown up to save the houses of other individuals further down the fire's path, and each of those individuals has a right to be protected from the fire. The person whose house is blown up has a right to property *only if* the action of destroying that person's house 'is pointless because as much will be lost as will be saved, or if our motives are mixed with favoritism or hostility unrelated to the menace of the fire' or other like considerations. Beyond these circumstances, the person's right 'do[es] not go (and, properly understood, never did)' (Webber 131 2009 [original brackets]).

In a further footnote, clarifying his intent, Webber writes "On this account, it may be that the concept of 'derogation' in emergencies is inapposite and that it may be more appropriate to rely on limitation clauses to revisit the limitation of rights in cases of emergencies" (Webber 131-2 2009). Much the same has been argued by Guiora and to a lesser extent by Ackerman, Ferejohn, Pasquino, and Scheuerman, in previous chapters. Each of these interventions, further undercuts the view espoused by Posner and Vermeule, which views emergencies as departures from the established legal order into what Dyzenhaus called "legal black holes."

While Webber grants that it is difficult to see rights as completely context independent, and consequently he grants that in a severe emergency the limitations and boundaries of a right may be altered, he makes an effort that Posner and Vermeule do not make to also preserve the intent of the right being altered. So when discussing rights derogation, Webber argues that the point of reevaluating a right that has been derogated in an emergency is to *reconstruct* the right, so as to bring it back in-line with its original aims and purposes (as much as possible). This is vastly different from the view of rights that allows rights to be derogated, or altogether jettisoned, into obsolescence. Webber's more nuanced view is appropriate to emergencies, even if it allows some rights to be completely reevaluated in an emergency, because his account does not do away with the *rationale* undergirding the right-claim in the first place. Thus, Webber shows that there is common ground between those who think derogation is the only possible protection and those like myself, who do not want rights to be wholly derogated in emergencies. The aim of reevaluating a right is to *reestablish* that right's standing and not to render it ineffectual.

This is part of what Webber, following Raz, terms a right's "dynamic profile" (Webber 132 2009). The contingency of a right's specification, which can always be put into question (emergencies notwithstanding), is not to be confused with a negation of its absoluteness (Webber 145 2009). To the extent that anything is absolute in law, which after all is a conventional system of manmade rules, rights are absolute unless otherwise specified in the manner of Webber's account. While rights can be altered to suit changing social and political contexts, the claims they make cannot and should not be eclipsed by *transient* situational factors. If an emergency were to become a permanent state of affairs, and the emergency was genuine and posed an ongoing existential threat, then a discussion

about the best way to *reestablish* existing rights in this changed environment could be had. Nevertheless, even here, the discussion and negotiation in question would proceed in a democratic and presumably public fashion, and would aim to *preserve* the spirit of established liberal democratic rights and freedoms, even when the letter of these rights and freedoms was forced into alteration. A good example of this compromise is found in Article 4 of the European Convention. There, in detail, are enumerated the reasons and conditions under which forced labor is prohibited. Among these conditions are emergencies. Even in the severest of emergencies, forced labor is not allowed on the territories in which the European Convention is binding (Webber 162 2009).

The European Convention, like similar documents, leaves unanswered the question of what constitutes a state of emergency, while laying out in absolute terms what is not permitted (*pace* Posner and Vermeule). Despite the protestations of some, the constant description of emergencies in binary terms, terms mostly taken from Schmitt, simply serves to poorly describe the nature of emergency and consequently, to poorly describe the resources available for dealing with emergencies. As with all rights, they cannot be applied selectively to some citizens, while not being applied to others, and they can never be applied arbitrarily, particularly in cases where coercion is a central component. Emergencies do not and cannot change this fact about the structure and purpose of constitutionally guaranteed liberal democratic rights, no matter what the circumstances. What Webber helps us see is that rights can be further delimited, based on context, but only to the extent that this new round of delimitation helps further purge arbitrariness. Limits on rights should "purify" the rights in question by making their area of application sharper and more concise, and by delimiting (in advance) the purpose of this further delimitation.

Rights are often limited "internally" by charters but they are also designed to be limited "externally" by further precision. This does not mean that rights are fungible or dismissible in emergencies, but rather it does mean that there is room for the types of alterations to existing rights that make them more effective overall, for both the state and the individual. While harsh interrogation in an emergency may not be productive or legal, rule-governed and supervised interrogation might be. Similarly, it may be worthwhile to detain someone briefly, and in accordance with established rules, rather than imprisoning that person in violation of their existing rights, on the simple suspicion that they have done

something wrong. The overall aim in extreme circumstances like genuine emergencies should be one of balance, between the state's right to protect itself and its citizens, and an individual citizen's right to privacy, mobility, dignity, free expression. This metaphor of balance is not so much illusory, as it is misunderstood. There is a balance to be struck, but it is between a right's general protections and that right's specific instantiations in a given society. A true balance however cannot be achieved if the state's imperatives skew solely toward harsh derogations or if they evince complete disregard for the spirit that motivates and animates a particular rights-claim, nor can arbitrariness be tolerated.

Despite the concession that in times of great peril rights may need to be reevaluated in the specific sense endorsed by Webber, it should still be plain to see that even on Webber's view, civil and political rights in liberal democracies are explicitly egalitarian in a non-delimitable, non-arbitrary, and non-derogable, way. Even if the content (or the ambit) of a specific right can be reevaluated, the holder of the right remains the citizen under every and all circumstances. The battleground for many of the issues touched upon in this dissertation are the various fora in which constitutional essentials are debated and decided. The gap between the rights guaranteed by a constitution, and the application of those rights, is intentional. That gap allows for adjustments, of the type we have discussed, to be made and for corrections to take place. Where a given right should start and where it should end, remains a matter of controversy and an issue on which it is unrealistic to expect Charters and Bills of Rights to specify exhaustive conditions. As Webber says, "In matters of rights, constitutions tend to avoid settling controversies." To secure a temporary consensus on what are after all controversial issues, constitutions and other foundational documents leave intentional room for interpretation.

"With few exceptions, rights are formulated in open-ended language, seeking consensus on an abstraction without purporting to resolve the many moral-political questions implicated by rights" (Webber 2009). Yet the moral drawn from this fact about constitutions is often the wrong one. If one thinks of rights as ever-expanding, then one will see unlawful derogation at each opportunity, just as if one adopts the view that every right should be open to derogation at all times one will fail to evince the proper respect for rights.

