# EMERGENCY GOVERNANCE IN LIBERAL DEMOCRACIES

# EMERGENCY GOVERNANCE IN LIBERAL DEMOCRACIES

By MAX LEONOV, M.A.

A Thesis Submitted to the School of Graduate Studies in Partial Fulfillment of the Requirements for the Degree Doctor of Philosophy

McMaster University DOCTOR OF PHILOSOPHY (2016) Hamilton, Ontario (Philosophy)

TITLE: Emergency Governance in Liberal Democracies AUTHOR: Max Leonov, M.A. ( McMaster University) SUPERVISOR: Professor Wil J. Waluchow NUMBER OF PAGES: viii, 295.

*Lay abstract*: Some national security crises pose serious challenges to western liberal democracies. On the one hand, because such crises threaten individual lives and the welfare of the political community, there is a strong case in favor of demanding that the government do everything in its power to quash such threats by any means necessary. On the other hand, a number of constitutional commitments seem to prevent liberal democracies from using some means in addressing national security crises. In particular, emergency measures such as coercive interrogation and indefinite detention seem to undermine a number of values and commitments that are fundamental to liberal democratic regimes. In addition, there is a controversy surrounding the role of the judiciary during emergencies. Should judges review executive action to ensure its legitimacy during emergencies or should the executive be the final authority on the legitimacy of its policies? My dissertation develops answers to these questions. I begin by exploring conceptual issues surrounding emergencies. On the basis of this exploration, I provide an account of the role of fundamental liberal democratic commitments in the project of emergency governance and argue in favor of judicial participation in governing liberal democratic communities during periods of emergency.

*Abstract*: This dissertation explores conceptual, normative, and institutional dimensions of the emergency problematic and defends judicial participation in emergency governance. I develop my arguments on the basis of Posner and Vermeule's discussion in their book *Terror in the Balance.* I reject their institutional account of emergency governance captured in their *deference thesis* by showing its incompatibility with fundamental liberal democratic commitments. As I argue, Posner and Vermeule's call for across-the-board judicial deference to the executive during emergencies is unwarranted in a number of cases, most notably those involving conflicts of constitutional rights. I also reject Posner and Vermeule's account of emergency policymaking captured in their *tradeoff thesis* by showing that it does not provide a suitable criterion by means of which the legitimacy of emergency policies could be determined. My arguments against the tradeoff and deference theses are based in part on my critique of Posner and Vermeule's conception of emergency situations. In fleshing out my conception of emergency, I present and defend a methodological approach to studying the emergency problematic and offer an extensive discussion of exceptionality associated with emergencies. My conclusion is that it is necessary to take in account liberal democratic commitments in the process of emergency policymaking and that judicial review of the executive during periods of emergency is conducive to legitimate emergency governance.

*Acknowledgements*: I would like to express my gratitude to all of those who helped and supported me as I worked on my dissertation. First and foremost, I would like to thank my PhD committee. I owe a special debt of gratitude to my supervisor, Wil Waluchow, who inspired my interest in the topic of judicial review, offered constructive and insightful criticisms of my ideas, and was a constant source of encouragement and support. Likewise, Mike Giudice has been a source of inspiration and insight in our countless conversations about philosophy of law. My interest in emergencies can be traced to his seminar on this topic at York University in 2013. I would also like to thank Stefan Sciaraffa for his advice and encouragement during the initial and concluding stages of my project.

I would also like to thank McMaster Philosophy department for providing me with financial support during my graduate studies and, most notably, for supporting my one year research visit to Cambridge University where I had the pleasure to attend several seminars and discuss my ideas with Matthew Kramer, David Dyzenhaus, Trevor Allan, and Nigel Simmonds. This experience has laid a foundation for the development of my dissertation. Thanks are also due to a number of my fellow graduate students in McMaster and York Universities whose interest and passion for philosophical inquiry created an excellent environment for my research. You all know who you are!

Finally, I would also like to acknowledge several individuals outside academia who made important contributions to this work. Most notably, Bai Bunpanya and Jasper Wu have always been open to discuss my ideas and put them in perspective. My partner, Preston Li, always supported my academic ambitions and motivated me to do my best. His affection and patience have made it easier for me to overcome a number of challenges that I faced in the course of writing my dissertation. Lastly, I owe an immense debt of gratitude to my parents. Without their unwavering emotional and financial support as well as their belief in the importance of my work none of this would have been possible.

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# CHAPTER 1: POSNER AND VERMEULE'S ARGUMENT

## 1.1. INTRODUCTION

The defense of national security is a task of any government that purports to be legitimate. However, the means by which a government may choose to protect its citizens can conflict with other commitments and values that are necessary for a legitimate rule. Indefinite detention, coercive interrogation, various types of profiling are just a few examples of policies that are advocated by appeals to national security and that conflict with constitutional values of states that are committed to liberal democratic ideals. In the common law jurisdictions, the judiciary is often thought as an institution that can safeguard the constitutional values and protect individuals' fundamental rights from unjust legislative and executive initiatives. The institutional position of the judiciary, with its insulation from public pressures, its independence from the other branches of government, its expertise in law, and its openness (along with several other features), is thought to be integral for liberal democratic government. However, these institutional characteristics that are thought to be advantageous normally can also be thought to be detrimental to the project of steering a political community from the brink of a crisis.

The purpose of this dissertation is to address a controversy surrounding judicial participation in emergency governance. Our inquiry will involve conceptual analysis of emergencies, an exploration of normative challenges arising during

emergencies, as well as a study of institutional characteristics of the judiciary and the executive relevant for emergency governance. Most discussions in the course of this work will engage with Posner and Vermeule's arguments that they presented in their book *Terror in the Balance: Security, Liberty, and the Courts.* Even though I take issue with many of these arguments and reject Posner and Vermeule's central conclusions, I believe that their view deserves a careful scrutiny. In part, this is because their account relies on a number of common intuitions about the nature of emergencies and appropriate responses to them. Exploring these intuitions is important for understanding the appeal of some popular arguments surrounding emergency governance. On the other hand, Posner and Vermeule do not only offer one of the strongest arguments available in favor of judicial deference during emergencies but their account contains one of the harshest criticisms of competing positions. Thus, a critical examination of their work will help to appreciate the appeal of both sides of the controversy.

The purpose of this chapter is to present and offer some initial comments on Posner and Vermeule's central argument in favor of the deference thesis, according to which judges should defer to the executive during emergencies. Their argument is based on a number of institutional considerations. According to Posner and Vermeule, states of emergency warrant judicial deference to the executive because the executive is better positioned institutionally to evaluate the crisis and has a better chance of making the right calls to bring the situation under control. The executive has the necessary expertise for dealing with security crises – the expertise that judges lack. Importantly, the judiciary is institutionally disadvantaged because

it is slow, rigid, and because its openness leads to the disclosure of the sensitive information that can endanger the government's project of maintaining national security.

In addition, Posner and Vermeule analyze three lines of argument that are offered by their opponents – civil libertarians. As Posner and Vermeule tell us, the civil libertarian view "holds that courts should be willing to strike down emergency measures [introduced by the executive] that threaten civil liberties to the same extent that they strike down security measures during normal times".[1] Civil libertarians offer several justifications for their position: some argue that the effects of fear and panic necessitate judicial involvement; others are motivated by the prospects of democratic failures; finally, there are those whose concern is the irreversibility and long-term harm of emergency measures.

The discussion of this chapter is structured as follows: first, I present and discuss Posner and Vermeule's deference thesis; second, I present and briefly discuss the tradeoff thesis which is central to Posner and Vermeule's arguments in favor of the deference thesis; finally, I examine the three main lines of argument against judicial deference and offer initial criticisms of Posner and Vermeule's rendition of these arguments.

## 1.2. THE DEFERENCE THESIS

[1] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 5.
[2] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 5.

Posner and Vermeule argue that the civil libertarian view is wrong because it "is too weak to overcome the presumptive validity of executive action during emergencies."[2] The presumptive validity is rooted in the widely shared view – I will be referring to it as a 'common view' – that can be summarized as follows. Emergency situations are not like normal situations. This means that the conduct that is appropriate in normal situations is not appropriate in emergencies and vice versa. What explains this change in context? There is something – a grave risk of harm, urgency, lack of options, etc. – that warrants the types of conduct that are normally restricted or prohibited. We are familiar and conceptually comfortable with such ideas as 'emergency services', 'emergency funds', and 'emergency contacts' the use of which is restricted to special circumstances. Posner and Vermeule's account of emergencies resonates with our common understanding of these circumstances. So, for example, just as in private life we see nothing wrong with the idea that in emergencies we can access the funds that are normally restricted to us, so the government may do certain things in emergencies that it is normally restricted or prohibited from doing.

If the presumptive validity of executive action is explained along these lines, then it is important to examine the distinction between normalcy and emergency. Posner and Vermeule do not offer a detailed discussion of this distinction despite its central role in their argument. In the following chapters, we will attempt to analyze this distinction in some detail. For now, it is important to raise questions about it. For example, what distinguishes emergencies from everyday, run-of-the-mill

[2] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 5.

situations? Related but a distinct question is how is one to know whether she is facing an emergency? Should emergencies affect one's interpretation of values? Is there a difference between facing an ethical problem in normal circumstances as opposed to in an emergency? If so, what explains this difference? These sorts of questions form the heart of the emergency problematic and it is important to keep them in mind as we explore Posner and Vermeule's arguments.

For now, let me distinguish the view about emergencies that I called 'common' from Posner and Vermeule's argument in favor of judicial deference. Posner and Vermeule aim to provide conclusive reasons for judicial deference by relying exclusively on the analysis of the institutional capacities and competencies of the executive and judicial branches of government. Their argument offers institutional reasons for vindicating the presumptive validity of the executive action during emergencies. Their view is that the distribution of powers and authority among the branches of government in emergencies should differ from normalcy. During emergencies, the executive's authority should be expanded. Thus, in addition to an understanding of the difference between emergency and normalcy, the key to understanding Posner and Vermeule's deference thesis is to understand the rationale and justification of the roles and functions of government institutions in governing liberal democratic communities.

The task of determining the judicial role is tied to the conception of the roles and functions of other branches of government. For example, some argue that the legislators should have the final say in deciding fundamental political and legal questions because they are democratically accountable; others advocate for greater

judicial involvement in everyday governance because of the judicial insulation from public pressures; still others have great faith in the administrative state, for example, on the grounds of efficacy. However, once the context of these debates shifts from normal to emergency circumstances, the disagreements may disappear or continue along different lines in light of new considerations associated with emergencies. So, for example, someone who believes that in a democracy during the periods of normalcy the parliament should have the final say in resolving controversies surrounding constitutional interpretation may be willing to accept that the executive should be the one resolving such controversies during emergencies. The shift from the normal to emergency circumstances is significant because it alters the force and the manner of justification of the distribution of power among the branches of government.

Posner and Vermeule's deference thesis reflects some concerns with the institutional capacities of the legislature and the judiciary. The deference thesis "holds that the executive branch, not Congress or the judicial branch, should make the tradeoff between security and liberty."[3] They continue to explain, "During emergencies, the institutional advantages of the executive are enhanced. Because of the importance of secrecy, speed, and flexibility, courts, which are slow, open, and rigid, have less to contribute to the formulation of national policy then they do during normal times."[4] These institutional characterizations of the executive and the

[3] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 5. Posner and Vermeule's discussions are primarily focused on the US. However, as we will see, their arguments in favor of judicial deference to the executive are applicable to political regimes with institutional separation of powers, including western liberal democracies.
[4] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 5.

judiciary are central to Posner and Vermeule's thesis and are widely accepted.[5] However, it is important to correctly assess the purchase of these characterizations.

Consider, for example, the following statistics. According to Adult Criminal Court Statistics in Canada for the years 2010/2011, the average median length of criminal proceedings was 118 days.[6] In the UK, the average for the year 2014 was 23 weeks or 161 days for the period between charges being laid and the outcome of the case.[7] Such data can be taken as evidence for the slowness of the judiciary. But, it is important to keep in mind that the length of proceedings is not only indicative of the overloaded docket of courts. The process is designed to take time in order to foster a setting where responsible and just decisions can be made. If the process of establishing justice requires time, it seems that this requirement applies equally to any institution tasked with establishing justice, be it the judiciary or the executive. It seems patently false to think that officials who require a long time to make good decisions populate the courts and that officials in the executive branch tend to make responsible and just decisions quickly. Of course, if the executive branch of government is well structured and effectively run, it can carry out decisions swiftly. But while speed and efficacy are important in the project of carrying out justice, the process of decision-making – certainly, a crucial element in the pursuit of justice – may not benefit from these characteristics. Thus, it is not enough to merely gesture at institutional characteristics of various branches of government in order to make a case for the roles they should play in governing during emergencies. It is necessary

[5] See Chapter 6 for a more detailed analysis of institutional characteristics.
[6] Adult Criminal Court Statistics
[7] Open Justice GOV.UK.

to explore the rationale behind the institutional design that produces these characteristics and assess its applicability to the emergency context.

Posner and Vermeule make several important qualifications of the deference thesis that go some way to address these concerns. "The deference thesis" they tell us "does not hold that courts and legislators have no role at all. The view is that courts and legislators should be more deferential than they are during normal times; how much more deferential is always a hard question and depends on the scale and type of the emergency."[8] Posner and Vermeule do not mean to suggest that during emergencies the executive should enjoy complete deference from the legislature and the judiciary. Rather, they intend to offer a more nuanced view, the view that is sensitive to the nature of the specific emergency and, presumably, the effects that the specific emergency has on the institutional capacities of all three branches of government. Even though throughout their book Posner and Vermeule suggest that during emergencies the institutional position of the judiciary makes it highly problematic to determine the nature of the emergency and the adequate means for responding to it, which suggest that the deference will always be warranted, there could be emergencies that may not warrant judicial deference. It is unreasonable to insist on the same level of deference to the executive in cases when it is clear that the cabinet happens to be inflexible and slow or when it happens to be clear that an emergency can best be dealt by other branches of government. In light of that, it is better to understand the deference thesis as setting out a framework that is generally warranted given the analysis of the capacities of government's

[8] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 5-6.

institutions, their competency, and the type of emergencies in question. By framing the thesis in these terms, Posner and Vermeule can get the desired level of context sensitivity.

The second qualification that puts the deference thesis in perspective is that Posner and Vermeule are not advocating for an increase in judicial deference relative to the historical record of deference shown by the courts.[9] Given the institutional disadvantages of the judiciary during emergencies, judges already accept, according to Posner and Vermeule, that they are unable to improve the executive's efforts to bring the emergency under control. "Judges themselves appear to accept this pessimistic view."[10] Their pessimism is explained by the awareness of the institutional limitations of the courts and judges' lack of competence in dealing with the matters of national security. As Posner and Vermeule summarize,

> If insulation gives them [the judges] the advantage of calm, the price is lack of information and lack of power. Judges do not have the information that the executives have, and are reluctant to second-guess them. They also do not have access to the levers of power, so they can only delay a response to an emergency by entertaining legal objections to it. They do not have such access because such power cannot be given to people who are not politically accountable. … All of this explains why, during emergencies, judges rarely feel that they have their ordinary peacetime authority to interfere with executive decisionmaking."[11]

Because institutional limitations and access to relevant information by the judiciary are taken to be indisputable obstacles to effective governance and because judges are aware of and accept these disadvantages, Posner and Vermeule's defense of the deference thesis is an apologist project rather than an argument advocating a

[9] Throughout their book, Posner and Vermeule are primarily analyzing the US historical record.
[10] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 75.
[11] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 75.

change in the way power is distributed among the branches of government during emergencies.

The final qualification that merits our attention has to do with the type of issues that the deference thesis is meant to address. Posner and Vermeule are very clear that they do not take a stand on, what may be called, the substantive issues of emergency anti-terrorism provisions or any other types of emergency measures. Instead, Posner and Vermeule wish to set aside all substantive matters and focus on the issues of institutional allocation of authority. They explain with an example,

> suppose that ethnic or racial profiling during emergencies does not increase security, or even reduces it; if it does not increase security, then it is all cost and no benefit, and thus a bad policy. We call this a *first-order* question and bracket such questions to the extent possible. We focus instead on the *second-order* institutional and legal challenges – such as the arguments that ethnic profiling is inevitably a pretext for the scapegoating of minorities or that it irreversibly expands government power. Our basic concern is to rebut a common set of second-order arguments that courts should be skeptical of executive action during emergencies.[12]

The distinction between first and second order questions carries a lot of weight for Posner and Vermeule's argument. If it can be established that a certain arrangement of institutions is better suited for addressing any or most emergencies, it resolves an important problem inherent in the emergency problematic. Even if we disagree about what needs to be done to deal with a particular crisis, we can be in agreement about which institution should be dealing with it. If Posner and Vermeule can defend the deference thesis on an institutional, second-order level, the question of the distribution of powers in an emergency may be resolved, or at least an

[12] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 10.

important step towards its resolution can be made, without an engagement with the substantive and, no doubt, controversial issues.

## 1.3. THE TRADEOFF THESIS

Before we turn to the three criticisms of the civil libertarian insistence on judicial review of the executive action during emergencies, it is important to examine Posner and Vermeule's understanding of policymaking. In normal circumstances as well as during emergencies, Posner and Vermeule think that government should devise policies by balancing values and interests. Because the deference thesis is aimed at addressing only those emergency situations when the constitutional values of liberty and security are involved, the balancing that Posner and Vermeule are focusing on is between these two values. This way of conceiving of government policymaking is presented in the *tradeoff thesis*, which "holds that governments should, and do, balance civil liberties and security at all times. During emergencies, when new threats appear, the balance shifts; government should and will reduce civil liberties in order to enhance security in those domains where the two must be traded off."[13] On this view, the government officials examine the critical situation as well as laws and policies that are in effect; in light of these examinations they adjust the legal and political framework according to the exigencies of the crisis. Posner and Vermeule add that in the exercise of tradeoffs, "governments will err, but those errors will not be systematically skewed in any direction and will not be

[13] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 5.

more likely during emergencies than during normal times, in which governments also make mistakes about quotidian matters of policy."[14] This means that for Posner and Vermeule there is no principled difference in the process of decision-making – in the exercise of trading values off against each other – between normal and emergency circumstances.

In Chapter 5 we will examine in some detail the suitability of the tradeoff thesis for deciding the matters of emergency governance. At this point, it is important to focus on developing an understanding of this style of evaluating and decision-making. First, it should be noted that the tradeoff framework presents the nature of decision-making as a distributive problem. In a setting where there is a finite amount of resources and a number of projects that require their use, the tradeoff framework is aimed to resolve questions of the allocation of these resources. The operation of the tradeoff framework is most clear in settings when time, money, or other easily quantifiable resources need to be distributed among different projects. However, some normative questions may resist the distributive analysis. For example, a person who finds herself faced with a choice between raising a family and having a dream career (both of which she values) can be hard-pressed to quantify the values of each alternative in a manner suitable for comparison within the tradeoff framework. This could be the case if she believes those values to be incommensurable or if she simply does not know how she should go about striking the needed balance. There is also a question of whether she should accept an outcome of the decision that strikes out one of these options entirely or

[14] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 5.

the one that offers a compromise. She is right to wonder whether the employment of the tradeoff framework is sufficient to arrive at good decisions or if it should be supplemented with other considerations.[15]

Second, it is helpful to keep in mind the relation of the tradeoff framework to consequentialist and deontological types of ethical theories. Consequentialism, and most notably its original version utilitarianism, utilizes the tradeoff framework. For consequentialists the best course of action from the moral point of view is the one that produces the best outcomes. To identify the best outcome, consequentialists analyze and compare various available courses of action. Bentham, for example, proposed to analyze the alternatives by using the Hedonistic Calculus, which was designed to measure the balance of pain and pleasure.[16] Modern consequentialists offer more sophisticated tools for selecting the best course of action but the selection of the best alternative is always achieved by stacking values against disvalues implicated in the decision. Whether we are asked to assess individual actions in light of likely consequences of particular acts or of complying or disobeying general rules, the tradeoff framework animates the consequential thinking.

The role of the tradeoff framework in deontological theories is more complex. Deontological theories are distinguished from others by their insistence on various imperatives. For example, according to the Kantian deontology the right course of action from the moral point of view is the one whose underlying maxim

[15] See Chapter 5 for a more detailed discussion of the tradeoff framework and the analysis of it as a proper tool for decision-making in the emergency contexts.
[16] See, Jeremy Bentham (2007), *Introduction to Principles of Morals and Legislation*, Chapter 4.

can be universalized.[17] Other deontological theories and theories that import deontological elements can be characterized by the presence of rights, duties, and prohibitions that are meant to constrain or limit the available courses of action. These constraints tend to invoke the respect of human dignity, autonomy, and freedom. They may also include divine commands or the respect for certain traditions or rules.

A criticism that deontological theories sometimes face is associated with the difficulty of adhering to the imperatives in light of circumstances. A usual example of a criticism of Kant's deontology, according to which one must always tell the truth, is a situation when telling the truth necessarily results in an offense against human dignity. Many fanciful examples can be constructed to create such situations but one common instance is when an individual happens to harbor Jews from Nazi persecution in her basement and the Nazis show up asking her whether she harbors any Jews. This tension, quite clearly, is produced by means of a judgment that weighs the pros and the cons of the alternatives. According to the intuition shared by many people, the imperative that demands that we respect human dignity overpowers[18] the imperative that demands that we tell the truth. The pressure that circumstances can bring to bear on commitment to particular deontological constraints, signaled by the intuitive appeal of the exercise of balancing the values at stake, may create a problem for deontologists. Thus, in contrast to consequentialist,

[17] See, Immanuel Kant (1981), *Groundwork for the Metaphysics of Morals*.
[18] There are vast differences in deontological accounts as to what happens to the imperatives that give way in such situations. The range spans from theories that completely nullify the imperatives to theories that insist on their 'force' despite the competing considerations or insist that the deontological constraints must be maintained in the face of any and all consequences. My use of the term "overpowers" here is meant to be neutral among these accounts.

for whom the tradeoff framework is a vehicle for finding solutions to moral problems, for deontologists it can constitute the moral problems.

This brief sketch of the tradeoff framework should prepare us to question its suitability for dealing with emergency situations. Insofar as the tradeoff framework is a centerpiece of consequential theories, it is susceptible to some criticisms advanced against them; also this framework may force uncomfortable choices associated with deontological theories. Not all decisions and judgments can be easily reduced to and presented as distributive problems. Presenting an ethical problem as a distributive problem may not help to find satisfactory answers in some cases. Finally, sacrificing commitments on either side of the scale can be deeply troubling. These brief observations should put us on guard against the tradeoff approach to decision-making. Of course, Posner and Vermeule may be right that governments in fact rely on this mode of decision-making; however, this fact should not suggest that it is right for governments to do so or that there are no alternative methods. In the following sections we will turn to the examination of Posner and Vermeule's tradeoff account as it is applied to the resolution of the three main objections to judicial deference that Posner and Vermeule associate with the civil libertarian position.

## 1.4. THE PANIC THEORY ARGUMENT

According to the panic thesis, the expansion of the executive's power during emergencies will have negative effects because "fear causes decisionmakers to

exaggerate threats and neglect civil liberties and similar values."[19] If fear produces these effects on the executive, it is a good idea to authorize an institution to oversee and review the executive's conduct during emergencies. It may be thought that the judicial branch is well suited for this role because of its institutional insulation from public pressures, its principled impartiality, and its independence from the other branches of government. These institutional characterizations are important characteristics of the judiciary in liberal democratic regimes, and so, it may be argued, they are also desirable in times of crisis. From the point of view of the tradeoff thesis, judicial participation can be deemed important because it can be tasked with increasing the chances of establishing the right balance of values at a time when the executive is prone to err in policymaking. Thus, it may be thought that judges should actively participate in emergency policymaking since their institutional position shields them from the negative effects of panic. Similarly, some civil libertarians against whom Posner and Vermeule argue may view the judiciary as an institutional failsafe mechanism the purpose of which is not to actively increase the quality of policy making but only to stop those executive orders and initiatives that are motivated by fear.

Posner and Vermeule offer a wide range of arguments against the panic thesis. Let us focus on the most critical and insightful ones. First, Posner and Vermeule draw our attention to the beneficial effects of fear on policymaking. "Fear compels people to devote resources to solving a problem that to a dispassionate and uninvolved person may be interesting but not compelling. In this way, fear

[19] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 59.

motivates not only action but deliberation. Having perceived a threat, and felt fear, people will work hard to think of ways to address it. They are more likely to discard old assumptions and complacent ways of thinking and to address problems with new vigor."[20] While counterintuitive and provocative, the plausibility of Posner and Vermeule's argument is hard to deny, especially against the background of criticisms of the Kafkaesque levels of bureaucracy and resistance to change characteristic of modern democracies. Fear may be a catalyst that improves governments in their business of striking the right balance among constitutional values and interests of its citizens. Now, Posner and Vermeule are not suggesting that fear is always beneficial for such tradeoffs. Their more subtle view is that "fear will produce choices that are different from those that will be made by a person who does not feel fear, but these choices may be better or worse, depending on the context."[21] In light of that, all that Posner and Vermeule wish to establish with this argument is that the panic thesis does not unequivocally support the civil libertarian view or undermine the deference thesis. But if that is right – fear may be advantageous and disadvantageous – the panic thesis does not resolve the institutional question about the distribution of government powers in emergencies either. Thus, with this argument, Posner and Vermeule are only able to undermine the position of those civil libertarians who insist on the necessarily negative effects of fear on decision-making.

Another argument under the rubric of the Panic theory promises a positive case in favor of judicial deference. Insofar as terrorist threats constitute an ongoing

[20] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 63.
[21] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 63.

problem for liberal democratic governments, it may be thought that the panic thesis applies not only amidst the chaos and devastation of an emergency but also in its wake and for a significant amount of time thereafter. If the effects of fear on the executive are pervasive and ongoing, it may be argued that judicial supervision of the executive – particularly, in regard to an assessing executive's counter-terrorist measures against a court's view of the terrorist threat – is warranted and useful for arriving at the right emergency policy.

Posner and Vermeule offer an interesting counter-argument against this view. They contend that this view is hard to square with psychological research that shows that people are more likely to react to immediate rather than remote threats. "[A] standard view is that people ignore low-probability risks and that elected officials with short time horizons ignore remote ones; on this account, government will probably do too little to prevent terrorist threats, not too much."[22] In addition, Posner and Vermeule remind us, "Government is organized so that general policy decisions about responses to emergencies are made in advance, and the implementation of those policies during emergency is trusted to security officials who have been trained to resist the impulse to panic."[23] If it is true that the executive officials are unlikely to be swayed by the psychological effects of fear to remote risks and that they are "trained to resist the impulse to panic" when the threat is immediate, judicial involvement is superfluous for the purposes of arriving at an optimal emergency policy. Taking into account the institutional disadvantages

[22] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 65.
[23] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 66.

of the judiciary during emergencies, such as slowness, limited information, and its reactionary role, judicial deference may well be warranted.

Another stab at the panic thesis made by Posner and Vermeule poses an interesting challenge to civil libertarians and those who take emergencies to be inherently negative circumstances. It is worth quoting at some length the foil of this argument,

> The civil libertarian view relies on a simple and much criticized theory that constitutional or other rules can be properly thought of as rational (good) pre-commitments against emotional (bad) decisions. The old metaphor is that of Ulysses being tied to the mast so that he would not yield to the songs of the Sirens. But the analogy does not hold, as a recent literature has emphasized. Because the sirens were both irresistible and unambiguously bad, prior commitment to stay on the ship was an unambiguously good choice. In addition, Ulysses could trust his crew. Fear, though, plays a valuable role as well as a negative role; and no commitment device can be designed in advance to prevent fear from influencing behavior, nor is there reason to think that broad constitutional restrictions on executive power would produce good outcomes by reducing the influence of fear.[24]

The thought seems to be that strong emotional responses during emergencies do not necessarily lead to disastrous consequences, as they did in the story of Ulysses. Some emergencies may be thresholds to better states of affairs and the success in crossing such thresholds depends on the absence of emotional restraints. In other words, Posner and Vermeule seem to be saying through their analogy that fear and other strong emotional responses may be important for achieving better states of affairs and that institutional mechanisms to guard against such emotions may be counterproductive.

If my explanation of the invocation of the analogy to Ulysses is correct, Posner and Vermeule are offering an interesting argument because it is

[24] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 76.

counterintuitive and provocative. It is counterintuitive because we tend to think that emergencies open the possibility to disasters rather than to improved states of affairs. It is provocative because the attainment of the improved state of affairs in some cases may only be possible if strong emotions, such as fear and panic, are left unchecked. Unfortunately, Posner and Vermeule do not offer sufficient arguments to support both of these claims. However, their discussion raises a number of important points regarding the nature of emergencies and their relation to normalcy.

Posner and Vermeule suggest that there are several historical examples of what they call "libertarian panics", that is, situations when great sacrifices of security were made in the name of liberty. With reference to Bernard Bailyn's work, they analyze the situation in colonial America after 1763 and attempt to show that the tradeoffs at that time weighted heavily on the side of liberty. They propose that the "American Revolution itself might be described as the consequence of a widespread and sustained libertarian panic, or perhaps a wave of serial panics."[25] While Posner and Vermeule do not explicate this argument in as much detail as one would like, their thought here seems to be that before the American Revolution people enjoyed greater levels of security (or perhaps just stability) and lower levels of liberties. Life after the revolution saw an increase in liberties. If I understand Posner and Vermeule's argument correctly, this increase is explained by a panic on behalf of the revolutionaries. While I cannot deny that it could play a role in these events, I find it awkward to claim that panic was the main impetus of the Revolution.

[25] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 78.

So, I am more inclined to take Posner and Vermeule to be suggesting that it was a state in important sense similar to that of panic that ruled the hearts of those who rebelled against the British rule. If this is more or less right, the American Revolution could be viewed as an emergency the outcome of which was an increased level of liberty. So, if the American Revolution qualifies as an emergency, then we have an example of an emergency where panic, or a state similar to it, led to greater levels of liberty.

In the twenty first century, the USA saw another libertarian panic, according to Posner and Vermeule, the cause of which was the PATRIOT act. Although their analysis does not seem to suggest that any tradeoffs heavily favoring liberty took place during that period, Posner and Vermeule think it sufficient for the purposes of demonstrating the existence of a libertarian panic that civil libertarians vocally denounced this act in "apocalyptic terms", that several states "have passed ordinances calling the act a fundamental retrenchment of American civil liberties", and that "much popular and academic commentary [took] an equally lurid line" towards it.[26] The historical evidence of libertarian panics is contentious and rather puzzling with respect to the PATRIOT act era because Posner and Vermeule do not offer us any evidence that tradeoffs favoring liberty took place at that time. However, the animating idea behind libertarian panics is worth pondering: when a situation is classified as an emergency it carries an implicit connotation that there is a possibility of a collapse, devastation, or some sort of a negative and undesirable prospect. But an analytical and retrospective look at some situations that we

[26] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 79.

commonly label as emergencies may reveal that some upheavals and disorders that were regarded as negative and undesirable at the time ultimately led to a better political, legal, or social order. It is worth assessing the institutional significance of the deference thesis with this possibility in mind.

To summarize, the three main arguments offered under the umbrella of the Panic Theory are as follows. First, fear does not unequivocally have negative effects on decision-making. Second, there is empirical evidence suggesting that people are generally unlikely to be swayed by remote prospects of fear. This observation is meant to defuse the worry that governments may be tempted to do too much by way of promoting security. Finally, fear can be an important ingredient in the legal and political evolution of a community. Each of these arguments is meant to chip away at the civil libertarian insistence on judicial participation in emergency governance.

## 1.5. THE DEMOCRATIC FAILURE THEORY

One broad set of reasons for insisting on judicial involvement in governance appeals to democratic considerations. The judiciary can play an important role in governing liberal democracy because it can prevent democratic failures, i.e., situations when the democratic process produces results that are incompatible with *raisons d'être* of the democratic regime[27]. The doctrine of the separation of powers is necessary to this end and, in part, for this reason it is common to liberal

[27] For an explanation of how democracy as a process can come in conflict with the values that invite this process see Samuel Freeman (1990-1991), "Constitutional Democracy and the Legitimacy of Judicial Review."

democracies. It is a system of checks and balances that puts judges in an institutional position suited for upholding the values and principles that legitimize the democratic regime. So, for example, judicial review is implemented in a variety of institutional forms against the dangers of majoritarianism in the USA, Canada, the UK, Australia, and New Zealand. In broad terms, it functions to check the compatibility of legislative enactments with the Constitution and principles entrenched in the common law. In this way, judicial review prevents the interests of majorities with large representation from infringing on the minority rights entrenched in the legal and political orders of these liberal democracies.

It is noteworthy that the academic debates surrounding the topic of the legitimacy of judicial review by and large focus on the relationship between the legislative and the judicial branches. While some attention is paid to the wide discretion that the executive enjoys in such matters as foreign policy and immigration, the judicial review of the executive action is widely regarded as a legitimate and uncontroversial practice in liberal democracies. For example, it is a cornerstone of a liberal democracy that a private citizen can bring a suit against the police or other law enforcing agencies that constitute the executive branch of government. It is a sign of a healthy liberal democracy if in such cases courts can rule in favor of the plaintiff; conversely, if courts exhibit a strong tendency to rule in favor of the government, it raises questions about the legitimacy of the political order and its status as a liberal democracy.

Justiciability of executive action (that is, whether an executive decision should be reviewable by courts) becomes more controversial when liberal

democracies are undergoing crises.[28] A common intuition expressed and developed by Posner and Vermeule in their defense of the deference thesis holds that the executive should enjoy a significant degree of freedom from judicial scrutiny when national security is threatened. Anticipating objections to this view motivated by considerations of democratic failure, Posner and Vermeule offer a number of arguments that are designed to address these concerns. In outline, Posner and Vermeule try to show that concerns about democratic failures do not apply to the emergency context and that courts are poorly positioned to judge the emergency measures from the institutional point of view. The tradeoff framework plays a central role in these arguments.

Posner and Vermeule identify the main idea behind the democratic failure in the following way: "Self-interested majorities will cause government policy to provide too much security, relative to an impartial baseline somehow defined, because those majorities do not bear the full costs of increased security. Rather, democratic majorities partially externalize the costs of increased security onto minorities."[29] Minorities that enjoy legal and political protections during normal times can lose these protections during emergencies. A crisis can instill a panic in the majority and undermine its commitment to rights and fundamental political values, thus making the majority self-interested. The government needs to introduce measures that would not only deal with the crisis itself but would also appease the unsettled majority. To succeed in both these tasks, the government may choose to

[28] See Chapter 6 for a more extensive discussion of justiciability in the emergency context.
[29] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 87.

distribute the burdens of emergency measures unfairly placing the heaviest brunt on minorities' shoulders.

With respect to emergencies brought on by the threat of terrorism, the price of an increase in security for the majority often amounts to a decrease of liberties and securities for minorities within the tradeoffs framework. For example, the policy of profiling an ethnic, religious, or other identifiable minority may have the effect of increasing the sense of security for a majority. People may feel safer if they see their government pressing a minority that is associated with a terrorist organization based on similar religious views or an ethnic background. However, individuals constituting that minority will suffer a decrease in liberties resulting from profiling. For instance, they may wish to avoid certain activities, such as flying, that would expose them to profiling by the government. Furthermore, minorities are likely to suffer a greater decrease in security (in contrast to the one shared by the whole community facing a terrorist threat) because the loss of liberties constitutes the loss of various legal rights and protections.[30] In such scenarios, an unfair distribution of costs is not a result of panic or fear on behalf of the government or the majority. The government acts rationally but undemocratically; the majority is also rational but self-interested, i.e., its concern over the fair distribution of burdens as well as legal and political rights takes a backseat due to the ongoing crisis. Strong, active, and independent courts may be thought to be a solution to these distributive worries. According to Posner and Vermeule, civil libertarians often insist on the

[30] For more detailed explanation of the relation between security and liberty see, Jeremy Waldron (2010). *Torture, Terror, and Trade-Offs: Philosophy for the White House* and Ronald Dworkin (2006), *Is Democracy Possible Here?: Principles for a New Political Debate*

judicial participation in governance during emergencies on exactly these grounds. They want courts to uphold the rights of individuals and minorities during emergencies by scrutinizing the emergency measures implemented by the executive.

Posner and Vermeule attack the democratic failure theory on several fronts. First, they contend that democratic failure is not specific to emergencies; it is a problem for both normal and emergency circumstances.[31] The main reason why Posner and Vermeule do not distinguish between these two contexts when discussing democratic failure is because, on their view, government policymaking always takes place within the tradeoff framework. It is always about balancing and distributing the goods, including securities and liberties. What distinguishes normalcy from emergency for them is that in emergencies the amount of social goods diminishes relative to the periods of normalcy. Thus, the main difference between normalcy and emergency is in the number of goods available for distribution. Posner and Vermeule also contend, "The majority has no greater ability to impose costs on a minority in the emergency case than in the non-emergency case. The structural mechanism of voting and representation that are said to produce democratic failure operate in the same way both in emergencies and in normal times."[32] Because of this, democratic failure is a context-independent worry for Posner and Vermeule.

But in normal times the distribution of legal and political goods, such as liberties and securities, is subject to judicial oversight. So, if we agree that courts should have the power to oversee these distributions during normal times, and if

[31] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 88.
[32] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 106.

there are no principled differences between normalcy and emergency contexts,[33] why do Posner and Vermeule argue that judges should defer to the executive in emergencies? As Posner and Vermeule see things, judges can commit two types of errors with respect to democratic failure. They can either validate policies that stem from democratic failure or they can invalidate policies that do not stem from democratic failure. The first type of error is not interesting from the institutional point of view: we have the executive that made a bad policy and the judiciary that did not catch it. The second type of error is interesting because here we have a judiciary that invalidates a policy that is *ex hypothesis* a good one. Posner and Vermeule argue that the costs of the second type of error during emergencies are especially high. In this case, we have an *ex hypothesis* good policy that is thwarted by the second-guessing of the judiciary. The consequences of such an error can be disastrous because the stakes are high during emergencies and because there may not be a time for the executive to come up with another good policy that would satisfy the courts. As Posner and Vermeule remind us, "It times of emergency, the judges' information is especially poor, their ability to sort justified from unjustified policies especially limited, and the costs of erroneously blocking necessary security measures may be disastrous."[34] Given the limitations stemming from judges' institutional position and the heavy costs of potentially invalidating emergency measures that the executive deems warranted and that pass the democratic muster, Posner and Vermeule argue for judicial deference.

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[33] I do not mean to suggest that judicial deference is never justified during normal times. It could be. My intention here is to raise the question of justifiability of changing one's stance on the legitimacy of judicial deference in the same type of cases between the normal and the emergency contexts.
[34] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 91.

It is worth noting that this argument is probabilistic but we are not given any indication of the likelihood of judicial errors. Without such data it is difficult to evaluate Posner and Vermeule's argument because it is a dubious strategy to arrange government institutions with the view to situations that rarely arise. Surely, we would be more likely to agree with Posner and Vermeule's argument if the likelihood of judicial errors envisaged by Posner and Vermeule was overwhelmingly high. Conversely, if courts make mistakes regarding the emergency measures only on rare occasions, Posner and Vermeule's argument would lose much of its force. Unfortunately, there does not appear to be any legitimate method of assembling such data because there is bound to be controversy about the substantial merits of past emergency policies introduced by the executive and the judicial treatment of them.

Secondly, this sort of probabilistic argument may not be suitable for justifying an institutional scheme establishing the roles and functions of the judiciary and the executive branches of government during emergencies. According to Posner and Vermeule's conception of emergencies, these circumstances tend to be unpredictable and novel. If that is true, one may argue that different examples of emergencies may require the government institution to take on and fulfill different roles and functions. Thus, there are two problems with Posner and Vermeule's line of argument: first, without sufficient empirical evidence it is hard to assess the likelihood of judicial errors and, second, if there were empirical evidence it is unclear what role it should play in determining institutional allocation of authority during emergencies because at least some emergencies are novel and

unprecedented. Insofar as this characterization of emergencies is right, it is impossible to tell beforehand whether the judiciary will be able to deal responsibly with future emergencies.

Let us now turn to the second line of attack on the Democratic Failure theory. Posner and Vermeule aim to undermine the view according to which, "courts should presumptively require government to proceed through general laws and policies, as opposed to narrowly targeted ones. Government action directed against dissenters, the disenfranchised, or discrete and insular groups among the citizenry should be strictly scrutinized to smoke out animus or opportunistic scapegoating of ideological, political, or ethnic minorities, and this is true in both emergencies and normal times."[35] However, the generality of laws may be disadvantageous in an emergency because certain crises – and especially security crises brought on by the threat of terrorism – are localized. They may be geographically limited, involve a certain type of perpetrators, utilize a specific kind of means, target a certain type of victims, etc. If a security crisis is localized in some such way, it is reasonable that the measures undertaken for its resolution should also be specific. The government should dedicate all its resources to addressing the specifics of the crisis and if that is right, the generality of laws can be detrimental to the efficient and successful emergency governance. Thus, for Posner and Vermeule, the approach that counsels

[35] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 88. This is the core of the *Carolene Products* doctrine that Posner and Vermeule take to be included in the arsenal of civil libertarians who insist on the importance of judicial review of the executive during emergencies. See further *United States v. Carolene Products Co.,* 304 U.S. 144 (1938)

generality is problematic because judges are not in a good position to evaluate emergency policies and because threats to national security are better dealt by localized and targeted measures.

It is certainly important for the courts to generally require the government to proceed through general laws in order to preclude the government from scapegoating any minority group. However, the task of ensuring that laws and policies are general in the relevant sense should be a part of a greater task of ensuring that these laws and policies are justifiable from the democratic point of view.[36] There is nothing in the institutional structure of the courts that makes them so rigid and inflexible to be unable to allow targeted laws and policies. And there is nothing inherently undemocratic about targeted laws and policies. It is not the level of generality that is threatening to democratic legitimacy but the justifiability of specific policies – the justifiability that can vary relative to the scope of the implementation of a policy. As Posner and Vermeule correctly observe, "…a statute that applies only to a very small class C is fine, not even presumptively bad, *so long as there is some normatively valid reason to target C*. The rationale for the classification is still general, in the sense that it would apply to anyone similarly situated."[37] Laws that apply to presidents, prime ministers, parliamentarians, or other individuals who are members of very small classes are not necessarily problematic from the democratic point of view. Thus, the worry about democratic legitimacy is not coextensive with concern about the generality of laws. If my

[36] Here, I use the term "democratic" in a robust sense that implies a commitment to fundamental liberal ideals and excludes majoritarianism and other forms of democracy that conflict with these liberal commitments.
[37] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 95. (Emphasis added.)

reasoning is sound, it shows that those civil libertarians who claim that democratic legitimacy is only possible if government policies and laws are general are wrong. However, to the best of my knowledge, there is nothing that compels civil libertarians to accept this erroneous view.

The third and related to the above concern is the civil libertarian worry about executive opportunism. It is suspected that the executive may use emergencies as pretext in order to grab more power, suppress the opposition, or attack individuals or groups of people for self-interested purposes. Alternatively, the executive may choose to scapegoat a minority in order to appease the majority in order to justify some of its financial commitments, acquire greater levels of support from the citizens, or to advance interests of powerful individuals or groups. Executive opportunism is a distinct type of democratic failure because here the failure occurs not because of the political dynamics between the majority and minorities but because the executive is taking advantage of the destabilized legal and political order.

Posner and Vermeule's strategy for dealing with the opportunism worry is similar to the strategy they employed when addressing the democratic failure generally. They try to take the sting out of these concerns by arguing, first, that these sorts of failures are just as possible during normal times as they are in emergencies and, second, that in emergencies the courts do not have the institutional capacity to safeguard against these sorts of situations. As they put it, "…it is not clear that emergencies change anything other than the rhetoric or rationalizations

surrounding the majority's actions."[38] If anything, emergencies only highlight the prejudice and lack of concern for the rights of minorities that existed in the political community all along. As an example, Posner and Vermeule remind us about the internment of Japanese Americans during the Second World War and point out that the government did not intern Italian or German Americans, even though America's enemies were of these ethnic backgrounds as well. This is taken to show that the internment of Japanese Americans was motivated by a certain racial animus that was distinct from the ethnic sentiments that applied to the German and Italian Americans.[39]

In making these points, Posner and Vermeule stress that they are not evaluating government's policies in their substance but only arguing that courts, as well as civil libertarians, lack the necessary expertise to assess these policies in the fog of war and without the benefit of hindsight. It is important to keep in mind, however, that if executive opportunism is a legitimate worry, and if it is an issue both in normal and emergency circumstances, then there is good reason to develop a scheme establishing the separation of powers that would provide the necessary checks against executive opportunism. If we agree with Posner and Vermeule that courts are institutionally incapable of dealing with executive opportunism, it is necessary to devise other institutional mechanisms to address this concern because this is a concern for the integrity of some of our most fundamental liberal and democratic commitments. We should not lose sight of the fact that it is the rights to be treated with respect and dignity that are at stake here.

[38] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 110.
[39] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 113.

That said, the role of the judiciary in checking the executive is not as inefficacious as Posner and Vermeule claim. While they are probably right that the historic record shows that the judiciary tends to reassert itself only after an emergency passes, it is not true that this history should be taken proscriptively. Even if past emergencies cannot be taken as legal precedents for future ones, this should not suggest that there is nothing to learn from history. In retrospect we often criticize the majority decision in *Korematsu*[40] as well as some cases involving the "war on terror" era, such as *Hamdi*.[41] Civil libertarians think not only that these decisions were unfortunate but also that judges could have done better. The history lesson that needs to be learnt is that the next time we find ourselves in the fog of war we should not lose sight of the important commitments that were abandoned on previous occasions.

The last concern under the rubric of democratic failure that Posner and Vermeule address deals with non-citizens and aliens. These groups of people are often thought to be the most vulnerable to the security measures and have the least legal and political protections. Some people feel that even though the government owes its citizens protections against attacks, it must take into account the welfare of the non-citizens and aliens as well. Against this concern, Posner and Vermeule offer four audacious arguments. First, they say that non-citizens and aliens are unlikely to be the targets of an unjustified attack because "the voting majority wants foreigners to come to its country – as tourists, who consume goods and services; as students,

[40] *Korematsu v. United States*, 323 U.S. 214 (1944)
[41] *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004)

who pay tuition; and as employees, who bring needed skills."[42] Second, Posner and Vermeule want us to believe that the government would not attack aliens and non-citizens because "recent immigrants maintain family and ethnic ties to aliens and object when these aliens are subjected to governmental discrimination."[43] The thought is that the government would not want to upset these recent immigrants by unjustifiably attacking non-citizens. Third, some of these non-citizens and resident aliens may become citizens in the future; and that gives politicians "an incentive to treat them well." In addition, and most audaciously, we are told that these aliens have "virtual representation" through their children, friends, employers, etc. who are citizens.[44] Finally, Posner and Vermeule remind us that the government knows that its citizens travel abroad. So, the government would not want to treat aliens badly because it does not want its citizens to be treated badly when they are abroad.[45]

I am hard-pressed to find any merit in Posner and Vermeule's arguments regarding aliens and non-citizens. For example, while it is true that some governments wish to attract tourism, it is hard to believe that the interest in prosperous tourism could trump the interest in handling a national security crisis, especially if the voting majority feels threatened. If that is right, a state may well wish to temporarily sacrifice its reputation as a tourist destination. This argument seems to apply *mutatis mutandis* to international students and workers. As much as some states (but not all) rely on these classes of people, it is difficult to imagine that

[42] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 125.
[43] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 125.
[44] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 125.
[45] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 125.

these considerations can be of a very high priority to a government that is facing a security crisis. The idea that a government is going to become unpopular among new citizen who maintain close ties with non-citizens is also dubious. The political influence of new citizens is unlikely to be of any significant concern to the national government in charge of security policies because many new citizens are in the initial stages of integration into the social and political environment of the new country and they tend to lack economic and political resources to assert their influence. The idea of virtual representation is also highly questionable if for no other reason than some non-citizens and aliens may simply not have any employers, friends, or relatives who are willing to take up their cause.

