Emergencies and the Limits of Legality

Edited by
Victor V. Ramraj

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Most modern states turn swiftly to law in an emergency. The global response to the 11 September 2001 attacks on the United States was no exception, and the wave of legislative responses is well-documented. Yet there is an ever-present danger, borne out by historical and contemporary events, that even the most well-meaning executive, armed with extraordinary powers, will abuse them. This inevitably leads to another common tendency in an emergency, to invoke law not only to empower the state but also in a bid to constrain it. Can law constrain the emergency state or must the state at times act outside the law when its existence is threatened? If it must act outside the law, is such conduct necessarily fatal to aspirations of legality? This collection of essays – at the intersection of legal, political and social theory and practice – explores law's capacity to constrain state power in times of crisis.

'Combining a subtle appreciation of the complexities with brilliant insights into their resolution, together these essays form an important contribution and an intellectual feast.'

Lucia Zedner, Professor of Criminal Justice, University of Oxford

'This is an unusually fine collection of essays on one of the most important questions in legal and constitutional theory – the propriety of violating legal norms in times of emergency. What makes it especially illuminating is the way that the various essays are very much in dialogue – and sometimes in tension – with one another, as well as the ability of the international cast of essayists to draw from a very broad range of examples.'

Sanford Levinson, Professor of Government,
University of Texas at Austin

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For my parents, Ruby and Victor,
who have always known what is most important.

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PREFACE

This volume was inspired by a debate at a symposium in Singapore in 2004 between David Dyzenhaus, who attended the symposium in person, and Oren Gross, who spoke by teleconference. Their debate was later published in a volume I had the privilege of co-editing with Michael Hor and Kent Roach, *Global Anti-Terrorism Law and Policy,* published by Cambridge University Press in 2005. Reflecting on their debate, I became more and more convinced that the legal-theoretical issues they were confronting were likely to become the defining theoretical issues of our generation, and would preoccupy legal theorists for years, and probably decades, to come – in much the same way that the atrocities of World War II were the backdrop against which much of the subsequent twentieth-century jurisprudence developed. The more I reflected on the Gross–Dyzenhaus debate, the more determined I was to provide a forum in which the parameters of this debate could be fully examined, critiqued and challenged by a group of eminent legal, political and social theorists. And so the idea for this project was conceived.

I am especially grateful to David Dyzenhaus and Oren Gross for their enthusiasm from the very start, when I first broached the idea with them in late 2005. Their continued support for this project has been crucial to its completion. Convening an international symposium requires significant financial support, and the funding for this project came from a generous grant from the National University of Singapore (NUS). Thanks are therefore due to NUS and especially to the members of the Faculty Research Committee in the Faculty of Law and to my Dean, Tan Cheng Han, for their support of, and confidence in, this project.

I am also grateful for excellent research and editorial work from a superb team of students – Liu Huijun, Nishan Muthukrishnan, Li Daming, Dennis Tan Chuin Wei, Zhang Rui – and especially Cheryl Fung Shuyin, Teo Jin Huang and Crystal Tan Yan Shi, who provided invaluable assistance at critical stages in the project. I am indebted to my NUS colleagues Michael Hor, Arun Thiruvengadam, C.L. Ten and Alan Khee-Jin Tan for chairing

sessions and for their thoughtful interventions at the symposium. Michael also kindly provided a guiding editorial hand on one of the chapters. I also owe Elizabeth Chua and Connie Yew an enormous debt of gratitude for their tireless logistical and administrative support, and their attention to detail.

My parents, Ruby and Victor, and my sister, Sharon (and her then-fiancé, Rob), graciously agreed to move our family holiday celebrations forward a month so that I could return to Singapore in time for the symposium. I am thankful for this small act of kindness – and deeply appreciative of their love and steadfast support over the years. Sandy was especially understanding and encouraging when this project was at its most demanding. But my gratitude to her also extends much further back. Sandy's probing questions have prompted me to refine my thinking and the beauty of her prose has inspired me – since the day thirteen years ago when our respective interests in legal theory and the printed word brought us together. As E.B. White once wrote, it 'is not often that someone comes along who is a true friend and a good writer'. Like Wilbur, I am lucky to have found someone who is both.

Above all, the flying, no-holds-barred, bowl-me-over hugs that I get from Eli and Satchel when I return home from the office – and the hours of uninhibited play, belly-splitting laughter and wondrous conversation that follow – remind me daily of what is most important in life, and help me to keep everything else in perspective.

Victor V. Ramraj

Introduction

1

No doctrine more pernicious? Emergencies and the limits of legality

VICTOR V. RAMRAJ

1.1 Introduction

Most modern states turn swiftly to law in times of emergency. The global response to the 11 September 2001 (9/11) attacks on the United States was no exception and the wave of legislative responses, encouraged by the United Nations Security Council (UNSC) through its Counter-Terrorism Committee, is well-documented.[1] Yet there is an ever-present danger, borne out by historical and contemporary events, that even the most well-meaning executive, armed with emergency powers, will abuse them. And this inevitably leads to another common tendency in an emergency: to invoke law not only to empower the state, but also in a bid to constrain it. This volume explores law's capacity to do so.

Those who are interested in the use of law solely as an instrument of counter-terrorism policy might be inclined at this stage to put this volume promptly back on the shelf. But there are good reasons not to. For one, even in appropriating law as an instrument of counter-terrorism power, states commit to governing through law – and thus commit, in some fashion, to the principle of legality. Understanding the implications of this commitment is one of the primary objectives of this volume. Of course,

I am most grateful to all who made the time to comment on drafts of this introduction, especially Tom Campbell, Simon Chesterman, David Dyzehaus, Johan Geertsema, Sandy Meadow, Terry Nardin, Ruby Ramraj, Victor J. Ramraj, Sharon Ramraj-Thompson, Kent Roach, William E. Scheuerman, A.P. Simester, François Tanguay-Renaud and Arun K. Thiruvengadam.

[1] The Counter-Terrorism Committee, which was set up in the wake of the 9/11 attacks to monitor implementation of United Nations Security Council Resolution 1373, requires states to implement a range of legislative counter-terrorism measures. Its country reports, available through its website, provide a useful overview of the range of counter-terrorism legislation enacted after 9/11. See www.un.org/sc/ctc/. For a survey of counter-terrorism law and policy post-9/11, see V.V. Ramraj, M. Hor and K. Roach (eds.), *Global Anti-Terrorism Law and Policy* (Cambridge: Cambridge University Press, 2005).

the concept of legality (which is used in this volume interchangeably with the 'rule of law') is itself contentious. For some, it means formal legality, the idea that law implies clear, consistent, stable, prospective rules that are capable of being obeyed and are faithfully applied by public officials; others see legality as encompassing the minimum requirements of the formal account, but also substantive requirements of justice, whether in relation to the economic or political structure of the state or in relation to human rights.[2] Central to both of these conceptions of legality, however, is the notion that any power exercised by the state must be authorised by law.[3] This is the essence of modern, constitutional government.

Emergencies, especially violent emergencies, challenge the state's commitment to govern through law. Can a state confronted with a violent emergency take steps necessary to suppress the emergency while remaining faithful to the demands of legality? Nazi philosopher Carl Schmitt argued, notoriously, that it cannot. In times of crisis, Schmitt insisted, 'the state remains, whereas law recedes'.[4] At most, law could spell out *who* was to exercise emergency powers; it could not, however, set out in advance what would be a necessary or permissible response.[5] Even John Locke's theory of constitutional government, Schmitt observed perhaps with some justification, could not escape the conclusion that the state, faced with an emergency, required the prerogative to act even 'against the direct Letter of the Law, for the publick good'.[6] Yet others, also sceptical of maintaining legality in a crisis, have looked further back, to the Ancient Roman institution of dictatorship, to find inspiration for a constitutional mechanism that temporarily transfers expansive emergency powers to the executive,

[2] See, for instance, P. Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' [1997] *Public Law* 467–87. The variations on these two basic models are extensive, and my brief descriptions here are not intended to be exhaustive.

