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Oren Gross

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# Article

## **Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?**

**Oren Gross<sup>†</sup>**

### CONTENTS

I. INTRODUCTION .....	1014
II. DEMOCRACY AND STATES OF EMERGENCY:	
A TENSION OF “TRAGIC DIMENSIONS” .....	1027
A. <i>Action over Deliberation</i> .....	1031
B. <i>Judicial Deference</i> .....	1034
C. <i>Public Support, Temporal Duration, and “Otherness”</i> .....	1035
D. <i>Perceptions and Misperceptions</i> .....	1038

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III. KEEPING THE LAW ON OUR SIDE:	
CONSTITUTIONAL MODELS OF EMERGENCY POWERS .....	1042
A. <i>The Business as Usual Model</i> .....	1043
1. <i>"It is imperative that the trains run on schedule."</i> .....	1043
2. <i>Challenges and Justifications</i> .....	1044
a. <i>The Charge of Hypocrisy</i> .....	1044
b. <i>Absolutism and Resistance</i> .....	1046
i. <i>Constitutional Absolutism and Perfection</i> .....	1046
ii. <i>A Strategy of Resistance</i> .....	1048
iii. <i>Myths, Symbolism, and Ideals</i> .....	1050
iv. <i>Slippery Slopes</i> .....	1052
3. <i>Courage and Relevancy: Ex parte Milligan</i> .....	1053
B. <i>Models of Accommodation</i> .....	1058
1. <i>"Each crisis brings its word and deed."</i> .....	1058
a. <i>Interpretative Accommodation</i> .....	1059
b. <i>Legislative Accommodation</i> .....	1064
i. <i>Modifying Ordinary Laws</i> .....	1065
ii. <i>Special Emergency Legislation</i> .....	1065
c. <i>Executive Inherent Powers</i> .....	1066
2. <i>Challenges and Justifications</i> .....	1068
IV. THE ASSUMPTION OF SEPARATION .....	1069
A. <i>Normalcy and Emergency:</i>	
<i>The Discourse of Rule and Exception</i> .....	1070
B. <i>Four Degrees of Separation</i> .....	1073
1. <i>Sequencing and Temporal Distinctions:</i>	
<i>Separating the Best and the Worst of Times</i> .....	1073
2. <i>It's a Bad World out There (I):</i>	
<i>Spatial Distinctions</i> .....	1075
3. <i>It's a Bad World out There (II):</i>	
<i>Domestic and Foreign Affairs</i> .....	1077
4. <i>Communal Divisions: Us vs. Them</i> .....	1082
C. <i>The Breakdown of the Normalcy-Emergency Dichotomy</i> .....	1089
1. <i>Normalization of the Extraordinary</i> .....	1089
2. <i>Increasing Dosages</i> .....	1090
3. <i>One Can Get Used to This</i> .....	1092
4. <i>Persistence of Judicial Precedents</i> .....	1094
5. <i>Structural and Institutional Changes</i> .....	1095
V. THE EXTRA-LEGAL MEASURES MODEL .....	1096
A. <i>Ethic of Political Responsibility</i> .....	1102
1. <i>Locke's Theory of the Prerogative Power</i> .....	1102
2. <i>Theory: Searching for "Moral Politicians"</i> .....	1104

3.	<i>Practice: "Casting Behind Metaphysical Subtleties"</i> .....	1106
4.	<i>Ex Post Ratification</i> .....	1111
B.	<i>Challenges and Justifications</i> .....	1115
1.	<i>A Nation Worth Saving?</i> .....	1115
2.	<i>Acting upon Great Occasions</i> .....	1118
a.	<i>Warning: You Are Now Entering an Emergency Zone. Usual Categories of Judgment No Longer Apply!</i> .....	1118
b.	<i>The (Not So) Obvious Case for Rule Departures</i> .....	1121
i.	<i>Crossing the Threshold (and Giving Reasons for It)</i> .....	1122
ii.	<i>Open and Informed Public Deliberation</i> .....	1126
iii.	<i>Precedents: Hard Cases Make Bad Law</i> .....	1130
VI.	CONCLUSION: FAITH AND MICROSCOPES .....	1134

Books on constitutional law find little to say about emergency powers . . . .<sup>1</sup>

[W]e urgently require new constitutional concepts to deal with the protection of civil liberties. Otherwise, a downward cycle threatens. After each successful attack, politicians will come up with repressive laws and promise greater security—only to find that a different terrorist band manages to strike a few years later. This disaster will, in turn, create a demand for even more repressive laws, and on and on.<sup>2</sup>

I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes . . . . Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.<sup>3</sup>

## I. INTRODUCTION

The terrorist attacks of September 11, 2001, and the ensuing “war on terrorism” brought to center stage issues that have previously lurked in a dark corner at the edge of the legal universe, such as how a constitutional regime should respond to violent challenges.<sup>4</sup> This question is as ancient as the Roman Republic<sup>5</sup> and as new as the realities wrought by the terrorist

1. Ian Brownlie, *Interrogation in Depth: The Compton and Parker Reports*, 35 MOD. L. REV. 501, 501 (1972).

2. Bruce Ackerman, *Don't Panic*, LONDON REV. BOOKS, Feb. 7, 2002, at 15.

3. LEARNED HAND, *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 189-90 (Irving Dilliard ed., 3d ed. 1960).

4. By “violent challenges,” I mean such events as rebellions, wars, or terrorist threats and attacks. As explained below, my focus in this Article is on violent crises and emergencies as distinguished from economic crises and natural disasters. Cf. ALEX P. SCHMID & ALBERT J. JONGMAN, *POLITICAL TERRORISM* 1-38 (1988) (describing the problems associated with defining “terrorism”); Oren Gross, *“Once More unto the Breach”: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies*, 23 YALE J. INT’L L. 437, 438-39 (1998) (describing the problems associated with defining “emergency”); Keith E. Whittington, *Yet Another Constitutional Crisis?*, 43 WM. & MARY L. REV. 2093, 2096-98 (2002) (describing the problems associated with defining “crisis”).

5. For a discussion of the Roman dictatorship, the constitutional institution used by the Roman Republic to deal with states of emergency, see, for example, M. CARY & H.H. SCULLARD, *A HISTORY OF ROME* (3d ed. 1975); and CLINTON L. ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* 15-28 (1948). Alexander Hamilton also commented on the Roman dictatorship:

Every man the least conversant in Roman history knows how often that republic was obliged to take refuge in the absolute power of a single man, under the formidable title of dictator, as well against the intrigues of ambitious individuals who aspired to the tyranny, and the seditions of whole classes of the community whose conduct threatened the existence of all government, as against the invasions of external enemies who menaced the conquest and destruction of Rome.

attacks of September 11th. It has faced nations embroiled in wars against external enemies, as well as those responding to violent movements within their own borders. It has haunted countries powerful and weak, rich and poor. The dilemma confronting a constitutional democracy having to respond to emergencies has been famously captured by Abraham Lincoln's rhetorical question: "[A]re all the laws *but one* to go unexecuted, and the Government itself go to pieces, lest that one be violated?"<sup>6</sup> Yet, prior to the attacks in New York, Washington, and Pennsylvania, violent crises and emergencies and their implications for legal systems had not attracted much attention in legal scholarship. Ian Brownlie's perceptive observation about the scant attention given to such issues in studies of English constitutional law<sup>7</sup> can be applied, with at least equal force, to the United States. Discussion of emergency powers in general, and counterterrorism measures in particular, has been relegated to a mere few pages, at most, in the leading American constitutional law texts.<sup>8</sup> Nor has the situation been much different in other countries.<sup>9</sup> Emergencies have been conceptualized as

THE FEDERALIST NO. 70, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

6. Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 421, 429-30 (Roy P. Basler ed., 1953) [hereinafter COLLECTED WORKS].

7. Brownlie, *supra* note 1. Since 1972, when this observation was made, a number of books have been dedicated to dealing with emergency powers and counterterrorism in the United Kingdom. See, e.g., DAVID BONNER, EMERGENCY POWERS IN PEACETIME (1985); CLIVE WALKER, THE PREVENTION OF TERRORISM IN BRITISH LAW (2d ed. 1992); PAUL WILKINSON, TERRORISM AND THE LIBERAL STATE (2d ed. 1986). However, and notwithstanding those publications and the interest in the complex issues that terrorism in Northern Ireland raises, to date there is still little discussion of these issues in the leading treatises on English constitutional law. See, e.g., A.W. BRADLEY & K.D. EWING, CONSTITUTIONAL AND ADMINISTRATIVE LAW 667-94 (12th ed. 1997).

8. Indeed, none of the following selected texts have the word "emergency" or "emergency powers" in their index. See, e.g., PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 378-97 (4th ed. 2000) (discussing World War I and the First Amendment cases); *id.* at 704-24 (discussing war and emergency powers); GERALD GUNTHER, CONSTITUTIONAL LAW 351-70 (12th ed. 1991) (discussing separation of powers in the context of foreign affairs and war); GEOFFREY STONE ET AL., CONSTITUTIONAL LAW 477-88 (3d ed. 2000 & Supp. 2002) (discussing war powers generally); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 965-67 (3d ed. 2000) (discussing war powers).

While a full exposition of the reasons for this apparent lack of interest is beyond the scope of this Article, the following reasons may be noted briefly. First, for those steeped in the liberal legal tradition, principles of generality, publicity, and stability of legal norms form part of the bedrock of the rule of law. Emergencies tend to challenge those tenets since they often call for particularity and extremely broad discretionary powers, while the forces they bring to bear on the relevant society are inherently destabilizing. Second, the geopolitical position of the United States and its history have facilitated the externalization of conflict. Violent emergencies have been mostly regarded as falling within the realms of foreign affairs and national security, which have traditionally been treated as deserving special treatment and as standing outside the normal realm of constitutional legal principles, rules, and norms.

9. E.g., TONY BLACKSHIELD & GEORGE WILLIAMS, AUSTRALIAN CONSTITUTIONAL LAW & THEORY: COMMENTARY & MATERIALS 647-74 (2d ed. 1998) (discussing the defense power as related only to times of war or preparation for war); PETER HOGG, CONSTITUTIONAL LAW OF CANADA ¶¶ 17.4-17.5 (4th ed. 1997 & Supp. 2001) (describing the relationship of "emergency"

aberrations, rare and uninteresting exceptions to the otherwise ordinary state of affairs.<sup>10</sup> As Fred Schauer suggested in another, yet related, context, the exception has been “an invisible topic in legal theory.”<sup>11</sup>

In the context of emergency powers, the exception is no longer invisible. Nowhere is this more pronounced than in the current controversy over the possible establishment of special military tribunals. Until relatively recently, few (legal academics and practitioners included) were aware of the Supreme Court’s decision in *Ex parte Quirin*<sup>12</sup> or of the requirements set forth by the international laws of war for acquiring the status of lawful combatancy. Certainly, more were familiar with the 1866 decision in *Ex parte Milligan*,<sup>13</sup> but even there, one suspects that the extent of such familiarity was quite limited.

All this changed when President Bush signed an executive order on November 13, 2001, authorizing special military tribunals to try aliens who are either suspected of involvement in terrorist activities or of membership in al Qaeda, or are believed to have knowingly harbored such individuals.<sup>14</sup> One of a series of measures designed to enhance the powers of law enforcement and intelligence agencies to fight the threat of future terrorist attacks, as well as to bring to justice those who were involved in the attacks of September 11th, special tribunals have attracted much public and scholarly debate both in the United States<sup>15</sup> and abroad.<sup>16</sup> Legal journals,

powers to “nonemergency” powers); 2 AMNON RUBINSTEIN, HA-MISHPAT HA-KONSTITUTSYONI SHEL MEDINAT ISRAEL 801-25 (5th rev. ed. 1996).

10. See *infra* Section IV.A.

11. Frederick Schauer, *Exceptions*, 58 U. CHI. L. REV. 871, 872 (1991). Schauer suggests that the notion of the exception deserves to be treated as a discrete jurisprudential phenomenon. He suggests that a study of the exception reveals important insights about the linkage of law and a “background social landscape” by which he refers particularly to the language a society uses and the categories it deploys to carve up the world. *Id.* As I will seek to show below, discussion of the phenomenon of emergency-as-exception can similarly tell us a great deal about that linkage.

12. 317 U.S. 1 (1942).

13. 71 U.S. (4 Wall.) 2 (1866).

14. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57, 833 (Nov. 13, 2001).

15. There are those who argue that the proposed use of military tribunals is unconstitutional and undermines the basic values of freedom, democracy, and the rule of law—values for the defense of which the United States went to war. See, e.g., Philip B. Heymann, *Civil Liberties and Human Rights in the Aftermath of September 11*, 25 HARV. J.L. & PUB. POL’Y 441, 452 (2002) (depicting the irregular military trial as “foolhardy disdain for American pride in, and foreign admiration of, the fairness of our courts”); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1260 (2002) (calling the Executive Order establishing military tribunals “flatly unconstitutional”).

Others argue that the military tribunals, in addition to being the only practicable course to deal with al Qaeda members, are in accordance both with international legal norms and with constitutional dictates. See, e.g., Ruth Wedgwood, *Al Qaeda, Terrorism, and Military Commissions*, 96 AM. J. INT’L L. 328, 330, 332 (2002). But see Christopher M. Evans, *Terrorism on Trial: The President’s Constitutional Authority To Order the Prosecution of Suspected Terrorists by Military Commission*, 51 DUKE L.J. 1831 (2002) (arguing that the Executive Order is constitutional but violates international law); Joan Fitzpatrick, *Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 AM. J. INT’L L. 345, 353-54 (2002)

newspapers, and radio and television shows have all dealt extensively with this issue. It has become as “invisible as a nose on a man’s face or a weathercock on a steeple.”<sup>17</sup>

Taken together, the panoply of counterterrorism measures put in place since September 11th has created “an alternate system of justice” aimed at dealing with suspected terrorists.<sup>18</sup> While its contours have shifted considerably since the early responses to the attacks, that alternate system of justice includes such additional elements as allowing the monitoring of exchanges between suspected terrorists and their lawyers,<sup>19</sup> the

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(noting that use of military commissions as replacements for federal courts in trying suspected terrorists who are not combatants in Afghanistan is “unprecedented and legally insupportable”); Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT’L L. 1, 10-17 (2001); Jordan J. Paust, *Antiterrorism Military Commissions: The Ad Hoc DOD Rules of Procedure*, 23 MICH. J. INT’L L. 677 (2002). It has been suggested that foreign terrorists simply do not deserve constitutional guarantees that “[w]ould be used for an American citizen going through the normal judicial process.” Elisabeth Bumiller & Steven Lee Myers, *Senior Administration Officials Defend Military Tribunals for Terrorist Suspects*, N.Y. TIMES, Nov. 15, 2001, at B6 (quoting Vice President Cheney).

Situating themselves between these two opposing poles are those who argue that the use of military tribunals may be justified under certain conditions and those who suggest that such use, while not unlawful per se, would be imprudent and unwise. See, e.g., Michal R. Belknap, *A Putrid Pedigree: The Bush Administration’s Military Tribunals in Historical Perspective*, 38 CAL. W. L. REV. 433, 440 (2002) (arguing that while the military tribunals may not be unlawful and may even be an appropriate method to deal with certain types of suspected terrorists, their use would be unwise in light of “the many abuses and injustices associated with past military commission trials”); Christopher L. Eisgruber & Lawrence G. Sager, *Military Courts and Constitutional Justice* 7 (May 14, 2002) (unpublished manuscript, on file with author).

16. In reaction to the Bush Administration’s plan to use military tribunals, as well as the possibility that the United States will seek the death penalty in such proceedings, certain countries within the European Union, as well as the European Parliament, stated that they either would refuse to extradite suspected terrorists or would see both the military tribunal and death penalty issues as obstacles to a speedy extradition. See Mark Champion et al., *Europe Tour by Ashcroft Starts Sourly*, WALL ST. J., Dec. 13, 2001, at A18 (noting that the Spanish, French, and European legislatures oppose military tribunals and the death penalty); Sam Dillon & Donald G. McNeil, Jr., *Spain Sets Hurdle for Extraditions*, N.Y. TIMES, Nov. 24, 2001, at A1 (reporting on Spain’s refusal to extradite eight suspected al Qaeda members in Spanish custody). But see Jason Benneto, *Suspects Face Fast-Track Removal in Overhaul of Extradition Laws*, INDEPENDENT (London), June 21, 2002, at P6 (describing the streamlining of the British extradition process, including curbing the right of appeal).

17. WILLIAM SHAKESPEARE, *THE TWO GENTLEMEN OF VERONA* act 2, sc. 1, ll. 120-21 (S. Greenblatt ed., W.W. Norton & Co. 1997).

18. Matthew Purdy, *Bush’s New Rules To Fight Terror Transform the Legal Landscape*, N.Y. TIMES, Nov. 25, 2001, at A1. One infamous example of the operation of such an alternate system of justice is the circumstances surrounding the arrest and detention of Jose Padilla, a.k.a. Abdullah al-Muhajir, an American citizen who was suspected of researching how to build a “dirty bomb” in Pakistan. Oliver Burkeman, *FBI Says Dirty Bomb Suspect Is No Big Fish*, GUARDIAN (London), Aug. 15, 2002, at 12.

19. Attorney General John Ashcroft explained the contours of this policy during a Senate hearing:

We have the authority to monitor the conversations of 16 of the 158,000 federal inmates and their attorneys because we suspect that these communications are facilitating acts of terrorism. Each prisoner has been told in advance his conversations will be monitored. None of the information that is protected by attorney-client privilege may be used for prosecution. Information will only be used to stop impending terrorist acts and save American lives.



aggrandizement of powers of the federal government,<sup>20</sup> combating the financial infrastructure of terrorism,<sup>21</sup> racial profiling,<sup>22</sup> the refusal to release information about hundreds of persons arrested since September 11th,<sup>23</sup> expanding the scope of government surveillance,<sup>24</sup> and the Total Information Awareness project.<sup>25</sup> It also involves significant structural and institutional changes such as the establishment of the Department of Homeland Security<sup>26</sup> and the restructuring of the FBI,<sup>27</sup> as well as closer coordination between the FBI and CIA with respect to intelligence gathering on terrorist threats.<sup>28</sup>

*Antiterrorism Policy: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. 2001 WL 26188084 (Dec. 6, 2001) (testimony of Attorney Gen. John Ashcroft); see also Avidan Y. Cover, *A Rule Unfit for All Seasons: Monitoring Attorney-Client Communications Violates Privilege and the Sixth Amendment*, 87 CORNELL L. REV. 1233 (2002).

20. See, e.g., Aviation and Transportation Security Act, Pub. L. No. 107-71, § 107, 115 Stat. 597 (2001) (codified in scattered titles and sections of the *United States Code*) (establishing the Transportation Security Administration); see also Matthew L. Wald, *U.S. Begins Taking Over Screening at Airports*, N.Y. TIMES, May 1, 2002, at A18.

21. See Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten To Commit, or Support Terrorism, Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001); Neil MacFarquhar, *Saudis To Sign Agreement on Assets of Terror Groups*, N.Y. TIMES, Nov. 6, 2001, at B4; Michael M. Phillips & David S. Cloud, *U.S. To Seize Assets in Antiterrorism Drive*, WALL ST. J., Sept. 25, 2001, at A3.

22. See, e.g., Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413 (2002) (examining and critiquing the practice of racial profiling generally and in the context of post-September 11th); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1576-86 (2002) (discussing the changed perceptions of racial profiling post-September 11th); Jackie Calmes, *Washington Wire*, WALL ST. J., Oct. 12, 2001, at A1 (noting that the Department of Transportation suspended a study of alleged racial profiling at Detroit's Metro Airport that began in June 2001 as part of reassessing "what security changes [were] needed"); Jason L. Riley, *"Racial Profiling" and Terrorism*, WALL ST. J., Oct. 24, 2001, at A22 (stating that popular talk of racial profiling intensified after the terrorist attacks on September 11th).

23. See Danny Hakim, *States Are Told To Keep Detainee Information Secret*, N.Y. TIMES, Apr. 19, 2002, at A14 (reporting on an INS directive to state and local governments that prohibited disclosing names of immigration detainees in local government custody); Tamar Lewin, *Rights Groups Press for Names of Muslims Held in New Jersey*, N.Y. TIMES, Jan. 23, 2002, at A9; Katharine Q. Seelye, *Moscow, Seeking Extradition, Says 3 Detainees Are Russian*, N.Y. TIMES, Apr. 3, 2002, at A13 (noting that U.S. investigators were refusing to release or confirm names of Guantanamo Bay prisoners even if native countries identified them as citizens).

24. See, e.g., Mark G. Young, Note, *What Big Eyes and Ears You Have!: A New Regime for Covert Governmental Surveillance*, 70 FORDHAM L. REV. 1017 (2001).

25. See, e.g., Elec. Privacy Info. Ctr., Total Information Awareness (TIA), at <http://www.epic.org/privacy/profiling/tia/#introduction> (last visited Feb. 9, 2003).

26. See Philip Shenon, *Threats and Responses: The Reorganization Plan*, N.Y. TIMES, Nov. 20, 2002, at A14 (describing the reorganization of many departments into the Department of Homeland Security as a massive and difficult undertaking); see also Mike Allen & Bill Miller, *Bush Seeks Security Department; Cabinet Level Agency Would Coordinate Antiterrorism Effort*, WASH. POST, June 7, 2002, at A1 (stating that the new department would encompass the United States Coast Guard, Secret Service, FEMA, INS, and Customs, as well as the Transportation Security Administration).

27. Naftali Bendavid, *FBI's Mueller Reshapes Agency's Top Ranks*, CHI. TRIB., Dec. 4, 2001, at 3.

28. See Julian Borger, *Blunders Prompt U.S. Security Shake-Up: Bush Moves To Force CIA and FBI Cooperation*, GUARDIAN (London), June 7, 2002, at 1; David Wise, *Spy-Game: Changing the Rules so the Good Guys Win*, N.Y. TIMES, June 2, 2002, at D3; Calvin Woodward,

The creation of such an alternate system of justice has not been confined to the United States. In the aftermath of September 11th and in light of the perceived need to respond to the challenges of global terrorism, many nations have passed, or are in the process of passing, new antiterrorism bills while strengthening existing antiterrorism laws.<sup>29</sup> With the scene of the Twin Towers collapsing and being reduced to gray dust still fresh in everybody's mind, the political right and left mobilized behind their governments in support of the fight against terrorism.<sup>30</sup>

Despite repeated statements that the events of September 11th have forever changed the world,<sup>31</sup> much of the discussion around matters dealing with terrorism, the structuring of counterterrorism measures, and extraordinary governmental powers to answer future threats is not new. The same holds true with respect to fashioning legal responses to terrorist threats. Many of the measures proposed in the United States post-September 11th can find precedents in other countries. Indeed, some may find forebears in the legal history of the United States itself.

Experience shows that when grave national crises are upon us, democratic nations tend to race to the bottom as far as the protection of human rights and civil liberties, indeed of basic and fundamental legal principles, is concerned. Emergencies suspend, or at least redefine, de facto, if not de jure, much of our cherished freedoms and rights.<sup>32</sup> Thus, there is

*FBI, CIA Struggle To Put History of Animosity Behind Them in the Antiterror Age*, ASSOCIATED PRESS, June 1, 2002, LEXIS, Nexis Library, AP File.

29. See, e.g., Act of Dec. 18, 2001, ch. 41, 2001 S.C. 1 (Can.); Anti-Terrorism, Crime and Security Act, 2001, c. 24 (Eng.); Celia W. Dugger, *India, Too, Weighs Antiterror Measure Against Liberties*, N.Y. TIMES, Nov. 22, 2001, at A10; Statement by Prime Minister Junichiro Koizumi on the Passing of the Anti-Terrorism Special Measures Law by the Diet of Japan (Oct. 29, 2001), at <http://www.mofa.go.jp/region/n-america/us/terro0109/speech/pm1029.html>; see also THE SECURITY OF FREEDOM: ESSAYS ON CANADA'S ANTITERRORISM BILL (Ronald J. Daniels et al. eds., 2001) [hereinafter THE SECURITY OF FREEDOM]; Joshua D. Zelman, *Recent Developments in International Law: Anti-Terrorism Legislation—Part One: An Overview*, 11 J. TRANSNAT'L L. & POL'Y 183 (2001); Joshua D. Zelman, *Recent Developments in International Law: Anti-Terrorism Legislation—Part Two: The Impact and Consequences*, 11 J. TRANSNAT'L L. & POL'Y 421 (2002).

30. See, e.g., Edmund L. Andrews, *German Greens Patch Rift and Support Use of Military*, N.Y. TIMES, Nov. 25, 2001, at A6 (pointing out that "the tenor of the debate over military activities has changed markedly since the terrorist attacks on Sept. 11. In recent days, even party veterans with deep roots in the left-leaning and often anti-American wing of the party have argued that the Greens need to abandon their categorical antimilitarism.").

31. See, e.g., Anthony Lewis, *A Different World*, N.Y. TIMES, Sept. 12, 2001, at A27; *President Bush's Address on Terrorism Before a Joint Meeting of Congress*, N.Y. TIMES, Sept. 21, 2001, at B4 ("All of this was brought upon us in a single day. And night fell on a different world. . . ." (quoting President George W. Bush)); see also W. Michael Reisman, *Editorial Comments: In Defense of World Public Order*, 95 AM. J. INT'L L. 833, 833 (2001) (noting that the attacks "shattered the world view [that took national security for granted] and, quite possibly, the emotional foundation on which that sense of security rested").

32. The First Amendment, for instance, has not fared well in times of great actual or perceived peril. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 109 (1980) (stating that the history of free speech jurisprudence in times of crisis "mocks our commitment to an open political process"); HARRY KALVEN, JR., *A WORTHY TRADITION*

much to be learned from past experience—of the United States as well as that of other countries<sup>33</sup>—in order to avoid repeating old mistakes. Unfortunately, experience also tells us that it is quite likely that old mistakes will, in fact, be repeated. Speaking in Jerusalem in 1987, Justice Brennan stated:

There is considerably less to be proud about, and a good deal to be embarrassed about, when one reflects on the shabby treatment civil liberties have received in the United States during times of war and perceived threats to its national security . . . . After each perceived security crisis ended, the United States has remorsefully realized that the abrogation of civil liberties was unnecessary. But it has proven unable to prevent itself from repeating the error when the next crisis came along.<sup>34</sup>

This Article seeks to explore why it is that we seem unable to avoid repeating old mistakes and errors when faced with new crises and emergencies.<sup>35</sup>

187-211 (Jamie Kalven ed., 1988); Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 457 (1985) (“Most constitutional commitments are fragile in the sense that they embody ideals that are easily abandoned or tempered in times of stress. Certain distinctive features of the commitment to free speech enhance that fragility.”); L.A. Powe, Jr., *Situating Schauer*, 72 NOTRE DAME L. REV. 1519, 1531-32 (1997) (describing speech as “a good times civil liberty”); Rodney A. Smolla, *Terrorism and the Bill of Rights*, 10 WM. & MARY BILL RTS. J. 551, 573-74 (2002); Bill Carter & Felicity Barringer, *In Patriotic Time, Dissent Is Muted*, N.Y. TIMES, Sept. 28, 2001, at A1.

33. Many of the trends and patterns identified in this Article transcend national boundaries in their existence and effects. Thus, I do not share (at least in the particular context that is the subject of this Article) Seth Kreimer’s concern that “it is the particular pathologies of the American history that are most important” in evaluating the likelihood that failures of other systems will replicate themselves in the United States. See Seth F. Kreimer, *Commentaries, Invidious Comparisons: Some Cautionary Remarks on the Process of Constitutional Borrowing*, 1 U. PA. J. CONST. L. 640, 643-44 (1999); cf. David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 566-72 (2001) (discussing the pragmatic virtues of comparative projects in constitutional law, e.g., American courts can use Vincent Blasi’s idea of the “pathological perspective” to avoid the harmful results of rules that resulted in other countries, or can adjust the rules from other countries based on what worked best there).

34. William J. Brennan, Jr., *The Quest To Develop a Jurisprudence of Civil Liberties in Times of Security Crises*, 18 ISR. Y.B. HUM. RTS. 11, 11 (1988); see also MICHAEL LINFIELD, *FREEDOM UNDER FIRE: U.S. CIVIL LIBERTIES IN TIMES OF WAR* (1990). But see WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE* 219-21 (1998) (identifying a “generally ameliorative trend” in the protection of civil liberties during wartime including a pattern of increased congressional and judicial involvement in the protection of civil liberties); Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT. 261, 284-89 (2002) (noting increased protection for civil liberties during wartime as a result of shifting baselines for determining which civil liberties restrictions are appropriate and recognizing past mistakes).

35. When speaking of mistakes in the context of responding to violent crises, I mostly have in mind the mistake of overreaction to perceived or even real threats and dangers. I take Chief Justice Rehnquist’s point:

In any civilized society the most important task is achieving a proper balance between freedom and order. In wartime, reason and history both suggest that this

Several distinct constitutional frameworks have dominated both the practice and the theoretical debate concerning responses to acute national crises. The Business as Usual model is based on notions of constitutional absolutism and perfection. According to this model, ordinary legal rules and norms continue to be followed strictly with no substantive change even in times of emergency and crisis. The law in times of war remains the same as in times of peace. Other models of emergency powers may be grouped together under the general category of “models of accommodation” insofar as they attempt to accommodate, within the existing normative structure, security considerations and needs. Though the ordinary system is kept intact as much as possible, some exceptional adjustments are introduced to accommodate exigency. This compromise, it is argued, allows for the continued faithful adherence to the principle of the rule of law and to fundamental democratic values, while at the same time providing the state with adequate measures to withstand the storm wrought by the crisis. Within this general category, I identify several possible models, each corresponding to a somewhat different equilibrium between maintenance of the ordinary system of rules and norms and accommodation for emergency, as well as to a different mechanism by which such equilibrium is established.

I suggest that these traditional models may not always be adequate, both as a matter of theory and practice. The Business as Usual model is criticized as either naive or hypocritical in the sense that it disregards the reality of governmental exercise of extraordinary measures and powers in responding to emergencies. While its appeal is found in its insistence upon clear rules and upon maintaining the ideal that the constitutional framework is not affected by crises and exigencies, the main weakness of the model lies in its rigidity in the face of radical changes in the surrounding context. The models of accommodation are subject to claims of being unprincipled. Their relative strength inheres in their flexibility in the face of great calamities and in their accommodation of shifting and expanding the powers needed to meet such exigencies. Yet, their shortcoming is found in the innate susceptibility to manipulation and in the danger that accommodating counter-emergency responses within the existing legal

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balance shifts to some degree in favor of order—in favor of the government’s ability to deal with conditions that threaten the national well-being. It simply cannot be said, therefore, that in every conflict between individual liberty and governmental authority the former should prevail. And if we feel free to criticize court decisions that curtail civil liberty, we must also feel free to look critically at decisions favorable to civil liberty.

REHNQUIST, *supra* note 34, at 222-23. However, it is also the case that historical perspective teaches us that overreaction has frequently been the case in times of crisis. Moreover, as I will show below, reason also indicates that overreaction is more likely than not in times of crisis and great peril. Thus, while balancing freedom and order is necessary, there are compelling reasons to question our ability to strike a “proper balance” in such times.

system starts us down a slippery slope toward excessive governmental infringement on individual rights and liberties while undermining constitutional structures and institutions in the process.

Furthermore, a basic assumption on which all the traditional models of emergency powers are premised does not hold true in practice. The *assumption of separation* is defined by the belief in our ability to separate emergencies and crises from normalcy,<sup>36</sup> counterterrorism measures from ordinary legal rules and norms. This assumption facilitates our acceptance of expansive governmental emergency powers and counterterrorism measures, for it reassures us that once the emergency is removed and terrorism is no longer a threat, such powers and measures will also be terminated and full return to normalcy ensured. It also assures us that counter-emergency measures will not be directed against us, but only against those who pose a threat to the community.

However, bright-line demarcations between normalcy and emergency are all too frequently untenable, and distinctions between the two made difficult, if not impossible. In fact, the exception is hardly an exception at all.<sup>37</sup> In various meaningful ways, the exception has merged with the rule. "Emergency government has become the norm."<sup>38</sup> Fashioning legal tools to respond to emergencies on the belief that the assumption of separation will serve as a firewall protecting human rights, civil liberties, and the legal system as a whole may be misguided. Since the assumption of separation is also closely linked to the goals of the different models of emergency powers and inasmuch as it informs each of these models, we must reassess the strength of the arguments supporting each of them. Blind adherence to the models may result in long-term destabilization of such fundamental principles as the rule of law and the strong protection of rights, freedoms, and liberties. Innovative legal concepts to deal with the problem of emergencies may be needed.<sup>39</sup>

Building on these critiques of the existing models, I suggest that we need to reexamine a second fundamental assumption that underlies the traditional models of emergency powers. The *assumption of*

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36. The term "normalcy" was famously invoked by Warren G. Harding in his "Readjustment" speech during the 1920 presidential campaign. See ROBERT K. MURRAY, *THE POLITICS OF NORMALCY: GOVERNMENTAL THEORY AND PRACTICE IN THE HARDING-COOLEDGE ERA* 9 (1973). By "normalcy," Harding described not "the old order, but a regular steady order of things." *Id.* at 15.

37. For the notion of emergency as exception, see *infra* Section IV.A.

38. SPECIAL SENATE COMM. ON NAT'L EMERGENCIES & DELEGATED EMERGENCY POWERS, 93D CONG., *A BRIEF HISTORY OF EMERGENCY POWERS IN THE UNITED STATES*, at v (Comm. Print 1974) (Frank Church & Charles McC. Mathias). Prompted by general distrust of the Nixon Administration's foreign and domestic policy, Senators Mathias and Church investigated the nearly continuous state of emergency that had existed in the United States since 1933, discovering nearly 470 pieces of emergency power legislation that remained in force. *Id.*

39. See Ackerman, *supra* note 2, at 16.

*constitutionality* tells us that whatever responses are made to the challenges of a particular exigency, such responses are to be found and limited within the confines of the constitution. While terrorists are lawless and operate outside the sphere of legal principles, rules, and norms, democratic governments must be careful not to fight terrorism with lawless means. Otherwise, they may only succeed in defeating terrorism at the expense of losing the democratic nature of the society in whose defense they are fighting.

It may well be that the assumption of constitutionality has served as a rhetorical, more than a real, check on governmental powers during “times of great crises.”<sup>40</sup> However, I challenge that assumption not merely as a descriptive tool, but mostly on normative grounds. I argue that there may be circumstances where the appropriate method of tackling grave dangers and threats entails going outside the constitutional order, at times even violating otherwise accepted constitutional principles, rules, and norms. Such a response, if pursued in appropriate circumstances and properly applied, may strengthen rather than weaken, and result in more rather than less, long-term constitutional fidelity and commitment to the rule of law.<sup>41</sup>

This Extra-Legal Measures model proposed in this Article informs public officials that they may act extralegally 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. It is then up to the people to decide, either directly or indirectly (e.g., through their elected representatives in the legislature), how to respond to such actions. The people may decide to hold the actor to the wrongfulness of her actions, demonstrating commitment to the violated principles and values. The acting official may be called to answer, and make legal and political reparations, for her actions. Alternatively, the people may act to approve, *ex post*, the extralegal actions of the public official.

Thus, under the Extra-Legal Measures model, we may conclude in particular instances that acting in a certain way is the right thing to do to promote the greatest good for the greatest number of people, but in other situations we may decline to approve such action from legal, political,

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40. Attorney General Francis Biddle stated that “the Constitution has not greatly bothered any wartime President. That was a question of law, which ultimately the Supreme Court must decide. And meanwhile—probably a long meanwhile—we must get on with the war.” FRANCIS BIDDLE, *IN BRIEF AUTHORITY* 219 (1962) (referring specifically to President Roosevelt’s Executive Order 9066, which authorized the evacuation of persons of Japanese ancestry from the West Coast); see also REHNQUIST, *supra* note 34, at 224 (“[T]he fact that the phrase *Inter arma silent leges* is quoted by modern writers suggests that it has validity at least in a descriptive way.”).

41. I should clarify up front that this Article is designed to put forward the rationale and arguments in support of an alternative model of emergency powers. I will not attempt here to define or give concrete meaning to the concepts of “appropriate circumstances” and “proper application” of the model. These will have to wait for another opportunity.

social, and moral standpoints. At the same time, the model does not completely bar the possibility that public officials will take such actions and that their actions may be later ratified by the public. By separating the two issues—action and ratification—the model adds an element of uncertainty hanging over the head of the public official who needs to decide how to act. That uncertainty raises the cost of taking an extralegal course of action.

Hence, it ought to be clear that the Extra-Legal Measures model must not be confused with what may be called political realism. Political realists have often made the argument that when dealing with acute violent crises, democracies ought to forgo legal and constitutional niceties. The Extra-Legal Measures model reflects a diametrically opposite approach. It seeks to preserve the long-term relevance of, and obedience to, legal principles, rules, and norms. While going outside the legal order may be a “little wrong,” it is advocated here in order to facilitate the attainment of a “great right,” namely the preservation not only of the constitutional order, but also of its most fundamental principles and tenets.<sup>42</sup> Significantly, I argue that the Extra-Legal Measures model promotes, and is promoted by, ethical concepts of political and popular responsibility, political morality, and candor. To be implemented properly, the model calls for candor on the part of government agents, who must disclose the nature of their counter-emergency activities. The model then focuses on the need for a direct or indirect popular *ex post* ratification of such activities. The process leading up to such ratification (or rejection) of those actions promotes deliberation after the fact, as well as establishes the individual responsibility of each member of the relevant community for the actions taken on behalf of the public during the emergency. That very process, with its uncertain outcomes, also serves the important function of slowing down any possible rush to use extralegal powers by governmental agents. Although the model may seem open to the challenge that its application would result in a downward spiral toward authoritarian rule and totalitarianism,<sup>43</sup> as it seemingly dispenses with existing constitutional norms and structures, there are other, perhaps more important, checks against governmental abuse of extralegal powers.

The Article proceeds in five parts. Part II examines the tension that exists between democratic values on the one hand, and the realities and

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42. “To do a great right, do a little wrong” is the advice given by Bassanio to Portia. WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 4, sc. 1, l. 211 (S. Greenblatt ed., W.W. Norton & Co. 1997); see also Ward Farnsworth, “*To Do a Great Right, Do a Little Wrong*”: *A User’s Guide to Judicial Lawlessness*, 86 MINN. L. REV. 227 (2001) (suggesting that the remedial decision in *Bush v. Gore* was an instance of pragmatism or perhaps even lawlessness by the Supreme Court).

43. On the place of antitotalitarianism sentiment in shaping both modern theories of American constitutional law and case law, see Richard Primus, Note, *A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought*, 106 YALE L.J. 423 (1996).

necessities of responding to emergencies and crises on the other. Part III presents the traditional frameworks for responding to emergencies, namely the Business as Usual model and several models of accommodation. Part IV focuses on the assumption of separation, which informs the constitutional models of emergency powers discussed in Part III. After explaining both the role that this assumption plays in each model and the traditional mechanisms used to maintain the separation between normalcy and emergency, I argue that the assumption does not hold true in practice. As a result, it distorts the expected effects of each of the constitutional models. In Part V, I introduce an alternative model of emergency powers, namely the Extra-Legal Measures model. I argue that this model, when properly applied, may strengthen, rather than weaken, our constitutional commitments and the rule of law in the long term. A brief conclusion follows.

Before going further, three notes are in order. First, while emergencies need not be limited to violent events and threats such as terrorism and war but can also encompass economic crises and natural disasters,<sup>44</sup> the main focus of this study is on *violent* emergencies and crises. While parts of my argument are also applicable to other types of emergency situations (and examples of past responses to such crises are used in developing my argument),<sup>45</sup> I believe that such a distinction is warranted in light of the

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44. Emergencies have been traditionally classified into three major categories: grave political crises (including international armed conflicts, terrorist attacks, riots, and rebellions), economic crises such as the Great Depression, and natural disasters and force majeure events. See, e.g., *Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency*, U.N. Commission on Human Rights, 35th Sess., Agenda Item 10, at 8-9, U.N. Doc. E/CN.4/Sub.2/1982/15 (1982) [hereinafter *Questiaux Report*]; SUBRATA ROY CHOWDHURY, *RULE OF LAW IN A STATE OF EMERGENCY* 15 (1989) (categorizing three different circumstances from which emergency situations may arise). Clinton Rossiter suggests a slightly different classification of emergency situations. See ROSSITER, *supra* note 5, at 6 (distinguishing among war, rebellion, and economic depression); see also Aaron S. Klieman, *Emergency Politics: The Growth of Crisis Government*, 70 CONFLICT STUD. 5 (1976) (dividing the major causes of emergency situations among aggression, public calamity, and internal disorder).

The use of emergency powers appears with at least as much frequency in times of great economic consternation and in situations of severe natural disasters as it does in the context of violent conflicts. For a recent analysis of the use of emergency powers to deal with an "economic-financial state of emergency," see William E. Scheuerman, *The Economic State of Emergency*, 21 CARDOZO L. REV. 1869, 1869 (2000). See also Aaron Perrine, *The First Amendment Versus the World Trade Organization: Emergency Powers and the Battle in Seattle*, 76 WASH. L. REV. 635, 654 (2001) (noting that the emergency power in the United States evolved along with capitalist liberal democracy).

45. To a large extent, emergency responses to economic crises have been shaped along contours similar to those of emergency measures taken in the face of military or political threats. The Roosevelt Administration treated the Great Depression, both in rhetoric and practice, as equivalent to a war waged against a foreign invader. See Michal R. Belknap, *The New Deal and the Emergency Powers Doctrine*, 62 TEX. L. REV. 67, 70-76 (1983); see also ROBERT HIGGS, CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT 159-95 (1987) (discussing the Great Depression as "An Emergency More Serious than War"); Daniel W. Levy, *A Legal History of Irrational Exuberance*, 48 CASE W. RES. L. REV. 799, 807 (1998)



different categorical requirements for action that each situation raises. Thus, for example, a violent conflict may (but does not have to) require immediate action, without time for consultation with other institutions. On the other hand, an economic crisis usually allows (but does not have to allow) for longer response periods, thus enabling interbranch action.<sup>46</sup>

Second, since September 11th, much has been said about the threats posed by “global” terrorism as well as the need to meet the challenge of terrorism by a coordinated global response.<sup>47</sup> The roles played by global interconnectedness; the mobility of people, goods, and money across national borders; and technologically advanced systems of communication and transportation in facilitating terrorism have all been closely scrutinized and debated since the attacks.<sup>48</sup> In as much as “terrorism globalizes us,”<sup>49</sup> many believe that a response must be global in nature in order to succeed. In this respect, it may well be that trends of increased interconnectedness and interdependence among the nations of the world will lead to heightened emphasis on the exception.<sup>50</sup> Yet, such was the case even prior to September 11th. Modern terrorism has been changing its face and the scope

(suggesting that “by the mid-twentieth century, emergency response to economic distress would eventually either be subsumed under statutes which, like war, require congressional declaration of a national emergency, or be justified as a necessary extension of war-making power”).