The general tenor of the arguments that Posner and Vermeule peddle to allay worries about non-citizens and aliens seem to ignore a simple fact that non-citizens and aliens belong to one of the most vulnerable classes of people from the legal and political points of view. The informal mechanisms that Posner and Vermeule identify in their arguments may arguably provide some protection in some cases to non-citizens and aliens. However, it is crucial to remember that modern governments possess large arsenals of resources that can be used to protect individuals from various dangers but which could also cause great, systematic, and prolonged harm. Because there exists a possibility of illegitimate use of government powers, it is important that there exist formal and publically known norms according to which this power is to be exercised. In addition, the formalization and transparency of government operations which impact fundamental rights of individuals is important for fostering a public understanding and appreciation of the

costs of the existence of the political community. If security for the citizens of a political community is purchased at the cost of the terror of non-citizens, the political community cannot maintain its status as a liberal democracy, at least on any adequate conception of this political and legal association.

## 1.6. THE RATCHET THEORY

The third main challenge to the deference thesis examined by Posner and Vermeule is the Ratchet Theory. The motivating worry behind this view is that policies adopted during emergencies will negatively impact legal and political life after the emergency passes. The problem is that setting a precedent during an emergency may amount to instituting a change in the legal and political order that will be either difficult or impossible to reverse. Posner and Vermeule define *the ratchet effect* as a phenomenon whereby "a succession of emergencies produces a unidirectional increase in some legal or political variable, an increase that is irreversible or at least costly to reverse. In the most common version of this claim, ratchets produce a long-term trend toward ever-greater security and ever-diminishing liberty, perhaps concluding in authoritarian oppression."[46] According to Posner and Vermeule, two essential features of this view are that the change is unidirectional and entrenched.[47] This means that a precedent creates a tendency in favor of a variable within the tradeoff framework. So, if security and liberty are locked in the tradeoff relation and a precedent is set in favor of security, this means

[46] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 131.
[47] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 133.

that there will be fewer and fewer liberties in the future. Posner and Vermeule also distinguish between strong and weak ratchet accounts: the former posit that the change is irreversible while the latter claim that it is "sticky" and "costly to undo".[48]

If the ratchet account in some form is accepted, it may be argued that "the role of judicial review in times of emergency [is to] provide a long-run perspective that compensates for the shortsightedness of current governmental decisionmaking."[49] On this view, the judiciary is a failsafe mechanism that is meant to prevent those decisions that will negatively impact the integrity of the legal and political order by enforcing the commitments to the fundamental values entrenched in that order. This view does not seem to guarantee that the involvement of the judiciary in emergency governance will protect these fundamental values. It also seems a possibility on this view that the judiciary may make a mistake and set a detrimental precedent. However, the institutional arrangement for emergency governance that involves the judiciary is preferable because it increases the chances of getting the decisions right and provides checks on the executive power.

Posner and Vermeule are skeptical about the plausibility of the ratchet account; and even if the view is plausible, they argue that considerations that it raises are "too speculative and inchoate" to be meaningful in the debate about institutional arrangements suitable for emergencies. They offer four lines of attack on the ratchet account on the basis of which they argue that there are "no systematic trends in the history of civil liberties, no important ratchet-like mechanisms that cause repeated wars or emergencies to push civil liberties in one direction or

[48] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 133.
[49] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 131.

another in any sustained fashion."[50] By identifying conceptual, institutional, psychological, and normative problems with the ratchet theory, Posner and Vermeule aim to support their deference thesis.

The main conceptual problem with the ratchet account is that it assumes that emergencies produce a unidirectional and irreversible change towards greater official oppression, the executive usurpation of democratic power, and the loss of rights and liberties.[51] Against unidirectional characteristic of ratchets, Posner and Vermeule remind us that policies adopted by the government are the result of tradeoffs. If that is right, it is not necessary that ratchets be unidirectional; instead, the nature of the change in policy and law is better explained by the circumstances, not by the tendency or inertia of policymaking. Posner and Vermeule suggest that any trends in policymaking need to be examined against the background of technological, economic, and social changes. They propose to imagine the government "as a rat on a treadmill, constantly struggling to keep pace with new forms of technology and new modes of citizen behavior."[52] The role of the government is to maintain the appropriate balance needed for continual maintenance in light of technological, economic, and social changes. These considerations undermine unidirectional and irreversible characteristics as necessary features of the ratchet account.

On the institutional dimension the ratchet account suffers because it fails "to specify any institutional mechanism by which legal and political measures intended

[50] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 149-150.
[51] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 145-146.
[52] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 136.

to combat emergencies become irreversible."[53] First, Posner and Vermeule see no reason to suppose that an emergency precedent has to "spill over into ordinary law."[54] If a policy is introduced or a decision is made in order to deal with the emergency, why would this policy or decision have any effect on normal circumstances? The precedent set during an emergency may be appealed to in the circumstances similar to the ones when it was set, in which case there would not be a problem if the policy or the decision were right. But it is unclear to Posner and Vermeule why the precedent should have any effect when it comes to the circumstances unlike those that existed at the time when it was set. Against the worry that the boundaries between emergency and normalcy can be hazy, Posner and Vermeule argue that in those cases there are as many chances that precedents set during normal circumstances will have sway over emergencies as there are chances of emergency precedents infiltrating normal life.[55] This shows that there are in fact institutional mechanisms that adequately deal with confining precedents to emergencies and that maintain the separation between emergency and normalcy. In light of that, Posner and Vermeule argue that the onus is on the ratchet theorists to justify their view against these considerations.

Another set of problems that Posner and Vermeule identify with the ratchet account addresses psychological assumptions as well as the assumptions about the adaptive preferences. "Somehow, the intuition runs," Posner and Vermeule observe, "society gets used to the postcrisis baseline of expanded governmental power; the

[53] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 136.
[54] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 137.
[55] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 140.

ratchet operates not because temporary emergency measures block society's capacity to return to the status quo ante, but because society no longer desires to do so. The implicit assumption here is that the postcrisis baseline is bad."[56] Posner and Vermeule see no reason why the citizenry would adapt to and prefer the emergency measures in the period after the crisis if the postcrisis legal and political order is worse. They ask the advocates of the ratchet theory to come up with a plausible story that would explain this psychological phenomenon as well as to square this story with such historical examples as the internment of the Japanese Americans in the Second World War. Posner and Vermeule argue that this internment did not create an entrenched and irreversible psychological animus towards Japanese-Americans. This, in their view, shows that the citizenry is more resilient towards the discriminatory emergency measures than some ratchet theorists may think.

Lastly, Posner and Vermeule examine, what they call, the normative problem with the ratchet theory. They claim that this theory assumes that there exists an optimal balance between liberty and security before the emergency. "So the statist ratchet in effect makes two normative assertions: (1) the precrisis legal rules were optimally balanced for the precrisis state; and (2) the postcrisis rules are too restrictive for the postcrisis state."[57] Posner and Vermeule argue that it is possible that while a pre-emergency legal system was optimal, the legal state of affairs post-emergency, which includes policies adopted during the emergency, may be optimal for the postcrisis state. If the anti-emergency policies were successful and if there is a possibility of a similar type of critical circumstances to arise in the future, why

[56] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 142.
[57] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 143.

wouldn't we want emergency policies to remain a part of the legal and political order? The integration of these policies may bring the system closer to an optimal level because now it is better able to deal with the circumstances that were not properly dealt with by the precrisis norms. Alternatively, it is also possible that precrisis legal rules were not optimal in the first place. Thus, these two normative assumptions of the ratchet account should be rejected.

## 1.7. CONCLUSION

Among the three lines of argument in favor of judicial involvement that Posner and Vermeule criticize, the arguments grouped under the ratchet theory are the most sound. However, just as with some of their earlier arguments, there does not appear to be any obvious reason why civil libertarians are committed to the central premises of these arguments. In the following chapters I will present a version of a civil libertarian position which will, on the one hand, avoid making the assumptions that Posner and Vermeule criticize and, on the other hand, will maintain that judicial involvement in emergency governance is possible and beneficial. In developing this position, we will continue to explore the suitability of the tradeoff thesis for decision and policy making by officials in liberal democracies, the institutional characteristics of the executive and the judiciary, and the project of maintaining a liberal democratic identity. Before delving into these tasks, however, in the next two chapters we will concentrate on the conceptual and normative examination of emergencies.

# CHAPTER 2: EMERGENCY AND METHODOLOGY

## 2.1. INTRODUCTION

The defense of Posner and Vermeule's deference thesis relies on a conception of emergency situations. They argue that the distribution of power among the branches of government should favor the executive during emergencies. For this argument to work it is necessary to adopt a conception of emergency and identify the distinctive challenges that are associated with this type of situation. As I pointed out in the last chapter, Posner and Vermeule do not sufficiently explain their position in this regard. In this chapter I begin to develop my account of the emergency problematic. The task of this chapter is to explore the methodological issues surrounding the inquiry into the nature of emergency situations. The objective is to offer a method of inquiry suitable for studying emergency situations. In the process of doing so, I will be addressing Posner and Vermeule's charge that civil libertarians, lawyers, and philosophers do not have the required expertise to contribute to the solution of problems brought on by security crises. Their view is that only security officials have the needed expertise. As a philosopher and an advocate of liberal values, I challenge their view by offering a philosophical treatment of emergencies. My engagement with this topic is meant to reveal several problems with Posner and Vermeule's approach to conceptualizing emergencies that have ramifications for their argument in support of the deference thesis. The method of inquiry that I propose in the second part of this chapter is meant to address some of the problems with Posner and Vermeule's account as well as fairly

common and dangerous assumptions about the nature of emergencies, which I examine in the first part of this chapter.

## 2.2. QUESTIONING EMERGENCY

While there exists a lot of philosophical literature on emergencies, relatively little attention has been paid to the concept of emergency. One possible reason for this neglect is the complexity of the task of analyzing this concept across all contexts where it is used. Emergencies occur in both private and public spheres. They are thought to have normative, psychological, and empirical dimensions. At least in some cases, there does not seem to be a clear way to tell when an emergency starts and when it ends. In light of these and many other difficulties, a project of offering a plausible all-encompassing conceptual account of emergencies seems like a daunting task. On the other hand, the lack of attention to the concept of emergency can possibly be explained by the fact that we seem to know what emergencies are: we can name (and perhaps agree on) some historical examples; we can recall some personal experiences of emergencies; we are also familiar with such notions as emergency services, emergency contacts, and emergency funds. Perhaps, an understanding, based on such examples, commonly shared experiences, and notions, is enough to know what we are dealing with when we engage with arguments about political and legal organization of governments during emergencies.

One problem with neglecting conceptual analysis is that the quality of arguments developed on the basis of an example, or an intuition, or a pre-theoretical

understanding of the central concept used in one argument is difficult to assess when it is applied to other contexts. It is not clear why a plausible argument about the separation of powers that focuses, say, on the events surrounding the suspension of habeas corpus during the American civil war should have any traction when the focus is switched to the events surrounding the internment of the Japanese Americans during the Second World War or the responses of the Bush administration to 9/11. To gage the applicability of the first argument to other contexts and examples, one must be able to identify some features that are common to the relevant cases. Simply relying on our linguistic intuitions is not enough because they come from a diverse range of contexts and can invite dangerous assumptions. Our intuitions may not account for different considerations that apply to public and private spheres or that involve ongoing or short-lived threats. One of the main tasks of an inquiry into emergency situations is to identify and organize conceptual features that explain our intuitions and core examples of emergencies. On the basis of this account, it is possible to proceed with the inquiry into normative issues arising in emergencies as well as practical and institutional problems that are characteristic of these situations.

A difficulty with conducting conceptual analysis of emergencies is that there do not appear to be any essential or necessary features that can do the job of meaningfully individuating such circumstances. Features such as harm and urgency can be thought to be necessary but in addition to the identification of these features a lot more work needs to be done to achieve a satisfactory level of specificity and clarity because it seems that many other non-emergency circumstances seem to

exhibit these features. Posner and Vermeule are aware of these conceptual difficulties and observe, "Emergency is a continuous variable, and can be more or less serious; the boundary between emergency and non-emergency is so fuzzy and indistinct that no one can be severely faulted for failing to specify where it lies."[58] Gross and Aoláin explore in great detail the difficulties associated with separating emergency from normalcy on the public (state) level and identify various obstacles that stand in the way of a clear differentiation of these contexts. These include such phenomena as "hidden emergencies", formal emergencies, and several others.[59] The diversity of the phenomena that are classified as emergency situations creates a serious obstacle for conducting conceptual analysis with the view to identifying necessary, essential, or sufficient features.

A seemingly simple way of dodging some of these difficulties is to adopt an understanding of emergency from a legal source. Gross and Aoláin identify a number of such sources in their exploration of international and state mechanisms for dealing with national crises. Throughout their book they cite constitutional provisions, legislative acts, precedents set by domestic and international courts, as well as various international declarations and documents. While Gross and Aoláin argue that definitions found in these legal sources "point to a broad international consensus on the general contours of the term emergency, particularly with respect to its contingent and exceptional nature,"[60] they immediately notice that there is a

[58] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 43.
[59] For an explanation of these terms see Oren Gross and Fionnuala Ní Aoláin (2006), *Law in Times of Crisis: Emergency Powers in Theory and Practice*, Chapters 5 and 6.
[60] Oren Gross and Fionnuala Ní Aoláin (2006), *Law in Times of Crisis: Emergency Powers in Theory and Practice*, p. 251.

difference in "nuance and emphasis" among them.[61] A strategy of adopting a definition of emergency from a legal source encounters the difficulty of choice among the available options. Why should we prefer one definition to another? How should the significance of nuance and emphasis of these definitions be evaluated? It is difficult to see how these questions can be answered well without reference to a non-legal conception of emergency.

The second difficulty with following this strategy is that legal definitions do not seem to significantly resolve interpretive problems.[62] For example, in *Lawless v. Ireland*, a public emergency is defined as "a situation of exceptional and immanent danger or crisis affecting the general public, as distinct from particular groups, and constituting the threat to organized life of the community which composes the State in question."[63] In Canada, the Emergency Act (1985) defines an emergency as "an urgent and critical situation of a temporary nature that a) seriously endangers the lives, health or safety of Canadians and is of such proportions or nature as to exceed the capacity or authority of a province to deal with it, or b) seriously threatens the ability of the Government of Canada to preserve the sovereignty, security and territorial integrity of Canada, and that cannot be effectively dealt with under any other law of Canada."[64] Apart from differences in "nuance and emphasis" between these two definitions, it is not clear which situations should count as "exceptional", "immanent", "urgent", "serious", and "critical." It is also not clear what is meant by

[61] For some examples of these definitions, see Oren Gross and Fionnuala Ní Aoláin (2006), *Law in Times of Crisis: Emergency Powers in Theory and Practice*, pp. 249-252.
[62] In making this claim, I do not mean to deny any value to the study of legal definitions in the course of the inquiry. A survey and analysis of legal definitions could be a good starting point.
[63] *Lawless* (Commission), para. 90, at 82.
[64] Emergency Act, (R.S.C. 1985, 3).

"the threat to organized life" or the preservation of sovereignty and security. We'll do well to remember that the abundance of qualifications in definitions should not be mistaken for conceptual precision or clarity. Given the thoroughly contestable nature of claims of emergency and vastly divergent views about how some cases of emergency should be dealt with, it is unclear how an adoption of a legal definition of the sort presented above can be of much use in resolving these disagreements.

Posner and Vermeule do not ground their understanding of emergency in legal definitions or limit their inquiry to the search for the essential and necessary features. Instead, they suggest that emergencies "may be defined by paradigm cases and family resemblances."[65] Their suggestion is not to look for essential or necessary features but for the characteristic ones. In taking this approach, they observe, "novel threats, heightened public concern, and deaths arising from hostile attacks typify these situations; the ordinary routines of bureaucratic policymaking are suspended, and elected officials quickly intervene to redirect resources and reorient policies. Time is of the essence, the stakes of blocking necessary government action are possibly catastrophic, and uncertainty reigns."[66] Situations that exhibit these features qualify as emergencies that are the focus of Posner and Vermeule's analysis. According to them, Pearl Harbor and 9/11 are the paradigmatic examples of emergency situations that exhibit these features.

It could be argued that Posner and Vermeule are offering a stipulative definition of emergencies that is suitable for their specific purposes. Because their main goal is to offer an institutional justification for judicial deference, conceptual

[65] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 43.
[66] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 42.

issues associated with emergencies do not merit an extensive examination. Thus, one may argue that their enlistment of the characteristic features of emergencies is sufficient for their purposes.

This defense of Posner and Vermeule's methodology has some merit. However, we should note that while stipulative definitions could be suitable for some purposes, they are subject to revision in light of a more comprehensive conceptual analysis. Cracks in the conceptual foundation could have serious ramifications for institutional arguments, especially if the concept in question sets the context for the institutional argument. Thus, a full engagement with issues surrounding the concept of emergencies is preferable. Furthermore, as it will become apparent in the course of my dissertation, institutional solutions to emergencies must reflect the variable nature of these circumstances as well as resolve the specific type of practical and normative challenges that could arise in these circumstances. Although Posner and Vermeule's account of emergencies tracks some important features relevant for this purpose, it misses some important characteristics, such as the exceptional nature of these circumstances.[67]

Following Jon Elster's distinction between three types of emergencies, Posner and Vermeule narrow their focus on the kinds of situations that they are interested in. Elster distinguishes between those emergencies that are produced by intentional human actions (wars, terrorism), those that are produced by human action but not of human design (economic and environmental crises), and those that

[67] For a discussion of exceptionality associated with emergencies, see Chapter 4 of this dissertation.

are produced by nature (volcanic eruptions and earthquakes).[68] Emergencies of the first type are the focus of Posner and Vermeule's deference thesis. Furthermore, while Posner and Vermeule make historical references at various junctures to wars, acts of aggression, social upheavals, revolutions, and economic crises, terrorism is the central phenomenon that motivates their advocacy of the deference thesis.

It is worth keeping in mind that, like the concept of emergency, the concept of terrorism is hard to pin down. One needs only to superficially peruse the political debates surrounding anti-terrorist measures adopted or debated in Western liberal democracies, such as debates about the adoption of Bill C-51 in Canada, to notice the recurring worry associated with defining terrorists, terrorist acts, and terrorist organizations. Undoubtedly, the focus on emergencies brought on by the threat of terrorism excludes a number of other emergencies, such as earthquakes and volcanic eruptions. But this should not suggest that sufficient conceptual clarity is achieved by this exclusion. The reverse may be true: by focusing on 'terrorist emergencies' the phenomena that we try to understand require a more extensive conceptual analysis because we need to arrive at an adequate conceptual account of terrorism and integrate it with a conceptual account of emergencies.

Posner and Vermeule also associate the concept of national security with emergencies. They say, "The essential feature of the emergency is that national security is threatened; because the executive is the only organ of government with the resources, power, and flexibility to respond to threats to national security, it is

[68] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 42. See also Jon Elster (2004), "Comments on the Paper by Ferejohn and Pasquino," pp. 240-241.

natural, inevitable, and desirable for power to flow to this branch of government."[69] The point to note is that a threat to national security is identified as an essential feature of emergencies. Immediately, questions spring up about the term "national security". What is it? What can and cannot threaten it? How do we measure the levels of threat to national security? Why does the threat to national security necessarily produce or amount to an emergency? Do all terrorist acts pose a threat to national security? These are but initial questions concerning this term and can be further complicated by questions about the role of the government in responding to this type of threat.

We should also note that developing a conceptual understanding of emergencies by narrowing the focus on matters of national security could result in a concept of emergencies that may not cohere with a number of examples that can normally be labeled as emergencies. Unless our understanding of national security is so broad that it captures any type of threat, it is likely that there can be emergency situations that do not threaten national security or do not threaten it in the same way. Protests, civil disobedience, certain types of information sharing are but initial examples of the types of activity that is sometimes brought under the wide umbrella of threats to national security. Yet, the nature of these threats, if they are indeed threats to national security, is diverse. In light of that, the use of a narrow concept of emergency in the context of developing an argument for a specific separation of powers scheme (or an argument for other types of institutional and practical issues) may be problematic. In particular, it is problematic to develop formulaic solutions to

[69] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 4.

emergencies, such as 'judges should always defer to the executive during emergencies,' because not all emergencies revolve around the threat to national security. And not all emergencies that can justifiably be understood as threats to national security threaten it in the same way. It is important to make sure that institutional solutions to emergencies address these concerns. To that end, an adoption of a narrow conception of emergency seems unpromising.

Posner and Vermeule tell us that resources, power, and flexibility of the kind that is characteristic of the executive branch of government are necessary to deal with emergencies. Institutions comprising the executive in the US and in most other modern states include extensive networks of ministries, agencies, and departments with substantial budgets, authority, and access to latest technologies. If situations in question require the use of such resources, we need to be careful to make sure that the conception of emergency that we are operating with does not implicitly rely on the intuitions stemming from other contexts where the scale of the crisis, the means of dealing with it, and the justificatory dimensions involved in adopting these means are different.

However, we also need to be careful not to assume that resources are all that is required to deal with emergencies. The executive uses many of these resources during normal, non-emergency circumstances and there is no controversy that in all such cases their use stands in need of justification from the liberal democratic point of view. Among other things, this means that executive policies and initiatives need to conform to constitutional values and principles. There is no reason to think without further argument that these constitutional considerations do not apply

during emergencies. If that is true, then in addition to having institutional resources to deal with a crisis, the executive should be justified in dealing with it in a specific way. An understanding of emergencies underpinning the scheme of the separation of powers must make room for an inquiry into the justifications of using the executive's resources.

Last but not least, it is important to keep in mind that Posner and Vermeule's argument in support of the deference thesis is prescriptive. They do not only want to convince us that the levels of deference were historically justifiable in cases such as 9/11. Their argument also supports the presumption in favor of deference to the executive during all future emergencies. In light of that it is necessary to provide a solid account of these situations. It is possible to push this difficulty back by designing a procedure for authoritatively settling disputes about emergency claims. But an institution tasked with such resolutions will still need to rely on an understanding of emergencies, even if we agree with Posner and Vermeule that such an institution should be comprised of officials with "special expertise" in emergency matters. For this reason, it makes sense to face this question squarely and from the start.

Posner and Vermeule seem to be aware of this difficulty but their attempts to dodge this consideration are unsuccessful. They tell us, "the answer to the "who decides" question is: it depends,"[70] that is, different institutions may authoritatively resolve this question, depending on the crisis. They also say that the cases that they are interested in are those where "all branches of government will agree that an

[70] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 43.

emergency exists…" and that "the executive has no private information about those events" because the crisis is "observable by all."[71] It is important to understand, however, that even if we agree that an event has taken place and that different government organs happen to be particularly suited to address the crisis, this does not mean that we agree on the exact nature of the problem or on the best means of dealing with it.

It is important to understand that an agreement about the fact that a crisis exists does not resolve institutional questions about which branch of government is responsible for addressing the crisis and what role other branches might play in the process. It also does not speak to the fact that there seem to be important reasons, stemming from considerations about government legitimacy and its responsibility to those it governs, that it is the government that should address emergencies and not non-government agencies, even if they possess the required resources. In short, it is problematic to assume that an institution that has resources to deal with an emergency is justified in dealing with it simply in virtue of having the resources. We need to better understand the nature of responsibility between government institutions and those they govern in order to understand how institutional problems need to be resolved for an emergency context.

In light of the above considerations, Posner and Vermeule's claim that "the deferential view does not rest on a conceptual claim" but "rests on a claim about relative institutional competence and about the comparative statistics of governmental and judicial performance across emergencies and normal times" is

[71] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 43.

dubious at best.[72] Even if it is true that the levels of deference in the past were justifiable, and if it is true that the survey of the institutional capabilities of the governmental and judicial performances clearly favor the executive as the organ which is in the best position to act – and those are big ifs, – it does not follow that all that matters is whether we agree on an occurrence of an event and on which institution has the resources to deal with the crisis. Even if we agree that the tradeoff framework is suitable for dealing with emergencies – a claim that will be thoroughly analyzed and undermined in the next chapter – it does not follow that only institutional considerations of the sort invoked by Posner and Vermeule matter.

## 2.3. THE GENERAL ORIENTATION OF THE INQUIRY

In this section, I begin to outline the method that I employ for my analysis of the emergency problematic and address several methodological concerns that can be raised about my approach. By emergency problematic I refer to a set of problems and considerations that define and are associated with the phenomenon of emergencies. An exploration of emergency problematic involves an uncovering and organization of the relevant features of emergency situations for the purpose of understanding. The goal is to develop a suitable account of emergency situations with the view to evaluating Posner and Vermeule's main theses and, more generally, to providing a basis for political and legal inquiries relevant to this type of circumstances.

[72] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 17.

Methodological debates about the nature of law inspired and shaped the methodological choices for this inquiry into the emergency problematic.[73] However, this should not suggest that developing an understanding of emergencies as legally significant circumstances is my exclusive motivation. I am not after anything like a distinctively legal conception of emergency, although my analysis does have legal implications that are important for addressing the kind of legal and political questions that Posner and Vermeule engage with. I argue that the methodological approach that I adopt for my analysis promises clearer and more useful results than the one adopted by Posner and Vermeule.

My analysis begins at a pre-theoretical stage. This means that I begin the conceptual work by focusing on what seem to be common intuitions about emergencies. There are five such intuitions, which are: the distinction between normal and emergency circumstances as well as disasters, the presence of serious harm, the high degree of urgency, the necessity of response, and the exceptionality of emergency situations. If the reader disagrees with these pre-theoretical characteristics, the discussion of these features in the course of my analysis in the next chapter is meant to clarify these terms and justify their inclusion in my account of emergencies. I do not claim that my analysis is sufficient for developing anything like a complete or exhaustive concept of emergencies. Alternative approaches may be possible and the one that I pursue can be developed in greater detail and depth. However, the insights of my analysis are sufficient for undermining Posner and

[73] In particular, I have greatly benefited from the methodological debates between the followers of Dworkin, Fuller, and the 20th century positivist (as well as the internal disagreements within the positivist camp).

Vermeule's position and for gaining a perspective on the kind of inquiry we will need to pursue as we aim to answer the plausibility of the deference thesis.

## 2.4. DIRECTLY AND INDIRECTLY EVALUATIVE METHODOLOGIES

According to common understanding, emergencies are situations are associated with pressing practical and normative problems. If that is right, the concept of emergency picks out certain circumstances in the world, states of affairs, or facts about the world. Because of this, the project of developing an understanding of emergency must engage with an analysis of the empirical phenomena, i.e., factual situations and features of these situations. On the other hand, it seems that invocations of emergency in our practice also identify normatively significant circumstances. Often, emergencies are difficult situations that involve various normative problems. They are not just those circumstances that share some empirical feature, like a high death toll or destruction. They are also those circumstances that raise normative concerns, such as 'what should be done?' and 'who is responsible for dealing with an emergency?'

Thus, in everyday usage, the invocation of emergency seems to serve at least two purposes: one, it signals a certain state of affairs, and, two, it claims that this state of affairs is normatively significant. More specifically, it merits a certain response from someone.[74] It may be possible to find examples of emergencies that

[74] If someone runs into the room and states that there is an emergency, it seems reasonable to ask 'what is going on?' and to think of the possible ways of addressing the situation. Similarly, upon learning that a state declared a national emergency, it seems reasonable to assume that there are certain problematic circumstances in that state that need to be urgently addressed. If that is true,

do not have both these empirical and the normative dimensions. However, for the purposes of conceptual inquiry into emergency situations, it is prudent to adopt a methodology that mediates between these two dimensions, since some, if not most, emergency situations seem to involve them. Importantly, the situations that Posner and Vermeule have in mind certainly combine both these aspects. Their deference thesis is a purported solution to a problem (national security crises) that is constituted by certain circumstances that call for a response.

In developing an account of emergencies, it is important to differentiate between empirical and normative features as well as to develop an understanding of their interrelations in order to understand the problems characteristic of the emergency problematic. How do we know that there is an emergency? Why do we sometimes disagree that there is an emergency? Who should be in charge of dealing with an emergency and why? What can and cannot be done in order to address an emergency? The task of answering such questions can be aided by an understanding of the interrelation between the empirical and normative dimensions of the concept of emergency.

Julie Dickson's analysis of directly evaluative and indirectly evaluative methodologies in her book *Evaluation and Legal Theory* could help with our inquiry. Dickson argued in favor of an indirectly evaluative approach to the inquiry into the nature of law. One of the advantages of this approach is that it promises to deliver a systematized understanding of the normative and descriptive features of the

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invocations of emergency issue a call for some action. Examples like these invite the claim that our common understanding of emergencies involves the empirical and normative dimensions on which I focus.

phenomenon in question. To understand the main tenets of this approach, let us distinguish between directly evaluative propositions and indirectly evaluative propositions. Dickson tells us,

> …to evaluate something is to ascribe value or worth to it. If we think, then of there being some basic category of value, for example, the property of being good, then what I shall refer to as directly evaluative propositions will be those propositions which ascribe value or worth to something in this fundamental sense of accounting it as good. Directly evaluative propositions, then, are those which are of the form, or which entail propositions which are of the form, "X is good".[75]

'An emergency situation is a bad situation' or 'Emergencies are circumstances that should be avoided' are examples of directly evaluative propositions that capture common attitude towards emergencies. Reasons for holding such attitudes can prove to be insightful in regard to the common experience of some emergency situations. However, it is important to determine to what extent our understanding of emergencies in general depends on such claims. While directly evaluative propositions can be useful for gathering pre-theoretical data about a phenomenon and for discussing the justifiability of our attitudes towards it, we should be careful when considering whether to include such claims into an account of a phenomenon. By including these directly evaluative propositions, we risk confusing the insights about our attitudes towards the phenomenon with the insights about the nature of the phenomenon independent of our normative evaluations of it. It is possible to distinguish these two types of evaluations because it is possible to establish a sufficiently clear distinction between considerations of our attitudes (whether we think something right, good, legitimate, or justifiable) and considerations that describe it in normatively neutral terms

[75] Julie Dickson (2001), *Evaluation and Legal Theory*, pp. 51-52. Author's citations are omitted.

(what happens, how fast, on what scale). The risk involved in using directly evaluative propositions in descriptions of phenomena is the potential confusion of the question 'what is?' with the question 'what ought to be?' with all the fallacious ramifications of this confusion. For this reason, it is important to be on the lookout for directly evaluative propositions in conceptual accounts.

In contrast to directly evaluative propositions, indirectly evaluative ones take the form "X is significant", or entail propositions that are of that form. As Dickson explains, "indirectly evaluative propositions such as "X is important", then, state that a given X has evaluative properties but they are evaluative properties from which it does not follow that this same X is good."[76] In other words, indirectly evaluative propositions flag those aspects or features of a phenomenon that are normatively significant without specifying the nature of this significance. So, for example, the claim 'emergencies test our normative commitments' is an indirectly evaluative claim. It describes emergencies as the circumstances that raise normative problems but it does not involve a substantive evaluation of this feature of emergencies.

Putting these points in more general terms, the difference between defining X as important and defining it as good is that in the former case we leave open the possibility of a positive, negative, or a number of other normative evaluations. In contrast, by defining X as good, we assume that X has a specified evaluative valence. As Dickson explains,

> Another way of putting this might be to say that in the case of proposition like "X is an important feature", the evaluation concerned does not go to the substance or content of the subject of the proposition in the same way as is the case with the directly

[76] Julie Dickson (2001), *Evaluation and Legal Theory*, pp. 53-54. Author's citations are omitted.

> evaluative proposition. In asserting that "X is an important feature", we are accounting the *existence* of some X as significant and hence worthy of explanation, not directly evaluating as good or bad the substance or content of that X. For example, if I claim that leaving his native land was the most important thing that happened to John in his life and is hence important to explain in understanding his life, my claim does not entail that the event in question was a good or bad, wonderful or terrible thing.[77]

It is important to emphasize that the indirectly evaluative approach is meant to prepare the ground for substantive evaluations. Consider the following example explained by Wil Waluchow on the basis of which he argues for the difference between identifying moral relevance of a concept of abortion or one of its features and taking a moral stand on the issue centered on this concept or one of its features:

> It is obviously morally relevant to the abortion debate that a living entity which, if allowed to develop naturally could become a fully fledged human being, is killed when abortions are performed. One can know that this killing is a morally relevant feature of abortion without knowing whether abortions are ever justified. Indeed, the relevance issue is one upon which all sides of the abortion debate agree even though they disagree radically on the effect of this feature on the ultimate justification of killings foetuses. All participants in the debates would find totally inadequate any theory which neglects even to mention or account for the fact that killing does take place.[78]

Waluchow argues that it is necessary to identify the morally relevant features of the concept of abortion. Without these features, an account of abortion would be inadequate because, as we know, debates surrounding abortion do focus on the moral issues. However, in order for the parties of the debate to have a fruitful conversation about the moral merits of this practice, it is imperative that they first agree on an understanding of the phenomenon in question, including the features that are morally significant. Once that understanding is reached, a substantive debate on the moral merit and demerits of abortion can take place.

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[77] Julie Dickson (2001), *Evaluation and Legal Theory*, p. 53.
[78] Wil Waluchow (1994), *Inclusive Legal Positivism*, p. 23.

As Waluchow and Dickson argue, development of an indirectly evaluative account of a phenomenon can aid in the project of assessing its normative significance, i.e., in engaging with substantive normative questions surrounding the phenomenon. The distinctive feature of the indirectly evaluative methodology is that it requires a clear demarcation of the task of identification of conceptually significant features of a phenomenon in question (including the normatively significant ones) from the task of assessing it in terms of moral worth, legitimacy, justifiability and other substantive normative standards. If the purpose of the inquiry is to provide as complete an account of a phenomenon as possible, and if normatively significant features are important for understanding the phenomenon in question, then the indirectly evaluative approach is a suitable methodology.

However, the account of emergencies that I will offer in the following chapter will be directly evaluative. Indeed, I do not think it is possible to come up with a plausible account of emergencies in strictly indirectly evaluative terms. In my view, an adequate account of emergencies must include, what I call, a response feature. By this I mean that to understand that a situation is an emergency is to acknowledge that it requires a response; the 'emergency' label implies that there is a reason for addressing the situation. If it is true that the response is a necessary conceptual feature of emergencies, it follows that in order to classify a situation as an emergency, one must make a direct normative evaluation of the situation. In other words, one must not only acknowledge that the situation is significant but also to acknowledge that something is *ought* to be done.

Dickson's analysis of directly and indirectly evaluative approaches helps us to prepare for the conceptual analysis of emergency situations. First, it counsels us to capture the concept descriptively by focusing on empirically verifiable features as well as those features that are normatively significant. The identification of the normatively significant features on the conceptual stage prepares us for normative evaluations but does not dictate their outcomes. Second, if an adequate understanding of the concept of emergency requires a certain normative stand towards the situations to which it refers, such as captured by the claim 'all emergency situations are bad', it is necessary to identify the features that necessitate such directly evaluative claims and justify their inclusion in the account of emergencies. It is important to be aware whether our understanding requires directly evaluative propositions in addition to the indirectly evaluative ones. Third, it is important to work out the relation between, on the one hand, an understanding of the concept of emergency and, on the other hand, various normative implications of this understanding. In particular, we are interested in understanding if emergencies place any constraints on agents' ability to make good judgments and act responsibly in these situations.

## 2.5. IS EMERGENCY A THICK CONCEPT?

It is helpful to make a distinction between three types of concepts in order to facilitate our inquiry into the emergency problematic. It can be argued that there are three types of concepts: descriptive, normative, and thick ones. It should be noted

that there are ongoing philosophical debates about the adequacy and usefulness of these distinctions. But there is no need for us to explore these debates in great detail. For our purposes it is helpful to outline the bases for making these distinctions in order to facilitate our conceptual inquiry into the emergency problematic. In short, these distinctions allow us to focus on the role or meaning of relevant concepts for our understanding and reasoning with respect to emergencies. My intention in introducing these distinctions is not to engage in a philosophical debate about the relation of facts and values but to explore the complexity of this relation with a view to analyzing concepts. It will be possible to organize the insight about the relation between descriptive and normative features of the concept of emergency in light of the results of this exploration.

The distinction between descriptive and normative concepts can be cashed out along the lines of the well-known is/ought distinction, which claims to separate the realm of facts from the realm of values. According to this picture, descriptive concepts pick out facts about the world and normative concepts pick out values. Thick concepts can be said to complicate the separability of these realms because they combine both descriptive and normative elements.

Let's start with descriptive concepts. A triangle is an example of a descriptive concept. To understand what it means for a thing to be a triangle, we need to identify those features that are distinctive of those objects. Suppose that when I say that X is a triangle, I mean that it is an enclosed, three-sided shape, located on a flat surface. This description does not include any normative features. Instead, it claims to pick out a set of facts. You may, of course, disagree whether the set of features

that I selected is a good one. We may also disagree whether Egyptian pyramids or the entrance to Louvre exhibit these shapes and are good examples of triangles. Such disagreements certainly call for an evaluation of the set of defining conceptual features or instantiations of the concept. However, the meaning of the concept, as we use it, is limited to the non-normative aspects. Of course, we can wonder whether a world devoid of triangles would be better or worse for it, or whether triangles are better shapes than circles or squares. These sorts of normative inquiries, – and this is important, – are separable from the descriptive account of the shape itself that the concept of a triangle serves to define.

'Evil' is an example of a normative concept. To understand the meaning of this term, it is necessary to explicate our attitudes towards this or that state of affairs. When I say that genocide is evil, I am expressing a certain type of attitude towards genocide that is captured by the concept of evil. I am evaluating the phenomenon of genocide and express the result of my evaluation or my attitude towards it by using this concept. Thus, it can be argued that I make normative judgments in addition to describing the world of facts. We may disagree whether this or that is an example of evil, and we may also disagree about the possibility of developing or explicating a sufficiently clear account of evil. Such disagreements are normative disagreements if they involve considerations about what should and what should not be and what is and what is not of value.

Thick concepts can be said to complicate the straightforward separability of the factual and the normative realms. Thick concepts combine descriptive and normative elements such that their meaning cannot be properly grasped without an

integrated understanding of these two types of elements. Courage and fool-heartedness are examples of thick concepts. On the one hand, these concepts are descriptive: they identify specific features of acts or behavior that can be described in non-normative terms. On the other hand, they also imply an attitude towards those descriptive features. As Bernard Williams explains, "The way these notions are applied is determined by what the world is like (for instance, by how someone has behaved), and yet, at the same time, their application usually involves a certain valuation of the situation, of persons or actions. Moreover, they usually (though not necessarily directly) provide reasons for action."[79] If to understand the meaning of a thick concept it is necessary to understand a set of descriptive features in combination with normative ones, then thick concepts can be said to undermine the separability of the realm of facts from the realm of values. As Williams explains, "Terms of this kind certainly do not lay bare the fact-value distinction. Rather, the theorist who wants to defend the distinction has to interpret the workings of these terms, and he does so by treating them as a conjunction of a factual and evaluative element, which can in principle be separated from one another." [80]

When exploring our intuitions and pre-theoretical examples of emergencies, we should keep in mind these distinctions. According to common understanding, emergency situations involve both empirical and normative dimensions. If that is correct, it may be that a plausible account of emergencies must combine a set of descriptive features with certain substantive normative judgments. As I will argue in the course of my analysis, not all emergency situations require this sort of

[79] Bernard Williams (2011), *Ethics and the Limits of Philosophy*, p. 144.
[80] Bernard Williams (2011), *Ethics and the Limits of Philosophy*, p. 144.

combination. However, in a number of characteristic cases our understanding of emergencies involves a certain attitude towards the facts of the case. Namely, we tend to understand some emergencies to be those situations when one is warranted in acting against the established normative standards. (I will provide a more detailed explanation of this point in my discussion in the next chapter.) For now, it is important to address potential concerns with developing indirectly evaluative accounts of thick concepts.

The indirectly evaluative methodology insists on separating the project of substantive normative evaluations of a phenomenon from the project of identifying normatively significant aspects of the phenomenon. How is it possible to analyze a thick concept in this way, that is, a concept the understanding of which requires an account of substantive normative evaluation? Indirectly evaluative analysis can prepare the ground for developing an account of a thick concept. Even if full understanding of a phenomenon requires substantive normative judgments, it is important to ensure that only the relevant attitudes are reflected in the account. The indirectly evaluative methodology can aid in weeding out the conceptually irrelevant evaluations.[81]

It should be remembered that the separability of the realm of facts from the realm of values, which is challenged by the use and intelligibility of thick concepts, is not presumed by the indirectly evaluative methodology. The method only asks the theorist to favor normatively neutral descriptions because it pursues clarity of

[81] The indirectly evaluative methodology could be used in a similar way to analyze such concepts as 'disaster' or 'terrorism'. Even though an analysis of these concepts could aid in our inquiry into the nature of emergencies, unfortunately it is beyond the scope of this dissertation to engage with these concepts.

understanding, which it aims to achieve by separating normatively neutral from normatively substantive claims. But if phenomena and experiences that we try to understand challenge the separability of the normative and empirical realms, the indirectly evaluative methodology should be able to acknowledge and deal with such cases. The main benefit of this methodology is that it alerts us to different types of possible evaluations of phenomena and aims at systematizing them for a clearer understanding.

## 2.6. CONSTRUCTIVE CONCEPTUAL EXPLANATION

There are several goals that conceptual analysis can pursue and it is important to set them out explicitly in advance in order to be able to evaluate the results of the analysis. A standard approach to conceptual analysis aims at explicating concepts, notions, categories, and models of thought out of common practices and experiences. The process of the analysis begins by, first, gathering the data in the form of intuitions, common understandings, most often cited instances or the examples of a phenomenon in question, in short, paradigms, and, second, by systematizing the collected data. The process of systematization often includes several stages: first, the central and paradigmatic instances of the concept are identified. Then, the concept in question is contrasted with other concepts with a view to developing an insight into its necessary, sufficient, essential, central, or characteristic features. At the following stages, explanations are offered about the distinctness of the borderline cases, counter-intuitive examples, if there are any, and

any implications worthy of attention. On this view, the task of conceptual analysis is to explicate concepts that we more or less know how to use and to polish our understanding of them for a clearer and a more consistent usage.

If the purpose of the analysis is to explicate and refine concepts that we already know, then it is inviting to evaluate the results of such analysis according to the breadth of examples that they can accommodate and their faithfulness to the existing practices and experiences. However, it is important to understand that conceptual work does not have to be limited to these tasks and goals. When exploring the purpose of philosophy and the role that concepts and ideas play in creating and sustaining social practices and individual experiences, Isaiah Berlin argued,

> …much of the misery and frustration of men is due to the mechanical and unconscious, as well as deliberate, application of models where they do not work. Who can say how much suffering has been caused by the exuberant use of the organic model in politics, or the comparison of the state to a work of art, and the representation of the dictator as the inspired moulder of human lives…? Who shall say how much harm and how much good, in previous ages, came of the exaggerated application to social relations of metaphors and models fashioned after the patterns of paternal authority, especially to the relations of rulers of states to their subjects, or of priests to the laity?[82]

The misery and frustration that is the result of an adherence to inadequate concepts can be alleviated, at least in part, by philosophy. In particular, the revision and development of concepts can offer new perspectives and ways of thinking. Thus, as philosophers, in addition to understanding the existing practices and experiences through the lens of the familiar and common concepts, we are also interested in evaluating our common ways of thinking, criticizing certain notions, and offering alternatives by revising, developing and inventing new concepts.

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[82] Isaiah Berlin (2013), *Concepts and Categories*, p. 10.

The motivation behind conceptual analysis applied to the ideal of an emergency is twofold. On the one hand, the intention is to explicate and systematize the common understanding of emergency situations. To this end, it is important to do justice to the regular usages of the term and to account for the paradigm examples illustrating this concept. On the other hand, the intention is to develop that understanding of emergencies in such a way as to help address a number of controversies associated with the emergency problematic. In particular, I am looking to develop an account of emergencies that would be useful for addressing Posner and Vermeule's arguments in favor of judicial deference during emergencies.

In his book *Understanding the Nature of Law*, Michael Giudice distinguishes between standard conceptual analyses, which aim at uncovering implicit understandings, from constructive conceptual explanations. The latter, as Giudice explains, "preserves crucial critical space for revision and explanation of ordinary concepts, in ways responsive to new problems and new phenomena."[83] Developing constructive conceptual explanations of a phenomenon involves striking a balance between relying on general and common understandings on the one hand and, on the other, developing and re-developing these understanding with the view to addressing new kinds of problems.[84] As Giudice puts it with regard to the project of developing constructive conceptual explanations of law, "while conceptual analysis is concerned with elucidating and making explicit what is already implicit in some particular culture's self-understanding…, constructive conceptual explanation

[83] Michael Giudice (2015), *Understanding the Nature of Law: A Case for Constructive Conceptual Explanation*, p. 135.
[84] See, for example, Giudice's discussion of the limits of self-understanding. Michael Giudice (2015), *Understanding the Nature of Law: A Case for Constructive Conceptual Explanation*, pp. 150-156.

attempts to correct, revise or improve on what might be mistaken, distorting or parochial in that self-understanding…"[85]

One of the most significant differences between offering a traditional conceptual analysis of a phenomenon and providing a constructive conceptual explanation of it is the manner in which these two approaches treat disagreements surrounding the usage and meaning of concepts. We have already anticipated that the concept of emergency may have different meanings in the public in contrast to the private sphere as well as in the legal and the everyday contexts. The task for traditional conceptual analysis is to explain away as many of these differences as possible. An account of the concept of emergency has to be general enough in order to accommodate all these usages. The more cases it leaves unaccounted for, the less successful is the analysis. The conceptual account is to be constructed by finding some set of features that is common to all the relevant cases.

In contrast, the project of offering a constructive conceptual explanation aims at offering a useful conception of a phenomenon for a certain task. The goal is not only to make explicit what is already implicit in our practices. The goal is also to develop a tool for addressing problems that we encounter in our practices. This does not mean that the theorist is free to develop her concepts in any way she pleases without any regard to common experiences and practices. Instead, she must strike a balance between the project of explicating the common meaning and the project of developing a useful tool for a specific purpose. Thus, the constructive

[85] Michael Giudice (2015), *Understanding the Nature of Law: A Case for Constructive Conceptual Explanation*, p. 159-160.

conceptual explanation approach places a greater emphasis on the importance of contingent features of a phenomenon in contrast to its traditional counterpart.

Giudice argues that Hart's theory of law is a "paradigm example" of this type of conceptual explanation because of the role it allows for several contingent features and relations, like the separability of law from morality as well as the role of coercion.[86] Giudice argues that Hart's theory shows "how the construction of philosophical concepts can be seen to rely not just on purported necessary features of law but also on recognition of contingent features and relations."[87] For constructive conceptual explanations, contingencies are not there just to be explained away but are potentially promising elements for designing useful explanations that can be used to tackle a range of practical and theoretical problems. Contingent features and relations are those that help to develop an understanding of a phenomenon with a view to addressing a certain problem but which may not figure in every instance of the concept as it is used.