If however, one adopts the view proposed by Webber, the problem of delimiting rights and freedoms becomes more tractable. Instead of arguing for rights expansion or rights derogation, the more promising avenue is to argue for the specification of rights, that for one reason or another, are (at present) underspecified. By focusing on the contextual specification of select rights, we can amass a set of "limitation clauses" around rights specific to emergencies. This way, when rights are limited in genuine cases of emergency, they are limited in ways that render the population safe, and that retain the essential component behind the right in question, allowing the right-holder to retain as much of the right as possible. A suspected terrorist who is also a citizen could for example, be held under house arrest, rather than being imprisoned. This intermediate step allows the suspect to retain some vestige of his rights, while also taking him off the street.

If the rules that govern such an arrest are public and non-arbitrary, there should be no issue as to its validity. Webber points out that "limitation clauses" are already common features of most liberal democratic bills of rights and hence offer a way of bringing emergencies into the legal order they allegedly escape. Much like Ackerman and Dyzenhaus, Webber does not agree with the idea that the executive is best placed to deal with emergencies, rather it is the legislature that is best situated to deal with crises, because it is the legislature's constitutional role (as a deliberative body) to complete the specification of constitutional rights that will guide the emergency response. Much of the discussion over emergencies fails in certain crucial respects to do justice to norms of argumentative cogency and clarity, failures that would not be tolerated with regard to other important political and normative concepts, were it not for the severity and the rapidity with which genuine emergencies strike. Be this as it may, as Scarry and Ackerman argue we ought not to act out of fear but out of careful deliberation, especially when derogating key political rights.

The decisions taken by government officials and their representatives, whether directly or via proxy must conform to intelligible public reasons, particularly when the type of decision undertaken has institutional (rather than localized) effects, as in cases of arbitrary search and seizure, unlawful rendition, or even in cases of arbitrary detention without trial. Each of these is an instance of arbitrary coercion that is too often justified by appealing to emergency measures, even when such measures do not apply. Genuine

emergencies, I hope to have argued persuasively do not license wholesale departures from law and established social order, even on the part of the government. If further research is done in this area, the most useful avenue to pursue is an analysis of the threefold connection between the reasons that governmental agents give for taking the decisions that they take and the institutional effects precipitated by those same reasons and decisions. Because reasoning effects decision-making, the link between the two cannot be severed as easily as Schmittians would have it. Decisions that aim to modify the conduct of the key coercive social institutions in a constitutional democracy (institutions like courts, the military, or the police) must make their underlying reasoning public and compelling, otherwise they serve only to undermine the liberal institutions that authorize their authority in the first place.

The logical relation between the reasons-given and the actions-taken by a government in an emergency can always be clarified further and their overall effect always better understood. Genuine states of emergency often alter the institutional profile of the liberal democracy that undergoes the emergency. These alterations can (and should) be examined further, chiefly because many governments take states of emergency to license the widespread use of arbitrarily coercive measures, measures that end up undermining the legal and normative expectations of their citizens. I have attempted to begin such an endeavor here, by taking the first set of steps toward a greater understanding of just what the concept of "emergency" commits us to, and to an analysis of how constitutional democracies of a liberal persuasion, deal with events like emergencies. Those who make decisions in emergencies have a responsibility to provide reasons for the decisions they make as their reasons also function as *justifications* for the decisions they take and this responsibility cannot be discharged simply by decoupling one's decisions from the public reasons one gives as an elected representative (or other agent of government)[88].

Public institutions are "public" in exactly this respect. They offer intelligible reasons for their actions and rules and make these available to the public they serve. This act of "transparent reasoning" also serves as a partial justification of the existence of these institutions. Think here of the role that a free press is to play in a democracy in which

[88] For a similar view, see Mathilde Cohen "The Social Epistemology of Public Institutions." Last accessed October 31, 2011. http://ssrn.com/abstract=1743538

active citizenship is impossible without the information that the press makes available or think of the role of the courts to uphold the law in an intelligible and largely predictable manner. Without these types of "soft guarantees" of institutional intelligibility, it is difficult to run a democratic and liberal society. To attribute "reasoned institutional intelligibly" to an institution, one must consider if the institution (or branch of government, for that matter) is the type of institution that serves the public in this way. Does this institution implicitly or explicitly give the public reason to believe that its overall decisions are made based on transparent and intelligible reasons taken in the public interest? If it does, then the institution falls within the ambit of reasoned institutional intelligibly. If not, then it does not. CSIS and the CIA are not such institutions for example; even though they are subject to rules, which aim at protecting the interests of the public and that must be respected, even if the rationales behind many of their decisions are never made public.

Overall, such institutions do not owe direct transparency to the public, but they do need to follow rules set out by branches of government that are subject to the constraints of reasoned institutional intelligibly. This asymmetry is acceptable on my view, if there is proper oversight and the "intelligible" institutions of a society exert unidirectional control over the "non-intelligible" institutions. This alone is of course not enough. There must also be deep deliberation for a liberal democratic society to function properly and function according to principles that aim to limit instances of arbitrary coercion and other abuses of power. This distinction between intelligible institutional reasoning and non-intelligible institutional reasoning concerns rights and their status in emergencies in a direct way. Liberal rights in a constitutional democracy, I want to argue cannot be derogated or overridden, by any institution that exhibits a non-intelligible institutional reasoning structure. This is because they are democratically unaccountable.

The form of reasoning and attendant decision-making that these institutions employ are not compatible (on their own) with liberal democracy, because their reasoning and decision-making does not stand in a transparently justificatory relationship. Their reasons and decisions are not intelligible to the public as they are not intended for public oversight or consumption and are therefore not publically justifiable in the requisite liberal democratic manner. Further, it is unclear how their internal rules of conduct could be formalized to make them compatible with intelligible institutional reasoning and equally

unclear if this formalization would be desirable overall and in all cases[89]. In connection with my other thoughts on emergencies and their administration, it is obvious that the argument that we should allow both legal and extra-legal departures from the established liberal democratic social norms due to the allegedly "exceptional" nature of emergency situations is false. None of the authors I have discussed with regard to emergencies has provided a compelling reason to believe that liberal democracies do better at dealing with emergencies by jettisoning rule of law principles and expectations. The strongest argument for this view, the one put forth by Posner and Vermeule, relies on just the type of unintelligible institutional reasoning and decision-making I have just shown to be otiose.