46. Rossiter distinguishes between executive- and legislative-type emergency powers. ROSSITER, *supra* note 5, at 9-11, 290-94. Executive emergency powers include all those powers given to the executive in times of emergency, but which do not confer upon it lawmaking power. *Id.* at 10. Legislative emergency powers are relevant when the executive acquires emergency legislative powers either by means of specific, temporary legislation; broad delegation of powers from the legislature; an enabling act; or permanent legislation with an “emergency-flavor.” *Id.* at 292-93. While the executive-type emergency regime is thought to be more suitable to meet an emergency of a violent nature such as war or extreme rebellion, the legislative-type emergency regime is considered better suited to cope with such crises as severe economic depression. *Id.* at 292. *See, e.g.*, CARL J. FRIEDRICH, *CONSTITUTIONAL GOVERNMENT AND DEMOCRACY: THEORY AND PRACTICE IN EUROPE AND AMERICA* 563-66 (4th ed. 1968) (distinguishing between the legislative and executive emergency powers). Friedrich argues, however, that the distinction between executive and legislative powers in times of crisis is questionable. *See id.* at 565; Frederick M. Watkins, *The Problem of Constitutional Dictatorship*, in *PUBLIC POLICY* 324, 368-79 (C.J. Friedrich & Edward S. Mason eds., 1940) (distinguishing among administrative dictatorship, legislative dictatorship, and dictatorship by delegation).

47. *See, e.g.*, Reisman, *supra* note 31, at 833 (suggesting that the attacks were designed to destroy the “social and economic structures and values of a system of world public order”); David Schneiderman, *Terrorism and the Risk Society*, in *THE SECURITY OF FREEDOM*, *supra* note 29, at 63, 65-67 (discussing the global scope of the new terrorism threat); Wedgwood, *supra* note 15, at 329 (arguing that “Al Qaeda’s real target was globalization itself”).

48. *See, e.g.*, Janice Gross Stein, *Network Wars*, in *THE SECURITY OF FREEDOM*, *supra* note 29, at 73, 75-76 (discussing “global networks of terror”); *see also* Kevin E. Davis, *Cutting Off the Flow of Funds to Terrorists: Whose Funds? Which Funds? Who Decides?*, in *id.* at 299 (describing the war on terrorism on the financial front); Audrey Macklin, *Borderline Security*, in *id.* at 383 (describing the war on terrorism’s impact on immigration policy).

49. Schneiderman, *supra* note 47, at 66 (quoting John Manley, Foreign Affairs Minister of Canada).

50. *But see* Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 *OHIO ST. L.J.* 649 (2002) (contending that globalization eliminates the need for a special and different treatment of foreign affairs).

and areas of its activities. Narcoterrorism, organized international crime, and cyberterrorism have been most facilitated by the blurring of geographical boundaries and the increasing difficulties facing nation-states in regulating and controlling their environments under conditions of globalization.<sup>51</sup> The compression of time and space brought about by technological innovation, the communications revolution, and advancements in transportation brings new challenges and threats to states while significantly reducing the state's available time for response.<sup>52</sup>

This leads to my final preliminary point. This is not an "American" study, nor is it a post-September 11th one. Nor are the patterns identified in this Article unique to the post-September 11th world. The arguments set forth below ought to be treated as generally applicable to constitutional democratic regimes faced with the need to respond to extreme violent crises.

## II. DEMOCRACY AND STATES OF EMERGENCY: A TENSION OF "TRAGIC DIMENSIONS"

Times of crisis pose the greatest and most serious danger to constitutional freedoms and principles.<sup>53</sup> In such times, the temptation to disregard constitutional freedoms is at its zenith, while the effectiveness of traditional checks and balances is at its nadir.<sup>54</sup> In times of crisis, it is often

51. In a study published in December 2000, the United States National Security Council suggested that global criminals perpetrating global crimes such as terrorism, drug trafficking, alien smuggling, trafficking in women and children, copyright violations, and even auto theft ought to be treated as threats to national security. See Joseph Kahn & Judith Miller, *Getting Tough on Gangsters, High Tech and Global*, N.Y. TIMES, Dec. 15, 2000, at A9 ("Globalization has created a new kind of national security threat that is not fully recognized by the administration or Congress.") (quoting Richard A. Clarke, Counterterrorism Coordinator on the National Security Council).

52. See generally ANTHONY GIDDENS, *RUNAWAY WORLD: HOW GLOBALIZATION IS RESHAPING OUR LIVES* (2000) (demonstrating the effect of compression of time and space on democratic and capitalistic structures); DAVID HARVEY, *THE CONDITION OF POSTMODERNITY: AN ENQUIRY INTO THE ORIGINS OF CULTURAL CHANGE* 240, 284-307 (1990) (articulating the theory of time-space compression).

53. See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 686 (1995) (O'Connor, J., dissenting) ("It cannot be too often stated that the greatest threats to our constitutional freedoms come in times of crisis."); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting) ("History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure.")

54. Judicial and academic warnings against sacrificing individual freedoms under pretensions of "emergency" or "national security" abound. For example, the majority in *United States v. Robel* recognized:

Implicit in the term "national defense" is the notion of defending those values and ideals which set this Nation apart. . . . It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile.

389 U.S. 258, 264 (1967). In addition, Judge Youngdahl in *United States v. Peck* recognized, "Although an infringement of the Bill of Rights may be necessary under certain circumstances, no

argued, legal niceties may be cast aside as luxuries to be enjoyed only in times of peace and tranquility.<sup>55</sup> Yet, it is precisely in such times that constitutional safeguards for the protection of rights, freedoms, and liberties are put to the test.<sup>56</sup> A continued commitment to preserving and maintaining rights, freedoms, and liberties ought to be reconciled with the caution against turning a constitution into a suicide pact.<sup>57</sup> The issue this Article explores is whether such acts of reconciliation should at all times be pursued within the confines of a constitution, or whether they can be carried out, in certain truly extraordinary circumstances, outside the constitutional framework. This Part argues that times of emergency lower, rather than increase, the costs of curtailing liberties and freedoms from the perspective of government officials and the vast majority of the population.

There exists a tension of “tragic dimensions” between democratic values and responses to emergencies.<sup>58</sup> Democratic nations faced with serious terrorist threats must “maintain and protect life, the liberties necessary to a vibrant democracy, and the unity of the society, the loss of

one can rejoice in such an exigency. For with each such authorized infringement, the rights of all citizens become fewer, the freedoms we cherish are limited, and democracy itself is weakened.” 154 F. Supp. 603, 607 (D.D.C. 1957). Academic commentators have also warned against such sacrifices. See, for example, James Oakes’s poignant warning:

Our institutions fortunately do not hang by a thread, but a deep depression, a serious blow to national pride, extensive internal terrorism, a serious external threat to security, or a combination of these may enlarge the ranks of the elements of society that are ever ready to abandon liberty for order and to abandon freedom for security.

James L. Oakes, *The Proper Role of the Federal Courts in Enforcing the Bill of Rights*, 54 N.Y.U. L. REV. 911, 925 (1979).

55. Thus, for example, the British Home Secretary, David Blunkett, referred to the view that people ought not to be detained indefinitely without trial as an “airy-fairy” view of the world. See Brian Groom, *Detaining Suspects Not Abuse of Human Rights, Says Blunkett*, FIN. TIMES (London), Nov. 12, 2001, at 3.

56. See cases cited *supra* note 53; see also Blasi, *supra* note 32, at 449-50 (arguing that the First Amendment should be equipped “to do maximum service in those historical periods when intolerance of unorthodox ideas is most prevalent and when governments are most able and most likely to stifle dissent systematically. The first amendment, in other words, should be targeted for the worst of times.”). But see *Acton*, 515 U.S. at 686 (O’Connor, J., dissenting) (“[W]e must also stay mindful that not all government responses to [crisis] times are hysterical overreactions; some crises are quite real, and when they are, they serve precisely as the compelling state interest that we have said may justify a measured intrusion on constitutional rights.”); REHNQUIST, *supra* note 34, at 222-23. Two well-known maxims capture the essence of the debate. Compare Benjamin Franklin’s statement that “[t]hey that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety,” BENJAMIN FRANKLIN, HISTORICAL QUOTATIONS 141 (Anthony Jay ed., 1996), with Justice Jackson’s statement that “[t]he choice is not between order and liberty. It is between liberty with order and anarchy without either,” *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

57. See *Haig v. Agee*, 453 U.S. 280, 309-10 (1981); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963) (“[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact.”); *Terminiello*, 337 U.S. at 37 (Jackson, J., dissenting) (warning that the majority decision in that case might lead to the conversion of the Bill of Rights into a suicide pact).

58. Pnina Lahav, *A Barrel Without Hoops: The Impact of Counterterrorism on Israel’s Legal Culture*, 10 CARDOZO L. REV. 529, 531 (1988) (noting the “tragic dimensions of the tension between terrorism, counterterrorism, and justice in any democratic society”).

which can turn a healthy and diverse nation into a seriously divided and violent one.”<sup>59</sup> At the same time, exigencies and acute crises directly challenge the most fundamental concepts of constitutional democracy. The question then arises to what extent, if any, violations of fundamental democratic values can be justified in the name of the survival of the democratic, constitutional order itself; and if they can be justified, to what extent a democratic, constitutional government can defend the state without transforming itself into an authoritarian regime.

Take, for example, the notion that a government must be of limited powers, a government of laws, not of men (or women).<sup>60</sup> When an extreme exigency arises it almost invariably leads to the strengthening of the executive branch not only at the expense of the other two branches, but also at the expense of individual rights, liberties, and freedoms. The government’s ability to act swiftly, secretly, and decisively against a threat to the life of the nation becomes superior to the ordinary principles of limitation on governmental powers and individual rights.<sup>61</sup> Crises tend to result in the expansion of governmental powers, the concentration of powers in the hands of the executive, and the concomitant contraction of individual freedoms and liberties.<sup>62</sup> Enhanced and newly created powers are asserted by, and given to, the government as necessary to meet the challenge to the community. Concepts such as separation of powers and federalism are likely to be among the first casualties when a nation needs to respond to a national emergency, as by engaging in a war against terrorism.<sup>63</sup> The executive branch assumes a leading role in countering the

59. PHILIP B. HEYMANN, *TERRORISM AND AMERICA: A COMMONSENSE STRATEGY FOR A DEMOCRATIC SOCIETY*, at ix (1998); Wedgwood, *supra* note 15, at 330 (arguing that the “fabric of American liberalism and democracy would be irreparably coarsened if government proves unable to provide a reasonable guarantee of life and safety to its citizens”).

60. This idea traces its origins to Aristotle, who suggested that “where the laws have no authority, there is no constitution.” 2 ARISTOTLE, *THE COMPLETE WORKS* 2051 (Jonathan Barnes ed., Princeton Univ. Press 1984); see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (“The government of the United States has been emphatically termed a government of laws, and not of men.”).

61. See, e.g., LINFIELD, *supra* note 34; CHARLES DE SECONDAT MONTESQUIEU, *THE SPIRIT OF LAWS* 154 (Thomas Nugent trans., Univ. of Cal. Press 1977) (1748); Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1386 (1989); Watkins, *supra* note 46, at 343-44; Itzhak Zamir, *Human Rights and National Security*, 23 ISR. L. REV. 375 (1989).

62. See HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 117-49 (1990); ROSSITER, *supra* note 5, at 288-90; PITIRIM A. SOROKIN, *MAN AND SOCIETY IN CALAMITY: THE EFFECTS OF WAR, REVOLUTION, FAMINE, PESTILENCE UPON HUMAN MIND, BEHAVIOR, SOCIAL ORGANIZATION AND CULTURAL LIFE* 122-44, 275-76 (1942); Arthur S. Miller, *Constitutional Law: Crisis Government Becomes the Norm*, 39 OHIO ST. L.J. 736, 738-41 (1978).

63. EDWARD S. CORWIN, *TOTAL WAR AND THE CONSTITUTION* 35-77 (1947) (describing how total war shapes and transforms domestic governments); Peter Rosenthal, *The New Emergencies Act: Four Times the War Measures Act*, 20 MAN. L.J. 563, 576-80 (1991) (noting a long history of encroachment by the Canadian federal parliament on provincial jurisdiction in times of emergency, under the aegis of the “emergency doctrine”).

crisis, with the other two branches pushed aside (whether of their own volition or not).<sup>64</sup> The increase in governmental powers leads, in turn, to a contraction of traditional individual rights, freedoms, and liberties.<sup>65</sup> While such expansions and concentrations of powers are not unique to times of crisis, but rather are part of the modernization of society and the need for governmental involvement in an ever-growing number of areas of human activity,<sup>66</sup> it can hardly be denied that such phenomena have been accelerated tremendously (and, at times, initiated) during emergencies.<sup>67</sup> Our acceptance of the growing role of the executive branch as natural may be attributed, in part, to our conditioning during times of emergency.

Thus, two seemingly antithetical vectors are in a constant tug-of-war. The existence of restrictions and limitations on governmental powers is a fundamental attribute of democratic regimes. The ideals of democracy, individual rights, legitimacy, accountability, and the rule of law suggest that even in times of acute danger, government is limited, both formally and substantively, in the range of activities that it may pursue in order to protect the state. However, grave terrorist threats directly challenge this organizing principle. The notion of *raison d'état* privileges the exercise of a wide panoply of measures by the state faced with challenges to its very existence.<sup>68</sup>

Terrorists seek to exploit this fundamental conundrum facing their victims. In most cases, terrorist groups and organizations do not believe they can win by sheer force. They are no real physical or military match to well-organized states.<sup>69</sup> The threats they pose are not existential in the sense that they do not put in real danger the very existence of the victim state. Instead, terrorism presents its real threat in provoking democratic regimes to embrace and employ authoritarian measures<sup>70</sup> that (1) weaken the fabric of democracy; (2) discredit the government domestically as well as internationally; (3) alienate segments of the population from their

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64. See KOH, *supra* note 62, at 117-49; ROSSITER, *supra* note 5, at 288-90; Miller, *supra* note 62, at 738-41.

65. See Alan M. Dershowitz, *The Role of Law During Times of Crisis: Would Liberty Be Suspended?*, in CIVIL DISORDER AND VIOLENCE 129, 133-34 (Harry M. Clor ed., 1972) (focusing on the way that "stretch points" in a legal system allow for the expansion of governmental powers at the expense of rights and freedoms).

66. See generally Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987).

67. See PAUL L. MURPHY, *THE CONSTITUTION IN CRISIS TIMES, 1918-1969* (1972).

68. C.J. FRIEDRICH, *CONSTITUTIONAL REASON OF STATE* 4-5 (1957). Friedrich explains that considerations of "reason of state" exist when "whatever is required to insure the survival of the state must be done by the individuals responsible for it, no matter how repugnant such an act may be to them in their private capacity as decent and moral men." *Id.*; see also MAURIZIO VIROLI, *FROM POLITICS TO REASON OF STATE* 238-80 (1992).

69. This may change should the use of nuclear, biological, or chemical weapons become a real option for terrorist groups.

70. See HEYMANN, *supra* note 59, at ix-xi (outlining governmental responses to terrorism).

government, thereby pushing more people to support (passively, if not outright actively) the terrorist organizations and their cause; and (4) undermine the government's claim to the moral higher ground in the battle against the terrorists, while gaining legitimacy for the latter.<sup>71</sup> The most critical danger from terrorism is "not that democracies would fail to defend themselves, but rather that they would (and did) do so far too well" and, in so doing, become "less democratic."<sup>72</sup> This overreaction may result in the "barbarization"<sup>73</sup> of society not only in that terrorism from "below" may be transplanted by institutionalized terror from "above,"<sup>74</sup> but also in that use of power and force is legitimated as a means for settling disputes.<sup>75</sup>

Setting the equilibrium between the powers of the state and the rights of individuals is, of course, not unique to the realm of emergency powers.<sup>76</sup> However, certain characteristics of times of crisis suggest likely distortions in trying to strike the proper balance under conditions of extreme pressures.

#### A. *Action over Deliberation*

Violent emergencies in general, and shocking terrorist attacks in particular, tend to bring about a rush to legislate. The prevailing belief may be that if new offenses are added to the criminal code and the scope of existing offenses broadened, and if the arsenal of law enforcement agencies

71. See Yehezkel Dror, *Terrorism as a Challenge to the Democratic Capacity To Govern*, in *TERRORISM, LEGITIMACY, AND POWER* 65 (Martha Crenshaw ed., 1983); see also R.D. Crelinsten, *Terrorism as Political Communication: The Relationship Between the Controller and the Controlled*, in *CONTEMPORARY RESEARCH ON TERRORISM* 3, 9 (Paul Wilkinson & Alasdair M. Stewart eds., 1987).

72. David A. Charters, *Introduction to THE DEADLY SIN OF TERRORISM* 1, 1 (David A. Charters ed., 1994); see also Lahav, *supra* note 58, at 559 ("Counterterrorism may be tamed, but too much domestication may render it ineffective. . . . Undomesticated counterterrorism on the other hand, when challenged by the state, responds by attempting to tame the legal system rather than be tamed by it.").

However, a successful terrorist campaign met by a hesitant governmental counteraction may eliminate inhibitions against using force and violence to accomplish political, social, and economic goals by other committed groups and individuals within the community. See HEYMANN, *supra* note 59, at 16. Thus, if the state is expected to guarantee the "liberty" of its citizens, surely it is supposed to protect and guarantee their "life." See generally Irwin Cotler, *Thinking Outside the Box: Foundational Principles for a Counter-Terrorism Law and Policy*, in *THE SECURITY OF FREEDOM*, *supra* note 29, at 111.

73. Dror, *supra* note 71, at 73-74 (noting the barbarization of the international global system as a result of counterterrorism measures invoked against the challenge of international terrorism).

74. See GRANT WARDLAW, *POLITICAL TERRORISM* 69 (2d ed. 1989); see also BENJAMIN CONSTANT, *The Spirit of Conquest and Usurpation and Their Relation to European Civilization*, in *POLITICAL WRITINGS* 43, 134-35 (Biancamaria Fontana ed. & trans., Cambridge Univ. Press 1988) (1814).

75. See, e.g., CONSTANT, *supra* note 74, at 136 ("Power, by emancipating itself from the laws, has lost its distinctive character and its happy pre-eminence. When the factions attack it, with weapons like its own, the mass of the citizens may be divided, since it seems to them that they only have a choice between two factions.").

76. See, e.g., ALAN BARTH, *THE PRICE OF LIBERTY* 193 (1961) (discussing such equilibrium in routine policing).

is enhanced by putting at their disposal more sweeping powers to search and seize, to eavesdrop, to interrogate, to detain without trial, and to deport, the country will be more secure and better able to face the emergency.<sup>77</sup> Furthermore, it is often easier to pass new legislation than to examine why it is that the existing legislation, and the powers granted under it to government and its agencies, was not sufficient. This allows government to demonstrate that it is doing something against the dangers facing the nation rather than sitting idly.<sup>78</sup> Legislation of this sort permits the government to claim that the preexisting legal infrastructure was inefficient and thus it forestalled efficient actions/responses to the threat. The result is a piling up of legislative measures into a complex state of emergency.<sup>79</sup> Moreover, the need to respond quickly to future threats—as much as to assure the public that its government is acting with a vengeance against past and future terrorists—frequently results in rushed legislation, often without much debate and at times forgoing normal legislative procedures. The lack of interest in the problem of dealing with emergencies and terrorism during times of quiet has also led to the fashioning of emergency and counterterrorism legislation without much thought and deliberation. Examples of this abound.

On March 9, 1933, with all the banks in the United States closed for four consecutive days, Congress passed—within an hour of receiving the White House proposal—the Emergency Banking Act,<sup>80</sup> which granted expansive powers to the President.<sup>81</sup> Given the time constraints, the votes of some members of Congress “were not recognized and there was no roll call vote allowed in the House.”<sup>82</sup>

77. Kent Roach, *The Dangers of a Charter-Proof and Crime-Based Response to Terrorism*, in *THE SECURITY OF FREEDOM*, *supra* note 29, at 131, 138-42; see also Conor Gearty, *Airy-Fairy*, LONDON REV. BOOKS, Nov. 29, 2001, at 9.

78. Francis Wheen recounted a telling story about Britain's passage of the Prevention of Terrorism Act of 1974:

Clare Short attended the 1974 debate in her capacity as a Home Office civil servant, sitting on the bench reserved for senior Whitehall officials. After listening to a couple of speeches she whispered to her neighbour—the man who had drafted the bill—that it would do nothing to prevent terrorism. “You know very well that is not what it is about,” he replied. The point, he said, was to appease the Tories and the tabloids.

Francis Wheen, *Bill That Costs Too Much*, GUARDIAN (London), Sept. 2, 1998, at 5.

79. See *Questiaux Report*, *supra* note 44, at 29 (noting that a complex state of emergency is characterized by “the great number of parallel or simultaneous emergency rules whose complexity is increased by the ‘piling up’ of provisions designed to ‘regularize’ the immediately preceding situation and therefore embodying retroactive rules and transitional regimes”).

80. Pub. L. No. 73-1, 48 Stat. 1 (1933).

81. The bill was derided by one of its opponents as “a dictatorship over finance in the United States.” Roger I. Roots, *Government by Permanent Emergency: The Forgotten History of the New Deal Constitution*, 33 SUFFOLK U. L. REV. 259, 266 n.39 (2000) (quoting Rep. McFadden of Pennsylvania).

82. *Id.* at 266. In addition, only a single copy of the actual bill was delivered by the President to the floor of both houses and as no additional copies had been made, the bill was read to the assemblies.

More recently, Congress overwhelmingly supported the passage of the USA PATRIOT Act merely six weeks after the terrorist attacks of September 11th.<sup>83</sup> Congress moved to act despite strong claims that it was interfering unnecessarily and excessively with individual rights and liberties.<sup>84</sup> Established legislative procedures—such as the committee process and floor debate—were abandoned in the name of speedy process.<sup>85</sup>

In the United Kingdom, a new terrorism act came into force in February 2001.<sup>86</sup> Merely nine months later, as a response to the events of September 11th, the British Government put the 118-page Anti-Terrorism, Crime and Security Bill before Parliament.<sup>87</sup> Despite its complexity, and despite the fact that questions had been raised as to the necessity of passing yet another piece of antiterrorism legislation, the bill passed in the House of Commons in sixteen hours.<sup>88</sup>

A similar story can be told of the British Parliament's enactment of the first Prevention of Terrorism (Temporary Provisions) Act of 1974 (PTA)<sup>89</sup> immediately after the Birmingham pub bombings that killed twenty-one people.<sup>90</sup> For the first time, emergency legislation addressing the conflict in Northern Ireland hit home in Great Britain proper. The PTA marked a watershed in legal responses to terrorism related to Northern Ireland in that it deviated from the previous pattern of enacting special emergency legislation for Northern Ireland that did not apply to the rest of the United

83. Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT) Act, Pub. L. No. 107-56, 115 Stat. 272 (2001); see also Michael T. McCarthy, *Recent Developments, USA Patriot Act*, 39 HARV. J. ON LEGIS. 435, 435 (2002) (noting that after the attacks, "Congress moved with tremendous alacrity to authorize new powers for the federal government"). The House vote was 357-66. 147 CONG. REC. H7224 (daily ed. Oct. 24, 2001). The Senate vote was 98-1. 147 CONG. REC. S11,059 (daily ed. Oct. 25, 2001).

84. For reports on the process that led to passage of the Act, see Jess Bravin & Ted Bridis, *Political Role Reversals Shape Antiterrorism Legislation*, WALL ST. J., Oct. 8, 2001, at A8; and Neil A. Lewis & Robert Pear, *Terror Laws Near Votes in House and Senate*, N.Y. TIMES, Oct. 5, 2001, at B8. On objections to the enactment of the USA PATRIOT Act, see, for example, Frank Rich, *Wait Until Dark*, N.Y. TIMES, Nov. 24, 2001, at A27 ("Congress . . . pass[ed] the U.S.A.-Patriot Act before anyone could read it . . ."). For critical views of the Act, see, for example, Jennifer C. Evans, Comment, *Hijacking Civil Liberties: The USA PATRIOT Act of 2001*, 33 LOY. U. CHI. L.J. 933 (2002). For a favorable view of Congress's role in shaping the USA PATRIOT Act, see McCarthy, *supra* note 83, at 439-40 (noting that Congress ensured a continuing oversight role for itself and for the judicial branch).

85. Gia Fenoglio, *Jumping the Gun on Terrorism?*, 33 NAT'L J. 3450 (2001); McCarthy, *supra* note 83, at 439; Letter from the American Civil Liberties Union to the U.S. Senate (Oct. 23, 2001), at <http://www.aclu.org/congress/1102301k.html>.

86. Terrorism Act, 2000, c. 11.

87. Anti-Terrorism, Crime and Security Act, 2001, c. 24.

88. See, e.g., Philip A. Thomas, *September 11th and Good Governance*, 53 N. IR. LEGAL Q. (forthcoming 2003) (detailing the legislative process).

89. c. 56.

90. Fionnuala Ni Aolain, *The Fortification of an Emergency Regime*, 59 ALB. L. REV. 1353, 1357 (1996).



Kingdom.<sup>91</sup> Yet, despite the significant transformation of the British legal landscape wrought by the PTA, little debate took place prior to the passage of the Act.<sup>92</sup>

### B. *Judicial Deference*

Courts are seen as the bulwarks that safeguard rights and freedoms against encroachment by the state. As exigencies tend to test the protection of such rights and freedoms, courts are expected to be evermore vigilant in a time of emergency. Notwithstanding statements about the courts' role in safeguarding human rights and civil liberties precisely when those rights and liberties are most at risk,<sup>93</sup> when faced with national crises, the judiciary tends to "go[] to war."<sup>94</sup> Judges, like the general public and its political leaders, "like[] to win wars"<sup>95</sup> and are sensitive to the criticism that they impede the war effort. Thus, in states of emergency, national courts assume a highly deferential attitude when called upon to review governmental actions and decisions.<sup>96</sup> Both domestic<sup>97</sup> and international<sup>98</sup> judicial bodies share this systemic failure.

91. JOHN E. FINN, *CONSTITUTIONS IN CRISIS: POLITICAL VIOLENCE AND THE RULE OF LAW* 118 (1991); WALKER, *supra* note 7, at 31-33; Oren Gross & Fionnuala Ni Aolain, *To Know Where We Are Going, We Need To Know Where We Are: Revisiting States of Emergency*, in *HUMAN RIGHTS: AN AGENDA FOR THE 21ST CENTURY* 79, 97 (Angela Hegarty & Siobhan Leonard eds., 1999).

92. The Act of 1974 passed through the House of Commons in less than twenty-four hours. See PADDY HILLYARD, *SUSPECT COMMUNITY 1* (1993). Similarly, in 1914, at the outbreak of World War I, Parliament passed the most important and far-reaching emergency legislation in British history without any meaningful debate. See JOHN EAVES, JR., *EMERGENCY POWERS AND THE PARLIAMENTARY WATCHDOG: PARLIAMENT AND THE EXECUTIVE IN GREAT BRITAIN 1939-1951*, at 8-9 (1957).

93. See, e.g., *United States v. United States Dist. Court*, 444 F.2d 651, 664 (6th Cir. 1971) ("It is the historic role of the Judiciary to see that in periods of crisis, when the challenge to constitutional freedoms is the greatest, the Constitution of the United States remains the supreme law of our land.").

94. Michal R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 *MIL. L. REV.* 59, 59 (1980).

95. CLINTON ROSSITER & RICHARD P. LONGAKER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF* 91 (expanded ed. 1976) (referring to the U.S. Supreme Court).

96. See, e.g., THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* 124 (1992) (supporting the German courts' rejection of the political question doctrine, but recognizing that "[m]easured by outcomes, the German judiciary, taking jurisdiction in virtually every instance, has upheld the contested foreign-policy and security initiatives of the political branches in roughly the same proportion . . . as the U.S. federal courts have by practicing abdication"); KOH, *supra* note 62, at 134; CHRISTOPHER N. MAY, *IN THE NAME OF WAR: JUDICIAL REVIEW AND THE WAR POWERS SINCE 1918*, at 261-64 (1989) (speaking of "[r]itualistic [a]pproval" by courts of governmental emergency measures); REHNQUIST, *supra* note 34, at 221-22; Michal R. Belknap, *The Warren Court and the Vietnam War: The Limits of Legal Liberalism*, 33 *GA. L. REV.* 65, 66-67 (1998); Anne-Marie Slaughter Burley, *Are Foreign Affairs Different?*, 106 *HARV. L. REV.* 1980, 1991-95 (1993) (book review).

Some courts invoke judicial mechanisms, such as the political question doctrine, and proclaim issues pertaining to emergency powers to be nonjusticiable. See, e.g., FRANCK, *supra*, at 10; KOH, *supra* note 62, at 146-48.

C. *Public Support, Temporal Duration, and "Otherness"*

Few situations can solidify broad national consensus behind the government. Times of crisis and emergency can and do.<sup>99</sup> Moved by

In a famous letter to Zechariah Chafee, Judge Learned Hand described his rejection of the "clear and present danger" test as invoked by Justice Holmes in *Abrams v. United States*. 250 U.S. 616, 628-30 (1919) (Holmes, J., dissenting). Judge Hand criticized the test, stating: "Besides even their Ineffabilities, the Nine Elder Statesmen, have not shown themselves wholly immune from the 'herd instinct' and what seems 'immediate and direct' to-day may seem very remote next year even though the circumstances surrounding the utterance be unchanged." Letter from Learned Hand to Zechariah Chafee, Jr. (Jan. 2, 1921), *quoted in* GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 169 (1994). In a similar vein, Chafee himself wrote that "[t]he nine Justices in the Supreme Court can only lock the doors after the Liberty Bell is stolen." ZECHARIAH CHAFEE JR., *FREE SPEECH IN THE UNITED STATES* 80 (1941).

For two post-September 11th examples of such deferential judicial attitudes toward government, see the decision of the House of Lords in *Secretary of State for the Home Department v. Rehman*, 2002 A.C. 6 (H.L. 2001), and the Administrative Court's decision in *The Queen v. Secretary of State for the Home Department*, No. 0/2587/2001, 2002 WL 498873 (Q.B. Apr. 17, 2002).

97. See, e.g., JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 54-60 (1993); FRANCK, *supra* note 96, at 10-30; KOH, *supra* note 62, at 134-49; LAURENCE LUSTGARTEN & IAN LEIGH, *IN FROM THE COLD: NATIONAL SECURITY AND PARLIAMENTARY DEMOCRACY* 320-59 (1994); George J. Alexander, *The Illusory Protection of Human Rights by National Courts During Periods of Emergency*, 5 HUM. RTS. L.J. 1, 15-27 (1984); see also Brennan, *supra* note 34, at 20 ("Without prolonged exposure to the claimed threat, it is all too easy for a nation and judiciary . . . to accept gullibly assertions that, in times of repose, would be subjected to the critical examination they deserve."). Evaluating the performance of domestic courts during World War I, George Bernard Shaw was paraphrased as saying, "During the war the courts in France, bleeding under German guns, were very severe; the courts in England, hearing but the echoes of those guns, were grossly unjust; but the courts in the United States, knowing naught save censored news of those guns, were stark, staring, raving mad." *Ex parte Starr*, 263 F. 145, 147 (D. Mont. 1920); see also Arnon Gutfeld, "Stark, Staring, Raving Mad": *An Analysis of a World War I Impeachment Trial*, 30 Y.B. GERMAN-AM. STUD. 57, 69 (1995).

98. The argument is often made that international or regional courts, which enjoy detachment and independence from the immediate effects of national emergencies, are better situated to monitor and supervise the exercise of emergency powers by national governments. As one commentator pointed out, "It is entirely possible that superior courts whose relevant executive authority is not threatened may in fact effectively place limits on subordinate executives." Alexander, *supra* note 97, at 3; see also L.C. Green, *Derogation of Human Rights in Emergency Situations*, 16 CANADIAN Y.B. INT'L L. 92, 112-13 (1978) (describing international public opinion as the sole means to promote protection of human rights, and the European Court as the sole effective judicial mechanism of protection among international and regional human rights adjudicatory organs).

For the argument that international and regional judicial bodies are not necessarily more effective in dealing with the concept of "emergency" than are domestic courts, see Fionnuala Ni Aolain, *The Emergence of Diversity: Differences in Human Rights Jurisprudence*, 19 FORDHAM INT'L L.J. 101 (1995); and Gross, *supra* note 4, at 490-500.

99. Indeed, that fact was noted by James Madison in *The Federalist No. 49*, in which he wrote that constitutions originated in the midst of great danger that led, among other things, to "an enthusiastic confidence of the people in their patriotic leaders, which stifled the ordinary diversity of opinions on great national questions." THE FEDERALIST NO. 49, at 315 (James Madison) (Clinton Rossiter ed., 1961); see also 1 KARL R. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* 43, 198 (5th ed. 1971); E.L. Quarantelli & Russell R. Dynes, *Community Conflict: Its Absence and Its Presence in Natural Disasters*, 1 MASS EMERGENCIES 139, 140, 145 (1976) (noting that emergency periods are characterized by an absence of conflict, as conflict is deemed dysfunctional for the maintenance or survival of the relevant social system); Roots, *supra* note 81,

perceptions of substantial physical threat, motivated by growing personal fear of being the next victim and by hatred toward the terrorists, and frustrated by the continuance of terrorist activities, the general public may “rally ’round the flag”<sup>100</sup> by supporting and calling on the government to employ more radical measures.<sup>101</sup> The creation and maintenance of such consensus depend on a whole slew of factors, but two are of special importance to our inquiry here: the perception that emergency powers and measures are temporary, and the perception that they will be directed against “others,” i.e., not against members of the public who, after all, are the victims of terrorist aggression.

The concept of “emergency” powers invokes images of short-term, transient measures that are designed to respond to a particular emergency and then be removed as soon as, or shortly after, that emergency has been met successfully.<sup>102</sup> The sense that emergency measures, which may deviate from what is normally acceptable within the confines of a legal system in ordinary times, are to be temporary and are not to affect the legal and political terrain for years to come makes the draconian nature of such measures easier to accept.

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at 266 n.40 (“[T]here are provisions in the bill [the Emergency Banking bill of 1933] to which in ordinary times I would not dream of subscribing, but we have a situation that invites the patriotic cooperation and aid of every man who has any regard for his country.” (quoting Sen. Glass)); Eugene V. Rostow, *The Japanese American Cases—a Disaster*, 54 YALE L.J. 489, 490-91 (1945); John Harwood, *By Big Margin, Americans Support Bush on Fight Against Terrorism*, WALL ST. J., Sept. 17, 2001, at A24 (reporting that eighty percent of Americans expressed support for President Bush’s response to the World Trade Center and Pentagon attacks); Greg Jaffe, *U.S. Bomber Crashes as Planes Attack Tora Bora*, WALL ST. J., Dec. 13, 2001, at A3 (indicating continued support for the Bush Administration “war effort”).

100. BRUCE RUSSETT, *CONTROLLING THE SWORD: THE DEMOCRATIC GOVERNANCE OF NATIONAL SECURITY* 34 (1990) (describing the “rally ’round the flag effect” as the phenomenon by which “a short, low-cost military measure to repel an attack . . . is almost invariably popular at least at its inception. So too are many other kinds of assertive action or speech in foreign policy.”); see also GAD BARZILAI, *A DEMOCRACY IN WARTIME: CONFLICT AND CONSENSUS IN ISRAEL* 248-60 (1992).

101. See Purdy, *supra* note 18 (noting the Bush Administration’s claim that its agenda commands strong public support and suggesting that claim is “bolstered by recent polls”); Tim Rutten & Lynn Smith, *When the Ayes Have It, Is There Room for Naysayers?*, L.A. TIMES, Sept. 28, 2001, at E1 (quoting political theorist Michael Walzer as saying that “the burden of proof has shifted in a significant way. Before Sept. 11, a police agency that wanted to expand its powers had to make its case. After Sept. 11, if a police agency comes forward and says we need these additional powers to prevent another terrorist attack, the burden of proof is on those who want to say “No.”); Robin Toner, *Now, Government Is the Solution, Not the Problem*, N.Y. TIMES, Sept. 30, 2001, at D14; see also Quarantelli & Dynes, *supra* note 99, at 141 (highlighting external threats as consolidating communal solidarity).

102. See *Questiaux Report*, *supra* note 44, at 20 (“[A]bove and beyond the rules [that constitute the general principles of the derogation system] . . . one principle, namely, the principle of provisional status, dominates all the others. The right of derogation can be justified solely by the concern to return to normalcy.”); CHOWDHURY, *supra* note 44, at 45 (discussing the temporary nature of emergencies); R. St. J. Macdonald, *Derogations Under Article 15 of the European Convention on Human Rights*, 36 COLUM. J. TRANSNAT’L L. 225, 241 (1997) (“It is inherent in theory and practice that the declaration of an emergency represents a temporary measure.”).

Moreover, in times of crisis, when emotions run high, the dialectic of “us—them” serves several functions. It allows people to vent fear and anger in the face of (actual or perceived) danger and to direct negative emotional energies toward groups or individuals clearly identified as different. The same theme also accounts for the greater willingness to confer emergency powers on the government when the “other” is well-defined and clearly separable from the members of the community.<sup>103</sup> The clearer the distinction between “us” and “them” and the greater the threat “they” pose to “us,” the greater in scope become the powers assumed by government (with the cooperation of the legislature and frequent acquiescence of the courts) and tolerated by the public.

The fact that the targets of counter-emergency measures are perceived as outsiders, frequently foreign ones, has important implications when communities set out to strike a proper balance between liberty and security in times of crisis. Targeting outsiders means that while the benefits (perceived or real) of fighting terrorism and violence accrue to all members of a society, the costs of such actions seem to be borne by a distinct, smaller, and ostensibly well-defined group of people. Under such circumstances, the danger is that political leaders will tend to strike a balance disproportionately in favor of security and impose too much of a cost on the target group without facing much resistance (and, in fact, receiving strong support) from the general public.<sup>104</sup>

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103. W.A. ELLIOTT, *US AND THEM: A STUDY OF GROUP CONSCIOUSNESS* 9 (1986) (arguing that crises lead to heightened individual and group consciousness such that internal conformities within the community are exaggerated while divergence from “outsiders” is emphasized); Blasi, *supra* note 32, at 457 (“Because the instinct to suppress dissent is basic, primitive, and aggressive, it tends to have great momentum when it breaks loose from the shackles of social constraint. Aggression is contagious, and hatred of strangers for what they believe is one of the safest and most convenient forms of aggression.”); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 955 (2002) (“It is often said that civil liberties are the first casualty of war. It would be more accurate to say that noncitizens’ liberties are the first to go.”); Oren Gross, *On Terrorists and Other Criminals: States of Emergency and the Criminal Legal System*, in DIRECTIONS IN CRIMINAL LAW: INQUIRIES IN THE THEORY OF CRIMINAL LAW 409 (Eli Lederman ed., 2001) (suggesting that reference to terrorists as “others” leads to greater acceptance of sweeping governmental emergency powers); Ileana M. Porras, *On Terrorism: Reflections on Violence and the Outlaw*, 1994 UTAH L. REV. 119 (discussing descriptions of terrorists as “foreign” and “other”); Natsu Taylor Saito, *Crossing the Border: The Interdependence of Foreign Policy and Racial Justice in the United States*, 1 YALE HUM. RTS. & DEV. L.J. 53, 57-59 (1998) (detailing the “us against them” mentality in national security policy); Volpp, *supra* note 22 (discussing the effects of September 11th on the redefinition of the protection offered by citizenship as well as the effects on noncitizens); Note, *Blown Away? The Bill of Rights After Oklahoma City*, 109 HARV. L. REV. 2074, 2091 (1996) [hereinafter *Blown Away?*] (“The majority may be willing to accept broad, vaguely defined law enforcement powers when the minority’s constitutional rights are at stake . . . .”); Huong Vu, Note, *Us Against Them: The Path to National Security Is Paved by Racism*, 50 DRAKE L. REV. 661, 663 (2002) (describing how U.S. national security policy singles out nonwhite citizens and legal residents as possible security risks); Ronald Dworkin, *The Threat to Patriotism*, N.Y. REV. BOOKS, Feb. 28, 2002, at 44.

104. Blasi, *supra* note 32, at 457 (“[T]he suppression of dissent ordinarily is undertaken in the guise of political affirmation, of insisting that everyone stand up and be counted in favor of the

#### D. *Perceptions and Misperceptions*

It is easy to say that in times of crisis, when panic, fear, hatred, and similar emotions prevail, rational discourse and analysis are pushed aside in formulating the nation's response. Moreover, when faced with serious terrorist threats or with extreme emergencies, the general public and its leaders are unlikely to be able to assess accurately the risks facing the nation. Any act of balancing—taking into consideration the threats, dangers, and risks that need to be met, and the costs for society and its members of meeting those risks in different ways—is going to be heavily biased, even when applied with the best of intentions.

People operate under a set of cognitive limitations and biases that may prevent them from capturing the real probabilities of the occurrence of certain types of risks and uncertainties. Because accurate risk assessment requires information pertaining to both the magnitude of the risk and the probability of that risk materializing, such cognitive limits color our risk assessment in times of crisis and create a strong tilt toward putting undue emphasis on certain potential risks. While similar observations hold true in a wide variety of areas,<sup>105</sup> the risks involved in acute national crises, in

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supposed true values of the political community. As such, this particular type of challenge to constitutional liberties can take on the character of a mass movement; it can engage the imagination of the man on the street.”); Cole, *supra* note 103, at 957 (noting the “illegitimate balance,” established by “sacrificing the liberties of a minority group to further the majority’s security interests”); Juan E. Méndez, *Human Rights Policy in the Age of Terrorism*, 46 ST. LOUIS U. L.J. 377, 383 (2002) (comparing the “relatively muted criticism among the public at large” to the withholding of information about persons arrested after September 11th, and attributing this to the fact that all of those arrested were non-Americans); William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2165 (2002) (“Anytime the government does something that has concentrated costs but diffused benefits, there is a danger that it will do too much—harming one voter to please ten is generally thought to be a good deal from the point of view of politically accountable decisionmakers.”); Volpp, *supra* note 22, at 1576-77 (detailing the public consensus in favor of racial profiling).