[3] A.V. Dicey, in *Introduction to the Study of the Law of the Constitution*, 8th edn (London: Macmillan, 1920) at 179–201.

[4] G. Schwab (trans.), *Political Theology: Four Chapters on the Concept of Sovereignty* (Chicago: University of Chicago Press, 2005), p. 12.

[5] According to Schmitt, 'The precise details of an emergency cannot be anticipated, nor can one spell out what may take place in such a case, especially when it is truly a matter of extreme emergency and of how it is to be eliminated. The precondition as well as the content of jurisdictional competence in such a case must necessarily by unlimited. From the liberal constitutional point of view, there would be no jurisdictional competence at all. The most guidance the constitution can provide is to indicate who can act in such as case' (*ibid.* at 6–7). See also W.E. Scheuerman, 'Emergency Powers and the Rule of Law After 9/11' (2006) 14 *Journal of Political Philosophy* 61 at 65.

[6] J. Locke, *Two Treatises of Government*, Peter Laslett (ed.) (Cambridge: Cambridge University Press, 1988), p. 377.

which is entrusted with the task of ending the emergency and restoring constitutional order.[7] Even in the absence of a formal constitutional mechanism, many wartime courts have produced the same result, deferring to the executive's determination of what is necessary in an emergency.[8]

All the same, the importance of upholding legality in times of crisis has been eloquently defended by judges around the globe, sometimes in lone dissent,[9] at other times in unanimous resistance to a determined executive. 'In our view', the judges of the Singapore Court of Appeal once held, in reviewing the power of executive detention without trial under the Internal Security Act in *Chng Suan Tze*, 'the notion of a subjective or unfettered discretion is contrary to the rule of law. All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power'.[10] Such acts of judicial resistance resonate with the now-famous decision of the US Supreme Court in the Civil War case, *ex parte Milligan*:

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.[11]

But such eloquence is not always successful in checking emergency powers. It is often met with a swift executive or legislative response restoring those powers (as in *Chng Suan Tze*)[12] or comes well after the height of the

[7] C.L. Rossiter, *Constitutional Dictatorship: Crisis Government in Modern Democracies* (New Brunswick: Transaction Publishers, 2002). See also B. Ackerman, 'The Emergency Constitution' (2004) 113 *Yale Law Journal* 1029; *Before the Next Attack* (New Haven: Yale University Press, 2006).

[8] See, for example, *Liversidge* v. *Anderson*, [1942] AC 206 (HL); *Korematsu* v. *United States*, 323 US 214 (1944), esp. at 223–4.

[9] *Per* Lord Atkin in *Liversidge*, at 225–47, dissenting.

[10] *Chng Suan Tze* v. *Minister of Home Affairs*, [1988] SLR 132 (Singapore CA).

[11] *Ex parte Milligan*, 71 US 2 (1866), at 120–1.

[12] M. Hor, 'Law and Terror: Singapore Stories and Malaysian Dilemmas' in Ramraj, Hor and Roach (eds.), *Global Anti-Terrorism Law and Policy*, pp. 273–94; V.V. Ramraj, 'The *Teh Cheng Poh* Case' in A. Harding and H.P. Lee (eds.), *Constitutional Landmarks in Malaysia* (Kuala Lumpur: LexisNexis 2007), pp. 145–55.

conflict, when a measure of normality has returned (as was the case in *Milligan*).[13] Even the least controversial legal principles, which are regarded in international law as *jus cogens*, such as the prohibition on torture, can begin to unravel in the face of an emergency.

Many questions have been asked about a state's legal response to an emergency. Are new laws strictly necessary to address the emergency? Do the state's counter-terrorism measures strike the right balance between national security and human rights? What specific legal limits should be placed on the state's response and which rights, if any, are non-derogable even in times of emergency? These are important and contentious questions about which much has been and will continue to be said. But there is good reason to step back and ask a prior question, whether and to what extent *legality* can be preserved[14] when the state responds to an emergency. This is a prior question because, unless legality remains intact, those other important questions – about the need for new laws, the proportionality of the laws to their objectives, and the limitations on those laws – all become moot. It is perhaps for this reason that Schmitt has attracted such close attention in recent years – not because many sympathise with his views on political power, but rather because of the challenge he poses for liberalism particularly in times of crisis. Can law constrain the state in an emergency or must the state at times act outside the law when its existence is threatened? If it must act outside the law, is such conduct necessarily fatal to aspirations of legality? In short, can liberalism survive an emergency?[15]

The essays in this volume confront these difficult questions and explore a range of theoretical and practical responses to them. They take their inspiration from two attempts to answer these questions by distinguished legal theorists who have studied and written extensively on emergencies

[13] Arguably, the belated interventions of the United States Supreme Court in *Hamdi* v. *Rumsfeld*, 124 SCt 2633 (2004), the House of Lords in *A.* v. *Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, and the Supreme Court of Canada in *Charkaoui* v. *Canada (Citizenship and Immigration)* [2007] 1 SCR 350, 2007 SCC 9, all post-9/11, fall into the same category. On the historical record of the courts, see: G.J. Alexander, 'The Illusory Protection of Human Rights by National Courts during Periods of Emergency' (1984), 5 *Human Rights Law Journal* 1; O. Gross and F. Ní Aoláin, 'From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights' (2001) 23 *Human Rights Quarterly* 625–49.

[14] Framing the issue as one of preservation is itself problematic, for it assumes that the state and its legal and political institutions are largely established. This, however, is not always the case.

[15] Scheuerman, 'Emergency Powers'.

and the limits of legality well before 9/11: David Dyzenhaus and Oren Gross. These authors have attempted, both independently and by engaging with one another's work, to articulate in a theoretical and practical way competing models for preserving legality in times of emergency.

In a provocative article in the *Yale Law Journal*,[16] Gross articulates his extra-legal measures model, arguing that it may occasionally be necessary for public officials to step outside the constitutional order to deal with grave dangers and threats, but that doing so need not undermine, and may in fact strengthen, the legal order. Gross explains: 'The model is premised on three essential components: official disobedience, disclosure, and ex post ratification. The model calls upon public officials having to deal with catastrophic cases to consider the possibility of acting outside the legal order while openly acknowledging their actions and the extralegal nature of such actions. If a public official determines that a particular case necessitates her deviation from a relevant legal rule, she may choose to depart from the rule'.[17] But Gross insists, and this is crucial to the model, that the rule prohibiting the conduct continues to apply in general, so 'rule departure constitutes, under all circumstances and all conditions, a violation of the relevant legal rule.[18] The consequences of the rule departure, however, are a different question. It is up to 'the people' to decide *ex post* whether to punish the disobedient official for the illegal conduct or to ratify her conduct retrospectively.[19] The uncertainty that public ratification will be forthcoming and the uncertainty of the personal consequences for the official in question even if the conduct were ratified, are together sufficient to deter public officials from abusing their power.

Dyzenhaus challenges the extra-legal measures model arguing that it would permit egregious departures from the principle of legality.[20] He proposes instead that we not give up 'on the idea that law provided moral resources sufficient to maintain the rule-of-law project even when legal and political order is under great stress'.[21] Judges, he insists, have a duty

[16] 'Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?' (2003) 112 *Yale Law Journal* 1011; for further development of his ideas, see 'Stability and flexibility: A Dicey business' in Ramraj, Hor, and Roach (eds.), *Global Anti-Terrorism Law and Policy*, 90–106; O. Gross and F. Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press, 2006), especially ch. 3.