For their extra-legal view to go through, they need to make the case that we should allow institutions that previously relied on public justifications of their actions and reasons to act in violation of those conditions of publicity and justifiability in emergencies. I see no compelling rationale to accept this conclusion. If anything, this argumentative strategy once again makes an extraordinary claim based on controversial and defeasible premises. Just as with the contention that emergencies are "exceptional" events that sunder all previous normative and legal requirements on the part of the liberal democratic state, here too Posner and Vermeule would need to argue that public justifiability should be sacrificed so that government can better deal with the emergency at hand. Yet this account is self-contradictory, as the aim of government in a state of emergency is the protection of the public. It consequently strains reasonability to argue (as they must) that publicly justifiable institutions should shed their publically intelligible form of reasoning and decision-making in order to protect the public better. This type of argument works in non-liberal and non-democratic states, where the government sets the terms of political engagement with the citizens, but it cannot be sustained in even minimally democratic contexts.

A monarch can command compliance, but an elected representative cannot, at least not if minimally egalitarian standards of constitutional representation for all emancipated citizens are to be enforced. Too often, in debates over the proper reach and execution of emergency powers, premises that would not be acceptable in other contexts, are smuggled

[89] For more on formalization and institutional reasoning, again see M. Cohen. Last accessed October 31, 2011. http://ssrn.com/abstract=1743538

into the argument without further mention. Abuses of institutional power are abuses no matter where they occur; nothing in the nature of emergency changes this, despite the protestations of Posner and Vermeule. Further still, the logic of one form of institutional abuse of power extends to other similarly constructed cases of abuse, at least so long as the institution in question is taken to (normally) be subject to public oversight. Many of our coercive institutions are structured in such a way that their very existence is in fact justified solely by their public role. Institutions of this type, justify themselves by offering reasons which seek to underscore the protections and the benefits that they afford the public at large. Jails exist to protect the public from dangerous criminals, armies to guard against foreign enemies, and courts to ensure that collective rules are followed, all ostensibly in the interest of protecting an explicit public agreement between the citizenry and their coercive institutions. Once such an institution abuses its power, it cannot then turn around and argue that it does not need to justify its actions by making its reasons for acting public.

If the coercive institutions of liberal democracy are allowed to so excuse themselves for their abuses, then their public justifiability (and hence their reason for existing) is decoupled from the rest of the liberal democratic constitutional order in which their authority to act exists. As Mathilde Cohen argues, "proper ascriptions of reasons to institutions depend on whether they have formally adopted a common set of reasons. I contend that the correct understanding of the relationship between having a reason and giving it as a reason gives rise to what I call the 'no-priority view.' The no-priority view is simply the idea that there may be reciprocal relationships between the reasons a decision-maker 'has' and the reasons she puts forward for a given decision. Following this view, it becomes possible to understand how the legal requirement to give reasons can become an effective oversight mechanism to prevent arbitrary decision-making and increase the contestability of public decisions[90]." What Cohen makes clear is that there is a legal requirement, in addition to their being a normative requirement, for public institutions to provide publicly justifiable reasons for their actions.

This justifiability requirement extends to all liberal democratic institutions that have the coercive power to harm the public and it renders Cohen's schema an effective oversight

[90] Mathilde Cohen "The Social Epistemology of Public Institutions." http://ssrn.com/abstract=1743538

mechanism for preventing arbitrary institutional decision-making. Because Cohen's proposed mechanism ties the actions of institutions to their stated reasons, and then ties their avowed reasons (in turn) to their ability to justify their actual actions, it greatly reduces the possibility that arbitrary actions will go unnoticed, by either the public or by other agents, charged with such oversight functions. In short, the mechanism makes publicity and transparency central elements of a "social epistemology" of coercive institutions. Cohen's view is also an important corrective to the widespread tendency in political philosophy to remain agnostic as regards the epistemic dimension of coercive decision-making. By this, I have in mind the tendency to accept at face value arguments such as those proposed by Schmitt, Posner, and Vermeule, which argue that emergency events are in some sense "indefinable." It is on this basis of "indefinability" that they tender such arguments as the argument that the executive (or the "sovereign" in Schmitt's case) needs free rein during severe crises. From an epistemic viewpoint, this argument holds no water.

The fact that we cannot define an event completely in no way automatically warrants wholesale departures from established institutional rules and procedures, departures of the sort endorsed by Schmitt, Posner, and Vermeule. A careful analysis of this form of argumentation finds it wanting, and if pushed to its logical conclusions, incoherent. Wars, which are much graver events than emergencies, are not treated in this way by constitutional democracies, and there is little reason to believe that the arguments so far offered by Posner and Vermeule on behalf of this analysis of emergency government, sanction any such conclusion. It can easily be argued that wars are even less predictable than emergencies, and yet despite their severity, liberal democracies have clear rules regarding war powers, rules that do not rely on notions like "indefinability." Cohen's introduction of an epistemic dimension to this debate is I think salutary and a resource that future research should draw on freely. A key feature of liberal democratic politics, at least at the ideal level, is the commitment to equalizing asymmetries of power to limit avoidable instances of domination.

Any analysis of the way liberal democracies treat emergencies also needs take into account the social and institutional circumstances within which asymmetries of power and other rights violations are made possible by failures in institutional design and institutional

action[91]. As Lena Halldenius argues, "liberty and its restriction and violation are played out in a social and institutional setting, a setting which sets conditions for what liberty can meaningfully be understood to mean. For example, 'freedom from law' not only implies different things depending on whether we talk about freedom from the practical, moral-political, or evaluative dimension; it also means different things depending on whether our outlook is internal or external to the institution of law. Hence, what liberty is or can be and when and how it is or can be restricted, by and for whom, is largely conditioned on institutional circumstance and the vantage point from which we view our collective existence."[92] The same point can be made with regard to any individual civil or political right that one as a citizen of a liberal democratic system of government can expect to reasonably exercise (and this, with limited interference).