Giudice sets out three success criteria that shape the purposes behind providing constructive conceptual explanations and guide the theorist to account for the common experiences on the one hand and to introduce innovation on the other. First, "conceptual explanation are meant to clarify our understanding of some phenomena, and as such they ought to help us in exposing distortions or misrepresentations, as a means to clearing the way for more adequate explanations

[86] My goal here is not to endorse Giudice's view of Hart but rather to provide an illustration of such an approach could be implemented.
[87] Michael Giudice (2015), *Understanding the Nature of Law: A Case for Constructive Conceptual Explanation*, p. 67.

and understanding."[88] This criterion requires a degree of faithfulness to regular usages of the relevant concepts. Second, Giudice explains, "while conceptual explanations will not answer all the questions we might have about [the phenomenon in question], better conceptual explanations will serve as precursors or accompaniments to subsequent moral deliberation and judgment."[89] This criterion orients the theorist towards the inquiry for which the concept is being constructed. It acknowledges that the price of the usefulness of the developed explanation can be a lack of conceptual universality. However, the third criterion postulates that "conceptual explanations are meant to be general, so those which approach universality are naturally to be preferred to those whose scope is limited to particular times and places."[90] Thus, the aspiration of traditional conceptual analysis to attain universality is not totally lost in constructive conceptual explanations; however, the attainment of universality is no longer the exclusive or primary goal.

## 2.7. CONCLUSION

My engagement with the emergency problematic is suited to the constructive conceptual explanation methodology. First, one of my primary goals is to engage with the arguments of Posner and Vermeule, whose treatment of the topic of

[88] Michael Giudice (2015), *Understanding the Nature of Law: A Case for Constructive Conceptual Explanation*, p. 88.
[89] Michael Giudice (2015), *Understanding the Nature of Law: A Case for Constructive Conceptual Explanation*, p. 89.
[90] Michael Giudice (2015), *Understanding the Nature of Law: A Case for Constructive Conceptual Explanation*, p. 89.

emergency is by and large limited to the context of national security crises. Thus, it is more important to have a coherent account of the concept of emergency in this context rather than a more general but less coherent account. The constructive conceptual explanation approach promises to deliver such an account.

Second, given the parameters of my debate with Posner and Vermeule set out by the deference thesis, the normative and institutional problems that we are addressing require an understanding that is going to be insightful for the solution of these problems. Of course, this does not suggest that any deliberate attempt is going to be made to limit the scope of the applicability of the concept or preclude the development of avenues for addressing other problems associated with the emergency problematic. However, the conceptual account that I develop will need to be more transparent and useful for addressing the problems surrounding judicial deference during emergencies.

With these methodological commitments and guidelines in mind, in the next chapter I present my analysis.

# CHAPTER 3: CONSTRUCTIVE CONCEPTUAL EXPLANATION OF EMERGENCIES

## 3.1. INTRODUCTION

In this chapter I offer an account of emergency situations. My account focuses on four aspects of the emergency problematic. I explore the contrast between emergency circumstances on the one hand and disasters as well as normal circumstances on the other. I also focus on the harm, urgency, and response features of emergencies. In developing my analysis I use, what I take to be, common intuitions and attitudes towards emergency situations. The risk of this approach is that some readers may disagree with the role that these features play in the explanations of their understanding of emergencies. In the course of my analysis, I explain and defend my account and offer reasons for accepting my characterizations of emergency situations. I will use the understanding of emergency situations that is worked out in the course of this chapter in order to critique some of Posner and Vermeule's arguments. It will also be used more positively in the following chapters for developing a strategy for dealing with emergencies on the state level.

## 3.2. NORMALCY-EMERGENCY-DISASTER CONTINUUM

The first step towards working out a concept of emergency is to situate it among other circumstances. On the most abstract level, it is possible to distinguish between normal and emergency circumstances. On this level, this distinction is only

conceptual; it is drawn between two types of circumstances and no substantive evaluation of any one state is offered. While substantive normative issues play a very important role in the shift between these two types of circumstances, and indeed emergencies are philosophically interesting and practically puzzling because of the substantial normative issues involved, it is certainly possible to draw a conceptual distinction between emergency and normalcy without engaging with the normative issues from the outset. That said, it should be noted that for the purposes of my analysis the assumption is that normal circumstances meet certain substantive criteria. The normal is that which we think to be normal for the Western liberal democracies. I set aside the terrible, unjust and inhuman contexts that sadly can be characterized as normal and all too familiar for some people living in tyrannical regimes. This stipulation does not render the distinction between normalcy and emergency substantive but only focuses the analysis on the context relevant for my project.

Normalcy can be understood as a steady, common, and a familiar framework. It is the way things usually tend to run in our communities whether we find this way to be justified or not. Understood in this way, normalcy creates a contrast with emergency. An emergency is a situation where the normal order of things is interrupted or threatened or is about to be interrupted or threatened. The fact that the normal order of things is threatened by an emergency in this way is normatively significant but should not be taken as a directly evaluative claim; no substantive value is attributed to the steady and familiar way of things or to the interruption in that order.

The acceptance of the characterization of normalcy as a steady, common, and familiar state of affairs does not imply that no changes take place during normalcy. Heraclitus observed, "no man ever steps in the same river twice, for it is not the same river and he is not the same man." First and foremost this observation applies to the common and familiar experiences. In contrast, changes that are brought about by emergency circumstances designate moments when normalcy hangs in the balance. They can be said to be critical circumstances because they promise a qualitatively different state of affairs. But in addition, and very importantly, the qualitative change that threatens normalcy is judged to be a change for a much worse state of affairs.

Thus, emergencies can be said to be pivotal moments because the normal order of things is at risk of deteriorating or collapsing. To understand their pivotal nature it is useful to situate emergencies between normal and disastrous circumstances. Unlike the relation between normalcy and emergency, the relation between emergency and disaster is not normatively neutral. The contrast between a disastrous state of affairs and the normal one is established by an evaluative judgment. The former state is worse, indeed much worse, than the latter. We certainly always try to avoid disasters and often we are prepared to go to great length in order to prevent them because we judge them to be horrible and tragic states of affairs. Of course, we may disagree whether a given state of affairs constitutes a disaster or is merely a different state of affairs. Our conceptual account of emergencies should be open to the possibility of diverging views regarding what sorts of states of affairs are disastrous. However, the account that leaves such

questions open does not thereby become normatively neutral because, according to the common usage, a disastrous circumstance is always a bad one. In other words, to claim that a state of affairs is disastrous is to make a directly evaluative judgment. And because an understanding of emergencies is made possible, in part, by the contrast between these situations and disasters, it is important to be aware of this feature.

It is useful to draw a distinction between emergencies and critical periods. This distinction can help to explain why it is possible to be mistaken about the existence of emergencies as well as to shed more light on the normative significance of these circumstances. As it was claimed earlier, normalcy is not a static state. Normal and familiar states of affairs undergo a continuous change. Emergencies can be understood as sudden breaks in the normal order and be contrasted with continuous, ongoing changes characteristic of normalcy. However, we should be careful not to confuse any sudden break in the normal order with an emergency. High-ranking officials may leave their posts for personal reasons. Certain events in neighboring states, such as natural disasters or economic crises, may suddenly change domestic politics. Rapid technological advancements and social movements may change social dynamics of a community in a profound way within a relatively short period of time. While such examples can be taken to illustrate sudden breaks in the normal order of things, it is wrong, and contrary to common usage, to label all such events as emergencies. Emergencies are pivotal points not only because they are signals of and precursors to drastic changes, but, importantly, they are also signs of drastic changes for the worse. If we call any drastic change in the normal order a

critical period, then emergencies are critical periods that signal a deterioration of the normal order from the normative point of view. When events such as 9/11, the Paris attacks of 2015, or various economic crises are characterized as emergencies, the implication is that these events changed the normal order of things for the worse.

It is important to note that at times it is possible to characterize one and the same situation as a disaster and as an emergency. Consider, for example, the terrorist attacks on the World Trade Center and the pentagon on September 11, 2001. It is certainly consistent with the common usage of the term to characterize that event as a disaster. Those attacks resulted in serious devastation and a lot of casualties. But it is also possible to characterize that event as an emergency if we understand it to be a precursor to further devastation and deaths brought about by future terrorist acts somehow related to the events of 9/11. Some of the "war on terror" rhetoric that played a very prominent role in the wake of 9/11 assumed that the events of that tragic day were part of a larger narrative that promised more terrorist attacks, unless certain measures were taken. It can be argued that from that perspective 9/11 was an emergency because it was a pivotal moment in the history of the United States. It is the event that forced America to face the ongoing threat of terrorism.[91] The fact that one and the same event can be viewed as an emergency and as a disaster does not undermine anything that I say about the conceptual relation between normalcy, emergency, and disaster. To understand

[91] I would like to stress that I am not taking any position on the role of the events of 9/11 in the historical context. My exclusive aim is to demonstrate how it is possible to think about one and the same event as an emergency and as a disaster.

emergencies is to understand the perspective that one can take on events and states of affairs.

When disasters appear on the horizon as real as opposed to only hypothetical possibilities and meet several other criteria (identified below), it can be said that there is an emergency. It is important to emphasize that emergencies and disasters are separate concepts. Emergencies tend to precede disasters and may pose different types of normative challenges.[92] By maintaining the distinction between emergencies and disasters, we are in better position to appreciate the nature and the sources of harm that form a part of the emergency problematic. More specifically, with this distinction, it is possible to separate the harms as those that are produced by the disaster itself and those that arise as a means of preventing the disaster. Both types of harm can undermine the normal order but the ethical significance of incurring these harms may be crucially different. For example, harms that are produced by a certain type of disaster may not be anyone's fault and thus no one should be held responsible for their advent. However, there may be certain types of measures introduced as means for addressing such disasters that may place the responsibility for inflicting harm in the course of mitigating a possible disaster on specific agents. The distinctions between normalcy, emergency, and disaster offer us a vantage point for assessing these issues.

We should also note that it is possible to make mistakes in classifying situations as disasters and, consequently, as emergencies. For example, we can

[92] Wil Waluchow has suggested that a scenario where a volcano begins to spew out lava near a town could qualify both as an emergency and a natural disaster. If he is right, then it is impossible to always neatly separate disasters and emergencies.

imagine an individual who lived shortly before the beginning of the Civil War in America and who judged the abolition of slavery to be a social catastrophe. Such an individual could regard the Civil War as an emergency measure to prevent this "catastrophe." Obviously, such judgment is wrong. But the possibility of making wrong judgments does not undermine the conceptual contrast between normalcy, emergency, and disaster that I sketched out above. We may disagree about what counts as normalcy and we may disagree about what can constitute a disaster. However, it seems very plausible to claim that we can designate some circumstances as normal and imagine that these normal circumstances can drastically deteriorate. If that is true, then an emergency situation – the period when normalcy hangs in the balance in the face of a disaster – is logically located between normalcy and disaster and signals a possible deterioration of normalcy. The fact that sometimes people are wrong in their assessments of situations according to these distinctions does not undermine the logic behind them.

## 3.3. HARM

One of the central and most obvious conceptual elements of emergencies is harm. The central motivation of the inquiry into the emergency problematic is the development of an understanding of and strategies for dealing with harms that are characteristic of emergency situations. Because emergencies are situations that can occur in all sorts of contexts, it stands to reason to employ a broader rather than a narrower understanding of harm. The types of harms that are most commonly

associated with this context involve death, destruction, physical pain, as well as long-term and seriously negative consequences for individuals, communities, and environments. Given our motivations for engaging with the inquiry into the emergency problematic, threats to the existence and proper functioning of institutions, such as rights and a variety of public norms on the one hand and institutional structures, such as family or state on the other, should also count as kinds of harms that can give rise to emergency situations.

Emergencies are situations when the stakes are high. In other words, these situations are characterized by the probability of serious as opposed to trivial harms. The gravity of harm is one of the central elements of emergency situations that give rise to practical and normative issues. It is because there is so much at stake that it is important to make sure that right procedures are developed and good calls are made in these situations. Of course, we may disagree whether a given scenario is an example of a state of affairs that is characterized by the presence of serious harms. Where some see serious harms, others may see only moderate ones or see no harms at all. This is not, however, the kind of worry that affects my explanation of emergencies because the fact of a disagreement about the status of an event as an emergency in virtue of the assessments of the harmfulness of this particular situation does not in any way undermine the understanding of emergency situations as those that involve grave and serious harms.

The nature of harms in question can vary. Most often individuals, groups of people, as well as communities are threatened with harms during emergencies. In the least controversial cases, it is the survival of individuals that is at stake. In

addition, the prospect of serious harms to the legal and political institutions of a community, to the economical stability, to the environment, and to social institutions can prompt an invocation of emergency. Very generally, we can say that when serious harms threaten the most valued aspects of individual and social life, such as physical survival or the institutions that serve as a foundation for individual and communal life, then the appearance of these harms on the horizon of real possibilities can explain invocations of emergency.

It is worth emphasizing that one disaster can pose a variety of harms. Harms can affect different aspects of individual and communal life and they may appear in various temporal patterns: some harms come at once, while others appear in a sequence. For example, consider the prospect of a foreign invasion. Historically, most invasions brought about destruction, loss of human life and sometimes enslavement. It was not uncommon for invaders to sabotage cultural practices, social institutions, and appropriate economic and cultural wealth. The purpose of some invasions was to annihilate cultures, including customs and traditions of a community, its religious and cultural institutions, as well as its ethnic identity. Similarly, an environmental catastrophe, such as a nuclear explosion, may often have a variety of dimensions of harm as well: an immediate loss of life, a destruction of a habitat, a pollution of vital natural resources, and long-term health effects on living organisms. While all of the above examples of harms are serious, and so are to be avoided, it is useful to individuate them and understand them within a temporal framework, if such is applicable given the nature of the disaster, in order to understand the reasons for regarding a particular time period as an emergency.

Such an understanding can also help to prepare the analysis of the best responses to emergencies.

In addition to the seriousness, the harms that are associated with emergency situations may be relatively indeterminate. Consider an example of an ongoing terrorist threat. If it is true that a community is a target of terrorists, it does not mean that it is possible to identify in advance the direct targets of those attacks as well as the types of harms that are going to be inflicted on specific individuals, the community, or its institutions. The covert nature of terrorism conceals the who, the where, and the when of the next attacks. The form of attacks can take a variety of forms, such as suicide bombings, hostage takings, assassinations, or major disruptions to vital industries or institutions. Similarly, warring states that possess developed technological and extensive military arsenals can bring about harms through a variety of means that may be difficult to determine precisely in advance. The available options for an attack may include airstrikes, cyber attacks, chemical and biological warfare, and special operations. These considerations show that, on the one hand, it is possible to correctly identify the prospect of a serious harm but, on the other hand, it may be impossible to sufficiently determine the precise nature of the harm and direct targets of the activities that threaten. These considerations need to be kept in mind when fulfilling the task of designing procedures for dealing with emergencies.

One of the reasons for focusing on the relationship between normalcy, emergency, and disaster as a continuum is because harms can have escalating and deescalating characteristics. For example, an emergency may be prompted by the

fact that a first harm in the escalating series of harms is inflicted. Consider, for example, the political rhetoric surrounding terrorist attacks. It is not uncommon to hear that such events "serve as a wake up call" for the governments and communities where those attacks take place. The logic of this way of thinking takes the occurrence of the first harm as a sign of more, likely more serious, harm to come. The occurrence of the initial attack is evidence for the existence of an emergency situation if there are reasons to expect further attacks from hostile groups. This logic assumes that the attackers can grow bolder, their attacks become more frequent and deadly. Of course, in principle, there is nothing to deny the fact that the reverse can be true. An attack may not be part of a series of attacks, or if it is a part of a series of attacks, the seriousness of harms of the future attacks may be decreased compared to the initial one. Such possibilities can be explained by the limited means available to the attackers as well as by the motives of their attacks. For the purpose of the developing a conceptual understanding of emergencies, it is important to be aware of possible fluctuations in severity of harms, their temporal sequence, and their escalating or deescalating nature.

It is also important to be aware of the variety of sources of harms. So far, I have been mainly focusing on the harm that is threatened by disasters themselves. However, the measures taken to prevent or mitigate disasters often also bring about various harms. It is for this reason that emergencies are thought to pose difficult normative problems for agents. They often involve, what is sometimes called, tragic choices or choices of evils, where in order to prevent the serious harms of a looming disaster, the infliction of other harms, often thought of as lesser harms in contrast to

the disaster, is thought justified as an emergency measure. A clear example of a harmful emergency measure is the use of torture in order to prevent a terrorist attack. It is beyond doubt that the use of torture is harmful to the victim of torture and there exists a number of convincing arguments leading to the conclusion that the use of torture is also harmful, albeit in a different way, to the actual perpetrators of torture as well as those that accept and support this practice on the communal or institutional levels.[93] Other types of harm that stem from the emergency measures employed to address looming disasters include suspension or limitation on the scope or comprehensiveness of rights, such as a right to privacy, to a fair trial, as well as various rights surrounding the appropriate procedures of detention and interrogation of suspects. The harmfulness of emergency measures introduced in Western liberal democracies affect not only specific individuals and groups but also the legal, political, and social culture of these communities. It is important to be aware of the diverse sources of harm that figure into the account of emergency situations in order to be able to address normative problems that arise in emergencies, including the justifiability of emergency measures and the nature of government's responsibility to deal with emergencies.

## 3.4. URGENCY

Urgency is another feature that is central for understanding emergencies. If a disaster is in a distant future and the harms that it brings are remote possibilities,

[93] For example, see Matthew Kramer's discussion in his book on Torture. (Matthew Kramer (2014), *Torture and Moral Integrity: A Philosophical Enquiry*.) See also, David Luban (2014), *Torture, Power, and Law*.

there are no grounds for claiming that the present situation qualifies as an emergency. A disaster has to be in close temporal proximity in order for an emergency to take place. It is, of course, important to understand that urgency is not an objective criterion. The amount of time between the point t1 where we have normalcy, the point t2 that designates an emergency situation, and the point t3 where the disaster strikes in full force cannot be conceptually stipulated. The amount of time that emergencies last depends, among other factors, on the nature of the disaster, the harms it brings, and the available means for addressing them.

Just as we noticed that the fact of a disagreement whether a given event or a state of affairs is harmful does not undermine the claim that a prospect of a serious harm is central for understanding emergency situations, so the fact of a disagreement regarding the presence of urgency in a specific case does not undermine the centrality of this feature for our understanding of these situations. The fact that we disagree whether a given situation is an emergency is consistent with the fact that we employ the same conceptual understanding but disagree over such issues as the criterion by means of which we determine the level of urgency or whether this criterion has been met in a given case.

When analyzing the harm feature of emergencies, we noticed that some disasters could be constituted by harms that come in an increasing, decreasing, or a steady sequence. This difference may determine the degree of urgency created by the disaster. For example, the existence of a terrorist organization that intends to attack a community in the immediate future may be said to create an emergency situation for the government of that community and demand from it to address this

threat quickly. The degree of urgency can change if this terrorist organization carried out an initial attack and intends to continue to carry out attacks in the future. In contrast, if we know that in carrying out the first attack the terrorist organization has depleted its resources and is unable to attack again, the degree of urgency to implement anti-terrorist measures against that organization can change. The more remote is the possibility of a disaster, the lesser the degree of urgency to address it. There may be other reasons for prioritizing the implementation of measures against a terrorist organization that is unable to strike again, such as reasons of justice or political stability. Likewise and more generally, there may be a variety of reasons for addressing more distant threats to individuals and communities rather than the reason of urgency to prevent an onrushing crisis. But it is important to be aware that such reasons cannot be explained by the appeal to the emergency context.

The combination of features of serious harm and high degree of urgency is the basis of the common understanding of emergency. The interrelation of these two features serves in our understanding as a criterion for determining emergencies and, for this reason, it is important to examine how urgency and harm combine. Tanguay-Renaud observes, "Urgency and harm operate on different axes of salience. Meeting a need may be urgent, but a matter of moderately harmful consequences. Conversely, a need may be a matter of little urgency, yet be otherwise very important, as measured by the amount of harm that would be occasioned if it were not met."[94] Relying on Tanguay-Renaud, we can capture the level of threat that

[94] François Tanguay-Renaud (2012), "Basic Challenges for Governance in Emergencies," p. 7.

emergencies pose by multiply the seriousness of harm by the level of urgency. The greater is the threat, the more fitting the label of emergency.

In cases when harms are not very serious but the urgency to address them is high or vice versa, it is a matter of argument whether there is an emergency. Tanguay-Renaud provides examples to illustrate such cases. It is a matter of high urgency to get a ketchup stain out of the white shirt (in order to prevent it from becoming permanent) but a matter of trivial harm. In contrast, certain environmental problems, such as climate change, involve very serious harms. However, the urgency to address some such problems may be relatively low in contrast to other types of threats. Of course, it is possible to concoct additional circumstances to the above cases that would increase or decrease the respective levels of harm and urgency. The point is that a determination of emergency invariably depends on the assessments of the seriousness of harms and the levels of urgency of an approaching disaster. The fact that the plausibility of an emergency claim is a matter of argument is an important conceptual claim; and it points to the fact that our attitudes towards events can play a decisive role for determining whether a given situation counts as an emergency.

We should note that Tanguay-Renaud's account of the interrelation between harm and urgency features does not offer any objective criteria for verifying the seriousness of harm and the levels of urgency. While it is possible to develop such objective standards for well understood and theorized contexts[95], in a number of other contexts, where the nature of disasters and the means available to deal with

[95] For example, in the medical context, the reaching of a certain body temperature or blood pressure (standards which are objectively verifiable) can be used for determining emergency situations.

them cannot be determined sufficiently well in advance, it is problematic to adopt an objective set of criteria that could be adequate for dealing with crises. In our discussion of legalistic approaches to defining emergencies in the last chapter, we already observed several difficulties with attempting to employ so-called objective definitions of emergencies. Such definitions invariably need to be interpreted in the context of a specific crisis. The difficulty that we encountered with this approach is that it is necessary to determine whether a given case counts as "extreme", "exceptional", etc. Offering such determinations seems like an interpretive project rather than the one of verifying objective criteria.

Secondly, I would like to suggest that we are better off not trying – and ultimately failing – to construct an adequate, objective conception of emergency. The concept of emergency should be responsive to the variety of situations and variables that can constitute disasters. I would like to suggest that the concept of emergency should accommodate the possibility of crises the nature of which we do not yet sufficiently understand. Even if we have an extensive understanding of our values and are committed to a time-proven set of normative principles, we should be open to the possibility that a circumstance may arise that could either test our commitment to these values and principles or offer a new interpretive perspective that could call for a re-evaluation of our values and principles. If we are open to the possibility of such a circumstance, we should not accept objective criteria in our understanding of emergencies.

## 3.5. RESPONSE

The response element is the last core conceptual feature that I identify in my analysis. In addition to the presence of serious harms and a high degree of urgency, emergency situations are characterized by the possibility and necessity of a response. While the centrality of this feature is not as obvious as that of harm or urgency for the common understanding, in what follows I argue that it is a necessary feature.

It must be possible to prevent or mitigate the harm of a looming disaster in order for an emergency situation to exist. Consider another one of Tanguay-Renaud's observations, "a fast unfolding risk of serious harm whose materialization cannot realistically be averted or minimized does not constitute an emergency. If anything, it is a tragedy, a disaster."[96] According to Tanguay-Renaud, the response feature is what allows us to distinguish between emergencies and disasters. A possibility of averting a disaster, of doing something about it, or responding to it is the distinctive characteristic of the emergency context.

This does not mean that disasters are situations where no action or response is possible. Once the crisis strikes in its full force certain courses of action may be available that can mitigate harms and promise an eventual return to normalcy from the crisis. However, the difference between an emergency and a disaster is that an emergency is always a precursor to something more devastating. It is because one can see that a disaster is just around the corner that the situation one is in merits the status of an emergency. During an emergency it is still possible to prevent or

[96] François Tanguay-Renaud (2012), "Basic Challenges for Governance in Emergencies," p. 4.

mitigate a disaster, and questions about the manner of response are asked precisely with the view to addressing the disaster. In contrast, questions about what should be done that arise in the context of a disaster must invoke different considerations because the disaster is already here and so its avoidance is not at issue. Thus, the response feature points to a number of normative considerations central to the emergency problematic.

It is characteristic of emergency situations that they *demand* or *necessitate* a response. Thus, during emergencies it is not only possible to do something in order to address the impending disaster but it is also *imperative* to do so. If this is true of the concept of emergency, it follows that it is a directly evaluative concept. If situation S *is* an emergency, it necessarily means that S *should* be responded to. Such questions as whether responding to S is practically possible or what would be the best response to S may allow for different and competing answers. However, if we understand S as an emergency, it means that there is a reason to do something about S.

The idea that it is necessary to address the crisis is characteristic of our common understanding of emergencies and is reflected in the manner in which we sometimes characterize emergencies. For example, it is not uncommon in political discourses to refer to states of emergency as states of necessity. In criminal law, the doctrine of necessity – that one has no choice but to act in some way in a kind of circumstance – can be invoked in cases that are commonly thought to constitute or closely resemble emergency situations. In *Perka v The Queen*, for example, Justice Dickson articulated the motivation behind the doctrine of necessity, underscoring

the relation of emergency situations to normative considerations, in the following way: "a liberal and humane criminal law cannot hold people to the strict obedience of laws in emergency situations where normal human instincts, whether of self-preservation or of altruism, overwhelmingly impel disobedience."[97]

If emergency situations are characterized by the possibility and necessity of a response, it is important to be aware of the nature of choice that is afforded by particular emergency situations. In some cases, there may be only one course of action available. A choice involved in such a situation is to either do whatever is necessary or fail to do whatever is necessary to prevent the disaster. In the best-case examples of such scenarios, the measures to avert the harm of a disaster are neither harmful nor normatively problematic. In other cases, emergency situations may involve a choice of evils. There may be a number of available alternatives to prevent or mitigate an emergency but all such alternative involve some sort of harm. Such emergencies offer a choice of bringing about harm in order to prevent a much greater harm constituted by the disaster.[98]

Yet another possibility is when emergencies involve tragic choices, that is, situations where serious harm of a disaster can be prevented only by inflicting another serious, yet qualitatively, different harm. It can be said that such emergencies offer a choice of devastation. One may object that if we accept Tanguay-Renaud's claim that an inability to avert devastation precludes the possibility of emergencies, then situations that involve tragic choices are not emergencies. However, if harms constituting alternative devastations are

[97] *Perka v The Queen* [1984] S.C.R. 232
[98] This logic informs the idea of the necessity defense.

qualitatively different, the choice between them may be meaningful, and thus normatively significant. For this reason it is acceptable to regard certain situations that involve tragic choices as emergencies. [99]

Tanguay-Renaud offers another consideration regarding the nature of choices involved in emergency situations. In his discussion of Walzer on supreme emergencies, Tanguay-Renaud examines the possibility of establishing a distinction between emergencies and ethical dilemmas: "whereas in the moral dilemma category there is no right answer to the problem, in supreme emergency scenarios, it is assumed that a government should choose the 'necessary' course of action over the rights of the innocent."[100] In other words, in ethical dilemmas, we are faced with several alternatives the selection between which does not give us a right answer. In emergencies, according to this conception, there is a right answer but making that choice is hard because it requires offending against an important value. The distinction between moral dilemmas and emergencies, we can say, is that the former are about the absence of the right choice and the latter are about the absence of an easy one. In an emergency, one may argue, it may be psychologically difficult to make the right choice, but there is one to be made.

Drawing a distinction between emergencies and ethical dilemmas in this way can be useful for explaining some of the common attitudes towards emergencies. In particular, it can be used to explain why there is a common expectation that

[99] To illustrate this point consider a scenario where a general is faced with a choice of either retreating from a strategically important city or defending the city against a much greater army. The cost of defending the city is the loss of his army; the cost of saving his army is the loss of the city. In this scenario, the general could be said to face a tragic choice.
[100] François Tanguay-Renaud (2009), "Making Sense of 'Public' Emergencies," p. 44.

individuals who are in charge of dealing with an emergency must not be fainthearted. (The character of Jack Nicholson in the film *A Few Good Men*, who utters the famous phrase "you can't handle the truth!" fits this bill.) On the other hand, according to some thinkers, such as Posner and Vermeule, philosophers are thought to be ill suited for the task of dealing with emergencies despite their expertise in resolving ethical dilemmas. Examining subtleties and offering insights from the comfort of an armchair is often thought to be irrelevant for dealing with grave crises in concrete circumstances.

It is worth noting, however, that while the distinction between ethical dilemmas and emergencies helps to sort our intuitions about these circumstances, there is nothing in principle that precludes the possibility of emergency situations involving ethical dilemmas. It may be the case that a normative problem in a given emergency situation does not have a right answer and that the rights of innocents will need to be sacrificed. In other words, it may be unclear that there is a strategy of dealing with the approaching crisis that is the most justified; yet it may be clear that whichever strategy is chosen innocents will be harmed. If we accept the point made earlier in this chapter that an account of emergencies should accommodate scenarios that are not well understood and theorized, then it is reasonable that we should accept the possibility of emergency situations involving ethical dilemmas.

While these considerations about the nature of choice involved in emergencies is far from exhaustive, they are sufficient to illustrate the normative significance of emergencies in light of the response feature and point to a potential variety of normative problems that can arise in emergency circumstances.

In order to further explore the variety of normative problems associated with the emergency problematic, it is useful to examine the response feature in terms of foreseeability and preventability. Tom Sorell, for example, finds the foreseeability and preventability associated with emergencies to be important for assessing the responsibility of actors. He notes, "In general, the more an emergency is foreseeable and preventable by morally harmless and undaunting precautions, the less the *ad hoc* wrongdoing involved in coping with emergency is justifiable or excusable, all things considered."[101] The fact that an agent could have foreseen and prevented a set of circumstances is unlikely to influence our determination of these circumstances as an emergency, provided that other relevant criteria are met. However, the relation between the ability to foresee and prevent a crisis and the project of determining the justifiability of a wrongful act performed in order to mitigate a crisis could be central for determining the responsibility of the agent involved in this situation. The foreseeability and preventability features are normatively significant aspects that are relevant for assessing the justifiability of responses to emergencies.

It is worth placing a special emphasis on the fact that some emergencies can be addressed by a number of different responses. Consider for example a state that faces a prospect of a foreign invasion. Such a situation can certainly merit a status of an emergency. A state that faces such a prospect may have a number of alternatives available to it for preventing and mitigating the harms that are likely to result from the invasion. The state may choose to fortify its defenses, evacuate certain areas,

[101] Tom Sorell (2003), "Morality and Emergency," p. 23.

demonstrate its military might to its opponent, or, alternatively, it may attempt to remedy the situation by establishing powerful alliances, look for diplomatic remedies, or, finally, it may decide to negotiate a capitulation. All these alternatives are means for mitigating a disaster. While some of these alternatives may not be available in certain concrete situations and while different emergencies involve different types of measures for tackling the crisis, it is important not to confuse the necessity of responding to the crisis with the lack of alternatives for providing such a response. Disasters may leave us no choice but to face them; however, this does not mean that there is only one way to face them.

Another normatively significant aspect of emergencies that can be gleaned from an exploration of the response feature is the responsibility associated with the preparation for possible disaster as well as the exercise of the adopted emergency protocols and procedures during an emergency. The majority of disasters do not come out of nowhere. Many can and should be theorized, explored, and predicted before they appear on the horizon of real possibilities. Tanguay-Renaud observes, "In cases in which one could have planed ahead, but in which one did not want or care to plan, it seems more problematic than in reasonably unexpected cases to characterize the situation as one in which there were no alternatives…"[102] If Tanguay-Renaud is right, then it must be possible to respond to emergencies not only by making choices in the heat of the moment as the emergency unfolds, but also by making advance preparations. The normative significance of emergencies does not only involve an assessment of possible courses of action and respective

[102] François Tanguay-Renaud (2012), "Basic Challenges for Governance in Emergencies," p. 9.

outcomes from the normative point of view. It also involves evaluations of how well individuals and communities meet their responsibility in foreseeing and preparing for possible disasters and emergency situations.

Lastly, we should note that the response feature of emergencies brings to light considerations about agents or agencies that are best suited to act during an emergency and are responsible for tackling the exigencies of a given crisis. Consider the scenario where, due to some complications during pregnancy, either the fetus or the expectant mother can survive, but not both. Suppose that there is a good and equal chance of one of them surviving but only if the other one dies. Also, suppose that if doctors do not actively attempt to save either one, both the fetus and the woman will die. This scenario is constructed so that someone needs to make a choice about who lives and who dies. In this case, who should be making this choice: the expectant mother? Her partner or family? The doctors? The state? It is certainly likely that any one of these agents will be guided, at least in part, by considerations of minimization of harm, and so none is likely to choose to do nothing so that both the expectant woman and the fetus die. Perhaps, it is possible that all potential decision-makers will make the same choice. But it is certainly not a matter of indifference who actually gets to make this fateful decision. This case illustrates the fact that in emergencies it not only matters which alternative is chosen but also who does the choosing.

When we explore the emergency problematic on the state level, we should keep in mind that there are no conceptual reasons to think that national emergencies should be dealt with by the executive or, more generally, by the

government. For example, if we accept the view that the agent or the agency that is best able to minimize the harms of the potential disaster is the one best suited for dealing with an emergency, then it may be that non-government agencies are better candidates for dealing with emergencies. A wealthy and powerful individual or a corporation may turn out to fit this criterion better than the government. It is a matter of moral and political argument to determine whether such a criterion is acceptable or whether it needs to be modified or rejected. There are no conceptual grounds for settling these questions.

## 3.6. IMPLICATIONS OF THE ANALYSIS

The conception of emergencies developed above can be developed further. For example, much more needs to be said in order to distinguish private from public emergencies. More needs to be done to illustrate how institutions can be undergoing emergencies and whether these cases are consistent with our common understanding of emergencies. However, the above considerations are sufficient to address several normative and practical issues specific to the emergency problematic as well as to show several significant flaws with Posner and Vermeule's position. Let me briefly outline how the above conception creates problems with some of Posner and Vermeule's arguments.

One of the motivating reasons behind Posner and Vermeule's project is to determine how one *should* act in the face of the prospect of a serious and fast approaching harm. That is, they are concerned with the possibility of finding a

concrete strategy that could be useful in a number of emergency situations. I agree with Posner and Vermeule that such a general strategy should be developed, but I disagree with their institutional solution that calls for the executive to be the final authority on the legitimacy of emergency policies. In contrast to Posner and Vermeule, who do not dedicate any significant effort for exploring, developing, and laying out a conception of emergency, I think that it is crucial to be aware of the sources of harm as well as the interrelation between the harm and urgency if solving the normative and practical problems associated with emergencies is to be possible. By offering an understanding of emergencies that focuses on various characteristics of harm and urgency, such as the temporal sequence of disasters or their escalating and deescalating characteristics, we are in a better position to answer normative and practical questions of the emergency problematic as well as to appreciate the great variety of possible circumstances that can count as emergencies.

In the course of my analysis we saw that determinations of emergency should not be done according to set objective criteria because of the unpredictability of these circumstances. If we are open to the possibility that there could be disasters that are not well understood or theorized and that there could be unpredictable circumstances in which agents attempt to mitigate these disasters, the conception of emergency that we adopt should be responsive to these possibilities. An implication of this conceptual commitment is that it will be more difficult to explain how an agent or agency can be said to have an expertise in dealing with emergencies.

Recall that Posner and Vermeule place a strong emphasis on the executive expertise. The nature of such expertise needs to be carefully examined, especially if we accept Posner and Vermeule's characterization of emergencies as novel and unpredictable circumstances. What sort of knowledge, skills, and experience is necessary for addressing such situations? Of course, it may turn out that the executive has the needed expertise in a given case. Moreover, it may turn out that it has the required expertise to deal with most emergencies. However, in order for this argument to work it is necessary to offer an account of executive expertise as well as defend the view that the possession of such expertise warrants deference from other branches of government.

Given the unpredictable nature of emergencies and a variety of combinations of the circumstances that constitute them, Posner and Vermeule's approach to settling the institutional question of deference by sidestepping normative problems is inadequate. For example, we saw that emergencies may present agents with a variety of normative problems and choices. Unless we accept the image of the executive official as a philosopher king who is among the wisest individuals, we should reject the claim that the executive is best suited to make all possible decisions arising in the emergency context. It may be best suited to deal with some emergencies. Perhaps, it may turn out that in some circumstances there is no one else who is in a position to act except the executive. But there does not appear a way to make this argument work without demonstrating executive's ability to resolve normative problems during emergencies. To that end, the engagement with normative issues is necessary.

Through the exploration of the response feature, we saw how the questions of responsibility arise in the emergency context. If we are studying emergencies on the political level and understand them as pivotal periods in the life of a community, we have further reasons to resist the sidestepping of normative issues. The concept of emergency necessarily picks out normatively significant circumstances because they are precursors to disasters. In other words, an emergency is a period when the fate of normalcy is decided. If that is right, this means that Posner and Vermeule's second order approach for settling the question of judicial deference in times of emergency is unsuitable.

Recall that Posner and Vermeule argue in favor of judicial deference on the basis of the institutional comparison between the executive and judicial branches. Finding judiciary to be slow and bureaucratic and the executive capable of acting swiftly and effectively, they argue that substantive considerations of decisions do not need to factor into their argument. What matters to them is who can act. However, if we understand emergencies as pivotal periods in the life of a community, we cannot be satisfied with this argument. The strategy for addressing emergency problems has to engage with substantive issues because emergencies are normatively significant. It seems strange (to say the least) to say that a phenomenon is normatively significant but in order to address it the substantive normative issues should be ignored.

In the next chapter, I will turn to the study of exceptionality of emergencies – a very significant characteristic but the one that should not be included as a conceptual feature of emergencies, or so I will argue. This study will shed more light

on the difficulties surrounding the emergency problematic and show further problems with Posner and Vermeule's position.

# CHAPTER 4: EXCEPTIONALITY AND POLITICAL RESPONSIBILITY

## 4.1. INTRODUCTION

The task of this chapter is to explore exceptionality associated with emergencies. In line with the analysis of the previous chapters, the emergency situations that I have in mind are those that are faced by states and political communities. The primary examples of emergencies that I continue to focus on are national security crises. Exceptionality will be explored along the empirical and normative dimensions, that is, I will be looking at the characteristics of circumstances and at the characteristics of norms and values. In exploring these dimensions, I aim to prepare for the analysis of emergency policymaking and government accountability.

The analysis of conceptual features of emergencies needs to be supplemented with an examination of the exceptionality feature associated with these circumstances. There are several reasons for focusing on this aspect of the emergency problematic. In addition to the seriousness of harm, high degree of urgency, and the necessity of response, emergency situations are also often thought to be exceptional. In light of this association, it is important to explore the meaning of this commonly shared characterization of emergencies. We tend to think that emergency situations, especially on the public scale, warrant exceptional measures. This thought is captured in claims, such as "necessity knows no law" and "desperate times call for desperate measures". Given the prominence of this way of thinking about emergencies, it is important to examine the meaning of exceptionality as a

type of circumstances in the world and as a feature or characteristic of norms or the normative domain.

Exploring the exceptionality of emergency situations is also helpful for assessing Posner and Vermeule's deference thesis. Recall that their strategy for defending the judicial deference view is based on the comparative assessment of institutional performances of the executive and the judicial branches during times of normalcy and during emergencies.[103] In the previous chapters we saw the importance of explicating and developing an understanding of emergency situations for defending this argumentative strategy. By exploring exceptionality, we will be able to bring to light a set of further considerations relevant to the assessment of institutional functions in the emergency context. In particular, we will see how issues of political responsibility can arise in the context of the emergency problematic. This analysis will lay the groundwork for the next chapter where we will examine the problems of adhering to liberal democratic values during emergencies.

Furthermore, recall that Posner and Vermeule rely on the tradeoff framework in their support of the deference thesis. In particular, their view is that the government makes tradeoffs between liberty and security during normal and emergency circumstances.[104] While the government institutions perform differently during these periods, the objective of the tradeoff is the same in both contexts. According to Posner and Vermeule, it is to "maximize the welfare of all persons

[103] For example, see Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 21.
[104] For example, see Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 29-30.

properly included in the social welfare function."[105] By exploring exceptionality of emergencies, we will be able to assess the adequacy of this objective and prepare for the analysis of the tradeoff framework in the next chapter.

The discussion of this chapter is structured as follows: first, I establish a distinction between empirical and normative dimensions of exceptionality. Second, on the basis of my analysis of the empirical dimension, I argue that not all emergency situations are exceptional circumstances in the relevant sense. Third, on the basis of my analysis of the normative dimension of exceptionality, I explore the issues of political responsibility during exceptional circumstances. The two main objectives of this chapter are to show that not all emergency situations are exceptional and that the issue of political responsibility plays an important role in the exceptional circumstances.

## 4.2. NORMATIVE AND EMPIRICAL ASPECTS OF EXCEPTIONALITY

Emergency situations are often characterized as exceptional and it is important to examine the possible meanings of this characterization. On the basis of the analysis in the previous chapter, it is possible to understand exceptionality associated with emergencies as an interruption of normalcy. An emergency, it can be said, is an exception to the normal order of things. The routine, the ordinary order, or the expected pattern of events is interrupted by a prospect of a serious harm that demands an urgent and necessary response. In virtue of these characteristics, interruptions can be said to be exceptional. While this

[105] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 30.

characterization seems to reflect the common attitude, it leaves many questions constituting the emergency problematic unaddressed. What makes emergencies exceptional? Are all emergencies exceptional or only some of them? What justifies exceptions and how do we know whether a given case qualifies as exceptional?

To address these questions, I propose to begin by distinguishing between exceptionality in the empirical sense from exceptionality in the normative sense. This distinction aims to parse that which we find exceptional in the world of facts from that which we find exceptional in the realm of values for the purpose of exploring these two dimensions in more detail. Drawing this distinction brings to light several characterizations of exceptionality that are often used in describing and assessing emergency situations. By systematizing and explaining these dimensions of exceptionality, we will be in a better position to examine the empirical and normative issues associated with the emergency problematic.

Let's start with the notion of exceptionality in the empirical sense. It was suggested earlier that familiar patterns of events constitute normalcy. Emergencies can be understood as empirically verifiable events that interrupt those patterns and signal their deterioration. If emergency situations are exceptional, it is possible to verify the exceptionality in the empirical sense by answering the following questions: Did an unusual and unexpected event take place? Was the routine order interrupted? Did the event, the occurrence of which threatened the normal order, take place? What made the event in question different from the ones that are considered to constitute the normal order? Answers to these questions call for determinations of facts. It is possible to understand emergencies like the attacks on

Pearl Harbor or 9/11 as exceptional in this empirical sense. These events are often characterized as unprecedented in order to underscore their exceptionality and emphasize their contrast with ordinary events.

In contrast to exceptionality in the empirical sense, exceptionality in the normative sense focuses on values. What is the nature of values? Do values always matter or are there contexts where their importance "lessens" or "disappears" all together? Is there a hierarchy of values or some other type of relationship among them that can be used to explain why we have certain intuitions about emergency situations, such as those captured in phrases like "necessity knows no law" or "desperate times call for desperate measures"? These questions are about the nature of values as well as the scope and limits of the normative realm. One way to explain the normative exceptionality associated with emergency situations is to rely on a theory of value that accepts a limit, understood in some way, on the applicability of values.

Apart from establishing a distinction between empirical and normative senses of exceptionality, it is also helpful to explore the relation between exceptionality of facts and exceptionality of norms. Generally, our understanding of exceptionality of some emergencies involves an inference from the fact of exceptional circumstances to the warrant to act "outside" or contrary to our settled normative commitments. It is *because* the circumstances are exceptional that exceptional measures are warranted. By settled normative commitments I mean values, rules, and other norms that normally are accepted and generally adhered to. In evaluating actions and conduct, it is these values, rules, and norms that we

normally use as standards for guiding and evaluating actions. And it is the applicability of these values, rules, and norms that is in question in the exceptional circumstances.

Now, it is important to note that our settled normative commitments accommodate some emergencies. For example, it is acceptable in some circumstances to kill a person in self-defense. It is not out of place to characterize a situation when killing in self-defense is justifiable as an emergency situation or as an exceptional situation. Upon closer reflection, we can identify a number of rules and norms that are designed to guide conduct in the exceptional circumstances. This shows that the exceptionality of some emergency situations is not characterized by the warrant to act outside settled normative commitments. In order to get a better understanding of the logic behind such intuitions, let us look more closely at the factual characteristics of exceptional circumstances.

## 4.3. EMPIRICAL EXCEPTIONALTY

One way to understand empirical exceptionality is to identify it with infrequency and rarity of events or states of affairs. Setting aside individuals and institutions that are specifically tasked with addressing or studying emergencies, it seems to be a matter of fact that for most people emergencies are rare and infrequent occurrences. Most of the time we are not staring at a prospect of a disaster that requires an urgent response. It is only occasionally that such circumstances arise. If exceptional circumstances precipitate serious harms, they raise moral questions, such as ‘How should I act in this situation?’ If exceptional

circumstances are rare and infrequent, they raise epistemic questions, such as 'How do I know whether this is an exceptional situation?' Thus, the empirical exceptionality reveals moral and epistemic considerations. The moral worry is how our normative commitments apply. This could be the question of how to interpret our commitments since we have not pondered their application to all possible cases. The epistemic worry is whether our normative commitments apply. This is the question of determining when, if ever, our commitments do not apply. Thus, the epistemic dimension concerns the scope of our settled normative commitments and the moral one concerns the limits of their applicability.

While the common understanding seems to hold that emergencies are rare and infrequent occurrences, there are many examples that challenge this intuition. In some parts of the world, states of emergency seem ongoing and permanent. For example, for the most part of its existence the state of Israel has, arguably, been in the state of emergency.[106] Similarly, it seems plausible to think that Northern Ireland has been in a state of emergency for a significant period of time.[107] In their work Oren Gross and Fionnuala Aoláin analyze in detail a number of examples of evidently permanent emergencies defining them as contexts "…where democratic states [first] introduce temporary legislation limiting rights protection in order to confront final crises, but subsequently allow such legislation to become entrenched

[106] Mark Neocleous (2006), "The Problem with Normality: Taking Exception to "Permanent Emergency"." See also, Oren Gross (2003), "Providing for the Unexpected: Constitutional Emergency Provisions."
[107] Fionnuala Ni Aolain (2000), *The Politics of Force: Conflict Management and State Violence in Northern Ireland*, p. 22; also Paddy Hillyard "(1987), "The Normalization of Special Powers: From Northern Ireland to Britain."

and survive as an integral component of the state's legal regulation."[108] Cases when this happens challenge the separability of the periods of normalcy and emergency by normalizing emergencies. If it is true that permanent emergencies exist, then it is not true that all emergencies are rare, infrequent, or unfamiliar occurrences.

Furthermore, national or state emergencies draw a lot of attention from the domestic and the international public. Reporting and analyzing emergencies is a big portion of the media. Political debates often focus on the manner in which governments handle emergencies. And, of course, the topic of emergencies – in legal, political, and ethical contexts – is studied in the academy, if not as the central subject of study (such as in this work) then as a context that tests theories, principles, and ideas.[109] If emergencies attract a lot of attention from many quarters of the public and if they are a testing ground for ideas and arguments, it is problematic to characterize emergencies as unfamiliar events. We may not know where the next crisis is going to strike and what will be needed in order to deal with it but we are certainly familiar with a number of examples of emergencies on the public scale.