[17] Gross, 'Stability and Flexibility', at 92. [18] *Ibid.* [19] *Ibid.*

[20] D. Dyzenhaus, 'The State of Emergency in Legal Theory' in Ramraj, Hor, and Roach, eds., *Global Anti-Terrorism Law and Policy*, 65–89. See also *The Constitution of Legality: Law in a Time of Emergency* (Cambridge: Cambridge University Press, 2006).

[21] See also *The Constitution of Legality*.

to 'uphold a substantive conception of the rule of law'[22] in an emergency. Even when considerations of national security and confidentiality of intelligence sources require a departure from ordinary trial procedures, modern administrative law shows how, through 'imaginative experiments in institutional design',[23] we can deal with emergencies in a way that is consistent with the rule-of-law project and which transcends a rigid separation of powers by developing solutions that include the legislature and the executive. But, maintains Dyzenhaus, 'judges always have some role in ensuring that the rule of law is maintained even when the legislature and the executive are in fact cooperating in the project, and they have an important role when such cooperation wanes or ceases in calling attention to that fact'.[24]

The Gross–Dyzenhaus debate provides a useful starting point for a collection of essays on emergencies and the limits of legality because it sets out, in a compelling and theoretically sophisticated way, two competing approaches to the issue. One approach attempts to subordinate the state's emergency response to principles of legality while attempting to ensure, through the careful and sophisticated redesign of institutions, that the legal regime remains relevant and responsive to the exigencies of the emergency; the other aims to preserve the rule of law in the long-term by subjecting extra-legal measures to democratic and political, not judicial, checks on executive power to ensure that the inevitable exercise of such powers is not legally affirmed and thereby normalised.

This introduction seeks to unpack and clarify the central issues that emerge from the challenge posed to legality in times of emergency. Specifically, and with reference to the essays in this volume, it identifies three sets of issues that arise from this challenge. First, it explores the tension between normative theories that see law as providing a comprehensive and autonomous response to emergency powers and legal realist accounts that point to the limits of the law and the need for other, non-legal constraints. Second, in respect of those theories that affirm law's capacity to constrain emergency powers, it considers the divergence between those theories that emphasise *ex ante* constraints, typically in the form of framework emergency statutes, and those that stress *ex post* constraints, usually through judicial review. Third, it examines the lessons to be learnt from expanding our perspective beyond a contemporary and largely domestic perspective on legality, to include historical approaches to the role of law under

[22] *Ibid.*, at 64. [23] Dyzenhaus, 'The State of Emergency,' at 67.
[24] The Constitution of Legality, at 201.

colonialism, and the international dimensions of the politics of law. The final section considers how our methodological and theoretical assumptions affect our response to the problem of legality, examining how the assumptions we make about the nature of theoretical inquiry and the intended audience affect our substantive conclusions on the scope and limits of legality in times of emergency.

1.2 Normative, political and sociological theories

Accounts of legality in times of crisis range from normative theories that defend law's capacity to constrain emergency powers, where legality serves as a 'regulative assumption' that informs and influences practice,[25] to those theories that, wary of law's ability to do so and mindful of the fine line between law and politics, emphasise instead the importance of alternative, non-legal or informal means of constraining the state. As will become clear in the discussion that follows, we can usefully approach these theories by inquiring into the *scope* and *autonomy* of law in a state of emergency. How comprehensive is the law's response to the exercise of emergency powers (does law, to paraphrase Mark Tushnet, fill the entire normative universe[26]) and how independent is law's control over these powers from social and political pressures?

1.2.1 Conceptual and normative theories

Consider, for example, normative theories of the rule of law. These theories might begin, as do several of the essays in this collection, with the assumption that a state is committed to governing through law, and then explore the conceptual and normative implications of that commitment. Dyzenhaus argues, for instance, that unless we commit to governing through law in an emergency, we are forced into either an internal or external realist position, neither of which is satisfactory, even for legal positivists.[27] An internal realist position undermines law's claim to authority by creating a veneer of legality over what is really the exercise of power by the political elite; an external realist position holds that the sovereign's power is not ultimately constrained by law. For the external legal realist, the state's

[25] Dyzenhaus, 'The compulsion of legality', Chapter 2, this volume, p. 000.
[26] 'The constitutional politics of emergency powers: some conceptual issues' (Chapter 6), this volume, p. 000.
[27] Dyzenhaus, Chapter 2.

authority comes from a political, not a legal constitution. But this position is problematic, because it undermines the assumption shared by positivists and non-positivists alike that the state is 'completely constituted by law'.[28]

In his contribution to this volume, Terry Nardin advances a similarly non-instrumental conception of the rule of law, according to which the rule of law 'implies a moral standard, one derived not from an arbitrary notion of the good but from the idea of human beings as autonomous persons who articulate their own conceptions of the good'.[29] Distinguishing this conception of morality 'from theories like political realism or utilitarianism, which understand rules in instrumental terms as expedients for bringing about desired ends',[30] Nardin argues that an 'escape clause for emergencies, by allowing moral rules to be overridden by prudential considerations, obscures what is distinctive of the moral point of view'.[31] Laws forbidding torture cannot be set aside, 'because they express a moral rule' which cannot be 'altered or nullified by an act of will'[32] and, argues Nardin, public officials have no authority to waive them. For Nardin, the rule of law as a moral idea constrains the ability of public officials to justify extra-legal conduct taken for the public good since the justification for doing so is neither legal nor moral, but instrumental or prudential. But prudential reasons 'cannot "justify" illegal or immoral action if that word is to retain its core meaning as making an act just within a framework of legal or moral prescriptions'.[33] The argument here is a conceptual one, and Nardin insists that the idea of illegal action in an emergency cannot be reconciled *conceptually* with the rule of law.[34]

Along similar lines, Rueban Balasubramaniam,[35] using the experience of indefinite detention in Malaysia and Singapore by way of illustration and drawing on Lon Fuller's work, argues that liberal democracies, in attempting to reconcile indefinite detention with the rule of law, risk undermining the values of 'liberal political morality' to which they are otherwise committed.[36] Specifically, Balasubramaniam argues that an 'attempt to construct and maintain legal order as a stable framework for the

[28] *Ibid.*, p. 000.
[29] 'Emergency logic: prudence, morality, and the rule of law' (Chapter 4), this volume, p. 000.
[30] *Ibid.*, p. 000. The act of founding a legal order, however, is 'necessarily extra-legal, a matter of expediency for the sake of a substantive end (in this case, establishing the rule of law itself), not a matter of legality (governing within the rules of an established legal order)' (at 000).
[31] *Ibid.*, p. 000. [32] *Ibid.*, p. 000. [33] *Ibid.*, p. 000. [34] *Ibid.*, p. 000.
[35] 'Indefinite detention: rule by law or rule of law?' (Chapter 5), this volume.
[36] *Ibid.*, p. 000.

guidance of conduct involves a moral dimension that constrains the lawgiver's capacity to use law for authoritarian purposes, because legal order is a reciprocal enterprise requiring cooperation between lawgiver and legal subject'.[37] Once a government commits to operating 'on the rule-of-law continuum, it cannot assert rule *by* law without contradicting its commitment to legality'.[38]

Nardin and Balasubramaniam share with Dyzenhaus a common goal, to draw out the implications for emergency governance of a state's commitment to govern through law. They also share Fuller's belief that a commitment to legality includes, but goes beyond, a commitment to clear, stable, accessible, prospective, consistent rules that are capable of being obeyed and faithfully enforced.[39] And their conception of legality also involves – whether conceptually, as Nardin explicitly argues, or normatively, as Balasubramaniam implies – a model of the rule of law that includes a substantive commitment to respect the rights of legal subjects, even in times of emergency. Normative theories would tend to regard law as providing a comprehensive and autonomous response to emergency powers, but they need not collapse in the face of a legal black hole.[40] Rather, confronted with this reality, says Dyzenhaus, judges should strive to resist any attempt by the executive to govern beyond the reaches of the law.[41] Law is not necessarily comprehensive in its scope, but aspires to be so; it aspires to be autonomous, at least in the sense that it is independent from other considerations, including political ones.[42]

This picture of legality might be challenged in several ways, which variously question law's claim to comprehensive and autonomous control of the state in an emergency. For example, it might be challenged on the ground that black holes do not violate every aspect of the rule of law since the perimeters of the black hole and the conduct that places one into it might be clearly defined in advance. In this case, argues A.P. Simester, the requirement of prospectivity would be met, so those held

[37] *Ibid.*, p. 000. [38] *Ibid.*, p. 000 (emphasis added).