Those who argue in a Schmittian vein that rights and liberties can be forcefully derogated during emergencies owe citizens so affected a plausible account of why this should be. Such an account has not been forthcoming, and appears unavailable to theorists who advocate for deep derogations during emergencies, at least if Cohen's "social epistemic" view is correct. Those who accept derogation uncritically need to consider that claims to civil and political rights can be violated by institutional maleficence alone, and similarly can only be insured by accountable institutions, amenable to oversight and who function within reasonable and predictable parameters. For this reason, the idea that severe rights derogations can rest solely on arbitrary and opaque institutional reasoning (on the part of government) is unacceptable to traditional individualist liberalism, cosmopolitan liberalism, and also to newer republican versions of liberalism[93].

Halldenius can be read as arguing credibly for the view that all three versions of liberalism are (whatever their other disagreements) united by a commitment to viewing the rights of citizens as institution-dependent political values worthy of protection. If

[91] For a detailed neo-republican account of the social bases of power asymmetry in liberal democracies see Lena Halldenius "Liberty and its Circumstances – A Functional Approach" in *New Waves in Political Philosophy* (Palgrave 2009).

[92] Ibid.

[93] For development of this view along cosmopolitan lines with special attention to institutional design see Halldenius "Building Blocks of a Republican Cosmopolitanism: The Modality of Being Free" *European Journal of Political Theory* vol. 9 no. 1 12-30 (Sage 2010).

Halldenius and Cohen are right, then there are both conceptual and institutional reasons for preserving our resistance to the idea that rights should become easy to restrict in emergencies. Instead, we should look to more sophisticated institutional arrangements such as administrative detention, which is more transparent than raw derogation (and therefore more accountable) and leave derogation as an option of last resort. Like Cohen, Halldenius argues that rights should not be understood as attaching to individuals in some atomic or deracinated way, instead civil and political rights as understood within the liberal canon, are better viewed as aspects of our institutional lives in democracy on her view. As Halldenius argues, the "point is that concepts like liberty are institution-dependent and that we cannot hope to understand or even talk about what they mean without adhering to that fact. To anticipate, I will argue that even when liberty is understood in terms of the absence of law, the presence of law or the possibility of its presence will have to be assumed in principle in order for its absence to make sense[94]."

Seeing rights and access to rights, as institution-dependent, makes the tendency to derogate them at an individual level, less attractive. While Halldenius's focus is on cosmopolitanism, her account underscores something important about the linkage between our institutions and our rights, left untouched by the critiques of Schmitt, Posner, and Vermeule. Moreover, while Halldenius's key concern is with justice and liberty (and not with emergency) her account remains a valuable complement to Cohen's oversight mechanism and a welcome addition to my own republican-liberal view against derogation and arbitrary coercive measures. I therefore recommend generalizing her view, to encompass all key liberal political and civil values, not just liberal justice. My own concern with the arbitrary nature of the coercive measures recommended by Schmitt, Posner, and Vermeule, is grounded in a misapprehension over the straightforwardness with which they are willing to trade the liberty of the individual citizen, for the liberty of the executive, or the liberty of the state. There is no seeming realization in their respective views of the interconnections between rights (like the right of liberty) and their institutional grounding.

This type of misapprehension is widely shared by various authors and is the core of the liberal-republican view of liberal democratic rights, which has informed my view of

[94] Halldenius "Liberty and Law: Institutional Circumstances of Freedom" in *Redescriptions: Yearbook of Political Thought and Conceptual History* (99 2007).

what is permissible and what impermissible in emergencies. One need not however find republicanism plausible or even attractive to agree with the cogency of my critique, traditional liberalism argues much the same thing with regard to how rights can come to be rescinded or contracted. Genuine emergencies are severe events that require careful administration. Nevertheless, not every event labeled an emergency is a genuine, for that reasons I have already offered. Further, even in emergencies, one's rights do not cease to exist in sole virtue of an emergency obtaining, and here I have given both conceptual and institutional reasons for why this is the case (aided by the work of others).This final chapter has offered some reasons for thinking that more work needs to be done in this area and has forged some new paths toward such research. That being said the overall view it advances is not unduly controversial and it can be summed up thusly. Liberal democracies infringed on civil and political rights to the extent that an agent appointed by the government has the power to interfere (with impunity and at will) with one's constitutionally guaranteed rights. Whether this interference actually takes place or not, is not always the issue, as the threat of such derogations of rights are enough to constitute a threat to healthy citizenship.

A legitimate constitutional democracy respects and protects the civil and political rights of citizens, even under non-optimal circumstances. Otherwise, liberal democracy remains open to Schmitt's general challenge, which I discuss again briefly below. While a democracy can impose certain constitutional restrictions on civil and political rights, these rights need to create an institutional "shield" against vulnerability to the arbitrary institutional and coercive interference of state agents and representatives. Moreover, for these rights and freedoms to be of lasting value, my account argues that they must also be institutionally secured, even in genuine emergencies. Pointedly, Schmitt once asked what distinction marks "political" concepts off from other concepts. What set of distinctions make the language of "politics" different from legal language or from coercive speech or action in general? His answer to these questions came to define much of the rest of his thinking on political philosophy. Critics of liberalism influenced by Schmitt continue to argue that he shows an important weakness with liberal democracy. I disagree with these critics, but I have granted throughout, their point that Schmitt located a blind spot in liberal thought, one that liberalism is incapable of recovering from, if it does not come to terms with its own core political commitments.

Schmitt is right that liberalism's commitment to pluralism and its rejection of homogeneity in all its forms is a potential weakness, but he fails to see that it is also a potential strength. When push comes to shove, Schmitt argues that liberal tolerance will wane during a crisis (like an emergency) and that people will come to distrust those who are most unlike them, resorting to a form of tribalism against any imminent threat. They will in short, reinstate the distinction between "friends and enemies" that Schmitt believes to be the hallmark of all politics and in so doing will undercut the liberal state's institutional authority, making it weaker and susceptible to further attack from its enemies. Emergencies (some think) exemplify this insight of Schmitt's, going so far as to argue that states have one logic in emergencies, and citizens another. Conservative supporters of Schmitt's view have something like this "dual logic" scenario in mind, when they argue that the state should coercively derogate rights and do this unilaterally in emergencies. The issue cannot be cast aside as a curiosity, as the issue of institutional stability is central to liberal thought. Rawls for example, sought to address issues of legitimacy and stability in his theory of political liberalism.