It is, thus, worth emphasizing that infrequency and rarity are different from uniqueness and novelty and that the challenges facing decision-makers in these different sets of circumstances could be significantly different. A situation can be a product of a new combination of circumstances, the likes of which have not been encountered or envisioned before. (It may be possible to argue that Pearl Harbor

[108] Oren Gross and Fionnuala Ní Aoláin (2006), *Law in Times of Crisis: Emergency Powers in Theory and Practice*, p. 275.
[109] Lifeboat and ticking time bomb scenarios are an example of an emergency context being used as a testing ground for distilling intuitions and refining principles.

and 9/11 can be characterized in this way.) Understanding exceptionality not only as rarity and infrequency but also as uniqueness and novelty is promising because it purports to explain the normative significance of emergencies. It can be argued that in the normal, everyday circumstances our settled normative commitments are at home. We know or know better how to adhere to our values and obey the established rules. If exceptional circumstances arise that are sufficiently unlike anything that was encountered before, they may pose normative problems that were never encountered. A prospect of a new kind of a serious harm is one possible explanation of normative exceptionality if it creates new normative problems. The argument can be, then, that novel or unique circumstances may require us to step outside our settled normative commitments because these commitments do not apply to the new facts.

If it is accepted that emergencies are exceptional circumstances, they have to exhibit some combination of the above-examined characteristics: infrequency, rarity, novelty, and uniqueness. It is, of course, always a matter of a speculative argument, and not an objectively verifiable standard, whether a given event is a rare, unfamiliar, novel, or a unique occurrence. But that should not suggest that any emergency could fit the bill of an exceptional circumstance. It is possible that not all emergencies are empirically exceptional events in the relevant sense. For our purposes, we should note that it is sadly the case that more often than not terrorist attacks do not fit the bill of the exceptional circumstance.[110] It is difficult to argue that terrorist attacks are novel or unique, much less rare or unfamiliar. And while

[110] In the period when I'm writing this dissertation, several major terrorist attacks occurred in western liberal democracies: the Paris (2015), Brussels (2016), and London (2017).

this does not subtract any significance from terrorist attacks, the absence of the empirical exceptionality has important implications for the institutional arguments about the justifiability of strategies for dealing with threats to national security.

The point is that not all emergency situations, characterized by the presence of serious harms, high degree of urgency, and the necessity of response, are exceptional circumstances. Some interruptions of normalcy are exceptional and some are not. Furthermore, we know that our settled normative commitments accommodate some emergencies. We are in a better position to design institutional mechanisms for dealing with emergencies that are not exceptional in the empirical and the normative senses. We can rely on our settled conceptions of crises as well as our settled normative commitments in addressing the problems of institutional design in this context. Exceptional kinds of emergencies are more problematic. In part, it is because we do not have an adequate understanding of the circumstances surrounding such emergencies. We can expect that exceptional circumstances may arise, but we cannot know what they are going to be. This is one of the central challenges for designing strategies to address future emergencies. The project of designing an institutional framework the purpose of which is to effectively address emergencies must cope with the uncertainty of possible challenges.

## 4.4. EXCEPTIONALITY AND INTERPRETATION

So far, we have been focusing on surveying the empirical sense of exceptionality and tracing normative implications of such understandings. It is also possible to proceed in the reverse and to understand exceptionality, first, through

norms and then move on to the relevant facts in the empirical world. Such an approach does not necessarily deny that certain events must occur or that certain states of affairs must obtain in order for exceptions to be warranted. But first and foremost, this approach offers an account of the nature of normativity. If it is accepted that there could in principle be normative exceptions, then there is a need for strategies for determining the kinds of circumstances where normative exceptions may occur. In contrast to the inquiry into the empirical understanding of exceptionality, which explains how moral and epistemic challenges come about, the inquiry into the normative understanding of exceptionality explores the nature of values and norms and, more specifically, the limits of their applicability.

On the basis of my analysis, there are potentially at least four different types of normative exceptionality. First, norms and values can be understood to be defeasible: exceptionality as defeasibility. Second, when exceptionality is invoked it may mean that values and norms are suspended: exceptionality as suspension. Third, it may mean that values and norms are replaced by some other considerations: exceptionality as replacement. And fourth, it may mean that values and norms lose their importance or weight: exceptionality as insignificance. While I do not argue that these four options exhaust all possible alternatives for conceiving normative exceptionality, it seems that these four conceptions are the most intuitive, commonly employed, and most familiar ways of understanding the notion. Our examination of these four conceptions will help us to develop a deeper understanding of normative issues surrounding emergency governance.

Before exploring these conceptions, I would like to explicitly state an assumption that is at the core of my analysis. I assume that there is a difference between normative exceptions on the one hand and reinterpretations of settled normative commitments on the other.[111] It is uncontroversial that some interpretive work is needed to apply values and norms to cases. If a parent is committed to treating his children equally, does it mean that they should have the same curfew on Wednesday evenings?[112] If a state is committed to respect equality, does it mean that it should accept affirmative action policies?[113] To answer these questions, it is necessary to interpret these commitments in light of the circumstances as well as other values and commitments. I assume that some such interpretive work is part and parcel of all normative assessments, including legal and political judgments.

In contrast, normative exceptions that I focus on are not those cases when a value or a norm is interpreted or re-interpreted in light of the circumstances or other values and norms. Normative exceptions are exceptions from values and norms as such. It is for this reason that the exploration of normative exceptionality is a project that examines the nature of values rather than a project that examines the strategies for interpreting values and norms. As we will shortly see, the views that I examine do not purport to treat exceptions as opportunities for interpretation

[111] I will address some challenges with interpreting values in exceptional circumstances in the following two chapters.
[112] If one child spends his Wednesday nights volunteering at a soup kitchen while the other one tends to party at a friend's house, it may well be consistent with the parent's commitment to equality to extend the curfew for the former child but not for the latter. But if one child volunteers at a soup kitchen while the other reads to the blind, then different curfew times may not be justifiable given the parent's commitment to equal treatment.
[113] A good answer to this question would appeal to historical considerations as well as social, political, and legal ones. There is an indefinite number of normatively significant features, which could be included in such scenarios, and that would influence one's normative judgment.

of values and norms.[114] Instead, they purport to claim that normative considerations have no place in exceptional circumstances.

Now, a view that accepts the possibility of normative exceptions as I have sketched them out above may be flawed. There could be good reasons to treat any invocation of exceptionality in the normative sense as a call for reinterpreting values in light of the given circumstances. Perhaps, one may argue that normative exceptionality does not refer to anything that is true of the nature of values or that all talk about normative exceptionality merely tracks the customary way of speaking about highly significant cases. My analysis is not aimed at resolving these disagreements, although some of my arguments could be used for addressing them. The primary purpose of my analysis is to reveal various difficulties with the notion of normative exceptionality.

## 4.5. EXCEPTIONALITY AS DEFEASIBILITY

The topic of defeasibility is relevant to a number of subjects including epistemology, artificial intelligence, legal theory, and value theory. Because we are interested in examining the relationship between exceptionality and emergencies brought on by national security crises, our focus is on the defeasibility of legal and political norms as well as constitutional values. Exceptionality as defeasibility is problematic if this view commits us to the understanding that the defeated values do not matter in the interpretive process. This does not mean that the

[114] Primarily, I have in mind political and legal norms and values that are captured in the constitutions of liberal democracies. Throughout my analysis, the references to the constitution include not only written documents but also and more importantly the underlying values and norms that animate the legal and the political order of democratic regimes.

understanding of all norms as defeasible is problematic. The argument concerns only those values that are captured in the constitutions of liberal democracies and underlie the rationale of liberal democratic regimes.

Generally, we are familiar with the idea of defeasibility, especially when it comes to everyday commitments and obligations. When we make plans or promises or when we incur various obligations, it is often tacitly assumed that these norms impose defeasible obligations on agents. That is, there is a reason or a duty to comply with a plan, a promise, or an obligation, provided that there are no compelling reasons for not complying with them. Scott Shapiro captures the notion of defeasibility as it applies to plans:

> When I plan to go to the movies tonight, I am not planning to go *come what may*. I realize that there are compelling reasons that might arise that would force me to reconsider my decisions, for example, I suddenly get sick, the movie theater increases the price of admission tenfold, my house catches fire, and so on. "Unless compelling reasons arise," therefore, is an implicit codicil that typically attaches to our plans and conditions their applicability.
>
> In everyday life, these clauses are left extremely vague. Our plans do not specify the compelling reasons that would force reconsideration, but we know them when we see them.[115]

One may be tempted to understand constitutional commitments in a similar fashion. On this understanding, constitutional commitments to liberty, equality, or respect for dignity have "an implicit codicil", according to which it should be understood that they extend only to normal circumstances. Whenever exceptional circumstances arise, we are exempt from these constitutional commitments. If we accept this understanding, we are treating constitutional norms as defeasible or as prima facie reasons. That is, we understand the constitutional commitments as

[115] Scott Shapiro (2011), *Legality*, p. 303.

norms that can be overridden by other norms. But if we take constitutional commitments to be defeasible in this way, we need to explain what sorts of considerations could defeat these commitments.

It should be noted that if we take constitutional commitments to be defeasible, this does not necessarily commit us to the view that they become irrelevant. Defeasible norms can still provide reasons, albeit only prima facie ones, that influence the process of normative deliberation. Fred Schauer warns against misunderstanding the defeasibility of norms:

> What is most troublesome about using 'prima facie' as a description of non-absolute reasons is that it suggests that under some circumstances, that of being opposed to even stronger reasons, the prima facie reason might just go away. But such a characterization is misleading. Reasons, even non-absolute ones, do not evaporate when they are outweighed or overridden, any more than the security guard evaporates when she is overcome by the bank robber. It is just that the reason, like the guard, is sufficient in certain circumstances, but insufficient in others. But reasons and security guards supply *resistance* even when they are insufficient, and in each case the presence of resistance requires more force to overcome it than would otherwise have been necessary.[116]

If Schauer is right, then exceptionality as defeasibility does not necessarily require us to set aside any norms and values in deliberation. Instead, we may only need to acknowledge that some norms and values that are normally compelling can give way to other more compelling reasons in some cases. If that is right, then the defeasibility conception does not exempt any norms or values from factoring in our deliberations but helps to rank their significance.

On such a conception of normative exceptionality it seems entirely possible for an agent or a government to act responsibly and have its conduct assessed

[116] Frederick Schauer (2002), *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life*, pp. 2-3. See also Chapter 6 of Schauer's book.

according to norms and values that override the constitution, assuming that there exist in fact values and norms that can provide such reasons. The problem with this view is that while there is nothing in principle that precludes this possibility, it is difficult to conceive what such norms and values could be. If it is true that the constitution of a liberal democracy expresses the most fundamental values shared by the community, it is difficult to explain what norms and values can be more compelling. If we cannot provide an account of compelling reasons that override constitutional values and norms, it seems that the defeasibility of the constitutional norms is a moot point: even if they are defeasible, there are no compelling reasons to defeat them.

To appreciate this point, consider the kind of rights that the constitutions of liberal democracies guarantee. For example, consider Section 7 of the *Canadian Charter*, which states, "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[117] It is difficult to image what norm or value could render this right irrelevant because it is unclear what sort of value or right would be more fundamental than the right to life. By this I do not mean to suggest that the right to life can never come in conflict with other rights; rather, my point is that if it were to be defeated in some scenario, it will not lose its significance.

It is also worth pointing out that some values and norms, such as the right to life, are fundamental not only to liberal democracies but to other forms of political association. Consider, for example, the social contract theory offered by Hobbes.

[117] *Canadian Charter of Rights and Freedoms,* s. 7.

According to him, the move from the state of nature to the civil society requires the transfer of power and natural rights to the absolute monarch. The sovereign, on Hobbes' view, has absolute power over his subjects. However, even that does not deprive individuals from their "right of nature" to protect their lives. As Hobbes puts it, "The right of nature… is the liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing any thing, which in his own Judgment, and Reason, hee shall conceieve to be the aptest means thereunto."[118] Individuals have an inalienable right to life because the main function of civil society, on Hobbes' view, is the protection of individuals from threats to their lives. As Hobbes argues, "to give up this right would be to violate the very law of nature by whose authority the commonwealth is created."[119] If this interpretation of Hobbes is correct, it highlights the significance of the right to life and the difficulty of identifying other norms and values that could make it disappear.

One may object by arguing that there is no need to override the constitutional values all at the same time. Only portions of the constitution need to be defeated at any one time during exceptional circumstances. While some or any constitutional norm can be overridden, it is never the case that all constitutional norms are silenced at once. So, for example, if there is a threat of terrorism that constitutes an exceptional circumstance, some portion of the constitution, namely liberty rights, are defeated by other constitutional norms, namely norms expressing the commitment to the value of security. On this view, the constitution, as an

[118] Thomas Hobbes (1994), *Leviathan,* Chapter XIV, p. 106.
[119] Wil Waluchow (2007), *A Common Law Theory of Judicial Review*, p. 26. (Footnote 15)

expression of our fundamental commitments, always matters but some parts of the constitution can defeat other ones in the exceptional circumstances. Thus, for example, the value of security could make the value of liberty "disappear" in the exceptional circumstances.

To respond to this objection we must consider cases when constitutional commitments come in conflict with each other.[120] In such cases, it may be necessary to choose to adhere to one commitment at the expense of another. However, it is important to understand that in such cases the defeated commitment does not disappear but continues to exert its normative force. For example, if your right to live in a secure environment defeats my constitutional right to a fair trial, it does not mean that the constitutional commitment that guarantees me the right to a fair trial loses its significance. If the right to a fair trial is justifiably denied, it does not mean that it somehow loses its justification that merits its inclusion in the constitution. For this reason, if an individual's constitutional right is denied, it is a cause for concern and a reason to compensate this individual in some way or at least to officially recognize the sacrifice imposed on that individual, even if this sacrifice was justified.

The defeasibility conception of exceptionality does not offer a satisfactory explanation of how constitutional commitments and values can be defeated if it assumes that some values and norms simply disappear in the process. First, because of the great significance of these commitments it is difficult to image what other values or norms could be compelling enough to defeat them. Second, while we

[120] The possibility of such conflicts could be challenged on the metaethical level. For an example of how such a challenge could be made, see Ronald Dworkin (2011), *Justice for Hedgehogs*.

acknowledge the possibility that constitutional commitments may legitimately come in conflict with one another, we must also recognize that the commitment that loses out in this process does not disappear. The fact that an individual or a group of people were justifiably denied a constitutional right is a serious concern and a reason to find remedies to compensate the affected individuals and communities as well as to prevent situations that give rise to such conflicts.

If that is right, the defeated commitments and values cannot be extinguished. Rather, they continue to exude their normative force in all circumstances. Thus, the challenge before decision-makers in the exceptional circumstances is not to determine a strategy of how to act in the absence of some values or norms that have disappeared but to find the best interpretation of their values and norms for the given case.

## 4.6. EXCEPTIONALITY AS SUSPENSION: EXTRA-LEGAL MEASURES MODEL

In their book *Law in Times of* Crisis, Oren Gross and Fionnuala Ní Aoláin discuss three constitutional approaches for dealing with emergencies on the state level. The first part of their book provides an overview of a variety of theoretical positions that they categorize in three general approaches: accommodation, business as usual, and the extra-legal models. Gross and Aoláin argue that the best approach is the extra-legal one that they develop. This approach advocates a suspension of the constitution or some parts of it for the duration of an emergency. In order to get a better sense of their justification for advocating this approach, it is helpful to briefly overview the other two competing alternatives.

Let's start with accommodation models. Approaches grouped under this category share the aspiration to deal with national emergencies by adopting emergency provisions that empower the government to introduce emergency measures during periods of crisis. For example, in Canada the preamble to section 91 of the Constitutional Act of 1867 gives the power to the parliament to "make laws for the Peace, Order, and good Government of Canada."[121] This is an example of what Gross and Aoláin call a "constitutional anchor." Its function is to allow the government to make the necessary changes to the legal order during a crisis while maintaining its commitment to the Constitution. "According to the models of accommodation, when a nation is faced with emergencies its legal, and even constitutional, structure must be somewhat relaxed... This compromise, it is suggested, enables continued adherence to the principle of the rule of law and faithfulness to fundamental democratic values…"[122] It should be noted that these approaches do not advocate for normative exceptions in the sense that we have been exploring, that is, as exceptions from values and norms as such. Instead, they recognize the potential need to make adjustments to existing commitments and offer mechanisms for interpreting these commitments in the emergency circumstances.

The second category of approaches is called "business as usual". The characteristic feature of these approaches is that they categorically deny the justifiability of altering or deviating from the established legal and political

[121] *Constitutional Act 1982*, s. 91.
[122] Oren Gross and Fionnuala Ní Aoláin (2006), *Law in Times of Crisis: Emergency Powers in Theory and Practice,* p. 17.

framework during emergencies. These approaches share the commitment that "the ordinary legal system already provides the necessary answer to any crisis without the legislative or executive assertion of new or additional governmental powers."[123] Business as usual models, even more clearly than accommodation models, do not advocate for normative exceptions. This does not mean that these approaches must accept that constitutions explicitly account for all possible circumstances, that is, contain provisions for all possible emergencies. Rather, they insist that constitutions are sufficiently comprehensive to offer meaningful guidance in all possible scenarios.

The last category of approaches is grouped under the title the *extra-legal measures models* and includes Gross and Aoláin's theory of emergency governance. Their view is motivated by the thought that "there may be circumstances where the appropriate method of tackling extremely grave national dangers and threats may entail going outside the legal order, at times even violating otherwise accepted constitutional principles."[124] This means that actions directed at tackling emergencies are free from constitutional constraints. In other words, the extra-legal measures model makes room for otherwise illegal action during crises. As Gross and Aoláin explain, "necessity does not make legal that which otherwise would have been illegal. It may excuse an actor from subsequent legal liability, but only subsequent ratification *may* (but does not have to) justify such extra-legal conduct."[125] On this view, legal norms neither constrain nor guide officials during

[123] Oren Gross and Fionnuala Ní Aoláin (2006), *Law in Times of Crisis: Emergency Powers in Theory and Practice,* p. 86.
[124] Oren Gross and Fionnuala Ní Aoláin (2006), *Law in Times of Crisis: Emergency Powers in Theory and Practice,* p. 112.
[125] Oren Gross and Fionnuala Ní Aoláin (2006), *Law in Times of Crisis: Emergency Powers in Theory and Practice,* p. 141.

emergencies. These agents act outside of law, or in exception to the law, in the expectation that their extra-legal actions will be deemed *morally* justifiable after the fact through the process of ratification. In this way, Gross and Aoláin's extra-legal measures model accepts the possibility of normative exception as suspension: they argue that the constitution should be temporarily suspended for the duration of crises. The legal norms should be suspended in favor of the moral ones.

Thus, instead of legal scrutiny of emergency measures according to the constitutional standards, Gross and Aoláin advocate moral scrutiny in the course of the post-crisis ratification. As they explain, their extra-legal measures model "seeks to compel each member of society, in whose name terrible things have been done, to become morally responsible through the process of ratification or rejection. Government agents must decide whether or not to act extra-legally in times of crisis. They must face that question as moral agents."[126] Acceptance or rejection of government's emergency actions can be expressed through a variety of channels, including the exercise of prosecutorial discretion, governmental indemnification of state agents, honorific awards or withholding of such awards, or in the form of constitutional or legal amendments after the fact.[127] The central feature of Gross and Aoláin's view is that these actions cannot be a result of legal judgments, since the law is suspended for the period of the emergency, but must be the result of the public's moral judgments.

[126] Oren Gross and Fionnuala Ní Aoláin (2006), *Law in Times of Crisis: Emergency Powers in Theory and Practice,* p. 140.
[127] Oren Gross and Fionnuala Ní Aoláin (2006), *Law in Times of Crisis: Emergency Powers in Theory and Practice,* pp. 137-142.

One of the central motivations behind this theory is to provide an account of decision-making suitable for emergencies that, on the one hand, allows the necessary freedom for the government officials to deal with emergencies but, on the other hand, does not leave these actors free from all normative constraints. Gross and Aoláin take pains to distance their view from realist accounts, according to which legal, political, and moral considerations do not apply during emergencies.[128] According to Gross and Aoláin, the central distinguishing feature of their extra-legal measures model is that it "emphasizes an ethic of responsibility on the part of not only public officials, but also of the general public."[129] Moral norms replace suspended legal norms during the crisis and for the purposes of assessing emergency actions. Together, the officials and the general public ensure that the problems posed by a crisis are addressed appropriately: officials act so as to bring the crisis under control, unconstrained by law, and the public reviews those actions in the process of ratification. Thus, the extra-legal measures model purports to promote government accountability.

Gross and Aoláin argue that the main upshot of the extra-legal measures model is that it protects the integrity of the legal order. According to them, the model "seeks to preserve the long-term relevance of, and obedience to, legal principles, rules, and norms."[130] Suspending the law to address exceptional

[128] Quotidian norms and other elements of realist views will be discussed in more detail in the following section.
[129] Oren Gross and Fionnuala Ní Aoláin (2006), *Law in Times of Crisis: Emergency Powers in Theory and Practice,* p. 141.
[130] Oren Gross and Fionnuala Ní Aoláin (2006), *Law in Times of Crisis: Emergency Powers in Theory and Practice,* p. 112.

normative challenges is necessary for maintaining the integrity of law on this theory. As Gross and Aoláin explain,

> Hard cases make bad laws. Times of emergencies make some of the hardest of cases. What the Extra-Legal Measures model attempts to do is keep the ordinary legal system clean and distinct from the dirty and messy reality of emergency so as to prevent, or at least minimize, the perversion of that system in search for answers to hard, exceptional cases. Ordinary rules need not be modified or adapted so as to facilitate governmental crisis measures. In so far as exceptional measures are required to deal with the 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.[131]

For Gross and Aoláin, law is an important tool for governing a community during periods of normalcy but it is ill suited for emergency governance. The integrity of the legal system must be protected during emergencies by suspending the legal framework, according to their view.

There are several practical and institutional problems with the extra-legal measures model. In particular, the ethic of responsibility promoted by this model is vulnerable to criticism. For example, it is unclear that the process of ratification by the public can promote responsibility on behalf of the officials and offer enough freedom to them to deal with the exigencies of crises. Gross and Aoláin themselves point to several vulnerabilities of their position; they write, "Faced with the need to give reasons for her actions, a public official may well decline to engage in extra-legal measures and actions unless she is confident that the people and their representatives will come to see things her way and regard her action as necessary and legitimate. Even then she may still hesitate to act unless she is confident that

[131] Oren Gross and Fionnuala Ní Aoláin (2006), *Law in Times of Crisis: Emergency Powers in Theory and Practice,* pp. 161-2.

she will not suffer personally for taking such actions."[132] If that is true, then officials may be tempted to refrain from doing what should be done in order to bring the emergency under control. Being uncertain about the outcomes of ratification, officials may hesitate or refrain from certain actions that could prevent serious harms.

Furthermore, there are plenty of reasons to doubt that the public will hold officials accountable after the crisis. Much will depend on the moods and the climate of the political community, the quality of information available to the public to assess government actions, and the qualifications of the public in making this type of judgment. We'll do well to remember that normally many of important legal and political decisions are not decided by a popular vote in liberal democracies but by decisions of qualified officials with access to relevant information. It is unclear why the general public should have any say, let alone the final say, in assessing emergency measures through the process of ratification, which calls for moral evaluation. The public opinion could be an important ingredient in assessing the legitimacy of emergency measures, but it is far from obvious that public's collective moral judgment constitutes a proper standard.

Beside the uncertainty of public's ability to make good moral judgments on emergency policies, there are reasons to doubt that the public will use any moral standards in the process of ratification at all. We should recognize that public judgment could be little more than expressions of fear, anger, or uncritical solidarity in the wake of the crisis. People's evaluations could be influenced by government's

[132] Oren Gross and Fionnuala Ní Aoláin (2006), *Law in Times of Crisis: Emergency Powers in Theory and Practice,* p. 156.

promises or by an animus created towards certain groups during the turmoil. Unless we accept the troublesome view that any kind of popular judgment is acceptable, the process of ratification requires a mechanism for ensuring that only good moral judgments are used to scrutinize emergency governance. If the outcome of ratification is not based on moral judgments, let alone good moral judgments, its usefulness and value for determining the legitimacy of government's actions is highly suspect.

The fact that people could make bad moral judgments or that they could avoid making moral judgments at all in the process of ratification puts a dent in the account of political responsibility of the extra-legal measures model. In light of these considerations, officials have a compelling reason to manipulate public's perception rather than to implement optimal emergency policies, since the public could mistakenly reject them. If that is right, the extra-legal measures model does not promote moral responsibility but rather political prudence based on the politicians' ability to predict and mold public's reactions. (That said, we should note that to mold public's perceptions and to develop optimal emergency policies are not mutually exclusive tasks.)

These problems stem in part from Gross and Aoláin's problematic account of normativity. In particular, they stem from a sharp separation between law and morality in constitutional matters, a separation that isolates moral and legal considerations. If moral norms should be used to assess the legitimacy of emergency governance instead of the suspended legal ones and if legal norms are to be protected from the messy business of emergency governance, the moral and legal

domains must be separable and at least somewhat independent of each other. However, it is plainly obvious that the content of many constitutional norms is the expression of our moral views and values. For example, our legal commitments to respect the dignity of persons, equality, and justice are expressions of our moral values. To the extent that legal and moral norms share their content, it seems that if emergencies threaten legal norms, they must also threaten moral ones. If Gross and Aoláin are right to worry that emergencies threaten the integrity of our legal system, their worry should extend to the integrity of our moral commitments.

Conversely, if Gross and Aoláin are right to claim that moral standards should be used for evaluating emergency policies, it seems possible that at least some legal norms could be used for such evaluations as well. Constitutional norms in particular are likely to prove suitable for this task because they reflect our most fundamental commitments. If the constitution reflects our most central and fundamental views, then it should be used for assessing the legitimacy of emergency governance. This argument does not undermine the significance of moral evaluations of emergency governance but shows that the case for the suitability of moral evaluations supports the suitability of the legal ones.

One may be tempted to defend the extra-legal measures model by arguing that the content of legal and moral norms is sufficiently distinct. If that is true, the moral perspective could offer a unique vantage point for legitimacy assessments. This response, however, runs into the problem we encountered earlier when we explored the defeasibility conception of exceptionality. As we noticed then, constitutions of liberal democracies are thought to reflect the most fundamental

commitments of these political communities. While it is certainly possible to argue that not all moral norms are reflected in laws of liberal democracies, there does not appear any reasonable argument in support of the claim that our central constitutional commitments are non-moral. If this is correct, then suspending the legal framework and substituting it with the moral one for the purposes of assessing the legitimacy of emergency governance, as Gross and Aoláin suggest, is not a remedy for avoiding "hard cases" that could "contaminate," and leave "interpretive stretch marks" on our fundamental commitments.

If the suspension of the legal framework also entails the suspension of the moral framework, the extra-legal measures model lacks a criterion by means of which the legitimacy of emergency governance could be assessed. If a constitutional suspension that Gross and Aoláin advocate leads to a suspension of the most central and fundamental view and values, it is difficult to explain what sort of standards must be satisfied by the extra-legal actions to pass the test of ratification. If this argument is correct, it should put us on guard against the idea of exceptionality as suspension. If it is true that the constitution is the expression of our most fundamental legal, political, and moral commitments and if it is true that it is the best tool for verifying the legitimacy of government's actions, the suspension of law in favor of moral judgments is not a promising strategy.

## 4.7. EXCEPTIONALITY AS REPLACEMENT: REPUBLICAN AND DECISIONSIST LOGIC

The doctrine of exceptionalism reveals another set of issues with the idea of normative exceptionality. In her book *States of Emergency in Liberal Democracies*,

Nomi Lazar offers a discussion of the realist view of normativity captured in the doctrine of exceptionalism. According to her, "Exceptionalism is grounded in the claim that the usual norms cease to apply in emergencies. Exceptional times, as the saying goes, call for exceptional measures. Emergency powers, on a view that conflates them with exceptionalism, are amoral because a rule that does not apply cannot be violated."[133] The idea that rules are context specific, and thus may not apply in some circumstances, is uncontroversial.[134] However, the idea that no moral judgments should be used for assessing emergency actions because moral norms do not apply in emergency circumstances stands in need of justification. This idea also calls for an exploration of conceptions of political responsibility that are suitable for evaluating emergency responses and actions of government officials during emergencies. If moral judgments should not be passed on government's emergency measures, could the conduct of officials be evaluated in these circumstances? Are there any other types of evaluations that could be used for such assessments? Is it possible to hold officials accountable for their conduct during emergencies on the exceptionalist account of normativity? To answer these questions let us examine he doctrine of exceptionalism in more detail.

This view of normativity is associated with political realists, such as Hobbes, Rousseau, Machiavelli, and Carl Schmitt. Lazar tells us that for realists emergency is "an organizing principle" in political theory, meaning that the study of how political

[133] Nomi Lazar (2009), *States of Emergency in Liberal Democracies*, p. 20.
[134] For example, rules of soccer do not apply to chess; Canadian laws do not apply in Japan. Analogously, rules that apply in the normal context may not apply during emergencies.

regimes address emergencies reveals key aspects of their nature.[135] The central premise of exceptionalism is that any political community needs to be protected from dangers that threaten its existence. In order for subjects to be protected, their collective obedience to the government is necessary. Lazar explains, "when the aim of the political community is conceived as protection, and when that protection is conceived as impossible without unity and force, then obedience is its natural counterpart."[136] It can be argued then that emergency is an organizing principle because it informs the nature of the relationship between the government and the governed. The main purpose of this relationship is the protection of individuals and their political community from existential threats. According to the realist view, the government has authority over its subjects and its subjects owe a duty of obedience to it because the government protects its subjects from existential threats.

According to this account, the protection of a political community from threats to its existence is a special task. The fulfillment of this task requires a special set of considerations that are different from those that normally apply to individuals who live in political communities. Thus, on this view, there are two tiers or domains of normativity. On the one hand, there is an ethic that is produced by the political order and that applies to its subjects. This includes laws, traditions, and other social norms that are meant to guide subjects' conduct. On the other hand, there are considerations that apply to those who are in charge of preserving and protecting the political community. The first tier is produced by the state and it applies to the

[135] Nomi Lazar (2009), *States of Emergency in Liberal Democracies*, pp. 48-9.
[136] Nomi Lazar (2009), *States of Emergency in Liberal Democracies*, p. 49.

normal every-day affairs of people; the second one is outside the state and it applies to justifications and strategies for maintaining the state as a distinct political entity.

Lazar distinguishes between these two tiers, calling the internal one "the quotidian" and the external one "the existential." As she explains, "existential ethics concern the founding and preserving of states while quotidian ethics govern life within a state."[137] One prominent distinguishing feature of the two-tier view of normativity in contrast to the conception that is presupposed by the extra-legal measures model discussed in the previous section is that for Gross and Aoláin moral considerations are only used to assess the legitimacy of government actions when the legal order is suspended. In contrast, the view described by Lazar claims that quotidian and existential considerations are always at play. While quotidian ethic always applies to the subjects of the political regime, the existential ethic always applies to the guardians of the regime. Thus, the separation between the quotidian and existential ethics is not temporal but rather agent-relative.[138]

According to Lazar, the doctrine of exceptionalism differentiates among states on the basis of their quotidian orders. "The quotidian ethics of a Maoist regime are significantly different from those of contemporary Sweden."[139] Norms constituting quotidian order could vary significantly among different political communities but they always apply to their subjects and include constitutional commitments, such as respect for equality, dignity of person, and procedural rights. In contrast, existential considerations "are characterized by their relative uniformity

[137] Nomi Lazar (2009), *States of Emergency in Liberal Democracies*, p. 12.
[138] Nomi Lazar (2009), *States of Emergency in Liberal Democracies*, p. 35.
[139] Nomi Lazar (2009), *States of Emergency in Liberal Democracies*, p. 23.

across regime types."[140] Such existential norms as the survival or the continuity of the political order always apply to relevant decision-makers. They apply to all guardians of all political regimes at all times.[141]

Now, we should notice that separating normativity into two tiers gives rise to the type of challenge we examined with the extra-legal measures model. The challenge is to show that it is possible to isolate the quotidian from the existential ethic with regards to values and norms reflected in constitutional commitments. The plausibility of the doctrine of exceptionalism depends on the possibility of identifying a set of norms that could make up the existential ethic and that does not coincide with the quotidian norms. If our familiar legal, political, and moral norms belong to the quotidian tier, what kind of norms could belong to the existential tier on the realist understanding? If the separation cannot be established, it could effectively mean that our fundamental values are suitable for addressing existential threats.

Lazar's discussion attributes to realists the view that continuity and survival of political communities are the central examples of norms making up the existential ethic.[142] This answer, however, is not convincing. One could easily argue that such norms as protection and preservation of the community and its political culture

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[140] Nomi Lazar (2009), *States of Emergency in Liberal Democracies*, p. 24.

[141] One may argue that the constitution of a political community, which forms a part of its quotidian order, could reflect some or all norms constituting the existential ethics. As long as the reflection of existential norms in the constitution, a quotidian document, does not commit one to the view that these norms apply to average citizens, this possibility does not threaten the distinction that Lazar examines.

[142] For example, Hobbes, to whom Lazar attributes the exceptionalist view, argues that the sovereign's task is "…preserving of Peace and Security, by prevention of Discord at home, and Hostility from abroad, and, when Peace and Security are lost, for the recovery of the same." Thomas Hobbes (1994), *Leviathan*, Ch. XVIII, p.136.

belong to the quotidian order of at least some states because they are reflected in their legal and political commitments. For example, in Canada *the Emergency Act (1985)* authorizes "the taking of special temporary measures to ensure safety and security during national emergencies…"[143] Similarly, in the UK *the Emergency Powers Act (1964)* authorizes the government "to make regulations for securing the essentials of life to the community" during emergencies.[144] Seemingly, these legal norms are meant to regulate the conduct of officials who are charged with addressing, what realists would call, existential threats. Yet, they are reflected in law, which means that they belong to the quotidian order on the realist understanding. The doctrine of exceptionalism, then, must contend with this difficulty. Unless an account of distinct norms constituting the existential tier could be offered, we cannot accept the two-tier view of normativity underlying the doctrine of exceptionalism. We cannot ignore the fact that liberal democratic values include norms governing protection and maintenance of the liberal democratic culture and institutions.[145]

A related but a distinct difficulty with the realist view of normativity pertains to the conception and the role of political responsibility. In particular, realists are committed to the separation between the *guardians* of the community and the rest of the people, with the latter being subject to quotidian norms and the former

[143] *Emergency Act* (R.S.C. 1985)
[144] *The Emergency Powers Act*, (1964)
[145] In Canada, for example, Bill C-36 was enacted to address the threat of terrorism. (Bill C-36, Anti-Terrorist Act (ATA), S.C. 2001. In the United States, the PATRIOT Act (2001) was enacted to address this threat.

unbound by them. The quotidian order provides mechanisms for assessing conduct by offering standards reflected in political, legal, and moral frameworks. The quotidian order includes such institutions as courts that could make judgments about the legitimacy and justifiability of the subjects' conduct. But if laws and legal institutions that are regulated by them are part of the quotidian order, there does not appear to be any standard or mechanisms by means of which one could evaluate the conduct of the guardians who address existential threats to the community. This means that the guardians cannot be held accountable for their actions as guardians of the political community, even though in that capacity they hold the greatest power over the people.

It is important to be aware that the issue of accountability in relation to the guardians of the political regime extends to the normal circumstances. For example, on Schmitt's view the sovereign is not only in charge of making decisions during exceptional times but also of deciding whether a given situation qualifies as an exceptional one.[146] If we recognize that the possibility of emergency is constant and that there are no mechanisms by means of which it could be objectively determined that an emergency exists in all cases, it follows, one may argue, that the guardians must have the power to decide not only what is to be done during any given crisis but also whether any given situation qualifies as a crisis. If so, the question of political accountability is an overarching issues and pertains to normal and emergency circumstances.

[146] According to Schmitt's famous thesis, "the sovereign is he who decides on the exception." Carl Schmitt (2005), *Political Theology: Four Chapters on the Concept of Sovereignty*, p. 5. For a discussion of this thesis, see David Dyzenhaus (1999), *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Herman Heller in Weimar.*

As a consequence, the doctrine of exceptionalism that is the basis of the realist view is incompatible with liberal democratic aspirations. As Lazar argues, "Exceptionalism always implies a constantly exempted political figure, in contrast to democratic governance, which necessitates an always accountable political figure. [Hence,] exceptionalism is a doctrine fundamentally incompatible with democratic accountability."[147] Because the government is not constrained by the fundamental liberal democratic values when it attempts to defend its subjects from existential threats, it does not have an obligation to treat them according to the standards set out by the liberal democratic commitments, such as the respect of the dignity of persons. In light of that, the suitability of the realist approach to the question of emergency governance as well as its two-tier view of normativity are unpromising for developing a meaningful conception of political responsibility from the liberal democratic point of view.

However, even if we set aside liberal philosophy, the doctrine of exceptionalism is problematic with regard to the account of political responsibility. If the realist view assigns a different ethic to the guardians of political regimes in contrast with the subjects of those regimes, it is difficult to devise strategies for ensuring that the guardians in fact fulfill their role of protecting the political community. Whatever the content of the quotidian ethic, as long as it is different from the existential ethic, the separation between the guardians and the subjects shields the guardians' conduct from any criticism from their subjects, who appear to be the only candidates for ensuring the proper functioning of the guardians. Thus,

[147] Nomi Lazar (2009), *States of Emergency in Liberal Democracies*, p.19.

for example, Hobbes is arguably against holding the sovereign accountable to his subjects. As Lazar argues,

> First, because we transfer our authority to the sovereign when we contract, we are the author of all the sovereign's actions. We cannot find fault with actions we ourselves have authored. Second, one cannot justify civil disobedience against a remiss sovereign by appealing to higher law or a higher power because one cannot covenant with God unless there is some mediating figure to personate God, such as Moses or a prophet, whose appearances in Hobbes' day, and ours, have been limited. Third, the sovereign cannot be held to be in breach of a contract with his subjects because he is not a party to the contract, which exists between the subjects, not between them… and the sovereign.[148]

If we add to this Hobbes' insistence that for a contract to be meaningful, there must be someone who is in a position to enforce it,[149] it follows, on Hobbes' reasoning, that the sovereign is unaccountable for his actions to his subjects.[150]

A further difficulty stems from the fact that the project of protecting the community from existential threats may be pursued according to a variety of strategies. For example, the goal of protecting the community from a foreign invasion or from the threat of international terrorism may be achieved through creation of alliances, improvement of defenses, or through changes in domestic and international policies. How should the guardians choose among the possible strategies for addressing a given threat? It seems that because their function is to protect the community, the strategy that achieves this result in the most optimal[151]

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[148] Nomi Lazar (2009), *States of Emergency in Liberal Democracies*, pp. 44-45.
[149] Hobbes argument 'no one fears paper and words, only swords and men' speaks to the significance of force in maintaining normative order and, more specifically, in fulfilling obligations.
[150] Hobbes' view of force as a necessary requirement for the existence of obligations has been extensively criticized. For example, see Waluchow's distinction between normative and de facto conceptions of freedom. Wil Waluchow (2007), *Common Law Theory of Judicial Review*, pp. 35-37. I do not explore these criticisms here because they do not directly speak to the issues of political responsibility that I am outlining.
[151] A further difficulty at this point is to explicate the standard for determining "optimal strategies." It is unclear what that standard may be, if all our quotidian norms are unsuitable for all aspects of emergency governance.

fashion is preferable. But it is difficult to see how such choices could be made in isolation from the quotidian values and norms. It also seems entirely plausible that a strategy for addressing a threat that is compatible with the quotidian norms is preferable to the one that is not. If this is the case, then it seems that for guardians to fulfill their function of protecting the community they must be guided by the quotidian norms at least in some cases. If this argument is correct, it does not only complicate the separation between the quotidian and existential tiers but it also serves as the basis for holding the guardians accountable according to the quotidian ethic.

It is worth examining some possible routes for defending exceptionalism. For example, it may be argued that exceptionalism only describes how governments in fact act when facing existential crises. The argument, then, is that exceptionalism should be accepted because it offers a true account of the social and political reality. But this is hardly sufficient. If we accept as social fact that governments do not behave as though they are constrained by quotidian considerations when they face existential crises, we still need an argument to show that this is a normatively acceptable state of affairs. The acceptance of the social fact that governments do not comply with normative standards in emergencies does not prove that governments are not subjects to normative standards when political communities face existential threats. We must be careful not to commit a naturalistic fallacy, that is, confuse the fact that X is the case with the fact that X should be the case.

One may also be tempted to defend exceptionalism by adopting an argument along the following lines: when it comes to questions of national security and the continued existence of any political community, the government has no choice but to do whatever it must to provide such protection. Just as we think that an individual is justified in resorting to exceptional measures during exceptional circumstances (such as killing in self-defense), a government, it may be argued, is justified in resorting to exceptional measures for protecting the political community during states of exception.

This line of argument is problematic because there is a number of significant disanalogies between an individual on the one hand and political communities and governments on the other.[152] These are ontologically different entities and it is a matter of argument to show that normative considerations that apply to one of them apply to the other in the same manner.[153] For example, it is certainly not true that an instinct for self-preservation that may spur an individual to act in self-defense is attributable to an institution, such as the executive. In cases of self-defense the biological existence of an individual is at stake. Because political communities and governments are not biological entities, it is unwarranted to attribute to them the characteristics of biological entities. This is a normatively significant fact that

[152] Recall Isaiah Berlin's warning about the dangers of misapplying concepts and disregarding the differences of contexts sited in Chapter 2.
[153] To get a sense of questions surrounding the application of normative considerations to different types of agents, see, for example, Christian List and Philip Pettit (2011), *Group Agency: The Possibility, Design, and Status of Corporate Agents*.

radically distinguishes individuals from political communities and government institutions.[154]

A more sophisticated argument can be pursued in support of exceptionalism. It may be argued that the preservation of a political community should not be taken as a value but as an interest. On the basis of the distinction between values and interests, one may argue that the exceptionalist position offers a standard for the determination of responsibility by asking us to evaluate the government's actions not according to liberal or any other kind of values. Rather, the government's action should be evaluated according to the interest in the perpetuity of a given political community. Any political community, one may argue, simply strives to be and owes no value-based justifications in pursuing this goal. If that is right, then for as long as the government guarantees the perpetuity of the political community, it meets its standard of "existential" responsibility.

In his book, *Justice for Hedgehogs*, Dworkin attempts to draw out a distinction between values and interests or, what he calls, desiderata. Dworkin writes, "Values have judgmental force. We ought to be honest and not cruel, and we have behaved

[154] It is possible to object to this line of reasoning by arguing that it is individual agents who represent governments and communities who act on self-preservation grounds. Thus, the self-preservation talk really refers to actions of concrete individuals rather than government institutions. While this objection assumes that institutions cannot act without individuals who officiate them (an assumption that I do not make but that is consistent with my reasoning), it does not undermine my central point that there are crucial differences between, on the one hand, justifications for actions directed at individual self-preservation and, on the other hand, justifications for actions directed at preservation and maintenance of government institutions. As important as government institutions are for communal life, it is a mistake to suppose that the same set of reasons justifies their preservation as individuals. I cannot provide a detailed explanation of this difference at this point but, in my view, the following considerations are among the decisive ones. 1) Individuals have an intrinsic value while institutions have an instrumental one. 2) In principle, it is possible and there is nothing morally wrong to eliminate one government institution in favor of another. The same cannot be said about individuals. 3) Given that individuals are biological entities and that government institutions are social constructs, the respective accounts of self-preservation could be grounded in radically different considerations, such as instincts in the former case and political commitments in the latter.

badly if we are cruel and dishonest. Desiderata, on the contrary, are what we want but do no wrong not to have. Or not to have as much of as we might."[155] On this account, a fulfillment of desiderata or, in other words, a satisfaction of an interest is not a basis for moral judgments. This is so because a satisfaction of an interest is not a proper basis for moral praise or blame. Barring unjust conditions, there is nothing morally wrong, for example, if I do not get the job that I want or if I am not as safe as I would like to be in my community.[156] But there is a moral failing if I were to act cruelly or maliciously towards other people. On the basis of Dworkin's distinction, it may be argued that the preservation of political communities is not a value but rather an interest.[157]

There are at least two problems with this line of argument. First, it is not obvious that a sufficiently clear distinction between values and interests can be made when we focus on communal or national security. While it is true that we can conceive of security as an interest (as something we can have more or less of without thereby being morally better or worse for it), it is also possible to conceive of security as a value in Dworkin's understanding. In the discussions of crises that political communities at times face, it is perfectly suitable, and appears to be

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[155] Ronald Dworkin (2011), *Justice for Hedgehogs*, p. 118.

[156] In *Justice for Hedgehogs,* Dworkin is explicit that the pursuit of public safety is not a value. In brief, his central claim about the nature of normativity is that there cannot be any conflicts of values. In light of that and in order to highlight the contrast between values and interests, Dworkin writes, "Values often conflict with desiderata. Some steps we might take to improve safety from terrorists, which we certainly desire, would compromise liberty or honor [these are values for Dworkin]. …There is no moral conflict in such cases, however, because morality requires that we give up whatever security our dishonor would achieve." Ronald Dworkin (2011), *Justice for Hedgehogs*, p. 118.

[157] It should be noted that Dworkin would not accept exceptionalism. Dworkin's unity of value thesis overwhelmingly and emphatically places Dworkin on the opposite side of the spectrum from exceptionalists in their attempts to find space outside the purview of fundamental values. I am only borrowing Dworkin's distinction between values and interests here because it is possible that one may be tempted to defend exceptionalism by means of it.

common, to understand security as a value rather than an interest. It is generally accepted that a legitimate government should ensure a certain level of security for its subjects. It follows, then, that there is a moral or a political failing if the government does not provide the appropriate level of security. Expressed in this way, this is clearly a moral or a political judgment on Dworkin's understanding. And if security is a value, then we encounter the problems that we discovered with the previous conceptions of normative exceptionality.

Secondly, it is difficult to take the satisfaction of interests as a standard for determining political responsibility. We are comfortable with the idea that individual agents, organizations, and government institutions can be used to achieve a variety of goals. And it is not uncommon for us to evaluate such entities based on how well they promote our interests. However, it is a mistake to conflate actions that promote an interest with responsible actions. We certainly can notice the difference between entities that only promote our interests and those that do so responsibly. And we commonly criticize agents and institutions that place the attainment of interests, including political ones such as gaining popular support, beyond their moral and political obligations.

The general conclusion is that there does not appear to be a suitable conception of responsibility that is compatible with the exceptionalist doctrine. While the two-tier view of ethics promises to deliver a standard for determining political responsibility, it faces serious obstacles. The view of exceptionality as replacement that underlies the exceptionalist doctrine fails to account for our

understanding of the nature of values and for our expectations of legitimate and responsible governance during exceptional circumstances.