Public choice theory’s accepted wisdom that concentrated costs would lead to the emergence of interest groups that would fight the imposition of such costs does not detract from the validity of the above statement. DANIEL A. FARBER & PHILLIP P. FRICKEY, *LAW AND PUBLIC CHOICE* 21-37 (1991). The “outsiders” in times of crisis are all too often those belonging to some sort of discrete and insular minority. The creation of such interest groups is less meaningful as far as their potential political weight. Moreover, inasmuch as violent emergencies may lead to the targeting of “foreigners,” as the post-September 11th measures have, those targeted may lack the most basic of requirements for a meaningful political leverage—the right to vote political officials out of office. Thus, borrowing from William Stuntz, violent emergencies tend to result in situations where the cost bearers are sufficiently few and powerless, or have certain substantial (perhaps even insurmountable) barriers to their coalescing to fight the government’s actions. See Stuntz, *supra*, at 2165 n.87.

105. See, e.g., Stephen M. Bainbridge & G. Mitu Gulati, *How Do Judges Maximize? (The Same Way Everybody Else Does—Boundedly): Rules of Thumb in Securities Fraud Opinions*, 51 EMORY L.J. 83, 113-18 (2002); Ward Edwards & Detlof von Winterfeldt, *Cognitive Illusions and Their Implications for the Law*, 59 S. CAL. L. REV. 225 (1986); Melvin A. Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211 (1995); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998); Thomas S. Ulen, *Cognitive Imperfections and the Economic Analysis of Law*, 12 HAMLINE L. REV. 385 (1989).

general, and in threats of terrorist activity, in particular, have a special tendency to trigger such cognitive limitations and biases due not only to their potential magnitude, but mostly due to the manner in which they are perceived.

The concept of “bounded rationality” relates to our limited knowledge and computational imperfections and explains our failure to process information perfectly.<sup>106</sup> An important element of information processing and analysis is the time needed to investigate consequences and alternatives. Emergencies, characterized by sudden, urgent, and usually unforeseen events or situations that require immediate action, often without time for prior reflection and consideration, accentuate the problems related to our ability to process information and evaluate complex situations. Hence, such crises tend to lead to an increased reliance on cognitive heuristics—shortcuts that people use when making decisions—as a means of countering the lack of sufficient time to properly evaluate the situation. However, the most common heuristics tend to create patterns of mistaken assessments. Those patterns are reinforced when such heuristics are applied in times of crisis.

The availability heuristic means that individuals tend to link the probability of a particular event taking place with their ability to imagine similar events taking place.<sup>107</sup> Past emergencies and terrorist attacks make it easier for us to imagine such events taking place in the future. Terrorism and emergency do not remain abstract notions, but rather are transformed into tangible, real, and probable events.<sup>108</sup> The stronger the images of past terrorist attacks, the more such attacks are going to be perceived as likely to occur in the future.<sup>109</sup> In the context of September 11th, images of the planes hitting the Twin Towers, the towers crumbling down, firefighters and police officers battling against time, and people jumping to their death are extremely powerful. In addition, the obsessive public discussion of possible future attacks, regardless of the low probability of many of the specific scenarios ever materializing, coupled with repeated official

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106. HERBERT A. SIMON, *MODELS OF MAN: SOCIAL AND RATIONAL* 198 (1957) (“The capacity of the human mind for formulating and solving complex problems is very small compared with the size of the problems whose solution is required for objectively rational behavior in the real world—or even for a reasonable approximation to such objective rationality.” (emphasis omitted)).

107. Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 *COGNITIVE PSYCHOL.* 207 (1973); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 3, 11 (Daniel Kahneman et al. eds., 1982) [hereinafter Tversky & Kahneman, *Judgment Under Uncertainty*].

108. See Note, *Responding to Terrorism: Crime, Punishment, and War*, 115 *HARV. L. REV.* 1217, 1230 (2002).

109. Tversky & Kahneman, *Judgment Under Uncertainty*, *supra* note 107, at 11 (“[T]he impact of seeing a house burning on the subjective probability of such accidents is probably greater than the impact of reading about a fire in the local paper.”).

warnings of pending attacks on bridges,<sup>110</sup> apartment buildings,<sup>111</sup> or attacks carried out on days of particular significance<sup>112</sup> further feed the terrorism frenzy, increasing the imaginability of various potential hazards and hence their perceived riskiness.<sup>113</sup> It comes as little surprise that many Americans regard future domestic attacks as virtually inevitable.<sup>114</sup>

Prospect theory suggests that individuals tend to give excessive weight to low-probability results when the stakes are high enough and the outcomes are particularly bad.<sup>115</sup> Terrorist threats such as those imagined post-September 11th are perceived to raise the stakes to a sufficiently high level.<sup>116</sup> Thus, our perception of the risk presented by emergencies and

110. See, e.g., William Booth, *Alert Issued on Four Big California Bridges*, WASH. POST, Nov. 2, 2001, at A1 (reporting on Governor Gray Davis's warning that four suspension bridges were potential targets of a terrorist attack in November 2001).

111. See, e.g., Philip Shenon & James Risen, *Terrorist Yields Clues to Plots, Officials Assert*, N.Y. TIMES, June 12, 2002, at A1 (noting the possibility of attacks on banks, shopping malls, apartment buildings, and landmarks in New York City); Marjorie Valbrun, *INS Handling of Visas Criticized*, WALL ST. J., May 21, 2002, at A8 (reporting that a national apartment trade group notified its members of an FBI warning that al Qaeda networks had discussed the possibility of renting apartments with the intention of blowing them up).

112. See, e.g., Don Van Natta, Jr. & David Johnston, *New F.B.I. Alert Warns of Threat Tied to July 4th*, N.Y. TIMES, June 30, 2002, at 1; see also E.S. Browning, *A 2% Fall Puts Index on Verge of Bear Level; Dow Falls 102 Points*, WALL ST. J., July 3, 2002, at C1 (describing the effect that warnings about possible terrorist attacks on July 4th had on Standard & Poor's stock index).

113. See Patricia Leigh Brown, *Preparing for a Potential Emergency*, N.Y. TIMES, Oct. 4, 2001, at F12 (discussing steps individuals were taking to prepare for future terrorist attacks, such as taking classes in disaster-preparedness techniques and buying gas masks); Lauren Lipton, *Preparing for the Worst . . .*, WALL ST. J., Oct. 5, 2001, at W14 (listing prices and suppliers of "emergency gear" such as gas masks, antibiotics, hazmat suits, and radiation detectors); see also Paul Slovic et al., *Facts Versus Fears: Understanding Perceived Risk*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, *supra* note 107, at 463, 465 (discussing how a low-probability hazard may increase in memorability and imaginability and hence in perceived riskiness, regardless of what the evidence indicates); Thomas L. Friedman, Editorial, *Cool It!*, N.Y. TIMES, May 22, 2002, at A27 (criticizing the Bush Administration for "terrorizing" the country by "predicting every possible nightmare scenario, but no specific ones, post 9/11").

114. E.g., Joe Battenfeld, *A Nation Rebuilds*, BOSTON HERALD, Sept. 3, 2002, at A1 (reporting that in a nationwide poll 30% of people considered another terrorist attack a certainty and 59% thought it to be a probability); Adam Nagourney & Marjorie Connelly, *Poll Finds New York Fearful, but Upbeat over Future, Too*, N.Y. TIMES, June 11, 2002, at A1 (reporting that 70% of New Yorkers thought an attack was inevitable, but that the heightened sense of insecurity might have been exacerbated by recent alerts by Washington of potential future attacks); see also Josh Meyer, *FBI Expects Suicide Bomb Attack in U.S.*, L.A. TIMES, May 21, 2002, at A1 (noting that FBI Director Robert Mueller told a group of prosecutors it was "inevitable" that an Islamic terrorist organization would attempt a suicide bombing attack).

115. Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, in CHOICES, VALUES, AND FRAMES 17 (2001).

116. See David S. Cloud et al., *Cold War Echo: Soviet Germ Program Is a Worry Once Again amid Anthrax Scare*, WALL ST. J., Oct. 15, 2001, at A1 (describing how the appearance of anthrax in three states increased the public and Administration's focus on possibilities of nuclear, chemical, and biological terrorism); James Dao, *Defense Secretary Warns of Unconventional Attacks*, N.Y. TIMES, Oct. 1, 2001, at B5 (reporting on remarks by Administration officials about the possibility of nuclear, biological, or chemical attacks); Jim Rutenberg, *Talk of Chemical War Grows Louder on TV*, N.Y. TIMES, Sept. 27, 2001, at C6 (discussing the media focus on biological and chemical terrorism).

terrorism may be skewed. Cass Sunstein has recently suggested that the predictions of prospect theory are especially valid where the bad outcome is “affect rich,” namely when it involves not merely a serious loss, but one that produces particularly strong emotions.<sup>117</sup> Sunstein focuses on what he calls “probability neglect,” i.e., situations where individuals do not assess at all the probability that a certain scenario will materialize, but instead focus exclusively on the worst possible outcome, which, in turn, invokes strong, if not extreme, emotions (such as fear).<sup>118</sup>

Finally, it has been noted that people entertain myopic perspectives about the future in that they tend to undervalue future benefits and costs when comparing them with present benefits and costs.<sup>119</sup> While a strong governmental response against terrorism is perceived by the public as socially beneficial, the longer-term costs for the rule of law and to individual rights and liberties tend to be overly discounted.<sup>120</sup> The fact that such future costs seem mostly intangible and abstract, especially in comparison with the very tangible sense of fear for one’s person and loved ones, coupled with a feeling of increased security as a result of governmental action, only exacerbates this defect in our risk assessment.<sup>121</sup>

All of the above suggests why, under extreme circumstances, governments may opt for draconian, authoritarian measures and why overreaction against the terrorist threat is a likely outcome. This overreaction may be the result of the breaking down of traditional checks and balances in times of emergency, as well as of bona fide (but potentially cognitively biased) assessments of the risks facing the nation.<sup>122</sup> How then should the legal system attempt to immunize itself against the dangers of overreaction, while still allowing the authorities to respond effectively to a given crisis? And how should the legal system account, if at all, for the fact that when faced with an acute emergency, governments tend to, in the words of Attorney General Francis Biddle, “get on with the war” while not

117. Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 YALE L.J. 61, 66 (2002) [hereinafter Sunstein, *Probability Neglect*]; Cass R. Sunstein, *The Laws of Fear*, 115 HARV. L. REV. 1119, 1137-44 (2002) (book review) (discussing the “affect heuristic”).

118. Sunstein, *Probability Neglect*, *supra* note 117, at 69 (“When a bad outcome is highly salient and triggers strong emotions, government will be asked to do something about it, even if the probability that the bad outcome will occur is low.”).

119. *See, e.g.*, Eisenberg, *supra* note 105, at 222; *see also* Quarantelli & Dynes, *supra* note 99, at 142 (discussing how disasters lead to focusing on the present).

120. This is exacerbated further due to the ability of the government to manipulate information and to publicize both the potential risks and the costs and benefits of pursuing different measures in response to such risks.

121. *See, e.g.*, Cole, *supra* note 103, at 956; *cf.* Quarantelli & Dynes, *supra* note 99, at 142 (describing how disasters result in placing a priority on activities that benefit the “total community”).

122. Of course, there is also the very strong possibility of intentional manipulation. *See, e.g.*, Slovic et al., *supra* note 113, at 483 (“That subtle differences in how risks are presented can have marked effects on how they are perceived suggests that those responsible for information programs have considerable ability to manipulate perceptions.”).



bothering too much with the Constitution?<sup>123</sup> The next Part introduces the models that have been pursued in search of an answer.

### III. KEEPING THE LAW ON OUR SIDE: CONSTITUTIONAL MODELS OF EMERGENCY POWERS

Two extreme responses to the conundrum suggested in Part II are possible. One radical solution may be the domestic equivalent of the realist school of international relations.<sup>124</sup> An extreme version would read as follows: There is no room for any kind of "legalistic-moralistic" approach in dealing with emergencies.<sup>125</sup> Legal rules and norms are too inflexible and rigid to accommodate the security needs of states. Governments should have full and unfettered discretion to determine what course of action ought to be taken to fight any given crisis in the most efficient way. Maxims such as "necessity knows no law," "*salus populi suprema lex est*," "*inter arma silent leges*," and "raison d'état" reflect this approach. Where the survival (or fundamental interest of the state) is concerned, there ought to be no holding back on governmental action to save the nation. One also frequently encounters the argument that since terrorists do not obey any legal principles, the victim state need not put on self-imposed legal shackles in its fight against them. Law is, to a large extent, irrelevant when dealing with violent crises.<sup>126</sup>

Under this brand of political realism, democracies face no real conundrum in dealing with emergencies. The only constraints within which government functions are those emanating from efficiency and limited resources. This cannot be acceptable to those who believe that law matters

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123. BIDDLE, *supra* note 40, at 219; cf. Frederick Schauer, *May Officials Think Religiously?*, 27 WM. & MARY L. REV. 1075, 1083-84 (1986). Schauer argues:

We must deal with the fact that, regardless of what the norm of official behavior is, public officials *will* take their own religious convictions into account in performing their official duties. They may not always do so, but it is absurd to suppose that they have never done so with some frequency, that they do not now do so with some frequency, and that they will not always do so with some frequency.

The question is thus one of determining how to confront the inevitable . . .

*Id.*; see also Stuntz, *supra* note 104, at 2190 ("[W]hatever the law says, there are some things the police are bound to do. Better to get the relevant police behavior out in the open than to maintain nominally strict rules that are ignored in practice.").

124. See generally HANS J. MORGENTHAU, *POLITICS AMONG NATIONS* 4-15 (5th ed. 1973) (outlining six principles of political realism as applied to international politics).

125. GEORGE F. KENNAN, *AMERICAN DIPLOMACY, 1900-1950*, at 95 (1951). For a recent exposition of similar views, see Robert Kagan, *Power and Weakness*, POL'Y REV., June-July 2002, at 3.

126. See FRIEDRICH, *supra* note 68, at 14 (noting that Hobbes recognized the state as a supreme value, and, therefore, its preservation and the maintenance of its internal order justified all means necessary, regardless of the inherent justice of that order); see also GREGORY S. KAVKA, *HOBBESIAN MORAL AND POLITICAL THEORY* (1986).

and that it matters greatly, and perhaps especially, in times of crisis as a check against arbitrary actions and unlimited discretion.

A diametrically opposed position to that of political realism is the claim that legal systems must not, under any condition and regardless of circumstances, recognize emergencies as deserving of special treatment and accommodation. Whereas political realism abandons legal norms, this approach eschews flexibility.

In the spectrum of possibilities that stretches between these two opposing poles, we can identify several models that have been applied in practice. The remainder of this Part introduces models of emergency powers that seek to “keep the law on our side,”<sup>127</sup> as we respond to violent emergencies. The models presented below are “constitutional” in the sense that they are based on the premise that legal rules control the government’s response to emergencies and terrorist threats. The fundamental assumption that underlies these models is the assumption of constitutionality, which dictates that whatever responses are made to the challenges of a particular exigency, such responses are to be found and limited within the confines of the constitution. While terrorists are lawless and operate outside the sphere of legal principles, democratic governments must be careful not to fight terrorism with lawless means. Otherwise, these governments may succeed in defeating terrorism at the expense of losing the democratic nature of the society they are defending. The assumption is, therefore, that the exception is governed and controlled by legal norms.

#### A. *The Business as Usual Model*

1. *“It is imperative that the trains run on schedule.”*<sup>128</sup>

Under the Business as Usual model of emergency powers, a state of emergency does not justify a deviation from the “normal” legal system. No special “emergency” powers are introduced either on an ad hoc or a permanent basis. The ordinary legal system already provides the necessary answers to any crisis without the legislative or executive assertion of new or additional governmental powers. The occurrence of any particular

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127. Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT’L L.J. 23, 23 (2002). Koh explicates this point as follows:

In thinking about our response [to the attacks of September 11th], we need to ask not just what the letter of the law permits and forbids, but which course of action most closely comports with the spirit of the laws. . . . [D]oing so will keep the law on our side, will keep us on the moral high ground, and will preserve the vital support of our allies, international institutions, and the watching public as the crisis proceeds.

*Id.*

128. FRIEDRICH DÜRRENMATT, *DER BESUCH DER ALTEN DAME* [THE VISIT] 22 (1980) (“In this country [Switzerland], you never pull the emergency brake, even when there is an emergency. It is imperative that the trains run on schedule.”).

emergency cannot excuse or justify a suspension, in whole or in part, of any existing piece of the ordinary legal system. Thus, Justice Davis could state in *Ex parte Milligan*<sup>129</sup> that the Constitution applied equally in times of war as well as in times of peace.<sup>130</sup>

The Business as Usual model rejects the possibility that a tension exists between protecting the security of the nation and maintaining its basic democratic values, including the rule of law.<sup>131</sup> In times of danger and peril, as in normal times of quiet and calm, the laws (and the powers vested in the government) remain the same. Ordinary legal rules and norms continue to be followed strictly and adhered to with no substantive change or modification. This approach offers a unitary vision of the constitutional order. While the occurrence of emergencies and acute crises is acknowledged, such events are of no constitutional significance because no distinct legal emergency regime is recognized under the constitution.<sup>132</sup> Hence, we may think of this model as “Ordinary/Ordinary”: Ordinary rules apply not only in times of peace but also in times of war.

## 2. Challenges and Justifications

### a. The Charge of Hypocrisy

Proponents of the Business as Usual model must respond to several challenges to their approach. One argument is that the model can only be supported by those who are naive or hypocritical. When faced with serious threats to the life of the nation, government will take whatever measures it deems necessary to abate the crisis. Regardless of whether government *ought* to do so, history demonstrates that it *does*.<sup>133</sup> As Justice Ben-Porat of the Israeli Supreme Court wrote in her opinion in *Barzilai v. Government of Israel*:<sup>134</sup>

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129. 71 U.S. (4 Wall.) 2 (1866).

130. *Id.* at 120-21.

131. *See, e.g.*, Lobel, *supra* note 61, at 1387.

132. For the idea of nonderogable rights, see American Convention on Human Rights, opened for signature Nov. 22, 1969, art. 27(2), 1144 U.N.T.S. 123, 152 (entered into force July 18, 1978); International Covenant on Civil and Political Rights, adopted Dec. 19, 1966, art. 4, S. EXEC. DOC. E, 95-2, at 23, 24 (1978), 999 U.N.T.S. 171, 174 (entered into force Mar. 23, 1976); and European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 15(2), 213 U.N.T.S. 221, 232.

133. Joan F. Hartman, *Derogation from Human Rights Treaties in Public Emergencies*, 22 HARV. INT'L L.J. 1, 11 (1981) (noting that suspension of human rights treaties is practically inevitable during periods of acute crisis).

134. H.C. 428/86, *Barzilai v. Gov't of Israel*, 40(3) P.D. 505, reprinted in 6 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 1 (1988) [hereinafter SELECTED JUDGMENTS]; *see also* Mordechai Kremnitzer, *The Case of the Security Services Pardon*, 12 IYUNEI MISHPAT 595 (1987); Lahav, *supra* note 58, at 547-56.

[T]he smaller the deviation from the legal norm, the easier it would be to reach the optimal degree of harmony between the law and the protection of the State's security. But we, as judges who "dwell among our people," should not harbor any illusions . . . . There simply are cases in which those who are at the helm of the State, and bear responsibility for its survival and security, regard certain deviations from the law for the sake of protecting the security of the State, as an unavoidable necessity.<sup>135</sup>

Adopting the Business as Usual model means either being unaware of the reality of emergency management, or ignoring it and knowingly maintaining an illusory facade of normalcy. That indeed happened in Israel with respect to the use of illegal interrogation techniques by the General Security Service (GSS), which led in 1987 to the establishment of the Landau Commission of Inquiry.<sup>136</sup> When GSS interrogators were faced with an acute need to respond effectively to Palestinian terrorism, legal restrictions limited their ability to conduct the interrogations of terrorist suspects in ways the GSS deemed necessary. The officers opted to use force in interrogations. In its report, the Landau Commission declared that a legal system that is aware of such a pattern of conduct, but is unwilling to acknowledge it normatively, can be charged with hypocrisy in that it "declares that [it] abide[s] by the rule of law, but turn[s] a blind eye to what goes on beneath the surface."<sup>137</sup>

Linked to that charge of hypocrisy is the related argument that application of the Business as Usual model may result in public realization that law and actual governmental practice diverge systematically when emergencies arise. That may lead, in turn, to portrayal of the legal system as unrealistic because it fails to adjust to the needs of fighting national crises. As a result, particular norms, and perhaps the legal system in general, may break down, as the ethos of obedience to law is seriously shaken and challenges emerge with respect to the reasonableness of following these norms.<sup>138</sup> Thus, legal rigidity in the face of severe crises is not merely

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135. See *Barzilai*, 40(3) P.D. 505, reprinted in 6 SELECTED JUDGMENTS, *supra* note 134, at 63. Alan Dershowitz has also noted:

We know, of course, what all governments would actually *do* under these conditions of tragic choice: they (or more precisely, some flack-catching underling) would torture (with the implicit approval of the powers-that-be). But could the government *justify* it? Would they write a law expressly *authorizing* such means? Or would they choose the "way . . . of the hypocrites . . . ."

Alan M. Dershowitz, *Is It Necessary To Apply "Physical Pressure" to Terrorists—and To Lie About It?*, 23 ISR. L. REV. 192, 192 (1989) (quoting ISRAELI GOV'T PRESS OFFICE, COMMISSION OF INQUIRY INTO THE METHODS OF INVESTIGATION OF THE GENERAL SECURITY SERVICE REGARDING HOSTILE TERRORIST ACTIVITY (1987), reprinted in 23 ISR. L. REV. 146, 183 (1989) [hereinafter LANDAU REPORT]).

136. LANDAU REPORT, *supra* note 135.

137. *Id.* at 183.

138. Schauer, *supra* note 123, at 1084.

hypocritical, but is, in fact, detrimental to long-term notions of the rule of law. Moreover, it may lead to more, rather than less, radical interference with individual rights and liberties.<sup>139</sup>

Finally, Justice Davis's statement that the Constitution is the same in times of war as in times of peace is in danger of being reversed, so that the Constitution will be the same in times of peace as in times of war. In other words, government may be tempted to retain its expansive emergency powers in order to have them available even when the emergency has passed and normalcy has been restored. Emergency norms, measures, and institutions are thus likely to find their way into the ordinary legal system.<sup>140</sup>

### b. *Absolutism and Resistance*

Several different routes may be pursued in attempting to respond to the challenges noted above.

#### i. *Constitutional Absolutism and Perfection*

Under the theory of constitutional absolutism supported by Justice Davis in his extensive obiter dictum in *Ex parte Milligan*,<sup>141</sup> the constitutional limitations on power and the protections accorded to individual rights are fully applicable in both times of peace and times of war.<sup>142</sup> "Absolutism" in this context stands for two propositions. First, whatever powers the government may lawfully wield under the constitution to meet an emergency, such powers cannot diminish the scope of, let alone suspend, constitutional guarantees.<sup>143</sup> The second proposition is that

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139. See, e.g., Ackerman, *supra* note 2, at 15 ("If pedantic respect for civil liberties requires government paralysis, no serious politician will hesitate before sacrificing rights to the war against terrorism. He will only gain popular applause by brushing civil libertarian objections aside as quixotic.").

140. See A. Kenneth Pye & Cym H. Lowell, *The Criminal Process During Civil Disorders*, 1975 DUKE L.J. 581, 600-01.

141. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

142. CORWIN, *supra* note 63, at 79-80; see also Lobel, *supra* note 61, at 1386-87. Molly Ivins also noted:

The U.S. Constitution was written by men who had just been through a long, incredibly nasty war. They did not consider the Bill of Rights a frivolous luxury, to be in force only in times of peace and prosperity, put aside when the going gets tough. The Founders knew from tough going. They weren't airy-fairy guys.

Molly Ivins, Editorial, *Trampling All over the Constitution*, CHI. TRIB., Nov. 22, 2001, at N19.

143. Thus, for example, almost all the major international human rights conventions recognize the possibility of derogating from otherwise protected rights in times of public emergency that threaten the life of the nation. See sources cited *supra* note 132. Constitutional absolutism in this sense is anchored in a position that denies any room for a judicial balancing of competing interests and values. See, e.g., Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 737 (1963).

government may not lawfully wield any special powers to deal with emergencies unless such powers are explicitly provided for by the constitution.<sup>144</sup> Taken together, these propositions focus on the constitution as a constitution of rights.<sup>145</sup> As Justice Davis reasoned:

It is insisted that the safety of the country in time of war demands that this broad claim for martial law shall be sustained. If this were true, it could be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation. Happily, it is not so.<sup>146</sup>

The constitutional absolutism argument is joined by an argument about constitutional perfection.<sup>147</sup> Statements claiming that the constitutional framework should be the same in times of war as in times of peace project a belief in the fortitude, completeness, and perfection of the existing legal system, and in the government's ability to fend off any crisis without deviating from ordinary norms. According to this view, the constitution

144. *Lobel, supra* note 61, at 1386-87.

145. *But see* CORWIN, *supra* note 63, at 168-80 (noting the transformation of the "Constitution of Rights" into the "Constitution of Powers"); ARTHUR SELWYN MILLER, *DEMOCRATIC DICTATORSHIP: THE EMERGENT CONSTITUTION OF CONTROL* (1981). *See generally* Louis Henkin, *Constitutionalism and Human Rights*, in *CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD* 383 (Louis Henkin & Albert J. Rosenthal eds., 1990).

146. *Milligan*, 71 U.S. (4 Wall.) at 126. Benjamin Constant shared similar sentiments when speaking of the experience following the French Revolution:

All the mediocre minds, ephemeral conquerors of a fragment of authority, were full of all these maxims [such as public safety and supreme law], the more agreeable to stupidity in that they enable it to cut those knots it cannot untie. They dreamt of nothing else but measures of public safety, great measures, masterstrokes of state; they thought themselves extraordinary geniuses because at every step they departed from ordinary means. They proclaimed themselves great minds because justice seemed to them a narrow preoccupation. With each political crime which they committed, you could hear them proclaiming: "Once again we have saved the country!" Certainly, we should have been adequately convinced by this, that a country saved every day in this manner must be a country that will soon be ruined.

CONSTANT, *supra* note 74, at 138.

147. I use the term "constitutional perfection" in this context to refer to the notion that the Constitution anticipates any future emergency and incorporates, within its framework, all the powers that may be necessary to respond to such a crisis, whatever its nature. *See, e.g.*, ROSSITER, *supra* note 5, at 212-15. Thus, constitutional perfection means that there is no need for government to go outside the Constitution in order to meet emergencies. For a flip-side aspect of constitutional perfection, see, for example, Nicholas N. Kitzrie, *Patriots and Terrorists: Reconciling Human Rights with World Order*, 13 CASE W. RES. J. INT'L L. 291, 295 (1981). The idea of constitutional perfection has also been extensively discussed in the context of constitutional amending clauses. *See, e.g.*, *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* (Sanford Levinson ed., 1995) (providing a collection of essays focusing on various issues concerning constitutional amendments); Sanford Levinson, *"Veneration" and Constitutional Change: James Madison Confronts the Possibility of Constitutional Amendment*, 21 TEX. TECH L. REV. 2443, 2451-52 (1990) (noting Madison's argument that the very recognition of possible constitutional imperfection is dangerous to the constitutional order, which depends on a mood of "veneration" toward the Constitution).

includes within its purview all the powers that government might need to exercise in order to carry out its functions and duties. The powers given to government under the constitution encompass not only powers that are required in order to deal with the normal functions of government in times of peace, but also those powers that might be necessary in times of war. There is no situation that is not covered by constitutional arrangement or that might necessitate looking outside the basic law of the land for additional powers and authority.<sup>148</sup> Since the American constitutional text does not provide for special emergency powers to be vested in government when faced with an emergency,<sup>149</sup> we must conclude that there is no place under the Constitution for such exceptional governmental powers.<sup>150</sup>

## ii. *A Strategy of Resistance*

A different source of support for the Business as Usual model adopts a "strategy of resistance."<sup>151</sup> According to this strategy, "one says 'no' even to the inevitable."<sup>152</sup> The argument from the strategy of resistance is that maintaining the ordinary system of laws unchanged, and not succumbing to pressure to stretch, bend, modify, or replace it, has a significant value in and of itself.<sup>153</sup> Such a strategy does not purport to bar governments from resorting to exceptional measures. "Resisting the inevitable is not to be desired because it will prevent the inevitable, but because it may be the best strategy for preventing what is less inevitable but more dangerous."<sup>154</sup> The strategy of resistance may not be able to stop the inevitable—the use of extraordinary powers by government in times of crisis. Rather, it is designed to minimize the likelihood of the use by government of emergency powers in nonemergency situations or of the government's use

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148. ROSSITER, *supra* note 5, at 212 ("It is constitutional dogma that this document foresees any and every emergency, and that no departure from its solemn injunctions could possibly be necessary.")

149. When the Framers considered such powers to be necessary, they made explicit and specific allowance for such powers within the constitutional framework. See U.S. CONST. art. I, § 8, cl. 15 (granting the power to call out the militia to execute the laws, suppress insurrections, and repel invasions); *id.* art. I, § 9, cl. 2 (granting the power to suspend the writ of habeas corpus).

150. *Milligan*, 71 U.S. (4 Wall.) at 126 ("[The Framers] limited the suspension to one great right [the writ of habeas corpus], and left the rest to remain forever inviolable.")

151. See Schauer, *supra* note 123, at 1084.

152. *Id.*

153. Thus, for example, Schauer writes:

Although disturbing, perhaps reactions similar to those that prompted the internment of the Japanese-Americans never can be expected to disappear, and during time of war or national hysteria the courts will behave the way they did in *Korematsu*. The mere fact that courts will fold under pressure, however, does not dictate that they should be *told* that they may fold under pressure, because the effect of the message may be to increase the likelihood of folding even when the pressure is less.

*Id.* at 1084-85 n.11.

154. *Id.* at 1085.

of excessive powers. Thus, for example, the use of categorical prohibitions on certain governmental actions, or of categorical rights, may make it harder for governmental actors to exercise extraordinary powers in deviation and violation of such absolutes. Similarly, the insistence that times of crisis do not give rise to new powers may slow down the rush to use such powers.<sup>155</sup> A firm insistence on the applicability of ordinary legal norms in times of emergency, and on governmental operation only within the limits of the law, may lead government officials to be more circumspect before breaking the law. Such a principled position not only imposes moral inhibitions on government officials, but also raises the specter of public exposure if a measure is later considered to have been unnecessary, and the (albeit remote) possibility of criminal proceedings and civil suits brought against the perpetrators.

Vincent Blasi put forward a similar argument for adopting a “pathological perspective”—the equivalent of the Business as Usual model—in adjudicating First Amendment disputes and fashioning First Amendment doctrines. He argues that such an approach is necessary in light of governmental proclivity to violate those rights protected by the First Amendment in times of crisis.<sup>156</sup> Courts are called upon to make “a conscious effort . . . to strengthen the central norms of the first amendment against the advent of pathology.”<sup>157</sup> Emphasis ought to be put “in adjudication during normal times on the development of procedures and institutional structures that are relatively immune from the pressure of urgency by virtue of their formality, rigidity, built-in delays, or strong internal dynamics.”<sup>158</sup> Even if one thinks times of crisis justify redefining the scope of protection of the First Amendment and lowering the walls of protection surrounding the expression that falls within its ambit, Blasi points out the danger that the rush to dilute First Amendment protections in times of great peril will not merely end there, but rather will spill over to “normal” First Amendment jurisprudence and doctrine.<sup>159</sup> Thus, the long-

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155. See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 178-79 (1982). Calabresi acknowledges the desire “in situations of uncertainty to slow down change until we are sure we want it.” *Id.* Additionally, he suggests that “[t]he use of absolute or categorical language, even when it is inaccurate and leads to inaccurate results, may have substantial merit for this . . . reason.” *Id.*

156. Blasi, *supra* note 32, at 450 (“‘Pathology’ . . . is a social phenomenon, characterized by a notable shift in attitudes regarding the tolerance of unorthodox ideas. What makes a period pathological is the existence of certain dynamics that radically increase the likelihood that people who hold unorthodox views will be punished for what they say or believe.”).

157. *Id.* at 459.

158. *Id.* at 468. Blasi advocates a “keep it simple” guideline, i.e., judges should use simple First Amendment principles in order to strengthen the restraining power of the First Amendment in times of crisis. *Id.* at 466-76. Blasi suggests viewing the First Amendment as concentrating on core values that are more easily defensible in repressive times. *Id.* at 476-80.

159. *Id.* at 456-58; see also FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* (1982) (discussing the spillover of doctrines from economic-related speech to political



term dangers of such an act of convenience outweigh the benefits of short-term dilution in order to respond to a given emergency.

Finally, the strategy of resistance calls for a rules-based approach. Clear, bright-line rules may make it more likely that decisionmakers (including judges) will make unpopular decisions in times of stress (namely, decisions that are more favorable to individual rights and liberties than those deemed desirable by the general public and its political leaders).<sup>160</sup>

### iii. *Myths, Symbolism, and Ideals*

An argument related to that made from the strategy of resistance invokes the symbolic value of attachment to a Business as Usual attitude.<sup>161</sup> One may acknowledge the unrealistic attributes of the model and still contend that upholding the myth of regularity and control by normal constitutional principles even under circumstances of emergency is socially beneficial.<sup>162</sup> As Laurence Tribe has suggested, establishing and maintaining “popular and institutional respect for constitutional structures and liberties,” as well as for the constitutional document itself, “may be an even greater bulwark against tyranny than the textual provisions

speech); Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978); Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181 (1988).

160. See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 794 (2d ed. 1988) (“Categorical rules . . . tend to protect the system of free expression better because they are more likely to work in spite of the defects in the human machinery on which we must rely to preserve fundamental liberties.”); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180 (1989). Blasi does not completely disregard doctrinal standards. Rather, he professes his preference for “mechanistic measures” that confine the range of discretion that is left to future decisionmakers over standards (such as the “clear and present danger” test) that require in their application an assessment of social conditions and that are more likely to bend and be distorted in a way that is less protective of expression under intense pressure. Blasi, *supra* note 32, at 474-80; see also ELY, *supra* note 32, at 109-16.

161. See, e.g., SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 11 (1988) (noting that Madison’s vision of veneration of the Constitution “has become a central, even if sometimes challenged, aspect of the American political tradition”); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1375 (1997) (“[T]here are good arguments for requiring people, and particularly legal officials, on pain of penalty, to follow the law even when they believe they have good reason to disobey and even if they in fact do have good reason to disobey.”); Levinson, *supra* note 147, at 2452-55; Bruce G. Peabody, *Nonjudicial Constitutional Interpretation, Authoritative Settlement, and a New Agenda for Research*, 16 CONST. COMMENT. 63, 67 (1999) (noting that law’s stability promotes a sense of “law abidingness”).

162. Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 439 (1985) (“Myths serve important functions. They provide goals and ideals, and as such they channel our thinking.”); see also Judith Olans Brown et al., *The Mythogenesis of Gender: Judicial Images of Women in Paid and Unpaid Labor*, 6 UCLA WOMEN’S L.J. 457, 457-58 (1996) (“Myths can create reality and increase meaning, operating not as reflection but inspiration.”).

themselves.”<sup>163</sup> The model may serve as a constant reminder that emergency neither justifies nor excuses forsaking fundamental constitutional values and doctrines.<sup>164</sup>

Thus, the Business as Usual model assumes important symbolic and educational functions. Maintaining an unbending commitment to existing legal norms, the constitution, and the ideal of the rule of law—maintaining a “mood of veneration”<sup>165</sup> toward them—helps us answer the question of what are and what are not “necessary” measures in a particular state of emergency. The more entrenched a legal norm is, the harder it is for the government to convince the public that violating that norm is absolutely necessary.

And what if the Business as Usual model is an aspiration, an ideal for which to strive, rather than an accurate description of reality? Should we discard that ideal just because it may not always be useful in practice? In a sense it may be argued that the Business as Usual model does not purport to be an accurate depiction of reality, but rather is a Weberian “ideal type.”<sup>166</sup> As an ideal type, the model may be regarded as a “theoretical construct[] that model[s] certain aspects of social reality and help[s] us to explain particular historical conditions . . . under explicit assumptions that actually hold true in no historical society.”<sup>167</sup>

163. Memorandum from Laurence H. Tribe to the Authors of the Constitution for the Czech and Slovak Federated Republic (Jan. 8, 1991) [hereinafter Memorandum from Tribe] (on file with author).

164. See CALABRESI, *supra* note 155, at 172-73; Schauer, *supra* note 162, at 439 (“The myth of literalism . . . remains the conscience on the judicial shoulder, constantly reminding judges . . . that they are expounding a *written* Constitution, and that interpretations inconsistent with the written text require an enormous amount of explanation and justification, if indeed they are even legitimate.”).

165. Levinson, *supra* note 147, at 2451-52. On the role of the Constitution in American civil religion, see, for example, Max Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290, 1294-95 (1937); and Sanford Levinson, “*The Constitution*” in *American Civil Religion*, 1979 SUP. CT. REV. 123. See also DANIEL A. FARBER, LINCOLN’S CONSTITUTION: THE NATION, THE PRESIDENT, AND THE COURTS IN A TIME OF CRISIS 199-200 (forthcoming 2003) (noting that Lincoln’s prewar position was that “reverence for the constitution and laws” was key for “our future support and defense” (quoting President Lincoln)).

166. SUSAN J. HEKMAN, WEBER, THE IDEAL TYPE, AND CONTEMPORARY SOCIAL THEORY 18-60 (1983); MAX WEBER, ECONOMY AND SOCIETY (Guenther Roth & Claus Wittich eds. & Ephraim Fischoff et al. trans., Bedminster Press 1968) (1922); MAX WEBER, “*Objectivity*” in *Social Science and Social Policy*, in MAX WEBER ON THE METHODOLOGY OF THE SOCIAL SCIENCES 49, 89-104 (Edward A. Shils & Henry A. Finch eds. & trans., 1949) [hereinafter WEBER, *Objectivity*].

167. Dhananjai Shivakumar, *The Pure Theory as Ideal Type: Defending Kelsen on the Basis of Weberian Methodology*, 105 YALE L.J. 1383, 1399 (1996); see also WEBER, *Objectivity*, *supra* note 166, at 90 (offering his definition of the “ideal type”); Immanuel Kant, *On the Common Saying: “This May Be True in Theory, but It Does Not Apply in Practice,”* in POLITICAL WRITINGS 61 (Hans Reiss ed. & H.B. Nisbet trans., Cambridge Univ. Press 2d ed. 1991). But see Charles L. Black, Jr., *Mr. Justice Black, the Supreme Court, and the Bill of Rights*, HARPER’S MAG., Feb. 1961, at 63. I wish to thank Steve Ratner and Sanford Levinson for drawing my attention to this article.

iv. *Slippery Slopes*

Accommodation of exigency considerations within the body of the legal system may induce the government to use its emergency powers expansively even when such use is uncalled for under the prevailing circumstances. If the power "is there," it is more likely to be used than when it has first to be put in place.<sup>168</sup> Moreover, the existence of such constitutional dictates could encourage unscrupulous political leaders to foment an atmosphere of fear so as to be able to invoke these extraordinary constitutional powers.<sup>169</sup> The danger that government will exercise permissible, special emergency powers "and wield [them] oppressively or selfishly, to the detriment of liberty, equality, or enduring national progress,"<sup>170</sup> may be "less inevitable but more dangerous."<sup>171</sup> By the mere incorporation of a set of extraordinary governmental powers into the legal system, a weakening of that legal system will have already taken place and a dangerous threshold will have been crossed. The system will have embarked on its descent along a slippery slope as government will resort to special emergency powers in situations that are farther and farther away from a real exigency.<sup>172</sup>

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In fact, the degree of similarity between the ideal type and the actual reality can be taken as a measure of the level of usefulness and utility of that ideal type as a descriptive and explanatory tool. Usefulness in that sense is, however, the only criterion by which an ideal type model ought to be evaluated. The question whether such a model is correct or incorrect is irrelevant since the model does not purport to comport with any specific number of empirically observable phenomena. Shivakumar, *supra*, at 1400-02. The ideal type is meant to represent a certain idea. WEBER, *Objectivity*, *supra* note 166, at 91.

168. See CALABRESI, *supra* note 155, at 167-68 (discussing the claims that an open assertion of judicial power will lead to the use of such power even when it is generally unwelcomed); Christoph Schreuer, *Derogation of Human Rights in Situations of Public Emergency: The Experience of the European Convention on Human Rights*, 9 YALE J. WORLD PUB. ORD. 113, 123 (1982) (noting that those who objected to the inclusion of derogation clauses in the major international human rights conventions argued that the presence of a derogation clause, by permitting considerations of expediency to prevail over true necessity, might actually encourage governments to resort to that mechanism). But consider Justice Story's caution that "[i]t is always a doubtful course, to argue against the use or existence of a power, from the possibility of its abuse." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 344 (1816).

169. It is worth noting in this context not merely the general patterns of consensus formation in times of danger, see *supra* note 99 and accompanying text, but also the claim, made by behavioral studies scholars, that choices are frequently shaped more by the framing of outcomes than by the substance of the issues at stake, which may allow for manipulation. This is especially so when issues are framed in terms of "our" security versus "their" rights. Thus, in order to increase its public support, the government may seek to manipulate information pertaining both to the potential risks to the public and to the costs and benefits of pursuing different measures in response to such risks. See MICHAEL STOHL, *WAR AND DOMESTIC POLITICAL VIOLENCE 82-95* (1976). On framing, see, for example, Richard L. Hasen, Comment, *Efficiency Under Informational Asymmetry: The Effect of Framing on Legal Rules*, 38 UCLA L. REV. 391 (1990).

170. Memorandum from Tribe, *supra* note 163.

171. Schauer, *supra* note 123, at 1085.

172. See *id.* at 1084 ("If official toleration of the suspect occurs, the fear is that this will be taken as implicit, if not explicit, permission to go one step further."); see also Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985).

### 3. *Courage and Relevancy: Ex parte Milligan*

Perhaps nowhere has the Business as Usual model been more forcefully debated than in the Supreme Court's decision in *Ex parte Milligan*.<sup>173</sup> The accolades and scathing criticisms that the decision has provoked are a testament to the passions invoked by the issues discussed in that case. Justice Davis's strong statement that the Constitution was "law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances"<sup>174</sup> came to be praised by some as "courageous,"<sup>175</sup> "one of the great doctrines of the Supreme Court,"<sup>176</sup> and "one of the bulwarks of American civil liberty,"<sup>177</sup> while others declared it to be "irrelevant,"<sup>178</sup> "sheer fustian,"<sup>179</sup> and an "evident piece of arrant hypocrisy."<sup>180</sup>

In its decision of April 3, 1866,<sup>181</sup> the Supreme Court reversed Milligan's conviction by a military commission. The Court held that the military commission lacked jurisdiction over Milligan, who was a civilian and a resident of Indiana, which had not joined the Confederacy. Subsequently, the Supreme Court ordered Milligan's release from custody. The Justices based their decision on their interpretation of the Habeas Corpus Act of March 3, 1863,<sup>182</sup> which authorized the President to suspend the privilege of the writ of habeas corpus whenever he deemed it necessary. The Court held that the Act did not contemplate, and as a result did not authorize, the trial of persons arrested and denied the privilege of habeas corpus in military tribunals.