Many commentators take Rawls to have made progress on this front, but to have ultimately failed to offer a fully persuasive argument against political skeptics like Schmitt. Much contemporary liberal theory sidesteps this dilemma without answering it. This dissertation has sought to offer a rebuttal to this type of skepticism about the ability to of liberal democracies to deal with crises like emergencies. The answer I developed here argues that liberal democratic constitutional rights function in an institutional matrix, which guarantees their applicability, because that institutional matrix links the rights of individual citizens to a (potentially) transparent logic of institutional action. If its institutions work correctly, when a liberal government issues a state of emergency, its citizens rights remain protected for the duration of the emergency, thus undercutting the partisan and factional tensions that Schmitt believes will eventually undermine democracy. I provided necessary and sufficient conditions for genuine emergencies to exist, while also giving reasons for being skeptical of those who see emergencies as chimerical, or those who view every crisis as a state of emergency.

I have additionally argued that a clearer understanding of the justificatory character of contemporary liberalism yields two significant benefits that have so far been

undervalued in the literature and that can help quell misunderstandings of ways constitutional democracies deal with emergencies and other crises. First, liberals can justify rights in a particular way, that is to say institutionally. Contemporary liberal democracies accord rights to persons, not to traditions and only sometimes to groups, as a way of securing both cooperation between citizens and as a way of ensuring social and institutional stability. Comparing Schmitt's Manichean view, with the liberal view, has allowed us to see what is important in Schmitt and to separate that from what is irrelevant in his challenge to the liberal way of dealing with emergencies. Second, proceeding as I have in the preceding chapters allows liberalism the use of its full resources in the attempt to meet Schmitt's challenge and the challenges he has inspired. By displaying the link that exists between democratic liberalism's institutional egalitarianism and its commitment to respecting citizens' rights (even in emergencies) I have I think underscored liberalism's advantages over authoritarian proposals like Schmitt's.

By trying from various directions at once to undercut the premises and assumptions that have given rise to the view that liberal democracies cannot deal with emergencies without turning into authoritarian states, I hope to have cast doubt on the cogency and validity of the ideas that Schmitt and others have embraced with regard to the way liberal democracies deal with states of emergency. Finally, following Colin Bird and against Schmitt, Posner, and Vermeule, I propose that there are two types of general standards that one can appeal to in a reasonable disagreement over a political issue: Opaque Standards and Transparent Standards. Transparent standards are simply norms the grounds of which are available to all. Opaque standards make use of norms that are only open to some. For example, one appeals to an opaque standard, when claiming that only members of a given cultural group can judge whether a certain intra-group action was right or wrong. By making group membership a prerequisite for the application of a standard of rightness or wrongness, as Schmitt does and as Posner and Vermeule do in holding the executive branch to be over and above the rest of government, one already delimits the types of arguments available for consideration, as well as limiting the number of individuals entitled to offer an opinion on whatever actions are to be taken.

Liberal societies seek to implement transparent standards as widely as possible because contemporary liberals believe that "the criteria according to which we distinguish true from false beliefs apply equally to everyone. If individuals are to be able to claim to others and themselves that they are justified in holding certain beliefs, they can only do so on the basis of standards which apply to all" (Bird 1996 75[95]). These types of appeals extend to liberal democratic institutions and to institutional reasoning in liberal democracies. When normative appeals are made on opaque grounds, there is both a failure to communicate effectively and failure to evince respect for the status of citizen and the status of our representative institutions. What we fail to respect when we make opaque claims of the type Schmitt makes (or argue for unilateral action, as Posner and Vermeule do) is the other's ability to distinguish good reason from bad reasons or relevant actions from irrelevant actions. This is part of the reason that I earlier characterized Schmitt's political philosophy as largely authoritarian, for it places state sovereignty and state coercion over and above other values, and does this on opaque grounds.

Schmitt's views fail to do something that contemporary liberalism does very well, namely he fails to accord individuals *authority over their own judgments*. It is not enough to allow others room to express themselves, their judgments about their own reasoning, must carry some institutional weight if it is to be political binding. Otherwise, we are merely paying lip service to the opinions of others rather than counting them as equal citizens. There is also a difference, which Schmitt and those influenced by him gloss over, between disagreement and the use of opaque reasoning. Liberal democratic states at their best are not simply assemblages of political factions, because there is communication and interplay at both the intra-group level and the inter-group level. Institutional reasons matter in political decision-making, in a way not allowed for on the Schmittian view endorsed by many who write about emergencies. The way we think about our institutions in liberal democracy is both normatively significant (particularly with concern to their coercive profile) and practically important. Nowhere is this more apparent than in states of emergency. In the end, two aspects of emergency management that are often analyzed and used separately need to be conjoined in practice.

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[95] Colin Bird "Mutual Respect and Neutral Justification" Ethics Vol. 107, No. 1, Oct., 1996 (Chicago).

Both our theories of emergency politics and our theories of emergency judicial review need to work in tandem if liberal democracies are to administer states of emergency efficiently and coherently. The normative and procedural elements of emergency management need to be brought into alignment. An account of emergency politics I have tried to show, must not only assess whether governmental decision-making is better or worse in an emergency, but also do so according to a normative standard, which is consonant with the non-emergency principles and practices of liberal democracy. I have been explicit throughout the dissertation that the relevant normative standard must be multidimensional and not binary. An emergency account of emergency judicial review on the view I have presented and defended would be what Posner and Vermeule label a "non-deferential" view of judicial review. This means that no branch of government can be override established constitutional rights and freedoms, except to the extent that administrative rules such as those put forth by Guiorna are respected, even in supreme cases of emergency. While Posner and Vermeule are correct to note that in principle theories of emergency politics and theories of emergency judicial review can be logically detached from one other and offered separately, in practice I have aimed to show (among other things) that this view is otiose.