## 4.8. EXCEPTIONALITY AS INSIGNIFICANCE: THE CIRCUMSTANCES OF JUSTICE

Lastly, it is possible to understand normative exceptionality through the idea of the circumstances of justice. These circumstances designate 'a space' where the value of justice matters; outside of that space justice loses its significance as a value. This does not mean that the value of justice is suspended or is replaced by other considerations. Rather, it means that the value of justice becomes less relevant or becomes entirely irrelevant in certain exceptional contexts. While in this section I primarily focus on the value of justice, my analysis is applicable to other fundamental political values, such as liberty and equality. I aim to show that this conception of exceptionality precludes a meaningful examination and assessment of government's responsibility during an exceptional crisis. This is a serious problem since we are just as concerned, if not more, that the government acts responsibly during the times of crises as during the periods of normalcy.

The idea of the circumstances of justice is not a new one. Here is how David Hume presented the thought experiment where justice loses its value:

> Encrease to a sufficient degree the benevolence of men, or the bounty of nature, and you render justice useless, by supplying its place with much nobler virtues, and more valuable blessings. The selfishness of men is animated by the few possessions we have, in proportion to our wants; and `tis to restrain this selfishness, that men have been oblig`d to separate themselves from the community, and to distinguish betwixt their own goods and those of others.[158]

[158] David Hume (2001), *A Treatise of Human Nature*, p. 403.

Hume's thought is that the value of justice loses its significance in the context where agents are wholly benevolent and where natural resources are unlimited. It is certainly likely that in such a context all sorts of social, economic, and political problems will not arise. Most distributive problems, concerning the distribution of resources as well as rights, will simply not come up in such an environment for such agents. Now, we are concerned with these issues because we live in the world characterized by moderate scarcity of resources and by human dispositions that are neither perfect nor absolutely wicked. In our context, justice matters.

In his *The Theory of Justice*, John Rawls relies on Hume's idea about the circumstances of justice in order to determine the scope of his theory. He writes, "the circumstances of justice obtain whenever persons put forward conflicting claims to the division of social advantages under conditions of moderate scarcity. Unless these circumstances existed there would be no occasion for the virtue of justice, just as in the absence of threats of injury to life and limb there would be no occasion for physical courage."[159] Rawls' theory of justice offers a solution to the problem of distribution of social advantages, which is highly influential for liberal theory. But his theory is only meant to apply to the circumstances where justice matters for reasons set out in the context familiar to us. That means that in an idyllic context, where there is an abundance of resources, including the social ones, and a perfect disposition of agents to communal living, justice is not an issue.

If we are willing to entertain the insights of Hume and Rawls' thought experiments regarding the idyllic context, we should have no trouble with exploring

[159] John Rawls (1999), A *Theory of Justice*, p. 110.

the insights of catastrophic scenarios. Imagine a terrible and a wicked world where human beings are not only evil and hostile towards one another but also inhabit an environment characterized by an extreme scarcity of resources, such that it is impossible that most individuals can get a bare minimum necessary for survival. In filling out the details of this sinister context, we can take inspiration from such thinkers as Thomas Hobbes, whose conception of the state of nature – "the war of all against all" – can serve as a useful tool for exploring reasons for the diminished concern for justice. Given the extreme scarcity of resources as well as the hostility and wickedness of the human nature, it is difficult to imagine, one may argue, what kind of distributive framework could be developed and what would motivate hostile and evil agents to adopt such a framework if it could be developed.

The purpose of this farfetched thought experiment is to show that the characteristics of human nature and social environment determine whether questions of justice arise. The insight that these thought experiments could claim to offer is that our concern for our values fluctuates depending on the circumstances. The idea of the circumstances of justice, then, can be used to explain normative exceptionality. One can argue that the importance of the fundamental political values is a matter of context. Normally, we place a high value on equality, liberty, justice, and other constitutional values. However, it is wrong to suppose that these values always matter to us in the same way. In the exceptionally horrible contexts, for example, certain types of national security crises, constitutional values lose their significance for us.

Adopting such a view, however, is problematic. First, even if we accept the account of values that the idea of the circumstances of justice relies upon, a lot more will need to be done in order to show that national security crises that we are familiar with can present such exceptional circumstances when fundamental political values lose their significance or are rendered irrelevant. While the polemic surrounding national security crises at times proceeds in such apocalyptic terms, hardly any national security crisis is an example of a context that sufficiently resembles the space outside the circumstances of justice. National security crises, as threatening as they are to the welfare of the affected communities, do not undermine the condition of moderate scarcity that informs Hume and Rawls' thought experiments. While it is true that some security crises, such as 9/11 or Pearl Harbor, are pivotal, they do not affect all facets of communal life and destroy all social bonds in the political community. Thus, it is certainly true that courts of western liberal democracies continue to resolve private and public disputes amidst national security crises, the disputes that have little or nothing to do with these circumstances. This shows that national security crises familiar to us do not overshadow every other aspect of our lives and that our fundamental values matter in those contexts.

Secondly, if the fundamental political values lose their significance, it is hard to see how the question of government's responsibility for dealing with crises can have any significance either. It seems that the stance most congruent with the conception of exceptionality as insignificance is that the project of assessing responsibility is also insignificant. There does not seem to be any place for political

responsibility in the desolate world where all are fighting all. However, it is difficult to accept this view not only because the crises that we encounter are not sufficiently extreme to change the condition of moderate scarcity or rewire our human dispositions but also because we do take the question of political responsibility seriously during national security crises. It matters to us how the government acts and whether it acts responsibly in these circumstances. If that is right, we should be careful not to misapply the insights of Hume and Rawls' thought experiments to our attitudes towards national security crises.

## 4.9. CONCLUSION

By exploring the exceptionality associated with emergency situations, we have established two conclusions. First, not all emergency situations are exceptional in the normative sense of the term. This is important because it is impossible to know in advance the nature of normative challenges that emergencies could create. Some of these challenges may be possible to address through our settled normative commitments while others may require going outside their scope. Strategies for addressing emergencies must take into account the variability of these circumstances. Second, we saw that the notion of political responsibility does not sit well with the idea of normative exceptionality. We saw that it is difficult to provide a plausible account of political responsibility during emergencies if we accept the view that these situations are outside the scope of our fundamental values.

In the next chapter, we will turn to the examination of more specific normative problems associated with emergency governance when we examine

Posner and Vermeule's tradeoff thesis. That discussion will rely on the insights that we have developed in the course of our conceptual exploration of emergencies as well as our normative inquiry into challenges associated with this type of situations.

# CHAPTER 5: SHORTCOMINGS OF POSNER AND VERMEULE'S TRADEOFF THESIS

## 5.1. INTRODUCTION

In the second part of their book, Posner and Vermeule discuss the application of their institutional argument in the context of such issues as coercive interrogation, indefinite detention, censorship laws, as well as military trials, all of which commonly arise in the context of national security crises brought on by the threat of terrorism. Throughout these discussions Posner and Vermeule maintain that the executive should be in charge of decisions regarding the introduction of these policies during emergencies and that the courts should not have the power to review these decisions. Their aim is to show that the executive is the best institution to assess the justifiability of these policies in concrete circumstances. According to their view, all emergency measures and policies that the executive branch develops during emergencies should not be reviewable by the courts.

In this chapter I examine Posner and Vermeule's account of policymaking that is captured in their tradeoff thesis. This account is meant to explain the process of policymaking during emergencies and to provide a foundation for their deference thesis, according to which judges should defer to the executive in these circumstances. The discussion of this chapter begins with a detailed presentation of Posner and Vermeule's tradeoff thesis as well as an exploration of the two types of objections that they anticipate to their view. The critical portion of the chapter advances three types of criticisms of the tradeoff thesis. The first concerns the

troubling ambiguities created by the balancing metaphor that lies at the heart of the tradeoff thesis. The second focuses on a plethora of conceptual issues with this account. And the last points to the absence of a criterion by means of which the legitimacy of emergency policies could be assessed. Together, these criticisms offer sufficient reasons to reject Posner and Vermeule's account of emergency policymaking. An implication of these criticisms is that Posner and Vermeule's institutional argument, according to which the judiciary should defer to the executive during emergencies, begins to unravel.

## 5.2. POSNER AND VERMEULE'S TRADEOFF THESIS

Posner and Vermeule's tradeoff thesis is based on the idea that preferences, interests, and values can be traded off against one another in the decision-making process.[160] This way of thinking is commonplace in political rhetoric, which is evidenced by frequent invocation of the balancing metaphor that lies at the heart of the tradeoff framework.[161] While in principle the tradeoff framework can be applied to balancing all types of preferences, interests, and values, Posner and Vermeule focus exclusively on the project of balancing security and liberty. According to

[160] See my discussion of consequentialism and deontology in relation to the tradeoff framework in Chapter 1. For a more extensive discussions of the tradeoff framework in decision-making in general, see David Skinner (2009), *Introduction to Decision Analysis*; Ralph Keeney and Howard Raiffa (1993), *Decisions with Multiple Objectives: Preferences and Value Trade-Offs*; Ralph Keeney (1992), *Value-Focused Thinking: A Path to Creative Decisionmaking*. For insightful criticisms of the tradeoff framework, see Jeremy Waldron (2012), *Torture, Terror, and Trade-Offs: Philosophy for the White House*.

[161] For examples of prominent political figures appealing to and discussing the balancing metaphor, see George W. Bush's speech on Iraq from October 7, 2002. See also the speech by James Brokenshire, the UK Security Minster, from July 3, 2013. For another discussion of the balancing metaphor, see the speech from October 29, 2009 by Richard Fadden who was the National Security Advisor to the Prime Mister of Canada.

Posner and Vermeule, "the tradeoff thesis can be stated in simple terms. Both security and liberty are valuable goods that contribute to individual well-being or welfare. Neither good can simply be maximized without regard to the other. The problem from the social point of view is to optimize: to choose the joint level of liberty and security that maximizes the aggregate welfare of the population."[162] The function of Posner and Vermeule's tradeoff framework is to determine the optimal balance between two separable values juxtaposed against one another: liberty and security. The optimal point or the point of balance is established when both values are maximized. At that point neither of the terms can be increased without decreasing the other. The curve on which both terms are maximized is also known as the *Pareto frontier*. The balancing of the terms in the tradeoff framework is conducted with the view to improving the welfare of the political community.

The scope of Posner and Vermeule's discussion of the tradeoff framework is limited to the emergency context. For this reason, it is important to evaluate this account of policymaking as it operates in this type of circumstances rather than generally. To that end, we should bear in mind the analysis of the previous chapters where the concept of emergency was examined. These insights should help us to understand the nuances of Posner and Vermeule's tradeoff thesis. A point of particular significance for Posner and Vermeule is that emergencies are high stakes situations.[163] This is so because emergencies are characterized by the prospect of serious harm and high degree of urgency. Because of this, Posner and Vermeule believe that it is more important than usual to "get policies right" during

[162] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 22.
[163] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, pp. 42-45.

emergencies.[164] This understanding of emergencies has institutional implications as well as implications for adopting the tradeoff thesis for Posner and Vermeule. In particular, it is the presence of an imminent threat that requires juxtaposition of security and liberty in their view.

We should also bear in mind the analysis of Posner and Vermeule's arguments regarding the effects of panic, the likelihood of democratic failure during emergencies, as well as the negative ratchet effects that emergency measures could produce on liberal democracies.[165] According to Posner and Vermeule, none of these institutional worries is as serious as civil libertarians make them out to be and do not warrant judicial participation in emergency governance. According to Posner and Vermeule, the executive is likely to act rationally and in good faith during emergencies and even if it does not, there is not much judges could do in these types of situations to improve the quality of emergency governance.[166] Thus, Posner and Vermeule acknowledge that the executive could make mistakes and introduce bad policies during emergencies, but such risks are acceptable in their view because the executive is more likely to get policies right when it is unencumbered by judicial oversight.[167] For Posner and Vermeule, these risks are "folded into the tradeoff thesis."[168]

With these points in mind, let us turn to a more detailed examination of the tradeoff thesis. For Posner and Vermeule, "the claim that security and liberty trade

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[164] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, pp. 42 - 49.
[165] See the discussion in Chapter 1 of my dissertation.
[166] In the following chapter this aspect of Posner and Vermeule's position will be assessed in more detail.
[167] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 4, also pp. 29-30.
[168] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 37.

off against one another implies that respecting civil liberties often has real costs in the form of reduced security."[169] This means that not all crises require a reduction of liberty in order to increase security but most crises do. To demonstrate their point, Posner and Vermeule analyze institutional mechanisms and policies that were in effect prior to the terrorist attack of 9/11 and explain the occurrence of this attack in their light. According to Posner and Vermeule, the relevant factors included the "Intelligence Wall" between various law enforcement agencies, the screening and profiling policies in effect at the time, as well as the state's position on coercive interrogation.[170] By analyzing this example, Posner and Vermeule explore policies, institutional arrangements, and legal norms that inform the notions of security and liberty. In doing so, they develop an account of the circumstances that explain the reasons for rebalancing security and liberty during periods of national security crisis, such as 9/11.

For the purposes of their analysis, Posner and Vermeule propose to visualize the tradeoff framework as the *Pareto frontier*, which "identifies a range of points at which no win-win improvements are possible: any change in policies that makes A better off must make B worse off."[171] On such a diagram, a curve connects the X-axis to the Y-axis; one of the axes stands for the value of liberty and the other stands for the value of security. The enclosed surface stands for all of the possible combinations of joint values of liberty and security. At any given time, the optimal point is located somewhere on the curve:

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[169] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 24.
[170] See, Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 24-25.
[171] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 26. (See the diagram on page 27 for an illustration.)

> As threats increase, the value of security increases; a rational and well-motivated government will then trade off some losses in liberty for greater gains in increased security. This does not mean, of course, that the overall level of social welfare remains unchanged before and after the emergency; social welfare declines because the existence of a terrorist threat makes the polity worse off.[172]

Posner and Vermeule's *Pareto frontier* represents the image of balance between liberty and security and the government functions to determine this point. Below we will analyze Posner and Vermeule's *Pareto frontier* in more detail and take up, among other issues, the question of whether more than one optimal point is possible.

In the second part of their book, Posner and Vermeule offer arguments that such emergency measures as coercive interrogation, indefinite detention, and military trials are prima facie legitimate policy options during national security crises. However, in the first part of their book, when they explicate their tradeoff thesis, they do not explain how such policies could be justified within the tradeoff framework. As they maintain throughout the exposition of their tradeoff thesis, "our project is *not* to evaluate, on the merits, whether particular antiterrorism policies pass or fail cost-benefit analysis. That is the province of experts in terrorism policy, econometrics, and empirical research."[173] For Posner and Vermeule, the tradeoff thesis is an account of emergency policymaking that expert government officials use to tackle national security crises. Posner and Vermeule's expertise as lawyers only

[172] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 27.
[173] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 32.

allows them to assess second-order or institutional issues, such as democratic failure or ratchet effects, during emergencies.[174]

Keeping in line with this strategy, Posner and Vermeule emphasize that their "tradeoff thesis does not set out an empirical claim about governmental motives or behavior. The tradeoff thesis is an expository device that allows us to clarify the grounds on which civil libertarians advocate more expansive or intrusive judicial review of government policymaking during emergencies."[175] As an expository device, the role of the tradeoff thesis is to explain how substantive issues arise and are handled during emergencies but not to provide a resolution for them. Posner and Vermeule do not offer explicit arguments to the conclusion that the tradeoff framework is the best strategy for developing emergency policies. They only note that there is a "wide range of real-world settings in which security and liberty, in its various aspects, trade off against one another"[176] and that the government *in fact* makes tradeoffs between liberty and security during emergencies.[177]

Posner and Vermeule believe that they can defend their deference view by setting aside substantive aspects of policy and instead focusing only on the issues of institutional allocation of authority, i.e., the mechanisms that produce policies.[178] According to them, judicial deference is warranted in light of the institutional characteristics of the executive and the judicial branches of government. This being their central argument, the objective of the tradeoff thesis is to set a baseline against

[174] In the following chapter we will examine Posner and Vermeule's argument about the significance of executive expertise in more detail.
[175] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 32.
[176] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, pp. 22.
[177] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, pp. 22-26.
[178] We began to explore this methodological commitment in Chapter 1 and we will return to it in more detail in Chapter 6 of this dissertation.

which competing institutional views can be assessed.[179] The central question for them concerns the identification of the institutional structure that is the most suitable for this account of emergency policymaking.

It is important to be clear on Posner and Vermeule's distinction between their first and second order questions as it applies to the tradeoff thesis. This distinction is used to separate substantive issues pertaining to emergency governance from the institutional ones. The role of the tradeoff thesis is to work as an account of emergency policymaking in order to engage with the institutional questions. In addition, Posner and Vermeule's discussion also suggests that the distinction between first and second order questions separates the inquiry into prima facie justifications for types of emergency policies and justifications of policies in specific circumstances. Posner and Vermeule's primary goal is to offer an institutional argument in favor of judicial deference. They argue that to that end they do not need to engage with the substantive analysis of emergency measures beyond general and prima facie arguments in favor of legitimacy of such emergency measures as coercive interrogation, indefinite detention, and military trials.[180]

Posner and Vermeule explain their limited engagement with substantive issues by citing their lack of expertise in emergency policymaking.[181] As they put it,

> …we do not endorse or criticize any particular counterterrorism measure… One of our central points is that we, as lawyers, do not know enough about the underlying variables to be able to express an informed opinion; nor do the administration's vociferous critics, in many cases. What we do believe is that the government must

[179] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 31.
[180] Posner and Vermeule defend these practices in the second part of their book. I do not analyze their attempts to show the prima facie legitimacy of these practices in my dissertation.
[181] See, for example, Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 273.

> make tradeoffs, that policy should become less libertarian during emergencies, and that courts should stay out of the way.[182]

According to Posner and Vermeule, lawyers, philosophers, and other commentators working on the emergency problematic lack the necessary information and expertise to assess specific emergency policies in concrete circumstances. Thus, their contribution to the project of good emergency governance should be limited to prima facie assessments of emergency polices, such as 'is waterboarding ever justifiable?' and to institutional assessments, such as 'who should decide if waterboarding should be using in specific circumstances?' According to Posner and Vermeule, the justifiability of adopting a policy in specific circumstances is outside the competence of such thinkers.

Posner and Vermeule argue that we should accept the results of the first-order balancing conducted by expert government officials as long as the institutional framework employed for reaching them is more effective than the available alternatives.[183] On the basis of the comparative analysis of institutional characteristics of the executive (speed, flexibility, and secrecy) and the judiciary (slowness, rigidity, and openness)[184], Posner and Vermeule argue that the judiciary should not check the executive during emergencies. Posner and Vermeule's analysis of these second-order considerations, animated by their tradeoff thesis, is meant to offer conclusive reasons for accepting their deference view.

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[182] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 158.
[183] For Posner and Vermeule's analysis of alternative approaches see, Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, Chapter 5, pp. 161-183. We will turn to their examination in the following chapter.
[184] For explanation and analysis of these features see the discussion in Chapters 1 and 6.

## 5.3. INTERNAL AND EXTERNAL CRITIQUES OF THE TRADEOFF THESIS

Posner and Vermeule anticipate two general types of objections to their account. According to them, the tradeoff thesis could be criticized from the internal or from the external points of view. Posner and Vermeule criticize civil libertarians for confusing these two types of objections. For example, they say that Waldron vacillates between them.[185] It is unclear whether Posner and Vermeule think that there is any special danger that comes from confusing the internal and external critiques but the distinction between the two critiques is useful for understanding the vulnerabilities of Posner and Vermeule's tradeoff thesis.

According to Posner and Vermeule, "an internal critique of the tradeoff thesis… would say that if government attempts directly to strike the optimal balance between security and liberty, it will systematically get the balance wrong."[186] In the first chapter we surveyed some of the internal critiques of the tradeoff thesis when we examined the civil libertarian arguments in favor of judicial participation in emergency governance. The three main lines of argument were *the Panic Thesis*, *the Democratic Failure Theory*, and *the Ratchet Theory*. The first of these arguments attempts to defend judicial review by showing that one function of the judges during emergencies could be to reign in the panicked executive.[187] The second aims to show how courts can defend minorities from democratically unjust emergency policies.[188] And the third argument is meant to carve out a role for courts by

[185] For Posner and Vermeule's assessment of the nature of Waldron's criticism, see, Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, pp. 36-38.
[186] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 37.
[187] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, pp. 59 – 86.
[188] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, pp. 87 – 129.

showing that they could preserve the quality of legal and political order by blocking emergency policies that promise to set dangerous precedents and have other negative long-term effects on the legal order of the political community.[189]

Posner and Vermeule argue that all such arguments are misguided because they fail to establish that "government decisionmaking is systematically worse during emergencies than during normal times and that judicial review of government policymaking during emergencies should be stricter than non-civil libertarians [such as Posner and Vermeule] advocate and stricter than it historically has been."[190] This means that civil libertarians are unable to show that the executive is systematically worse at making tradeoffs and that judicial participation in emergency governance could improve the quality of emergency policies. These are examples of an internal critique because they focus on the feasibility of the task of striking the optimal balance between liberty and security.[191]

In contrast, "an external critique of the tradeoff thesis… would simply claim that the package of civil liberties that government affords at some particular point on the security frontier is inadequate according to some independent theory."[192] Posner and Vermeule tell us that one way to undermine the tradeoff thesis is to adopt a nonconsequentialist theory of rights and to argue on its basis that some

[189] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, pp. 131 – 156.
[190] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, pp. 31 – 32.
[191] According to Posner and Vermeule, Waldron could be classified as an internal critic based on the views he expressed in one of his papers. See Jeremy Waldron (2003), "*Security and Liberty: The Image of* Balance." They say that Waldron's "concerns about the tradeoff thesis are not conceptual in character and are not derived from [the relevant] expertise. Rather, they rest on implicit institutional and causal hypotheses about political psychology and its effects on policymaking, about the structure of political representation, and about the second-order consequences of recognizing expanded governmental powers in times of emergency." Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, pp. 37-38. I refrain from evaluating Posner and Vermeule's assessment of Waldron's work in this regard here.
[192] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 37.

sacrifices of liberties are not justifiable even during emergencies.[193] According to their assessment, the external critiques "risk being, and seeming, extremist and impractical"[194] because these critiques insist on the impermissibility of violating or sacrificing rights under the umbrella of civil liberties even in the most dire circumstances.

The external critic does not focus on the feasibility of striking the optimal balance between liberty and security but on the suitability of this mode policymaking. In other words, the external critic does not agree that the tradeoff framework is the right tool for policymaking. In contrast, the internal critic acknowledges the suitability of the tradeoff framework for addressing emergencies but worries about the possibility of its implementation by the government during emergencies. Most of Posner and Vermeule's efforts in their book are directed at undermining the latter worries. In contrast, not a lot of effort is dedicated to responding to external critics. This is so because for Posner and Vermeule emergencies are the types of situations where liberty and security are locked in the tradeoff relation and because they think that the tradeoff thesis is best suited to resolve crises brought on by the threats to national security.

In this chapter, I take myself to be offering a combination of internal and external criticisms of Posner and Vermeule's tradeoff thesis. My goal is to show the weaknesses of their account of emergency policymaking and identify the relevant considerations that must be analyzed in the project of emergency governance.

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[193] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 37.
[194] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 38.

## 5.4. THE BALANCING METAPHOR

The balancing metaphor that animates the tradeoff framework has received a great deal of criticisms from such prominent figures as Ronald Dworkin and Jeremy Waldron, among many others. It is impossible to survey, let alone to do justice, to all these criticisms within the limits of this chapter. In light of that, I will focus on what I take to be the most pertinent and damaging criticisms of the tradeoff framework that pertain to Posner and Vermeule's account.

One of the problems characteristic of the tradeoff framework is that it sets up discussion of emergency governance in a biased and a reductive manner. In one of his papers, Stephen Holmes criticizes the tradeoff framework on the grounds that it is detrimental to constructive debates about the challenges associated with developing emergency policies. Holmes argues, "Rational, intelligent debate about counterterrorism policy cannot be conducted if the public comes to believe – largely by power of suggestion – that the party defending liberty has abandoned concern for national security to its partisan rivals. But the tradeoff metaphor suggests exactly that."[195] Holmes' worry is that the mere acceptance of the tradeoff metaphor – that is the juxtaposition of liberty and security – undermines rational and intelligent debate about emergency measures and misrepresents the civil libertarian position. As Holmes explains, "it does so by lending a spurious plausibility to the

[195] Stephan Holmes (April, 2009), "In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror," p. 316.

slanderous charge that expressing concern for personal liberty, in the context of the war on terror, comes close to lending aid and comfort to the enemy."[196]

At various points, Posner and Vermeule's argumentation is open to the criticism of distorting a productive and well-reasoned debate. For example, Posner and Vermeule say that the civil libertarians overdramatize the prospect of the judicially unrestrained executive because "the specter of Weimar's collapse [and the rise of Hitler] looms ominously in the civil libertarian imagination."[197] The implicit charge is that civil libertarians are unable to tell the difference between the circumstances that allowed Hitler's rise to power and the circumstances of the western liberal democracies of today. As a consequence, civil libertarian worries are overinflated; they are unwarranted criticisms motivated by past experiences that have little or no relevance to the current affairs. The effect of Posner and Vermeule's argumentation is that it dismisses the civil libertarian concern for the value of liberty for the wrong reasons, that is, by portraying civil libertarians as unreasonable and overly sensitive to any suggestion of readjusting liberties.

Another example is the manner in which Posner and Vermeule formulate their charge that civil libertarians overstep their domain of expertise when they criticize emergency policies.[198] Posner and Vermeule say that criticizing the tradeoff thesis requires "empirical and institutional predictions" about the effects of emergency measures. According to them, these requirements put "civil libertarians

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[196] Stephan Holmes (April, 2009), "In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror," p. 316.
[197] See Posner and Vermeule's discussion in Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, pp. 38-39. See also the remarks made on pp. 56-57.
[198] See for example Posner and Vermeule's critique of Waldron in Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, pp. 39-41.

– who are usually philosophers or constitutional lawyers rather than terrorism experts – in the position of offering hypothesis, speculations, or empirical claims well outside their domain of expertise."[199] Posner and Vermeule characterize civil libertarians who criticize emergency policies as "amateurs playing at security policy"[200] and as "whistling in the wind."[201] In this way, Posner and Vermeule attempt to discredit the civil libertarian position by suggesting that no security expert would accept civil libertarian theses. And while Posner and Vermeule offer some arguments in support of the necessity of special security expertise for assessing emergency policies, no arguments are made to show that such expertise is incompatible with civil libertarian motivations.[202]

In their discussion of the internment of the Japanese Americans during the Second World War, Posner and Vermeule make a similar accusation: "Our point is that civil libertarian commentators and the judges lack the necessary expertise [to assess the legitimacy of such policies]. The former have often failed to recognize their own limited competence; the judges, burdened with real responsibility, usually do recognize their own limits during times of emergency."[203] By making such claims, Posner and Vermeule create an illusion that civil libertarians do not understand "real responsibility" needed for governing a community through the period of crisis and are not taking security concerns seriously. Such examples could be taken to

[199] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 38.
[200] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 31.
[201] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 56.
[202] In the following chapter we will analyze in some detail Posner and Vermeule's claim regarding the necessity of security expertise for assessing emergency policies.
[203] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 113. Throughout their discussions, Posner and Vermeule repeatedly emphasize their own lack of security expertise as well.

show that the manner in which Posner and Vermeule choose to engage with their opponents opens them up to Holmes' criticism.

In addition to undermining the productive debate about emergency governance, Holmes observes that the tradeoff framework relies on a number of troubling slogans, such as "better safe than sorry", "we cannot afford not to act", and "we must prevail whatever the cost"[204] as well as a number of troubling metaphors, such as "tying hands", "taking off the gloves", and the "tradeoff between security and liberty".[205] In Holmes' view, such rhetorical devices, and in particular the metaphor of balance, are loaded and as a consequence they have a tendency to distort our understanding and appreciation of the challenges associated with addressing national security crises. According to him, the danger of the tradeoff framework consists in obfuscating the task of developing the appropriate strategy for responding to crises.

In his book *Torture, Terror, and* Tradeoffs, Jeremy Waldron makes a similar argument. Waldron explores a number of conceptual problems with the business of making tradeoffs and warns against many dangers associated with this way of thinking about policymaking. One of the most pressing points of his criticism is that the meaning of the tradeoff terms needs to be sufficiently clear in order for the tradeoff framework to be a reliable tool for policymaking. We need to understand what exactly we mean by "liberty" and "security" in order to balance them against

[204] Stephan Holmes (April, 2009), "In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror," p. 319.
[205] Stephan Holmes (April, 2009), "In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror," p. 313.

each other.[206] In addition, Waldron echoes Holmes' observations that the language of the tradeoff framework often employs such terms as "gain", "sacrifice", and "balance". The meaning of these terms and that which they refer to is often far from clear.[207]

Let us begin with the examination and analysis of the terms "liberty" and "security" in Posner and Vermeule's tradeoff thesis.

## 5.5. LIBERTY

One of the main vulnerabilities of Posner and Vermeule's tradeoff thesis is the absence of sufficiently clear conceptions of liberty and security. Posner and Vermeule's explanations of these terms are few and far between and leave a number of unanswered questions. With regard to liberty they only tell us that it has positive and negative strands and "includes such disparate components as freedom of speech, freedom of association, due process, and privacy."[208] Posner and Vermeule do not employ or attempt to develop any theory for systematizing these "disparate components" or explain their significance for the emergency context. Nor do they explicate the distinction between positive and negative liberty or explain how it is relevant for the emergency problematic.

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[206] See, for example, Waldron's discussion in Jeremy Waldron, (2010), *Torture, Terror, and Trade-Offs: Philosophy for the White House,* pp. 11-16.
[207] For examples of possible problems identified by Waldron, see Jeremy Waldron, (2010), *Torture, Terror, and Trade-Offs: Philosophy for the White House,* Chapter 2.
[208] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 22.

Presumably, it is fair to adopt a classic version of this distinction, such as developed by Isaiah Berlin.[209] For Berlin, the negative concept of liberty serves to address the question, "What is the area within which the subject – a person or group of persons – is or should be left to do or be what he is able to do or be, without interference by others?" The positive concept of liberty serves to address the question, "What, or who, is the source of control or interference that can determine someone to do, or be, this rather than that?"[210] According to an alternative formulation, "Whereas positive liberty is a matter of accomplishments, negative liberty is a matter of opportunities."[211] Thus, it can be said that negative liberty refers to the sphere where an individual is free from interference by others to pursue her projects and plans. Positive liberty, in contrast, refers to the opportunities provided to the individual, for example, by the government, to pursue and accomplish one's projects and plans.

On the basis of this distinction a number of good questions can be asked regarding emergency policymaking suitable for liberal democracies. Does the government have an obligation to take positive steps to provide individuals with certain opportunities during emergencies, such as certain information about the nature of the crisis or access to courts where individuals could take up their concerns before an unbiased arbitrator? Is it consistent with liberal commitments to limit opportunities of some individuals in the community but not others during

[209] For other discussions of the concept of negative liberty see David Miller (October, 1983), "Constraints on Freedom." Also, see Hillel Steiner (1994), *An Essay on Rights*. For other discussions of the concept of positive liberty see Charles Taylor(1991), "What's Wrong with Negative Liberty." Also, see John Christman (February, 2005), "Saving Positive Freedom."
[210] Isaiah Berlin (2002), *Four Essays on Liberty*, pp. 121-122.
[211] Matthew Kramer (2003), *The Quality of Freedom*, p. 2.

emergencies for the overall good? Is there a sphere of freedom that the government cannot legitimately infringe upon during emergencies? Good answers to such questions could be helpful for assessing emergency measures, accounts of policymaking, and the institutional arrangements suitable for governing a community through periods of crisis. Unfortunately, Posner and Vermeule neither develop such answers nor reference any accounts that explain the role of liberty in the emergency problematic.

In developing a conception of liberty suitable for emergency policymaking, it is important to keep in mind one of Waldron's observations that "the class of civil liberties at stake here is not necessarily a homogenous class of rights, principles, or guarantees. The term "civil liberties" represents a variety of concerns about the impact of governmental powers upon individuals freedom."[212] This means that the level of liberty enjoyed by individuals in a community is a function of a complex set of substantive and procedural norms that are difficult to parse for the purposes of the balancing exercise. The right to free speech, for instance, could be taken as an example of a civil liberty. However, it could also be taken as a norm that promotes security for individuals. Similarly, the right to have an attorney could be viewed as both a norm promoting liberty and a norm promoting security. These observations raise doubts about the suitability of framing the question of emergency policymaking as a balancing exercise that presupposes a neat separation between liberty and security.

[212] Jeremy Waldron (2003), "Security and Liberty: The Image of Balance," p. 195.

Waldron points to another caveat with the notion of liberty. According to him, the term "liberty" is relational and for this reason "has ramifications for both sides of the balance."[213] As he explains, liberty "is something that cannot be reduced without increasing something else, namely the powers and means and mechanisms that obstruct and punish the ability of individuals to do what they want."[214] This means that the reduction of civil liberties corresponds to the increase of state's power. For example, if reduction of civil liberty takes the form of suspension of the right to free speech, then it follows that the state has the right to censor or punish individuals who choose to criticize the government or distribute certain kinds of information or views. Thus, even if the reduction of civil liberties increases security against terrorism, it reduces security against the state.

In light of that Waldron reminds us that we want to be safe not only from the terrorists but also from the state. Indeed, the idea of protecting individuals from the awesome powers of modern states is one of the central motivations behind liberalism. Waldron reminds us that we should not lose sight of the "overwhelming means of force" available to modern states and the potential harms that the use of that force may bring about to private individuals. This consideration is a reminder that "one of the ironies of pursuing security is that whilst claiming to protect liberty from one source – terrorism, it diminishes the protection of liberty from another – the state."[215]

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[213] Jeremy Waldron (2003), "Security and Liberty: The Image of Balance," p. 205.
[214] Jeremy Waldron (2003), "Security and Liberty: The Image of Balance," p. 205
[215] Lucia Zedner (2005), "Security and Liberty in the Face of Terror: Reflections from Criminal Justice," p. 532.

By leaving these concerns about the conception of liberty unaddressed, Posner and Vermeule's tradeoff thesis risks failure as an explanatory account of emergency policymaking. In order to continue this exploration of the difficulties with the concept of liberty in Posner and Vermeule's tradeoff thesis let us turn to the examination of the concept of security.

## 5.6. SECURITY

Posner and Vermeule's account of security is riddled with problems. The only place where they come close to engaging with the myriad conceptual issues associated with security is when they define it as "the risk of harm."[216] From their discussion, it is unclear how the presence of this risk is calculated or who exactly is taking this risk. This is a serious oversight because it is necessary to have a sufficiently clear understanding of who or what is at risk during emergencies in order to develop suitable and effective emergency policies. There are several candidates for this role: it could be individuals, groups, or government institutions; it is also not out of place to speak about securing a certain type of political environment with the commitment to a certain set of values, traditions, and ideals that are important to some members or to the entire political community. The most obvious difference between protecting individuals and communities is that individuals are subject to physical harm and communities could be harmed by the destruction of social ties, its traditions, and culture.

[216] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 22.

From Posner and Vermeule's analysis it is also unclear how objective levels and subjective experiences of threats are factored into the calculation of risk. How could it be determined whether the government dedicates sufficient efforts for addressing threats? What constitutes a justified and a proportional response to a given danger? Without answers to such questions, the term "security" is too ambiguous and open to manipulation to be used in emergency policymaking.

It is possible to explain the appeal of security rhetoric by the fact that individuals and political communities are vulnerable to a variety of threats. As Lucia Zedner observes, the concept of security

> is wantonly deployed in fields as diverse as social security, health and safety, financial security, policing and community safety, national security, military security, human security, environmental security, international relations and peacekeeping. For security to keep such varied bedfellows as these, it must be not only promiscuous but also inconstant, appearing as different objects of desire in different places and at different times.[217]

Taking into account the ambiguity and the rhetorical appeal of the concept of security, Zedner argues,

> In each of these fields security presents itself in a new guise, its meaning altering according to time, place, and context. This inconstancy might matter less were it not for the power that resides in ambiguity. No small part of the lure of security is that the variety of these guises makes it possible to appeal to the idea in pursuit of multiple different objectives and in respect of policies that might otherwise appear indefensible. It follows that pinning security down is not only analytically important but it has important political and policy implications too.[218]

There are several policy implications that are relevant for the assessment of Posner and Vermeule's tradeoff thesis.

[217] Lucia Zedner (2009), *Security*, p. 9.
[218] Lucia Zedner (2009), *Security*, p. 25.

For example, it is necessary to determine how much security is enough in order to develop legitimate emergency policies. As Zedner points out, "security has an unattainable quality, its pursuit can never said to be over since unknown vulnerabilities, new threats, and new adversaries always leave it open to challenge."[219] If complete security is unattainable, it is necessary to develop an understanding of the sufficiently secure environment and of the government's role in fostering this environment. If security is an ideal that can never be fully realized, it is necessary to have a practical conception of security that would set out the duties of the government for a given emergency.

We should keep in mind that in a number of contexts we accept risks, and at times very serious risks, in order to maximize efficiency or pursue other desirable goals. In other words, we stop the pursuit of security in favor of other ends. For example, this is the case with speed limits. We accept the risk of serious injury and death when we drive on highways so that we could arrive faster to our destination. Similarly, we accept risks associated with relying on nuclear energy despite historical evidence of the devastating effects of nuclear catastrophes, such as Chernobyl. If we agree that in most facets of life we assume some degree of risk, it follows that it is necessary to have a practical conception of security that could allow us to evaluate the justifiability of risks when it comes to the pursuit of national security.

The question, then, is to understand exactly how much danger and what kind of dangers is acceptable for the political community. While it may seem obvious that

[219] Lucia Zedner (2009), *Security*, p. 145.

the occurrence of terrorist acts, like suicide bombings or hostage taking, clearly warrants an increase in security, the ideal level of security is not obvious. It is possible that terrorist attacks may happen despite government's best efforts to prevent them or they may not happen even if the government does nothing. The former scenario calls for exploration of the extent of government's duties to prevent terrorist attacks and the latter scenario calls for the study of terrorism and the nature of other threats that a political community could be facing. In light of these possibilities, it is important to articulate the ideal level of security that the government may legitimately pursue.

In developing this conception, it is important to bear in mind that liberal democracies share a set of legal commitments, such as the presumption of innocence, norms regulating police conduct, gathering of evidence, and standards of proof. These commitments could at times hinder quick apprehension and punishment of suspects. Thus, it could be argued that these norms prevent an effective pursuit of security. If that is true and if these norms are nevertheless accepted as fundamental legal norms in liberal democracies, it means that the pursuit of security is subject to the limits set out by the relevant legal and political considerations. It follows, then, that the pursuit of security is not the ultimate aim of liberal democratic regimes and it must be conducted within applicable limits set out by liberal democratic commitments.

In developing an understanding of the role that the pursuit of security should play in emergency policymaking, it is worth bearing in mind that provision of security is a business. Zedner reminds us that the existence of "risk is essential to

the health of the security market; without it shares would surely tumble. The inescapable conclusion is that absolute security is unattainable and that, even if it were, is not sought by those whose political and economic prosperity relies upon continuing threat."[220] Developing a good conception of security and secure environment is important because this understanding is necessary for regulating institutions that provide security and evaluating the services they offer. Even if Posner and Vermeule are right that social welfare declines overall during emergencies, security providers could stand to benefit politically and financially from these crises. This consideration must be taken into account in assessing emergency policies, especially in those cases when those who stand to gain from providing security are also the ones who are in charge of developing emergency policies.

Finally, it is important to be aware of the deleterious effects of the pursuit of security on communal life. As Zedner explains,

> …although security is held up as a public good, the manner in which it is pursued too often tends to erode trust and other attributes of the good society. Many security measures and practices are based upon a presumptive mistrust of strangers and many security technologies (for example, surveillance, data retention, access control, and target hardening) operate further to erode trust by presuming everyone to be a potential source of threat. The proliferation of agents, technologies, and strategies of security both signals and fosters a lack of trust in fellow citizens that impoverishes social relations.[221]

If that is right, then the pursuit of security is not an unequivocally desirable goal. It means that it is possible to have too much security and it is necessary to take into account social costs of pursuing security in developing emergency policies.

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[220] Lucia Zedner (2009), *Security*, p. 145.
[221] Lucia Zedner (2009), *Security*, p. 149-150.

The above considerations about the terms "security" and "liberty" point to one set of main flaws with Posner and Vermeule's tradeoff thesis. Without a sufficiently clear understanding of what liberty and security are and how they interrelate, it is unclear how the balancing exercise could be conducted. Let us now turn to the examination of the balancing aspect of the tradeoff thesis.

## 5.7. QUANTIFICATION AND AGGREGATION PROBLEMS

Two fundamental issues characteristic of the tradeoff framework are the problems of quantification and aggregation of "liberty" and "security." These problems raise a number of questions about the suitability of the balancing metaphor for policymaking. It is one thing to have an actual scale, such as those they use in markets and grocery stores, and to put a certain number of apples in one basket and a certain number of oranges in the opposite basket. It is quite another to imagine a scale that could measure the weight of security and liberty. It is not obvious how to assign weight to civil liberties or to the risk of an attack or how to "weigh" these terms against each other.

Upon closer reflection, there appear to be serious difficulties with framing the task of emergency policymaking as a "balancing exercise" analogous to weighing apples and oranges. Values, principles, and constitutional commitments that constitute the notions of liberty and security appear to be very much unlike apples and oranges. For example, how much does the right to fair trial "weigh" in comparison to the communal interest in security that a democratically legitimate

government promised to serve? Or, what is the "weight" of the security policy that allows the government to indefinitely detain and coercively interrogate members of an ethnic minority in comparison with the constitutional commitments to respect equality and dignity of persons? If security and liberty are to be quantified and aggregated, there must be clear answers to such questions as well as methods for verifying the correctness of answers in specific cases.

In light of that, the interpretive work required to determine the proper relation between security and liberty seems to be very much unlike the act of putting an apple on one side of the scale and an orange on the other. There are no obvious answers about which interpretative theory to use for "weighing" security and liberty or for how the balance between them is to be determined. The analogy between real and metaphorical scales underlying the tradeoff framework seems to break down in these crucial points. The problems of quantification and aggregation expose these flaws with the metaphor.

Now, Posner and Vermeule are aware of these vulnerabilities but they deny their impact on their project: "In our view, any conceptual imprecision that arises from this aggregation does not affect the lower-level institutional problems we… discuss."[222] According to Posner and Vermeule, the fact that their main goal is to show that executive action should not be subject to judicial review during emergencies allows them to leave the problems of quantification and aggregation unaddressed. The claim that the tradeoff thesis is an expository device is meant to neutralize these worries for the purposes of their institutional analysis.

[222] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 22.

However, it is difficult to understand how Posner and Vermeule could dodge these difficulties. Their tradeoff thesis is an account of policymaking that explains how emergency policies are best developed. If the institutional account is meant to reveal an advantage of a certain scheme of separation of powers and distribution of authority for the purposes of policymaking, it is difficult to see how it could be defended without taking into account the problems that could arise in the process of developing policies. Who decides what liberty and security mean? Who quantifies them? How do we make sure that they are properly aggregated? These questions point to the connection between conceptual issues associated with employing the tradeoff framework and the institutional dimension of emergency governance.

Consider, for example, the following observations. It is possible that in order to quantify and aggregate liberty and security for the purposes of balancing them against each other, certain information is necessary that pertains to the specific circumstances. If that is true, then there is a reason to argue that the institution with access to this information should be in charge of striking the balance between security and liberty. This is a reason to think that the executive should be in charge of developing emergency policies because, as Posner and Vermeule observe, the executive is the branch of government that is most likely to have the access to relevant information during emergencies.

However, it could also be argued that conceptions of liberty and security should be developed on the basis of the common law tradition of the communities affected by the crisis. If this argument is accepted, then there is a reason to argue that the institution that best understands the common law tradition should be in

charge of striking the balance between liberty and security. In this case, one could argue that the judiciary has a role to play in emergency policymaking. It is, of course, also possible to argue that both institutions, the executive and the judiciary, should work together during emergencies because one has the relevant information and the other has the best understanding of the common law tradition. But the important point is that the answer to the institutional question depends, upon closer inspection, on one's account of emergency policymaking and, more specifically, on one's strategies for resolving a variety of conceptual issues pertaining to security and liberty. In light of that, Posner and Vermeule's evasion of the problem of quantification and aggregation undermines their institutional analysis.

Posner and Vermeule's attempts to argue that conceptual issues with the tradeoff thesis are in principle resolvable and that security experts – as a matter of fact – do come up with security policies using the tradeoff strategy despite conceptual difficulties are unsatisfactory. Consider Posner and Vermeule's argument,

> An assumption of the tradeoff thesis is that security and liberty are comparable, meaning that people can make judgments about the relative worth, to them, of increases (decreases) in security that produce a concomitant decrease (increase) in liberty. Moreover, we also assume that security and liberty are interpersonally comparable, meaning that a loss in liberty (security) for Jack can be compared to a greater gain in security (liberty) for Jill, allowing us to make meaningful claims about whether overall social welfare has increased or decreased as a result of government policies. Economists sometimes urge that interpersonal comparisons are either unscientific or conceptually meaningless; but security policy is not a scientific subject, and meaningful interpersonal comparisons are made in many policy domains.[223]

The persuasiveness of this argument leaves much to be desired. First, the claim that it is possible to make judgments about the relative worth of security and

[223] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 28.

liberty as well as make interpersonal comparisons does not explain how such judgments and comparisons are made or what makes one judgment or comparison better than another. Without such explanations Posner and Vermeule cannot base their institutional analysis on the tradeoff thesis for the reasons we surveyed above. Second, even if it is a fact that security policies are developed on the basis of a tradeoff framework that is questionable from the scientific and conceptual points of view, this does not mean that it is a good strategy for developing security policies. The fact that security experts and government officials use a strategy does not make that strategy a good one. Finally, in light of both these worries it appears that Posner and Vermeule are stacking the deck in favor of their institutional argument: they protect their institutional argument by assuming away the problems inherent in their account of policymaking.

It is hard to see how Posner and Vermeule could set aside the difficulties with quantifying and aggregating liberty and security we explored above. After all, their main argument for judicial deference hinges on the claim that the executive is best suited to quantify, aggregate, and balance these values in determining emergency policies. Without addressing the host of concerns with this tradeoff exercise canvassed above, an informed, theoretically sound comparison of institutional solutions to emergency governance is simply not possible.

## 5.8. DISTRIBUTIVE CONCERNS

On the back of the problems of quantification and aggregation come distributive problems. For example, in his book *Is Democracy Possible Here?* Ronald Dworkin argues that the tradeoff framework is responsible for entrenching the "us versus them" attitude in reasoning and policymaking.[224] Dworkin recognizes that there are contexts where it is appropriate for the government to divide people into categories of citizens and foreigners. For example, that is the case with the collection of taxes or distribution of social welfare. However, when it comes to issues surrounding violations of basic human rights, which could result from such emergency measures as indefinite detention and coercive interrogation, it is wrong to use such divisions in his view.