[39] L.L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969).

[40] J. Steyn, 'Guantanamo Bay: The Legal Black Hole' (2004) 53 *International and Comparative Law Quarterly* 1.

[41] Dyzenhaus, Chapter 2, p. 000.

[42] This aspirational quality may well be a positive feature of the rule of law, as Johan Geertsema observes in 'Exceptions, bare life, and colonialism' (Chapter 14), this volume: 'Like democracy, the rule of law is a project that can in principle never arrive, for the political process of actively interrogating, negotiating, and reflecting that is constitutive of democracy if it were, or were thought, to have arrived' (p. 000).

within the legal black hole would 'not be able to complain about lack of notice when they deliberately jump in'.[43] This argument suggests that the reach of the law can be less than comprehensive and yet it might still conform to at least some of the requirements of legality. Alternatively, a normative model of legality might be challenged on the ground that the law's apparent inability to constrain the state in practice means that democratic, rather than legal, constraints are necessary. Specifically, Gross challenges Dyzenhaus's characterisation of the extra-legal measures model as a 'lawless void'[44] – a legal black hole in which the state acts unconstrained by law. The model, he insists, does not create a black hole; rather, it 'seeks to preserve the long-term relevance of, and obedience to, legal principles, rules, and norms' by showing how 'going outside the law in appropriate cases may preserve, rather than undermine, the rule of law in ways that constantly bending the law to accommodate emergencies and crises will not'.[45] It permits a 'little wrong' (going outside the legal order) to attain a 'great right, namely the preservation not only of the constitutional order, but also of its most fundamental principles and tenets'.[46] To substantiate his claim that actions taken by public officials under the extra-legal measures model do not take place in a legal void, Gross returns to the process of ratification, arguing that the law remains intact, as one benchmark against which to judge the conduct in question; yet the legal, social and political response might be different in times of crisis.[47] Drawing on an ethic of political responsibility on the part of public officials, he insists that those who engage in official disobedience remain answerable to the public for their actions, and that the uncertain prospect of ratification remains a formidable deterrent for public officials, in the grip of an emergency, who are considering resorting to extra-legal measures.

1.2.2 Political and sociological theories

Gross shares with normative theorists an aspiration to legality, but finds in law's inability to constrain the state a practical need for a non-legal

[43] 'Necessity, torture and the rule of law' (Chapter 12), this volume, p. 000. 'One should certainly object to black holes', Simester argues, but the 'core of the objection needs no rule-of-law label. . . . If it is wrong to torture people, it is wrong [for the state] to empower people to torture' (p. 000).

[44] D. Dyzenhaus, *The Constitution of Law*, p. 1.

[45] O. Gross, 'Extra-legality and the ethic of political responsibility' (Chapter 3), this volume, p. 000.

[46] *Ibid.* [47] *Ibid.*, p. 000.

check on power. Others, however, articulate a more thorough-going scepticism concerning law's ability to constrain state power in an emergency and, more generally, the autonomy of law. Mark Tushnet,[48] for instance, argues that both Dyzenhaus *and* Gross rely too heavily on law to regulate emergency powers. Even in his so-called extra-legal measure model, Gross 'is committed to the proposition that law occupies the entire institutional space of normative evaluation of emergency powers'.[49] In contrast, Tushnet argues that the possibility of a 'moralized politics' in which political leaders within the institutions of government and in civil society 'appeal for support on the basis of moral claims in addition to appeal for support from constituents non-moral preferences'[50] can fill rule-of-law gaps or black holes and constrain the exercise of emergency powers. By way of illustration, Tushnet argues that the emergence of 'rule of law' procedural fairness requirements with the system of combatant status review tribunals in the United States can best be explained not by the slim prospect that the courts would evaluate these tribunals, but rather by reference to bureaucratic and professional interests, including codes of military honour and military lawyers' discomfort with procedural informality.[51] These are, of course, contingent factors, but, for Tushnet, the poor record of the courts suggests that sociological and political constraints may well have a significant role to play in constraining emergency powers.

Nomi Lazar,[52] for her part, highlights the importance of agency and discretion as well as informal constraints on power in response to emergencies. In stark contrast with Nardin's non-instrumental conception of law, Lazar begins with the proposition that the rule of law and the structure of institutions are instrumental to the attainment of other ends, including the prevention of tyranny. She argues not only that formal constraints are insufficient means for constraining power, but also that discretion and informal power well-used can further the aims of good government, even in times of emergency. Lazar is conscious that agency and discretion can be abused. But so too, she argues, can strict conformity to the rule of law, citing Indira Gandhi's invocation of emergency powers in 1975, which 'conformed exactly to [the] procedural requirements' but 'resulted in gross and arbitrary abuses of power'.[53] By the same token, 'the formal constraint of power can sometimes hamper the necessary and positive effects of power well-used'.[54] The problem with Dyzenhaus's argument,

[48] Chapter 6. [49] *Ibid.*, p. 000. [50] *Ibid.*, p. 000. [51] *Ibid.*, p. 000.
[52] 'A topography of emergency power' (Chapter 7), this volume. [53] *Ibid.*, p. 000.
[54] *Ibid.*, p. 000.

says Lazar, is that it places too much faith in judges to preserve the rule-of-law project. But the effectiveness of judges itself depends on conditions of informal power; so 'it is not just the weakness of judges, but also the power of rhetoric and popular support [that determines] whether a matter will ever come before a judge'.[55] The problem common to Dyzenhaus's and Gross's theories is that both authors fail to acknowledge the central role that 'informal means of constraint and enablement' have in relation to emergency powers.[56]

According to Tushnet and Lazar, then, factors apart from the law, such as politics, informal power and discretion, operate to regulate and constrain state power in an emergency. There are stronger and weaker versions of this challenge to the scope and autonomy of law. Stronger versions would deny both that law is comprehensive (denying, perhaps, its reach in an emergency) and that it is autonomous (asserting, for instance, that law should not always trump other considerations). Schmitt's challenge to liberalism, which denies law's capacity to survive an emergency, is perhaps the strongest version of this claim. Weaker versions might deny the comprehensive coverage or the autonomy of law in emergency situations, viewing emergency measures, with Gross, as regulated not primarily by law but through informal constraints on power. Tushnet's account of the sociological and political constraints on the detention of 'enemy combatants' by the United States post-9/11 could also be interpreted as a claim of this sort.

On the other hand, Tushnet's more general claim that concepts such as the rule of law 'cannot succeed at all without sociology and politics at their back'[57] could be interpreted as consistent with normative theory, if what he is claiming is that legality requires a particular institutional and political culture to support it. Dyzenhaus seems to say as much when he accepts, as a precondition for judicial deference, the need for a 'culture of justification' – a legal culture which comes about 'when a political order accepts that all official acts, all exercises of state power, are legal only on condition that they are justified by law, where law is understood in an expansive sense, that is, as including fundamental commitments such as those entailed by the principle of legality and respect for human rights'.[58] It is also consistent with his argument in this volume that the 'liberal aspiration to have the rule of law rather than the rule of men requires

[55] *Ibid.*, p. 000. [56] *Ibid.*, p. 000. [57] Chapter 6, p. 000.