This element of the Court's decision provided a sufficient basis to issue a writ of habeas corpus discharging Milligan from custody. However, from

173. 71 U.S. (4 Wall.) 2 (1866). Much has been written about the case, mostly in the immediate context that was at issue before the Court—the use of military commissions to try civilians in states that were not part of the territory of the South occupied by the North during the Civil War or, indeed, in border states, where the civilian courts had been open for business and functioning. See, e.g., CHARLES FAIRMAN, 6 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864-88, at 214-29 (1971); FARBER, *supra* note 165, at 186-89; J.G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 179-83 (rev. ed. 1951); REHNQUIST, *supra* note 34, at 89-137.

174. *Milligan*, 71 U.S. (4 Wall.) at 120-21.

175. *Ruppert v. Caffey*, 251 U.S. 264, 306 (1919) (McReynolds, J., dissenting).

176. RANDALL, *supra* note 173, at 513.

177. J.G. RANDALL & DAVID DONALD, THE CIVIL WAR AND RECONSTRUCTION 304 (2d ed. 1969).

178. See MARK E. NEELY, JR., THE FATE OF LIBERTY 179-84 (1991) (citing to several scholars who view Justice Davis's statement to be irrelevant and who predict that if the Court's decision were to be subjected to the strain of actual war it would be disregarded).

179. CORWIN, *supra* note 63, at 142.

180. NEELY, *supra* note 178, at 184 (quoting Edward S. Corwin).

181. It is interesting to note that the opinions of the Justices were released on December 17, 1866—more than eight months after the actual decision in the case.

182. An Act Relating to Habeas Corpus, and Regulating Judicial Proceedings in Certain Cases, ch. 81, 12 Stat. 755 (1863).

this agreed-upon holding, the Justices parted ways. The two main doctrinal issues at stake were: first, the nature of martial law, the criteria for its lawful imposition under the American legal system, and the scope and range of powers available under such a regime;<sup>183</sup> and second, the sources for emergency powers under the Constitution. It is the latter issue that is of interest to us here.

Justice Davis's majority opinion essentially embraced the Business as Usual model. He declared that it was the protection of the law that secured human rights against "wicked rulers, or the clamor of an excited people."<sup>184</sup> Whether a law that allowed trial by a military commission existed was a question to be determined in light of the Constitution and the statutes that had been promulgated under it.<sup>185</sup> The laws of the land were applicable to their fullest extent at all times, whatever the circumstances and the exigencies.

Justice Davis explained:

Time has proven the discernment of our ancestors . . . . Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, *unless established by irrepealable law*. The history of the world had taught them that what was done in the past might be attempted in the future.<sup>186</sup>

Justice Davis continued to state the doctrinal conclusion in these famous words:

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or

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183. The opinions of the Justices were split sharply on this point. *Compare Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 127 (1866) (Davis, J.) (seeking to limit the lawful use of martial law to situations of actual war and to the locality of such a war), *with id.* at 137-40 (Chase, C.J., dissenting).

184. *Id.* at 119.

185. *Id.* Several constitutional provisions that Milligan's trial before a military tribunal seemed to violate were singled out by Justice Davis as the bulwark for protection of criminal defendants. These provisions included Article III, Section 2, Clause 3, which states, "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury," *see id.* at 119, and the Fourth, Fifth, and Sixth Amendments, *see id.* at 119.

186. *Id.* at 120 (emphasis added).

despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.<sup>187</sup>

Justice Davis rejected the contention that in a time of war, military commanders had the power to suspend constitutional civil rights. Constitutional guarantees and safeguards cannot be ignored, suspended, or removed in times of war and calamity any more than they can be so ignored, suspended, or removed in times of peace.<sup>188</sup> The Constitution embodies a fixed and unchanging balance between individual freedom and liberty, on the one hand, and governmental powers, on the other. This equilibrium is to be maintained at all times. Government does not acquire any new powers in times of acute crisis nor do the powers that the government wields in ordinary times expand in times of emergency. When faced with an exigency, the government may employ its regular powers *and those alone*.

The Business as Usual model as explicated by Justice Davis is not to be understood as barring or prohibiting any use of measures to fight an emergency; all it prohibits is the use of *extraordinary* measures that do not constitute an integral part of the ordinary legal system. The Constitution includes within its purview all the powers that the government might need in order to carry out its functions and duties. Furthermore, constitutional restrictions and limitations on power and the protections accorded to individual rights are fully applicable not only in times of peace but also in times of war. This means that whatever powers the government may lawfully use under the Constitution to meet an emergency cannot diminish the scope of, or suspend, constitutional guarantees. Take the protection of individual rights away—by suspending constitutional safeguards or by contracting the scope of rights protection under the Constitution—and you have destroyed the basic justification for the preservation of the constitutional order. For the *Milligan* majority, the mere concept of “emergency” powers was anathema. The government had only one set of powers available to it. Emergency was, from a legal perspective, nonexistent. The vision offered by Justice Davis’s opinion was that of a monistic, unitary view of the Constitution.

Justice Davis’s *Milligan* opinion has often been hailed as a “landmark decision in the protection of individual rights” in the American legal

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187. *Id.* at 120-21.

188. *See id.* at 125. The sole exception to that sweeping proposition is the privilege concerning the writ of habeas corpus. *Id.*

system.<sup>189</sup> It has also faced its share of criticism.<sup>190</sup> The most scathing critique of Justice Davis's decision relegates it to mere irrelevance or even to outright "arrant hypocrisy."<sup>191</sup> The constitutional doctrine expounded by Justice Davis is, it is argued, plainly unrealistic. To the extent that it is designed to set out guidelines for future actions by Congress and the Executive it is unworkable in the face of great calamities, as it ignores both the needs of the moment and the realities that push governments to do whatever they can in order to safeguard the nation. For opponents of the majority position, the context in which the decision was rendered, as well as internal inconsistencies within the majority's position, demonstrate the weaknesses of its doctrinal position and of the Business as Usual model. Three specific critiques are offered in this context. First, it is argued that the nonworkability of Justice Davis's constitutional doctrine should have been obvious in light of the experience of the Civil War itself and in light of future developments that were apparent to judges who reiterated the words of Justice Davis. In his opinion, Justice Davis wrote, "[F]or the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; *as has been happily proved by the result of the great effort to throw off its just authority.*"<sup>192</sup> However, the narrative of the use of war powers by President Lincoln casts much doubt on the factual foundation for this assertion.

Second, the Supreme Court's own conduct during and after the Civil War demonstrates the idealistic nature of Justice Davis's position. Throughout that bloody period, the Court refrained from interfering with

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189. ROBERT FRIDLINGTON, 4 THE SUPREME COURT IN AMERICAN LIFE: THE RECONSTRUCTION COURT 1864-1888, at 74 (George J. Lankevich ed., 1987).

190. For example, the decision was vehemently opposed by Republicans who feared that it would obstruct the implementation of the Reconstruction program. For a general discussion of the reactions to the *Milligan* judgment, see FAIRMAN, *supra* note 173, at 214-29. In a letter to his brother-in-law, dated February 24, 1867, Justice Davis wrote:

*Not a word said in the opinion about reconstruction & the power is conceded in insurrectionary States, & yet the Republican press every where has denounced the opinion as a second Dred Scott opinion, when the Dred Scott opinion was in the interest of Slavery, & the Milligan opinion in the interest of liberty. I did not suppose the Republican party would endorse such trials after the war is over. Yet they do it. . . . I abide the judgment of time. The people are mad now, and, if they dont recover soon, civil liberty will be entirely gone. During the war I was afraid it [would] be all gone. If saved at all, I believe that two years longer of war [would] have buried it out of sight.*

Letter from Justice Davis to Judge Rockwell (Feb. 24, 1867), in FAIRMAN, *supra* note 173, at 232, 232-33 [hereinafter Davis's Letter] (first emphasis added); see also BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 140 (1993). For the view that *Milligan* may have been directed against the "Radical Congress" without risking a full showdown with that body, see John P. Roche, *Executive Power and Domestic Emergency: The Quest for Prerogative*, 5 W. POL. Q. 592, 600-01 (1952).

191. See *supra* notes 178-180 and accompanying text.

192. *Milligan*, 71 U.S. (4 Wall.) at 121 (emphasis added).

military arrests and trials carried out by the Union Army,<sup>193</sup> demonstrating a substantial deference to the Executive.<sup>194</sup> *Milligan* was a bold decision, but it was handed down more than a year after the end of the Civil War, when the guns were silent and Lincoln dead.<sup>195</sup> The Court's decision was no theoretical exercise; it had a very tangible impact on the life of Lambdin Milligan, it set a clear legal rule regarding martial law powers, and it seemed to fortify the protection of individual rights. Yet much of its fiery rhetoric seems ironic, to say the least, in light of the Court's judicial role during the war. The relevant facts in *Milligan* were not substantially different from those in previous cases—such as *Vallandigham*<sup>196</sup>—that had been decided in 1863.<sup>197</sup> Yet the outcomes were diametrically different. The sense that the Court decided *Milligan* knowing all too well that its decision would not jeopardize the war effort, while it refused to act when most needed, *durante bello*, brought harsh criticism upon *Milligan* as a “mere rhetorical jousting at accomplished wartime deeds.”<sup>198</sup> Such examples of courts' apparent inability to protect individual rights while extreme violence is raging around them, compared with their greater willingness to resume their role as guardians of human rights and civil liberties once the crisis is over, have led some commentators to suggest that courts ought to refrain from deciding cases pitting claims of individual liberty against counterclaims of national security until the crisis is over.<sup>199</sup>

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193. *See Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1863). *But see Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487). *Merryman* was the only wartime case in which a judicial attempt was made to restrain the Executive. However, in defiance of a court order to the contrary, Merryman was not released.

194. *See, e.g.*, *The Prize Cases*, 67 U.S. (2 Black) 635 (1862) (holding that the President's order to blockade ports in possession of persons in armed rebellion against the government was a proper exercise of executive power).

195. *See* SCHWARTZ, *supra* note 190, at 139.

196. 68 U.S. (1 Wall.) 243.

197. Commentators have noted that while the *Milligan* decision was handed down more than a year after the end of the war, the *Vallandigham* ruling was rendered during the very early stages of the war. *See, e.g.*, ROSSITER & LONGAKER, *supra* note 95, at 37. The Court was apparently aware of that fact when it stated:

During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. *Then*, considerations of safety were mingled with the exercise of power; and feelings and interests prevailed which are happily terminated. *Now* that the public safety is assured, this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment.

*Milligan*, 71 U.S. (4 Wall.) at 109.

198. ROSSITER & LONGAKER, *supra* note 95, at xi; *see also id.* at 38 (“It is one thing for a Court to lecture a President when the emergency has passed, quite another to stand up in the middle of the battle and inform him that he is behaving unconstitutionally.”). *But see* Davis's Letter, *supra* note 190, at 232 (“The opinion [would] have been worth nothing for future time, if we had cowardly toadied to the prevalent idea, that the legislative dept of the govt can override everything. Cowardice of all sorts is mean, but judicial cowardice is the meanest of all.”).

199. *See, e.g.*, MAY, *supra* note 96, at 268 (suggesting that, in light of judicial practice of abdicating review of executive activities during an emergency, “courts should steer a middle course and defer review until the emergency has abated”). Justice Rehnquist also noted:



Finally, opponents of the Business as Usual model assail the internal logic and consistency of the *Milligan* doctrine. A conflict seems to exist between the Court's rhetorical assertions of constitutional perfection and absolutism and its willingness to recognize certain circumstances in which application of martial law may be lawful and proper.<sup>200</sup> In those latter situations, constitutional rights would not bar a full-fledged martial law regime. Surely this cannot be reconciled with a Constitution that applies "equally in war and in peace."<sup>201</sup>

Thus, the Business as Usual model, as explicated in Justice Davis's opinion in *Milligan*, came to be regarded as a rhetorical exercise that ought to be, and inevitably will be, disregarded when "subjected to the strain of actual war."<sup>202</sup> Indeed, the first major postbellum crisis that the United States had to face resulted in a shift of the Court's majority toward the doctrine proposed by the *Milligan* minority, which I call a doctrine of accommodation.

## B. *Models of Accommodation*

### 1. "Each crisis brings its word and deed."<sup>203</sup>

Several constitutional models may be grouped together under the general category of "models of accommodation." They all countenance a certain degree of accommodation for the pressures exerted on the state in times of emergency, while, at the same time, maintaining normal legal principles and rules as much as possible. This compromise, it is suggested, enables continued adherence to the principle of the rule of law and faithfulness to fundamental democratic values, while providing the state with adequate measures to withstand the storm wrought by the crisis.

Where the accommodation models differ is in their respective answers to the question of which branch of government is going to perform best in balancing the pressing security needs with preservation and protection of

If, in fact, courts are more prone to uphold wartime claims of civil liberties after the war is over, may it not actually be desirable to avoid decision on such claims during the war?

Lambdin Milligan . . . surely would answer no to this question. While the body of case law might benefit from such abstention, those who are actually deprived of their civil liberties would not. But a decision in favor of civil liberty will stand as a precedent to regulate future actions of Congress and the Executive branch in future wars.

REHNQUIST, *supra* note 34, at 222.

200. See *Milligan*, 71 U.S. (4 Wall.) at 127.

201. See Lobel, *supra* note 61, at 1387 & n.13.

202. NEELY, *supra* note 178, at 181 (quoting nineteenth-century political scientist John W. Burgess).

203. John Greenleaf Whittier, *The Lost Occasion*, ATLANTIC MONTHLY, Apr. 1880, at 448, 449.

individual rights and liberties. A second question concerns the best means to achieve this accommodation and balancing. Thus, despite their grouping, each of the models below results from a fundamentally different view of the functioning of existing constitutional institutions and structures.

a. *Interpretative Accommodation*

The first model of accommodation focuses on interpretation of existing legal rules in a way that is emergency-sensitive. Existing laws and regulations are given new understanding and clothing by way of context-based interpretation without any explicit modification or replacement of any of their provisions. Thus, the need for additional powers to fend off a dangerous threat is accommodated by an expansive, emergency-minded interpretative spin on existing norms through which various components of the ordinary legal system are transformed into counter-emergency facilitating norms. While the law on the books does not change in times of crisis, the law in action reveals substantial changes that are introduced into the legal system by way of revised interpretations of existing legal rules.<sup>204</sup>

If the Business as Usual model seeks to apply ordinary rules in times of crisis as in ordinary times (hence “Ordinary/Ordinary”), this model of interpretative accommodation seeks to apply ordinary rules in times of crisis, but to change the scope of such rules by way of emergency-minded interpretation. It may thus be described in a shorthand form as “Ordinary/Emergency.”

William Stuntz has recently noted that the scope of protection guaranteed by the Fourth and Fifth Amendments has shifted in response to changes in crime rates.<sup>205</sup> This ebb-and-flow model of criminal procedure parallels in important parts the interpretative model of accommodation.<sup>206</sup> Constitutional limitations on governmental powers are not seen as fixed and immutable, but rather as designed to minimize the sum of the costs of crime and the costs of crime prevention.<sup>207</sup> A trade-off must always be considered

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204. While most would look to the courts to carry out such an interpretative task, others would argue that the task of constitutional and legal interpretation is not the monopoly of the judicial branch of government. On the role of other branches of government in interpreting the Constitution and the law, see, for example, TRIBE, *supra* note 8, at 722-30; Alexander & Schauer, *supra* note 161; Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347 (1994); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power To Say What the Law Is*, 83 GEO. L.J. 217 (1994); and Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773 (2002).

205. Stuntz, *supra* note 104, at 2138-39 (stating that higher crime rates lead to cutbacks in restrictions imposed on law enforcement agencies while lower crime rates lead to the strengthening of such restrictions and to their expansion).

206. Stuntz supports the ebb-and-flow model both as a descriptive tool and as a normative one. *See id.* at 2144-50.

207. *Id.* at 2144-47.

between police power—with its potential for abuse—and crime.<sup>208</sup> Imposing restrictions on law enforcement agencies, while having the benefits of stronger protections of individual rights, incurs costs in the form of higher crime rates. As crime rates fluctuate, so does the need to change the point of balance between the various risks. At the same time, such changes may be introduced into the legal system by way of judicial interpretation of existing constitutional provisions and legal rules.<sup>209</sup> Violent crises tend to be dealt with through the mechanisms of criminal law and procedure.<sup>210</sup> Hence, in times of crisis, we can expect expansive judicial interpretations of the scope of police powers, with the concomitant contraction of individual rights.<sup>211</sup>

This vision of constitutional fluidity and adjustment to changing circumstances was offered by Chief Justice Chase in his opinion in *Ex parte Milligan*. Speaking for four Justices, the Chief Justice agreed with Justice Davis that any construction of emergency powers must be constrained within the existing constitutional framework.<sup>212</sup> All the powers that might be used by government in times of both peace and war were to be found, directly or indirectly, in the Constitution. Where Davis saw continuity, however, Chase saw expansion of powers and a parallel contraction of constitutionally protected rights. When appropriately exercised, the war powers of Congress may constitutionally curtail fundamental rights of the individual in a manner that would be impermissible in normal times.<sup>213</sup> Although in agreement with Justice Davis that the Constitution was the exclusive source of governmental powers, the Chief Justice regarded the scope of those powers (and, as a result, the scope of the rights guaranteed under the Constitution)<sup>214</sup> to be contingent upon the circumstances in which

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208. *Id.* at 2145.

209. *Id.* at 2150-56 (analyzing changes in Fourth Amendment doctrine).

210. See Roach, *supra* note 77, at 133 (pointing out the tendency to rely on criminal law in response to horrific crimes in the belief that the criminalization of activity or the enhancement of penalties for engaging in that activity will stop it from occurring in the future); Stuntz, *supra* note 104, at 2138 ("What happened on September 11, 2001 was, among other things, a crime wave . . .").

211. Cf. Stuntz, *supra* note 104, at 2155-56 (arguing that judges typically expand the scope of police powers after a time of crisis, though usually after a significant time-lag). Stuntz suggests, however, that at the time of writing, such changes may already have been taking place as a result of the September 11th attacks, despite the relatively short time that had passed since the attacks. See *id.* at 2156-59.

212. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 141 (1866) (Chase, C.J., dissenting).

213. Thus, Chase believed that when Congress had lawfully invoked its war power, that power would allow Congress (but not the President) to authorize the establishment of military commissions that would try not only soldiers but also civilians in areas where, according to Congress's judgment, there existed a great and imminent public danger. Under certain circumstances, the war powers of Congress could prevail over, and limit the application of, certain individual constitutional rights. *Id.* at 139-41.

214. See Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 344 (1993) (arguing that "rights are conceptually interconnected with, and occasionally

the nation found itself. The scope of constitutional rights was dependent upon the shifting scope of the powers given to government.<sup>215</sup> Powers expanded and rights contracted (but were not necessarily suspended) in times of crisis. For Chief Justice Chase, this was the price to be paid by society if it were to survive the crisis and retain its identity and independence.<sup>216</sup>

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World War I gave the Supreme Court an opportunity to revisit and ultimately reject, albeit without explicitly overruling *Milligan*, its position on emergency powers that stemmed from the Davis-Chase debate. Those two competing constitutional visions resurfaced once again in 1917 in *Wilson v. New*.<sup>217</sup> Faced with the prospect of a national general railroad strike due to a labor dispute, Congress passed the Adamson Act at the request of President Wilson. The Act imposed an eight-hour workday on the railroad industry. In doing so, it accepted, in essence, the employees'

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even subordinate to, governmental powers," with this interconnectedness facilitated by the mediating concept of "interests").

215. *Id.* at 362 ("The conceptual limit of the constitutional right is not, in other words, another right, but a power of government, supported and identified by reference to underlying interests."). *But see* Frederick Schauer, *A Comment on the Structure of Rights*, 27 GA. L. REV. 415, 430-31 (1993) (arguing for the interaction rather than the interconnectedness of rights and interests).

216. Another possible way to look at the divergence of opinion in *Milligan* would be to pursue the following line of argument: Both sets of opinions are in agreement that the Constitution is the sole source of governmental powers and that it contemplates all the powers that a government may need in order to deal with any contingency. The sole point of disagreement concerns the proper scope of the application of constitutional safeguards. The gap between the two opinions concerns, therefore, the internal definition of constitutional rights. Whereas according to Justice Davis's opinion such rights as the right to trial by jury apply under their own internally defined scope of application, in both times of peace and of war, Chief Justice Chase interpreted the same rights so as not to apply in certain circumstances arising out of a state of war or a similar exigency. The fact that Congress might order military commissions to try civilians in such circumstances does not violate the constitutional rights of civilians, since those rights, by their own internal definition, are not intended to apply to such situations. "The Constitution itself provides for military government as well as for civil government. And we do not understand it to be claimed that the civil safeguards of the Constitution have application in cases within the proper sphere of the former." *Milligan*, 71 U.S. (4 Wall.) at 137 (Chase, C.J., dissenting). Thus, there was no room for talking about the suspension of rights or, for that matter, of their curtailment. In times of war, certain rights were simply not applicable to their fullest extent, not because of an external limitation and derogation, but due to the internal definition of their scope of applicability.

217. 243 U.S. 332 (1917). The scholarly commentary on this and related World War I "emergency" cases is extensive. *See, e.g.*, Belknap, *supra* note 45, at 79-84. Other "emergency" cases of that period are *Highland v. Russell Car & Snow Plow Co.*, 279 U.S. 253 (1929) (upholding the Lever Act and subsequent regulations that allowed the President to fix coal prices on the grounds that they were a proper exercise of the government's war powers), *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922) (upholding rent-control statutes enacted to counter the effects of housing shortages due to World War I mobilization), *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921) (same), and *Block v. Hirsh*, 256 U.S. 135 (1921) (same).

position in the dispute.<sup>218</sup> The railroad companies challenged the constitutionality of the legislation, arguing that it fell outside the boundaries of the Commerce Clause power. The Supreme Court, in a five-to-four decision, upheld the statute.

While agreeing with Justice Davis's *Milligan* decision that a state of emergency could not create new governmental powers that did not exist previously, Chief Justice White, speaking for the majority, asserted that a crisis could alter the scope of existing governmental powers: "[A]lthough an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed."<sup>219</sup> Chief Justice White's opinion depicted an expansion of governmental powers in times of emergency and a concurrent contraction of the scope of constitutionally protected individual rights. These phenomena would, in turn, enable the government to exercise its emergency powers under the aegis of the Constitution in a way that under normal circumstances might brand its action with a mark of unconstitutionality.<sup>220</sup> Without explicitly overruling *Milligan*, the majority in *Wilson v. New* embraced the constitutional emergency powers model originally introduced by the *Milligan* dissent. Courts are able to apply an emergency-sensitive interpretation to constitutional arrangements, structures, powers, and rights. Governmental powers may expand, and the scope of rights protection may contract, so that the crisis can be met effectively. Importantly, when the crisis is over, a return to normalcy should take place, as powers contract to their "normal" extent, and rights concomitantly expand.

Justice Day's dissent tracked the *Milligan* majority opinion. For him, "no emergency and no consequence, whatever their character, could justify the violation of constitutional rights. The argument of justification by emergency was made and answered in this court in *Ex parte Milligan* . . . ."<sup>221</sup>

The circumstances surrounding *Wilson v. New* seem to support the claim that *Milligan* might have been decided differently had the Court's decision been handed down during the war rather than after hostilities had ended. *Wilson v. New* was decided on March 19, 1917, at a time when the

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218. An Act To Establish an Eight-Hour Day for Employees of Carriers Engaged in Interstate and Foreign Commerce, and for Other Purposes, Pub. L. No. 252, 39 Stat. 721 (1916); see also Belknap, *supra* note 45, at 79-80.

219. *New*, 243 U.S. at 348.

220. See Belknap, *supra* note 45, at 81.

221. *New*, 243 U.S. at 370 (Day, J., dissenting); see also *id.* at 371-72 (stating that the principle pronounced by the *Milligan* majority "is equally applicable today. . . . Constitutional rights, if they are to be available in time of greatest need, cannot give way to an emergency, however immediate, or justify the sacrifice of private rights secured by the Constitution."); *id.* at 377 (Pitney, J., dissenting) ("[A]n emergency can neither create a power nor excuse a defiance of the limitations upon the powers of the Government.")

United States was on the brink of war: Germany had recently announced that it would resume unrestricted submarine warfare against any vessel sailing in European waters, and the United States had severed its diplomatic relations with Germany; on March 9th, President Wilson announced that guns would be placed, and naval crews stationed, on American merchant vessels, and, on March 18th, after three American vessels had been sunk by German submarines, the railroad companies in fact agreed to the eight-hour workday demand of the workers.<sup>222</sup> Deciding the case when violence loomed imminent, the Supreme Court majority adopted a prudential view, balancing the costs and benefits of expanding governmental power and curtailing individual rights in the context of the impending war.<sup>223</sup>

Seventeen years after *Wilson v. New*, the Supreme Court, in its first New Deal case—*Home Building & Loan Ass'n v. Blaisdell*<sup>224</sup>—strengthened the doctrinal foundations laid down in *Wilson v. New*.<sup>225</sup> This time, the Court handed down its decision against the backdrop of the Great Depression. The issue before the Court concerned the Minnesota Mortgage Moratorium Law that was challenged as violative of the Constitution's Contract Clause, as well as its Due Process and Equal Protection Clauses. The Minnesota Supreme Court held that the impairment of obligations under mortgage contracts was within the state's police power, which had been invoked to respond to the great economic emergency facing the state and the nation. The Supreme Court affirmed the ruling. Writing for the majority, Chief Justice Hughes, drawing upon Chief Justice White's opinion in *Wilson v. New*, stated:

Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency . . . .

*While emergency does not create power, emergency may furnish the occasion for the exercise of power.*<sup>226</sup>

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222. Belknap, *supra* note 45, at 79-80 & n.91.

223. Cf. PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 17 (1991) (stating that prudential arguments, focusing on a cost-benefit balancing, are "likeliest to be decisive" in emergencies).

224. 290 U.S. 398 (1934).

225. For a discussion of *Blaisdell*, see Edward S. Corwin, *Moratorium over Minnesota*, 82 U. PA. L. REV. 311 (1934); and Note, *Constitutionality of Mortgage Relief Legislation: Home Building & Loan Ass'n v. Blaisdell*, 47 HARV. L. REV. 660 (1934). See also BOBBITT, *supra* note 223, at 17 (suggesting that the Court "recognized the political expediency of the legislature's action and acquiesced in it").

226. *Blaisdell*, 290 U.S. at 425-26 (emphasis added).

The war power of the federal government "permits the harnessing of the entire energies of the people in a supreme coöperative effort to preserve the nation."<sup>227</sup> The majority was cautious to pay rhetorical homage to the *Milligan* decision by citing it as precedent for the assertion that "even the war power does not remove constitutional limitations safeguarding essential liberties."<sup>228</sup> It presented the issue at hand as merely a question of proper interpretation of constitutional provisions, thus avoiding any notion of suspension of the Constitution under circumstances of emergency. The rights guaranteed by the Constitution and the freedoms enshrined therein were not abrogated. The limitations on governmental powers were not swept aside. But, the scope of those rights, freedoms, limitations, and powers was redefined in times of grave economic crisis so as to ensure that the emergency would be overcome as soon as possible.<sup>229</sup>

b. *Legislative Accommodation*

Another method of accommodating security needs in times of crisis is arrived at by way of introducing legislative amendments and modifications into the existing ordinary legal terrain. While it is acknowledged that *existing* legal rules do not supply a fully adequate answer to the acute problems facing the community in crisis, the belief is that such answers may still exist within the confines of *some* legal framework that does not require a complete overhaul of the existing legal system. The exceptional circumstances of crisis lead to an accommodation within the existing normative structure of security considerations and needs. The ordinary system is kept intact as much as possible; yet some exceptional adjustments are introduced. In acute states of emergency, ordinary norms may be modified or supplemented by emergency-specific provisions.<sup>230</sup>

This method of legislative accommodation may be further divided into two distinct models.

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227. *Id.* at 426.

228. *Id.*

229. The economic crisis of the late 1920s and early 1930s resulted in a flurry of legislation and in far-reaching structural changes in government institutions. The expansion of federal regulatory power was marked through the enactment of the National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933), the Agricultural Adjustment Act, ch. 25, 48 Stat. 31 (1933), and the National Labor Relations Act, ch. 372, 49 Stat. 449 (1935), as well as through creation of the Tennessee Valley Authority. Viewed as a threat on par with an actual foreign invasion, the crisis also transformed the Supreme Court and its doctrine. Perhaps the most celebrated demonstration of the interpretative model of accommodation came about in the context of interpreting the Commerce Clause against the backdrop of the Great Depression and the New Deal. *See, e.g.*, PETER H. IRONS, *THE NEW DEAL LAWYERS* 52-54 (1982) (discussing the link between emergency doctrine and the Commerce Clause in the New Deal).

230. *See, e.g.*, Adrian A.S. Zuckerman, *Coercion and the Judicial Ascertainment of Truth*, 23 *ISR. L. REV.* 357, 372-73 (1989).

i. *Modifying Ordinary Laws*

Under this model of legislative accommodation, the normal legal system is maintained intact as much as possible during the period of emergency. However, in order to facilitate the needs of security and the state's safety, certain modifications are introduced into that ordinary system. Legislative provisions that are born out of the need to respond to an emergency situation find their way into ordinary legislation and become part and parcel of the ordinary legal system.<sup>231</sup> Under this model—labeled the “Emergency/Ordinary” model for its focus on inserting emergency-driven legal provisions into existing ordinary legal rules and structures—the legal framework used for applying emergency measures is the ordinary one as so modified. However, the origin of such provisions reveals their close link to the phenomenon of emergency. They are “ordinary” in name only; in substance, they are emergency-driven.

ii. *Special Emergency Legislation*

This model also adheres to the notion that emergency must be met by the state and its agents under the umbrella of the law. Yet, at the same time, it deems ordinary legal norms to be inadequate for dealing with the pressing needs emanating from the specific emergency. Rather than attempting to modify existing legal norms (as is done under the previous model), the effort is directed at creating replacement *emergency* norms that pertain to the particular exigency (or to potential future exigencies). The term “emergency legislation” is thus most at home under this model. Such emergency legislation may, but need not, take the format of stand-alone legislation: Emergency provisions may be included in specific “emergency” legislation, but they may also be incorporated into an ordinary piece of legislation while retaining their specific emergency features. Thus, for example, a Special Senate Committee found:

The United States thus [had] on the books at least 470 significant emergency powers statutes without time limitations delegating to the Executive extensive discretionary powers, ordinarily exercised by the Legislature, which affect the lives of American citizens in a host of all-encompassing ways. This vast range of powers, taken

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231. See, e.g., Stuntz, *supra* note 104, at 2139 (noting that some antiterrorism legislation is not targeted, in that additional governmental powers are not limited to the fight against terrorism but are rather general); *id.* at 2162.



together, confer enough authority to rule this country without reference to normal constitutional processes.<sup>232</sup>

Most of these quasi-emergency<sup>233</sup> provisions would become operative upon a declaration of war by Congress or in the event of a presidential proclamation or an executive order in accordance with the National Emergencies Act.<sup>234</sup>

### c. *Executive Inherent Powers*

President Lincoln's actions during the Civil War, especially in the first twelve weeks between the bombardment of Fort Sumter, on April 12, 1861, and the convening of Congress on July 4, 1861, have been the subject of much study and debate. During this period Lincoln demonstrated perhaps

232. HAROLD RELYEA, A BRIEF HISTORY OF EMERGENCY POWERS IN THE UNITED STATES, at v (Special U.S. Senate Comm. on Nat'l Emergencies & Delegated Emergency Powers, Working Paper No. 36-612, 1974).

233. The term is taken from JOHN HATCHARD, INDIVIDUAL FREEDOMS & STATE SECURITY IN THE AFRICAN CONTEXT: THE CASE OF ZIMBABWE 5 (1993), which notes that quasi-emergency laws "give the government the sort of powers normally associated with a state of emergency," but are passed "using the ordinary legislative process." *Id.*

234. 50 U.S.C. § 1621 (1994). The same may also apply, of course, to full-fledged emergency legislation. Thus, for example, the International Emergency Economic Powers Act of 1977 (IEEPA), 50 U.S.C. §§ 1701-1706, allows the President, following his declaration of national emergency, to regulate or prohibit transactions in foreign exchange, transfers of credit or payments, or any dealings in property owned by a foreign state or national. A national emergency may be declared when the President finds "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States." *Id.* § 1701(a); see also Dames & Moore v. Regan, 453 U.S. 654 (1981); Beacon Prods. Corp. v. Reagan, 633 F. Supp. 1191 (D. Mass. 1986) (holding that a challenge to President Reagan's embargo on Nicaragua, which claimed that Nicaragua did not impose an "unusual and extraordinary threat" under § 1701(b), presented a nonjusticiable political question), *aff'd*, 814 F.2d 1 (1st Cir. 1987); Harold H. Koh & John C. Yoo, *Dollar Diplomacy/Dollar Defense: The Fabric of Economics and National Security Law*, 26 INT'L LAW. 715, 743-46 (1992).

The executive branch has declared numerous "national emergencies" pursuant to IEEPA, followed by regulations including blocking the transfer of Iranian government property during the hostage crisis, Exec. Order No. 12,170, 3 C.F.R. 457 (1979), imposing sanctions on South Africa, Exec. Order No. 12,532, 3 C.F.R. 387 (1985), penalizing Libya for terrorist acts, including freezing financial interests within the United States, Exec. Order No. 12,543, 3 C.F.R. 181 (1986), Exec. Order No. 12,544, 3 C.F.R. 183 (1986), prohibiting trade and other transactions with the Federal Republic of Yugoslavia (Serbia and Montenegro), Exec. Order No., 12,808, 3 C.F.R. 305 (1992), and prohibiting trade and supply to Angola's UNITA, Exec. Order No. 12,865, 3 C.F.R. 636 (1993).

Finally, it has been argued that the existence of legislative provisions that authorize the exercise of special or extraordinary powers by the Executive during a national emergency weighs in favor of Congress's issuing official declarations of war as this may shed light on the domestic costs of war resulting from the expansive executive powers available on the domestic front in times of war or national emergency. See J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27 (1991); J. Gregory Sidak, *War, Liberty, and Enemy Aliens*, 67 N.Y.U. L. REV. 1402, 1424-31 (1992); see also Harold H. Koh, *The Coase Theorem and the War Power: A Response*, 41 DUKE L.J. 122 (1991); J. Gregory Sidak, *The Inverse Coase Theorem and Declarations of War*, 41 DUKE L.J. 325 (1991).

the most awesome display of executive power in American history. On April 15th, Lincoln called for Congress to convene on July 4th—no later, but also no sooner—ensuring wide leeway for presidential operation in the meantime. Acting as the protector of the Union, Lincoln called forth the militia, imposed a blockade on the ports of the Southern states, paid out unappropriated funds to private persons unauthorized to receive such payments, authorized the commander of the Army to suspend the writ of habeas corpus in the area between the cities of Philadelphia and Washington (and, later on, also in the area between Washington and New York), and enlarged the army and navy beyond the limits set by Congress.<sup>235</sup> By the time Congress did convene, it was faced with extensive *faits accomplis*, leaving it no real choice but to ratify them and give its blessing to the President. Whereas some of these measures could be construed as falling within the constitutional or statutorily delegated presidential powers,<sup>236</sup> others were more questionable. For example, the President's unilateral enlargement of the armed forces violated an express constitutional provision vesting in Congress the power to "raise and support Armies" and to "provide and maintain a Navy."<sup>237</sup> Similarly, the power to suspend the writ of habeas corpus was generally thought at the time to belong exclusively to Congress. The Emancipation Proclamation, which as Dan Farber notes, "[w]ith the stroke of a pen (backed, admittedly, by Union guns) . . . wiped out property rights worth many millions of dollars," was also deemed unconstitutional when made.<sup>238</sup>

How may Lincoln's actions be explained? One possible explanation considers such actions to be within the boundaries of the Constitution under the doctrine of the "war powers" of the federal government.<sup>239</sup> Thus,

235. See NEELY, *supra* note 178, at 3-31; see also ROSSITER, *supra* note 5, at 224-27.

236. As Dan Farber explains:

[T]he closer a given situation came to the heart of the war, the more likely that Lincoln's actions were supported by precedent, and also the more likely that those actions have later passed the test of time. The single most important factor is the proximity between the action and specifically military concerns.

FARBER, *supra* note 165, at 163.

237. U.S. CONST. art. I, § 8, cls. 12-13.

238. FARBER, *supra* note 165, at 171. Farber argues that the Proclamation was justified as a war measure under the laws of war because it fell within the President's role as a military leader, *id.* at 171-76, and was "relatively unproblematic in terms of the separation of powers," *id.* at 176; see also Sanford Levinson, *The David C. Baum Memorial Lecture: Was the Emancipation Proclamation Constitutional? Do We/Should We Care What the Answer Is?*, 2001 U. ILL. L. REV. 1135.

239. President Lincoln stated:

It became necessary for me to choose whether, using only the existing means, agencies, and processes which Congress had provided, I should let the Government fall at once into ruin or whether, availing myself of the broader powers conferred by the Constitution in cases of insurrection, I would make an effort to save it, with all its blessings, for the present age and for posterity.

6 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 78 (1898) (emphasis added).

Lincoln's wartime presidency ushered in a new theory of crisis government based on the concept of inherent powers.<sup>240</sup> Since Lincoln's presidency, arguments put forward in support of an Executive's resort to emergency powers have invariably revolved around the claim that the President enjoys a wide range of constitutionally inherent powers, including emergency powers, and therefore acts legally and constitutionally, rather than outside the constitutional and legal framework.

## 2. *Challenges and Justifications*

If the Business as Usual model can be charged with naiveté and out-of-context idealism, the three models of accommodation present an answer in the shape of constitutional and legal flexibility. Legal principles and rules, as well as legal structures and institutions, may be adjusted to the needs of meeting violent threats successfully. But, just as the prior model could be charged with utopianism, the models of accommodation could be charged with being unprincipled and apologetic.<sup>241</sup> The claim is that these models enable the authorities to mold and shape the legal system, including the constitutional edifice, under the pretense of fighting off an emergency. In addition, experience informs us that neither the judicial nor the legislative branches function as meaningful guardians of individual rights and liberties in times of great peril.<sup>242</sup> Thus, it seems extremely dangerous to allow any modifications to the constitutional and legal terrain to take place at such times, regardless of whether such changes are introduced by way of judicial interpretation of existing legal and constitutional provisions, or by way of new legislative initiatives.

On the other hand, if the Business as Usual model is closely linked to a strategy of resistance, the alternative models adopt a strategy of accommodation and flexibility. Under this strategy, one confronts the inevitable by allowing it rather than by futilely resisting it.<sup>243</sup> Recognizing that

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240. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 682 (1952) (Vinson, C.J., dissenting); TRIBE, *supra* note 160, at 676; William C. Banks & Alejandro D. Carrió, *Presidential Systems in Stress: Emergency Powers in Argentina and the United States*, 15 MICH. J. INT'L L. 1, 42-46 (1993); Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1 (1993).

241. See MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 40-50 (1989); Martti Koskenniemi, *The Politics of International Law*, 1 EUR. J. INT'L L. 4, 31-32 (1990).

242. See KOH, *supra* note 62, at 117-49.

243. Schauer noted:

This strategy runs the risk that the message of allowance will be taken as saying substantially more than it actually says, or allowing more than it actually allows. In exchange for this risk, however, this strategy maintains the authority or legitimacy of the norm structure at issue because, by allowing the inevitable, the inevitable need not violate the norm structure in order to exist.

Schauer, *supra* note 123, at 1084.

extraordinary powers are, in fact, going to be used in times of great peril, the legal system ought to retain enough flexibility to allow such use within legal confines rather than outside them. Over the long term, adherence to the rule of law requires responding to crises from within the system rather than breaking free of it, since a break may be hard, if not impossible, to repair later.<sup>244</sup>

In addition, the accommodation models may actually lead to less draconian emergency measures. In the absence of legal permission to employ special emergency powers (or in the event that the legally available powers are insufficient), the government may be reluctant to take illegal emergency measures. Its hesitation may force it to respond to the emergency only at a later stage, when the crisis has further developed and the danger escalated, and when more extreme actions are required to overcome it. If emergency powers are part of the government's legal arsenal, it may be able to use them to nip the emergency in the bud before it gets out of hand.<sup>245</sup>

#### IV. THE ASSUMPTION OF SEPARATION

Each of the constitutional models of emergency powers suffers from fundamental weaknesses. In times of emergency, such weaknesses are especially dangerous because they open wide the door for abuse of power or rule breaking without concomitant accountability. The main weakness of the Business as Usual model lies in its rigidity in the face of radical changes. The models of accommodation are susceptible to manipulation and may start us down a slippery slope toward excessive government infringement of individual rights and liberties.

In addition to these general concerns, a basic premise of all the traditional models of emergency powers does not hold true in practice. The assumption of separation is defined by the belief in our ability to separate emergencies and crises from normalcy.<sup>246</sup> This assumption makes it easier

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244. This approach was suggested, for example, by the Landau Commission as the best available method to balance the needs of state security with the protection of human rights and civil liberties in the context of the GSS's interrogations of suspected terrorists. Describing its proposed solution as "the truthful road of the rule of law," the Commission envisioned a state of affairs in which the GSS and its members operate within the boundaries of the law, while the legal system accommodates the needs of the security services as they arise in the fight against terrorism. See LANDAU REPORT, *supra* note 135, at 184.

245. See Note, *Recent Emergency Legislation in West Germany*, 82 HARV. L. REV. 1704, 1710 (1969).

246. After World War I came to an end, Justice Brandeis confided in Felix Frankfurter: I would have placed the Debs case on the war power—instead of taking Holmes' line about "clear and present danger." Put it frankly on the war power . . . and then the scope of espionage legislation would be confined to war. But in peace the protection against restriction of freedom of speech would be unabated. You might as well recognize that during a war . . . all bets are off. *But we would have a clear line to go on . . .*

for us to tolerate expansive governmental emergency powers and counterterrorism actions, for it reassures us that once the emergency is removed and terrorism is no longer a threat, such powers and actions will also be terminated, and there will be a full (or at least nearly full) return to normalcy.