Underlying Dworkin's argument is the concern that the tradeoff framework does not recognize that the considerations of government legitimacy apply to all government actions that affect persons. According to the tradeoff framework, the balance between security and liberty needs to be readjusted during emergencies in order to defeat the terrorists. The assumption is that it is possible to separate "us" from "them" and that we should only be concerned with how the balance between liberty and security affects "us". The possibility that anything could be done to terrorists in our fight against them is left open. Contrary to this view, Dworkin argues, "we need a theory of citizenship that sets out and justifies a distinction between what a nation may do or refrain from doing for or to its own members and what it must do for or not do to anyone."[225] Posner and Vermeule's tradeoff thesis

[224] See, Ronald Dworkin (2006), *Is Democracy Possible Here?: Principles for a New Political Debate,* Chapters 1 and 2.
[225] Ronald Dworkin (2006), *Is Democracy Possible Here?: Principles for a New Political Debate,* p. 48.

ignores the welfare of those who are outside the scope of the political community and are not recognized as its members.

Zedner offers an explanation for the prominence of the 'us versus them' dichotomy in reasoning and rhetoric surrounding the pursuit of security. As she explains, "although security is posited as a universal good, its pursuit is predicated upon threat and, therefore, those who threaten." It follows, then, that "pursuing security necessarily places some sections of the populace outside protection and entails targeting and incapacitating those deemed to pose a threat."[226] Thus, according to Zedner, the pursuit of security necessarily entails "social exclusion," that is a separation of minorities who are thought to pose a threat to the community from the majority for whose benefit security is being pursued. The tradeoff framework inherits the issues surrounding the protection of minority rights during emergencies. For example, ethnic profiling policies that were adopted in the wake of 9/11 could be viewed as examples of anti-terrorist measures that are based on the 'us versus them' reasoning because they target minorities in the name of national security.[227]

Protection of minorities is an issue for Posner and Vermeule because they do not recognize any limits to what a government may do to them in the name of national security.[228] This means that minorities could justifiably be stripped of all liberties during some national security crises, according to Posner and Vermeule. If this characterization of their position is correct, Posner and Vermeule need to

[226] Lucia Zedner (2009), *Security*, p. 147.
[227] For an argument that some types of profiling could be consistent with the liberal democratic commitments, see Paul Bou-Habib (April, 2008), "Security, Profiling and Equality."
[228] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 27.

explain the absence of any normative constraints on government actions during emergencies. The fact that they wish to focus on the institutional dimension of the emergency problematic does not excuse the absence of normative arguments in support of their highly controversial view. The project of designing government institutions and resolving issues of authority allocation during emergencies depends in part on whether there are normative limits to what a government may legitimately do in pursuit of national security. Thus, for example, if we accept the view of some civil libertarians according to which the pursuit of national security must be conducted without violating human rights, we would have a reason for charging such institutions as courts with determining whether government's policies violate human rights. On the other hand, if we accept the view that all liberties could be stripped away from minorities in some cases in the name of national security, the institutional argument in favor of judicial review could be harder to make.

In addition to entrenching the 'us versus them' attitude, Posner and Vermeule's tradeoff thesis is blind to the distributive concerns with trading off civil liberties for increased security. In discussing the inadequacy of the balancing metaphor for formulating the anti-terrorist policies post 9/11, Dworkin writes,

> That much used expression [a new balance between liberty and security] suggests that we can properly judge the new policies by asking whether they are in our overall interest, as we might decide, for instance, whether to strike a new balance between road safety and the convenience of driving fast by lowering speed limits. But, with hardly any exceptions, no American who is not a Muslim and has no Muslim connections actually runs any risk of being labeled an enemy combatant and locked up in a military jail. The only balance in question is the balance between the

> majority's security and *other* people's rights, and we must think about that as a matter of moral principle, not of our own self-interest.[229]

The distributive concern to which Dworkin draws our attention is that an increase in security for one set of people will not be paid by the loss of liberty on the part of this same set of people. Rather, the majority's gain of security is paid by the minority's loss of liberty with a concomitant loss of their security. Thus, it is incorrect to think that ***we*** are giving up some rights in order to be safer as the rhetoric of the tradeoff thesis implies. Rather, some portions of the political community retain their civil liberties and stand to benefit from government's security measures, which take away civil liberties and undermine security for other individuals. According to Dworkin, it follows that the pursuit of security cannot be justified exclusively by the interest in a safer environment. Rather, because of the distributional effects of emergency measures, it is necessary to justify them on moral and political grounds that take into account the welfare of all.

If that is correct, the tradeoff framework misrepresents the effects of balancing security and liberty. As Waldron puts it, "if security gains for most people are being balanced against liberty losses for a few, then we need to pay attention to the few/most dimension of the balance, not just the liberty/security dimension."[230] According to this view, it is important not to lose sight of all the effects of emergency policies on all parties in evaluating specific emergency policies and to ensure that the government is in the position to take into consideration the wellbeing of all affected parties.

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[229] Ronald Dworkin (2003), "Terror and the Attack on Civil Liberties," section 2.
[230] Jeremy Waldron (2010), *Torture, Terror, and Trade-Offs: Philosophy for the White House,* p. 36.

It should also be noted that these distributive issues with the tradeoff thesis do not only affect the individuals but also could undermine the culture of the political community. Waldron argues that the talk of balancing security and liberty against each other is highly problematic because the tradeoffs logic

> has been used to justify unwarranted spying, mass detention, incarceration without trial, and abusive interrogation. In each case, we are told, some things that were formerly regarded as civil liberties have to be given up in the interests of security. But after a while we start to wonder what security can possibly mean, when so much of what people have struggled to secure in this country – the Constitution, basic human rights, and the Rule of Law – seems to be going out the window.[231]

In part, Waldron's concern with the tradeoff logic is conceptual and stems from the insufficiently articulated notion of security in the tradeoff rhetoric. According to Waldron, by engaging with the tradeoff logic we tend to "navigate between a concept of security tied too tightly to physical safety and a concept of security embracing so much of what we value overall – so much of what we want to be 'secure' in the possession of – that it does not help us parse the trade-offs that may be necessary between the various goods that we are trying to secure."[232]

But in addition to these conceptual problems, Waldron's concern with the tradeoff logic is that it does not recognize that the political culture of the community is at stake during the balancing exercise. The introduction of some types of emergency measures, such as incarceration without trial or abusive interrogation, is damaging to our political culture, a culture that is justified on the basis of liberal democratic principles of equality and respect for human dignity. Posner and Vermeule's tradeoff thesis runs into this problem because it does not recognize that

[231] Jeremy Waldron (2010), *Torture, Terror, and Trade-Offs: Philosophy for the White House,* p. 12.
[232] Jeremy Waldron (2010), *Torture, Terror, and Trade-Offs: Philosophy for the White House,* p. 13.

other factors, such as political values and principles, come into play in the distribution of benefits and burdens under the rubrics of liberty and security.

Even if it is true that resolution of the above distributional issues with emergency policies requires special security expertise, and thus lie outside the scope of Posner and Vermeule's inquiry, it remains true that the institutional dimension of these problems falls within the scope of their argument. We could only accept that the executive should be free of judicial review during emergencies if it can be shown either that distributional problems are irrelevant during emergencies or that the executive is in the best position to resolve them without review by another institution, such as the judiciary. The institutional characteristics of speed, secrecy, and flexibility lend some support to Posner and Vermeule's claim, as do their rejections of the second order objections to judicial deference, such as those based on the panic thesis, the democratic failure theory, and ratchet effects. However, a positive argument leading to the conclusion that the executive can adequately address problems with the tradeoff thesis, including the distributional concerns, is necessary to support Posner and Vermeule's deference view.

## 5.9. CIRCUMSTANCES AS THE CRITERION FOR BALANCING LIBERTY AND SECURITY

The last main problem with Posner and Vermeule's tradeoff thesis is the absence of a good criterion for verifying the legitimacy of emergency policies. In Posner and Vermeule's understanding it is the circumstances that shape the balance between security and liberty. They write, "The balance between security and liberty

is constantly readjusted as circumstances change. A well-functioning government will contract civil liberties as threats increase. A government that refuses to adjust its policies has simply frozen in the face of the threat. It is pathologically rigid, not enlightened."[233] According to Posner and Vermeule's tradeoff thesis, changes in circumstances both motivate the readjustment of the balance and serve as a criterion by means of which the suitability of the balance for a given emergency circumstance should be assessed.

In describing the role that circumstances play in their account, Posner and Vermeule write, "Of course, the [liberty – security] frontier itself conveys no information about where the optimal tradeoff point lies." The frontier only represents the totality of possible options. In order to determine where the optimal point lies for a given case, the circumstances need to be introduced in the analysis. As Posner and Vermeule put it, "there is no general answer to the question [where the optimal point is], which depends entirely on the values or preferences of the people in the relevant society. Whether a given increase in security is worth a given decrease in liberty depends upon what people want. Rather, the frontier represents a constraint on the opportunities available to governments."[234]

In light of this account of circumstances as the criterion by means of which the suitability of the balance for a given case must be determined, it is important to examine Posner and Vermeule's conception of this term. While Posner and Vermeule do not explicitly present their account of the circumstances, it is possible to explicate it on the basis of their overall discussion.

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[233] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 28.
[234] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 27.

First, by "circumstances" Posner and Vermeule must understand the events that break up the normal order.[235] They include the nature of the threat constituting the emergency, that is, those features of the situation that give rise to serious harms, high degree of urgency, and other conceptual features.[236] For example, the weapons that terrorists use in their attacks, the targets that they select, the demands that they make, if any, – all such factors can be said to constitute the circumstances or the nature of the crisis that the government must address through its emergency policies.

Second, for Posner and Vermeule the term "circumstances" refers to the means available to the government for addressing the crisis. The government must not only understand the nature of the potential harms and the timeframe within which it must act to address the threat of those harms but it must also appreciate the possible constraints on the means available to it for acting.[237] Does the government have the appropriate staff and funding to implement a profiling policy effectively? Does it have the technology to monitor the lines of communication among terrorist suspects? Does it have the appropriate facilities and personnel to detain and interrogate terrorist suspects? Answers to such questions explain the opportunities and options available to the government and thus can be said to contribute to the circumstances of the emergency.

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[235] For a more extensive discussion of the contrast between emergency and normalcy see Chapter 2 and 3 where I take up Posner and Vermeule's conception of emergency situations and present my criticisms of their view.

[236] See Chapter 3 for the discussion of the features of emergency circumstances that I take to capture these kinds of circumstances.

[237] For an analysis of how *The Patriot Act* modified the powers of the US government, see Nathan Henderson (October, 2002), "The Patriot Act's Impact on the Government's Ability to Conduct Electronic Surveillance of Ongoing Domestic Communications." See also William Stuntz (June, 2002), "Local Policing after the Terror."

Last, Posner and Vermeule understand the circumstances of the crisis as the values and preferences of the people.[238] Unfortunately, they do not explain how values and preferences of the people should shape the government's responses to emergencies nor do they tell us whether all values and preferences should be considered or respected by the government. It is a mistake to think that such questions are precluded by Posner and Vermeule's commitment to refrain from the substantive analysis of emergency measures. The development of an account of the relevant values and principles does not dictate specific answers to first-order questions, such as the legitimacy of an ethnic profiling policy or coercive interrogation in specific cases. However, the absence of such an account is a confirmation of the inadequacy of Posner and Vermeule's tradeoff thesis. Their account lacks a criterion by means of which the suitability of the balance between liberty and security could be verified.

The balancing rhetoric could once again be blamed for concealing this issue and, as a result, for producing another misconception. When one operates actual scales and puts apples and oranges on the opposing baskets, one could determine the balance between the baskets by checking if a straight line under them can be drawn. (Or if the scales are digital, one could compare the digits when weighing apples and when weighing oranges.) In this way, the existence of the balance between the juxtaposed terms could be determined. In contrast, there does not seem to be a readily conceivable equivalent with the metaphorical scales by means of which the balance between liberty and security could be determined. Thus, not

[238] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 27.

only do we have the problems of neatly separating security from liberty, as well as quantifying and aggregating them, but we also have the problem of determining the balance. How could one tell whether liberties and securities are in fact balanced? If you say that they are balanced and I disagree with you, what criterion could be used to settle our disagreement? Posner and Vermeule's tradeoff thesis does not provide answers to these very obvious questions.

The tradeoff language could be a possible source of misconceptions regarding the objective of the tradeoff exercise. Usually, when we say that something is balanced we mean that there is an even distribution or an equality of some sort. However, the objective of Posner and Vermeule's tradeoff thesis is not to achieve an even distribution of or equality between security and liberty, such as, for example, for every ten securities we should have ten liberties. Rather, the objective is to promote the welfare of the community. In light of that, it is a shortcoming of Posner and Vermeule's account that they do not explain what makes the balance optimal and how it could be verified. How could we determine whether the balance between security and liberty for the specific circumstances is optimal vis-à-vis the welfare of the political community? The language of the balancing metaphor suggests *that* a balance could be had but it does not explain *how* that balance could be had apart from claiming that it is a result of a combination of security and liberty. It is the responsibility of the theorist who employs this language to develop a criterion by means of which the balance could be established.

One possible strategy for developing such an account is to further develop Posner and Vermeule's idea that values and preferences of the people determine the

balance between liberty and security. This idea is promising because it seems that some values and principles of the political community should determine the limits of right action for the government. Unfortunately, Posner and Vermeule do not provide us with an account of these values and preferences. They do not tell us whether the relevant values and preferences refer to what people happen to value in a given community at a given time or what all people should objectively value in all circumstances. If people's values and preferences happen to change between the normal and the emergency periods, which one of these sets should the government aim to advance? Are some of these values more central or crucial than others? Are some of them more authentic than others?[239] We are left wondering whether the government has an obligation to cater to all preferences of the people during crises, including those it considers morally suspect or unjustified in any other way.

Finally, we should bear in mind that there is a difference between how safe or free people feel and how safe or free they actually are. This point pertains to the tradeoff framework during emergencies because in these circumstances emotions run high and quick action is often required. We generally recognize that one's *feeling* free can be distinguished from one's *being* free.[240] This is so because "…being free and feeling free by no means always go together. Not only can people feel free when they are unfree… They can also feel unfree when they are free."[241] The distinction between subjective and objective experience of liberty applies to experience of

[239] For a discussion of some of the difficulties surrounding the identification of authentic political commitments see Wil Waluchow (2007), *Common Law Theory of Judicial Review.* (See the discussion in Chapter 3, section E "Authenticity and the Doctrine of Informed Consent")
[240] For a discussion of this distinction between objective accounts and subjective experiences of liberty, see J.P. Day (Jul., 1970), "On Liberty and the Real Will."
[241] J.P. Day (Jul., 1970), "On Liberty and the Real Will," p. 180.

security, as Posner and Vermeule acknowledge in their discussion of the panic thesis.[242] In order to understand how the balance between security and liberty should be established, it is necessary to explain the role of objective and subjective experiences of liberty and security in emergency policymaking.

The conclusion of these reflections is that Posner and Vermeule's claim that the circumstances determine the balance between liberty and security must be clarified. On the one hand, it seems true that the circumstances, understood as the nature of the threat, governments' means to address it, as well as values and preferences of the people, must be taken into account in the process of emergency policymaking. On the other hand, this conception of the circumstances needs to be further developed, especially in regard to the nature of people's values and preferences. It is only if the standard of legitimacy of government action could be developed on the basis of values and preferences of the people that Posner and Vermeule's conception of the circumstances could serve as a criterion for establishing and verifying the balance between liberty and security.

In the remainder of the chapter I sketch out a route for developing such a criterion and in doing so I present considerations relevant for emergency policymaking that Posner and Vermeule's tradeoff thesis ignores. As my discussion will show, Posner and Vermeule's exclusive focus on liberty and security is an inadequate strategy for emergency policymaking.

[242] See, Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, pp. 59-87.

## 5.10. THE PURPOSE OF THE CRITARION FOR CHOOSING THE RIGHT POLICY

Posner and Vermeule understand the task of governing a community through a period of emergency as a task of implementing "right" policies.[243] In order to understand what makes a policy right, it is necessary to use some criterion. My suggestion is that a suitable criterion should help to differentiate among possible solutions to the conflicts of rights during emergencies from the position of liberal democratic legitimacy. If we accept that liberty and security come in conflict during emergencies, the function of the criterion should be to resolve conflicts among rights to security and rights understood under the umbrella of civil liberties.

If that is right, consider Waldron's observation about the nature of the conflicts of rights:

> I think it is fair to say that even if there are very few who believe that rights should be utterly impervious to very large changes in social costs, there is almost nobody (who believes in rights) who thinks that they should be adjusted in every case... Almost everyone believes that adjustments in rights require structured arguments for their justification – arguments that pay attention to their special character, to the ordered priorities of moral theory, and to the intricacies of various possible relations between one person's rights and another's.[244]

Waldron's point is that a change in circumstances alone is insufficient to warrant a readjustment of rights. Our idea of what rights individuals are entitled to could change but not for any reason. According to Waldron, to justify a readjustment of rights there need to be arguments that engage with the rationale behind having them. The justifiability of such arguments depends on the attractiveness and plausibility of moral, political, and legal considerations that they engage. If

[243] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 29.
[244] Jeremy Waldron (2003), "Security and Liberty: The Image of Balance," p. 200.

"structured arguments" are necessary for rebalancing rights, then the tradeoff account cannot be complete without an engagement with the relevant moral, political, and legal considerations that justify the existence and importance of these rights in the first place.

One problem with Posner and Vermeule's tradeoff thesis is that it assumes but does not explain the significance of liberty and security as central values of liberal democracies. They fail to explain *why* liberty and security matter and only claim – correctly – *that* they matter. Consider, for example, Matthew Kramer's explanation of the significance of liberty. He writes,

> The level of each person's overall freedom cannot be ascertained without any reliance on evaluative assumptions – specifically, assumptions concerning the content-dependent valuableness of each person's particular freedoms in connection with the fostering of certain ideals such as individual autonomy and development and well-being. Whereas the existence of any particular freedom or unfreedom is strictly a matter of fact, the extent of anyone's overall liberty is a partly evaluative phenomenon. It is determined principally by the sheer physical propositions of the latitude residing in the combinations of options that are available to a person, but it is also determined by the qualitative importance of those combinations in tending to further the ideals just mentioned.[245]

In this passage, Kramer argues that it is necessary to rely on "ideals" in order to show the importance of given options. It is not enough, according to Kramer, to merely point to the fact that a person has an option to do X or to do Y. The fact that a person has these options does not reveal the significance of having them. This significance or "qualitative importance" can only be grasped if an account of ideals, whatever these may be, is available to evaluate these facts.

If Posner and Vermeule's tradeoff thesis is an account of emergency policymaking, it must possess a criterion for verifying the optimal balance. It is

[245] Matthew Kramer (2003), *The Quality of Freedom*, p. 9.

impossible to analyze any institutional solutions to emergency governance without first understanding the standards that a policy must meet to be optimal or right. The standard must provide meaningful guidance to policymakers for resolving the conflict of rights in such situations as, for instance, when individual rights come in conflict with the interests of the state to defend its national security, its culture, or certain portions of the political community.

## 5.11. THE BACKGROUND OF POLITICAL THEORY

In developing a legitimacy criterion it is necessary to take into account the political theory that justifies liberal democratic regimes. Unless we find reasons to reject our fundamental political values and principles, these commitments should guide emergency policymaking. This does not mean that emergency policies should meet the same standard of legitimacy as the policies developed for periods of normalcy. But it does mean that fundamental liberal democratic commitments should be taken into account in formulating the criterion of legitimacy of emergency policymaking.

I would like to suggest that to be legitimate from the liberal democratic point of view, a government must choose policies that cohere with liberal democratic values and not merely represent the interests of a majority, the elites, or the entire society. In Samuel Freeman's words, "…the appropriate way to determine the principles of government and society is by asking what free and equal persons themselves, from a position of equal right, could mutually accept and agree to as the

conditions for their social and political relations."[246] According to this principle, a legitimate resolution for a rights conflict requires an understanding of the commitments that free and equal persons could agree upon from a position of equal right. One promising strategy for forming the emergency legitimacy criteria is that in addition to accounting for actual interest and preferences of the people in a liberal democracy, a legitimate government should also account for the best available interpretation of liberal democratic values and commitments from an ideal perspective.

By extending Freeman's principle to the periods of emergency, we could explain the mechanism for readjusting rights in specific circumstances of national security crises. The legitimacy of emergency policies would thus depend, at least in part, on the argument whether free and equal persons as well as individuals in actual political communities could mutually agree that ethnic profiling, coercive interrogation, or indefinite detention are policies that constitute acceptable conditions of their social and political relations during periods of crises. Whether this is the case or not is a matter of further exploration; however, it is the argument of this sort that is needed in order to develop a criterion by means of which it could be verified if an emergency policy is legitimate from the liberal democratic point of view.

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[246] Samuel Freeman (1990-1991), "Constitutional Democracy and the Legitimacy of Judicial Review," p. 343. It should be noted that in this paper Freeman defends the practice of judicial review as the backbone of constitutional democracy, the conception of which relies, among other things, on an understanding of what it means to be an individual. While it is not my intention here to engage with the topic of the justifiability of constitutional democracy, Freeman's argumentative strategy – the identification of fundamental concepts of liberal philosophy in order to defend a political and legal system – invokes considerations that are relevant for the justification of liberal democracies in general.

In combination with the above principle, a conception of individuality and of proper relationship between the government and the governed should be adopted to form a criterion by means of which the legitimacy of emergency policies could be established. For example, according to Cohen-Eliya and Porat,

> Rather than subscribing to the atomized conception of the self, European political theory generally rejects the notion of the "separateness of the person" and emphasizes the role of the person within a community that shares common values and that expresses solidarity towards all members. This organic conception of the state is based on a premise of reciprocal cooperation amongst all state organs. Rather than operating as side constraints on government power, which is based on the view that the government is antagonistic to the individual, such a conception views rights as standing for shared values which need be optimized.[247]

Following Cohen-Eliya and Porat we can argue that conflicts of rights should be assessed with the reference to the role of the community in the life of individuals as well as the conception of rights employed in the community. Thus, on the basis of such an account one could argue that the practice of coercive interrogation is not consistent with the organic conception of the state. Alternatively, one could argue that individuals should expect to make sacrifices for the benefit of their community during emergencies. Thus, the understanding of the relationship between the government and the governed helps to assess the legitimacy of government conduct.

The above considerations help to explain how the conflicts of rights, or conflicts between liberty and security, could be resolved. If we choose to formulate the problem of emergency governance as a balancing exercise, we should keep firmly in mind that the project of balancing is motivated by a perceived disequilibrium among the juxtaposed terms in a given circumstance. More

[247] Moshe Cohen-Eliya and Iddo Porat (Spring, 2011), "Proportionality and the Culture of Justification," p. 485.

specifically, it is a *judgment* that one set of rights does not suit the emergency circumstances. In order to defend the view that there is disequilibrium between liberty and security, there must also be an argument that deems such factors as the presence of the threat or the panic, the concern of the people for their security or liberty, or the likelihood of the future attacks as worthy of readjustment of the relation between liberty and security. Such an argument must rely on some political views, such as 'the government must always cater to the interests of the majority during a crisis' or 'core civil liberties cannot be given up in any circumstances.'

Any justification for rebalancing of the juxtaposed terms must rely on some reasons in order to show that the result of rebalancing is an improvement upon the previous picture. Posner and Vermeule do not account for these reasons in their tradeoff thesis. It is crucial neither to lose sight of the reasons that justify rebalancing nor to assume that they are obvious and uncontroversial in specific cases. The same reasoning applies to all accounts of emergency policymaking. The claim that the government must do something in order to address the crisis could only be justified in light of the understanding of the role of the government and its relation to the governed. Thus, the legitimacy criterion for emergency policymaking must engage political theory. Since it is our working assumption that liberal democratic values are fundamental for our political communities, these values must be taken into account in developing the standard of legitimacy for emergency measures.

## 5.12. NETWORK OF POLITICAL VALUES

The development of the criterion by means of which the legitimacy of emergency policies could be verified must also account for all specific elements of emergency situations. A central problem with Posner and Vermeule's tradeoff thesis is that they conceive the task of emergency policymaking as a balancing exercise between only two terms: liberty and security. In our discussion of their tradeoff thesis we already noticed that other considerations are likely to arise in the emergency context. For example, we explored the distributive concerns that arise as a result of the difficulties with quantifying and aggregating liberty and security. In addition to these problems, further considerations, such as the respect for the dignity of persons, equality, and justice, could arise in these circumstances. In light of that, there are good reasons to doubt the suitability of Posner and Vermeule's exclusive focus on liberty and security for the project of emergency governance.

Below, I briefly examine possible reasons for factoring competing values and principles into arguments relevant to the project of verifying legitimacy of emergency policies. The purpose of this examination is to show that a lot more is involved in assessing the legitimacy of emergency policies than considerations of liberty and security. My aim is not to identify the best strategy for resolving the conflicts of rights during emergency but to show that the exclusive focus on liberty and security is inadequate for this task.

The inadequacy of Posner and Vermeule's approach becomes evident if one adopts a holistic view on the nature of values. For example, in his book *Justice for Hedgehogs*, Dworkin offers reasons against adopting the tradeoff framework as a

tool for deciding questions of value. According to Dworkin, the tradeoff approach relies on a problematic procedure for interpreting values. In particular, the tradeoff framework isolates and pits values against one another.[248] Instead of accepting this erroneous account, Dworkin urges us to recognize that values form a unity and because of that the interpreter must take into account all values rather than isolate some of them in her reasoning. As Dworkin puts it, "Interpretation is pervasively holistic. An interpretation weaves together hosts of values and assumptions of very different kinds, drawn from very different kinds of judgment or experience, and the network of values that figure in an interpretive case accepts no hierarchy of dominance and subordination."[249]

For our purposes, we need to examine the reasons for thinking that values mutually support and inform one another. According to Dworkin, it is possible to distinguish two types of concepts: criterial and interpretive. Criterial concepts are those where "we agree, except in cases we all regard as borderline, about what criteria to use in identifying examples."[250] Tables, chairs, and books are examples of criterial concepts because, according to Dworkin, there are criteria that we share in identifying things that fall within the scope of these concepts. These criteria could be explicated and presented as dictionary definitions and are for the most part uncontroversial. In contrast, interpretive concepts resist such an analysis. As Dworkin explains,

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[248] For an example of Dworkin's criticism of views that allow for the possibility of conflicts among values, see Ronal Dworkin (2011), *Justice for Hedgehogs*, pp. 118-120. Also, see, Ronald Dworkin (2006), *Is Democracy Possible Here? Principles for a New Political Debate,* pp. 50-51.
[249] Ronald Dworkin (2011), *Justice for Hedgehogs*, p. 154.
[250] Ronald Dworkin (2011), *Justice for Hedgehogs*, p. 6.

> We share [interpretive concepts] because we share social practices and experiences in which these concepts figure. We take the concepts to describe values, but we disagree, sometimes to a marked degree, about what these values are and how they should be expressed. We disagree because we interpret the practices we share rather differently: we hold somewhat different theories about which values best justify what we accept as central or paradigm features of that practice. That structure makes our conceptual disagreements about liberty, equality, and the rest genuine. It also makes them *value* disagreements rather than disagreements of fact or disagreements about dictionary or standard meanings. That means that a defense of some particular conception of a political value like equality or liberty must draw on values beyond itself: it would be flaccidly circular to appeal to liberty to defend a conception of liberty. So political concepts *must* be integrated with one another. We cannot defend a conception of any of them without showing how our conception fits with and into appealing conceptions of the others.[251]

Dworkin's claim that values mutually support and inform one another rests on his account of how we understand values and our practices as well as on how we interpret, that is, reason about and justify conduct in light of values and our practices. If Dworkin is right that values mutually support and inform one another, the exclusive focus on liberty and security for the purposes of policymaking is not a suitable strategy.

It is worth emphasizing that all western liberal democracies are committed to the generally accepted standards and norms, such as those reflected in Human Rights. Because these commitments are relevant for emergency policymaking, the exclusive focus on liberty and security could be problematic. For example, Dworkin emphasizes the importance of respecting human dignity, reflected in the human rights norms, in developing policies during national security crises.[252] He makes a distinction between values and interests[253] and argues that our interests in safety

[251] Ronald Dworkin (2011), *Justice for Hedgehogs*, pp. 6-7.
[252] For an alternative account that explores the role of dignity in the US political culture, see Jeremy Waldron (2012), *Dignity, Rank, and Rights.*
[253] See Chapter 4 for the discussion of Dworkin's distinction between values and interests.

should not undermine our commitment to the value of dignity, the respect for which is at the heart of our legal and political order.[254] His argument,

> begins in a conception of human rights that is grounded in the two basic principles of human dignity. It demands, first, that any government, whatever its traditions and practices, act consistently with some good-faith understanding of the equal intrinsic importance of people's lives and of their personal responsibility for their own lives. It also demands, second, that nations that have developed their own distinct understanding of what these standards require not deny the benefit of that understanding to anyone.[255]

For Dworkin, the value of dignity is imbedded in the commitment to respect human rights. Conceptions of human rights may vary across political communities and time but the idea behind the commitment to human rights is respect for human dignity.

According to Dworkin, the analysis of the US political culture reveals that the respect for human dignity is fundamental to legal and political practices of this community. Such emergency measures as indefinite detention or coercive interrogation violate this commitment and are damaging to the political culture. In light of that Dworkin argues,

> We must hold to a very different virtue: the old-fashioned virtue of courage. Sacrificing self-respect in the face of danger is a particularly shameful form of cowardice. We show courage in our domestic criminal law and practice: we increase the statistical risk that each of us will suffer from violent crime when we forbid preventative detention and insist on fair trials for everyone accused of crime. We must show parallel courage when the danger comes from abroad because our dignity is at stake in the same way.[256]

Dworkin is clear that the commitment to respect dignity cannot be muted by the considerations arising during emergencies. His thought is that such anti-terrorist

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[254] Ronald Dworkin (2011), *Justice for Hedgehogs*, pp. 113-120.
[255] Ronald Dworkin (2006), *Is Democracy Possible Here? Principles for a New Political Debate,* pp. 45-46.
[256] Ronald Dworkin (2006), *Is Democracy Possible Here? Principles for a New Political Debate,* p. 50.

measures as indefinite detention and coercive interrogation threaten to violate the dignity of terrorist suspects and undermine the political commitment to respect human dignity of the community that employs such measures. For Dworkin, we lose our dignity when we violate the dignity of others.[257]

With Dworkin we should acknowledge the possibility of changing communal commitments and practices in light of better interpretations of values. However, given the fact that we recognize the great importance of some communal commitments, such as Human Rights, such changes cannot be whimsical and be accepted for mere convenience or out of fear. Rather, it is important that such changes are indicative of an improved understanding of our fundamental values. In order to justify such changes to our commitments, it is necessary to consider their significance in all relevant contexts and from all relevant perspectives. For this reason, the exclusive focus on liberty and security may not be sufficient.

Dworkin's theory of interpretation is not the only basis for doubting the suitability of isolating values in the process of policymaking. One way to discover connections among values is to adopt an instrumental or purposive perspective. On such an account, liberty and security are important because they allow for the achievement or realization of various ends, which are deemed worthy from the liberal perspective. Thus, for example, Zedner suggests that, "rather than seeing security as part of an inherently precarious balancing act set against other goods,

[257] Dworkin's scope of consideration of human dignity is universal. He argues, "The domain of human rights has no place for passports." Ronald Dworkin (2006), *Is Democracy Possible Here? Principles for a New Political Debate,* p. 48.

security measures might better be understood as justified only insofar as they conduce to their attainment."[258] The thought is that security is a value insofar as it allows for the pursuit of other projects and the attainment of other values. From such a standpoint, security is an instrumental value that manifests in specific security norms. On an instrumentalist view of this kind, it is necessary to identify and interpret other values, in addition to liberty, in order to determine the best strategy for pursuing security.

A conception of security that focuses on the maintenance of a political culture or a certain type of social environment could also reveal connections between security and other values. For example, as we saw earlier, Zedner argues that the pursuit of security could be detrimental to the culture of the political community if it undermines trust and erodes social relations valued in this culture.[259] On the basis of her analysis, it is possible to argue that security is important for liberal democracies insofar as it allows individuals to enjoy certain freedoms and live equally in a just society where members trust and respect one another. If that is correct, the project of pursuing security could be justified with the reference to trust, cooperation, and other values significant for a given political culture.

A physical conception of security, the primary focus of which is on the dangers of physical violence to individuals, lends itself to an instrumental view. Thus, for example, Henry Shue argues, "Regardless of whether the enjoyment of physical security is also desirable for its own sake, it is desirable as part of the

[258] Lucia Zedner (2009), *Security*, p. 156. Also see Lucia Zedner (2005), "Security and Liberty in the Face of Terror: Reflections from Criminal Justice."
[259] Zedner's analysis relevant for such an argument could be found in, Lucia Zedner (2009), *Security*, pp. 148-150.

enjoyment of every other right. No rights other than a right to physical security can in fact be enjoyed if a right to physical security is not protected. Being physically secure is a necessary condition for the exercise of any other right, and guaranteeing physical security must be part of guaranteeing anything else as a right."[260] The adoption of this conception of security calls for the consideration of other values and ideals for the purposes of which security is pursued. Consideration of these other values is directly relevant for determination of the value of security on this conception and consequently to the determination of the value of specific norms in which the value of security finds its expression.

It is also possible to regard the significance of liberty in instrumental terms.[261] Consider for example Dworkin's suggestion in *Taking Rights Seriously:*

> If we have a right to basic liberties not because they are cases in which the commodity of liberty is somehow especially at stake, but because an assault on basic liberties injures us or demeans us in some way that goes beyond its impact on liberty, then what we have a right to is not liberty at all, but to the values or interests or standing that this particular constraint defeats.[262]

With this argument Dworkin urges us to recognize, first, that the appeal to the notion of liberty provides "too easy an answer" about the special significance of rights, such as free speech, that are fundamental to the liberal culture. An appeal to the notion of liberty simplifies the advocacy for specific rights by pointing to the value that finds expression in civil liberties. But in doing so it also conceals "what is indeed at stake" in cases where specific right are threatened.[263] In order to

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[260] Henry Shue (1997), *Basic Rights: Subsistence, Affluence, and US Foreign Policy,* p. 22.
[261] For a criticism of instrumental views of liberty see Ian Carter (July, 1995), "The Independent Value of Freedom."
[262] Ronald Dworkin (1978), *Taking Rights Seriously*, p. 271.
[263] Ronald Dworkin (1978), *Taking Rights Seriously*, p. 271.

understand the stakes in cases of limitations of rights under the umbrella of liberty it is necessary to explore the connections between the freedoms that they afford and other values.

Charles Taylor's instrumental conception of liberty could help to explore this point in more detail. According to Taylor, "freedom is important to us because we are purposive beings."[264] According to his understanding, the nature of particular freedoms afforded in a political community is central for determining its standing as a liberal community. If this is so, the value of liberty is determined with a view to other values that are made possible by the rights afforded in its name. The function of civil liberties on this view is to allow the pursuit of other values, projects, and plans that liberal philosophy deems worthy.

The instrumental perspective also reveals that not all freedoms and opportunities are equally important from the liberal perspective. To demonstrate this, Taylor asks us to imagine the following "diabolical defense of Albania [under the communist regime of the 20th century] as a free country":

> We recognize that religion has been abolished in Albania, whereas it hasn't been in Britain. But on the other hand there are far fewer traffic lights per head in Tirana than in London… Suppose an apologist for Albanian socialism were nevertheless to claim that this country was freer than Britain, because the number of acts restricted was far smaller. After all, only a minority of Londoners practice some religion in public places, but all have to negotiate their way through traffic. Those who do practice a religion generally do so on one day of the week, while they are held up in traffic lights every day. In sheer quantitative terms, the number of acts restricted by traffic lights must be greater than that restricted by a ban on public religious practice. So if Britain is considered a free society, why not Albania?[265]

[264] Charles Taylor (1990), *Philosophy and the Human Sciences: Philosophical Papers,* p. 219.
[265] Charles Taylor (1990), *Philosophy and the Human Sciences: Philosophical Papers,* p. 219.

Taylor's point is that some freedoms are more significant than others from the liberal perspective. For this reason, the mere aggregation of freedoms afforded in a given regime is insufficient for determining its status as a liberal democracy. Rather, for this determination it is necessary to assess the nature of afforded freedoms from the liberal point of view.

The important insight for our purposes is that, first, such freedoms as the freedom of religious expression are examples of freedoms served by the value of liberty. The value of liberty, then, is determined with a view to the ends it serves; it finds an expression in specific norms that stipulate freedoms and unfreedoms in particular types of cases. As Will Kymlicka put it, "…the amount of freedom contained in a particular liberty depends on how important that liberty is to us, given our interests and purposes."[266] As a consequence, it is necessary to consider these interests and purposes in policymaking. Second, we need an account that could be used to differentiate freedoms that are relevant from the liberal point of view from those that are not. In other words, the task of interpreting liberty requires an understanding of values and projects deemed worthy from the liberal point of view.

Whether one favors an instrumentalist view of values of security and liberty or prefers a more holistic account, such as offered by Dworkin, the project of interpreting these values for the purposes of policymaking requires an engagement with other liberal democratic values and commitments. Posner and Vermeule's exclusive focus on liberty and security is inadequate because it ignores the

[266] Will Kymlicka (2002), *Contemporary Political Philosophy: An Introduction*, p. 145.

connections among values. As a consequence of this oversight, Posner and Vermeule are unable to explain how their tradeoff thesis could produce "the right policy" for a given circumstance.

If one takes issue with the holistic or instrumentalist accounts sketched out above, there are conceptual arguments against the exclusive focus on liberty and security for the purposes of policymaking. Any interpretation of values must rely on an understanding of these values and, thus, it requires conceptual analysis. For our purposes we are concerned with exploring conceptual connections among fundamental political values with the values of liberty and security. The discovery of these connections is meant to facilitate the understanding of the intricacies of the challenges associated with addressing emergency situations. Below I sketch out several examples of the interrelation of security and liberty with such fundamental political values as equality, justice, and human dignity. My brief analysis does not bring to light all the relevant considerations in regard to these values. Nor do I claim to have identified all the values relevant to emergency governance. But the analysis is sufficient to undermine Posner and Vermeule's exclusive focus on the values of liberty and security for the purposes of emergency policymaking on conceptual grounds.

Consider, for example, Waldron's analysis of the concept of liberty. According to him, the concept of liberty is informed by the commitment to equality. He writes:

> We know that *liberty* may be differentially distributed. But we know too that the very idea of liberty is associated with some firmly established views about what that distribution ought to be. Though liberty is mainly a good to the individuals who have

> it, there are strong principles in the liberal tradition about ensuring that each person's liberty is made compatible with an *equal* liberty assigned to everyone else.[267]

Waldron explains further, "So strong is the association between the value of liberty and this principle for its appropriate distribution that the very word 'liberty' is sometimes used in a way that suggests that the distributive principle is incorporated into the concept. Any demand for liberty that is incompatible with this principle of equality is seen sometimes as a demand for *license*, not liberty."[268] If Waldron is right, it follows that the government must take into account considerations of equality in cases of limitations of civil liberties. If the government ignores these considerations, it acts as if some individuals "were not worthy of respect" or "did not count in society."[269] On Waldron's understanding, by failing to conform to demands of equality, the government risks failing in its commitment to liberty. If that is right, there is a conceptual connection between values of liberty and equality.

According to Waldron, the value of equality also informs the value of security. Waldron argues, "Maybe the individual will fight tooth and nail, with little regard for others, to protect his life and that of his family. But he cannot expect *the state* to fight for him and his family *with little regard to others*. The state must have regard to all of those whose security it is bound to protect, and that necessarily qualifies what it can do for any one of us."[270] In drawing a contrast between individuals and the state in their respective projects of pursuing security, Waldron argues that the state

[267] Jeremy Waldron (2010), *Torture, Terror, and Trade-Offs: Philosophy for the White House*, p. 133.
[268] Jeremy Waldron (2010), *Torture, Terror, and Trade-Offs: Philosophy for the White House*, p. 134.
[269] Jeremy Waldron (2010), *Torture, Terror, and Trade-Offs: Philosophy for the White House*, pp. 133-134.
[270] Jeremy Waldron (2010), *Torture, Terror, and Trade-Offs: Philosophy for the White House*, p. 139.

must take considerations of equality seriously in this pursuit if it is to live up to its status as a liberal democracy.

If considerations of equality are inherently relevant for interpretations of liberty and security, it is no surprise that the value of justice is also connected to these values. Thus, Waldron's distributional criticisms of the tradeoff logic are motivated, in part, by the recognition of the value of justice. The argument that the tradeoff framework does not adequately take into account the distribution of benefits and burdens of security policies can be reformulated as the argument that the tradeoff framework engenders injustice. As Waldron explains,

> Though we may talk of balancing our liberties against our security, we need to pay some attention to the fact that the real diminution in liberty may affect some people more than others. …Justice requires that we pay special attention to the distributive character of the changes that are proposed and to the possibility that the change involves, in effect, a proposal to trade off the liberty of a few against the security of the majority.[271]

The pursuit of security at the expense of liberty cannot be justified without showing how an increase in security and the correlative diminution of liberty is fair from the distributive point of view.[272] If that is the case, the value of justice informs the values of security and liberty.

The exploration of conceptual connections among values reveals that our understanding of one value is likely to be conceptually connected to our understanding of others. For example, in order to explain what it means to be free from the liberal democratic point of view, it is necessary to have an understanding of what it means to be equal and to live in a just social environment. If the project of

[271] Jeremy Waldron (2010), *Torture, Terror, and Trade-Offs: Philosophy for the White House*, p. 26.
[272] See Waldron's discussion of the problems associated with maximization of security in Jeremy Waldron (2010), *Torture, Terror, and Trade-Offs: Philosophy for the White House*, pp.134-137.

tracing conceptual connections among values does not only reveal the significance of such values as liberty and security from the liberal democratic point of view but also explicates the meaning of these values, it is necessary to take into account all relevant values in the process of interpretation and, consequently, in the process of policymaking. It follows then that the exclusive focus on liberty and security is problematic because it could prevent us from operating with adequate concepts of values in the process of developing emergency policies.

Our brief exploration of the nature of values, the conceptual connections among values, and our social practices undermines Posner and Vermeule's tradeoff thesis. If emergencies threaten national security in our understanding of these circumstances and if civil liberties appear to be obvious obstacles in promoting security, it does not mean that values of security and liberty are the only relevant values for emergency governance. Even though my survey leaves open the possibility of some other basis for affecting the balance between liberty and security, I have identified serious obstacles for Posner and Vermeule's tradeoff thesis. The project of steering a community through national emergencies must take into account all relevant values of the political community and cannot be exclusively focused on liberty and security.

## 5.13. CONCLUSION

Despite the plethora of criticism of the tradeoff framework, it is continuously employed in political rhetoric surrounding national security crises. In light of that it

is not only important to understand the shortcomings of this view of emergency policymaking but also to be aware of its persistent appeal. Holmes speculates about the reasons for its popularity: "The image of a liberty-security tradeoff," he says, "appears at first to be eminently reasonable. This is probably because the very concept of a tradeoff calls up images of "balances" and "scales", and is naturally associated with anti-dogmatic, anti-hysterical ideas of compromise, negotiation, and splitting the difference between extremes."[273] Furthermore, "the tradeoff idea may also be so widely accepted because it is seductively easy to illustrate. Anyone who has passed through the airport security knows what it means to sacrifice comfort and convenience as an individual in order to avoid being murdered in a group."[274]

I think that Holmes is correct in identifying the cause of the popularity of the balancing metaphor. No doubt its simplicity and intuitive appeal explain its widespread use in political rhetoric surrounding national security crises. These features could be seen as advantageous for emergency policymaking because we often understand emergencies as situations when the stakes are high and time is of the essence. So, why wouldn't we want an account of emergency policymaking that is simple and intuitive for such circumstances? The answer to this question, which I have developed on the basis of the examination of Posner and Vermeule's tradeoff thesis, is that the intuitive appeal of the balancing exercise is purchased at the price of dangerous assumptions, conceptual ambiguities, and misconceptions about the project of legitimate emergency governance. In light of that, Posner and Vermeule's

[273] Stephan Holmes (April, 2009), "In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror," p. 313.
[274] Stephan Holmes (April, 2009), "In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror," p. 313.

tradeoff thesis should be rejected as an account of emergency policymaking. The question that we will turn to in the next chapter is whether Posner and Vermeule offer good institutional arguments in favor of judicial deference.

# CHAPTER 6: JUDICIAL ROLE IN EMERGENCY GOVERNANCE

## 6.1. INTRODUCTION

In the course of their analysis, Posner and Vermeule make three claims regarding judicial deference. First, they argue that it has historically been the case that judges defer to the executive during emergencies.[275] Second, given Posner and Vermeule's institutional assessments, judges have no choice to defer to the executive during emergencies.[276] And third, Posner and Vermeule argue that the historical pattern of judicial deference should continue, meaning that judges should defer to the executive in the future emergencies.[277] The purpose of this chapter is to analyze these three claims and tie the conclusions of the previous chapters with the analysis of the institutional capacities of the judiciary to improve the quality of emergency governance. Through the analysis of Posner and Vermeule's position, I will argue that their view of judicial deference is unjustified and that the judiciary not only has the resources to assess the legitimacy of some emergency measures during emergencies but it also has the capacity to improve the quality of its contribution to emergency governance.

The chapter is structured as follows. First, I present Posner and Vermeule's deference thesis. Second, I explain methodological difficulties with Posner and Vermeule's approach and examine the concept of deference as well as several relevant reasons for judicial deference. Next, on the basis of T.R.S. Allan's analysis, I

[275] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 6.
[276] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 18.
[277] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 12.

argue that judges have an institutional responsibility to review executive action during emergencies. Fourth, I present and analyze several tools and institutional mechanisms available to the courts for evaluating emergency measures. Fifth, I explain how the judiciary could improve the quality of its participation in emergency governance over time. And finally, by relying on Harris' model for determining justiciability, I reinforce the argument in favor of judicial participation in emergency governance.

## 6.2. POSNER AND VERMEULE'S DEFERENCE THESIS

Posner and Vermeule's argument in favor of judicial deference proceeds in two main steps. First, they defend the tradeoff thesis, according to which civil liberties and security must be traded off against one another in emergency policymaking. In the previous chapter we examined this aspect of Posner and Vermeule's argument and began to analyze its role in supporting their institutional account of emergency governance. The second step of their argument, and the primary focus of this chapter, is their deference thesis, which

> holds that the executive branch, not Congress or the judicial branch, should make the tradeoff between security and liberty. During emergencies, the institutional advantages of the executive are enhanced. Because of the importance of secrecy, speed, and flexibility, courts, which are slow, open, and rigid, have less to contribute to the formulation of national policy than they do during normal times. The deference thesis does not hold that courts and legislators have no role at all. The view is that courts and legislators should be more deferential than they are during normal times; how much more deferential is always a hard question and depends on the scale and type of the emergency.[278]

[278] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, pp. 5-6.

Posner and Vermeule attempt to defend their deference view exclusively on institutional grounds. They do so by employing their second-order methodology, which aims to isolate the substantive considerations surrounding the justifiability of emergency measures and focus instead on institutional considerations.[279]

In addition to the tradeoff thesis, Posner and Vermeule's deference thesis is supported by their conception of emergency circumstances. On their view, emergencies are high stakes situations that require urgent response from the government and that present novel and unique challenges.[280] For Posner and Vermeule, the crux of the problem of emergency governance is to develop an institutional structure that would allow for the most effective exercise of tradeoffs in the unpredictable circumstances of emergencies.