[58] See D. Dyzenhaus, 'Deference, Security and Human Rights' in B. Goold and L. Lazarus (eds.), *Security and Human Rights* (Hart Publishing, Oxford, 2007), p. 137 and n. 27, referring to the work of Etienne Mureinik.

not only a political struggle to subordinate politics to the rule of law, but also a political struggle within practice about how that is best done'.[59] Some versions of a sociological challenge to the autonomy of law might therefore be compatible with some normative theories of legality in times of emergency.

Sociological approaches need not, however, be sceptical of the role law plays in constraining power, as Colm Campbell's contribution shows. Along with Tushnet and Lazar, Campbell adopts an overtly sociological perspective on law, but not with a view to questioning law's ability to constrain the state; rather, he asks what signals the state sends dissident groups when it 'takes off the gloves'[60] – an inquiry into the impact of law on society from the perspective of social movement theory. Drawing on empirical data from Northern Ireland, Campbell shows how the indiscriminate use of emergency powers 'can have radicalizing effects by reinforcing a sense of membership of a victimized community, particularly in quasi-ethnic conflicts'.[61] Abuses of state powers that take place within a 'grey zone of conflict' in a rule-of-law state can lead to violent activism and, correspondingly, a visible commitment to legality on the part of the state can have an 'indirect damping effect' on the conflict.[62] According to Campbell, Dyzenhaus's rule-of-law approach demonstrates the relatively autonomous quality of law and shows how 'an ideological commitment to the rule of law can open some ground for legal challenge, even if it is likely to be weighted in favour of powerful social forces'.[63] Campbell expresses concern, however, about the messages that are sent when, as in Gross's model, the illegal conduct of a public official is publicly ratified. Such ratification is 'likely to enhance the salience and resonance within affected communities of the "injustice frames" and "rights-violation frames" articulated by violent challenger organisations, and therefore the viability of such groups' framing processes'.[64] The empirical data, Campbell argues, does not support the extra-legal measures model.

Most of the essays in this volume and indeed most accounts of the role of law in an emergency could, as a rough-and-ready classification, be plotted on a spectrum indicative of their respective degrees of confidence in the

[59] Chapter 2, p. 000. Similarly, William E. Scheuerman's account in this volume might be seen as an attempt to acknowledge sociological and institutional pressures on legality in an emergency, while maintaining that executive power can nonetheless be held in check through statutory and constitutional (although not primarily judicial) means: see 'Presidentialism and emergency government,' Chapter 11, this volume.

[60] 'Law, terror, and social movements: the repression-mobilisation nexus' (Chapter 8), this volume, p. 000.

[61] *Ibid.*, p. 000. [62] *Ibid.*, p. 000. [63] *Ibid.*, p. 000. [64] *Ibid.*, p. 000.

ability of law to constrain state power in an emergency. Some contributors do not see the law as able to constrain state power either for the political and sociological reasons just considered or, as we shall see, by reference to the complex geopolitical context in which law is invoked.[65] Most do think the law plays some role.[66] But even for those who hold some faith in law's ability to constrain the emergency state, an important cleavage separates those who see law as offering a suite of prospective constraints on emergency powers and those that view it as responding to the exercise of those powers after the fact.

1.3 Legal constraints on power: the temporal dimension

Even if law does or ought to play a central role in constraining state power in an emergency, it must yet be determined whether *ex ante* limits on state power, *ex post* checks, or some combination of the two is preferable. Specific, prior constraints on state power enhance certainty and predictably in times of heightened fear and attenuated emotions, and *ex ante* limitations are consistent with the demand of legality that any exercise of power by the state – particularly coercive power – be authorised by law. And yet, doubts persist. Although it might be true that our inability to anticipate the exigencies of any particular emergency is overstated by Schmitt and others,[67] there may yet be a need for flexibility to enable the state to respond and adapt quickly to the unique challenges of any particular emergency. *Ex post* checks on state power address this concern by allowing public officials to react, but then holding them accountable after the fact, legally or politically. This part of the chapter explores the parameters of these arguments in the context of the essays in this volume.

1.3.1 Prospective constraints on state power

Gross's extra-legal measures model is expressly based on *ex post* constraints on power.[68] And while Dyzenhaus, with Dicey, prefers *ex ante* constraints

[65] See K. Jayasuriya, 'Struggle over legality in the midnight hour: governing the international state of emergency' (Chapter 15), and C.L. Lim, '*Inter Arma Silent Leges?* Black hole theories of the laws of war' (Chapter 16), this volume, p. 000.

[66] This includes not only the authors already mentioned, but also Johan Geertsema, Chapter 14.

[67] Scheuerman, 'Emergency Powers and the Rule of Law After 9/11'.

[68] Gross specifically addresses the temporal issue in Chapter 3, p. 000.

on power where governments have adequate time to craft them,[69] he acknowledges, again echoing Dicey, that in times of emergency, it may be necessary for the executive to act first, and seek legal permission retrospectively. They might, for example, 'justify themselves by a defence of necessity', in which case their actions had 'prior legal authorization in that they act on a correct appreciation of what the common law of necessity permits them to do'.[70] Alternatively, they might seek an Act of Indemnity, 'to bring them back within the law, to legalize their illegality, as long as what they did was both reasonable and not recklessly cruel'.[71] What distinguishes their responses to emergencies, then, is not primarily the temporal dimension of the constraints on power they advocate, but their adherence to the rule of law.

In his contribution, Tom Campbell states upfront his wariness of the 'constant temptation in legal theory and in the practice of politics to expand the "rule of law" concept to contain norms such as substantive equality, material justice and various fundamental rights so that good form can be combined with good substance in a more pervasive constitutional bedrock'.[72] Rather, he explores the implications of his own positivist theory, *prescriptive legal positivism*, for emergency powers. According to prescriptive legal positivism, a government can best serve the common good and the 'interests of the vast majority of individuals when that government is conducted through law and that law is conceived in formal terms as authoritative rules that are expressed in general, clear, specific and prospective terms which can be understood and applied without drawing on controversial moral or speculative judgments'.[73] For Campbell, prescriptive legal positivism is consistent with a carefully crafted emergency powers regime which defines an emergency in precise, empirical terms, and specifies the powers that can be exercised when such an emergency arises.[74] Courts can usefully supervise the executive to ensure compliance with such formally good laws, but Campbell is sceptical of judicial review on the basis of fundamental constitutional rights, where 'out of

[69] See 'State of emergency in legal theory' where he argues that 'governments that have the luxury of time to craft a response to emergency situations should do so in a way that complies with the rule of law' (at 83).

[70] Dyzenhaus, Chapter 2, p. 000. [71] *Ibid.*, p. 000.

[72] 'Emergency strategies for prescriptive legal positivists: anti-terrorist law and legal theory' (Chapter 9), this volume, p. 000.

[73] *Ibid.*, p. 000.

[74] Compare K. Roach, 'Ordinary laws for emergencies and democratic derogations from rights' (Chapter 10), this volume.

touch constitutional courts' may be 'insufficiently responsive to changed and catastrophic circumstances'.[75] So while Campbell is sympathetic to Dyzenhaus's attempt to subordinate emergencies to legality, he rejects the priority Dyzenhaus accords to judicial, rather than political, judgments. At the same time, he finds Gross's extra-legal measures model inadequate in as much as it permits public officials what Campbell regards as an 'unfettered power' which 'departs from key ingredients of the rule of positive law, particularly the prospectivity required of formally good law'.[76] To the extent, then, that law is able to do so, and Campbell is confident that it is, it should specify *ex ante* what the executive is empowered to do and prohibited from doing in an emergency.