Unfortunately, bright-line distinctions between normalcy and emergency are frequently untenable, as they are constantly blurred and made increasingly meaningless. In this Part, I argue that the exception is hardly an exception at all. Fashioning legal tools to respond to emergencies on the belief that the assumption of separation will serve as a firewall that protects human rights, civil liberties, and the legal system as a whole may be misguided. Since the assumption of separation is also closely linked to the goals of the different models of emergency powers, and inasmuch as it informs each of them, we must reassess the strength of the arguments supporting each of the models.

Section A focuses on the relationship between periods of emergency and periods of normalcy, and suggests that the former are conceptualized as exceptions to the latter. In addition, I argue that the long-term success of each of the traditional models of emergency powers depends on the assumption of separation between normalcy and emergency. Success here is measured not only in the ability to overcome immediate threats and dangers, but also in the ability to confine the application of extraordinary measures to extraordinary times, insulating periods of normalcy from the encroachment of vast emergency powers.

The separation of emergency from normalcy is facilitated and sustained by resorting to several mechanisms of separation that may be broadly categorized as attempting to maintain temporal, spatial, or communal divisions. Section B briefly discusses these mechanisms. I argue that each mechanism is, in fact, problematic. I demonstrate the inherent limitations of each mechanism by drawing upon historical experiences. Section C suggests some specific patterns that further undermine the workability of the assumption of separation and demonstrate the insidious ways in which spillover takes place between counter-emergency measures and the ordinary legal system.

A. *Normalcy and Emergency:  
The Discourse of Rule and Exception*

Emergencies are conceptualized in terms of a dichotomized dialectic. The term “emergency” connotes a sudden, urgent, usually unforeseen event

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DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* 363 (1997) (quoting the personal papers of Louis D. Brandeis) (emphasis added).

or situation that requires immediate action,<sup>247</sup> often without time for reflection and consideration. The notion of “emergency” is inherently linked to the concept of “normalcy” in the sense that the former is considered to be outside the ordinary course of events or anticipated actions. To recognize an emergency, we must, therefore, have the background of normalcy. Furthermore, in order to be able to talk about normalcy and emergency in any meaningful way, the concept of emergency must be informed by notions of temporal duration and exceptional danger.<sup>248</sup> For normalcy to be “normal,” it has to be the general rule, the ordinary state of affairs, whereas emergency must constitute no more than an exception to that rule—it must last only a relatively short time and yield no substantial permanent effects.<sup>249</sup> Traditional discourse on emergency powers posits normalcy and crisis as two separate phenomena and assumes that emergency is the exception.

Each of the constitutional models of emergency powers takes this assumption of separation as its starting point. This may seem counterintuitive at first glance, especially with respect to the Business as Usual model. After all, that model is not concerned with the external circumstances of crisis, since it holds a unitary vision of the legal order: If regular legal norms are not subject to modification in times of exigency, one cannot speak of a distinct emergency legal regime. Yet, even for the Business as Usual model, the assumption of separation has significant implications. The main challenge facing the model is its perceived detachment from reality. The stronger that perception is, the stronger the challenges to the model become, and the greater the likelihood of its becoming irrelevant, if not outright detrimental, to the long-term prospects of the community. This is where the assumption of separation plays a significant role. Take, for example, the phenomenon of entrenched emergencies, which clearly contradicts the assumption of separation. When faced with situations of entrenched emergencies, the Business as Usual model will undergo pressure to allow the legal system to fight off the threat to the nation. The longer people live under the shadow of emergency, the more likely they are to recognize the utopian nature of the model and to

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247. See 1 THE NEW SHORTER OXFORD ENGLISH DICTIONARY 806 (Lesley Brown ed., 4th ed. 1993).

248. Although it is widely agreed that no one definition of “emergency” is feasible, temporal duration is a common starting point. See *Questiaux Report*, *supra* note 44, at 20 (“[A]bove and beyond the rules [of emergency regimes], . . . one principle, namely, the principle of provisional status, dominates all the others. The right of derogation can be justified solely by the concern to return to normality.”).

249. See, e.g., Heymann, *supra* note 15, at 451. The formula “normalcy—rule, emergency—exception” may be replaced by a rebuttable presumption of normalcy where emergency constitutes a rebuttal. See Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 963 (1995) (“A rule with necessity or emergency exceptions might be described, somewhat imprecisely, as a strong presumption.”).

demand that the legal system accommodate the necessities of the situation. Continued adherence to the Business as Usual model in those circumstances presents the great risk that, in practice, the system will adjust and accommodate such security considerations in ways that may be less transparent and less obvious. Eventually, the system will reach a position where significant portions of the "ordinary" legal system have, in fact, been formulated as responses to the crisis. The longer the crisis, the greater the possibility that such insidious changes will be made. To put it somewhat differently, as the duration of emergencies increases, it becomes harder to argue for a business-as-usual approach, for it is clear that much is not "as usual." An example will illustrate this point. In 1984, the Republic of Ireland's criminal justice system underwent a momentous paradigm shift, when it replaced the Offences Against the State Act of 1939 with the Criminal Justice Act of 1984.<sup>250</sup> The move signified a shift from a "due process" model to a "crime control" model of criminal process.<sup>251</sup> That shift was prompted by the reality of longstanding emergency legislation existing side by side with the ordinary criminal law and procedure. Eventually, the two were merged and brought together under the umbrella of the general "ordinary" penal code.

For their part, the models of accommodation allow emergency powers through either innovative interpretation of existing legal rules, specific emergency provisions incorporated into ordinary legal rules, or distinct emergency legislation and measures. Once again, the danger is that such emergency-specific accommodation will become an integral part of the regular legal system. In order to ensure that exceptional norms that find their *raison d'être* in a state of emergency do not become confused with ordinary legal rules in times of normalcy, it is essential to keep the two sets of norms, authorities, and powers apart as much as possible. By definition, emergency situations must be the exception to the general rule of normalcy. Without separation, it is but a short step to conflate emergency powers and norms with the "ordinary" and the "normal."

Thus, the dialectic of "normalcy—rule, emergency—exception" is inherent in each of the models.<sup>252</sup> Each model is aimed at overcoming specific crises and restoring normalcy.<sup>253</sup> Under each model, application of

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250. See Dermot P.J. Walsh, *The Impact of the Antisubversive Laws on Police Powers and Practices in Ireland: The Silent Erosion of Individual Freedom*, 62 TEMP. L. REV. 1099 (1989).

251. Pye & Lowell, *supra* note 140, at 589-603 (criticizing a due-process-like model for law enforcement during civil disorder, and proposing a model centered on restoring order); Walsh, *supra* note 250, at 1128.

252. See Gross, *supra* note 4, at 440.

253. See, e.g., H.P. LEE, EMERGENCY POWERS 1 (1984) ("The remarkable trait of a democratic country is that whilst the powers to cope with crises provide the potential for dictatorial rule such powers subside with the restoration of normalcy."); cf. FRIEDRICH, *supra* note 46, at 568-70 (explaining that the goal of extraordinary powers is to restore normalcy). On whether the return must be to the status quo ante or to a state of normalcy that may vary

emergency powers is designed to be of a temporary nature, to serve as a bridge between precrisis and postcrisis normalcy. With the termination of the conflict, normalcy ought to be reestablished and the emergency regime withdrawn.

The distinction between the two spheres of normalcy and emergency and counterterrorism measures is facilitated and sustained by resorting to several mechanisms of separation that may be broadly identified as aimed at maintaining temporal, spatial, or communal divisions. The next Section examines each of these mechanisms more closely and identifies their shortcomings and limitations.

## B. *Four Degrees of Separation*

### 1. *Sequencing and Temporal Distinctions: Separating the Best and the Worst of Times*

Normalcy and emergency are often seen to occupy alternate, mutually exclusive time frames. Normalcy exists prior to crisis and is reinstated after the emergency is over. Crises constitute brief intervals in the otherwise uninterrupted flow of normalcy. Emergency powers are supposed to apply only while the exigency persists. They are not to extend beyond that time frame into ordinary times.

However, this view of the temporal relationship between normalcy and emergency does not account adequately for the possibility that emergencies will become entrenched and prolonged.<sup>254</sup> Rather than the exception, crises may become the norm.<sup>255</sup> Emergency regimes tend to perpetuate themselves, regardless of the intentions of those who originally invoked them. Once brought to life, they are not so easily terminable. Several examples illustrate this point.

The State of Israel has been under an unremitting emergency regime since its establishment in May 1948. As originally authorized, however, the declaration of a state of emergency was considered a temporary necessary

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substantially from that status quo, see, for example, FINN, *supra* note 91, at 40-43 (explaining the possibility of constitutional reconstruction); and ROSSITER, *supra* note 5, at 7, 306 (describing the return to the status quo ante).

254. See Oren Gross & Fionnuala Ni Aolain, *From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights*, 23 HUM. RTS. Q. 625, 644-47 (2001); Gross & Ni Aolain, *supra* note 91, at 95-98 (describing the entrenched emergency in Northern Ireland).

255. See *supra* note 38 and accompanying text; see also Kanishka Jayasuriya, *The Exception Becomes the Norm: Law and Regimes of Exception in East Asia*, 2 ASIAN-PAC. L. & POL'Y J. 108, 110 (2001) (noting that regimes of exceptions have become the norm in Malaysia and Singapore); cf. H.A.L. FISHER, *A HISTORY OF EUROPE*, at v (1936) ("Men wiser and more learned than I have discerned in history a plot, a rhythm, a predetermined pattern. These harmonies are concealed from me. I can see only one emergency following upon another as wave follows upon wave . . .").



evil, a transition mechanism to be operative only as long as the War of Independence was being fought.<sup>256</sup> This temporary regime became, however, a permanent feature in the life of the state, outliving the war that gave it life. It is still an integral part of the Israeli legal terrain.

Similarly, when originally enacted by the British Parliament, the Civil Authorities (Special Powers) Act (Northern Ireland) of 1922 was meant to last for no more than one year.<sup>257</sup> It was renewed annually until 1928, when it was extended for a five-year period. Subsequently, the Act was made permanent.<sup>258</sup> The story of the series of Prevention of Terrorism (Temporary Provisions) Acts (PTA) was much the same. Originally introduced in Parliament in 1974, it was amended in 1975 and 1983, and reenacted in 1984. In 1989, the PTA became a permanent part of the statute books of the United Kingdom.<sup>259</sup> Northern Ireland itself has been the subject of an emergency rule for a combined period of some thirty years.<sup>260</sup>

Last, by the mid-1970s, the United States had experienced four declared states of emergency in force spanning a period of more than forty years.<sup>261</sup> As a direct result, more than 470 pieces of legislation, meant to

256. See MENACHEM HOFNUNG, *DEMOCRACY, LAW AND NATIONAL SECURITY IN ISRAEL* 52 (1996).

257. The result of the emergency regime under the Act was that "the Government enjoyed powers similar to those current in time of martial law." Claire Palley, *The Evolution, Disintegration and Possible Reconstruction of the Northern Ireland Constitution*, 1 *ANGLO-AM. L. REV.* 368, 400 (1972). The radical nature of this piece of legislation is best reflected in section 2(4), which provided that "[i]f any person does any act of such nature as to be calculated to be prejudicial to the preservation of the peace or maintenance of order in Northern Ireland and not specifically provided for in the regulations, he shall be guilty of an offence against those regulations." The South African Minister of Justice was quoted, at the time, as referring to section 2(4) when he said that he "would be willing to exchange all the [South African] legislation of that sort for one clause in the Northern Ireland Special Powers Act." *COMM. ON THE ADMIN. OF JUSTICE, NO EMERGENCY, NO EMERGENCY LAW 6* (1993).

258. See Gross & Ni Aolain, *supra* note 91, at 96 ("In 1973, following the bloodiest year of the 'troubles' and the introduction of 'direct rule' over Northern Ireland in March 1972, the UK Parliament enacted the Northern Ireland (Emergency Provisions) Act 1973 (EPA) which repealed the Special Powers Act.").

259. BRADLEY & EWING, *supra* note 7, at 682; WALKER, *supra* note 7, at 33-39.

260. See FIONNUALA NI AOLAIN, *THE POLITICS OF FORCE: CONFLICT MANAGEMENT AND STATE VIOLENCE IN NORTHERN IRELAND 17-71* (2000). From 1971, the United Kingdom had a nearly continuous derogation in place, linked to the Northern Ireland conflict. Derogation of 20 Aug. 1971, 1971 *Y.B. EUR. CONV. ON H.R.* 32 (Eur. Comm'n on H.R.); Derogation of 23 Jan. 1973, 1973 *Y.B. EUR. CONV. ON H.R.* 24-26 (Eur. Comm'n on H.R.); Derogation of 16 Aug. 1973, 1973 *Y.B. EUR. CONV. ON H.R.* 26-28 (Eur. Comm'n on H.R.); Derogation of 18 Dec. 1978, 1978 *Y.B. EUR. CONV. ON H.R.* 22 (Eur. Comm'n on H.R.); Derogation of 23 Dec. 1988, 1988 *Y.B. EUR. CONV. ON H.R.* 15-16 (Eur. Comm'n on H.R.). The United Kingdom withdrew its derogation in February 19, 2001, see Clare Dyer, *UK Finally Complies with Rights Convention*, *GUARDIAN* (London), Feb. 20, 2001, at 8, but on November 12, 2001, the British government again declared a "state of emergency," see HUMAN RIGHTS WATCH, *WORLD REPORT 2002*, at <http://www.hrw.org/wr2k2/europe21.html>. See generally Ni Aolain, *supra* note 98, at 106-26 (discussing derogations in the European system).

261. Between 1933 and 1972, four national emergencies were declared. See Proclamation No. 2039, reprinted in 2 *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT* 24, 24-26 (1938), and in 48 Stat. 1689 (1933) (ordering all banks to close from March 6, 1933, through

apply only when a state of emergency has been declared, could have been used by the government.<sup>262</sup>

## 2. *It's a Bad World out There (I): Spatial Distinctions*

A further separation of emergency from normalcy is set around geographic distinctions. Different legal principles, rules, and norms may be applied in distinct geographical areas that belong to the same “control system,”<sup>263</sup> such as Great Britain and Northern Ireland, Israel and the territories that came under its control after the 1967 war, or France and Algeria. One part of such a “control system”—the controlling territory—applies an emergency regime to the dependent territory. At the same time a putative normal legal regime is maintained in the controlling territory itself. Thus, the authorities of the controlling territory apply two legal regimes contemporaneously.<sup>264</sup> The dependent territory becomes an anomalous zone in which certain legal rules, otherwise regarded as embodying fundamental policies and values of the larger legal system, are locally suspended.<sup>265</sup> However, the claim is that the two realities and the two concomitant legal regimes—that of emergency applicable to the dependent territory and that of normalcy applicable to the controlling territory—are maintained separately and do not affect each other. Maintaining a regime of legal exception in the dependent territory does not adversely affect the form and content of the normal legal order that governs the controlling territory. In other words, there is no spillover from one legal regime to the other across geographic boundaries.

Experience shows that such a position is untenable. Geographic boundaries prove to be permeable, rather than integral, when emergency powers are concerned.<sup>266</sup> Gerald Neuman has already demonstrated that

March 9, 1933); Proclamation No. 2914, 3 C.F.R. 99 (1949-1953) (declaring a national emergency in response to the Korean conflict); Proclamation No. 3972, 3 C.F.R. 473 (1970) (declaring a national emergency in response to the Post Office strike); Proclamation No. 4074, 3 C.F.R. 80 (1971) (declaring a national emergency so that currency and foreign trade restrictions could be implemented).

262. Glenn E. Fuller, Note, *The National Emergency Dilemma: Balancing the Executive's Crisis Powers with the Need for Accountability*, 52 S. CAL. L. REV. 1453, 1453 (1979).

263. Baruch Kimmerling, *Boundaries and Frontiers of the Israeli Control System: Analytical Conclusions*, in *THE ISRAELI STATE AND SOCIETY* 265, 266-67 (Baruch Kimmerling ed., 1989).

264. See, e.g., A.W. BRIAN SIMPSON, *HUMAN RIGHTS AND THE END OF EMPIRE: BRITAIN AND THE GENESIS OF THE EUROPEAN CONVENTION* (2001) (noting that the rule of law was aimed at making Britons feel better about themselves at home, but that it was not designed to hinder the management of the British Empire vis-à-vis its colonies, where the utilization of sweeping emergency powers was the norm).

265. Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1201 (1996).

266. Marcus Raskin noted that government officials see no distinctions among geographic boundaries and are apt to operate in essentially the same way against Americans and non-Americans. Thus, the attempt of the CIA to

“anomalous zones” threaten to subvert fundamental values in the larger legal system.<sup>267</sup> The belief in our ability to use the politically, legally, and socially constructed anomaly in order to contain the exercise of emergency powers and confine their use to that territory is, therefore, misguided. As the story of the curtailment of the right to silence in the United Kingdom clearly shows, sweeping powers that have been used in the dependent territory find their way home to the controlling territory.<sup>268</sup>

Separation between normalcy and emergency along geographic lines has once again been resorted to in the wake of the terrorist attacks of September 11th.

Operation Enduring Freedom resulted, among other things, in several hundred suspected al Qaeda or Taliban members being detained by the United States at its naval base at Guantanamo Bay. The base is leased by the United States from Cuba. In a series of cases coming before U.S. district courts, several of the detainees petitioned for writs of habeas corpus. The district courts have, however, ruled that they lack jurisdiction to hear such claims.<sup>269</sup> Some have gone further to hold that aliens detained outside the sovereign territory of the United States cannot use American courts to pursue claims brought under the Constitution of the United States. Obviously, the courts have not deemed the fact that the United States exercises complete control over Guantanamo sufficient to find in favor of the petitioners.<sup>270</sup> Thus, the anomalous nature of Guantanamo—demonstrated in the 1990s in the context of detention of Haitian<sup>271</sup> and then Cuban refugees<sup>272</sup>—has been invoked once again.

The attacks have also sparked debate about the desirability of using torture to obtain information from suspected terrorists when such

assassinate Patrice Lumumba in the Congo is directly analogous to the FBI's attempt to destroy politically Martin Luther King, Jr. in the United States.

Marcus G. Raskin, *Democracy Versus the National Security State*, LAW & CONTEMP. PROBS., Summer 1976, at 189, 200. Raskin also noted that American actions against Salvador Allende were similar to the methods used by the Committee for the Reelection of the President in Nixon's reelection campaign. *Id.* On the concepts of permeable, fragmental, and integral boundaries and distinctions, see A.R. Luckham, *A Comparative Typology of Civil-Military Relations*, GOV'T & OPPOSITION, Winter 1971, at 5.

267. Neuman, *supra* note 265, at 1227-28, 1231-33.

268. See *infra* notes 317-334 and accompanying text.

269. See, e.g., *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002) (dismissing petition for writ of habeas corpus on the basis that aliens held outside the sovereign territory of the United States could not use U.S. courts to pursue petitions for habeas corpus); *Coalition of Clergy v. Bush*, 189 F. Supp. 2d 1036 (C.D. Cal. 2002) (dismissing petition for writ of habeas due to lack of standing by petitioners as next friend, while also holding that the court lacked jurisdiction to issue the writ and that Guantanamo detainees had no right to a writ of habeas corpus); see also *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002) (reversing a district court's order allowing counsel unmonitored access to a Guantanamo detainee held on a U.S. brig).

270. See Neuman, *supra* note 265, at 1230.

271. Steven Greenhouse, *As Tide of Haitian Refugees Rises, U.S. Uses Cuban Base*, N.Y. TIMES, June 30, 1994, at A3.

272. John Kifner, *Flight from Cuba: The Refugees*, N.Y. TIMES, Aug. 23, 1994, at A17.

information may be critical to foiling future terrorist acts.<sup>273</sup> Most relevant to our discussion here are allegations that the United States has “contracted” the torture services of other countries by way of extraditing suspected terrorists to such countries where they would be subjected to torture and the information extracted as a result would then be at the disposal of the CIA and FBI.<sup>274</sup> In the words of one FBI agent, “We are known for humanitarian treatment, so basically we are stuck.”<sup>275</sup> In other words, foreign intelligence agents, less scrupulous than their American counterparts and less concerned about their self-image with respect to human rights, will do the work. We will enjoy the fruits of their work without getting our hands dirty in the process.<sup>276</sup> Once again, the experiences of other countries demonstrate the danger that coercive interrogation techniques used abroad will become part of the domestic antiterrorist, and potentially even ordinary, criminal investigation process.<sup>277</sup>

### 3. *It's a Bad World out There (II): Domestic and Foreign Affairs*

It is often asserted that in the area of foreign affairs, ordinary constitutional schemes may be more relaxed. Greater deference than usual is accorded the decisions and policies of the Executive.<sup>278</sup> This attitude toward foreign affairs assumes that a clear separation between the “foreign” and the “domestic” is maintainable and the two spheres can be held apart.

273. See, e.g., ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* 131-63 (2002); Sanford Levinson, “Precommitment” and “Post-Commitment”: *The Ban on Torture in the Wake of September 11*, 81 TEX. L. REV. (forthcoming 2003); Walter Pincus, *Silence of 4 Terror Probe Suspects Poses Dilemma for FBI*, WASH. POST, Oct. 21, 2001, at A6; Richard A. Posner, *The Best Offense*, NEW REPUBLIC, Sept. 2, 2002, at 28 (reviewing Dershowitz, *supra*); Eric Schmitt, *There Are Ways To Make Them Talk*, N.Y. TIMES, June 16, 2002, at D1.

274. See Duncan Campbell, *September 11: Six Months on: US Sends Suspects To Face Torture*, GUARDIAN (London), Mar. 12, 2002, at 4; Rajiv Chandrasekaran & Peter Finn, *U.S. Behind Secret Transfer of Terror Suspects*, WASH. POST, Mar. 11, 2002, at A1; Vicki Haddock, *The Unspeakable: To Get at the Truth, Is Torture or Coercion Ever Justified?*, S.F. CHRON., Nov. 18, 2001, at D1; Pincus, *supra* note 273; Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, WASH. POST, Dec. 26, 2002, at A1.

275. Pincus, *supra* note 273.

276. Heymann, *supra* note 15, at 453-54.

277. See Oren Gross, *Theoretical Models of Emergency Powers* 314-16, 335-37 (1997) (unpublished S.J.D. dissertation, Harvard University) (on file with author) (discussing British and French examples).

278. See, e.g., FRANCK, *supra* note 96, at 11 (describing Chief Justice Marshall’s conviction that “there is something different about ‘foreign affairs’ that renders them particularly impervious to judicial inquiry”); Louis Henkin, *The United States Constitution in Its Third Century: Foreign Affairs*, 83 AM. J. INT’L L. 713, 716 (1989) (“Foreign affairs are likely to remain constitutionally ‘special’ in the next century, as they have been in the past two.”); Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1223 (1999) (noting the existence of a foreign affairs differential).

Trying to garner support for the proposed Constitution and alleviate fears of a strong central government, James Madison suggested that “[t]he powers delegated by the proposed Constitution to the federal government are few and defined. . . . [They] will be exercised principally on *external objects*, as war, peace, negotiation, and foreign commerce . . . .”<sup>279</sup> However, Madison himself was conscious of the difficulties associated with reliance on this separation between foreign and domestic: “Perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretended, from abroad.”<sup>280</sup>

In his opinion in *United States v. Curtiss-Wright Export Corp.*,<sup>281</sup> Justice Sutherland stated that the federal government enjoyed inherent powers in the realm of foreign affairs.<sup>282</sup> These powers are connected to conceptions of nationality and external sovereignty and are not limited to specific affirmative grants of authority found in the Constitution.<sup>283</sup> Moreover, within the federal government it is the President who is invested with these inherent powers.<sup>284</sup>

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279. THE FEDERALIST NO. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added). A similar idea was conveyed by John Locke’s separation between the “executive power” and the “federative power.” JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT, in TWO TREATISES OF GOVERNMENT § 148 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690). Although both powers are to be held by the same organ (or organs) of the community, they are distinct and separate. The executive power is the power to “see to the *Execution* of the Laws that are made, and remain in force.” *Id.* § 144. The federative power contains “the Power of War and Peace, Leagues and Alliances, and all the Transactions, with all Persons and Communities without the Commonwealth.” *Id.* § 146. Locke also noted that though this *federative Power* in the well or ill management of it be of great moment to the commonwealth, yet it is much less capable to be directed by antecedent, standing, positive Laws than the *Executive*; and so must necessarily be left to the Prudence and Wisdom of those whose hands it is in, to be managed for the publick good. For the *Laws* that concern Subjects one amongst another . . . may well enough *precede* them. But what is to be done in reference to *Foreigners*, depending much upon their actions, and the variation of designs and interests, must be *left* in great part to the *Prudence* of those who have this Power committed to them, to be managed by the best of their Skill for the advantage of the Commonwealth.

*Id.* § 147.

280. Letter from James Madison to Thomas Jefferson (May 13, 1798), quoted in THE COMPLETE MADISON: HIS BASIC WRITINGS 258 (Saul K. Padover ed., 1953).

281. 299 U.S. 304 (1936).

282. *Id.* at 315-16, 318.

283. *Id.* at 318.

284. *Id.* at 319. This power is not confined to express constitutional grants of power or to statutory delegations of authority; it also encompasses

[t]he very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.

*Id.* at 320.

In the past six decades, Justice Sutherland's opinion has been the subject of much heated debate.<sup>285</sup> Whatever the criticisms levied against it, the notion of inherent plenary foreign affairs powers has continued to appeal to the Executive and has had significant impact upon subsequent judicial decisions.<sup>286</sup> Precisely because of the great influence that *Curtiss-Wright* has had in the area of foreign affairs, it is interesting to note the pains to which Justice Sutherland went in order to distinguish between issues of foreign affairs and foreign policy, and the realm of domestic affairs. His opinion starts by noting:

It will contribute to the elucidation of the question if we first consider the differences between the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs. That there are differences between them, and that these differences are fundamental, may not be doubted.<sup>287</sup>

He goes on to state, more than once, that the powers of the federal government with respect to "external affairs" are wholly different than the powers it may exercise in "internal affairs." Thus, "[t]he broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, *is categorically true only in respect of our internal affairs.*"<sup>288</sup> Federalism,<sup>289</sup> separation of powers, and the delegation of powers doctrine<sup>290</sup> do not apply to the powers of the President over the whole range of foreign affairs issues.

285. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 n.2 (1952) (Jackson, J., concurring) (characterizing most of *Curtiss-Wright* as "dictum"); David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467, 490 (1946) (noting Justice Sutherland's "sharp departure from the accepted canons of constitutional interpretation and assumptions as to the nature of the American system of government"). See generally FRANCK, *supra* note 96, at 14-18; LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 19-26 (1972); KOH, *supra* note 62, at 93-95; Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1, 3 (1973) (stating that no consensus existed as to the meaning of *Curtiss-Wright*).

286. See KOH, *supra* note 62, at 134-46; see also FRANCK, *supra* note 96, at 16 ("Sutherland's words succeeded in capturing a widely shared public preference for rallying around the president in the face of foreign threats. Many Americans . . . may still believe that not only politics but also the writ of the law should stop at the water's edge.").

287. *Curtiss-Wright*, 299 U.S. at 315.

288. *Id.* at 315-16 (emphasis added).

289. See, e.g., *United States v. Pink*, 315 U.S. 203, 233 (1942) ("Power over external affairs is not shared by the States; it is vested in the national government exclusively."); THE FEDERALIST NO. 42, at 264 (James Madison) (Clinton Rossiter ed., 1961) ("This class of powers [which regulate the intercourse with foreign nations] forms an obvious and essential branch of the federal administration. If we are to be one nation in any respect, it clearly ought to be in respect to other nations.").

290. See generally TRIBE, *supra* note 8, at 977-1011.

However, such bright-line separation between foreign and domestic affairs has proven problematic. The external and the internal have increasingly converged. In an era of globalization, the interdependence among nations causes virtually every issue of domestic affairs to bear on the external affairs of the nations involved and on their national security policies. The significance of geographical boundaries, of the "water's edge," is greatly diminished. In his 1993 inaugural address, President Clinton expressed this idea when he said that "[t]here is no longer a clear division between what is foreign and what is domestic. The world economy, the world environment, the world AIDS crisis, the world arms race—they affect us all."<sup>291</sup> A former dean of Stanford Law School suggested the term "intermestic" to describe the large array of issues that are at the same time domestic and international, noting that while in the past these types of issues, although existing, formed a mere exception within the foreign relations agenda, "the exceptional has now become preponderant."<sup>292</sup>

Not only does such entanglement of foreign and domestic occur, but when it does, often the realities of foreign affairs and national security policy have the more pronounced impact upon the ultimate outcome of the interaction. Thus, for example, the movement of expansive presidential powers from the area of foreign affairs to domestic affairs has been well documented. In *The Imperial Presidency*, Arthur Schlesinger, Jr., notes:

[T]he imperial Presidency received its decisive impetus, I believe, from foreign policy . . . .

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291. William J. Clinton, *We Force the Spring*, Presidential Inaugural Address (Jan. 20, 1993), quoted in Slaughter Burley, *supra* note 96, at 1980. Franck also noted:

Foreign affairs have become inextricably interwoven with the fabric of American life and ought to be treated holistically . . . .

. . . [I]n a world so interdependent that the flow of persons, goods, and ideas between states is almost as ordinary as between states of our Union, no "affair" is any longer exclusively denominated as "foreign." . . . The elements of these mixed domestic-foreign affairs often cannot be disentangled even in theory, let alone in practice . . . . [T]here is now scarcely such a thing as a discrete "foreign-affairs" enterprise . . . .

FRANCK, *supra* note 96, at 8-9.

292. Bayless Manning noted:

The issues of the new international agenda strike instantly into the economic and political interests of domestic constituencies.

. . . [E]very jiggle in the pattern of the international economy is likely to pinch some local group in the United States and convert it immediately into a vocal group . . . . The international agenda itself has changed so that modern diplomacy is increasingly taken up with homespun economic subjects like fishing limits and commodity prices, as to which one or another set of domestic interests are deeply concerned . . . .

Bayless Manning, *The Congress, the Executive and Intermestic Affairs: Three Proposals*, 55 FOREIGN AFF. 306, 309 (1977).

....

... [I]f the President were conceded these life-and-death decisions abroad, how could he be restrained from gathering unto himself the less fateful powers of the national polity? For the claims of unilateral authority in foreign policy soon began to pervade and embolden the domestic Presidency.<sup>293</sup>

Nor should this come as a surprise. As nations become increasingly interdependent, there are growing domestic pressures on national governments to protect the public against the perceived deleterious effects of globalization on jobs, security, and national identity. Interdependence also accelerates the pace of the shifting of crises from one nation to another, carried over the transmission belts of global trade and commerce, as demonstrated by the East Asian currency crisis of 1997, as well as by the more recent decline of the world's economies into recession.<sup>294</sup> As crises move more rapidly from one country to another, the time available to national governments to respond to such exigencies is dramatically reduced. Events such as the attacks of September 11th strengthen the sense that the world has become a less secure place. If in the past the enemy was clearly known, today's foes are invisible and may be lurking anywhere. They may strike at any time and at any place. Concepts such as "national security" have transformed from being fundamentally military-related to encompassing many other areas of human endeavor.<sup>295</sup> Secrecy, dispatch, and access to broad sources of information—the attributes that have

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293. ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY*, at ix (1989). For a different assessment, see FRANCK, *supra* note 96, at 126 (recognizing that bringing foreign and domestic affairs closer together will result in the beneficial outcome of eliminating the political question doctrine from the jurisprudence of American courts when dealing with issues involving foreign affairs); and TRIBE, *supra* note 8, at 636 ("The constitutional role for the Executive in domestic matters is thus largely ancillary to that of Congress. And the more the foreign and domestic spheres tend to merge, the more this principle will apply to all executive action.").

294. See, e.g., Joseph Kahn, *The World's Economies Slide Together into Recession*, N.Y. TIMES, Nov. 25, 2001, at A6.

295. See, e.g., R.N. BERKI, *SECURITY AND SOCIETY: REFLECTIONS ON LAW, ORDER AND POLITICS* (1986); ROBERT MANDEL, *THE CHANGING FACE OF NATIONAL SECURITY: A CONCEPTUAL ANALYSIS* (1994); Oren Gross, *The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the "Norm-Exception" Dichotomy*, 21 CARDOZO L. REV. 1825, 1857-63 (2000); Daniel J. Kaufman et al., *How To Analyze National Security: A Conceptual Framework*, in U.S. NATIONAL SECURITY: A FRAMEWORK FOR ANALYSIS 3, 3-26 (Daniel J. Kaufman et al. eds., 1985); Moshe Lissak, *Civilian Components in the National Security Doctrine*, in NATIONAL SECURITY AND DEMOCRACY IN ISRAEL 55 (Avner Yaniv ed., 1993); Frank N. Trager & Frank L. Simonie, *An Introduction to the Study of National Security*, in NATIONAL SECURITY AND AMERICAN SOCIETY: THEORY PROCESS AND POLICY 35 (Frank N. Trager & Philip S. Kronenberg eds., 1973); *Developments in the Law—The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130, 1133 (1972); see also Peter M. Sanchez, *The "Drug War": The U.S. Military and National Security*, 34 A.F. L. REV. 109, 151 (1991) ("[I]f the drug problem is perceived as a national security threat, will any social problem become a national security threat in the future?").



traditionally been considered to put the Executive in the best position with respect to the conduct of foreign and national security policies<sup>296</sup>—are more likely to be introduced into the domestic scene.

#### 4. *Communal Divisions: Us vs. Them*

Counterterrorism measures and emergency powers are often perceived as directed against a clear enemy of “others.” The contours of conflict are drawn around groups and communities rather than individuals. Such communal distinctions need not be taken as given; counterterrorism measures often actively produce and construct a suspect community.<sup>297</sup> One is either with “us” or with “them.”<sup>298</sup> There is no middle way.

In times of crisis, when emotions run high, the dialectic of “us versus them” serves several functions. It allows people to vent fear and anger in the face of actual or perceived danger, and direct negative emotional energies toward groups or individuals clearly identified as different. The same theme also accounts for the greater willingness to confer emergency powers on the government when the “other” is well-defined and clearly separable from the members of the community.<sup>299</sup> The clearer the distinction between “us” and “them” and the greater the threat “they” pose

296. THE FEDERALIST NO. 64, at 392-93 (John Jay), NO. 75, at 451-52 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

297. HILLYARD, *supra* note 92, at 257 (noting that the most important feature of the series of Prevention of Terrorism Acts in Britain has been the way in which they have constructed a suspect community in Britain: the Irish community living in Britain or traveling between Britain and Northern Ireland); *see also* Macklin, *supra* note 48, at 398 (noting the role of law in general, and criminal law in particular, in producing “the alien within”).

298. Soon after the attacks of September 11th, President Bush declared, “Either you are with us or you are with the terrorists.” *President Bush’s Address on Terrorism Before a Joint Meeting of Congress*, *supra* note 31; *see also* David W. Chen & Somini Sengupta, *Not Yet Citizens but Eager To Fight for the U.S.*, N.Y. TIMES, Oct. 26, 2001, at A1 (reporting on legal permanent resident enlistment in the armed services post-September 11th due in part to “an us versus them thing [as] . . . children of immigrants feel a need to assert which side of the line they are on” (quoting Hunter College sociologist Philip Kasnitz, who studies assimilation issues facing children)).

299. *See supra* note 103; *see also* Macklin, *supra* note 48, at 396. The link between the perception of the threat and its sources as exogenous to the community as well as the public’s willingness to accept the use of increasingly sweeping emergency powers by the government, has led some to suggest that the government may seek to target “foreign” enemies in order to enhance its domestic popularity and solidify public support behind it (especially if it is faced with strong domestic criticisms on issues such as the economy). *See, e.g.*, Jack S. Levy, *The Diversionary Theory of War: A Critique*, in HANDBOOK OF WAR STUDIES 259 (Manus I. Midlarsky ed., 1989); *see also* Jack M. Balkin, *The Most Dangerous Person on Earth*, HARTFORD COURANT, Sept. 22, 2002, at C1 (asserting that “by shifting the nation’s forces from one military offensive to another, [Bush] can divert attention from domestic failures and foreign policy blunders”); Mark Matthews & Julie Hirschfeld Davis, *Bush Warns U.N. Not To Be Fooled by Iraq*, BALTIMORE SUN, Sept. 18, 2002, at 1A (quoting Senate Majority Whip Harry Reid as stating that “[t]he president could be doing this to divert attention from domestic issues” and characterizing Reid as “suspicious of the administration’s motives in focusing such intense pre-election national attention on Iraq”).

to “us,” the greater in scope the powers assumed by government and tolerated by the public become.

A bright-line separation between “us” and “them” allows for piercing the veil of ignorance.<sup>300</sup> We allow for more repressive emergency measures when we believe that we are able to peek beyond the veil and ascertain that such powers will not be turned against us. Furthermore, the portrayal of the sources of danger as “foreign” and terrorists as “others” who are endowed with barbaric characteristics and who are out to destroy us and our way of life is used to prove the urgent need for radical measures to meet the threat head on.<sup>301</sup>

Take, for example, the issue of racial and ethnic profiling. In the past, an overwhelming majority of the American public considered racial and ethnic profiling wrong. The terrorist attacks of September 11th brought about a dramatic reversal in public opinion on this issue.<sup>302</sup> This change in public attitude is attributed to the fact that the September 11th terrorists were all Arab Muslims. That fact, coupled with the high stakes involved in foiling future terrorist attacks, convinced many that “it [was] only common sense to pay closer attention to Arab-looking men boarding airplanes and elsewhere.”<sup>303</sup> The belief that profiling practices were only going to be targeting “Arab-looking” persons, or more broadly, foreigners, made easier the shift from objection to support of racial and ethnic profiling. After all, most Americans did not need to worry about such measures. They were not the intended targets and their rights were unlikely to be infringed. If ordinary Americans considered themselves potential targets of such measures, their willingness to support them might have been mitigated. This certainly seems to be the case if complaints, mostly of the “why me?” variety, by “ordinary Americans” selected for special security checks at airports are anything to go by.<sup>304</sup>

Certainly, the distinction between us and them is not unique to the sphere of emergency powers. Such notions are fundamental to the

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300. See JOHN RAWLS, A THEORY OF JUSTICE 102-07 (rev. ed. 1999).

301. Ileana Porras notes:

The terrorist is transformed through . . . rhetoric from an ordinary deviant into a frightening, “foreign,” barbaric beast at the same time that extra-normal means are called for to fight terrorism. Since terrorists are never imagined as anything other than terrifying, blood-thirsty barbarians, ordinary law is understood to be deficient or insufficient to deal with them. In the face of terrorism, extra-ordinary law, it seems, is required. Terrorism literature emphasizes, through its choice of metaphors, that the situation is one of “us” or “them.” To survive, we must destroy them. To fail to destroy them is to destroy ourselves.

Porras, *supra* note 103, at 121-22.

302. See JAMES X. DEMPSEY & DAVID COLE, TERRORISM AND THE CONSTITUTION 168 (2002) (noting that before September 11th, about eighty percent of the American public rejected racial profiling, whereas after September 11th, sixty percent supported such practice).

303. *Id.*

304. Cf. Stuntz, *supra* note 104, at 2165-66 (supporting group searches and seizures).

understanding of both our individual and group consciousness. An integral part of our definition as individuals or as members of certain distinct groups is tied to drawing boundaries between the ins and the outs. Group consciousness is, to a large extent, about an affirmative, internal, organizing, communitarian symbol that serves as the core around which the identity of the group is constructed.<sup>305</sup> It is also about distinguishing those who are in—members of the group—and those left outside.<sup>306</sup>

However, crises lead to heightened individual and group consciousnesses. Allegiance to the community and the willingness to sacrifice for the community's sake—in certain situations, the willingness even to sacrifice one's own life—receive a higher premium and attention in times of peril that endanger the group.<sup>307</sup> The lines of ins and outs are more clearly and readily drawn.<sup>308</sup> Stereotyping often is employed with respect both to insiders and to outsiders, emphasizing good, noble, and worthy attributes of the former, and negative traits of the latter. Collective derogatory name calling and identification of the others as "barbarians" are symptoms of that trend.<sup>309</sup> Internal conformities within the community are exaggerated, while divergence from "outsiders" is emphasized.<sup>310</sup>

As far as politicians are concerned, targeting outsiders is less costly, and hence more politically desirable, than targeting larger groups that include citizens. While the benefits, perceived or real, of fighting terrorism and violence seem to spread among all the members of society, the costs seem to be borne by a smaller, and ostensibly "other," group of people. Under such circumstances, the danger is that political leaders will tend to impose too many costs on the target group without facing much resistance (and, in fact, receiving strong support) from the general public.<sup>311</sup>

305. Frederick Schauer, *Community, Citizenship, and the Search for National Identity*, 84 MICH. L. REV. 1504, 1513-17 (1986).

306. See ELLIOTT, *supra* note 103, at 6-10; *id.* at 8 ("People only display attitudes of *us* due to an acquired sense of *we-ness* determined largely by a sense of *they-ness* in relation to others. So-called ingroup and outgroup behaviour therefore merely reflects the two sides of group consciousness.").

307. Schauer noted:

[A] meaningful sense of community exists only insofar as the individuals who comprise that community are willing to take actions on behalf of the community not only that they would not take on their own behalf, but that are quite possibly detrimental to their own interest. . . . [W]e cannot think about a meaningful sense of community without thinking of some sense of sacrifice.

Schauer, *supra* note 305, at 1504; see also Quarantelli & Dynes, *supra* note 99, at 143 (noting the effect of emergencies on the strengthening of community identification).

308. Quarantelli & Dynes, *supra* note 99, at 144 ("The increase in solidarity within the community is accompanied by an increase in hostility towards outsiders.").

309. ELLIOTT, *supra* note 103, at 9 (mentioning the use of such epithets as Krauts, Nips, Wops, Wogs, and Gooks by the Allies during World War II); see also J. GLENN GRAY, *THE WARRIORS: REFLECTIONS ON MEN IN BATTLE 157-202* (1973).

310. See ELLIOTT, *supra* note 103, at 9.

311. See *supra* note 104 and accompanying text.

However, reliance on the separation between “us” and “them” may prove illusory. Natural as the “us–them” discourse may seem to be, the dangers that it presents are disregarded too easily and its long-term costs are often ignored.<sup>312</sup> Thus, a search for an appropriate trade-off between individual liberties and security needs may lead to results that do not reflect adequately the true costs and benefits involved.