Posner and Vermeule's formulation of the deference thesis quoted above suggests that the degree of deference depends on the scale and type of the emergency. This claim could be taken to suggest that there could be emergencies that require little or no deference. This, however, is a moot point for Posner and Vermeule. In their view, "judges deciding constitutional claims during times of emergency should defer to government action so long as there is any rational basis for the government's position, which in effect means that the judges should almost always defer, as in fact they have when emergencies are in full flower."[281] As Posner and Vermeule explain,

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[279] For an exposition and critical assessment of Posner and Vermeule's second-order methodology, see Chapter 5 of this dissertation.
[280] See Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, pp. 42-45. See also Chapter 3 for my critique of Posner and Vermeule's conceptual account of emergencies.
[281] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 12.

> …the institutional structures that work to the advantage of courts and Congress during normal times greatly hamper their effectiveness during emergencies; and the decline in their performance during emergencies is much greater than the decline in governmental performance. Therefore, deference to government should increase during emergencies.[282]

In addition to what they view as institutional obstacles to effective judicial participation, Posner and Vermeule observe that the historical record as well as the conventional wisdom among constitutional lawyers suggests that courts should defer to the executive during periods of crises. Thus, it could be argued that there is a tradition of judicial deference during emergencies. However, Posner and Vermeule claim, "the real cause of deference to government during times of emergency is institutional: both Congress and the judiciary defer to the executive during emergencies because of the executive's institutional advantages in speed, secrecy, and decisiveness."[283]

So why does institutional performance of courts suffer during emergencies? According to Posner and Vermeule, one set of disadvantages of the judiciary pertains to the lack of access to the relevant information that is necessary to address the crisis at hand. In their view, the institutional position of the judiciary prevents the courts from meaningfully contributing to the quality of emergency governance since, "…political insulation that protects [judges] from current politics also deprives them of information, especially information about novel security threats and necessary responses to those threats."[284] Throughout their analysis, Posner and Vermeule repeatedly emphasize the inaccessibility of information relevant for

[282] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 6.
[283] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 16.
[284] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 31.

addressing emergencies and evaluating government's responses to them as one of the main supporting reasons for judicial deference.[285]

Posner and Vermeule do not explain exactly how judicial insulation deprives judges of information in their discussion of the institutional characteristics of the judiciary but elsewhere they portray the institutional position of federal judges in the following way:

> Federal judges are highly insulated officials in the American constitutional system. For this reason, civil libertarians argue that judges are well positioned to guard civil liberties against the excess of panic during wartime and other emergency periods. One might argue that judges are more likely to be calm during emergencies than are officials in the political branches because of the nature of adjudication. Cases come to judges only after a time lag during which emotions may cool. Adjudication puts a premium on argument and deliberation, whereas executive officials are not compelled to deliberate and may simply issue orders. And because judges are removed from the centers of power, they might not feel as anxious about the consequences of their decisions and may therefore be able to think more clearly about the problem.[286]

On the basis of this description, one could argue that in Posner and Vermeule's view judges do not have access to relevant information because their insulation from politics means that they are removed from the centers of power that are tasked with gathering of intelligence relevant for addressing emergencies. Furthermore, if the task of adjudication requires cool deliberation, there is no "time lag" requisite for proper deliberation during emergencies due to time constraints characteristic of these situations. This can be taken to mean that there is no time for judges to properly examine information during emergencies according to the standards of adjudication.

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[285] For examples, see claims in, Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 14, p. 44, p. 49, and p. 89.
[286] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 74.

In addition to the problem of insulation, the judiciary is institutionally disadvantaged because the process of adjudication requires open deliberations, according to Posner and Vermeule. As they explain, during emergencies "secrecy is more important than during normal times; so are speed, vigor, and enthusiasm. The characteristics of judicial review – deliberation, openness, independence, distance, slowness – may be minor costs, and sometimes virtues, during normal times, but during emergencies they can be intolerable."[287] Posner and Vermeule do not spell out how these characteristics of courts are disadvantageous during emergencies. However, it is possible to interpret their claim to refer to procedural constraints that could slow down the process of adjudication as well as to the danger of dissemination of sensitive information that could result from open deliberation and sharing of this information with the courts.

The third institutional disadvantage of the judiciary is its reliance on the legal framework in evaluating policies, according to Posner and Vermeule. As they argue, "emergency threats vary in their type and magnitude and across jurisdiction… The novelty of the threats and of the necessary responses makes jurisdictional routines and evolved legal rules seem inapposite, even obstructive."[288] In light of their understanding of the nature of emergency situations, Posner and Vermeule observe, "constitutional rules do no good, and some harm, if they block government's attempts to adjust the balance as threats wax and wane."[289] If legal norms are unsuitable to the project of emergency governance due to the nature of emergency

[287] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 61.
[288] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 18.
[289] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 31.

circumstances, judges, as experts in law, cannot meaningfully contribute to improving the quality of emergency governance, or so Posner and Vermeule argue.

Lastly, in Posner and Vermeule's view, the judiciary is disadvantaged during emergencies because it is a reactive institution. As they explain, judges "do not have access to the levers of power, so they can only delay a response to an emergency by entertaining legal objections to it."[290] Posner and Vermeule's thought is that the judiciary does not have the power to introduce emergency policies but could only assess those that are introduced by other branches of government. This assessment is unlikely to systemically improve the quality of emergency governance because courts have only limited information and insufficient time for proper deliberations. Combined, these disadvantages invite the conclusion that the best strategy for judges is to defer to the executive during emergencies, according to Posner and Vermeule.

In contrast to the judiciary, the executive "does no worse during emergencies, or at least its performance suffers less than that of courts and legislators."[291] Throughout their analysis, Posner and Vermeule characterize this branch of government as quick, decisive, flexible, vigorous, secretive, and enthusiastic. They consider these characteristics to be advantageous for governing during periods of emergency because of the demands that these situations place on decision makers. Since the executive has the most relevant information and security expertise for addressing crises and since it can act quickly and decisively, it is most adept in

[290] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 75.
[291] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 6.

determining the optimal policies during periods of crisis, according to Posner and Vermeule.

That said, Posner and Vermeule acknowledge that the executive could make mistakes in developing emergency policies. Their argument, however, is that the courts cannot improve the quality of emergency governance by catching these mistakes. As they explain,

> Of course, the judges know that executive action may rest on irrational assumptions, or bad motivations, or may otherwise be misguided. But this knowledge is largely useless to the judges, because they cannot sort good executive action from bad, and they know that the delay produced by judicial review is costly in itself. In emergencies, the judges have no sensible alternative but to defer heavily to executive action, and the judges know this.[292]

Because judges do not have relevant information and expertise for developing a sufficient understanding of the crisis and available means of addressing it, they are not in the position to evaluate the legitimacy of the executive's policy choices.

It is worth pointing out that in offering their institutional characteristics of the executive and the judiciary, Posner and Vermeule only claim that the courts do not have relevant information for addressing emergencies. They never claim that the executive has it. It is reasonable to assume that the executive is likely to have the best information about its resources and capabilities in a given situation. But it is not necessarily true that it will have any information, let alone sufficient information to develop the optimal emergency policy, about any given case. Thus, Posner and Vermeule's argument about access to relevant information should not be taken to necessarily imply that the executive is always well informed. Rather, their claim is

[292] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 18.

that the executive is more likely to be informed about crises, although it may not have sufficient information for developing optimal policies in any given case.

Posner and Vermeule's claim about executive expertise in security matters also deserves careful analysis. They claim that it is "extremely difficult" to evaluate emergency measures introduced by the executive without relevant security expertise. In their discussion of the emergency measures in the wake of 9/11, Posner and Vermeule argue, "whether the government justifiably detains al Qaeda suspects without charging and trying them depends to a large extent on the magnitude of the threat, the importance of secrecy, and other factors that few people outside of government are in a position to evaluate."[293] From this argument it could be inferred that not only the courts but anyone outside the security experts' office is ill placed to assess the suitability of emergency measures in such cases as 9/11. If the absence of expertise justifies deference, it follows from Posner and Vermeule's argument that everyone who is not a security expert should defer to the wisdom of the executive in dealing with national security crises, not only the courts.

In presenting these institutional characterizations of the executive, Posner and Vermeule assume that this branch of government is rational and well motivated during emergencies. They claim that these assumptions do not require empirical support because their function is to provide a baseline picture against which the views of the critics of judicial deference could be examined.[294] Thus, Posner and Vermeule acknowledge, "as a matter of fact, this baseline picture is almost certainly

[293] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 9.
[294] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 29.

incorrect."[295] However, they believe that it nevertheless helps them to clarify their position, according to which "government is not more likely to [introduce sub-optimal policies] during emergencies than during normal times, whereas courts are less able to police such behavior during emergencies than during normal times."[296]

When Posner and Vermeule characterize the executive as rational, they mean that it makes "no systematic errors in its empirical estimates and causal theories when assessing the likely effects of increases or decreases in security and liberty. Although government makes mistakes, those mistakes are randomly distributed; thus government's assessments are correct on average."[297] According to this view, the probability of government's mistakes is the same in the normal and the emergency contexts. And even though the stakes are higher during emergencies than during periods of normalcy, and for this reason one could argue that extra precautions need to be taken to ensure the quality of emergency governance, Posner and Vermeule argue that judges are precluded from providing a positive contribution to this task in light of their institutional disadvantages in these circumstances.

When Posner and Vermeule characterize the executive as well-motivated, they mean that "the government acts so as to maximize the welfare of all persons properly included in the social welfare function."[298] For the purposes of their argument they do not need to determine exactly whose welfare should count. Thus, they explain, "Whoever is properly included, a well-motivated government is one

[295] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 30.
[296] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 31.
[297] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 29.
[298] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 30.

that does not display either systematic agency slack or systematic majoritarianism. Officials do not systematically act as agents either for a majority or for a minority. Rather, government impartially maximizes the welfare of all whose interests and preferences should count."[299] Any one particular government may do a better or a worse job in promoting social welfare; however, its motivations will remain constant across normal and emergency contexts. The difference is that during emergencies the judiciary cannot adequately examine government's performance, according to Posner and Vermeule.

It is worth emphasizing that the main subject of Posner and Vermeule's deference thesis is the authority to decide on the legitimacy of emergency policies. According to them,

> The *deference view* is that judicial review of governmental action, in the name of the Constitution, should be relaxed or suspended during an emergency. During an emergency, it is important that power be concentrated. Power should move up from the states to the federal government and, within the federal government, from the legislature and the judiciary to the executive. Constitutional rights should be relaxed so that the executive can move forcefully against the threat. If dissent weakens resolve, then dissent should be curtailed. If domestic security is at risk, then intrusive searches should be tolerated. There is no reason to think that the constitutional rights and powers appropriate for an emergency are the same as those that prevail during times of normalcy. The reason for relaxing constitutional norms during emergencies is that the risks to civil liberties inherent in expansive executive power – the misuse of power for political gain – are justified by national security benefits.[300]

Posner and Vermeule's argument in favor of the concentration of powers in the hands of the executive and the relaxation of constitutional norms during emergencies speaks to the judicial role in emergency governance. Namely, it speaks to how well the judges can assess the justifiability of emergency measures.

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[299] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 30.
[300] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, pp. 15-16.

Posner and Vermeule's argument is not that the executive needs to introduce special measures to tackle emergencies, such as censorship laws, surveillance, and intrusive searches. This may or may not be true for a given emergency. Rather, their argument is meant to support the thesis that judges should defer to the wisdom of the officials in the executive branch of government in tackling the emergency in the way these officials see fit. Thus, for example, if the executive introduces a special censorship law to address a national security crisis, judges should not attempt to invalidate this measure when deciding cases. Unlike periods of normalcy, when judges are in the position to improve the quality of policies and verify their legitimacy through judicial review, emergencies prevent judges from assessing the legitimacy of emergency governance.

## 6.3. SECOND-ORDER METHODOLOGY

In our analysis of Posner and Vermeule's deference thesis, we should continue to bear in mind the difficulties stemming from their second order methodology. Even though in the last chapter we examined at length Posner and Vermeule's distinction between first and second order questions, it is important to understand how it impacts not only their account of policymaking but also their institutional analytics. They relied on this distinction in order to isolate the substantive questions of policy from the institutional considerations relevant for making policy decisions. According to them, the first order questions concern the

adjustments of rights.[301] The second order questions concern institutional performance. More specifically, they concern rules and other institutional mechanisms that could be used in order to ensure that the answers to the first order questions are more likely to be optimal.[302]

In the previous chapter, we raised doubts about the possibility of isolating the first from the second order questions for the purposes of developing optimal policies. In this chapter, we focus on the shortcomings of this methodology for accounting for the role of institutions within political orders of liberal democracies, and in particular, the judiciary.

In critiquing Posner and Vermeule's distinction between first and second order questions, I do not mean to reject the distinction altogether. Rather, I wish to acknowledge that the distinction between the first and second order inquiries could be useful for the analysis of the emergency problematic, provided that the relationship between these two inquiries is properly conceived. Indeed, some of what I will be saying in the following discussion will not explicitly engage with what Posner and Vermeule call the first order questions. However, my criticism of Posner and Vermeule's deference thesis as well as my suggestions about the role of the judiciary in the emergency context cannot be properly presented without identifying the substantive considerations in play during emergencies.

A separation of substantive and institutional issues could bring more clarity and insight to the study of emergency situations. Separating questions of how decisions and policies are made from the procedural point of view from the

[301] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 218.
[302] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 93.

substantive questions related to moral justifiability and political legitimacy of various courses of action could focus the inquiry and bring structure to our study. However, the fact that it is possible and could be useful to focus on either procedural or substantive issues should not be taken to mean that the procedural and substantive inquiries are unrelated, as Posner and Vermeule want us to believe.

While the distinction between substance and procedure may seem intuitive, the relation between the two resists a clear separation upon closer scrutiny. For example, Jenny Martinez observes,

> Many procedural rules seem on closer examination not to be transsubstantive at all, but rather driven by particular substantive concerns. Standards of pleading, for instance, reflect the desire to make the courts more or less accessible to particular kinds of substantive claims. The same is true for many of the procedural rules for class action suits. Presumptions formally structure the presentation of evidence in court, but draw not only upon substantive assumptions about the probability of particular facts but also normative judgments about where we want the risk of error in cases to fall.[303]

Because substantive considerations inform the established legal procedures, it is necessary to focus on the relevant substantive values and norms in order to provide justifications for these procedures. According to Martinez, this is particularly true of constitutional law an examination of which "reveals an even more perplexing creature: "substantive due process," which is to be distinguished from "procedural due process," which in turn actually seems to depend on the substance of the matter in dispute."[304] These different types of "creatures," to use Martinez's term, and the

[303] Jenny Martinez (June, 2008), "Process and Substance in the "War on Terror"," p. 1018.
[304] Jenny Martinez (June, 2008), "Process and Substance in the "War on Terror"," p. 1019.

relation between them further complicate the separability of substance from process.[305]

It is necessary to bear in mind that one of the best strategies for justifying a set of procedural rules is through the appeal to substantive ends. Thus, for example, one author observes, "One cannot usefully evaluate a procedural system, let alone participate in debate about procedural reform, without some notion of the values that the system serves or that it ought to serve."[306] The reason for this is that procedural rules are not neutral, which means that the adoption of a given set of procedural rules could have a significant effect on the substantive outcomes of the decisions produced by these processes. Thus, "if the lawgiver (whether the legislature or a court) makes a deliberate decision to shift the burden or manner of proof, to adopt certain presumptions, to prevent or exclude consideration of certain facts, we recognize that decision as reflecting particular priorities, values, choices, perhaps political pressures."[307] Thus, an account the purpose of which is to offer a comparative institutional assessment calls for an engagement with substantive considerations.

Now, if Posner and Vermeule's second order approach presumes that it is possible to find answers to institutional questions without invoking substantive values of any kind, then the above observations undermine its plausibility. However, we should keep in mind that substantive considerations that apply to the

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[305] For further discussion see, John Harrison (April, 1997), "Substantive Due Process and the Constitutional Text," section I.B.
[306] Stephen Burbank (1987), "The Costs of Complexity," p.1466.
[307] Andreas Lowenfeld (Autumn, 1997), "The Elements of Procedure: Are They Separately Portable?" p. 650.

justifications for a process may be different from substantive considerations that apply to the case evaluated through that process. Thus, for example, fairness to the accused might be a value that underlies a choice of a burden of proof in a criminal trial. However, in judging whether the defendant acted reasonably in warding off a threat with deadly force, fairness may have little or no relevance. Thus, we should evaluate Posner and Vermeule's treatment of the substantive questions with this point in mind.

In his defense of judicial review, Freeman argues that the significance of procedural limitations on the power of government institutions, such as the executive, legislature, and the judiciary, cannot be grasped without considering the substantive ends that these institutions are meant to serve in the democratic regimes.[308] He argues, "we cannot understand what these procedural forms are, their conditions and limits, without first coming to a decision on the basic rights and ends of justice these procedures are designed to realize."[309] According to Freeman, the question of institutional allocation of authority to assess the legitimacy of policies cannot be answered without taking into account the substantive considerations that justify the form of association in a political community and the responsibility of government institutions.

According to Freeman, the procedural view, which involves no substantive considerations, is problematic because "it unduly focuses our attention upon but

[308] Freeman's main focus in his paper Constitutional Democracy and the Legitimacy of Judicial Review is the examination of the relation between the legislature and the judiciary; however, he acknowledges that judicial review of the executive is important for the ends that democracy serves.
[309] Samuel Freeman (1990-1991), "Constitutional Democracy and the Legitimacy of Judicial Review," p. 369.

one aspect of societies that we think democratic to the exclusion of other features that are equally important. It then leads us to ignore the background conditions for stable democratic regimes, as well as the normative requirements of the values and ideals that underlie our commitment to democratic forms."[310] We may disagree on the conception of values that inform a democratic regime or on their interpretation in light of the given set of circumstances. But such disagreements do not undermine the claim that the design of institutions and procedures in a political community is justified with the view to these fundamental values.

The above observations undermine Posner and Vermeule's strategy of isolating the first from the second order questions. If the objective of the deference thesis is to defend the executive as an institution that should have the final authority to determine the legitimacy of emergency policies, it cannot be advanced without a reliance on substantive ends that the political order in question is meant to serve. Posner and Vermeule's isolation of the first from the second order questions precludes any meaningful assessment of the roles of government institutions during emergencies. For this reason, their approach should not be followed in evaluating the institutional arrangements for emergency governance.

## 6.4. THE CONCEPT OF DEFERENCE AND JUDICIAL DEFERENCE

One of the central tasks in assessing Posner and Vermeule's deference thesis is to explore the concept of deference and reasons courts may have for deferring to

[310] Samuel Freeman (1990-1991), "Constitutional Democracy and the Legitimacy of Judicial Review," p. 336.

judgments of other branches of government. It should be noted that in the exposition of their deference thesis Posner and Vermeule do not articulate the concept of deference but rather focus on the reasons that judges have to defer to the executive during emergencies. In my view, a brief exploration of the concept of deference is helpful for illuminating some of our intuitions and possible reasons justifying judicial deference in various circumstances. In this section, I will rely on Aileen Kavanagh's insightful and nuanced account of deference to prepare for the assessment of the institutional role of the judiciary in the context of national security crises.[311]

For Kavanagh, "deference is a matter of assigning weight to the judgment of another, either where it is as at variance with one's own judgment, or where one is uncertain of what the correct assessment should be."[312] As she explains, deference is "a rational strategy for dealing with uncertainty about what the balance of reasons requires. Thus, A can defer to the judgment of B in a situation where A does not know, or is uncertain about, what the correct solution to the problem is. Deference" says Kavanagh, "is a rational response to uncertainty."[313] This does not mean that taking the advice or concurring with the judgment of another agent necessarily amounts to deference. For Kavanagh, deference occurs only when one takes the

[311] While there are other theorists who offer conceptual analysis of deference, Kavanagh's account is preferable for our purposes because it is both illuminating and neutral with regard to the normative and institutional arguments about judicial deference during emergencies.
[312] Aileen Kavanagh (2008), "Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication," p. 185.
[313] Aileen Kavanagh (2008), "Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication," p. 186.

judgment of another "as a conclusive reason" for one's actions.[314] Finding another's claims or judgments persuasive in light of one's own assessment does not count as deference on Kavanagh's account.

There are several general reasons for judges to defer in the national security context to other branches of government in Kavanagh's view. First, Kavanagh argues that the judiciary always owes, what she calls, "minimal deference" to other branches of government. The idea of minimal deference, according to Kavanagh, "simply requires that the legislature's or executive's decisions are treated with respect in the sense that they should be taken seriously as a bona fide attempt to solve whatever social problem they set out to tackle."[315] By deferring in the minimal sense court recognize that another (legitimate) decision-maker has made a good faith judgment about the issue at hand. Importantly, such recognition is not a conclusive reason for the court to accept the decision. In advocating their view, Posner and Vermeule want judges to show much more than minimal deference to the executive during emergencies. Judges, on their view, have a conclusive reason to defer to the executive because of their institutional disadvantages.

Second, according to Kavanagh, judges may need to defer to the executive because they do not have access to relevant information. As Kavanagh explains, "deference is a rational response to uncertainty, and uncertainty will be heightened in a case in which secrecy surrounds some of the relevant facts."[316] This is one of the

[314] Aileen Kavanagh (2008), "Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication," p. 186.
[315] Aileen Kavanagh (2008), "Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication," p. 191.
[316] Aileen Kavanagh (2008), "Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication," p. 208.

central reasons supporting Posner and Vermeule's deference thesis. It is important to bear in mind, however, that this epistemic disadvantage is not always a sufficient condition for deference. For example, there is nothing incoherent in expecting the judiciary to review the activity of other branches of government under some level of uncertainty. It is not difficult to argue that judges, as much as any other agents, cannot be always certain that they have all the relevant information before them when they have to make decisions. If there is a practical demand to make a judgment, some levels of uncertainty could be tolerated. In such cases, the understanding that one does not have all the relevant information may not be sufficient to warrant deference.

Furthermore, there is nothing incoherent about an account of institutional responsibility that requires judges to make judgments when they do not have and know that they do not have all the relevant information. On such an account a greater access to relevant information is not sufficient to settle the question of deference. Instead, the question of deference could be settled only with the reference to the role of courts in the political system of the community. If that is correct, it follows that the question of access to information is not sufficient on its own to settle the question of deference but is a consideration that must be taken into account in determining the justifiability of deference.

Third, according to Kavanagh, in high stakes situations judges could choose to defer because their perception of risks could "cause them to err on the side of

caution."[317] It could be said that high stakes situations raise the bar for the quality of decision-making and thus could motivate some agents or institutions to defer to the judgments of others. In particular, the combination of high stakes and unequal distribution of information among institutions could warrant deference. So, if the court believes that there is a great deal at stake in the case before it, if it does not believe that it has all the relevant information to make a good judgment, and if it believes that another institution, such as the executive, has more relevant information about the case than the court, there is a reason to defer. The high stakes factor could be said to change the nature of responsibility. More specifically, it could justify deference where mere inequality in access to information would not be sufficient to justify it.

To formalize this thought, we could say that A has a reason to defer in a high stakes situation only if it has a good reason to think that B is in a better position to make a competent and responsible judgment. This is so, one could argue, because a more competent and responsible judgment is preferred to a less competent and responsible one in all cases but especially in high stakes situations. However, if A has no reason to think that B is more competent and responsible in a given case, the high stakes factor does not warrant A's deference to B. If that is correct, then the high stakes factor could constitute a reason for deference only in combination with other considerations, such as good reasons for thinking that B in fact is in a better position to judge.

[317] Aileen Kavanagh (2008), "Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication," p. 209.

Fourth, Kavanagh points out that it may be difficult for the judiciary to evaluate some executive decisions because courts are not the best forums for evaluating certain aspects of policy, such as those, for example, that involve the evaluation of anticipatory decisions.[318] It must be accepted that it may be difficult for the court to assess how best to deploy the executive's resources in anticipation of crises or which political strategy to choose in addressing a social or a political problem. Given the courts' lack of democratic accountability, such judgments may not only be difficult to make because they require access to relevant information but they may also be inappropriate in light of the executive's democratic mandate. The recognition that the task of governing a community requires not only the resolution of disputes but also making judgments pertaining to political strategy creates the possibility for judicial deference in some cases.

Now, Posner and Vermeule repeatedly emphasize that their analysis reveals judiciary's disadvantages stemming from its characteristic procedures and its relation to other branches of government. Thus, their account could be interpreted as suggesting that it is not the business of the courts to assess the optimality of emergency measures because they cannot make good judgments about questions of political strategy or crisis anticipation. On this interpretation, it could be argued, the deference thesis asks the judges to regard the emergency context as nonjusticiable because of the nature of challenges that arise during emergencies and because of the judiciary's institutional limitations in addressing them. We need to explore and assess this interpretation of Posner and Vermeule's deference thesis.

[318] Aileen Kavanagh (2008), "Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication," p. 209.

Fifth, Kavanagh argues that prudential reasons could warrant deference. A court that defers for prudential reasons could do so because it wishes to preserve its reputation, to avoid making an unpopular decision, or to avoid bringing the judicial role into disrepute.[319] According to Kavanagh, it is a matter of "interinstitutional comity" for branches of government to defer to their counterparts in some such cases.[320] If officials defer for prudential reasons, they are not, first and foremost, concerned with the quality of the decision at hand. They could recognize that their deference may result in an injustice or a suboptimal outcome in a given case. However, the importance of protecting the reputation of the institution or maintaining interinstitutional relations motivates this type of deference. It could be said that officials who defer for prudential reasons are concerned, first and foremost, with the quality of institutional environment rather than the quality of decisions in specific cases.

In exploring the prudential reasons for deference, Kavanagh focuses on the following question: Should courts explicitly state the reasons for their decisions when they are motivated by prudential considerations? Kavanagh argues that were courts to reveal the prudential basis of their judgments they may thereby undermine the rationale for deference. For example, if the court disagrees with the executive decision on the merits but nevertheless believes that it is important to show solidarity with the executive at the time, the revelation of its true reasons would likely defeat the purpose that the court is pursuing. As Kavanagh puts it,

[319] Aileen Kavanagh (2008), "Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication," pp. 187-9.
[320] Aileen Kavanagh (2008), "Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication," p. 188.

"concealing judicial reservation about or, indeed, outright disapproval of, a decision of the elected branches may be the only way of preserving the rationale of deference."[321]

Kavanagh justifies her view, which appears to be on the first blush an apology for judicial dishonesty, by arguing that judges have not only an obligation to do justice in individual cases but also to maintain the reputation of the judiciary and to promote cooperation with other branches of government in the name of maintaining a good legal and political environment. In order for judges to be able to do justice in individual cases, they "must also be concerned with their more long-term ability to fulfill this role."[322] Kavanagh recognizes that doing justice in an individual case may necessarily entail undermining the status of the judiciary; in such cases, according to Kavanagh, judges have prudential reasons for deference. Kavanagh reminds us that the courts,

> …are the weakest branch of government and are dependent on other branches of government to respect and implement their decisions. Given this dependence, the continued power of the courts to make law and do justice in individual cases depends, in part, on not alienating the legislature and executive.[323]

It is important to notice that the maintenance of the legal and political environment that could constitute a prudential motive for deference may require other actions, including judicial review. If we agree that the preservation of the legal and political order requires occasional deference, we should also recognize that it might require occasional defiance of the other branches of government. Making

[321] Aileen Kavanagh (2008), "Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication," p. 204.
[322] Aileen Kavanagh (2008), "Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication," p. 206.
[323] Aileen Kavanagh (2008), "Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication," p. 205.

unpopular decisions and straining interinstitutional relations could at times be in the long-term interest of the political community. It is necessary to introduce specific scenarios in order to explore justifications for these options. The important point for us is that the preservation of the legal and political order may not always be achieved by deference.

Now, Posner and Vermeule do not defend their deference thesis by relying on prudential reasons, such as the protection of judicial reputation or maintenance of interinstitutional relations. However, their deference thesis promises to improve the quality of emergency governance by supporting the trend of judicial deference. Thus, they are concerned with the preservation of the political order in the long-tem. The evaluation of Posner and Vermeule's account, then, calls for a critical examination of judicial disadvantages in the emergency context, in particular, the tools and mechanisms available to judges for improving the quality of emergency governance.

Finally, Kavanagh's treatment of deference contains another insightful point for our project. Unlike Posner and Vermeule who present the question of judicial deference as a question about the institutional capacity of the judiciary to positively influence emergency policymaking, for Kavanagh "the question of whether judges should defer to the elected branches is not about the legal powers judges possess. Rather, it concerns the appropriateness of judges *not* exercising those powers, or at least being restrained in exercising them."[324] For Kavanagh, the institutional question is not what should judges do in order to improve the quality of emergency policymaking but rather what reasons do judges have for not exercising their

[324] Aileen Kavanagh (2008), "Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication," p. 185.

regular duties. This reformulation focuses our attention not on the question of what judges could bring to improve the quality of emergency governance but on the question of why emergencies warrant departures from our settled normative commitments.

With these points in mind, let us turn to the critique of the doctrine of judicial deference.

## 6.5. ALLAN ON THE POSSIBILITY OF DEFERENCE

In order to set up the discussion of Posner and Vermeule's deference thesis, I would like to outline T.R.S. Allan's position on the question of judicial deference. Allan is one of the most vehement critics of judicial deference and an exploration of his view, which is primarily geared towards addressing questions about judicial review in the normal context, could help us to expose the shortcomings of Posner and Vermeule's deference thesis. Allan argues that we are "chasing a chimera" when we attempt to articulate a doctrine of judicial deference as an account of the relationship between the judicial and other branches of government. According to him, "there are no general criteria of deference to be discovered or expounded because no coherent doctrine of deference is feasible."[325] Basing his argument on conceptual and institutional reflections Allan argues, "we should abandon the search

[325] T.R.S. Allan (2006), "Human Rights and Judicial Review: A Critique of "Due Deference"," p. 672.

for what is, on close inspection, a substitute for legal analysis of specific claims of right, entitled to recognition or denial in accordance with their intrinsic merits."[326]

In Allan's view, the court does not have an option to defer to the executive, if by "deference" we understand the acceptance of executive's claims at face value by the court that is fulfilling its institutional duty. Rather, the court has only two options: either it adjudicates the case before it on the merits or it abdicates its judicial responsibility. As Allan explains,

> The only proper question for the court is simply whether or not the decision falls within the sphere of decision-making autonomy that the claimant's right, on its correct interpretation, allows. The relative expertise of the decision-maker and the excellence of its procedures are relevant insofar as they generate convincing arguments – good reasons for curtailing rights grounded in reasonable policies and supported by clear evidence. The court must be persuaded by the reasons, however, rather than impressed by expertise or procedural competence. The availability of means of review of policy, making the decision-maker politically accountable, will enhance the likelihood that objectives being pursued have been carefully considered; significant objections may have prompted further thought. Faced with the claim that the individual has been unfairly treated, however, the court must itself appraise the defence presented, in the most cogent form those responsible can muster.[327]

On this view, the court cannot accept the claims of another branch of government at face value or as conclusive reasons for its judgment and at the same time meet the demands of its institutional responsibility. Let us explore the reasons for this view.

According to Allan, "there is no logical space for any free-standing *doctrine* of deference since the identification of areas of legitimate governmental discretion is an intrinsic feature of the judicial process."[328] Allan's view is that for the government to be legitimate, its actions must comply with the relevant constitutional norms, which include, among others, judicial review of executive

[326] T.R.S. Allan (2006), "Human Rights and Judicial Review: A Critique of "Due Deference"," p. 672.
[327] T.R.S. Allan (2006), "Human Rights and Judicial Review: A Critique of "Due Deference"," p. 689.
[328] T.R.S. Allan (2006), "Human Rights and Judicial Review: A Critique of "Due Deference"," p. 694.

action. Judicial review is thus a necessary condition of government's legitimacy and all executive action must in principle be reviewable. For Allan "the only "deference" called for, in a liberal democracy worth the name, is obedience to rules or decisions that comply with the constitutional constraints that competent legal analysis identifies."[329]

Allan recognizes that a court may not have all the relevant information at its disposal or it may lack the requisite expertise to assess the significance of various factors relevant for adjudicating a case. However, in his view this does not mean that the court is incapable of fulfilling its adjudicative functions in such circumstances. On Allan's view, the court should accept all decisions and conclusion made by the executive in any case that comes before it "only to the extent that the reasons offered in support of those conclusions prove persuasive."[330] Thus, "no judge should "defer" to any opinion he thinks is doubtful" on Allan's account.[331] In order for the court to discharge its institutional responsibility it must decide the case before it based on the evidence and argumentation it finds persuasive.

One important insight from Allan's analysis is that the question of judicial deference must be resolved with the view to an account of institutional responsibility of courts in liberal democratic regimes. Allan's view is that the decision on the merits and abdication of judicial responsibility are the only two options available to courts in liberal democracies worth their name. If Allan is right, then it is the courts' institutional responsibility to offer competent legal analysis of

[329] T.R.S. Allan (2006), "Human Rights and Judicial Review: A Critique of "Due Deference"," p. 673.
[330] T.R.S. Allan (2006), "Human Rights and Judicial Review: A Critique of "Due Deference"," p. 676.
[331] T.R.S. Allan (2006), "Human Rights and Judicial Review: A Critique of "Due Deference"," p. 694.

all executive action. Courts cannot legitimately address the decisions of officials without evaluating them on the merits, which includes the assessment of relevant institutional competencies. As Kavanagh reminds us, "even when deferring completely to the elected branches, judges are still acting on their own (moral) judgment. By deciding that it is appropriate to defer, they have come to a moral view about what constitutional propriety demands of them and which institution should prevail."[332] Thus, judicial deference is a type of judgment on the merits in liberal democracies.

That said, there are factors that the courts must take into account when examining executive's claims in the course of adjudication, according to Allan. Access to relevant information and expertise in certain contexts are the factors that should influence judicial assessments.[333] In addition, judges should take into account such factors as democratic accountability of the decision-maker as well as the good faith attempts on behalf of the decision-maker to arrive at an optimal decision in a given case.[334] All such factors could play a significant role in justifying executive's actions and policies and thus should be taken into the account by the judges. Taking these factors into account, however, does not amount to judicial deference. Rather, as Allan argues, these factors constitute reasons for judges to adopt the appropriate standards of review.

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[332] Aileen Kavanagh (2008), "Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication," p. 207.
[333] T.R.S. Allan (2006), "Human Rights and Judicial Review: A Critique of "Due Deference"," p. 689.
[334] T.R.S. Allan (2006), "Human Rights and Judicial Review: A Critique of "Due Deference"," pp. 687-688.

The question for judges, then, is not whether to defer or to review executive actions, as Posner and Vermeule's account suggests. Rather, the question is to identify the appropriate standard of review for the given case in the given context. The difference between Posner and Vermeule's and Allan's accounts is that for Posner and Vermeule the fact that the executive has institutional advantages during emergencies is sufficient to warrant judicial deference in all cases. But if Allan's account is adopted for the emergency context, the judges must continue to review executive action in cases that come before them. It may so happen that judges may find some evidence or reasons more persuasive in the emergency context rather than during the periods of normalcy. However, in principle, the judicial function of reviewing the executive's actions remains unchanged across these contexts.

In suggesting how the standard of review should be selected, Allan argues, "the greater the threat to constitutional rights, and the more important the rights at stake, the stronger the grounds for the pertinent measure must be – the more rigorous and skeptical the necessary judicial scrutiny."[335] The general formula for determining the standard of scrutiny for Allan does not depend on the normal or emergency context but rather on the issues in question. For Allan, the degree of scrutiny should be proportional to the significance of the rights in question. This is because one of the central institutional responsibilities of courts is to adjudicate conflicts of rights.

The fundamental difference between Allan's account and Posner and Vermeule's pertains to the account of institutional responsibility of the judiciary.

[335] T.R.S. Allan (2006), "Human Rights and Judicial Review: A Critique of "Due Deference"," p. 686.

Posner and Vermeule place the responsibility of emergency governance on the executive's shoulders in light of their institutional assessments of the judiciary and the executive in the emergency circumstances. The responsibility is with the executive because it has the capacity to act quickly, because it is the most likely to have access to relevant information, and because it has expertise in matters of national security. The high stakes and the high degree of urgency characteristics of emergency situations preclude the judiciary from meaningfully assessing executive's emergency measures, according to Posner and Vermeule.

In contrast, Allan divides the responsibility among the branches of government and insists that the courts must continue to fulfill their function of review in all contexts. This position is attractive for several reasons. First, it takes into consideration the institutional differences of the executive and the judiciary by insisting that the institutional advantages of the executive should be given their due in the process of judicial review. Second, Allan's account is more congruent with liberal democratic commitments because it assigns the task of review of executive policies to the courts that are insulated from public pressures and have expertise in legal analysis. And, finally, Allan's account places the premium on the persuasiveness of reasons justifying executive measures. Thus, his account explains how the legitimacy of emergency policies could be verified.

Having outlined the advantages of Allan's view, let us now explore its attractiveness in the emergency context. In the next section (section 5), we will focus our attention on Posner and Vermeule's assumptions of rationality and proper motivation in addressing emergencies. We will also take up the executive's claim to

superior expertise in security matters and greater access to information relevant for addressing national security crises. In section 6, we will examine strategies that are available to courts for assessing the persuasiveness of executive's claims during emergencies. Section 7 will explore issues with constitutional interpretation during emergencies. Sections 8 and 9 will outline institutional benefits of judicial involvement in emergency governance and explore the difficulties with regarding emergency measures as nonjusticiable.

## 6.6. THE UNREVIEWABLE EXECUTIVE

Let's begin with the analysis of Posner and Vermeule's characterizations of the executive branch of government in the emergency context. I will argue that their assumptions of rationality and proper motivation in defense of the deference thesis as well as their claims regarding the role of expertise and access to information raise doubts about the plausibility of their institutional characterizations. While Posner and Vermeule use these assumptions to show that the executive's rationality and proper motivation do not change between the normal and emergency circumstances, these assumptions conceal several important considerations relevant for assessing institutional performance of the executive during emergencies.

As we saw, Posner and Vermeule assume that the government is rational and well-motivated.[336] For them, this means that the government will not intentionally introduce policies that do not maximize the joint level of liberty and security during

[336] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 27.

emergencies. Posner and Vermeule's account is based on the view that the executive could develop optimal policies and that judicial review cannot improve the quality of emergency governance. They do not argue that the executive will always make correct choices but only that "there is no systematic bias or skew in governmental moves along the [liberty-security] frontier" during emergencies.[337] As they put it, "government may make mistakes but it is no more likely to make mistakes about security policy than about more routine business, and there will be no predictable or systematic skew in government decisionmaking."[338] If it is true that the executive is rational and well-motivated, then we have fewer reasons to worry about executive underperformance during emergencies.

However, the assumptions of rationality and proper motivation do not appear justifiable. First, these assumptions portray government officials too favorably. We should bear in mind that one of the most common justifications for separating government's powers in liberal democracies is that it is necessary to provide checks on officials because they could act on wrong reasons.[339] One can hardly be accused of cynicism if one doubts the proposition that government officials are only concerned with maximizing the welfare of the community. To the contrary, the fact that the systems of checks and balances are characteristic of the political and legal systems of all western liberal democracies is a testament to the fact that government officials (as well as people generally) are sometimes prone to

[337] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 29.
[338] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 30.
[339] For one of the most historically influential accounts of the doctrine of the separation of powers, see, Montesquieu (1989), *The Spirit of the Laws*. (See especially, Bk. 11, Ch. 6). For a criticism of Montesquieu's view, see Laurence Claus (Autumn, 2005), "Montesquieu's Mistakes and the True Meaning of Separation."

error and corruption.[340] The assumptions of rationality and proper motivation can be taken to ignore this truism and, thus, they misrepresent the problem of emergency governance, when opportunities of error and corruption increase.

Second, Posner and Vermeule defend their deference thesis against such charges as executive opportunism[341] and scapegoating of minorities[342] by arguing that the executive is no more likely to act opportunistically or to scapegoat minorities during emergencies in comparison to periods of normalcy. Notice, that this argument is comparative. If Posner and Vermeule are right, it means that the danger of the abuse of power by the executive remains constant across the normal and the emergency contexts. But this means that if rationality and proper motivation are an issue during periods of normalcy, they remain an issue during periods of emergency. Posner and Vermeule only manage to show that we should be as worried about the executive acting for wrong reasons during emergencies as we are during periods of normalcy. This argument offers no comfort to us if we are concerned about the executive's motives and reasoning during periods of normalcy.

While Posner and Vermeule do not actually evaluate rationality and motivation of any governments, it is not uncommon to hear negative and pessimistic evaluations in this regard. For instance, Waldron argues, "given the record of the bumbling incompetence and in-fighting of American intelligence and law-

[340] Reasons for separating powers may extend beyond the concerns of rationality and proper motivation and could include, among others, the division of functions for more efficacious governance, prevention of conflicts of interests, and the development of expertise relevant to specific government tasks. My point is that mechanisms of checks and balances that ensure the appropriate levels of rationality and motivation are among the justifying factors.
[341] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, pp. 107-109. See also the discussion in Chapter 1 of this dissertation.
[342] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, pp. 110-113. See also the discussion in Chapter 1 of this dissertation.

enforcement agencies wielding the already very considerable powers that they had in the weeks leading to September 11, there is no particular reason to suppose that giving them more power will make them more effective in this desperately difficult task."[343] If the levels of rationality and motivation are a concern during periods of normalcy, and if emergency circumstances could further undermine rationality and motivation of some officials, it is important to devise an institutional structure that could address these concerns.

Recall further that Posner and Vermeule understand emergencies as situations when the stakes are high. For this reason, they argue that normal procedures of judicial review should not be employed since they are ineffective during emergencies. However, the acceptance of their account of emergencies as high-risk situations lends support to the opposite conclusion as well. One could argue that because the stakes are higher, there is a greater need to get policies right. Thus, there is a greater need of oversight in order to increase the probability of making right policy choices.

Third, Posner and Vermeule need to contend with the evidence presented against the view that the executive is no more likely to abuse power during emergencies than during periods of normalcy.[344] Londras and Davis, for example, agree on the importance of checking the executive during periods of emergencies brought on by the threat of terrorism. In support of their view they point to a number of cases arguing that "the examples of internment in Northern Ireland and

[343] Jeremy Waldron (2003), "Security and Liberty: The Image of Balance," p. 209
[344] Some evidence in support of this claim was already presented in the previous chapter in the discussion of Zedner's view of security industry.

the Republic of Ireland, targeted assassinations and house demolitions in Israel and the Occupied Palestinian Territories and forced disappearances in Turkey can be added to the contemporary phenomena of Guantánamo Bay and 'extraordinary rendition' to demonstrate the generally repressive nature of counter-terrorist laws and policies."[345]

According to Londras and Davis, "the instigation of repressive and rights-violating laws and policies in times of crisis is not random; rather it represents quite rational and self-interested behaviour on the part of the Executives."[346] This analysis directly challenges Posner and Vermeule's claim that the quality of governance during periods of emergency does not suffer in respect to rationality and proper motivation. If there is sufficient empirical evidence to suggest that the issues of rationality and proper motivation of the executive negatively impact the quality of emergency policies, as Londras and Davis' account suggests, then Posner and Vermeule's assumptions should be rejected.

In addition to the arguments that directly challenge the assumption of rationality and proper motivation, it is also important to be aware of several caveats pertaining to the nature of executive expertise and its access to relevant security information. These caveats could cast further doubt on the plausibility of Posner and Vermeule's assumptions and their placement of responsibility of governing the community during emergencies exclusively on the shoulders of the executive.

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[345] Fiona de Londras and Fergal Davis (2010), "Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms," p. 21.
[346] Fiona de Londras and Fergal Davis (2010), "Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms," p. 22.

For example, we need to keep in mind that expertise in security matters may not extend to governing the community according to liberal democratic commitments. Against the argument of executive expertise, Allan argues, "a weak argument for infringing rights gains no additional strength from its being adopted by a well-informed or [democratically] accountable decision-maker after an elaborate procedure; nor is a poor reason for curtailing rights rescued by its popularity."[347] As Allan explains, "an experienced and well-qualified public official can always make an error of judgment as regards the balance of private rights and public interest; and a similar error can be made by a body accountable to Parliament or the electorate."[348] A competent legal analysis of the case through judicial review is meant to minimize the possibility of such mistakes and ensure the quality of emergency governance.

As we saw, Posner and Vermeule deny that judges have the requisite expertise in matters of national security. However, it is important to keep in mind the kind of expertise that judges do have. As some researchers observed, "Expert testimony has become a fixture in today's state and federal courts. From fiber comparisons to economic projections to psychiatric evaluations, the range of proffered expertise covers the span of human knowledge. Expert testimony is rapidly becoming a basic building block for many legal cases."[349] If this observation is correct, there is reason to regard judges as experts at working with all types of experts in the diverse fields of knowledge. If that is right, the possibility of

[347] T.R.S. Allan (2006), "Human Rights and Judicial Review: A Critique of "Due Deference"," p. 688.
[348] T.R.S. Allan (2006), "Human Rights and Judicial Review: A Critique of "Due Deference"," p. 689.
[349] Shirley Dobin et all (2007), "Federal and State Trial Judges on the Proffer and Presentation of Expert Evidence," p. 1.

competent legal analysis involving expert testimonies from experts on national security is not beyond the pale. Thus, we can accept that the absence of expertise in security matters could be an obstacle for judges but we cannot ignore the fact that in many other contexts the judiciary finds a way to overcome it. In light of that, there is no conclusive reason to think that judges cannot adjudicate cases involving expertise in national security much less to ask of judges to abdicate their institutional responsibility in all such cases.

We should not be too hasty in accepting the claim that security expertise necessarily bars the judiciary from assessing government's security policies. It is possible that the national security context creates unique challenges vis-à-vis expert testimonies. For example, there could be difficulties associated with revealing the identity of some security experts or determining whether an individual presented by the government as a security expert in fact has relevant security expertise. Because matters of security expertise are closely related to the concern for distribution of sensitive information, the issue of national security expertise could present unique challenges for the judiciary. However, Posner and Vermeule offer no convincing reasons to preclude the possibility of overcoming these difficulties or showing why such attempts should not be made. If we acknowledge with Allan the importance of courts in protecting rights, we should be motivated to ensure that courts overcome problems with security expertise rather than counsel abdication of their institutional responsibility of protecting rights in all cases involving national security.

A critical look at Posner and Vermeule's reliance on the need for secret information in advocating judicial deference also contains several issues. First, consider the two claims that Posner and Vermeule make in their analysis. On the one hand, they claim that courts do not have access to relevant information to evaluate emergency responses. This is meant to show that the executive is better positioned to evaluate emergency measures in virtue of its institutional capacity to acquire the relevant information. On the other hand, in explicating the nature of emergencies and, in particular, in describing the early stages of crises, Posner and Vermeule write, "the executive has no private information about those events, and there is no risk that the executive is falsely claiming an emergency in order to expand its powers."[350] This means that there is general information about the crisis that is accessible to all.

One of the questions that Posner and Vermeule leave unaddressed is whether the information about the crisis that is accessible to all could prove sufficient for assessing the propriety of some emergency measures in combination with the judiciary's expertise in law. If knowledge of the crisis, established on the basis of the information that is accessible to everyone, is at times sufficient to meaningfully assess some emergency measures, the judiciary could be in the position to assess the legitimacy of emergency policies. In his discussion of the government strategies for addressing national crises, Arthur Schlesinger, for example, argued, "Secrecy must be strictly confined to the tactical requirements of the emergency. Every

[350] Eric Posner and Adrian Vermeule (2007), *Terror in the Balance*, p. 43.

question of basic policy must be open to national, public debate."[351] If we agree that in liberal democracies the basic questions of policy must be open to the public, it is unclear why judges are precluded to make judgments about such policies.