Kent Roach is critical of much of the post-9/11 literature on emergency powers for neglecting non-violent emergencies.[77] But like Tom Campbell, he believes that emergency legislation can be drafted prospectively in anticipation of a broad range of emergencies. Roach provides a critical survey of what he refers to the 'ordinary law of emergencies' in the United States (the National Emergency Act), the United Kingdom (the Civil Contingencies Act) and Canada (the Emergencies Act). He argues that the best practices exemplified in these statutes show how, through the use of *ex ante* restrictions and *ex post* checks involving all branches of government and (contrary to Tom Campbell[78]) the 'creative hybrids of different branches' suggested by Dyzenhaus,[79] the state can be effectively supervised and held accountable for its use of emergency powers. Where these ordinary laws are insufficient, however, Roach argues (again contrary to Campbell) that a temporary derogation from rights which is subject to *ex post* legislative and judicial review and is 'designed to maximize both political and legal deliberation about the justifications for derogation' is preferable to Gross's extra-legal measures model, which 'gives each member of the executive a discretion to decide when it is necessary to dispense with rights and laws in order to deal with an emergency'.[80]

Although his starting point differs from Tom Campbell's and Kent Roach's, Scheuerman[81] reaches a similar conclusion concerning the need for constitutional or statutory pre-constraints on emergency powers. Scheuerman argues that both Gross and Dyzenhaus overlook the special challenges posed by presidentialism for liberal-democratic responses to emergencies. Presidentialism poses a special challenge because the 'incentives for declaring and perpetuating emergencies are particularly

[75] Chapter 9, p. 000. [76] *Ibid.*, p. 000. [77] Chapter 10. [78] Chapter 9, p. 000.
[79] Chapter 2, p. 000. [80] Chapter 10, p. 000. [81] Chapter 11.

pronounced in the context of presidential regimes'.[82] By the same token, the ability of the president in times of crisis to define the terms of the political debate means that the prospect of a public debate over extra-legal measures taken by the executive will not have the deterrent effect Gross hopes it will. Dyzenhaus too, in relying on judicial checks on executive power, fails to appreciate the conservative tendencies of the common law tradition, which render the courts unable to provide an effective check on emergency power, particularly in presidential systems: 'Congenital structural tendencies, which drive the president incessantly to expand emergency discretion means that the courts always lag behind, its review powers always outpaced in an institutional competition which the courts cannot possibly win: before our cautious common law judges have even begun to grapple with the ramifications of the last round of presidential emergency decrees, the executive has already undertaken new ones'.[83] It is better, Scheuerman argues, invoking Bruce Ackerman's recent proposal,[84] to introduce 'properly designed constitutional mechanisms . . . [that] establish useful prospective legal guidelines for emergency authority, help to create separation between ordinary and extraordinary law, and provide standards by which we can delineate legal from illegal emergency government'.[85] Scheuerman's argument is not, he insists, that the 'institutional realities of presidential democracy preclude the achievement of the rule of law, but only that Dyzenhaus's overtly court-centred vision of the rule of law is likely to fail at effectively countering the pathologies of emergency government in the context of presidential democracy'.[86]

1.3.2 Judicial responses to official disobedience

There are, it seems, persuasive arguments in favour of *ex ante* constraints on state power: prospective constraints, if carefully crafted, promote liberty by making the exercise of state power more predictable and enable the state to respond to emergencies more effectively since the parameters of and limits on its powers are fixed in advance. Yet even outside the emergency context, modern administrative law reminds us of a corollary concern – the need for flexibility and discretion in the implementation of the law. All the more so, it would seem, in an emergency. Gross's appeal for flexibility[87] and

[82] *Ibid.*, p. 000. [83] *Ibid.*, p. 000.
[84] 'The Emergency Constitution' and *Before the Next Attack*.
[85] Chapter 11, p. 000. [86] *Ibid.*, p. 000.
[87] See Gross, 'Stability and Flexibility', and his arguments in this volume, Chapter 3.

Lazar's account of the need for discretion[88] are, in this respect, attractive. And if Gross is right that, in practice, official disobedience will inevitably take place, it is necessary to consider how to respond *ex post* to apparent excesses of state power in an emergency.

Notwithstanding the contested scope of legality, even the most parsimonious accounts of that concept hold that public officials are legally accountable for their misdeeds just as any other citizen.[89] A public official who disobeys the law in the name of national security (say, by torturing a terrorist suspect to prevent an apparently imminent threat) is subject to the ordinary law of the land, including the criminal law, as anyone else would be – unless, that is, she has a defence. But this approach to legality and official disobedience concerns Gross, who worries that legal recognition of such a defence is dangerous as it would normalise acts of official disobedience, including torture.[90] For Gross, the solution is an absolute prohibition on torture, coupled with his extra-legal measures model, which would leave open the possibility of public ratification of official disobedience in an extreme and tragic case. Dyzenhaus also insists on an absolute prohibition on torture, which he regards as 'unlegalizable,' but he makes this allowance: if 'officials consider that they have to torture to avoid a catastrophe – the ticking time bomb situation – such an act must happen extra-legally . . . All a court should say is that if officials are going to torture they should expect to be criminally charged and may try a defence of necessity'.[91]

Yet the availability of necessity in such cases is contentious, as Simester argues.[92] One view is that necessity could be invoked by public officials if the harm they were trying to avert (e.g., the detonation of a ticking time bomb) is greater than the harm they would inflict (e.g., torture). But this 'lesser evils' approach, as a 'fall-back, catch-all principle of ordinary law', poses serious rule-of-law difficulties – difficulties that Simester seeks to avoid.[93] So he argues for a conception of necessity as a rationale-based justification which focuses on the actor's reasons for acting. On this approach, Simester argues, most putative reasons for torture would be excluded. As for whether necessity or duress could be invoked as an excuse, Simester insists that, as a 'concession to human frailty',[94] it would

[88] Chapter 7. [89] Dyzenhaus, *Law of the Constitution*, pp. 189–90.
[90] O. Gross, 'Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience'. (2004) 88 *Minn. L. Rev* 1481.
[91] Dyzenhaus, 'The State of Emergency in Legal Theory', at 84. [92] Chapter 12.
[93] *Ibid.*, p. 000. [94] *Ibid.*, p. 000., citing *Howe* [1987] 1 AC 417 at 432–5.

not be open to public officials – in their public capacity – to invoke it. Simester's analysis suggests that there is limited scope for a public official to act in a prima facie illegal way and claim a defence of necessity.

Simon Chesterman offers a different solution to the dilemmas faced by public officials in times of emergency.[95] He begins by challenging the practicality of Gross's extra-legal measures model, focusing on the covert nature of executive counter-terrorism measures. Specifically, he disputes Gross's claim that public officials have, on the extra-legal measures model, an incentive to come clean with their conduct in a way that facilitates public deliberation and accountability. Drawing on contemporary examples of counter-terrorism measures in the United States, including the use of aggressive interrogation methods bordering on torture, extraordinary rendition, secret detention centres and warrantless electronic surveillance, Chesterman argues that the possibility of *ex post* ratification is unlikely to be 'a practical constraint on otherwise unlawful behaviour that is normally intended to be shielded from public scrutiny'.[96] Instead, he proposes that official misconduct of the sort Gross describes is better handled through mitigation, whereby a formal legal sanction is imposed with a minimal penalty.[97] Unlike Gross, Chesterman does not believe that the prospect of ratification creates an incentive on the part of the executive to disclose 'alleged wrongs perpetrated in the name of national security'.[98] The advantage of a mitigation approach, claims Chesterman, is that by requiring a judicial process, it 'reduces the danger of an executive asserting for itself the right to approve conduct that is never scrutinized'.[99]

While Simester and Chesterman both address the legal principles by which the courts, viewing the conduct retrospectively, can respond to official disobedience, it is important to bear in mind that as between the two accounts, only mitigation is arguably a truly *ex post* response. For as Dyzenhaus observes, a defence of necessity, if accepted, represents a judicial affirmation of the 'prior legal authorization' of their conduct in the common law.[100] In contrast, for Chesterman, constraints operate *ex post* when the courts, moved perhaps by the plight of public officials confronted with tragic choices in an emergency, mitigate the penalties imposed. At least in this temporal respect, Chesterman's approach mirrors the extra-legal measures model; rather than specifying *ex ante* the circumstances

[95] 'Deny everything: intelligence activities and the rule of law in times of crisis' (Chapter 13), this volume.
[96] *Ibid.*, p. 000. [97] *Ibid.*, p. 000. [98] *Ibid.*, p. 000. [99] *Ibid.*, p. 000.
[100] See note Error! Bookmark not defined. and accompanying text.

in which public officials may depart from ordinary legal principles in time of crisis, the courts should respond *ex post*, crafting an appropriate response to specific instances of official disobedience while leaving the legal prohibition intact.