Two interrelated major costs can be identified in this context. First, there is the danger that extraordinary measures that are employed at present against “them” will be turned against “us” in the future. This may happen for several reasons. First, with time there may be a redefinition of the boundaries of the relevant groups. Some who are today an integral part of the “us” group may find themselves outside the redefined group tomorrow, leaving within its circumference a smaller number of people. Second, exceptional emergency measures may be acceptable when premised on the understanding that they will only be exercised outward, outside the boundaries of the group consensus. However, in the rush to avail the group of such measures, it is oftentimes the case that no adequate guarantees are installed to ensure that the tide does not turn and that the same mechanisms do not operate inward, i.e., against “us.” Indeed, that such measures ought to be used solely against outsiders may be so clear to everyone within the community that there will seem to be no real need to express that implicit consensus explicitly in legislation or otherwise. Third, even if current emergency measures do explicitly refer, for example, to foreignness as an operative term for the applicability of new legal provisions, it may well be that with time such limitations on the scope of the measures will be removed and abandoned, with the measures applying to a much larger group than had been originally intended.<sup>313</sup>

A second and closely linked danger in relying on the us-versus-them discourse relates to the possibility that the growing schism between “us” and “them” will result not only in the alienation of different groups in the population, but in the dehumanization of the outsider or consideration of him or her as inferior.<sup>314</sup> A dichotomy may be created where the enemy is regarded as immoral, cruel, and evil, while “our” people are of the highest morality and fight for a just cause.<sup>315</sup> This may lead, in turn, to debasement of the fundamental values of the community and its members, as they come to ignore the same values when dealing with those who are not part of their own group.<sup>316</sup>

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312. See, e.g., *Blown Away?*, *supra* note 103, at 2091.

313. For specific examples, see Cole, *supra* note 103, at 989-1004.

314. DEMPSEY & COLE, *supra* note 302, at 170; ELLIOTT, *supra* note 103, at 96.

315. ELLIOTT, *supra* note 103, at 96.

316. Elliott noted, however, that

strong sense of group identity with feelings of *us* and *them* removes any sense of contradiction and has always tended to occlude humanitarian feelings towards an

The story of the curtailment of the right to silence in the United Kingdom exemplifies many of the different mechanisms of separation discussed above, and their eventual blurring or collapse. On August 25, 1988, in response to escalating terrorist attacks—including an August 20th bombing in County Tyrone, Northern Ireland, of a military bus that left eight British soldiers dead and twenty-eight injured<sup>317</sup>—the British government decided to adopt a series of security measures. The package included a measure to limit the right to silence of suspects and defendants, both with respect to their interrogation by the police and with respect to their silence in court during trial.<sup>318</sup> The government's argument for the proposed deviation from a well-established principle was that the wide and systematic lack of cooperation with the police by those suspected of involvement in terrorist activities in Northern Ireland was critically hampering interrogations.<sup>319</sup> The factual background against which the new limitations on the right to silence were introduced, as well as specific declarations made by senior public officials, created a clear impression that the measures were designed to bolster the state's powers needed to wage a comprehensive war on terrorism in Northern Ireland.<sup>320</sup>

The public debate on the new order focused on "terrorist activities."<sup>321</sup> The general perception was that the proposed measures were necessary in the fight against paramilitary terrorism in Northern Ireland.<sup>322</sup> Furthermore,

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enemy, once group fear or anger is aroused. Then the foe are [sic] not regarded as being "true" human beings at all. This may indeed, like stereotyping, be part of a primitive defence mechanism.

*Id.* at 97.

317. Steve Lohr, *I.R.A. Claims Killing of 8 Soldiers as It Steps Up Attacks on British*, N.Y. TIMES, Aug. 21, 1988, at A1.

318. Charles Hodgson & Raymond Hughes, *King Curbs Right To Remain Silent*, FIN. TIMES (London), Oct. 21, 1988, at 28.

319. See 140 PARL. DEB., H.C. (6th ser.) (1988) 184 (comments of Tom King, Secretary of State for Northern Ireland).

320. Explaining the reasoning behind the government's decision, the minister responsible for Northern Ireland, Tom King, emphasized:

[I]t will help in convicting guilty men. I don't think it will undermine standards of justice. In Northern Ireland, *the whole system of justice is under sustained attack by terrorists* and their aim is to destroy the whole system. They intimidate and murder witnesses and judges and they train people not to answer any questions at all.

Ed Moloney, *Britain Seeks To Abolish Key Civil Liberty in Ulster: London's Move Aimed at Thwarting IRA*, WASH. POST, Oct. 21, 1988, at A1 (emphasis added); see also Charles Hodgson, *Plan To Curb Right to Silence Approved*, FIN. TIMES (London), Nov. 9, 1988, at 15.

321. SUSAN EASTON, *THE CASE FOR THE RIGHT TO SILENCE* 60 (2d ed. 1998) ("The debates of the early seventies focused on the 'abuse' of the right to silence by professional criminals, but by the late eighties this concern was overshadowed by anxieties over professional terrorists, such as members of the Irish Republican Army and other sectarian para-military groups.")

322. See, e.g., THE VISCOUNT COLVILLE OF CULROSS, *REVIEW OF THE OPERATION OF THE PREVENTION OF TERRORISM (TEMPORARY PROVISIONS) ACT 1984, 1987*, Cmnd. 264, at 51 (declaring Viscount Colville's support for the annulment of the right to silence, on the grounds that terrorists were using this right to hide behind a wall of silence, thus causing difficulties for police interrogators and prosecutors in bringing terrorists to justice).

such measures were supported on the assumption that they were going to target an easily definable group. Not only were they to be limited in their geographic application to Northern Ireland, but even within this territorial framework they were to be aimed only at "terrorists." Thus, we have an example not just of geographic separation, but also separation along religious, national, and ideological lines. The separation was meant to be between "here" and "there," and between "us" and "them." Claims that similar measures might eventually find their way into the criminal law and procedural rules of the rest of the United Kingdom received little attention.<sup>323</sup>

Despite repeated declarations and assurances to the effect that the new limitations were meant to strengthen law enforcement authorities in their war on terrorism, once the Criminal Evidence Order (Northern Ireland) of 1988 was approved, its language was not confined to acts of terrorism.<sup>324</sup> Moreover, the Order was not enacted within the framework of emergency legislation that already existed in Northern Ireland, but rather as ordinary criminal legislation. Any mention or indication of the Order's relation to terrorist acts disappeared. Thus, the Order's jurisdiction and the restrictions it set on the right to silence were not limited to those suspected of serious crimes related to terrorism,<sup>325</sup> but were expanded and interpreted as relating to every criminal suspect or defendant in Northern Ireland.<sup>326</sup>

Denouncing the Thatcher government's decision to ban radio and television broadcasting of interviews with persons connected to certain organizations,<sup>327</sup> the Labour Party's spokesman on Northern Ireland, Kevin McNamara, blamed the government for using Northern Ireland as "an

323. Steven Greer, *The Right to Silence: A Review of the Current Debate*, 53 MOD. L. REV. 709, 716-17 (1990); Edward Rees, *Guilty by Inference*, GUARDIAN (London), Apr. 11, 1995, at 11.

324. Susan Easton noted:

It was also expected that any changes to the right to silence in Northern Ireland . . . would be incorporated into emergency legislation, and restricted to terrorist offences, rather than becoming part of the ordinary criminal law. . . . [I]t seems unlikely that this route will be taken now that the curtailment of the right to silence is a feature of the English criminal justice system applicable to all suspects.

EASTON, *supra* note 321, at 69.

325. ANTONIO VERCHER, TERRORISM IN EUROPE: AN INTERNATIONAL COMPARATIVE LEGAL ANALYSIS 121-25 (1992).

326. See, e.g., Gregory W. O'Reilly, *England Limits the Right to Silence and Moves Towards an Inquisitorial System of Justice*, 85 J. CRIM. L. & CRIMINOLOGY 402, 425 (1994). It is also worth noting that the Order was approved by the British Parliament in an expedited fashion, forsaking traditional legislative procedures. Michael Mansfield, *Reform That Pays Lip Service to Justice*, GUARDIAN (London), Oct. 6, 1993, at 22; see also EASTON, *supra* note 321, at 68-69; Andrew Ashworth & Peter Creighton, *The Right of Silence in Northern Ireland*, in LESSONS FROM NORTHERN IRELAND 117, 122-25 (Jon Hayes & Paul O'Higgins eds., 1990).

327. These measures were introduced as part of the antiterrorism package in 1988. Graham Zellick, *Spies, Subversives, Terrorists and the British Government: Free Speech and Other Casualties*, 31 WM. & MARY L. REV. 773, 775-82 (1990); Craig R. Whitney, *Civil Liberties in Britain: Are They Under Siege?*, N.Y. TIMES, Nov. 1, 1988, at A18.

experimental laboratory for draconian measures."<sup>328</sup> Six years after beginning its "experiment" regarding the right to silence in Northern Ireland, the British government decided that the time was ripe to extend the experiment to the rest of the United Kingdom.

In November 1994, Parliament approved the Criminal Justice and Public Order Act (CJPOA).<sup>329</sup> Articles 34 through 37 of the Act reproduced, almost verbatim, the relevant provisions of the 1988 Northern Ireland Order.<sup>330</sup> In fact, when proposing and explaining the new Act, the British Home Secretary relied specifically on the example of that Order. Once again, the government claimed that the new legislation was necessary because terrorists were abusing the right to silence.<sup>331</sup> As with its Northern Ireland prototype, the CJPOA was presented as part of a more comprehensive plan for a war against terrorism and organized crime. As with the Northern Ireland Order, these new limitations on the right to silence were incorporated into criminal legislation and were expanded to apply to every suspected offender, not just those accused of terrorist activities.

The significant change, in comparison to 1988, was the intensity of objections expressed in 1994 against the CJPOA.<sup>332</sup> However, the opponents of the proposed legislation found themselves fighting an uphill battle that was doomed to failure. Many found themselves opposing the provisions that they had not previously contested in the case of Northern Ireland.<sup>333</sup> Those who did not object when the 1988 Order curtailed the right to silence in one part of the United Kingdom could not oppose successfully setting the same limitations on their own rights at home. The right to silence, which in the past had been considered one of the basic tenets of the English criminal justice system, no longer enjoyed such status in 1994. The damage that this right had suffered in Northern Ireland six years earlier undermined it in other parts of the country. The British public

328. Andrew Phillips, *Gagging the IRA: Thatcher Imposes a Controversial Crackdown*, MACLEAN'S, Oct. 31, 1988, at 34.

329. See PAUL TAIN, *CRIMINAL JUSTICE AND PUBLIC ORDER ACT 1994: A PRACTICAL GUIDE* (1994).

330. See, e.g., J.D. Jackson, *Curtailing the Right of Silence: Lessons from Northern Ireland*, CRIM. L. REV. 404, 405-06 (1991).

331. In his speech to the annual convention of the Conservative Party on October 6, 1993, Home Secretary Michael Howard announced:

The so-called right to silence is ruthlessly exploited by terrorists. What fools they must think we are. It's time to call a halt to this charade. The so-called right to silence will be abolished. The innocent have nothing to hide and that is exactly the point the prosecution will be able to make.

Alan Travis, *Right to Silence Abolished in Crackdown on Crime*, GUARDIAN (London), Oct. 7, 1993, at 6 (emphasis added); see also Heather Mills, *Tougher Policies Aimed at Helping Victims of Crime*, INDEPENDENT (London), Nov. 19, 1993, at 6.

332. EASTON, *supra* note 321, at 69 ("The changes in Northern Ireland attracted far less criticism than the proposals for changes to the right to silence for England and Wales.").

333. Editorial, *The Judges' Fourth Front*, GUARDIAN (London), Jan. 20, 1994, at 21.

had been hearing debates on curtailment of the right to silence for over half a decade. The public began to accept that this right might be limited without causing grave harm to the nation's democratic character, and it could no longer be convinced that one of the most important individual rights was at stake.<sup>334</sup>

### C. *The Breakdown of the Normalcy-Emergency Dichotomy*

The belief in our ability to separate emergency from normalcy, counterterrorism measures from the ordinary set of legal norms, is misguided and dangerous. It undermines our vigilance against excessive transgressions of human rights and civil liberties. It focuses our attention on the immediate effects of counterterrorism measures, while hiding from view their long-term costs. When added to the inherent problems that times of crisis pose in striking an appropriate balance between individual rights and national security needs,<sup>335</sup> this militates against our ability to make accurate calculations of the relevant costs and benefits with respect to governmental emergency powers.

The previous Section highlighted the general mechanisms used to keep emergency and normalcy separate and the failures of these mechanisms. This Section is designed to serve as a brief road map to some of the ways in which the line between emergency and normalcy has been blurred.

#### 1. *Normalization of the Extraordinary*

Under the traditional understanding of the relationship between normalcy and emergency, the latter is understood to be no more than a transient phenomenon. Emergency powers should be available to the government only for short, well-defined periods. Such legislation must not extend beyond the termination of the emergency. Even in cases where some

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334. Gareth Peirce noted:

Any concept that we in England may once have had of inalienable individual human rights has been repeatedly jettisoned in the face of pragmatic demands and may never be reclaimed. Where it has suited us, we have invoked the Northern Ireland conflict for excuses, but we have acted blindly and lost our one opportunity for reclaiming our soul.

Gareth Peirce, *Now for Some Civil Rights*, GUARDIAN (London), Oct. 19, 1994, at 22.

Opposition to the CJPOA was further decimated in light of the government's open efforts to link the new legislation with efforts to curb terrorist activity. Colin Brown & Patricia Wynn Davies, *Ministers Want Silent Suspects To Be Filmed*, INDEPENDENT (London), Feb. 18, 1992, at 2 (quoting a minister who stated: "You can't force people to speak, but the *terrorists* are carefully trained not to say anything when they are in a police cell. They just stare at the wall. This would show juries how they have acted.") (emphasis added). The government enjoyed a comfortable majority in Parliament. The main opposition party, the Labour Party, chose to abstain in the vote over the bill. Alan Travis, *Labour Attacks Justice Bill over End of Right to Silence*, GUARDIAN (London), Jan. 12, 1994, at 6.

335. See *supra* Part II.



transition period beyond the emergency must precede a return to normalcy,<sup>336</sup> such a period must be as brief as possible, and the effects of the emergency must not spill over into the restored normalcy.

However, as already noted, temporary arrangements in this area have a peculiar tendency to become entrenched over time and thus normalized and made routine. Time-bound emergency legislation is often the subject of future extensions and renewals, despite Lord Devlin's caution that "[i]t would be very unfortunate if the public were to receive the impression that the continuance of the state of emergency had become a sort of statutory fiction which was used as a means of prolonging legislation initiated under different circumstances and for different purposes."<sup>337</sup> It is commonplace to find on the statute books legislative acts that had originally been enacted as temporary emergency or counterterrorism measures, but that were subsequently transformed into permanent legislation.<sup>338</sup> Furthermore, the longer that emergency legislation, broadly understood, remains on the statute books, the greater the likelihood that extraordinary powers made available to government under this legislation will become part of the ordinary, normal legal system.<sup>339</sup>

The maintenance of emergency powers may be accompanied by expansion over time of the scope of such powers. At the same time, built-in limitations on the exercise of emergency authority and powers tend to wither away. Thus, for example, Harold Koh and John Yoo have identified a trend of Presidents sidestepping congressional statutory restrictions incorporated into legislation such as the International Emergency Economic Powers Act of 1977<sup>340</sup> and thus gaining access to broad statutory grants of authority without the built-in limitations on the use of that authority.<sup>341</sup>

## 2. *Increasing Dosages*

Governmental conduct during a crisis creates a precedent for future exigencies as well as for "normalcy." Whereas in the "original" crisis, the

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336. For a discussion of transition periods between war and peace, see, for example, Christopher D. Gilbert, *"There Will Be Wars and Rumours of Wars": A Comparison of the Treatment of Defence and Emergency Powers in the Federal Constitutions of Australia and Canada*, 18 OSGOODE HALL L.J. 307, 320-24 (1980).

337. *Willcock v. Muckle*, 2 K.B. 844, 853-54 (1951) (Devlin, J.).

338. This should lead to concerns regarding whether the much fought over inclusion of sunset clauses in the USA PATRIOT Act will make a significant difference when the time comes to assess whether powers ought to be retained or left to expire.

339. See Joe Sim & Philip A. Thomas, *The Prevention of Terrorism Act: Normalising the Politics of Repression*, 10 J.L. & SOC'Y 71 (1983); Walsh, *supra* note 250 (describing the move in the Republic of Ireland from the emergency-type Offences Against the State Act of 1939 to the regular criminal code, the Criminal Justice Act of 1984).

340. 50 U.S.C. §§ 1701-1706 (1977).

341. Koh & Yoo, *supra* note 234, at 742-46; see also *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

situation and powers of reference were those of normalcy and regularity, in any future crisis, government will take as its starting point the experience of extraordinary powers and authority granted and exercised during previous emergencies. What might have been seen as sufficient “emergency” measures in the past (judged against the ordinary situation) may not be deemed enough for further crises as they arise. Much like the need to gradually increase the dosage of a heavily used medication in order to experience the same level of relief, so too with respect to emergency powers: The perception may be that new, more radical powers are needed to fight impending crises. In turn, new extraordinary emergency measures confer an added degree of ex post legitimacy and respectability, as well as a sense of normality, to previously used, less drastic emergency measures. What were deemed exceptional emergency actions in the past may now come to be regarded as normal, routine, and ordinary, in light of more recent and more dramatic emergency powers.

A related phenomenon pertains to the transformation of the previously unthinkable into the thinkable. I have already noted the shift in public opinion in the United States with respect to racial and ethnic profiling as a result of September 11th.<sup>342</sup> This is but one example of a more general pattern. When faced with an acute exigency, public officials and decisionmakers, as well as the general public, are often willing to resort to measures and mechanisms that they themselves had rejected in the past. Consider the following example. In September 1945, the British Mandatory Power in Palestine promulgated the Defence (Emergency) Regulations (DER), which established “a virtual regime of martial law.”<sup>343</sup> The Jewish community in Palestine, against whom the brunt of the regulations was directed, decried the measures as creating a “police state” in Palestine<sup>344</sup> and as “undermining the foundations of the law and constituting a grave danger to an individual’s life and freedom and imposing an arbitrary regime.”<sup>345</sup> When the State of Israel was established much of the mandatory legislation then in effect stayed on as part of the Israeli legal system,<sup>346</sup> including the DER.<sup>347</sup> The challenges to the DER did not stop in 1948. On several occasions these regulations were denounced by leading figures across the political spectrum. For example, in 1951, the then-opposition

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342. See *supra* notes 302-304 and accompanying text.

343. Alan Dowty, *The Use of Emergency Powers in Israel*, 21 MIDDLE E. REV. 34, 35 (1988).

344. BERNARD JOSEPH, BRITISH RULE IN PALESTINE 222 (1948).

345. 3 HAPRAKLIT 62, 62 (1946) (setting out resolutions accepted by the assembly of Jewish lawyers in Palestine on Feb. 7, 1946).

346. I RUBINSTEIN, *supra* note 9, at 63-82.

347. Attempts to attack the absorption of the DER into Israeli law in 1948 have been rejected by the Supreme Court sitting as the High Court of Justice. See, e.g., H.C. 5/48, Leon v. Gubernik, 1 P.D. 58 (1948).

leader, M.K. Menachem Begin, argued that the DER, “the law that [the government] used[,] is Nazi, it is tyrannical, it is immoral: and an immoral law is also an illegal law.”<sup>348</sup> Yet, the DER have remained in effect almost in their entirety to this day. Almost all the attempts to abolish the regulations, in whole or in part (including, early on, a government proposal to that effect), have failed. The continued use of the DER became acceptable; it came to be considered as an evil perhaps, but an evil that one had to live with because of external circumstances imposed on the nation. At first, the regulations were considered a necessary stopgap measure allowing the new state to deal with the critical situation it faced. At later stages, different reasons militated against abolishing the regulations.<sup>349</sup> It is interesting to note that in the official commentary to the Emergency Powers (Detention) Bill—which, as a law passed by the Knesset, is still the most significant reform of the DER since 1948<sup>350</sup>—Menachem Begin’s government declared:

[I]n the state of siege to which the State is subject since its establishment, one cannot relinquish special measures designed to ensure adequate defense of the State and the public against those who conspire to eliminate the State. Still, one should not be content with the existence of those radical regulations . . . .<sup>351</sup>

Perceived necessity made thinkable what had previously been considered unthinkable.

### 3. *One Can Get Used to This*

As crisis prolongs, emergency powers and legislation tend to pile up.<sup>352</sup> A related phenomenon concerns the use of emergency and counterterrorism legislation for purposes other than those for which it was originally promulgated. The likelihood of such use directly correlates with the age of that particular piece of legislation. The farther we get from the original situation that precipitated its enactment, the greater are the chances that the norms and rules incorporated therein will be applied in contexts not originally intended. The use of the Feed and Forage Act of 1861<sup>353</sup> to

348. D.K. (1951) 1807.

349. See Amos Shapira, *Judicial Review Without a Constitution: The Israeli Paradox*, 56 TEMP. L.Q. 405, 450-52 (1983).

350. I RUBINSTEIN, *supra* note 9, at 263-70.

351. *Id.* at 263 (quoting Minister of Justice, Shmuel Tamir).

352. See *supra* note 79 and accompanying text.

353. 41 U.S.C. § 11(a) (1994 & Supp. 1999). The Feed and Forage Act was also invoked on September 14, 2001, by the President. Exec. Order No. 13,223, 66 Fed. Reg. 48,201 (Sept. 14, 2001).

allocate funds for the invasion of Cambodia in 1971 is but one such example.<sup>354</sup>

Government and its agents grow accustomed to the convenience of emergency powers. Once they have experienced the ability to operate with fewer restraints and limitations, they are unlikely to be willing to give up such freedom.<sup>355</sup> “So it always happens that whenever a wrong principle of conduct, political or personal, is adopted on a plea of necessity, it will be afterwards followed on a plea of convenience.”<sup>356</sup>

In Israel, for example, the authority to issue emergency regulations under article 9(a) of the Law and Administration Ordinance of 1948 was originally used mainly in the context of security issues and in a relatively restrained fashion.<sup>357</sup> During the period spanning the 1950s through the early 1970s, there were few cases in which article 9(a) powers were used. However, this pattern changed dramatically after the Yom Kippur War of 1973.<sup>358</sup> Since 1974, emergency powers have been exercised in an almost routine fashion in situations relating to labor disputes and monetary issues.<sup>359</sup> After surveying the history of applying article 9(a) in the context of labor disputes, one scholar concluded that the emergency-related mechanism of compulsory work orders had been frequently used in situations where no special urgency was present or when other, less drastic means had been available. The availability of such a relatively easy to use mechanism to solve labor disputes has had a “narcotic effect” on government officials, allowing them to bypass the more burdensome process of negotiations between employers and employees.<sup>360</sup> Indeed, this pattern of legislation passed against the backdrop of a violent threat, which then serves as a blueprint for similar, perhaps even identical legislation designed to deal with other situations, is a well-established one.

There is yet another pernicious effect entailed in the “getting used to” phenomenon, to wit, the tranquilizing effect that it has on the general

354. Fuller, *supra* note 262, at 1453 n.4.

355. Walsh analyzes a similar pattern in Ireland. First, emergency legislation designed to deal with a terrorist threat is put in place. Second, law enforcement agencies stretch the scope of application and coverage of that legislation and of the powers given them in it while still carrying out those powers in the context of their counterterrorism activity. Third, both the general public and the legal profession (and, more importantly, the judiciary) give their seal of approval to such activity and to such claims of authority. Fourth, the law enforcement agencies exercise their broad emergency powers in contexts that are nonemergency—for example, when dealing with “ordinary” criminals. Finally, the legislature “enacts reality,” inasmuch as it normalizes those special emergency powers by explicitly incorporating them into ordinary legislation such as the criminal code. Walsh, *supra* note 250, at 1112-14.

356. *Julliard v. Greenman*, 110 U.S. 421, 458 (1884) (Field, J., dissenting).

357. I. Hans Klinghofer, *On Emergency Regulations in Israel*, in *JUBILEE TO PINCHAS ROSEN* 86 (Haim Cohen ed., 1962).

358. HOFNUNG, *supra* note 256, at 55-59.

359. *Id.* at 59-60.

360. Mordechai Mironi, *Back-to-Work Emergency Orders: Government Intervention in Labor Disputes in Essential Services*, 15 *MISHPATIM* 350, 380-86 (1986).

public's critical approach toward emergency regimes. Society can only disregard at its own peril the warning made by John Stuart Mill:

Evil for evil, a good despotism, in a country at all advanced in civilization, is more noxious than a bad one; for it is far more relaxing and enervating to the thoughts, feelings, and energies of the people. The despotism of Augustus prepared the Romans for Tiberius. If the whole tone of their character had not first been prostrated by nearly two generations of that mild slavery, they would probably have had spirit enough left to rebel against the more odious one.<sup>361</sup>

Instances of crossing the line that separates emergency from normalcy (assuming for the moment its existence) may go unnoticed. The rush to legislate means that it is not unusual that when emergency legislation is initially adopted, no meaningful debates over it take place. Once introduced, however, emergency provisions may then pass into the ordinary legal system without invoking further debate and discussion.<sup>362</sup>

#### 4. *Persistence of Judicial Precedents*

Court rulings in emergency-related issues may be subsequently used as precedents and their impact expanded to other matters.<sup>363</sup> "Concessions made to necessity in a special, largely unknown context might be later generalized to apply to other contexts."<sup>364</sup> Emergency-related precedents may be generalized and applied to "normal" cases. Considering that the scope of "national security" and "emergency" has increased substantially<sup>365</sup> and that "[i]t would, it seems, have to be a manifestly hopeless claim to

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361. JOHN STUART MILL, THREE ESSAYS—ON LIBERTY, REPRESENTATIVE GOVERNMENT, THE SUBJECTION OF WOMEN 185 (Oxford Univ. Press 1975) (1861).

362. See, e.g., Walsh, *supra* note 250, at 1129 (noting that the Criminal Justice Act—enacting reality—passed with hardly any notice of the incorporation of emergency-related provisions into ordinary criminal law).

363. George Alexander noted:

In evaluating the role of courts in emergencies it is important to consider not only the fact that bad decisions such as *Korematsu* may infest law long after the emergency has passed, but also the fact that they provide an imprimatur for military-executive decisions which might otherwise draw more political disfavor. The absence of court approval, as for example during the war in Vietnam, allows the questions of legitimacy full sway in public discussion.

Alexander, *supra* note 97, at 26-27; see also Kinglsey R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 538 (1991) ("Of one thing we may be certain: any precedents established 'just this once' to permit regulation of racist and sexist speech will later be called upon to support regulation of other speech.").

364. Harold Edgar & Benno C. Schmidt, Jr., *Curtiss-Wright Comes Home: Executive Power and National Security Secrecy*, 21 HARV. C.R.-C.L. L. REV. 349, 389 (1986).

365. Gross, *supra* note 295, at 1857-63.

national security before the courts would turn nasty,<sup>366</sup> the potentially vast impact of such precedents can be fully appreciated.

The link between emergency-related precedents and ordinary legal rules is even more pronounced and direct where the same rules and norms are applied in both ordinary and emergency contexts. The “transsubstantive” nature of many constitutional limitations—the fact that they apply to “ordinary” criminals and to suspected terrorists, for example—has two important implications in this context.<sup>367</sup> First, judicial decisions made in the context of fighting terrorism will also apply in the more general (and regular) context of criminal law and procedure. Second, when judges decide “ordinary” criminal cases, they will take into consideration the impact of their rulings on the fight against terrorism.<sup>368</sup>

### 5. *Structural and Institutional Changes*

Institutional and structural modifications that are installed as essential for crisis management may continue long past the termination of the original crisis. In times of emergency, governments enjoy unparalleled concentration and expansion of powers. More often than not the executive enjoys substantial, if not overwhelming, support from the public and from the other branches of government. Surely, the aggrandizement of executive power is not solely the product of emergency. The growing complexity of modern society and the needs of its members have played an important role in the expansion of executive authority, as has the inability to regulate the multifaceted aspects of modern life solely through legislative action. However, emergencies have led to quantum leaps in this process of aggrandizement. Past examples include the explosions of executive powers accompanying the “economic war” against the Great Depression<sup>369</sup> (and

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366. Graham Zellick, *Official Information, National Security and the Law in Britain*, 98 *STUDI SENESI* 303, 317 (1986).

367. See Stuntz, *supra* note 104, at 2140-41.

368. *Id.* (“One cannot read Fourth Amendment cases from the 1980s without sensing judicial attention to the pros and cons of the war on drugs—even when the cases did not involve drug crime. Crack dealers were the most salient crime problem a dozen years ago; now, terrorists occupy that place.”).

369. The fight against the Great Depression was thought of, and spoken about, in terms of “war” and “emergency.” See Belknap, *supra* note 45, at 70-76; William E. Leuchtenburg, *The New Deal and the Analogue of War*, in *CHANGE AND CONTINUITY IN TWENTIETH-CENTURY AMERICA* 81, 81-82 (John Braeman et al. eds., 1964). In his first inaugural address, President Franklin Roosevelt set the tone for regarding the economic crisis as analogous to the war against the German army in World War I. See *Inaugural Address of President Roosevelt* (Mar. 4, 1933), in 1933 *PUB. PAPERS* 11. The New Deal resulted in an enhancement of presidential power and authority vis-à-vis the other branches of the federal government, as well as the strengthening of the federal government at the expense of the states. Executive leadership in the legislative process and the creation of numerous administrative actors are two of the main outcomes of that period.

later on, World War II)<sup>370</sup> in the United States, the transformation from the Fourth to the Fifth Republic in France (closely linked to the Algerian War),<sup>371</sup> and the fundamental changes in the governmental structure of Great Britain during and after World War I.<sup>372</sup>

September 11th provides yet another example of a similar institutional and structural change. Just before this Article went to print, the largest U.S. governmental reorganization in fifty years—the establishment of the new Department of Homeland Security—was approved by the Congress.<sup>373</sup>

## V. THE EXTRA-LEGAL MEASURES MODEL

The assumption of separation underlies both the Business as Usual model and the different models of accommodation. As shown above, however, historical evidence belies this critical belief in our ability to isolate ordinary legal norms and institutions from emergency rules and powers. The bright-line distinctions that are used to sustain the separation are, by and large, untenable in the long run.

Emergencies present decisionmakers with a tension of tragic dimensions.<sup>374</sup> Democratic nations faced with serious threats must maintain and protect life and the liberties necessary to a vibrant democracy. Yet, emergencies challenge the most fundamental concepts of constitutional democracy. How ought this tragic choice be resolved? Each of the two general categories of constitutional emergency models is open to strong challenges. The Business as Usual model's appeal is in its insistence on clear rules. However, it is open to charges of inflexible, dogmatic utopianism. The strength of the models of accommodation inheres in their flexibility in the face of great calamities and in their accommodation of the shifting and expanding powers needed to meet such exigencies. Their shortcoming is that such flexibility is innately susceptible to manipulation. They are labeled unprincipled, apologetic, and without a significant normative restraining force. The models of accommodation seem

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370. See CORWIN, *supra* note 63, at 35-77; ROSSITER, *supra* note 5, at 265-87. Expansion of the power and authority of the Executive has been facilitated by the following means: first, expansive presidential claims of inherent constitutional emergency powers; second, broad delegations of power from Congress to the President; third, the establishment of various war agencies under the President's assumed constitutional war powers; finally, legislative leadership by the President.

371. See, e.g., ALISTAIR HORNE, *A SAVAGE WAR OF PEACE: ALGERIA 1954-1962*, at 543-44 (1977); IAN S. LUSTICK, *UNSETTLED STATES, DISPUTED LANDS: BRITAIN AND IRELAND, FRANCE AND ALGERIA, ISRAEL AND THE WEST BANK-GAZA* 239-99 (1993).

372. ROSSITER, *supra* note 5, at 151-70 (noting the rise of the Cabinet's power and prestige and the parallel decline in the Parliament's power and prestige).

373. See David Firestone, *Senate Votes, 90-9, To Set Up a Homeland Security Dept. Geared To Fight Terrorism*, N.Y. TIMES, Nov. 20, 2002, at A1.

374. See Lahav, *supra* note 58, at 531.

unsatisfactory in that any act of balancing during an emergency is likely to disadvantage the values that we normally hold as fundamental. Regardless of judicial reiteration of exercising caution in such times so as not to infringe unduly on individual rights and liberties, it is clear that the judicial branch does not present the executive with too great an obstacle in choosing the nation's response to the particular emergency. Changes to the legal system in times of emergency under these models have the tendency to become permanent features beyond the termination of the crisis. Yet, even if we were to impose categorical prohibitions on certain governmental activities, it seems likely that these prohibitions would not restrain the government from acting in a way that runs afoul of such prohibitions. This is because such actions are deemed to be necessary for the preservation of the nation or for the advancement of its significant interests. To believe otherwise is to be naive or a hypocrite.

In this Part, I suggest an alternative model, the Extra-Legal Measures model, which combines the strengths of the two prior models: It permits the maintenance of rules, while supplementing those rules with highly circumscribed, but effective, escape mechanisms.

I suggest that there may be circumstances where the appropriate method of tackling extremely grave national dangers and threats entails going outside the legal order, at times even violating otherwise accepted constitutional principles. Political realists often argue that when dealing with acute violent crises, democracies ought to forgo legal and constitutional niceties. Terrorists, it is argued, do not observe the rule of law; neither should we. They are not playing by the rules; neither should we. Legal principles, rules, and norms are deemed irrelevant when dealing with emergencies. In endeavoring to preserve enduring fidelity to the law, the Extra-Legal Measures model embraces a diametrically opposite approach. Going completely outside the law in appropriate cases may preserve, rather than undermine, the rule of law in a way that constantly bending the law to accommodate emergencies will not.

Allow me to sketch out this third model's general contours. First, assume we agree on these three points: (1) Emergencies call for extraordinary governmental responses, (2) constitutional arguments have not greatly constrained any government faced with the need to respond to such emergencies, and (3) there is a strong probability that measures used by the government in emergencies will eventually seep into the legal system even after the crisis has ended. Now, let us contemplate an extreme case.<sup>375</sup> The police have in custody a person who they are absolutely certain

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375. The scenario described below is known as the "ticking bomb" paradigm. See, e.g., Daniel Statman, *The Absoluteness of the Prohibition Against Torture*, 4 MISHPAT UNIMSHAL 161, 170-74 (1997). In 1989, the *Israel Law Review* published a collection of essays discussing this topic. See 23 ISR. L. REV. 192, 192-406 (1989).



has planted a massive bomb somewhere in a bustling shopping mall. The bomb may go off at any moment, and there may not be enough time to evacuate the market. Should the bomb go off, thousands of people may perish. The only lead that the police have to locate the bomb is the person in custody, but she will not reveal the location of the bomb. Police investigators are certain, beyond any doubt, that the only way of getting the information from her is by torturing her. They are also confident that if torture is applied the suspect will divulge correct information about the location of the bomb, thus giving the bomb squad a better chance of disarming it in time.<sup>376</sup> Finally, let us assume, in what I believe to be an accurate description of what is likely to happen in this scenario, that the investigators are going to apply torture to the suspect in order to get the information about the bomb.<sup>377</sup>

What is likely to happen next? When faced with the charges that it tortured people, the police may deny the charges by arguing that its investigators engaged in no such activity or, alternatively, that the interrogation techniques actually used, while certainly not the ones used in usual criminal investigations, fall short of torture. The police may also argue that their activities have not been illegal because the necessity of the situation justified or excused their actions.<sup>378</sup> They may also try to preempt future challenges by applying for a "torture warrant," i.e., an ex ante judicial authorization to apply torture in a specific case.<sup>379</sup> Thus, as a practical matter, the police are likely to either deny their actions or argue that, in the circumstances, using torture was legal. In any event, it is clear that torture will be used in this scenario.

How will the Extra-Legal Measures model deal with this situation? Under the model, categorical rules are possible and may be desirable with

376. Each of the elements of this story may be heavily contested and challenged. (For example, how would the police be certain that the person actually planted the bomb or otherwise knows of its location? How can they be confident that information disclosed under torture will be correct? And so on.) As I do not wish to focus here on the issue of torture, but rather to use this example as a way of discussing the Extra-Legal Measures model, I do not need to deal with such challenges here. For now, it may be sufficient to note that such questions are likely to emerge and be discussed in the context of public ratification (or rejection) of police activities in the "ticking bomb" scenario.

377. See, e.g., Yale Kamisar, *Physician Assisted Suicide: The Problems Presented by the Compelling, Heartwrenching Case*, 88 J. CRIM. L. & CRIMINOLOGY 1121 (1998).

378. For a general discussion of the distinction between excuse and justification, see, for example, GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* §§ 10.1-10.3 (1978); Joshua Dressler, *New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking*, 32 UCLA L. REV. 61 (1984); Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897 (1984); Michael S. Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091 (1985); and Kent Greenawalt, *Distinguishing Justifications from Excuses*, LAW & CONTEMP. PROBS., Summer 1986, at 89.

379. See, e.g., DERSHOWITZ, *supra* note 273, at 158-61; Aharon Barak, *The Supreme Court 2001 Term—Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 157 (2002).

respect to various important values. Thus, for example, a categorical prohibition on the use of torture, whatever the circumstances, may be desirable in order to uphold the symbolism of human dignity and the inviolability of the human body. At the same time, the proposed model also recognizes that such emergency tactics, in limited circumstances, will be employed. When great calamities (real or perceived) occur, governmental actors tend to do whatever is necessary to neutralize the threat. Yet, as I have suggested, it is extremely dangerous to provide for such eventualities within the framework of the legal system (as the models of accommodation may suggest) because of the large risks of contaminating and manipulating that system, and the deleterious message involved in legalizing such actions.

Instead, the Extra-Legal Measures model calls upon public officials to act outside the legal order while openly acknowledging their actions. They must assume the risks involved in acting extralegally. It is then up to the people to decide, either directly or indirectly (e.g., through their elected representatives in the legislature), how to respond *ex post* to such extralegal actions. The people may decide to hold the actor to the wrongfulness of her actions, demonstrating commitment to the violated principles and values. Alternatively, they may act to approve retrospectively her actions.

The people may determine that such activities are abhorrent, unjustified, and nonexcusable. In such a case, the acting official may be called to answer for her actions and make legal and political amends therefor. Thus, for example, she may need to resign her position,<sup>380</sup> face criminal charges or civil suits, or be subjected to impeachment proceedings. Politically speaking, she may jeopardize her chances for reelection and may be characterized as someone who is willing to act illegally and, perhaps, immorally. Alternatively, the people may approve the actions and ratify them. Such ratification may have direct legal ramifications (as, for example, when the people's representatives pass legislation designed to immunize public officials from any potential civil or criminal liability) or indirect legal effects (as, for example, when a president who personally authorized the use of torture is reelected by a substantial majority in free and democratic elections, in which the issue of torture constituted a major part of the public agenda prior to the elections).

Significantly, the Extra-Legal Measures model calls for an ethic of responsibility not only on the part of public officials but also the general public. To be able properly to invoke the Extra-Legal Measures model, public officials will need to acknowledge openly the nature of their actions. The public will then need to decide whether to ratify those extralegal actions. In the process of deciding that latter question, each member of the

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380. *But see* Frederick Schauer, *The Questions of Authority*, 81 GEO. L.J. 95, 102-03 (1992).

public becomes morally and politically responsible for the decision. Once the extralegal nature of actions taken by governmental agents is made public, each member of the public is called upon to take a stand on the issue through whatever democratic channels she has available to her. Inaction is also imbued with moral and political significance.

The proposed model separates, therefore, the question of what actions may be taken from the assessment of the legal, political, social, and moral implications of such actions. It distinguishes between two types of inquiries that need to be pursued: the “obvious question” and the “tragic question.”<sup>381</sup> Faced with the need to decide how to proceed in order to prevent or overcome a crisis, the first inquiry asks, “What shall we do?” Here we seek to ascertain the right thing to do from a pragmatic standpoint: how to promote the greatest good for the greatest number of people. Many tend to stop the inquiry here. For them, the question of what moral value ought to be attached to actions by government in times of crisis is irrelevant and rather uninteresting. A somewhat more nuanced inquiry conflates the “obvious question” with what Martha Nussbaum calls “the tragic question”—the question as to whether any alternative open to government is free from serious moral wrongdoing<sup>382</sup>—in that it identifies the outcome of the pragmatic, balancing, cost-benefit analysis with moral value. When government acts in a certain way that is deemed necessary to protect and safeguard the nation, then its actions are imbued with affirmative moral value, i.e., they are morally legitimate. If acting extralegally is the right thing to do (pragmatically), then it is the right thing to do whichever way you look at it.

The Extra-Legal Measures model seeks to distinguish between the obvious and the tragic questions. It also suggests that both are highly pertinent to our discussion. Even when counter-emergency actions are deemed necessary under the obvious question, such actions may still be considered unjustified or nonexcusable from a moral or legal perspective, as they run afoul of a community’s fundamental principles and values.

While doing the right thing from a pragmatic perspective, the acting agent has committed not only a moral wrong but also acted outside the law. How should such wrongfulness be addressed? The answer to that is left, in practical terms, in the hands of the general public. Under the model, we may recognize situations where we may conclude that acting in a certain way may be the right thing to do to promote the greatest good for the greatest number of people, but may decline to approve such action from legal, political, social, or moral standpoints. The Extra-Legal Measures

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381. Martha C. Nussbaum, *The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1005, 1005 (2000).

382. *Id.*

model does not completely bar the possibility that such actions will be taken by public officials and that such actions may even be later ratified by the public. By separating the issues of action and ratification/rejection (with the possibility of sanctions), conceptually as well as chronologically, we add an element of uncertainty to the decisionmaking calculus of public officials. That uncertainty raises the costs of pursuing an extralegal course of action. Indeed, even if there is a very good chance that *ex post* ratification will be forthcoming, there may still be significant costs attached to acting extralegally. Take our ticking bomb example. Even if the public eventually ratifies the decision to torture in that particular case, there may be personal implications for the officials involved in the decision (including, but not limited, to the fear that ratification will not follow), as well as broader implications for the nation as a whole.<sup>383</sup> In addition, such ratification need not, necessarily, prevent the victims of torture from obtaining compensation.