Against that view of judicial review and emergency politics as separable, I have presented a framework that shows that even with limited institutional competence, liberal democracies can both defend themselves and their citizens as well as staying true to their founding principles and practices. Liberal states can make good on the expectations created by the myriad social norms which guide their conduct and their overall institutional form of reasoning. With Lazar, I also argued that non-judicial actors such as legislators and executive officials need to protect civil liberties vigorously in emergency situation while remaining cautious of the historical failings displayed by these non-judicial actors. I remain unconvinced by her view that informal institutional mechanisms do a better job of preserving rights than formal institutional constraints do, while granting the import of informal institutional cultures during emergencies. Even if one remains unconvinced by my arguments about the best way to conceptualize emergencies, there remain important considerations that are only obscured by treating the various elements that constitute an emergency in isolation from one another. The difficulty in thinking about emergencies, as I

hope to have shown is that they affect multiple areas of logical space at once when they occur. These changes in logical space affect how we think about emergencies and in the end affect how we act toward them. The social norms that guide our collective conduct in society crisscross the various areas I discussed here. Social norms influence both normative and institutional reasoning, as well as influencing which empirical considerations we weight most heavily in an emergency and which we discard. This type of overlap cannot cogently be ignored in practice and it should not be ignored when thinking philosophically about emergencies. I hope to have been successful in at least showing that the interplay of these various factors merits sustained attention.

APPENDIX:

NOTES ON METHODOLOGY

In the interest of clarity, I wish to conclude this dissertation with some notes on my methodological commitments. Throughout, I have endeavored to use the method of wide reflective equilibrium to justify and defend my views about how we think about emergencies. Wide reflective equilibrium (henceforth WRE) is a coherentist method of epistemic justification. It is used in ethics, political philosophy, inductive and deductive logic, aesthetics, as well as in the philosophy of science, among other areas in philosophy. Beginning with our considered judgments on a given issue, we examine the fit between our specific beliefs about the issue while contrasting these already held beliefs with general principles and rules that we take to be relevant to our investigation. Note that considered judgments are not prejudices, but carefully weighed considerations about what data are

relevant to our decision-making. Such data often include normative data. Considered judgments also include considerations of what rules and moral commitments need to apply (or not apply) to various cases under consideration. In moving back and forth between our considered judgments and beliefs and new data that may not fir with these, we as inquirers are attempting to secure the most coherent fit between our rules, our principles, and our beliefs, as concerns the issue we are examining. To secure such a fit, some ideas will need to be modified while others will stand firm. The coherence we are trying to reach is a regulative ideal and not an actual point of stasis. In the end our reasons should cohere with each other in such a way as to provide support and explanatory power for whatever judgments we subsequently arrive at concerning the issue at hand. Because WRE is a dynamic methodology, we can alter our beliefs, our considered judgments, our rules of thumb, or the general principles we hold, should new evidence make that necessary. As we are supposed to be using our considered judgments in our reflections, and not just any judgments or beliefs we happen to hold, WRE acts as a filter for what can count as an eligible judgment, and what cannot. In this context, "considered" means something like "well-thought-out," where a set of considered judgments are equivalent to well-thought-out judgments rather than reactionary or prejudiced judgments. As new beliefs, facts, principles, or rules of thumb are adopted, others are jettisoned in the interest of creating the greatest overall coherence possible. In practice, full coherence is rarely (if ever) reached.

Instead, WRE functions as a normative/epistemic ideal, one which we try to attain in the course of inquiry. It is a ruler against which we can measure any progress that is being made in our understanding of a given issue. Here, I tried to show that our accepted view of what constitutes a state of emergency is mistaken by cycling through various beliefs and judgments and contrasting these with other considerations which may also be relevant to our way of thinking about emergencies. I endeavored to expose the tensions that beset our present understanding of states of emergency and concluded (and subsequently argued for the view) that emergencies are not always what we pre-reflectively take them to be. Further, liberal democracy and the rule of law are also placed in a position of non-coherence once faced with emergencies. How can a liberal democracy deal with a state of emergency but also continue adhering to the rule of law when its key institutions are being placed in peril? My answer to this question has been multifaceted, as I proposed that we

analyze the concept of emergency first before attempting to integrate it into emergency management. My approach throughout has been philosophical and normative (and not empirical) even though WRE does not posit a hard distinction between the empirical and normative, but rather thinks of the empirical and the normative as two poles on a shared spectrum, with each informing the other[96]. I share this view and eschew strong distinctions between empirical knowledge and conceptual knowledge. Knowledge on my view is unified and multifaceted and the distinction between facts and norms is largely chimerical. My concern here was with the way our social norms and expectations hang together when we think about emergencies. I placed this concern within the context of a republican informed liberal democracy to see how it would fare, philosophically speaking. My concern has not been with the actual reasons politicians may give in emergencies or with the limitations experienced by various government agencies or institutions. These are all important elements in the overall story of state emergencies, but that is not the story I tried to tell. My investigation concerns the internal coherence of the concepts we use to understand (and eventually administer) states of emergency when these occur and with the effects these actions will have on the freedom preserving elements of republican citizenship.

The administrative and empirical aspects encountered are secondary to the conceptual challenges that I have tried to disentangle. Relying on WRE, I have tried to present uncontroversial and unobjectionable criteria for what constitutes an emergency, conceptually speaking. To do so I turned to our everyday linguistic practices. I explored how we speak and reason about emergencies and then proposed what I take to be significant correctives to these quotidian ways of speaking and thinking about emergency events. Habits like beliefs can be revised in the face of a method like WRE and that is what I tried to do here; revise our views on what constitutes an emergency in the most general relevant sense. Unlike many of the authors I examined, I do not take our established practices to be immutable or clear; in fact many of our practices regarding emergencies are seemingly opaque. Moreover, our practices surrounding administration, discussion and

[96] For book-length defenses of this view of WRE and the relationship between empirical data and normative rules, see Kai Nielsen *Naturalism without Foundations* (Prometheus Books, 1996) and Norman Daniels, *Justice and Justification: Reflective Equilibrium in Theory and Practice* (Cambridge University Press, 1996).

reflection on emergencies, prove on my view to be anything but consistent and normatively coherent. So by using WRE I have tried to clarify both the meaning of emergency as well as try to point to some practical ways in which our ways of dealing with emergencies can be brought closer in line with our liberal democratic practices and norms (to say nothing of our legal practices). To make these types of changes we need to be able to reason with one another clearly and consistently. This meager and straightforward goal cannot be met however if we continue to define emergencies as we see fit, without recourse to explicit criteria for our definitions, or by simple appeal to what governments do or do not do. World governments perform many actions which most of us find normatively suspect and at times even manifestly illegal. Their actual conduct can only be corrected through the checks and balances of the institutions that make up the government in the first place. Without being clear about our goals and our concepts, we cannot sensibly ask for reform from our institutions. One cannot demand justice without some sensible notion of what justice consists in or not without the sense that a specifiable injustice has occurred. Similarly, we cannot deal with states of emergency if we do not know what they are. I proposed and defend a simple standard for such "knowledge," namely that a genuine emergency event had to conform to necessary and sufficient (logical/linguistic) criteria for so being. My account then proposed three such criteria for emergencies: that they are sudden, unforeseen, and serious events, capable of doing great damage.