The tension between prospective statutory constraints or retrospective judicial checks on emergency powers should not be overstated, for as most accounts recognise, it is possible, even desirable, to have both. At the same time, though, neither form of constraint is immune from political manipulation. Prospective constraints can be interpreted narrowly when invoked in the heat of a crisis, as the Bush administration's interpretation of the post-9/11 Congressional Authorisation for the Use of Military Force to detain terrorist suspects in Guantánamo Bay and subsequent litigation of these measures shows.[101] But if the politics of law tests our confidence in the capacity of law to constrain state power in the domestic sphere, it threatens to undermine our confidence altogether where neo-colonial agendas and *realpolitik* collide with aspirations of legality in the international sphere.

1.4 Post-colonial and international perspectives

Our discussion of emergencies thus far has focused on domestic conceptions of legality, largely in a contemporary setting. But as chapters by Johan Geertsema, C.L. Lim and Kanishka Jayasuriya remind us, it is crucial to look beyond the domestic and contemporary sphere in considering the problem of legality. For one thing, the experience of colonialism–including the Jamaica affair,[102] to which many of the chapters refer – reminds us not just of the potential dangers of legality, but also of its capacity to serve as a safeguard against abuses of state power, a point stressed by Dyzenhaus and Geertsema. These chapters expose what we would today call the *global* dimensions of law that Jayasuriya explores in his chapter, and the complexities of international legality that Lim stresses.

Geertsema is critical of attempts to simplify the colonial legal experience by focusing too narrowly on the lawlessness and violence of the moment of conquest or regarding the colonies as zones of exception, arguing that such views overlook 'the complexities involved in the dialectic between the colonial and the indigenous that resulted in the emergence of the colonial

[101] The scope of the Authorisation of the Use of Military Force was the subject of litigation in the United States Supreme Court's first significant post-9/11 case, *Hamdi* v. *Rumsfeld*.

[102] See R. Kostal, *A Jurisprudence of Power* (Oxford: Oxford University Press, 2005).

state' and neglect 'the role that law itself played in . . . colonial violence'.[103] At the same time, however, he recognises the dangers involved in reacting to the colonial experience by underestimating the role law can play in preventing the reduction of persons to 'bare life' – a term he borrows from Giorgio Agamben.[104] An examination of the experience of colonialism, Geertsema argues, 'encourages us to resist the temptation of limiting the reach of the rule of law' and 'alerts us to the tendency of the exception to produce bare life' which renders people expendable.[105]

While the colonial experience reminds us that legal discourse remains today, as it was before, transnational, contributions by C.L. Lim and Kanishka Jayasuriya confront squarely the complex international and transnational dimensions of contemporary emergency powers. Jayasuriya explores the 'intriguing parallels with metropolitan responses to colonial emergencies within the liberal British empire'[106] and argues that the post-9/11 international state of emergency has resulted in a 'hybrid domain of emergency governance that cuts across and beyond the boundaries of liberal constitutionalism'.[107] By disrupting nationally-defined constitutional structures, the international state of emergency opens the door to a 'jurisdictional politics'[108] in which new, contested legal categories (such as 'enemy combatant') and spaces emerge which are distinct from ordinary law. Along similar lines, Lim criticises the Gross's extra-legal measures model and Dyzenhaus's legality model for paying insufficient attention to the complexity of international legality. Specifically, he argues that both theories adopt what he called a 'flat' view of international legality which takes, for instance, the prohibition on torture as 'an absolute and unchanging international perception of acceptable conduct'.[109] Lim rejects this model as unrealistic and unreflective of the actual practice of international law. Through a close examination of the Bush administration's legal manoeuvres on the applicability of the Geneva Conventions to suspected terrorists and non-conventional combatants and in relation to the international prohibition on torture, Lim argues that a comprehensive theory of domestic legality in times of crisis must account for the 'textured' nature of international legality, which recognises its creative and doctrinally contested character. We need to pay much closer attention, then,

[103] Chapter 14, this volume, p. 000.
[104] D. Heller-Roazen (trans.), *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stanford University Press, 1998).
[105] Chapter 14, p. 000. [106] Chapter 15, this volume, p. 000. [107] *Ibid.*, p. 000.
[108] See L. Benton, *Law and Colonial Cultures* (New York: Cambridge University Press, 2002).
[109] Chapter 16, this volume, p. 000.

to the interplay between the 'jurisdictional politics' of international legal norms and practice, and domestic conceptions of legality in an emergency.

The importance of this international dimension of legality can be seen in the way that contemporary counter-terrorism efforts typically extend across national boundaries; and national counter-terrorism measures are increasingly subject to international scrutiny by human rights bodies, including the Counter-Terrorism Committee mentioned at the outset of this chapter, whose human rights mandate has also become much stronger. Equally, the importance of reflecting on the role of legality in colonial settings is evident given charges of neo-imperialism[110] in post-conflict reconstruction contexts, in which the rule-of-law rhetoric is particularly strong. These charges of neo-imperialism suggest the need to be alert to the dangers of hegemony and legal transplantation. Unless the lessons of colonial legality are properly understood, argues Geertsema, the 'imperial exception' threatens to 'locate authority outside legality' thereby undermining 'the very values that the (neo-)colonial empire was meant to export'.[111] Yet, if the rule of law can be theorised in a minimalist (though not necessarily formal) manner that is responsive to local needs and respectful of cultural sensitivities, it may yet make a positive difference where abuses of state power in the name of national security are prevalent.

1.5 The scope and limits of legality

The essays in this volume represent a collaborative attempt, through different disciplinary and methodological lenses, to explore the scope and limits of legality in times of emergency – to reflect on the promise of the law in constraining state power and on its conceptual and practical limits. This introductory chapter has identified three significant issues that arise from problems of legality in times of emergency, relating to the scope and autonomy of the law in an emergency, the choice between *ex ante* and *ex post* mechanisms for controlling emergency powers and the neo-colonial and international dimensions of legality. The arrangement of the essays in this volume into parts reflects these themes. But there are, of course, other important themes and concerns that cut across the various chapters and parts. For instance, the tension between positivist

[110] J. Stromseth, D. Wippman and R. Brooks, 'Introduction: A New Imperialism?' (ch. 1) in *Can Might Make Rights? Building the Rule of Law after Military Interventions* (New York: Cambridge University Press, 2006), pp. 1–17.

[111] Chapter 14, p. 000.

and non-positivist theories of law surfaces in several chapters; we might, for instance, contrast Dyzenhaus's non-positivist approach with Tom Campbell's prescriptive legal positivism. The legal (or extra-legal) acceptability of torture in the most extreme cases (the so-called 'ticking time bomb' scenario) is another common concern, featured in chapters by Dyzenhaus, Gross, Simester, Chesterman and Lim. We might also, taking the lead from Tom Campbell and Kent Roach, hone in on the contentious notion of 'emergency', in its conceptual, normative and historical dimensions, to clarify its boundaries and coherence.[112] In this section, I consider the significance of methodological approaches to the way we understand legality in times of emergency before concluding with a brief caveat on the scope of this volume.