The argument below is divided into several parts. Section A discusses historical and theoretical precedents for the Extra-Legal Measures model. It begins with a discussion of John Locke's theory of the prerogative power. This theory was accepted by many of the American Founding Fathers and their contemporaries as a foundation for a theory of extralegal powers. It has also been invoked as a model by those wishing to recognize the possibility of stepping outside the legal order in times of emergency. I argue that while Locke's prerogative power may be seen as a prototype of the Extra-Legal Measures model, it is deficient in at least one crucial respect. It seeks to merge the two issues that the Extra-Legal Measures model seeks to separate: doing the pragmatic right thing, and deciding what is legally, politically, and morally the right thing to do. In conflating the two issues, the Lockean model fails to impose an ethic of responsibility on the public. Moreover, to the extent that it accepts the legitimacy of actions promoting the general good and welfare for the greatest number of people, it also fails to advance an ethic of responsibility among public officials and does not create strong enough barriers against the easy use of extralegal powers by such officials. I then move to discuss the theory that underlies my Extra-Legal Measures model focusing specifically on the problem of

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383. For example, the fact that the prohibition against torture is absolute and nonderogable under international law means that involvement in acts of torture exposes the state to the possibility of civil suits, as well as of civil and criminal proceedings against the acting officials on both the international level and before domestic courts of other nations. *See, e.g.*, International Covenant on Civil and Political Rights, *supra* note 132, art. 4, S. Exec. Doc. E, 95-2, at 24, 999 U.N.T.S. at 174-75; *id.* art. 7, S. Exec. Doc E, 95-2, at 26, 999 U.N.T.S. at 175; European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 132, art. 3, 213 U.N.T.S. at 224 (prohibition on torture absolute and nonderogable); *id.* art. 15, 213 U.N.T.S. at 232 (derogation clause); *see also* Winston P. Nagan & Lucie Atkins, *The International Law of Torture: From Universal Proscription to Effective Application and Enforcement*, 14 HARV. HUM. RTS. J. 87 (2001).

the “dirty hands.” Next, I discuss examples of the (partial) invocation of the Extra-Legal Measures model by Thomas Jefferson. That discussion, taken together with the exposition of the underlying theory, reveals the critical ingredients of the proposed model. I deal specifically with two important elements of the Extra-Legal Measures model, namely the nature of the ex post ratification and the possibility that public officials will be called upon to make reparations. Following that discussion, Section B deals with both criticisms and arguments marshaled in support of the model. It demonstrates that resorting to the Extra-Legal Measures model in appropriate cases may prove more beneficial than applying the constitutional models in maintaining adherence to fundamental principles such as the rule of law.

### A. *Ethic of Political Responsibility*

#### 1. *Locke’s Theory of the Prerogative Power*

In his *Second Treatise of Government*, John Locke introduces the idea of the “prerogative” power vested in the executive branch of government.<sup>384</sup> For Locke, prerogative is “*nothing but the Power of doing publick good without a Rule.*”<sup>385</sup> The executive is entrusted with the power “to act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it.”<sup>386</sup> Such prerogative power is deemed necessary in order to deal with situations when strict and rigid observation of the laws may lead to grave social harm.<sup>387</sup> The criterion as to whether the prerogative power was appropriately used in any given case is a functional one. It focuses on the purpose for exercising the power: Was it directed at promoting the public good?<sup>388</sup> Government cannot have any legitimate ends apart from promoting the good of the community. Governmental power

384. LOCKE, *supra* note 279, §§ 159-68.

385. *Id.* § 166.

386. *Id.* § 160 (emphasis added). The power of prerogative encompasses executive discretion, the power to act without the prescription of positivist law (and in appropriate cases, even against it), and the power of pardon. The power of pardon can be used to mitigate the severity of the law, where, under the circumstances, a strict observation of the laws might have done more harm. The law may make no distinction between criminal offenders, on the one hand, and persons who, although they broke the law, deserve reward and pardon. See Christine Noelle Becker, *Clemency for Killers? Pardoning Battered Women Who Strike Back*, 29 LOY. L.A. L. REV. 297 (1995); Victoria J. Palacios, *Faith in Fantasy: The Supreme Court’s Reliance on Commutation To Ensure Justice in Death Penalty Cases*, 49 VAND. L. REV. 311 (1996).

387. LOCKE, *supra* note 279, §§ 159-60. Explaining his reasons for vesting the prerogative power with the executive, he argues that the legislature cannot anticipate in advance and regulate by statute all that may be, at any point in the future, beneficial to society, and that lawmaking power may be too slow to adapt adequately to exigencies and necessities of the times. See *id.*

388. *Id.* § 161 (“But if there comes to be a *question* between the Executive Power and the People, about a thing claimed as a *Prerogative*; the tendency of the exercise of such *Prerogative* to the good or hurt of the People, will easily decide that *Question*.”); see also *id.* §§ 163, 164, 168.

used for any purpose other than the public good is properly regarded as tyrannical<sup>389</sup> and may justify, under certain circumstances, a popular revolution to restore the people's rights and to limit the government's resort to such arbitrary power.<sup>390</sup>

But what if, in applying the functional test proposed by Locke, it appears that the executive used its prerogative power in an appropriate manner? What if, in other words, despite violating the law, such violation has been contemplated and pursued for the greatest social good? How should we evaluate the actions so taken? For Locke the answer is straightforward, namely: "*Prerogative* can be nothing, but *the Peoples Permitting their Rulers, to do several things of their own free choice, where the Law was silent, and sometimes too against the direct Letter of the Law, for the publick good; and their acquiescing in it when so done.*"<sup>391</sup> When the ruler applies her prerogative power for the public good, such action is considered the right thing to do whichever way one looks at it.<sup>392</sup> Thus, if the answer to the obvious question is an appropriate one by Lockean standards, then the answer to the tragic question follows suit. An appropriate exercise of the prerogative power is legitimate per se and ex ante due to the implicit acquiescence of the public to any such exercise (not necessarily to the specific use of the prerogative power in the circumstances of any particular crisis). There is no need for any further public involvement. In fact, Locke gives the executive the benefit of the doubt.<sup>393</sup> If there are allegations that the ruler's use of the prerogative power has not

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389. *Id.* § 199 ("*Tyranny is the exercise of Power beyond Right, which no Body can have a Right to. And this is making use of the Power any one has in his hands; not for the good of those, who are under it, but for his own private separate Advantage.*"); see also *id.* § 202 ("*Where-ever Law ends, Tyranny begins, if the Law be transgressed to another's harm.*").

390. *Id.* §§ 203-209. Where the ruler abuses the prerogative power and uses it to serve her own interests and purposes rather than to further the public good, the people have no remedy available from any "*Judge on Earth,*" and their sole recourse is "*to appeal to Heaven*" or, when the majority of the people feels wronged, to revolt against the oppressive ruler. *Id.* § 168. Locke's ideas were certainly influenced by such events as the abuses of power during the reign of the Stuarts and the controversy between King James I and Sir Edward Coke on the subject of the Crown's prerogative. See GEOFFREY DE Q. WALKER, *THE RULE OF LAW* 104-17 (1988). Of special relevance to understanding the historical influences on Locke's theory of the right of revolution is the question of whether the *Two Treatises of Government* was written before or after the Glorious Revolution of 1688. The exact year in which Locke's *Treatises* was originally published is a matter of some controversy. While convention dates his *Treatises* to 1689 or 1690, an alternative view pushes the publication back by almost a decade, circa 1680. Mark Goldie, *Introduction to TWO TREATISES OF GOVERNMENT*, at xv, xix-xxi (Mark Goldie ed., 1993) (1690).

391. LOCKE, *supra* note 279, § 164 (emphasis added).

392. Of course, this may only shift the debate to inquiring what it is that we mean by "the public good," as different conceptions of the good may bear differently on assessment of the ruler's actions.

393. As is usually the case with Locke, much faith is put in human reason and rationality as mitigating and limiting factors on the exercise of prerogative power. See LOCKE, *supra* note 279, §§ 163-164.

been for the purpose of promoting the public good, the only remedy that the public has is resorting to revolution. This is a tall order indeed.

Locke's theory of the prerogative power reveals a substantial degree of trust in government in general, and particularly in times of emergency. This need not be necessarily condemned. But if we are worried that it is precisely in such periods of stress that governments may be willing too easily to resort to their prerogative power at the expense of individual rights, freedoms, and liberties, then Locke's answer to the tragic question ought to concern us. This, I argue, is an important point of departure for the Extra-Legal Measures model vis-à-vis Locke's theory. Both answer the obvious question in similar terms. Both recognize the possibility of stepping outside the legal system in appropriate circumstances. However, whereas Locke seems to put his trust in an implicit, general, ex ante public acquiescence in the exercise of such power, I would argue that an explicit, particular, ex post ratification (or rejection) of the same is preferable.

## 2. *Theory: Searching for "Moral Politicians"*

In his essay on politics as a vocation,<sup>394</sup> Max Weber promotes what he calls the "ethic of responsibility" over the "ethic of ultimate ends."<sup>395</sup> Political leaders—those who choose politics as a vocation—must stand ready to violate even fundamental principles and values if such violation is genuinely for the good of the community at large.<sup>396</sup> However, even if their actions have been genuinely for the public good, they may still be required to pay the price of acting in violation of such principles and values.

Thus, a separation is presented between the treatment of the obvious and tragic questions. The fact that a public official did the right thing as far as the first question is concerned does not mean that she did the right thing with respect to the second question. The two are distinct and must be resolved as such. It is no longer enough to argue that the public permitted such actions ex ante as part of its implicit acquiescence in the application of the prerogative power in appropriate circumstances. More is needed if the official is not to be held liable for her actions and to be relieved from making reparations for her wrongful acts.<sup>397</sup>

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394. Max Weber, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77 (H.H. Gerth & C. Wright Mills eds. & trans., 1946). I thank Sanford Levinson for reminding me of this essay and its relevance to this present discussion. See Levinson, *supra* note 273.

395. Weber, *supra* note 394, at 120-21.

396. *Id.* at 123 ("[I]t is *not* true that good can follow only from good and evil only from evil, but that often the opposite is true. Anyone who fails to see this is, indeed, a political infant.").

397. See Robert Nozick, *Moral Complications and Moral Structures*, 13 NAT. L.F. 1, 35 n.46 (1968) (stating that even when one breaks a rule for good reasons one may still have a duty to make reparations).

Michael Walzer takes a similar position<sup>398</sup> with respect to what is known as “the problem of the dirty hands.”<sup>399</sup> He asks how one recognizes a “moral politician” and answers, “by his dirty hands.”<sup>400</sup> Walzer favors a distinction between doing the right thing in utilitarian terms and the moral value of such actions.<sup>401</sup> There is no need to choose between upholding an important moral principle and avoiding national catastrophe. Both continue to be applicable at the same time. Government ought to avoid disasters and to overcome them as soon as possible once they occur. This is the right thing to do. But “right” in this context must not be confused with moral rightness. We must not attach moral praise to such actions if they contravene moral principles. They are morally wrong but practically necessary—hence Walzer’s question and answer above. A moral person who is not a political leader would refuse to act in an immoral way. She would keep her hands clean. A politician who is immoral would merely pretend that her hands were clean. A moral politician would do the right (pragmatic) thing to save the nation, while openly acknowledging and recognizing that such actions are (morally) wrong—that is, openly admitting that her hands are indeed dirty. The question then becomes not whether a political leader will act in this way in the face of a moral principle to the contrary (for it is clear that she will act), but rather what moral judgment should be attached to such action.

Under both Weber’s ethic of responsibility and Walzer’s moral politician paradigms, answering the obvious question by saying that extralegal action was appropriate under the circumstances does not, in and of itself, absolve the politician from her moral culpability. Both Weber and Walzer stop their inquiry at this stage. The Extra-Legal Measures model takes their inquiry one step further. It seeks to operationalize the previous insights by exploring the circumstances in which politicians who have done the right thing may actually be absolved from legal liability for their extralegal actions. For that to happen, the model informs us, it is not enough that there is a general agreement that the actions taken were the right thing to do at the relevant time. Something more is needed—and that something more is the public’s explicit, particular, and ex post ratification. Before addressing this point further, it may be useful to consider some real-life examples of claims similar to those made under the Extra-Legal Measures model.

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398. Michael Walzer, *Political Action: The Problem of Dirty Hands*, in *WAR AND MORAL RESPONSIBILITY* 62 (Marshall Cohen et al. eds., 1974).

399. See, e.g., THOMAS NAGEL, *MORTAL QUESTIONS* 75 (1979); Bernard Williams, *Politics and Moral Character*, in *MORAL LUCK* 54 (1981).

400. Walzer, *supra* note 398, at 70.

401. *Id.* at 63.



### 3. *Practice: "Casting Behind Metaphysical Subtleties"*

In 1810, Thomas Jefferson wrote:

A strict observance of the written laws is doubtless *one* of the high duties of a good citizen, but it is not *the highest*. The laws of necessity, of self-preservation, of saving our country when in danger, are of a higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.<sup>402</sup>

During his term in office, President Jefferson was presented with opportunities to pursue this "liberal tradition of emergency powers."<sup>403</sup> On several occasions, when he considered the nation to be facing a grave emergency, he saw it to be his duty to act in a manner that could only be regarded as extralegal.<sup>404</sup> One example of such action was the 1803 Louisiana Purchase.<sup>405</sup> Although the President was actively supported in this matter by Congress and did not act solely on the basis of the constitutional powers of his office,<sup>406</sup> Jefferson himself believed the purchase and annexation of a new territory to be utterly outside the constitutional powers of the federal government.<sup>407</sup> Yet, believing that the situation constituted a national emergency, Jefferson was of the opinion that it called for extralegal powers in order to execute the purchase. Jefferson acknowledged the extralegal nature of his actions by writing:

402. Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810), in THOMAS JEFFERSON, WRITINGS 1231, 1231 (1984).

403. Lobel, *supra* note 61, at 1392. Jefferson's approach toward the use of extralegal powers by the executive does not contradict his general opposition to granting broad powers to that branch of government (or, indeed, to the federal government as a whole). It is precisely this general opposition to a strong executive that explains Jefferson's support for the extralegal powers doctrine. Without such a doctrine of emergency powers, the only way to enable the government to protect the nation in times of crisis would have been the concession of sweeping, permanent constitutional powers to the federal government and the President, allowing them to meet each and every emergency that might arise. The liberal theory of emergency powers facilitated a vision of more limited powers vested in the national government, for truly exceptional crises could be met by the use of those extralegal powers going beyond the strict lines of law. *See, e.g.*, ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS 226-27 (1976). Such extralegal powers could not serve as precedents that would support the expansion of governmental powers in times of normalcy.

404. SOFAER, *supra* note 403, at 226 (explaining that under Jefferson's theory of emergency powers, "a President is permitted to violate the Constitution in an emergency, though he does so at the risk of having his judgment rejected by the legislature or the people").

405. *See* BREST ET AL., *supra* note 8, at 73-75; JAMES MACGREGOR BURNS, THE VINEYARD OF LIBERTY 172-78 (1982); 4 DUMAS MALONE, JEFFERSON AND HIS TIME 311-32 (1978).

406. *Cf.* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

407. MARC LANDY & SIDNEY MILKIS, PRESIDENTIAL GREATNESS 79 (2000); SCHLESINGER, *supra* note 293, at 23-25.

The Executive in seizing the fugitive occurrence which so much advances the good of their country, *have done an act beyond the Constitution*. The Legislature in casting behind them metaphysical subtleties, and risking themselves like faithful servants, must ratify and pay for it, and throw themselves on their country for doing for [the people] unauthorized what we know they would have done for themselves had they been in a situation to act.<sup>408</sup>

And, on another occasion some five years later, he suggested both that “[t]here are extreme cases where the laws become inadequate even to their own preservation, and where the universal recourse is a dictator, or martial law”<sup>409</sup> and that “on great occasions every good officer must be ready to risk himself in going beyond the strict lines of law, when the public preservation requires it; his motives will be a justification.”<sup>410</sup>

In other words, there are situations in which it is the duty of “every good officer” to act in a manner not prescribed by the laws of the land.<sup>411</sup> Such an approach must be carefully limited and well-restricted lest it be interpreted as permitting official lawlessness. Basing his position on the laws of necessity and self-preservation, Jefferson sought to limit the incidents in which such an illegal action might be taken by claiming that such action was justified if, and only if, three conditions materialize: (1) the occurrence of certain objective circumstances that amount to “extreme cases” and “great occasions,”<sup>412</sup> (2) actions by the public official that

408. Letter from Thomas Jefferson to John Breckenridge (Aug. 12, 1803), *quoted in* DANIEL P. FRANKLIN, *EXTRAORDINARY MEASURES: THE EXERCISE OF PREROGATIVE POWERS IN THE UNITED STATES* 45 (1991) (emphasis added). It is debatable, however, to what extent Jefferson lived up to his own professed standards in this matter. After all, he acknowledged the nature of his actions in a private letter rather than publicly. *See id.*

409. Letter from Thomas Jefferson to James Brown (Oct. 27, 1808), at <http://memory.loc.gov/ammem/mjthtml/mtjser1.html>.

410. Letter from Thomas Jefferson to William C.C. Claiborne, Governor of Orleans Territory (Feb. 3, 1807), at <http://memory.loc.gov/ammem/mjthtml/mtjser1.html>.

411. Thomas Jefferson noted:

The officer who is called to act on this superior ground, does indeed risk himself on the justice of the controlling powers of the constitution, and his station makes it his duty to incur that risk. . . . The line of discrimination between cases [where such action is necessary and where it is not] may be difficult; but the good officer is bound to draw it at his own peril, and throw himself on the justice of his country and the rectitude of his motives.

Letter from Thomas Jefferson to John B. Colvin, *supra* note 402, at 1233.

412. That such “great occasions” were to be rare indeed can be learned from President Madison’s refusal to ratify the controversial actions of General Jackson in New Orleans in early 1815. Jackson was fined \$1000 for contempt of court for ignoring a writ of habeas corpus issued by Judge Dominick Hall and for imprisoning the judge himself. Jackson paid the fine out of his own pocket. It took Congress twenty-nine years before it repaid the fine (with interest) to Jackson. *See* SOFAER, *supra* note 403, at 333-36; George M. Dennison, *Martial Law: The Development of a Theory of Emergency Powers, 1776-1861*, 18 AM. J. LEGAL HIST. 52, 61-65 (1974); Jonathan Lurie, *Andrew Jackson, Martial Law, Civilian Control of the Military, and American Politics: An Intriguing Amalgam*, 126 MIL. L. REV. 133 (1989); Abraham D. Sofaer, *Emergency Power and*

advance the good of the country, and (3) the ex post approval of these actions by the American people (directly or through their representatives in Congress).<sup>413</sup> For that final and most crucial condition to apply, there ought to be open and public acknowledgment of the unlawful nature of such actions and of the necessity that called for committing them in the first place. According to Jefferson, such measures were taken for the sake of preserving the life, liberty, and property of the people, and the people ought to determine whether the actions should be ratified.<sup>414</sup>

Jefferson, like most of his contemporaries, was heavily influenced by Locke's ideas in general, and his theory of the prerogative power in particular.<sup>415</sup> However, whereas Locke's theory assumes the existence of an implicit, general, ex ante public acquiescence to the exercise of the prerogative power, Jefferson's approach requires an explicit, particular, ex post public ratification if the illegal actions of public officials, taken for the advancement of the public good, are to be considered legitimate. In the absence of such ex post ratification, or, in the case of an outright public rejection, the actor may be subject to legal sanctions for violating the dictates of the law, albeit for what are arguably the noblest of reasons. Public officials who act in violation of the law in order to fend off great

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*the Hero of New Orleans*, 2 CARDOZO L. REV. 233 (1981); see also Lucius Wilmerding, Jr., *The President and the Law*, 67 POL. SCI. Q. 321, 326-27 (1952) (discussing the heated debate in 1807 in the House of Representatives concerning the actions of General Wilkinson at New Orleans and noting that all parties were practically united in agreement that certain circumstances may arise in which an *illegal* suspension of the writ of habeas corpus would be justified and proper).

413. For example, following an attack (during a congressional recess) by a British frigate, the Leopard, on a United States ship, the Chesapeake, President Jefferson spent unappropriated funds for munitions to strengthen certain United States strongholds in the face of a possible war with England. He later asked Congress for a retroactive approval of this expenditure, explaining:

To have awaited a previous and special sanction by law would have lost occasions which might not be retrieved. . . . I trust that the Legislature, feeling the same anxiety for the safety of our country, so materially advanced by this precaution, will approve, when done, what they would have seen so important to be done if then assembled.

Wilmerding, *supra* note 412, at 323-24. Wilmerding notes that in the congressional debates that ensued, a general agreement with the above statement prevailed across political parties. *Id.* at 327-28; see also SCHLESINGER, *supra* note 293, at 24.

414. Discussing the charge that the Philadelphia Convention exceeded its powers, James Madison rejected the allegation but added that even

if they had exceeded their powers, they were not only warranted, but required as the confidential servants of their country, by the circumstances in which they were placed to exercise the liberty which they assumed; and . . . if they had violated both their powers and their obligations in proposing a Constitution, this ought nevertheless to be embraced, if it be calculated to accomplish the views and happiness of the people of America.

THE FEDERALIST NO. 40, at 254-55 (James Madison) (Clinton Rossiter ed., 1961).

415. See SCHLESINGER, *supra* note 293, at 25 (noting Locke's influence on the Framers); Wilmerding, *supra* note 412, at 324 ("[T]his doctrine was accepted by every single one of our early statesmen . . ."). For expressions of adherence to Locke's doctrine, see Wilmerding, *supra* note 412, at 323-29. *But see* FRIEDRICH, *supra* note 68, at 111-12 (arguing that Locke's theory of prerogative power was not viewed as an extralegal power but rather as a power inherent in the constitutional order, i.e., as a legal, albeit exceptional, power).

threats assume the risk of being found criminally and civilly liable for their illegal actions. They must openly and boldly disclose the nature of their actions and the reasons for taking them and “throw [themselves] on the justice of [their] country.”<sup>416</sup> This is the ethic of responsibility at its zenith.

The circumstances surrounding *Little v. Barreme*<sup>417</sup> illustrate the distinctions between action and ratification. During a period of hostilities between the United States and France, a merchant vessel, the Flying Fish, flying the Danish flag, was captured by two American vessels on suspicion of violating an act of Congress prohibiting commerce with France. Under the relevant provision, the President had been authorized to instruct naval commanders to seize any vessel on the high seas bound or sailing *to* any French port. The order issued by President Adams instructed the commanders to seize vessels bound *to* or sailing *from* French ports. When captured, the Flying Fish was sailing *from* France to Denmark, a neutral state in this conflict. The Supreme Court affirmed the circuit court’s decision to grant damages against Captain George Little, the commanding officer of the U.S.S. Boston, for the seizure and detention of the Danish vessel. Speaking for a unanimous Court, Chief Justice Marshall held that the President could not give lawful instructions that ran contrary to express congressional legislation. The commander’s actions could not be legalized by such a presidential order. The instructions of the executive order could not “change the nature of the transaction, nor legalize an act which, without those instructions, would have been a plain trespass.”<sup>418</sup> The Court did not doubt Captain Little’s motives. Yet, despite the fact that his actions were undertaken for the good of the country (as not only he but also the President saw it), the Supreme Court held such actions illegal and imposed penalties on the officer.

This judicial decision was not, however, the end of the story. After the Supreme Court had ruled on the matter and after damages had been

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416. Wilmerding, *supra* note 412, at 322-24, 329. Wilmerding describes the doctrine in these words:

Imperious circumstances may sometimes require the high officers of government to act *outside* the law; but when such action is taken, the causes of it ought to be truly imperious, and ought to be stated immediately to Congress, who is the only judge of the propriety of the measure, and not the man who has usurped its decision. If it shall appear, after full investigation, that the officer has acted honestly, under the pressure of such urgent necessity as he professes, then it becomes the duty of the Congress to sanction his illegal act . . . . On the contrary, if it shall turn out that the officer has acted unnecessarily and wantonly, from malice or resentment, Congress may decide to let him suffer the consequences.

*Id.* at 324; *see also* Lobel, *supra* note 61, at 1396.

417. 6 U.S. (2 Cranch) 170 (1804).

418. *Id.* at 178. In another case, Justice Paterson, while riding circuit, held that “[t]he president of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids.” *United States v. Smith*, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,342).

recovered from Captain Little, Congress reimbursed him for his damages, interest, and charges with money from the United States Treasury.<sup>419</sup> While the action taken by Captain Little was ruled illegal, the “justice of his country” dictated that he should not bear the brunt for that action.<sup>420</sup> While recognizing that Captain Little’s actions were the right thing to do in the circumstances, the Supreme Court found them to be illegal, thus separating the answer to the obvious question from the response to the tragic one. It was only with the *ex post* ratification of Little’s actions by Congress that the gap between the two answers was, for practical purposes, closed. This was by no means a foregone conclusion. Therefore, the commanding officer of the U.S.S. Boston undertook a double risk: (1) that his actions would, as they indeed were, be found illegal as a matter of law, and that he may need to make reparations, both civil and penal, for such actions, and (2) that *ex post* ratification would not take place. The potential absence of such ratification would have meant that no reimbursement would have been made, and, perhaps more significantly, that the moral and public vindication of Captain Little would not have been forthcoming. Such substantial risks are not lightly taken and their existence militates against acting in a way that falls outside the legal order, although it does not completely bar the possibility of such actions taking place.

Jefferson’s approach to emergency powers may be compared with the constitutional vision presented by President Lincoln during the Civil War. As noted above,<sup>421</sup> one possible reading of Lincoln’s assertions of special powers during the war sees the President as having appealed to special emergency powers that are inherent in the constitutional framework and that are available to the Executive in times of great peril and risk. There are, however, other possible readings of Lincoln’s claims to such powers that bring his actions closer to the Extra-Legal Measures model. Thus, when explaining to Congress the extraordinary measures that he had taken prior to July 4, 1861, Lincoln said that those measures, “whether strictly legal *or not*, were ventured upon, under what appeared to be a popular demand, and a public necessity; *trusting, then as now, that Congress would readily ratify them*. It is believed that nothing has been done beyond the constitutional competency of Congress.”<sup>422</sup> On other occasions, however, Lincoln seems to have been of the opinion that the necessity and exigency of the times made constitutional and legal that which in other circumstances might not have been so, without any further need for any form of *ex post* ratification

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419. Wilmerding, *supra* note 412, at 324 n.6 (referring to the Act of Jan. 17, 1807).

420. For an account of Congress’s decision to restore the fine paid by General Jackson in response to Judge Hall’s order twenty-nine years after Jackson had paid it, see SOFAER, *supra* note 403, at 335-36; and Lurie, *supra* note 412, at 142-44.

421. See *supra* Subsection III.B.1.c.

422. Lincoln, *supra* note 6, at 429 (emphasis added).

by either Congress or the general public.<sup>423</sup> The subsequent ratification and affirmation of Lincoln's emergency actions by Congress<sup>424</sup> and the Supreme Court<sup>425</sup> made the question of the legality of those actions practically a moot one.<sup>426</sup>

#### 4. *Ex Post Ratification*

What, then, are the characteristics of the Extra-Legal Measures model? In appropriate circumstances, the government may deviate from existing legal principles, rules, and norms. For such an action to be appropriate, however, it must be aimed at the advancement of the public good and must be openly, candidly, and fully disclosed to the public. Once disclosed, it is a matter for the general public, either directly or through its elected representatives, to ratify, *ex post*, those actions that have been taken on its

423. Lincoln asserted:

[M]y oath to preserve the constitution to the best of my ability, imposed upon me the duty of preserving, by every indispensable means, that government—that nation—of which that constitution was the organic law. Was it possible to lose the nation, and yet preserve the constitution? . . . I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation.

Letter from Abraham Lincoln to Albert Hodges (Apr. 4, 1864), in 7 COLLECTED WORKS, *supra* note 6, at 281, 281; *see also* SOTIRIOS A. BARBER, ON WHAT THE CONSTITUTION MEANS 191-92 (1984) ("Lincoln . . . was also correct to the extent that he admitted before Congress that circumstances can force departures from the Constitution. He erred later in suggesting that forced departures can be formulated as norms thereafter to be regarded as parts of the Constitution."). *But see* FARBER, *supra* note 165, at 220 (suggesting that Lincoln followed Jefferson's approach to emergency powers inasmuch as Lincoln was not arguing for the legal power to take emergency extralegal actions; rather, he saw such actions as unlawful but argued that Congress might elect to ratify them).

424. On August 6, 1861, Congress ratified all of the President's actions related to the armed forces and the militia. *See* FARBER, *supra* note 165, at 220. In 1863, Congress passed a more general immunity legislation. An Act Relating to Habeas Corpus, and Regulating Judicial Proceedings in Certain Cases, ch. 81, §§ 4, 7, 12 Stat. 755, 756-58 (1863).

425. *Mitchell v. Clark*, 110 U.S. 633 (1884) (upholding the 1863 Act relating to habeas corpus); *see also* *The Prize Cases*, 67 U.S. (2 Black) 635, 668-70 (1862) (holding that the President had the right to impose a blockade on the ports of the Confederate states).

426. *But see* Levinson, *supra* note 238. It should be noted, however, that of all the possible readings of Lincoln's actions, the argument from inherent powers has been the most influential. Since Lincoln's presidency, arguments for resorting to emergency powers have invariably revolved around the claim that the President enjoys a wide range of constitutionally inherent powers, including emergency powers, and therefore acts legally and constitutionally rather than outside the constitutional and legal framework. For Presidents, the possibility of arguing that their actions are constitutional is desirable. For the citizens, the notion that a valiant public official out to save the nation may be forced to employ illegal means and "throw himself on the electorate's judgment" is difficult to accept. *Id.* at 1155. The obvious discomfort that Chief Justice Marshall felt in deciding against Captain Little was but one reflection of such sentiments: "I confess the first bias of my mind was very strong in favor of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages." *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804). The upsurge in the number and scope of statutory delegations of powers from Congress to the President—including a wide array of emergency powers—all but made superfluous the need for any claims of extralegal emergency powers.

behalf and in its name, or to denounce them.<sup>427</sup> If the public elects to denounce those actions or, indeed, decides “not to decide,” these government actors may need to make legal amends by way of civil and even criminal sanctions that may be imposed on them. Thus, the requirement of ex post ratification ensures that public officials are not above the law. Even when acting to advance the public good under circumstances of great necessity, such actors remain answerable to the public for their extralegal actions.<sup>428</sup>

In a sense, then, the Extra-Legal Measures model puts the burden squarely on society to decide, ex post, the consequences of official extralegal action. Schauer’s thesis of the asymmetry of official authority supports this aspect of the proposed model.<sup>429</sup> According to that thesis, it is possible that strict obedience to authority (including legal authority) will be deemed irrational or immoral from the perspective of the subject, while at the same time it is expected and demanded by the imposer of such authority. If, again following Schauer, we consider the role of the authority to be filled by society and identify the public official as the subject of authority,<sup>430</sup> we can understand the possibility of having the latter action outside, and even against, the legal authority in particular cases. Society retains the role of making the final determination whether the actor ought to be punished and rebuked, or rewarded and commended for her actions.<sup>431</sup> A conceptually similar idea underlies the Supreme Court’s decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.<sup>432</sup> Due to the principle of sovereign immunity, existing doctrine bars bringing tort claims for constitutional violations against the federal government, unless Congress has specifically made such a claim available. In *Bivens*, the Court held that such constitutional violations might be remedied by way of money damages recovered in suits brought against government officials in their

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427. Jefferson analogized extralegal actions taken by public officials on great occasions to acts of a guardian who is making an advantageous, albeit unauthorized, transaction on behalf of her minor ward. When the minor comes of age, the guardian must explain her actions thus: “I did this for your good; I pretend to no right to bind you: you may disavow me, and I must get out of the scrape as I can: I thought it my duty to risk myself for you.” Letter from Thomas Jefferson to John C. Breckinridge (Aug. 12, 1803), in JEFFERSON, *supra* note 402, at 1136, 1138-39.

428. See FARBER, *supra* note 165, at 219.

429. Schauer, *supra* note 380, at 110-14.

430. *Id.* at 112.

431. Put as an empirical question, Schauer suggests:

[American] society presently strikes this balance pursuant to a procedure under which ex post justified acts of disobedience to the law on the part of officials are punished quite mildly, if at all, while ex post unjustified acts of disobedience to the law are punished somewhat more heavily than those same acts would have been punished merely for being bad policy.

*Id.* at 114.

432. 403 U.S. 388 (1971).

individual capacities.<sup>433</sup> Individual responsibility of government officials has thus been established as a mechanism to enforce constitutional rights.<sup>434</sup> A public official who acts extralegally may be exposed to having a *Bivens* 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,<sup>435</sup> play a role in providing added deterrence from acting extralegally.<sup>436</sup> Of course, the possibility that the government will actually pay the costs of judgments or settlements of *Bivens* claims is foreseeable.<sup>437</sup> However, despite the fact that such governmental indemnification has become practically guaranteed to public officials,<sup>438</sup> it is the conceptual framework established in *Bivens* that is of interest here. The possibility of governmental indemnification may be regarded as analogous to the possibility of ex post ratification. The fact that it has become practically automatic may be the subject of criticism, but this does not detract from its characterization as a ratification of extralegal actions previously taken by public officials. The *Bivens* claims system may not be working optimally, and it certainly poses practical difficulties.<sup>439</sup> This, however, need not obscure its basic logic—that of using individual liability as a mechanism to deter constitutional violations by public officials.

What if the public does ratify ex post the extralegal actions taken by public officials in times of emergency? How are we to understand the status

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433. 403 U.S. at 388; see also 42 U.S.C. § 1983 (1994) (permitting actions against state officials for violation of the Constitution and federal statutes, but providing no similar legislative mechanism against federal officials).

434. See, e.g., AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 40 (1997); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733, 1822 (1991). Amar's elaborate system of entity liability for constitutional torts resonates with the Extra-Legal Measures model. Unlike Amar's position, the Extra-Legal Measures model focuses on the individual liability of government officials rather than on the direct liability of the government itself. However, the model does also recognize the possibility of an entity liability as part of the ex post ratification process and considers such entity liability in the general framework of remedies for constitutional wrongs.

435. See, e.g., Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under Bivens*, 88 GEO. L.J. 65, 66 (1999) (noting the low rate of successful *Bivens* claims); *id.* at 76-77 (noting that the government indemnifies its employees for the costs of judgment, or the settlement, of *Bivens* claims).

436. See, e.g., *Carlson v. Green*, 446 U.S. 14, 21 (1980); Janell M. Byrd, *Rejecting Absolute Immunity for Federal Officials*, 71 CAL. L. REV. 1707, 1718-21 (1983); John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 51 (1998).

437. See AMAR, *supra* note 434, at 40.

438. Pillard, *supra* note 435, at 77.

439. Among such difficulties we may count the various doctrines developed as corollaries to the *Bivens* rule—first and foremost the doctrine of qualified immunity—that, in practice, bar successful claims against public officials who have acted extralegally, except in rare cases where, among other things, the official's actions were in violation of “clearly established” law. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982) (discussing the doctrine of qualified immunity). On the doctrine of qualified immunity and other doctrines that have evolved as barriers to *Bivens* claims, see, for example, Pillard, *supra* note 435, at 79-90.



of those actions once ratified? Does ratification render legal that which previously had been illegal, or does it excuse the acting official from liability for her extralegal actions without making such actions legal? Much would depend on the nature of the ratification. The answer to such questions would be made on a case-by-case basis. Thus, for example, it is quite clear that Congress's decision to indemnify Captain Little did not reveal an intention to make his otherwise unlawful actions legal. Indeed, the Supreme Court itself recognized the possibility of Congress's acting on the political level to "correct" decisions made by the judicial branch.<sup>440</sup> However, an act of ratification may also bear the characteristics of informal (and possibly even formal) constitutional and legal amendment.<sup>441</sup> The combination of a grave crisis, the illegal response to it by the government, the open acknowledgment of the nature of the actions taken to counter the exigency, and the subsequent popular ratification may form a constitutional moment that will lead to a constitutional shift on the issue at hand.<sup>442</sup> Ratification can also be made in the form of an explicit constitutional or statutory change that seeks to legalize and bring within the ambit of the legal system actions that were previously considered outside the boundaries of that system.

In any event, even where the illegal actions performed by public officials are taken to preserve and protect the nation, that alone does not make those actions legal. Necessity does not make legal that which otherwise would have been illegal. It may excuse the actor from subsequent legal liability, but only subsequent ratification *may* (but does not have to) justify such extralegal conduct.<sup>443</sup>

Two methods of ratification have already been pointed out. The legislative branch may ratify use of extralegal powers by the executive, either by way of meting out an individualized remedy as in the case of Captain Little, or by passing broader acts of indemnity that are designed to immunize governmental agents against the possibility of being hauled into court as civil or even criminal defendants.<sup>444</sup> Another mechanism of public ex post ratification may be the returning to office of elected officials who have acted extralegally and who have openly and candidly disclosed the nature of their actions to the public.

Other mechanisms attenuate the tension that arises from the Extra-Legal Measures model's separate treatment of the obvious and tragic questions. If the extralegal activities performed in the name of the public

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440. *The Apollon*, 22 U.S. (9 Wheat.) 362, 366-67 (1824).

441. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 320-21 (1991).

442. 1 *id.*

443. Lobel, *supra* note 61, at 1390-97.

444. See, e.g., BRADLEY & EWING, *supra* note 7, at 677, 679-80 (discussing the Acts of Indemnity passed by the British Parliament).

are considered through the prism of the criminal law, then, for example, prosecutors may decide to exercise their discretion and refrain from bringing criminal charges against the official.<sup>445</sup> Where criminal charges are brought, juries may exercise their power of nullification.<sup>446</sup> If the actor is nevertheless convicted, then the institution of pardon and clemency may be used to “correct” that outcome.<sup>447</sup>

## B. *Challenges and Justifications*

### 1. *A Nation Worth Saving?*

Several general and interrelated critiques of the Extra-Legal Measures model may be pointed out. The first line of attack on the model argues that the protection of the community is legitimate only so long as that community itself is worth saving. A despotic, authoritarian, and oppressive society is not worth the effort. A democracy may lose the battle against its enemies either by physically crumbling before them or by collapsing inward when it abandons its fundamental principles in the heat of battle. It is, indeed, a tension of tragic dimensions. A weak, hesitant action against an impending threat may cause irreparable damage to the state’s body. On the other hand, the instinct of self-preservation may lead to a transformation of the very nature of that society and to the loss of its soul. As Paul Wilkinson puts it:

It is a dangerous illusion to believe one can “protect” liberal democracy by suspending liberal rights and forms of government. Contemporary history abounds in examples of “emergency” or “military” rule carrying countries from democracy to dictatorship with irrevocable ease. What shall it profit a liberal democracy to be delivered from the stress of factional strife only to be cast under the iron heel of despotism?<sup>448</sup>

Similarly, Carl Friedrich observes: “For any community built upon such a faith, the task of survival and of security becomes one of defending the *inner-most self* as well as that of defending the *outer-most boundary*, when confronted with an enemy . . . .”<sup>449</sup> “To make [man’s] innermost self

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445. The literature on prosecutorial discretion is vast. For a recent publication dealing generally with the broad powers of prosecutorial discretion, see Peter Krug, *Prosecutorial Discretion and Its Limits*, 50 AM. J. COMP. L. 643 (2002).

446. See generally WAYNE LAFAVE ET AL., *CRIMINAL PROCEDURE* 1027-28 (3d ed. 2000) (discussing jury nullification).

447. For a recent publication, see Paul J. Haase, Note, “*Oh My Darling Clemency*”: Existing or Possible Limitations on the Use of the Presidential Pardon Power, 39 AM. CRIM. L. REV. 1287 (2002).

448. WILKINSON, *supra* note 7, at 122-23.

449. FRIEDRICH, *supra* note 68, at 13.

secure," he continues later in the same work, "is more vital to the security and survival of a constitutional order than any boundary or any secret. It is the very core of constitutional reason of state. It is the reason why a constitutional state is founded and is maintained."<sup>450</sup> "If we do not preserve the rule of law zealously in this area as well," commented the Landau Commission, "the danger is great that the work of those who assail the existence of the State from without will be done through acts of self-destruction from within, with 'men devouring each other.'"<sup>451</sup> Adherence to the rule of law is a necessary element in a nation's security and safety. No security exists in a democratic society without the rule of law.<sup>452</sup>

A second challenge to the model takes a swipe at the purported rationale of the Extra-Legal Measures model, especially its claim to serve better the long-term interests of the rule of law because, in appropriate circumstances, violating the law may be more beneficial in that respect than any of the alternatives. The force of the law as regulating behavior is, to a significant extent, a function of a cultivated habit of obedience to its dictates and an established ethos of its supremacy. Preventing lawlessness is one of the fundamental goals of the rule of law in a democratic society, a principle agreed upon by adherents of both procedural and substantive approaches to the concept of the rule of law. Violating the law deviates from that pattern of obedience. When such violation is perpetrated by the authorities, it is all the more pernicious. As Justice Brandeis wrote in *Olmstead v. United States*:

Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. . . . Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure

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450. *Id.* at 119.

451. LANDAU REPORT, *supra* note 135, at 183.

452. See H.C. 428/86, *Barzilai v. Gov't of Israel*, 40(3) P.D. 505, *reprinted in* 6 SELECTED JUDGMENTS, *supra* note 134, at 42. The majority held:

National Security too is based on the rule of law, both by ensuring domestic arrangements and assisting in creating the mechanisms which allow fighting hostile elements. There can be no organized activity of any unit of people, and there can be no discipline without normative prescriptions deriving from the binding legal dictate.

*Barzilai*, 40(3) P.D. at 555; see also *id.*, *reprinted in* 6 SELECTED JUDGMENTS, *supra* note 134, at 104 (Barak, P., dissenting) ("[T]here is no security without law, and the rule of law is a component of national security.").

the conviction of a private criminal—would bring terrible retribution.<sup>453</sup>

If government may deviate from the principle of the rule of law in some cases, would it not be able to do so in others? And why should the citizens hold the rule of law in any higher regard than their government? Once the rule of law ceases to be thought of as an absolute immovable rule, further incursions are likely to take place into its domain.<sup>454</sup> Violation of the law by public officials may lead to similar conduct by private individuals taking their cue from the government. It may also further breed and perpetuate the attitude of lawlessness among public officials. Government officials, seeing that they can get away with violating the law and being intoxicated by the immense powers that such conduct confers upon them, may seek to reproduce similar patterns of behavior even after normalcy has been restored. In order to justify the retention of such powers, they may claim that the emergency has not yet terminated, or that new dangers gather over the horizon, thus perpetuating a crisis mentality among the members of the community.

Thus, some may prefer to allow the normal legal system to stretch and be bruised, rather than let it become ineffective altogether.<sup>455</sup> Emergency legislation and expansionist interpretation of existing laws can be, in due course, uprooted and replaced by norms approximating the preemergency legal system. But once a habit of lawlessness and disobedience has developed, the point of no return may have been crossed.

Opposition to the Extra-Legal Measures model is rooted in the fear of totalitarianism and authoritarianism that the model seems to enable. If we accept the desirability, in extreme cases, of governmental actions that are extralegal so long as they are taken to advance the public good, there can be no constitutional or legal limitations on such governmental exercise of power. If we accept that the executive may act outside the law in order to avert or overcome catastrophes, what is there to prevent the wielder of such awesome powers from exercising it in violation of any constitutional and legal limitations on the use of such power?<sup>456</sup> Extralegal power can only

453. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

454. See, e.g., Liat Collins, *GSS Agent Involved in Death of Harizat Transferred from Post*, JERUSALEM POST, May 1, 1995, at 1 (“[A]nyone who allows himself widescale activities in the twilight zone is likely to find himself operating in total darkness.” (quoting Knesset Foreign Affairs and Defense Committee Member Benjamin Ze’ev Begin)).