This constitutes what I term my "definitional" account of genuine emergencies and while I am not the first or the only one to conceive of emergencies in this way (Gross does this as well) my view is the most comprehensive of the views that rely on straightforward criteria for defining emergencies. Further, mine is the only account to offer a republicanized view of liberal democratic rights under states of emergency. My dissertation (in short form) is about the *relationship* between liberal democracy and the ways in which it deals with emergencies. I propose that the tensions one finds in liberal democratic accounts of emergency can be traced to a conceptual source. I then diagnosed what I took to be the conceptual bottleneck that leads to some of these tensions, and recommend a minimalist conception of what constitutes an emergency, a conception that can undo some of the tension, thus rendering liberal democracy more internally coherent at the conceptual

level. I also argue that conceptual clarity can at times lead to greater clarity at the level of practice, given the way that social norms can sometimes guide actions. And while emergencies do not need to be conceptually distinguished from disasters and catastrophes, I offer such a conceptual distinction in the interest of demarcating clearly how emergencies differ from these other sorts of events, with which emergencies are often conflated. The *comprehensive* minimalist conception I offer differentiates my view from the views of other authors writing about emergency in philosophy and further shows why disasters and catastrophes are not emergencies. Further, disasters and catastrophes are often mixed up with emergencies and I tried to show how they are importantly dissimilar from each other by pointing out the salient differences. This comparison of emergencies, disasters, and catastrophes, it should be noted, is distinct from my claims about the relationship between liberal democracy and the ways in which it deals with emergencies. I address disasters and catastrophes to illustrate what is distinct about emergencies. Nothing methodological turns on my discussion of disaster and catastrophe. Emergencies are not disasters and they are not catastrophes, and while much of the literature runs them together, this is a mistake. I was merely pointing out that error. The points I do make about disasters and catastrophes are subordinate to the points I make about emergencies in liberal democracy, which is my key focus throughout.

Turning to another issue related to the structure of my argument, one key claim I make about derogation is that it is overused and that it yields poor results in emergencies. I grant that in certain select cases, which I describe at length in the dissertation, rights may indeed need to be derogated in cases of genuine emergency. I also lay out explicit criteria for when such emergencies obtain and when they fail to obtain. I argue at length that it is incumbent upon the state to prove its case that rights need to be derogated and that said derogation would improve the state of affairs caused by the emergency. Otherwise, derogation should be off-limits. In this, I merely stand with the established scholarship on the way rights are to be protected or derogated in liberal democratic political philosophy. I make no controversial claims with regard to rights. I merely point out (with Ackerman, Dworkin, and others) that derogation is a serious matter and one that requires explicit justification, particularly when the derogation is *arbitrary*. I simply add to this existing

caveat that clear criteria for when a genuine emergency obtains can help with such explication and justification. Part of the problem with existing treatments of emergency is the tendency to offer extensive taxonomies without analyzing the *concepts* that undergird these said taxonomies. This is precisely one of the substantive points I make throughout the dissertation, even if I do not strive to offer a taxonomy of emergency of my own. While I quote authors who write about taxonomies of crises, I myself do not because I do not find them philosophically helpful, save for illustrating the distinction between an everyday emergency and other forms of politically relevant emergencies. One of my goals was to show that we need to first understand and better define the concepts we use before constructing taxonomies. Conceptual clarity is not a side effect of my project; it is a core constituent whereas emergency taxonomies are not, even though they are a popular and influential way of discussing emergency events in the literature. So for the sake of clarity, I am not developing "conceptual taxonomy" within the dissertation, despite the fact that I analyze taxonomies that have been developed by other authors. Instead, I am analyzing the way key concepts in the literature on liberal democracy and emergency are used and understood and how they are connected to arbitrary coercion on the part of the liberal democratic state. I then tried to clarify and offer minimalist criteria for key concepts such as "emergency." The link between liberal democracy as a political philosophy and its understanding of emergency are what interests me.

If I were simply offering a taxonomy of the concept of emergency, then I would not address liberal democracy, republican criticisms of liberalism, questions of institutional design, or questions concerning the use of opaque reasons, in the dissertation, all of which I do extensively, particularly in the latter chapters. Nor would I discuss liberal democratic rights as extensively as I do if the main aim were taxonomic. Dealing with concepts is difficult, as one does not just analyze the word or idea behind a given concept but also a set of practices and even intuitions to some extent, particularly if dealing with legal and political concepts that attach to concrete institutions in the social world. No definition of a concept can be complete, especially if the concept's usage in the language is deliberately vague, as is the case with certain words. This vagueness is not a failing but rather a feature of the multifaceted ways the word or concept may be used. I allude and accept this type limitation when I write (as I did on page 144) that Hemple's distinction between real and

nominal definitions in this regard. Hemple argues that terms like "emergency" and "disaster" are "class terms," terms that are intended to preserve some significant measure of ambiguity within the definition itself. Greater clarity is neither required nor requisite for us to use "class terms" properly. I concur with Hemple in this respect. My attempt is not to offer a strict definition but rather to offer an outline of the proper conditions required by a polity to enact a "state of emergency." Mine was a project in philosophy and not in linguistics. Issues of definition are secondary to this main task of providing reasonable conditions for declaring an emergency in a liberal democracy. These conditions have both an institutional and a conceptual character, as I have argued. Even in cases where some attempt is made to define emergency in law, the result is typically philosophically unsatisfactory. Canada's *Emergencies Act* for example fares no better than any other comparable act of law designed to administer emergencies. Nowhere does the Act define the term "emergency," despite the fact that Article 17 of the Act itself states that the emergency *must* be defined. The exact wording is: "A declaration of a public order emergency shall specify concisely the state of affairs constituting the emergency." Yet this is never done either in practice or in the body of the Act itself. This is exactly the philosophical crux of the thesis; this initial step is never made, not in law and not in politics. It is merely assumed and never addressed explicitly. David Dyzenhaus is in general agreement with this point, as is William E. Scheuerman.