1.5.1 Methodological approaches and disciplinary perspectives

How might our methodological approaches and disciplinary perspectives shape our response to the limits of legality in times of emergency? There is, of course, a broad spectrum of approaches that might be employed in examining the scope and limits of legality – from a formal, legal, a priori approach to a contextual, political, empirical one. We have already observed the contrast between the normative approach to emergency powers employed by Dyzenhaus, Nardin and Balasubramaniam, on the one hand, and the sociological and institutional approaches adopted by Tushnet, Lazar, Colm Campbell and Scheuerman, on the other. The normative theories we have seen tend to adopt an internal legal perspective, asking questions about the normative implications of a commitment to legality in those systems. And while the conclusions reached might be stated in general terms, they are often premised expressly, though more often implicitly, on background assumptions about the kind of political system (a liberal-democratic one) and the particular kinds of institutions (independent courts, stable legal principles and practices) that are present. A sociological approach might regard law as one institution in a wider context, along with politics, religion, culture and other social phenomena; from this perspective, the critical issue is not simply whether formal legal institutions can control the exercise of emergency powers, but how their capacity to do so measures against the ability of other social institutions and informal mechanisms to do the same.

[112] I am grateful to Gregory Clancey and François Tanguay-Renaud for helpful exchanges on this point.

Does this mean that these two approaches will necessarily lead to inconsistent conclusions? Reflecting on the distinction between 'socio-legal' and 'philosophy of law' perspectives on emergencies, Colm Campbell argues that 'while there will be overlap in some areas, in others the perspectives are likely to be radically heterogeneous; different questions are asked, so it is unsurprising that answers may not be coterminous'.[113] And yet, one sub-discipline 'need not trump another, raising the possibility that the juxtaposition of a variety of sub-disciplinary perspectives may enhance understanding of the overall phenomenon'.[114] Dyzenhaus is less sanguine, however, in his critique of realism. Realism, he argues, 'denies the worth of legal theory altogether, seeing it as an attempt to hide the facts of power, in which legal considerations are but one of a number of, and far from the most important, considerations, when one is seeking to understand the constraints on the state'.[115] In doing so, however, it 'gives up on the aspiration of the rule of law to replace the arbitrary rule of men with something qualitatively better'.[116] In response, Dyzenhaus argues:

> This kind of theory of law goes much further than a claim that legal theory cannot be divorced from a political sociological understanding of the forces that shape the practice of law, a claim which I completely endorse. If, for example, the political and social forces in a presidential system of government incline the president to escape the limits of law, it is important for legal theorists to consider how such a system can nevertheless be subject to law. But this is a very different inquiry from the realist one, which seeks to move from contested facts about law's limits to the conclusion that legal theorists are both naïve about and blind to the reality of political power. Exactly that move is made, I contend, when it is alleged that in an emergency the executive is in fact unconstrained by law.[117]

At least for Dyzenhaus, then, methodology matters, and some methodological approaches cannot simply be reconciled with others. The disjunction between normative theory and realism leads Dyzenhaus to the conclusion we noted earlier, that the rule-of-law project invokes a 'regulative assumption [that] is made in order to bring a practice closer to its ideal realization; hence it both constitutes and guides that practice'.[118] Not surprisingly, Gross elsewhere criticises aspirational models, charging

[113] Chapter 9, p. 000. [114] *Ibid.*, p. 000. [115] Chapter 2, p. 000. [116] *Ibid.*, p. 000.
[117] *Ibid.*, p. 000. [118] *Ibid.*, p. 000.

them with 'naiveté and out-of-context idealism'[119] for their inability to constrain emergency powers when they are most needed.[120]

We might also consider who the intended primary audience is. Much of Dyzenhaus's work on the emergencies and legality is directed primarily at judges; his work is prescriptive and his implicit goal is to encourage judges to take seriously their role in constraining state power. In contrast, Gross's audience is distinctly *not* judges. Gross assumes that judges will, as a matter of empirical fact, tend to defer to the executive in times of crisis. In asking what we should do about this, his arguments appear to be directed, in part, at public officials in the executive branch of government. Faced with a tension of 'tragic dimensions',[121] these public officials should, conscious of whatever guidance the law can provide, take a considered and deliberate decision, mindful that the ultimate judgement on their conduct will rest in the hands of others.[122] Gross's arguments are therefore addressed, in part, to members of the executive confronted with the dilemmas of disobedience; they are also aimed at 'the people' who must later deliberate and stand in judgement of such conduct.

The lesson to be drawn, then, is that in seeking to make sense of the limits of legality in an emergency, we need not only to understand competing concepts and arguments, but to understand the methodological and disciplinary approaches employed. Some disciplinary approaches might complement one another, allowing us to see, as Colm Campbell reminds us, that an object described by different viewers as a circle and a triangle 'can only be a cone'.[123] But we should remain open to the possibility that some approaches are incompatible and irreconcilable.

1.5.2 The road ahead

Questions on the scope and limits of emergency powers are not new. Neither are theories of emergency powers. But in some important respects, times have changed. First, the international dimension of contemporary terrorism, facilitated by modern technology, means that non-state-based political violence (to use a less contentious term) is no longer limited primarily to domestic or geographically narrow regional disputes. This is not to suggest that political violence did not, in the past, have a global dimension, as anti-colonial political movements clearly did. But, as the 9/11 attacks demonstrate, political dissidents in seemingly far-away lands

[119] Gross, 'Chaos and Rules', at 1068. [120] *Ibid.*, at 1056–7.
[121] *Ibid.*, at 1027. [122] *Ibid.*, at 1123–4. [123] Chapter 8, p. 000.

can take their battle directly to the heart of the most powerful states. Second, the awesome political, economic and military clout of the United States has meant that few states could escape the legal and policy aftermath of the 9/11 attacks. Through its influence in the UNSC, the United States was able to persuade many states to adopt a broad counter-terrorism agenda under the supervision of the Counter-Terrorism Committee.[124] Third, this international dimension of contemporary political violence means that legal responses cannot be separated from geopolitical issues, including the alleged fault lines between East and West, North and South, and among 'civilisations' – or from the implications that geopolitics has on domestic politics, including multiculturalism, minority alienation and the politics of identity. Finally, the years immediately before 9/11 witnessed an expansion of the ideals of human rights, constitutionalism and legality in powerfully symbolic ways in South Africa and the United Kingdom, through the meteoric rise in the influence of the South African Constitutional Court's jurisprudence, and the adoption by the United Kingdom of the Human Rights Act 1998, together with constitutionally significant reforms in the structure of its judicial system. That the political and legislative responses to the attacks on the United States coincided with this rise in the legitimacy, practice, and influence of constitutionalism means, at least in contemporary liberal democracies, that the legal framework for emergencies has to be reconciled with constitutionalism on a theoretical and practical level.

The essays in this volume might be seen as an attempt to examine critically the theoretical aspects of emergency powers against the backdrop of these recent developments. In so doing, they raise a range of important questions on emergency powers that invite further reflection and analysis. We should, however, be mindful of the inevitable limitations of a study of this nature. One limitation is the focus in many chapters on liberal-democratic states with a stable and developed legal-political infrastructure and an entrenched – though perhaps severely strained – culture of accountability. How much relevance does this discourse have for the developing world, where emergencies connote insurgency and prolonged armed conflict or military government? Or where a prolonged and complex process of post-conflict reconstruction, involves, as it often does, the introduction of unfamiliar forms of wielding and constraining state power, the reduction or elimination of traditional forms of power and a

[124] Above, note 1.

direct challenge to the existing political elites? These questions are scarcely addressed in this volume, yet they are questions that must be confronted squarely. Alas, we must leave this task for another day. In the meantime, it is more than enough to grapple with the scope and limits of legality when established and otherwise stable legal systems are confronted with the challenge of an emergency.