455. See Monaghan, *supra* note 240, at 26 (arguing that extraconstitutional powers would allow the President “a vehicle for temporarily suspending constitutional limitations,” which would be all the more troubling as “the political process almost invariably will sustain popular presidential conduct even though it sacrifices an individual interest or that of some ‘discrete and insular’ group”).

456. Indeed, it may be argued that despite the centrality of the requirement of open acknowledgment and candor to the Extra-Legal Measures model, nothing in the model prevents

mean an unlimited power, constrained neither by any legal norms nor by principles and rules of the constitutional order!<sup>457</sup>

A final objection to the model contends that much like the traditional constitutional models of emergency regimes, it is premised on the assumption of separation. In fact, the model relies on that false assumption to a greater extent than the alternative models. The notion of total separation between normalcy and emergency, of impermeable boundaries between the two realities, enables proponents of the model to claim that the ordinary legal system will not be tarnished by the necessities of emergency and will remain intact and ready to be resumed to its fullest extent when the emergency is over. But, if we accept that such clear separation between the two realities is unattainable and that "it is impossible to isolate any one State authority from the overall social structure, and rot in one place is liable to spread and engulf the entire structure,"<sup>458</sup> then the model may result in more damage than any of the constitutional models.

## 2. *Acting upon Great Occasions*

### a. *Warning: You Are Now Entering an Emergency Zone. Usual Categories of Judgment No Longer Apply!*

The proposed Extra-Legal Measures model distinguishes between the obvious and the tragic questions. The latter is left for the discretion of the public. It is up to the public to decide whether to ratify extralegal actions taken by public officials who acted for the advancement of the public good. It is, then, up to the people, as the sovereign, to determine whether the values, principles, rules, and norms that were violated by such actions are so important, and the social commitment to them so strong, as not to accept any deviation from them. If this is the conclusion that is reached, then the actor must accept whatever sanctions may be imposed on her by the community. Her motivations for violating the law may have been noble, but the final assessment of her deeds (and the concomitant legal implications of such violations) is in the hands of the public.

The obvious question, namely what to do in the face of great calamity, calls for pragmatic, prudential reasoning.<sup>459</sup> This is the question, to use

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that very obligation from being overridden by the acting officials. *See* Schauer, *supra* note 380, at 103.

457. *See, e.g.*, BARBER, *supra* note 423, at 188-90; Joseph M. Bessette & Jeffrey Tulis, *The Constitution, Politics, and the Presidency*, in *THE PRESIDENCY IN THE CONSTITUTIONAL ORDER* 3, 24-25 (Joseph M. Bessette & Jeffrey Tulis eds., 1981).

458. LANDAU REPORT, *supra* note 135, at 183-84.

459. BOBBITT, *supra* note 223, at 17 (stating that prudential arguments, focusing on a cost-benefit balancing, are "likeliest to be decisive" in emergencies); MORTIMER R. KADISH & SANFORD H. KADISH, *DISCRETION TO DISOBEY* 33 (1973) ("In the facilitation, toleration, or flat prohibition of rule departures, the issue is social utility.").

Walzer's terminology, that the politician who wishes to promote the public good must answer.<sup>460</sup> However, the cost-benefit analysis necessary in this context does not attempt to determine where to balance security considerations against protection of individual rights and liberties in any particular case. Rather, the attention is directed to the selection of the tools by which such future balancing may be calibrated. Should these tools be confined to the existing legal system (whether modified or not) or can they be found outside that system?

Before taking up prudential and pragmatic arguments in support of the Extra-Legal Measures model, we should note that catastrophes present special difficulties not merely to advocates of pragmatic arguments. Take, for example, Charles Fried. In *Right and Wrong*,<sup>461</sup> he develops the general argument that rights may be absolute within their scope of application. He soon acknowledges, however, that this argument runs into difficulties when applied to a case "where killing an innocent person may save a whole nation."<sup>462</sup> Fried concedes that "[i]n such cases it seems fanatical to maintain the absoluteness of the judgment, to do right even if the heavens will in fact fall."<sup>463</sup> The regular norms that ought to apply in ordinary times lead to a "fanatical" result when an attempt is made to apply them in such exceptional situations. Fried resolves the tension between the general absolutist view of rights and the relativist approach taken in such "extreme cases" by appealing to the notion of the "catastrophic" case and regarding it as "a distinct concept just because it identifies the extreme situations in which *the usual categories of judgment* (including the category of right and wrong) *no longer apply*."<sup>464</sup> It is precisely for this reason that Fried speaks of categorical norms of right and wrong, rather than of absolute norms.<sup>465</sup> Both Ronald Dworkin and Robert Nozick follow a similar line of argument, recognizing the extreme case as exceptional, and as one to which general theory does not apply, in order to maintain their theories intact for all cases that do not amount to the extreme.<sup>466</sup> The Extra-Legal Measures model

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460. See *supra* notes 398-401 and accompanying text.

461. CHARLES FRIED, *RIGHT AND WRONG* (1978).

462. *Id.* at 10.

463. *Id.*

464. *Id.* (emphasis added).

465. *Id.* at 10-11. This type of argument enables Fried to claim that although extreme cases may invoke conduct that does not comport with the relevant categorical right, that fact, in and of itself, does not prove the absence of an absolute, central core of that right. *Id.* at 10, 31.

466. See ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 30 (1974) ("The question of whether . . . side constraints are absolute, or whether they may be violated in order to avoid catastrophic moral horror, and if the latter, what the resulting structure might look like, is one I hope largely to avoid."); Ronald Dworkin, *The Rights of Myron Farber*, N.Y. REV. BOOKS, Oct. 26, 1978, at 34. Both are cited and discussed in Schauer, *supra* note 215, at 423-25. Dworkin recognizes that cases of genuine catastrophe set limits on the otherwise valid preemption of a claim of policy by a claim of right. Dworkin, *supra*.

works in a similar way. It is the safety valve that allows application of a general theory to normal cases.

The argument about the extreme case implicitly acknowledges that legal norms presuppose the existence of a "normal" state of affairs and remain applicable as long as this state of affairs continues to exist. Accordingly, "[t]his effective normal situation is not a mere 'superficial presupposition' that a jurist can ignore; that situation belongs precisely to [the norm's] immanent validity."<sup>467</sup> In the extreme case, when this underlying normal state of affairs is fundamentally interrupted, the relevant legal norm may no longer be applicable as is and cannot fulfill its ordinary regulatory function. "For a legal order to make sense, a normal situation must exist . . ."<sup>468</sup> General norms are limited in their scope of application to those circumstances in which the normal state of affairs prevails. Crises undermine this factual basis. As the spectrum of possible extreme cases is indefinite and cannot be comprehensively anticipated, a priori general rules cannot, as such, regulate the exception. The exception "cannot be circumscribed factually and made to conform to a preformed law."<sup>469</sup>

A similar notion is promoted by catastrophe theory.<sup>470</sup> This mathematical theory deals with complex systems whose behavior generally follows a smooth, continuous, "normal" pattern but which, at certain points—known as cusps—breaks away from that continuous pattern and exhibits a discontinuity, a singularity, or a "jump change."<sup>471</sup> The theory does not tell us much with regard to when to expect a discontinuity to occur or what to expect once such a jump change has taken place. The theory

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A similar approach may have motivated Justice Black's implicit retreat from his usual absolutist rights approach in several wartime cases. Writing about Black's position in *Korematsu v. United States*, 323 U.S. 214 (1944), James Simon notes that "Captain Black, the military man, completely dominated the debate with Justice Black, the civil libertarian." JAMES F. SIMON, *THE ANTAGONISTS* 148 (1989). On a later occasion, Justice Black is quoted to have said that "[t]here's a difference between peace and war. . . . You can't fight a war with the courts in control." *Id.* at 155.

Schauer critiques Fried's, Nozick's, and Dworkin's approaches, challenging them as not giving an adequate answer to instances when rights are overridden by other interests in cases that are less than catastrophic. He, too, recognizes the possibility that the "unexpected and truly horrific case[]" serves as an exception to any theory about the categorical nature of rights:

[A]lthough catastrophe theory may provide the resources to deal with why the total stringency of Kantian categorical rights must give way in unexpected and truly horrific cases, it does not seem to have the resources to deal with the possibility that deontologically conceived rights may have to be overridden when interests would otherwise have to be sacrificed to a very large, but short of catastrophic, extent.

Schauer, *supra* note 215, at 424.

467. CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 13 (George Schwab trans., MIT Press 1985) (1922).

468. *Id.*

469. *Id.* at 6.

470. Schauer applied catastrophe theory in a related context. See Schauer, *supra* note 215, at 422-25.

471. VLADIMIR I. ARNOL'D, *CATASTROPHE THEORY* 114 (3d rev. ed. 1992).

does reveal, however, that the mathematical, physical, structural, and organizational rules that describe the system's behavior in its normal functioning are not applicable to that same system when a singularity occurs.<sup>472</sup> If principles such as the rule of law define the pattern of the social-legal-political complex system that is the society in which we live, catastrophic times may constitute a singularity, an exception, when normal principles, rules, and norms are not functional and are replaced by others.

Taking this argument to its logical terminus, one may conclude, following Carl Schmitt, that "[t]here exists no norm that is applicable to chaos."<sup>473</sup> As I argue below, however, this ultimate conclusion is neither an inevitable nor a necessary outcome of the willingness to recognize the possible existence of extreme cases and the descriptive and normative significance of such events.<sup>474</sup>

#### b. *The (Not So) Obvious Case for Rule Departures*

There are strong arguments to suggest that there may be extreme circumstances when the application of the Extra-Legal Measures model may be better suited than the use of the alternative constitutional models to maintain legal principles, rules, and norms as well as constitutional structures in the long run. In a sense, the strongest case for the Extra-Legal Measures model can be made by recognizing the fact that it combines the strengths of both categories of constitutional models. It combines the benefits of the strategy of resistance with some room for flexibility that is needed when dealing with emergency. Consider, for example, the models of constitutional accommodation of emergency powers. Each of these models takes into account such considerations as emergency-related necessity. One method of achieving this goal is by limiting the scope of applicability of individual rights and liberties by way of reading exceptions into their scopes of protection. The "clear and present danger" doctrine<sup>475</sup> and the doctrine developed in *Brandenburg v. Ohio*<sup>476</sup> are examples of such a limitation on the scope of First Amendment protection. Now take the Extra-Legal Measures model. That model offers a wider scope of individual rights' protection. Courts need not be concerned with the prospect of taking

472. P.T. SAUNDERS, AN INTRODUCTION TO CATASTROPHE THEORY 1 (1980). *See generally* ARNOLD, *supra* note 471; ANTAL MAJTHAY, FOUNDATIONS OF CATASTROPHE THEORY (1985); PETER W. MICHOR, ELEMENTARY CATASTROPHE THEORY (1985); ALEXANDER WOODCOCK & MONTE DAVIS, CATASTROPHE THEORY (1978).

473. SCHMITT, *supra* note 467, at 13.

474. *See* Gross, *supra* note 295 (arguing that while Schmitt's theory of the exception is normatively unsound, it has certain descriptive validity).

475. *See* Schenck v. United States, 249 U.S. 47, 52 (1919) (adopting the "clear and present danger" test).

476. 395 U.S. 444, 448-49 (1969) (offering the modern "incitement test").



an expansive view of constitutional rights coming back to haunt the nation when faced with critical threats and dangers that call for limitations on the exercise of such rights. The courts need not worry because if the situation is serious enough, there is always the possibility of government officials acting extralegally to protect the nation and its citizens. Thus, the Extra-Legal Measures model permits the judicial branch to fulfill its role as protector of individual rights without having to fear that by doing so it compromises the security of the state. At the same time, the executive would be charged with the task of protecting the state's national security interests, even by acting extralegally. The possibility of extralegal action reduces the pressures for incorporating built-in exceptions to protected rights.<sup>477</sup>

A similar point was made by Justice Story in *The Apollon*:

It may be fit and proper for the government, in the exercise of the high discretion confided to the executive, for great public purposes, to act on a sudden emergency, or to prevent an irreparable mischief, by summary measures, which are not found in the text of the laws. Such measures are properly matters of state, and if the responsibility is taken, under justifiable circumstances, the Legislature will doubtless apply a proper indemnity. *But this Court can only look to the questions, whether the laws have been violated; and if they were, justice demands, that the injured party should receive a suitable redress.*<sup>478</sup>

i. *Crossing the Threshold  
(and Giving Reasons for It)*

The Extra-Legal Measures model is challenged over its perceived inability to impose any meaningful legal or constitutional restraints on public officials. If a state of emergency permits taking unlawful actions, how can we be sure that such actions would not be taken as a matter of

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477. See Eisgruber, *supra* note 204, at 361-62.

478. 22 U.S. (9 Wheat.) 362, 366-67 (1824) (emphasis added). Similarly, in *Public Committee Against Torture in Israel v. Government of Israel*, the President of the Israeli Supreme Court stated:

Deciding these applications has been difficult for us. True, from the legal perspective, the road before us is smooth. We are, however, part of Israeli society. We know its problems and we live its history. We are not in an ivory tower. We live the life of this country. We are aware of the harsh reality of terrorism in which we are, at times, immersed. The fear that our ruling will prevent us from properly dealing with terrorists troubles us. But we are judges. We demand that others act according to the law. This is also the demand that we make of ourselves. When we sit at trial, we stand on trial.

H.C. 5100/94, Pub. Comm. Against Torture in Israel v. Gov't of Israel, 53(4) P.D. 817, 845, quoted in Barak, *supra* note 379, at 162.

simple political expediency? And if a time of crisis permits stepping outside the legal system, how can we set limits on how far such deviations would go and how wide in scope they would be?

In a democratic society, where such values as constitutionalism, accountability, and individual rights are entrenched and are traditionally respected, we can expect that the public would be circumspect about governmental attempts to justify or excuse illegal actions even if such actions have been taken, arguably, in the public's name.<sup>479</sup> For the moment, however, we may focus on the actors themselves, i.e., those public officials who are faced with the decision whether to violate the law for the greater good of the nation. We can and should expect those public officials to feel quite uneasy about possible resort to extralegal measures even when such actions are deemed to be for the public's benefit.<sup>480</sup> This feeling of uneasiness would be even more pronounced in nations where the "constitution is old, observed for a long time, known, respected, and cherished."<sup>481</sup> The knowledge that acting in a certain way means acting unlawfully is likely to have a significant restraining effect on government agents even during the emergency itself. This may be the case even if no further explanation to the public is required or if there is a presumption working in favor of the actor, as is the case under Locke's theory of the prerogative power. When we add the specter of having to give reasons for one's illegal actions to the public after the crisis is over, it seems likely that the mere need to cross the threshold of illegality would serve, in and of itself, as a limiting factor against a governmental rush to assume unnecessary powers.

The need to give reasons *ex post*, i.e., the need to justify or excuse one's actions before the people, is a critical ingredient of the Extra-Legal Measures model. By requiring transparency, it facilitates public accountability of government agents. Furthermore, the very need to give reasons may limit the government's choice of measures *ex ante*. The commitment to giving reasons, even *ex post*, adds another layer of

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479. *But see* Schauer, *supra* note 380, at 106.

480. *Cf.* Paulsen, *supra* note 204, at 224 (discussing the role of political pressure, public accountability, and the moral and persuasive force of judgments made by other branches of government).

481. GUY HOWARD DODGE, BENJAMIN CONSTANT'S PHILOSOPHY OF LIBERALISM: A STUDY IN POLITICS AND RELIGION 101 (1980) (quoting Benjamin Constant). Even a strong supporter of the Business as Usual model such as Benjamin Constant recognized that in nations where the constitutional experience is as described in the excerpt from the text, the constitution "can be suspended for an instant, if a great emergency requires it." He distinguishes this case from the following: "[I]f a constitution is new and not in practice nor identified with the habit of a people, then every suspension, either partial or temporary, is the end of that constitution." *Id.*; see also Gabriel L. Negretto & José Antonio Aguilar Rivera, *Liberalism and Emergency Powers in Latin America: Reflections on Carl Schmitt and the Theory of Constitutional Dictatorship*, 21 CARDOZO L. REV. 1797, 1800-03 (2000) (discussing Constant's theory of "self-defeating dictatorships").

limitations on governmental action.<sup>482</sup> Moreover, the public acknowledgment of the nature of emergency actions taken by government may contribute not only to reasoned discourse and dialogue between the government and its domestic constituency, but also between the government and other governments as well as between the government and nongovernmental and international organizations. Thus, the need to give reasons is not confined to the domestic sphere. It also has international implications, both political and legal.<sup>483</sup>

The need to "throw oneself on one's country"<sup>484</sup> also involves very real political and legal consequences for the acting official. With the need to obtain ex post ratification from the public, the official who decides to act illegally takes a significant risk. That risk is based on the uncertain prospects for subsequent public ratification. The risk is that her actions would not eventually be ratified because the public disagrees in hindsight with her assessment of the situation or with her assessment of the need to step outside the legal system in order to meet the exigency. The public may also determine that the actions under consideration violated values and principles that are too important to be encroached upon as a matter of general principle or in the circumstances of the particular case. The higher the moral and legal interests and values infringed upon, the less certain the actor should be of the probability of securing ratification. In fact, it may also be that the public just gets it wrong for whatever reason. Legally speaking, the actor would then face the possibility of civil claims, and perhaps even criminal charges brought against her. Hence, the uncertain prospect of ex post ratification in any given case should also be considered as having a deterrent effect on government officials contemplating

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482. See Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 656-57 (1995); see also FINN, *supra* note 91, at 30-36 (advancing the reasons requirement as a constitutive principle of constitutionalism); Besette & Tulis, *supra* note 457, at 10 (arguing that the need for public justification may influence the choice of political acts). For the argument that the requirement of reasoned judgment can constrain judicial power, see, for example, David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987).

483. Thus, for example, states that are party to the major human rights conventions may derogate from certain otherwise protected human rights under situations amounting to a "public emergency threatening the life of the nation." See *supra* notes 132, 143. The derogating state's claim that an emergency existed, that the situation justified derogating from rights safeguarded by the conventions, and that the measures undertaken in any particular case complied with the requirements imposed by the derogation regime are then subject to scrutiny not merely by other governments and nongovernmental bodies, but also by judicial and quasi-judicial bodies such as the European Court of Human Rights, the Inter-American Court of Human Rights, and the United Nations Human Rights Commission. On the international legal regime pertaining to the protection of human rights in times of emergency, see, for example, JOAN FITZPATRICK, HUMAN RIGHTS IN CRISIS: THE INTERNATIONAL SYSTEM FOR PROTECTING RIGHTS DURING STATES OF EMERGENCY (1994); JAIME ORAÁ, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW (1992); and Ni Aolain, *supra* note 98. For the idea of two-level games in international relations, see Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427 (1988).

484. See *supra* note 408 and accompanying text.

extralegal action. In extreme cases, however, such doubts do not present those officials with an insurmountable obstacle to such actions. While the element of uncertainty adds significantly to the costs of acting extralegally, it still permits taking extralegal action where the stakes are sufficiently high.<sup>485</sup>

I believe that Justice Jackson was right when he suggested that “[t]he chief restraint upon those who command the physical forces of the country . . . must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history.”<sup>486</sup> This accords with Biddle’s sobering observation that the Constitution never greatly bothered any wartime President.<sup>487</sup> At the end of the day, it is those political, moral, and—one may add to the list—legal judgments of the public that serve as the real restraint on public officials. A sense of self-indignation when rules are violated (which is the result of the social, political, and legal ethos of the community), coupled with uncertainty about the chances of ratification, militates against too easy a rush to use extralegal powers. Finally, the fact that specific emergency powers used by the government are extralegal, and perhaps also extraconstitutional, preserves the need not only to give reasons for such actions, but also to give reasons that go beyond pure pragmatic excuses or justifications for the specific conduct in question.<sup>488</sup> Once again, this is the point of keeping separate our investigation into the obvious and tragic questions. Pragmatic reasoning may be persuasive with respect to answering the former (and to convincing the public that the government’s approach is defensible),<sup>489</sup> but it falls short of providing an adequate response to the latter.<sup>490</sup> The task of giving reasons requires the actor to present publicly various types of arguments—prudential, pragmatic, and moral.<sup>491</sup> This, again, serves to check a possible rush to use extralegal powers. Furthermore, the mere fact that governmental agents acted in violation of the law in a given case (or even a series of cases) in order to

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485. See FARBER, *supra* note 165, at 191; Eisgruber, *supra* note 204, at 359-64. Eisgruber suggests that a presidential power to disregard judicial mandates *may* exist in extraordinary circumstances, but that the exercise of such power ought not to be endorsed in the abstract. He argues that keeping the existence of such power as a mere possibility, rather than a certainty, serves as a check against inviting abuses of power once it is acknowledged to exist. See Eisgruber, *supra* note 204, at 363; see also Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523 (1984).

486. *Korematsu v. United States*, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting).

487. See *supra* note 40.

488. *But see* Eisgruber, *supra* note 204, at 360 (arguing that Jackson’s dissent in *Korematsu* suggests that the executive branch does not have to offer reasons beyond the pragmatic).

489. For examples of the application of pragmatic reasoning in related areas, see, for example, Posner, *supra* note 273, at 29-31.

490. See Nussbaum, *supra* note 381, at 1007-08.

491. See KADISH & KADISH, *supra* note 459, at 5-12 (distinguishing between the justification of an action and the justification for undertaking an action).

respond to an acute crisis does not do away with their general obligation to obey the law and act within its boundaries.<sup>492</sup>

Governmental agents must decide how to answer both the obvious question and the tragic question in times of emergency. However, the ultimate decision concerning both questions is not in the hands of the actor. This is particularly significant with regard to the decision concerning the tragic question. Surely, the actor must face that question as a moral agent, but her grappling with the question is then followed by a public assessment of that same question. In this instance, however, the answer carries not only moral significance, but the potential for very real and tangible legal effects in the form of sanctions that would be imposed on the actor when the public fails to ratify her illegal actions.<sup>493</sup>

## ii. *Open and Informed Public Deliberation*

The Extra-Legal Measures model calls for public deliberation and, eventually, for the taking of responsibility by each and every member of the community. Once a crisis forces itself on the nation, government and its agents are faced with the need to decide how best to respond to the crisis. One possible answer to that dilemma, as suggested by the Extra-Legal Measures model, is that in truly catastrophic cases, officials may consider the possibility of acting extralegally when devising measures to counter the threat. A crucial element of the model calls on the public to evaluate the government's actions and determine whether to ratify them, in whole or in part, *ex post*. The need for ratification, with the concomitant demand for transparency and candid acknowledgment of what has been done, forces the public to become vested in the outcome. It also promotes public deliberation and discourse about the actions that have been taken on the people's behalf. Such deliberation is important both as a deterrent against governmental agents rushing too easily to exercise unlawful powers and as

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492. Schauer, *supra* note 380, at 103 (suggesting "the idea of overridable obligations that survive the override despite being overridden in a particular case").

493. Note, for example, Walzer's observation concerning the difference between legal and moral rules pertaining to the "dirty hands" problem. *See supra* note 398-401 and accompanying text. He acknowledges that if moral rules were enforced,

dirty hands would be no problem. We would simply honor the man who did bad in order to do good, and at the same time we would punish him. We would honor him for the good he has done, and we would punish him for the bad he has done.

Walzer, *supra* note 398, at 81. Mechanisms of legal enforcement thus serve to "set the stakes or maintain the values." *Id.* at 82. The images of Captain Little and General Jackson come to mind. We should note, however, that Walzer seems to consider only the twin possibilities of no enforcement (moral rules) or full enforcement (legal rules). It may well be, of course, that less-than-full enforcement in all cases is more socially desirable, as it encourages public officials to violate the law in appropriate cases.

a means of providing opportunity for an open discussion of such matters in light of the recent crisis and in anticipation of possible future ones.

Open and candid acknowledgment by the authorities of the need to resort to extralegal measures keeps the public alert against usurpation of power by the government. In addition, such acknowledgment—and the subsequent need for ratification by the public—forces the community as a whole to come to grips with the reality of the emergency and with the hard choices that the community's leaders had to make. It forces each and every member of the community to take a stand and commit herself to a moral, political, and legal position.<sup>494</sup>

The philosopher David Hartman stated:

The notion that we don't do things like torture is the greatest danger to our moral health. . . . We have to stop looking at our great moral past and start looking at ourselves as we behave in the present. If we always see ourselves as victims, we will never see ourselves as we really are and never be able to change when we need to.<sup>495</sup>

Maintaining a veneer of normality and legalities allows citizens to avert their eyes and minds from the crude reality surrounding them. They are not pushed to take any affirmative moral, legal, or political action on this issue and are content with letting things continue just the way they are. This, in essence, is the charge of hypocrisy that is leveled at the Business as Usual model. The Extra-Legal Measures model does not fall into the trap of complacency that allows the public to turn a blind eye.<sup>496</sup> As the difficult questions are put forth squarely and openly for public debate and decision, members of the public can no longer make such claims as "I was not told" or "I did not know."<sup>497</sup> By requiring ratification based on adequate governmental disclosure, the Extra-Legal Measures model seeks not only to

494. See Rostow, *supra* note 99, at 533 (suggesting that the American public is culpable for the internment of persons of Japanese ancestry during World War II). Obviously, taking no action is also a kind of action.

495. Thomas L. Friedman, *Israelis Seem Ambivalent on Violence in Domestic War*, N.Y. TIMES, Nov. 8, 1987, at E2.

496. See LANDAU REPORT, *supra* note 135, at 183.

497. Levinson, *supra* note 273 (discussing a "don't ask, don't tell" policy with respect to using torture in interrogations). In referring to Israeli society, Lahav notes:

The complacency of the entire family in hiding the reality is one of the gravest consequences of terrorism and counterterrorism. People develop a dependence upon the security forces, a tendency to defer to their judgment, and above all, a willingness to suppress the unpleasant. It is better not to know.

Lahav, *supra* note 58, at 538. Lahav suggests that the Zionists' constant fight to preserve the Jewish state against persistent Arab terrorism

has created a dual reality for Israel: the visible reality of normalcy, and the clandestine reality of terror and counterterror. Counterterrorism is kept secret not only to assure its success in its war against terrorism, but also to preserve the reality of normalcy and the success of the Zionist dream.

*Id.* at 546.

force public officials to make both a pragmatic analysis and moral assessment of their illegal actions, but also to make the people take a stand on the matter. It leaves no choice but for both government officials and the public to take such a stand and then be politically, legally, and morally responsible for it.

The Extra-Legal Measures model is disconcerting. It forces us to look to what may be the darkest corners of our national life. We would rather not look there. We would prefer to be led to believe that "we are known for humanitarian treatment"<sup>498</sup> and that we, as a society, are above moral reproach. That, however, is a luxury we cannot afford in such times. If we take seriously our commitments to the rule of law and to individual rights and liberties, we must not be allowed to opt out so easily. We must not be allowed the luxury of sitting on the clean green grass in front of our houses, while beneath the refuse is washed away in the sewer pipes, without assuming responsibility for such unpleasant actions.<sup>499</sup> That the public is put in a difficult position cannot be doubted. But this is precisely the point. If extralegal measures have been taken on our behalf and in our name, it is our moral, political, and legal obligation to ratify or reject such actions and at least to be accountable for our own decisions.<sup>500</sup>

Take this example of how opportunities for deliberation and responsibility sharing work together. The use of extralegal measures by government during an emergency involves the risk of exposing the actors to, for example, criminal charges or civil suits. Thus, it is quite likely that upon the termination of the crisis the legislature will be called upon to ratify governmental actions by, for example, passing acts of indemnity.<sup>501</sup> This process presents the legislative branch of government with an opportunity to review the actions of the government and assess them *ex post*, relieved from the pressures of the crisis, before deciding whether to ratify them. The appeal to the legislature to ratify the actions of the government may further invoke public deliberation and force the legislative branch to take an affirmative stand on issues connected with the emergency. This is of special significance when one considers the reluctance of legislatures to assume

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498. See Pincus, *supra* note 273.

499. The first part of this sentence is a paraphrase on the words of one officer of the Israeli General Security Service who appeared before the Landau Commission of Inquiry. LANDAU REPORT, *supra* note 135, at 183.

500. *But see* Walzer, *supra* note 398, at 67 (suggesting that members of the public may have a right to avoid, if they possibly can, those political or other positions in which they "might be forced to do terrible things"); *see also* A. JOHN SIMMONS, MORAL PRINCIPLES AND POLITICAL OBLIGATIONS 57-100 (1979) (identifying problems with social contract theory of legal obligation).

501. *See* Mitchell v. Clark, 110 U.S. 633, 640 (1884) (noting that acts of indemnity are "passed by all governments when the occasion requires it"); BRADLEY & EWING, *supra* note 7; *see also* FARBER, *supra* note 165, at 220-21.

responsibility in times of emergency, thus satisfying themselves with acquiescence in actions taken by the executive.<sup>502</sup>

The Extra-Legal Measures model is a process-oriented model. It seeks to promote deliberation, both among members of the public at large and among public officials. At the same time, ex post ratification may be accorded to egregious actions that practically subvert the foundations of the constitutional and legal structures. Taken to its logical extreme, the model does not seem to incorporate substantive limitations on the range of possible extralegal actions taken in the face of emergency that may later be ratified. Similar challenges have been leveled against other process-based theories.<sup>503</sup> One possible way around this difficulty is to incorporate into the theory some substantive elements, such as Bruce Ackerman's entrenchment of fundamental rights against constitutional revision and amendment,<sup>504</sup> or John Hart Ely's protection of certain minority groups.<sup>505</sup> But, in addition to the problem of putting special constitutional arrangements beyond the ratification power of the people, such proposals suffer from internal inconsistency with the process-based theory within which they are to operate.<sup>506</sup> If no substantive restraint on the ability to obtain ex post public ratification for extralegal actions exists, are we left with anything short of totalitarianism? As Judge Learned Hand suggested, if the people elect to go down that route, no constitution, no law, and no court would save them from the loss of liberty.<sup>507</sup> Eventually, ideas such as liberty, freedom, democracy, and rule of law must exist in the hearts of the people if they are to survive the whirlwind of crisis and emergency. If they are not there to begin with, neither model of emergency powers is likely to help much. At the same time, the Extra-Legal Measures model does not make extralegal actions and constitutionally permissible acts equal in obligation and force under the constitutional scheme.<sup>508</sup> The former are not made legal or constitutional as a result of the necessity of the situation. Furthermore, as the legal consequences (including the individual liability of acting officials) of the two categories of actions are markedly different, the fact that an action is branded "extralegal" raises the costs of undertaking it. Permitting

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502. See, e.g., KOH, *supra* note 62, at 117-33.

503. See, e.g., RICHARD A. POSNER, *OVERCOMING LAW* 219 (1995) (challenging Ackerman's "dualism" theory).

504. I ACKERMAN, *supra* note 441, at 320-21.

505. See ELY, *supra* note 32, at 135-79.

506. See, e.g., Daniel R. Ortiz, *Pursuing a Perfect Politics: The Allure and Failure of Process Theory*, 77 VA. L. REV. 721, 735-41 (1991); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1076-77 (1980).

507. See HAND, *supra* note 3, at 189-90.

508. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-77 (1803); see also Schauer, *supra* note 380, at 102-03 (suggesting that overridable obligations survive the override despite being overridden in a particular case).



extralegal actions under the proposed Extra-Legal Measures model does not undermine the theory of a written constitution.

Thus, open acknowledgment of the extralegal actions that have been taken is a critical element for the proposed model. Such open acknowledgment strengthens the constitutional order and the rule of law in yet another way: Public admission that certain actions pursued by public officials have been outside the rules amounts to at least an implicit acknowledgment of those rules and their relevance.<sup>509</sup>

Violating the law seems to undermine a habit of rule obedience. At the same time, open acknowledgment of the extralegal nature of an act minimizes the risks of depreciation in the value of the rule of law. Such depreciation may result from public perceptions that either (1) the government can provide itself with whatever powers it wishes while acting within the framework of the legal system, thus exercising an almost unfettered discretion under the aegis of the law (under the models of accommodation), or (2) the legal system is utopian and must not be allowed to interfere with the effort to overcome the crisis (under the Business as Usual model). This may lead to a loss of confidence in the protection that the legal system affords individual rights. The idea of legal and constitutional constraints will thus be gravely assaulted. Demonstration of elasticity and flexibility may be interpreted by members of the relevant community as a sign that "everything goes," i.e., that everything can be made legal if only the government wishes it to be so.

### iii. *Precedents: Hard Cases Make Bad Law*

The unlawfulness of extralegal measures and powers should serve as a warning that such actions are for "this time and this time only"—i.e., resulting from the exceptional nature of the threat forced on the nation.<sup>510</sup> By refraining from introducing any changes into the existing preemergency legal system, either by way of direct modification or by way of interpretation, the Extra-Legal Measures model avoids the creation of *legal* precedents that would be integrated into the normal system of laws. Although actions taken and decisions made during the emergency may

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509. As George Winterton explains:

The admission that the exercise of power is unlawful is also a recognition of the continued authority of the Constitution. Action taken in such circumstances, especially if only temporary, may not seriously weaken governmental or public respect for the Constitution, beyond creating a degree of disenchantment due to its apparent failure to cope with the crisis.

George Winterton, *The Concept of Extra-Constitutional Executive Power in Domestic Affairs*, 7 HASTINGS CONST. L.Q. 1, 43 (1979).

510. The idea of a (judicial) decision "good for this day and train only" and meant to have no precedential value is a well-known one. *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting).

establish a political precedent for future emergencies, the separation from the ordinary legal system adds another level of protection against the permeation of such precedents into times of peace and normalcy.<sup>511</sup> “A breach of the law, even a necessary one, *that ought to be justified*, can never destroy the law. . . . But an act legally done can always be drawn into precedent.”<sup>512</sup>

Although the sequence of extralegal action and subsequent public ratification may bring about an eventual change in the law, turning a political precedent into a legal one, such a shift cannot happen under the proposed model without informed public participation in the process.

In his celebrated dissenting opinion in *Korematsu*,<sup>513</sup> Justice Jackson followed a similar line of argument. Recognizing that “[i]t would be

511. Thus, for example, Maimonides, the great Jewish sage and codifier, clarifies the state of Jewish law regarding the concept of “the time requires it” (*Ha-sha’ah zerikhah le-khakh*):

The court may impose flogging on one who is not liable [according to the Torah law] for lashes and execute one who is not liable for the death penalty, [and it may so act] not to transgress the law of the Torah but in order to make a fence around the Torah. And whenever the court sees that the people are dissolute with respect to a certain matter, [the judges] may safeguard and strengthen that matter as they deem proper, and all this as a temporary measure, and not to establish a precedent for generations to come.

RAMBAM (MAIMONIDES), MISHNE TORAH, SEFER SHOFTIM, HILKHOT SANHEDRIN 24:4; *see also* TALMUD BAVLI: SANHEDRIN 46a; TALMUD BAVLI: YEVAMOT 90b; 2 MENACHEM ELON, JEWISH LAW-HISTORY, SOURCES, PRINCIPLES 515-20 (Bernard Auerbach & Melvin J. Sykes trans., 1994).

For warnings against the potential pernicious effect of violating the law, even for a short time and in the face of an exigency, see, for example, LOCKE, *supra* note 279, § 166 (pointing out the danger that any use of the prerogative power creates a precedent for future exercises of such power by less benevolent rulers “managing the Government with different Thoughts,” and asserting that so perilous may be the consequences that “[u]pon this is founded that saying, That the Reigns of good Princes have been always most dangerous to the Liberties of their People”); and NICCOLO MACHIAVELLI, THE DISCOURSES 195 (Bernard Crick ed., Pelican Classics 1970) (1513-1517) (“Though [extralegal measures] may do good at the time, the precedent thus established is bad, since it sanctions the usage of dispensing with constitutional methods for a good purpose, and thereby makes it possible, on some plausible pretext, to dispense with them for a bad purpose.”). In addition, it is interesting to note Portia’s response to Bassanio’s urging that “[t]o do a great right, do a little wrong.” SHAKESPEARE, *supra* note 42, act 4, sc. 1, l. 211. In rejecting this advice, Portia retorts, “It must not be . . . ’Twill be recorded for a precedent, and many an error by the same example will rush into the state. It cannot be.” *Id.* act 4, sc. 1, ll. 213-16.

512. Wilmerding, *supra* note 412, at 329-30 (emphasis added). Wilmerding explains his statement thus:

A breach of the law, even a necessary one, that ought to be justified, can never destroy the law. It stands upon the records of Congress as an exception out of the law to be transmitted to posterity “as a safeguard of the constitution, that in future times no evil might come of it, from a precedent of the highest necessity, and most important service to the country.” But an act legally done can always be drawn into precedent . . . [and] since “men by habit make irregular stretches of power without discerning the consequence and extent of them,” one small wrong must lead to a greater one, and in the end force must become the measure of law, discretion must degenerate into despotism.

*Id.*

513. *Korematsu v. United States*, 323 U.S. 214 (1944).

impracticable and dangerous idealism to expect or insist that each specific military command in an area of probable operations will conform to conventional tests of constitutionality,"<sup>514</sup> Justice Jackson rejected the Business as Usual model, stating:

When an area is so beset that it must be put under military control at all, the paramount consideration is that its measures be successful, rather than legal. The armed services must protect a society, not merely its Constitution. . . . Defense measures will not, and often should not, be held within the limits that bind civil authority in peace.<sup>515</sup>

He then went on to reject the possibility of accommodation and express his support for taking extraconstitutional measures:

But if we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient. . . .

. . . .

. . . [A] judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. . . . But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.<sup>516</sup>

Indeed, recognizing a separate reality of extralegal activity in the face of emergency may help in maintaining the integrity of the ordinary legal system. Hard cases make bad laws. Times of emergency make some of the hardest of cases. Keeping the ordinary legal system clean and distinct from the dirty and messy reality of emergency prevents the perversion of that system in order to give answers to the hard, exceptional cases. Ordinary rules need not be modified or adapted so as to facilitate governmental crisis measures. Insofar as exceptional measures are required to deal with the

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514. *Id.* at 244.

515. *Id.*

516. *Id.* at 244-46 (Jackson, J., dissenting).

crisis, these measures are viewed precisely as such, “exceptional.” They are not allowed to penetrate the ordinary legal system and “contaminate” it. Once an emergency has terminated, a return to normalcy may be possible without the ordinary legal system being marred by scars of emergency legislation or by interpretive stretch marks. One of the main goals of terrorism is to push the state to adapt itself to meet the terrorist threat on its own turf.<sup>517</sup> Under the Extra-Legal Measures model, while government and its agents sink lower in their fight against terrorism, the legal system remains afloat above the muddy water’s surface.

How does this argument fit with our understanding of the illusory nature of the assumption of separation? Does not the Extra-Legal Measures model rely on that false assumption to a greater degree than any of the constitutional models?<sup>518</sup> After all, it is the notion of total separation between normalcy and emergency that enables officials to take extralegal actions, for the argument is that the ordinary legal system will not be tarnished by the necessities of emergency.

The Extra-Legal Measures model does rely on the assumption of separation. Its appeal inheres, however, in the open recognition of the assumption’s limitations and in an attendant endeavor to minimize the actual reliance on it. This minimal reliance is achieved by focusing attention on ways to raise the costs for public officials and governmental authorities of assuming and wielding emergency powers by forcing them to go outside the legal system in appropriate circumstances. While in extreme cases the benefits of acting extralegally may exceed the costs—personal and otherwise—of such action, in many cases, the mere fact that potential actors would need to step outside the legal framework may serve as a strong deterrent militating against an all too easy assumption of expansive and radical powers. By raising the costs involved in such actions, the Extra-Legal Measures model curbs the use of emergency powers, while still enabling their exercise in appropriate cases when the extremity of the situation calls for it. By checking the tendency to wield sweeping powers in order to deal with any particular exigency, the Extra-Legal Measures model not only reduces the scope for such use but also limits the reliance on the suspect assumption of separation.

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517. “It is impossible to fight ruthlessness with considerateness, guile with sincerity. Opponents in battle, like partners in understanding, must meet on a common plane—which is inevitably that of their lowest common denominator.” Lahav, *supra* note 58, at 531 (quoting ARTHUR KOESTLER, PROMISE AND FULFILMENT, PALESTINE 1917-1949, at 134 (1949)).

518. *See, e.g.*, Lobel, *supra* note 61, at 1397-412 (arguing that Jeffersonian constitutional liberalism declined because of the breaking down of the dichotomy between emergency and nonemergency powers).

## VI. CONCLUSION: FAITH AND MICROSCOPES

Acute national emergencies are a test of faith—faith in ourselves, in our ability to cope and emerge victorious in the face of adversity, and in principles that we hold to be “fundamental.” Crises and exigencies put to the test our faith in the rule of law, in human rights and civil liberties, and in their application not only to ourselves but to those different from us. Such sharp times are also a test of our faith in government and in its ability to “do the right thing” even in hard times, in our moral convictions, and in our political and legal processes and institutions. Experience tells us, however, that times of emergency call for something more than faith.

In her four-liner, “*Faith*” *Is a Fine Invention*, Emily Dickinson wrote:

“Faith” is a fine invention  
 When Gentlemen can *see*—  
 But *Microscopes* are prudent  
 In an Emergency.<sup>519</sup>

Emergency powers discourse has traditionally been premised on two articles of faith, namely our faith in the paradigm of constitutionality and our faith in the possibility of separation. This Article suggests that it is time to revisit those axioms and to examine carefully under a microscope the basic assumptions that underlie the fight against terrorism and other emergencies. The proposed Extra-Legal Measures model does not seek to do away with the traditional discourse over emergency powers. It does not claim to exclude the constitutional models of emergency powers. It is a model for truly extraordinary occasions. There may be circumstances when it would be appropriate to go outside the legal order, at times even violating otherwise accepted constitutional dictates, when responding to emergency situations. Yet, even in circumstances where use of the model is inappropriate, and where the constitutional models may supply an answer to the particular predicament, we must recognize the limitations of each of these alternatives and its long-term implications.

Now—when the world is trying to come to terms with the aftermath of the terrorist attacks of September 11th, the implications of the war on terrorism, and, at the time this Article goes to print, the possibility of a war against Iraq—may be the worst of times to engage in such probing review. But as issues pertaining to emergency powers are now more on the public’s mind than they have ever been before, it may also be the best of times.

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519. EMILY DICKINSON, “*Faith*” *Is a Fine Invention*, in THE COMPLETE POEMS OF EMILY DICKINSON 87 (Thomas H. Johnson ed., 1960).