A strong argument could be made that the more relevant information one has about the crisis, the better one's position to make an informed decision. However, this does not mean that the questions of basic policy, such as the use of coercive interrogation or indefinite detention, require access to secret information about the identities of government operatives, government's tactics, etc. I would like to emphasize that the general information about a crisis available at its inception may not always be sufficient to make a reasonable decision about emergency policies. However, one could certainly argue that generally available information could be sufficient to make judgments about some emergency policies. Thus, at the very least, one cannot defend the view that the lack of access to secret information is always a decisive factor favoring the executive.

The second caveat pertains to the possession of information for determining the best strategy for addressing the relevant crisis. According to Posner and Vermeule, access to relevant information is necessary for producing optimal emergency policies. Now, consider this: two of the most controversial policies associated with national security crises are coercive interrogation and increased surveillance. The purpose of these policies is to obtain information. If the introduction of these morally and legal problematic policies could ever be justified during a crisis, it is difficult to imagine a plausible justification that does not appeal

[351] Quoted in, Oren Gross and Fionnuala Ní Aoláin (2006), *Law in Times of Crisis: Emergency Powers in Theory and Practice,* p. 157.

to the resolution of the crisis at hand. If the objective of these controversial policies is to acquire information, then the executive's proposal to introduce such measures necessarily implies that the executive does not have, or does not think it has, all the necessary information for resolving the crisis.[352]

Now, executive's advantage during emergencies could be explained by the fact that it has the best chance of knowing who should be interrogated, detained, or surveilled. Executive's institutional network could produce the most reliable guesses in this regard and thus could prove to be necessary for resolving any one specific crisis. But it is important to be clear that by introducing these measures the executive implicitly indicates that it does not have all the relevant information for resolving the crisis. Thus, the claim that the executive has privileged information about the crisis should not be taken to mean that the executive knows how best to resolve it. This means that we should be careful in placing our confidence in the executive's institutional capacities as well as its rationality and proper motivation to resolve emergencies brought on by the threat of terrorism.

My remarks in this section are meant to raise doubts about the plausibility of Posner and Vermeule's attempt to justify complete judicial deference through assumptions of rationality and proper motivation as well as through reliance on the claims of superior expertise and access to privileged information. These remarks are meant to shake the confidence that Posner and Vermeule have in the executive's ability to develop optimal policies during emergencies.

[352] I assume that these policies are morally and legally problematic in normal circumstances and that their introduction is being justified by an appeal to the dire circumstances of the emergency.

## 6.7. STANDARDS OF SCRUTINY

Keeping in mind these institutional assessments, let us now turn to examination of the tools available to the judiciary to fulfill its institutional responsibility of reviewing executive action. Our question now is this: how can the courts assess the legitimacy of executive's emergency measures in emergency circumstances? First, I would like to suggest that courts could use various standards of scrutiny to resolve conflicts of rights arising in the emergency context. Because emergencies can present different types of challenges and because the government may use different means for addressing them, the level of scrutiny cannot be determined in advance. The appropriateness of any standard will depend on the kind of emergency, the measures the government introduces to tackle the crisis, and the challenges to rights that arise in the specific circumstances.

The court could adopt various standards of review, such as reasonableness or correctness standards. As Kavanagh explains,

> Under a reasonableness test, the court assesses whether the legislative or executive decision falls within a range of reasonable options. An option is reasonable if it is supported by reasons and is open to justification. Under a correctness test, the court assesses whether the legislative or executive decision is the best one. Under such a test, the court would simply substitute its view for that of the primary decision-maker.[353]

If the court lacks the necessary information and security expertise in a case, it is not in the position to determine whether the adopted emergency measures are the best ones. Thus, as Kavanagh explains, "a court will only use a correctness standard when it concludes that it is in a better position to deal with the issue and it is

[353] Aileen Kavanagh (2008), "Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication," p. 192.

convinced it has got the right answer."[354] Insofar as the executive's access to relevant information and its expertise in the resolution of the crisis in question constitute warranted claims in the eyes of the court, it should, Kavanagh suggests, adopt a reasonableness standard in adjudicating cases during emergencies.

We should note that the arguments that Posner and Vermeule marshal in defense of their deference thesis have more bite if courts were only able to use the correctness standard. However, their worry also applies to the application of the reasonableness standard. Thus, it could be argued that information and expertise could be important for determining the reasonableness and justifiability of some emergency measures. How could the courts catch the executive's mistakes in emergency policymaking when applying a reasonableness standard?

To capture this possibility, consider Raz's distinction between, what he calls, "a great mistake" and "a clear mistake."

> Consider a long addition of, say, some thirty numbers. One can make a very small mistake which is a very clear one, as when the sum is an integer whereas one and only one of the added numbers is a decimal fraction. On the other hand, the sum may be out by several thousands without the mistake being detectable except by laboriously going over the addition step by step. … Establishing that something is clearly wrong does not require going through the underlying reasoning.[355]

The point is that it is possible to catch clear mistakes without fully analyzing the underlying reasoning process. By adopting Raz's distinction for the emergency context, we could argue that the judiciary could contribute to the quality of emergency governance by resolving conflicts of rights in cases where the executive makes "clear mistakes" in its policies. If it is possible to arrive at the correct

[354] Aileen Kavanagh (2008), "Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication," p. 192.
[355] Joseph Raz (1988), *The Morality of Freedom*, p. 62.

conclusion without going through the underlying reasoning, which requires information and expertise, the court could be tasked with assessing whether executive measures contain any "clear mistakes." Such judicial decisions could be taken to set the limits to government actions by identifying the range of legitimate options within which the executive must address the crisis. Thus, for example, the judiciary could rule against the government's use of torture on the grounds that torture is a *clearly* unacceptable policy for a liberal democratic government. To make such a ruling the judges do not need to be familiar with the details of the case before them, which could justifiably be held secret by security experts. Instead, to make such a ruling judges need to have a good understanding of the constitution and the moral problematic surrounding the use of torture.

Now, one of the ways in which courts test reasonableness and justifiability of claims is by adopting proportionality tests. The application of such tests is a method that could be utilized by courts for assessing emergency measures. According to Cohen-Eliya and Porat, the proportionality tests in one form or another already form a part of constitutional legal analysis in the countries of the European Union as well as non-European countries, such as Canada, Israel, South Africa, Australia, New Zealand, Brazil, India, and South Korea.[356] It is beyond the scope of this chapter to work out the best version of the proportionality test that could be used by courts during emergencies but several remarks should be sufficient to show how such a test could be used to resolve some conflicts between individual rights and the

[356] Moshe Cohen-Eliya and Iddo Porat (Spring, 2011), "Proportionality and the Culture of Justification," p. 465.

government's actions. I will use the *Oakes test* as my example.[357] This test is used to interpret Section 1 of the *Canadian Charter of Rights and Freedoms* that states that individual rights are "subject only to such reasonable limits… as can be demonstrably justified in a free and democratic society."[358]

The purpose of the *Oakes test* is to determine whether the purported benefits of the government's actions are sufficient to justify violations of individual rights. Showing that a government's actions violate rights guaranteed by the *Canadian Charter* is often sufficient for courts to rule against the government. However, if the government proves that its actions pass the *Oakes test*, that is, it shows that its actions are sufficiently important to justify the violation of a right, the court could rule for the government.

The *Oakes test* consists of three steps. First, the government must show that its limitation of a right is "rationally connected" to the law's purpose. This means that the action cannot be arbitrary or serve no logical purpose. Second, the government's action must be shown to "minimally impair" the *Charter* right. The government must convince the court that its action is the least restrictive among the range of reasonable alternatives.[359] As some commentators observe, "The first two stages are, in effect, efficiency or Pareto optimality tests, whose purpose is to make sure that governmental action is efficient in terms of the constitutional burdens that it imposes."[360] If the government can provide convincing proof that its actions serve

[357] *R v Oakes*, [1986] 1 SCR 103, 1986 CanLii 46 (1986) [Oakes].
[358] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s. 1.
[359] *Oakes*, at 46.
[360] Moshe Cohen-Eliya and Iddo Porat (Spring, 2011), "Proportionality and the Culture of Justification," p. 464.

a logical purpose, are not arbitrary, and constitute the least restrictive alternative vis-à-vis *Charter Rights*, this can lend significant support for the claim that its actions are justified.

However, in the national security context, it could be impossible for the government to provide arguments to this effect without revealing sensitive information. I emphasize that I see no reason to hold that in all cases arising in the context of national security the government is precluded from making such arguments. But it is possible that such cases could arise. Thus, it is of a particular interest to us how the government could show its actions to be justifiable in cases when it cannot reveal sensitive information pertaining to national security and how the court could evaluate the justifiability of government action in the absence of all relevant information.

It is to this end that the third prong of the *Oakes test* is the most promising. In the third step the court examines "proportionate effects" of government's action. As one commentator explains, "Proportionality examines the relationship between the object and the means for realizing it. Both the object and the means must be proper. The relationship between them is an integral part of the proportionality test."[361] In order for the court to find the violation of the *Charter Right* justifiable, it must be persuaded that the right's violation is not too high a price for the end that the government pursues. This step asks the court to take into perspective and evaluate the importance of the government's objective on the one hand and the importance of a given *Charter Right* on the other. Simply put, the question before the court is

[361] Aharon Barak (Spring, 2007), "Proportionality Effect: The Israeli Experience," p. 371.

this: What is more important, the protection of the right in question or the government's agenda in this case?

Is access to relevant secret information necessary for answering this question? My answer is that it is not. To make a case that the government's objectives are sufficiently important to justify rights violations does not require revealing tactical information or the identity of secret operatives. If the situation in question is indeed an emergency that threatens the security of the nation, the executive should be able to make a sufficiently convincing argument about the prospect and urgency of harms to the courts and to the people based in part on the information that is available to all. If we agree with Posner and Vermeule that the general public has access to some information about the crisis and if we agree that issues of basic policy should be open to public debate, we should expect the executive to openly justify its actions before the court. If that is right, the government's rationale for introducing emergency measures that threaten fundamental constitutional rights could be used by the judiciary to review emergency policies.

We should continue to bear in mind that constitutional rights reflect our fundamental political, legal, and moral commitments. Because of the importance of these rights, their violations must be justified with the view to more important considerations. For this reason, proportionality tests are a useful tool for determining the justifiability of rights violation in the emergency context. As Barak explains, "The objective of the test is to examine whether the severity of the harm to the individual, and the reasons justifying it, are reasonably proportional to each

other. That assessment is made against the backdrop of the general normative structure of the legal system."[362] Our fundamental legal, political, and moral commitments, which form the normative structure of our legal system, are necessary for proportionality assessments because they provide a background against which arguments could be made regarding justifiability of government's objectives. More specifically, these values could be used for assessing whether government's objectives are sufficiently important to override constitutional rights.

We need to be clear that the use of proportionality tests during emergencies may not always be possible. However, the executive should be able to offer at least basic justification for its emergency policies. Judicial evaluation of these justifications could be a meaningful step toward resolving potential concerns over an executive's motives and reasoning that we examined in the previous section. To identify how the judiciary could produce such evaluations it is necessary to explain how the courts could interpret the constitutional commitments of the political community during emergencies.

## 6.8. CONSTITUTIONAL INTERPRETATION DURING EMERGENCIES

The application of proportionality tests requires a theory of constitutional interpretation in order to assess the nature and significance of our fundamental legal and political commitments, including our respect for individual rights. Now, let us assume with Posner and Vermeule that some emergencies could pose novel

[362] Aharon Barak (Spring, 2007), "Proportionality Effect: The Israeli Experience," p. 374.

challenges. The novelty factor represents a challenge to theories of constitutional interpretation that are developed for normal circumstances. The challenge of emergency circumstances is that the existing legal system may not provide a clearly defined answer to the problem posed by an emergency with a novelty factor. If one accepts with Kavanagh that deference is a rational response to uncertainty, one could be tempted to accept the argument that emergencies with a novelty factor require judicial deference. In such cases, what could judges, as experts in law, do in order to resolve conflicts between government's emergency measures and rights?

Strauss' common law account of constitutional interpretation can serve as a basis for developing an account of constitutional interpretation for emergencies. It is beyond the scope of this chapter to survey Strauss' common law approach in its entirety but its two central elements – the traditionalist and the common law components – are important for our purposes. According to Strauss, the traditionalist rationale for following the constitution is "because its provisions reflect judgments that have been accepted by many generations in a variety of circumstances."[363] In other words, the constitution is taken as a guide in decision making because it is not only thought to contain our central values and principles but also because it has been tested throughout different times and in different cases.

But is an approach to emergency policymaking that focuses on constitutional text applicable to emergency circumstances? In earlier chapters we recognized the possibility that some emergencies could be novel and include unusual circumstances, such that the existing legal and political norms are inadequate for

[363] David Strauss (Summer, 1996), "Common Law Constitutional Interpretation," p. 891.

addressing them. This concern is summarized by Dyzenhaus who observes, "it is important to keep in mind that in an emergency situation, the question can arise as to whether texts that would dictate a solution in ordinary times are relevant. Text is no help when the question is whether text is relevant."[364] How should we assess emergency policies in those cases when no existing text applies?

The common law component of Strauss' approach allows for moving beyond the written text in constitutional interpretation. Strauss argues that the constitutional text, while "in some sense controlling", is secondary compared to the doctrinal view of the constitution in decision-making. "The issue is decided by reference to "doctrine" – an elaborate structure of precedents built upon over time by courts – and to consideration of morality and public policy."[365] In this way, the traditionalist rationale for following the constitution is integrated into Strauss' common law account of constitutional interpretation. Instead of primarily focusing on the text of the constitution, Strauss' approach aims to offer a justifiable interpretation of the text in light of past judgments accumulated in the body of the common law as well as the relevant moral and political considerations arising in the context of the decision.

One of the main attractions of Strauss' approach is that it allows for the necessary flexibility to address novel and unique challenges that could arise in some emergencies in light of the fundamental values of the political community. For example, the issue of the legitimacy of such emergency measures as coercive interrogation does not have to be decided in the vacuum on his account. Instead,

[364] David Dyzenhaus (2006), *The Constitution of Law: Legality in a Time of Emergency*, p. 9.
[365] David Strauss (Summer, 1996), "Common Law Constitutional Interpretation," p. 883.

such proposals should be assessed in light of existing interpretations of the constitution and also in light of the normative challenges brought on by the crisis. As Strauss explains, "The idea of rational traditionalism is simply that we should think twice about our judgments of right and wrong when they are inconsistent with what has gone before. We adhere to past practices… because we might be mistaken to think them wrong. …[But] if, on reflection, we are sufficiently confident that we are right, and if the stakes are high enough, then we can reject even a longstanding tradition."[366] Strauss' account asks to mediate between established and time-tested conclusions on the one hand and novel and unique considerations on the other.

It is important that rather than focusing on the relation between liberty and security, Strauss' approach allows for the possibility of bringing to bear all constitutional norms on decisions regarding emergency measures. Thus, even if emergency situations are understood as presenting a clear break with normal circumstances, for which constitutional norms are arguably designed, this approach explains how constitutional norms could play a role in judgments concerning various normative challenges that could arise in emergencies. The point is to bring to bear the best existing interpretation of fundamental political values on fateful decisions that at times need to be made during emergencies. As Strauss explains, "The reason for adhering to judgments made in the past is the counsel of humility and the value of experience. Moral or policy arguments can be sufficiently strong to outweigh those traditionalist concerns to some degree, and to the extent they do,

[366] David Strauss (Summer, 1996), "Common Law Constitutional Interpretation," p. 897.

traditionalism must give way."[367] According to this approach, best emergency policies cohere with the constitution, and in particular with the judgments on similar or related issues made in the past. This does not mean that decision makers are tied to past precedents. Instead, they can invoke moral and political considerations and argue that they offer sufficient justification for departing from past judgments and traditional interpretations of the relevant constitutional norms.

The constitution, thus, serves as a litmus test of legitimacy during critical times. Strauss' approach offers a strategy for developing responses to emergencies that addresses the difficulty of adhering to the constitution in extreme circumstances. On the one hand, this approach serves as a reminder of our central values and fundamental commitments; it counsels us to take them seriously at all times. On the other hand, it leaves room for revision and reinterpretation of various norms that may become necessary during critical periods. Strauss' account of interpretation is attractive because it promises to escape the two-pronged dilemma: either we stick to the constitutional commitments come what may or we abandon them in the face of danger. Instead, it aspires to mediate between the best existing interpretations of constitutional norms and the reasonable as well as necessary actions that must be taken during emergencies.

By avoiding this constitutional dilemma, we open up the possibility of judicial review of executive action. By rejecting the view that judges' role is to simply apply the existing rules and by accepting in its stead the view that judges must evaluate justifications for the existing legal norms in light of circumstances and new

[367] David Strauss (Summer, 1996), "Common Law Constitutional Interpretation," p. 902.

rationales, the judicial role in emergency governance gains significance. If we accept that our legal and political norms reflect our central and fundamental commitments, judicial expertise in law could provide important insights about novel challenges brought on during emergencies when it is employed in the interpretation of these commitments.

In exploring how judges could assess the propriety of emergency measures and the acceptability of rights violations it could be useful to identify, what Wil Waluchow calls, community's constitutional morality (CCM). The analysis of norms constituting CCM could be useful for developing common law interpretations during emergencies. According to Waluchow,

> CCM is not the personal morality of any particular person or institution, e.g., the Catholic Church, the Republican Party, or a judge who helps to decide a constitutional case. Nor is it the morality decreed by God, inherent in the fabric of the universe, or residing in Plato's world of forms. Rather, it [is] a kind of community-based, positive morality consisting of the fundamental moral norms and convictions to which the community has actually committed itself and which have, in one way or another, acquired some kind of formal legal recognition. It is the political morality actually embedded in (or endorsed or expressed by) a community's legal practices in much the same way as particularized principles of corrective justice are… embedded in (or endorsed or expressed by) the tort law of Anglo-American legal systems. So construed, CCM is a subset of the wider set of moral norms which enjoy some (not insignificant) measure of reflective support within the community (however that is identified).[368]

A focus on the relevant CCM is another resource for evaluating emergency policymaking. It could be particularly useful in those types of emergencies that are novel and sufficiently unlike all those circumstances that form the body of the existing law.

In Strauss's spirit, Waluchow suggests that we should not understand charters of rights to offer silver bullet solutions to all possible conflicts and disputes.

[368] Wil Waluchow (2013), "On the Neutrality of Charter Reasoning," p.205.

Rather, we should take them to be sending, what Waluchow calls, a "humble message:"

> We do *not* know, with certainty, which moral rights count, why they count, and in what ways and to what degree they count in the myriad circumstances of politics. What we do know, however, is the following. We know that the constellation of moral rights chosen for inclusion in our Charter constitutes, at least for the time being, a *reasonable* answer to the question of which moral rights deserve constitutional protection against government power. We further know that a reasonable answer to the question of why we should choose these and not some other constellation of rights is that the chosen set contributes, in ways consistent with (though certainly not determined by) the demands of reason and morality, to the workings of a reasonably free, self-governing society which aspires to respect its members as rights bearers deserving of equal concern and respect. We further know that we are somewhat in the dark concerning the many concrete questions of rights which will inevitably, and in unforeseen ways, come to the fore when government power is exercised…[369]

This vision of the role of charters is suited for guiding evaluations of policies during emergencies. The executive develops emergency measures with the information and expertise that it has. The role of courts is to ensure that executive measures are in compliance with the interpretation of rights developed against the backdrop of constitutional commitments and an underlying CCM.

## 6.9. INSTITUITONAL IMPACT OF JUDICIAL INVOLVEMENT

Judicial scrutiny of executive's measures has other institutional effects on the capacity of government institutions to address emergencies. David Cole, for example, identifies several institutional mechanisms that are available to the judiciary to that end. According to him, judicial review of emergency measures improves the task of emergency governance in the long term. This means that judicial involvement may not help to reach optimal policies during an ongoing crisis but it improves the

[369] Wil Waluchow (2007), *A Common Law Theory of Judicial Review*, 246.

government's responses to the future ones based on the analysis of the crises already passed. As Cole argues, "the conventional wisdom that courts perform poorly in crises should be qualified by the important proviso that, when viewed over time, judicial decisions do exert a constraining effect on what the government may do in the next emergency."[370] If this is correct, judicial review of emergency measures is in the long-term interest of political communities because it shapes responses to future crises.

Cole highlights institutional characteristics of the judiciary that are helpful for developing optimal emergency policies. In his view,

> Because emergency measures frequently last well beyond the de facto end of the emergency, and because the wheels of justice move slowly, courts often have an opportunity to assess the validity of emergency measures after the emergency has passed, when passions have been reduced and reasoned judgment is more attainable. In doing so, courts have at least sometimes been able to take advantage of hindsight to pronounce certain emergency measures invalid for infringing constitutional rights. And because courts, unlike the political branches or the political culture more generally, must explain their reasons in a formal manner that then has precedential authority in future disputes, judicial decisions offer an opportunity to set the terms of the *next* crisis, even if they often come too late to be of much assistance in the immediate term.[371]

Now, on the first blush, Cole's position does not present a challenge to Posner and Vermeule who welcome the reassertion of judicial authority once the emergency passes. However, if Cole's analysis is correct, courts could be better positioned to verify the legitimacy of emergency measures during future crises by relying on their experience of dealing with previous ones. If judicial analysis of previous crises could help to "set the terms" for the future ones as far as other

[370] David Cole (August, 2003), "Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis," p. 2577.
[371] David Cole (August, 2003), "Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis," p. 2566.

branches of government are concerned, it is possible that the courts' ability to positively influence emergency governance could also improve. If that is right, accepting Cole's argument directly undermines Posner and Vermeule's advocacy of upholding the historical record of judicial deference. The more judges learn from past emergencies, the less judicial deference is justified in similar emergencies in the future.

This claim is further supported by the following consideration. Recall that our conceptual study of emergencies showed that the line between normalcy and emergency is fuzzy. If there is no sharp separation between these two contexts, Cole's assessment of judicial functioning must have some traction during those emergencies that are closer to normalcy on the normalcy-emergency continuum. My argument, then, is that Cole's analysis warrants additional conclusions. It is not only that the judiciary can improve the quality of emergency governance by setting the terms for the future crises for other branches of government, as Cole argues, but that the judiciary could also improve its own institutional position to scrutinize emergency policies in the midst of future emergencies. In making this argument, I rely on Kavanagh's exploration of the concept of deference and, in particular, on her observation that deference comes in degrees.[372]

Cole illustrates his argument by analyzing the historical record of the US courts during emergencies. According to his interpretation, judicial analysis of emergencies has developed "a highly protective test for speech advocating illegal activity" derived from *Brandenburg v. Ohio*, 395 U.S. 444 (1969). He also argues that

[372] Aileen Kavanagh (2008), "Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication," p. 186.

the courts now subject government's claims regarding racial discrimination during emergencies to greater scrutiny since *Korematsu v. United States* 323 U.S. 214 (1944) as well as "prohibit guilt by association."[373] In Cole's view, these developments are the products of judicial review of government's measures. Thus, judicial participation limits the manner in which the government will have to address future crises involving such issues as free speech, racial discrimination, and guilt by association.

In Cole's view, political norms and other cultural sources could improve the quality of emergency governance as well. So, the judiciary is not alone in the project of improving the overall record of emergency governance. However, according to Cole there are several distinct institutional benefits that the judiciary brings to the table. First, courts bring their perspective on the quality of emergency governance that is developed on the basis of their legal expertise. Second, courts can set legal precedents that could improve the task of emergency governance during future crises. Third, courts could help with the piecemeal development of norms relevant for addressing emergencies. Fourth, courts could create a judicial record that could be useful for addressing future crises. And, finally, courts could help to resolve conflicts of rights during emergencies.

Cole argues that in these five ways the judiciary is able to improve the manner in which the government addresses future emergencies. His primary focus is on the ability of the judiciary to influence the decision-making of other branches

[373] David Cole (August, 2003), "Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis," p. 2566.

of government. Below, I explain how these institutional mechanisms could help the judiciary to deal with adjudicating cases more effectively during emergencies.

First, according to Cole, "the ability (and obligation) of courts to assess the legality of measures long after they have been adopted means that courts may bring more perspective to the question than those acting in the midst of the emergency."[374] The development of such perspectives is meant to be helpful to decision-makers during future crises. Even if this is true of officials in the executive and the legislative branches of government, it is no less true of the judiciary. Courts' legal expertise could be deepened by the analysis of past emergencies. An evaluation of emergency measures according to the standards of legitimacy reflected in the relevant constitutional norms could provide valuable insights and clarify the stakes in various types of situations. By relying on the experience of previous emergencies courts could develop better methods for verifying the legitimacy of government's policies and for the resolution of conflicts of rights.

Second, Cole points to the importance of setting legal precedents regarding emergency measures. Even though future emergencies may differ from past ones, the insights that judicial analysis could reveal about past courses of action could serve as a meaningful guide during future crises. As Cole points out, "precedents do tend to take certain options off the table" in emergency policymaking.[375] By setting legal precedents, courts limit the number of possible courses of action and thus simplify the task of emergency governance. It may be true that the novelty of a

[374] Cole, Judging the Next Emergency, 2576.
[375] David Cole (August, 2003), "Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis," p. 2576.

future crisis will find no application in the existing precedents. However, we need to continue to bear in mind that not all emergencies present novel challenges. Interpretation of past precedents could help the courts to decide cases arising during future emergencies. We should keep in mind that even if each new situation is in some way different from earlier ones, it is not always different in all relevant aspects. This is as true of emergency situations as it is of the normal situations where cases are always different in some respects. If this is so, precedents set in previous emergencies could be extremely helpful for addressing future ones.

Third, according to Cole, "the common-law method facilitates a measured development of rules in the context of specific cases and permits the incorporation of lessons learned from the early and often most overactive stage of emergencies."[376] The introduction of rules developed on the basis of past cases could help the judiciary with scrutinizing government's emergency measures and help offset some of the effects of "overreactions." How should the court respond to an executive's appeals to secret information? How should judges work with security experts? The development of rules governing such situations may help the courts to examine executive's claims more quickly and effectively. This, in turn, could make the legal system more stable and resilient to challenges brought on by future crises during initial stages. We should also keep in mind that the burden of proof required to stop the executive from acting as it sees fit could be set high during emergencies. Thus, for example, the court could make it easier for the executive to justify distinguishing the present case from earlier ones. Thus, we could acknowledge

[376] David Cole (August, 2003), "Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis," p. 2576.

Posner and Vermeule's institutional worry about the judiciary without following their extreme suggestion of complete deference.

Fourth, Cole argues that the requirement of creating an official record of judicial proceedings can facilitate the quality of emergency governance. As he explains, "while judicial proceedings are not necessarily to impose recording-keeping requirements, the highly formalized judicial process itself creates a record that may make subsequent assessments, beyond the heat of the moment, more reliable."[377] The study of past emergencies for the purposes of improving the procedures relevant for tackling future ones could be facilitated by detailed accounts of the circumstances and judgments captured in official judicial records. The creation of judicial records could serve as a reference for future assessments of substantive and procedural considerations arising during emergencies.

The fifth and, according to Cole, the most important reason for judicial review of emergency governance involves the assessments of rights claims. As Cole reminds us,

> Only the courts have an *obligation* to entertain claims of rights violations. The executive and the legislative branches can simply choose to ignore such claims, and are likely to do so when those claims are not backed by substantial political power or influence. By contrast, assuming standing and justiciability, courts must adjudicate any claim that a government initiative violates constitutional rights. As a result, courts are often the only forum realistically available.[378]

Adjudication of rights claims is one of the central functions of the judiciary and its insulation from public pressures is often justified with the reference to this function. As Cole explains, due to judicial insulation, the courts are "better suited to entertain

[377] David Cole (August, 2003), "Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis," p. 2576.
[378] David Cole (August, 2003), "Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis," p. 2592.

claims challenging executive action than are Congress or the executive branch itself, and more likely to take political unpopular positions than the political branches."[379] Judicial experience of resolving conflicts of rights from previous emergencies could help the judiciary to meet the demands of its institutional responsibility during future crises.

These institutional mechanisms available to the judiciary to influence the quality of emergency governance undermine the reasons in favor of judicial deference. In Cole's view, the primary reason for rejecting complete judicial deference in times of emergency is the judicial role in protection of rights. Cole emphasizes that courts are the only real option available for redress to most persons targeted by emergency measures.[380] Thus, he explains, "because courts are the only realistic option available to those targeted by emergency measures, and precisely because judges are all too human and already face substantial pressure to avoid fulfilling their responsibility, it seems especially misguided to *advocate* that they do so."[381]

Cole's advocacy of judicial involvement is further supported if my interpretation of his analysis is correct. As a consequence, Posner and Vermeule's advocacy of judicial deference is undermined. My brief account of how the judiciary could function during emergencies is not meant to show that courts can or will correctly resolve all challenges arising in these circumstances. Rather, my account

[379] David Cole (August, 2003), "Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis," p. 2577.
[380] David Cole (August, 2003), "Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis," p. 2593.
[381] David Cole (August, 2003), "Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis," p. 2593.

shows that the judiciary has the tools to meaningfully assess the legitimacy of emergency measures, resolve some conflicts of rights, and improve its institutional ability to address emergencies.

## 6.10. DEFERENCE AS NONJUSTICIABILITY

Let us now move to the final stage of our analysis of Posner and Vermeule's deference thesis. Earlier we noted that it is possible to interpret them as suggesting that emergencies, which are brought on by national security crises, are nonjusticiable. On such an interpretation, the institutional disadvantages of the judiciary are not a contingent result of the development of this institution. Improving the institution of the judiciary or its relation with other branches of government can have no effect on its institutional responsibility to resolve issues associated with national security because it is not judges' job to resolve them. Emergency governance, on such an interpretation, is the executive's prerogative and its sole responsibility. Courts are simply not meant to deal with these issues.

To explore this possible interpretation of Posner and Vermeule's deference thesis, we need to explore conceptual distinctions between deference and justiciability. Once again, we begin our investigation by examining Kavanagh's thoughts on this issue. She says,

> When the courts determine an issue to be nonjusticiable, they decide that it is inappropriate for judicial determination… The doctrine of deference differs from nonjusticiability in that it does not preclude judicial scrutiny altogether. Rather, it allows the courts to scrutinize the issue before them but requires them to assess the extent of their institutional competence, expertise, and/or legitimacy to adjudicate the matter and assign the varying degrees of weight to the judgment of the elected

> branches, out of respect for their competence, expertise, and/or democratic legitimacy.[382]

According to this distinction, judicial deference requires judgment on behalf of the court on the matter before it. Thus, the matter before the court is within its purview. If the court decides to defer, it means that it has a reason to respect or endorse the judgment of other officials. The finding of nonjusticiability, in contrast, indicates that the matter before the court is not within its purview. Court's respect for or its agreement with other officials on this issue is irrelevant. The distinction between justiciability and non-justiciability separates issues that the court could authoritatively decide from issues that the court has no business addressing.

We should be aware that the concept of justiciability and the separation between justiciable and non-justiciable matters is controversial. As B.V. Harris notes, "the absence of clear and firm lines between justiciability and non-justiciability means that the potential exists for different judges to believe the line should be drawn in different places."[383] This creates a practical problem because different judges may have differing points of view regarding which matters are justiciable and which are not. The same is true for political and legal theorists. The exploration of reasons in favor of finding some matter nonjusticiable, such as in cases of foreign policy, immigration, prerogative of mercy, nomination of Supreme Court justices, or some economic policies could reveal theoretical disagreements pertaining to the nature and the role of the government in the life of the community.

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[382] Aileen Kavanagh (2011), "Constitutionalism, Counterterrorism, and the Courts: Changes in the British Constitutional Landscape," p. 175.
[383] B.V. Harris (November, 2003), "Judicial Review, Justiciability and the Prerogative of Mercy," p. 634.

Despite the controversies surrounding the concept, the distinction between justiciability and nonjusticiability has its uses. Thus, for example, Harris argues, "it is a fact that the courts may not be the appropriate body, or be suitably equipped in all contexts to carry out the decision-making which judicial review would ideally ask of them. For these practical reasons the concept of justiciability remains relevant and useful for determining the availability of judicial review."[384] Harris deems this concept useful in light of his institutional assessment of courts and highlights its significance in verifying the quality of policy and decision-making. As he puts it,

> It is of primary constitutional concern that the courts make best possible decisions as to which matters are justiciable and which are not. Otherwise, simply put, the courts will perform decision-making functions to which they are not suited, and fail to perform decision-making functions to which they are suited. Justiciability decisions are decisions about where public decision-making responsibility should best reside. A decision that a matter is not justiciable will remove that matter from the jurisdiction of the court.[385]

Harris offers, what he calls, "a generic model" for determining justiciability in the context of judicial review, which includes five considerations. According to Harris, "the court should first appreciate thoroughly and accurately the nature and content of the particular executive-decision making in respect of which judicial review is sought."[386] The determination of the subject matter is a key consideration because "the greater the importance of the decision to the individual as different from others, the greater the influence for a finding of justiciability."[387] Because one of the primary functions of the judiciary is the protection of individual rights, the impact of executive decisions on individuals calls for judicial review.

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[384] B.V. Harris (November, 2003), "Judicial Review, Justiciability and the Prerogative of Mercy," p. 633.
[385] B.V. Harris (November, 2003), "Judicial Review, Justiciability and the Prerogative of Mercy," p. 634.
[386] B.V. Harris (November, 2003), "Judicial Review, Justiciability and the Prerogative of Mercy," p. 635.
[387] B.V. Harris (November, 2003), "Judicial Review, Justiciability and the Prerogative of Mercy," p. 635.

The second consideration concerns the determination of justiciability through law. "Higher law, for example a written constitution, or the legislature, may attempt directly or implicitly to determine justiciability when prescribing jurisdiction."[388] Harris observes that courts do not always accept such limitations imposed on them by other branches of government but notes that these limitations have a greater chance of being accepted if they have justification in law and, in particular, in constitutional law. The fact that judges require legal and constitutional justifications for classifying issues as justiciable and nonjusticiable is significant because it shows that a mere proclamation that the case is outside the purview of courts is insufficient for courts to find the case nonjusticiable, in Harris' view. The role of the judiciary in the liberal democratic regimes as well as its institutional responsibility must explain the separation between justiciable and nonjusticiable matters.

The third and fourth considerations derive from the first and the second. The third consideration refers to the accountability of courts. As Harris explains, "The consideration involves the courts deciding that which should appropriately be expected of the courts, given the place they have in the overall structure and functioning of the government system. The need for determination of justifiability flows from the nature of the courts, particularly their lines of accountability, personnel and processes."[389] In connection to judicial accountability, Harris stresses judicial insulation as the central institutional feature that distinguishes the courts from other the branches of government and highlights its role in the protection of

[388] B.V. Harris (November, 2003), "Judicial Review, Justiciability and the Prerogative of Mercy," p. 636.
[389] B.V. Harris (November, 2003), "Judicial Review, Justiciability and the Prerogative of Mercy," p. 637

individual rights. By exploring the accountability of courts we can understand the institutional responsibility of the judiciary within the legal and political order.

Harris argues that the independence of courts may deem their involvement in policy review inappropriate in some contexts. Cases where this is true could be viewed as nonjusticiable in his view. "Possible areas of such non-justiciability include disposition of nuclear armaments, national security, foreign relations and the distribution of scarce public resources, where society may wish review of the executive decision-making to be the responsibility of the more politically accountable legislature through ministerial responsibility."[390] This means that drawing the line between justiciable matters and non-justiciable matters requires not only the consideration of the institutional responsibility of the judiciary but also of other branches of government. The institutional responsibility and structure of the executive branch of government could help to justify in a court's eyes the choice between justiciability and nonjusticiability with respect to the relevant matter.

According to Harris, the promotion of institutional accountability may require other mechanisms of ensuring the quality of government policymaking. As he observes, "political accountability through the executive and legislative branches, and judicial review through the courts, need not be mutually exclusive."[391] However, to the extent that the government policy affects individual rights, the involvement of courts is imperative on his view. The degree to which an institution is sensitive to public pressures is not a sufficient factor to determine justiciability.

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[390] B.V. Harris (November, 2003), "Judicial Review, Justiciability and the Prerogative of Mercy," p. 638.
[391] B.V. Harris (November, 2003), "Judicial Review, Justiciability and the Prerogative of Mercy," pp. 639-640.

Fourth, courts' practical capacities could influence the determination of justiciability. Harris observes that decision-making is courts' "daily experience" and that legal training equips judges with skill to assess complex and technical matters that often arise in the course of adjudication. Nevertheless, in light of their institutional position judges should not make certain decisions. He argues, "Problems may flow from the fact that the courts are adversarial, participation of parties is limited, and the law of evidence may operate to constrain what is put before the court for consideration."[392] Harris provides examples of breaking off diplomatic relations and declarations of war to demonstrate his point. As Harris argues, "both prerogatives are wide-ranging powers of the executive government which a reviewing court would find difficult to harness within concepts of legality, rationality and procedural propriety."[393]

Finally, the fifth consideration that Harris identifies pertains to the criteria for review. According to Harris, "in the judicial review context the courts have recognized that executive decision-making may be rendered non-justiciable by the absence of objective criteria against which the reviewing court may measure the decision-making."[394] As an example, Harris offers a case where the issue was whether a budgeted expenditure was "excessive." He argues that the judiciary's institutional capacities and its institutional responsibility restrict the courts in applying "objective" criteria in deciding what makes a spending "excessive."[395]

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[392] B.V. Harris (November, 2003), "Judicial Review, Justiciability and the Prerogative of Mercy," p. 641.
[393] B.V. Harris (November, 2003), "Judicial Review, Justiciability and the Prerogative of Mercy," p. 641.
[394] B.V. Harris (November, 2003), "Judicial Review, Justiciability and the Prerogative of Mercy," p. 643.
[395] Courts' restriction to use "objective" criteria should not be taken to imply that courts should only use criteria that reveal objective or platonic reality. Courts' routine reliance on such determinations as "reasonable suspicion" and "probable cause" clearly indicate that the criteria used in adjudication

When such criteria are unavailable, other branches of government should make the relevant determinations.

Harris' model illuminates the factors relevant for determining justiciability. It allows us to take into account and examine the relation among several claims to which we are committed. On the one hand, we recognize that it is reasonable to require that not only the judiciary but also other government institutions make final authoritative decisions on some matters. It is a commonly acknowledged that the government of modern liberal democracies relies on experts from diverse fields. If that is true, it may not only be inefficacious to expect the judiciary to be the final authority on the great number of government related matters but also counterproductive since the expertise of government institutions in their respective fields makes their officials best suited to decide on the relevant government matters.

On the other hand, Harris's model coheres with our conception of the role of the judiciary in liberal democracies. In particular, one of the decisive factors for finding a matter to be justiciable is the significance of individual rights arising in the case. Thus, if we agree that it is the job of the judiciary to be the final authority on those matters that involve potential violations of individual rights, we have a strong reason to task the courts with addressing them. Insulation from public pressures, open deliberations, as well as the whole set of procedural rules that apply to the judiciary and reflect our commitments to liberal democratic ideals are the factors that make the judiciary the best candidate for protecting rights.

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are not always objective in this sense of the term. By "objective criteria" we should understand those criteria that have been developed and adopted into legal practice.

Should matters of national security be considered nonjusticiable? If we accept Harris' model, the answer to this question is: it depends. If the executive persuades the courts that its claims are justified, including its expertise in security matters and its duty not to share relevant information, the courts have some grounds to regard the matter before them as nonjusticiable. Crucially, however, it is only if the case before them does not impact individual rights that the courts should contemplate the possibility of regarding the matter before them as nonjusticiable. In light of the fact that the emergency policies in question typically involve violations of privacy, indefinite detention, and coercive interrogation, it is impossible that such policies do not affect individual rights. Thus, such matters are justiciable and judges have a role to play in emergency governance.

If this is correct, it means that we should reject Posner and Vermeule's deference thesis interpreted as a call to judges to recognize that matters of national security arising in the emergency context are nonjusticiable. If their deference thesis is to be at all plausible, it cannot ignore the variety of cases that could come up before the judiciary during emergencies that are clearly justiciable, if only because of their inevitable impact on individual rights. While it is true that in some cases judges may recognize the authority of the executive to make final determinations, in other cases, particularly those that threaten individual rights, the judges must exercise their institutional responsibility to review the executive action.

## 6.11. CONCLUSION

In the course of this chapter, I have presented a number of reasons to reject Posner and Vermeule's deference thesis. Even though some of the worries that motivate Posner and Vermeule are justified, their proposed institutional solution to address them is not. While it is true that some emergency situations could warrant an alteration in courts' review procedures, a complete judicial deference in all emergency contexts is a very radical suggestion. In denying the judiciary a role in emergency governance, Posner and Vermeule overinflate institutional disadvantages of the judiciary and ignore the benefits that it could bring to the quality of emergency governance. Thus, Posner and Vermeule's deference thesis, to use an old saying, throws the baby out with the bathwater. For this reason, their account should be rejected in favor of a more nuanced approach to emergency governance.

# CHAPTER 7: CONCLUSION

The central task of my dissertation was to develop a foundation for thinking about emergency governance from the liberal democratic point of view on the basis of a critique of Posner and Vermeule's account of emergency governance. In the first chapter I began by overviewing Posner and Vermeule's position and exploring their motivation. I raised questions about their methodological commitments, their tradeoff thesis, their deference thesis as well as their conception of emergency circumstances. I examined, what Posner and Vermeule call, the *Panic thesis*, the *Democratic Failure Theory*, and the *Ratchet Effects* theory in order to assess their criticisms of the civil libertarian views. My critical assessment of Posner and Vermeule's arguments called for an exploration of the concept of emergency, a closer study of the nature of emergency policymaking, and a reassessment of institutional capacities of the judiciary and the executive in the emergency context.

The second chapter focused on methodological issues associated with the study of the emergency problematic. I began by identifying central methodological difficulties with Posner and Vermeule's approach and argued in favor of an approach developed on the basis of Dickson's discussion of directly and indirectly evaluative methodologies and Michael Giudice's constructive conceptual explanation approach. As I argued, for the purposes of our project the concept of emergency must be responsive to our common intuitions and must be sufficiently stable and coherent to allow for a meaningful engagement with normative and institutional questions associated with the emergency governance. To that end, the

concept must capture the relevant empirical and normative factors constituting emergencies.

In the third chapter I presented my conceptual account of emergency situations. Among the key points of my discussion were the distinction of emergencies from normal circumstances and full-blown disasters, the centrality of serious harm and high degree of urgency in our understanding of emergencies, as well as the possibility of developing responses to emergencies. Even though my reflections did not produce an uncontroversial conception of emergency, they helped to organize the understanding of this type of situations and provide a conceptual basis for an inquiry into the problematic of emergency governance.

The fourth chapter dealt with the normative dimension of emergencies. Because there is a tendency to understand emergencies as exceptional circumstances, this chapter focused on the exceptionality feature of emergencies. I began by drawing a distinction between empirical and normative aspects of exceptionality. My primary focus was to examine the plausibility of the idea that normative considerations, such as moral values and constitutional commitments, may be unsuitable for the emergency context. In contrast to this view, I argued that normative commitments matter during emergencies by showing the implausibility of attempts to deny their role in these circumstances. In particular, I examined and criticized several attempts to show that values are defeated, suspended, replaced, or rendered insignificant during emergencies. If the arguments of this chapter are successful, they help to show that there is room for political responsibility in the exceptional circumstances and that our fundamental legal and political

commitments are an important factor in evaluating government's conduct and policies.

The fifth chapter focused on the issues associated with emergency policymaking. I offered detailed criticisms of Posner and Vermeule's tradeoff thesis and identified several shortcomings of their methodology that separates the substantive from institutional considerations in policymaking. I argued that Posner and Vermeule's tradeoff thesis relies on troubling ambiguities with the tradeoff metaphor and, as a result, there are several conceptual flaws with their account. Finally, I argued that Posner and Vermeule's tradeoff thesis offers no criterion by means of which the legitimacy of emergency policies could be assessed. This is a significant obstacle for developing a conception of political responsibility suitable for the emergency context. For these reasons, I rejected Posner and Vermeule's tradeoff thesis as an account of emergency policymaking and argued that a more nuanced approached that properly takes into account liberal democratic commitments is needed.

In the sixth and chapter I examined in detail Posner and Vermeule's deference thesis. My main goal was to defend the importance of judicial participation in emergency governance by offering more accurate institutional assessments of the judiciary and the executive than the ones provided by Posner and Vermeule. I explored competing institutional assessments of the judiciary and identified several key tools, such as the common law approach and proportionality tests, that could improve the quality of emergency governance. I also argued that Posner and Vermeule's institutional assessment of the executive does not

adequately capture the limitations and dangers of an unreviewable executive during emergencies. My main argument was that the judiciary's involvement in emergency governance could improve the quality and liberal democratic legitimacy of emergency governance.

The central conclusion of my dissertation is that Posner and Vermeule's tradeoff and deference theses should be rejected. My dissertation makes a strong case for the claims that liberal democratic values should form the basis for developing emergency policies and that the project of designing government institutions that are tasked with addressing emergencies must take into account liberal democratic commitments. As a critique, my dissertation identified a number of flaws with Posner and Vermeule's conception of emergency governance as well as with the common intuitions on which they rely. In terms of the positive contribution, my dissertation provides a much needed basis for developing an account of emergency governance that takes seriously liberal democratic values and the role of government institutions in protecting, maintaining, and improving the political and legal environment of these regimes.

My dissertation contributes to the study of emergency governance by integrating conceptual, normative, and institutional dimensions of the emergency problematic. In order to adequately address normative and institutional problems arising during emergencies, it is necessary to have a good grasp of the conceptual aspect of the emergency problematic. My dissertation offers a suitable method for studying the concept of emergency and, in particular, the empirical and normative dimensions of these circumstances. On the basis of my conceptual exploration, my

dissertation offers a critique of a widely accepted tradeoff framework on the example of Posner and Vermeule's tradeoff thesis. I expose a number of dangers of this type of ethical reasoning and policymaking in the emergency context. Finally, my dissertation offers an account of how the judiciary could improve the quality of emergency governance in accordance with liberal democratic commitments. More specifically, my dissertation explains how the judiciary could help to ensure the legitimacy of emergency policies introduced by the executive.

Although my analysis of the emergency problematic does not address all relevant aspects of the emergency problematic, it offers a solid foundation for developing a comprehensive theory of emergency governance according to liberal democratic commitments. The following are examples of topics that must be further explored for developing such a theory: (a) the nature of the judiciary's institutional responsibility in a constitutional democracy; (b) the role of the legislature in liberal democracies and its relation to the judiciary during emergencies; and (c) the desirability of other institutional solutions to emergency governance that could allow for the development of various oversight bodies and quasi-judicial institutions that could be used to either supplement the role of courts during emergencies or to take over some of their main responsibilities.

Analyses and arguments presented in this dissertation offer a foundation for thinking about emergency governance in liberal democracies. Given the political and legal significance of national emergencies for western liberal democracies, it is my hope that my reflections on this controversial topic can help to dispel

misconceptions about emergency situations and inspire further thinking about normative and institutional issues associated with the emergency problematic.

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