Additionally, despite Oren Gross's definition of emergency being similar to mine, he draws importantly different conclusions, and does not address the issue of arbitrary coercion at all on his view. Catastrophes and disasters for their part pose their own problems I argued, problems that are also often misunderstood by many commentators. There is nothing substantive that a government can do in an extinction-level catastrophe of the type described by Posner and others. Disasters are somewhat manageable but wholesale catastrophes are not. Short of evacuation or dissemination of information, a government cannot prevent or mitigate enormous catastrophes, as these by their nature cannot be mitigated. They are too powerful and too destructive. Even small-scale industrial incidents with clear guidelines and explicit protocols like the nuclear meltdown at Fukushima Dai-ichi yielded no organized intervention. Once the event occurs, many of the explicit protocols were jettisoned or ignored. There is an enormous difference between saying

something and doing something and this is one of many important conceptual/normative distinctions that my dissertation addressed.

I conclude with an empirical example from the recent past. The SARS outbreak in Toronto can help me illustrate my point about the *disconnect* that exists between what a set of emergency protocols *say* and what they as a matter of application actually *do*. While it is assumed that intervention on the part of authorities will always arrest an incident (be it an emergency, catastrophe, or a disaster) this is not always the case empirically speaking. Sometimes, the state's interventions do nothing but make things worse. In this spirit, consider the following empirical case. Here is a summary and "aftermath review" of those aforementioned SARS measures from the *Canadian Journal of Infectious Diseases*. It shows just how much of a departure from the World Health Organization's guidelines the Toronto quarantine in fact was and how off target the enacted emergency measures ended up being. Instead of resolving the conceptual difficulties posed by emergencies and elaborated on in this dissertation, the summary below shows (in part) that empirical inputs in "crisis reasoning" are rarely decisive in and of themselves. Just because a SARS protocol exists does not mean it will be interpreted and applied correctly or reasonably or successfully. For that, more needs to obtain, and I have attempted to explicate what these additional logical features must be for emergency events to be thought of and acted upon correctly and fruitfully. Facts do not interpret themselves and policies do not self-correct if they are misapplied.

The nexus between facts and norms needs to be analyzed as well; anything less than this increases our chances of failure rather than of success. Social norms are intended to bridge this gap between facts and norms and emergencies do not circumvent or evade this feature of social life. I end with an empirical caution. As noted in the *Canadian Journal of Infectious Disease Medicine and Microbiology* even well understood medical phenomena such as SARS can evade our best efforts to manage them. Often the failure is not empirical or legal, but instead conceptual, in the broad sense of that term. The failure below illustrates this point with regard to SARS[97]:

[97] *Canadian Journal of Infectious Disease Medicine and Microbiology 2004 Jul-Aug; 15(4) (204)*

Quarantine, the isolation of asymptomatic individuals who are thought to be incubating infection, was a prominent control strategy used in the recent severe acute respiratory syndrome (SARS) outbreaks. A recent report about the public health efforts to control SARS in Toronto concluded that in future outbreaks "for every case of SARS, health authorities should expect to quarantine up to 100 contacts." This is a remarkable conclusion. It is one thing to resort to an unproven intervention in the crisis posed by a novel disease threat; however, it is quite another to recommend the continued use of this intervention after the dust has settled and we know, or should know, a great deal more about the problem at hand. Mass quarantine for disease control was essentially abandoned last century. Does it deserve a second look? An outbreak should meet the following three criteria for quarantine to be a useful measure of disease control:

> First, people likely to be incubating the infection must be efficiently and effectively identified;
>
> Second, those people must comply with the conditions of quarantine; and
>
> Third, the infectious disease in question must be transmissible in its presymptomatic or early symptomatic stages.

The use of quarantine in the Toronto outbreak failed on all three counts. SARS quarantine in Toronto was both inefficient and ineffective. It was massive in scale. Toronto public health authorities quarantined approximately 100 people for each SARS case, while Beijing public health quarantined about 12 people for each SARS case. An analysis of the efficiency of quarantine in the Beijing outbreak conducted by the American Centers for Disease Control and Prevention concluded that quarantine could have been reduced by two-thirds (four people per SARS case), without compromising effectiveness if authorities had "focused only on persons who had contact with an actively ill SARS patient". This analysis suggests that Toronto quarantined at least 25 times more people than was appropriate. Concerns about this inefficiency were raised quite early in the outbreak. The Toronto quarantine was clearly ineffective in identifying potential SARS patients. At least the first 50 cases in the second phase of the outbreak were not quarantined. Compliance with the Toronto quarantine was poor.

Only 57% (13,291 of 23,103) of people quarantined were 'compliant', according to Toronto officials, although how this was defined and measured is not clear. It is hard to understand how anyone could attribute the rapid and effective elimination of an infectious disease to an intervention with such low compliance. We now know a great deal more about the natural history of SARS and its transmission. In fact, the evidence is compelling and shows that SARS is not infectious during the preclinical phase and does not become significantly infectious until the symptomatic illness is well-established. Peak infectivity is in the second week of clinical illness. If ever an infectious disease was ill-suited for quarantine, it is SARS. Did quarantine work for SARS? Notwithstanding the conclusions of the Toronto public health group, I think the evidence is now overwhelming that quarantine played little or no role in controlling SARS. Furthermore, mass quarantine, as practiced in Toronto, did considerable harm by sapping public health resources and fueling public anxiety. SARS was rapidly controlled and eradicated in Toronto and everywhere else that it appeared. Fundamentally, this is because SARS is only capable of sustained transmission in

hospitals that do not suspect its presence. SARS is not capable of sustained transmission in the community. Case identification and isolation in hospitals is what controlled SARS. Quarantine, as such, played no role. In the unlikely event of another SARS outbreak in Canada, public health officials should quarantine no one. Instead, they should identify and observe close contacts of cases, i.e., people with a 'reasonable suspicion' of SARS. These close contacts should be isolated if, and only if, they develop symptoms consistent with the current recommendations of the World Health Organization.