Introduction: Toward New Conceptions of the Relationship of Law and Sovereignty under Conditions of Emergency

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It is widely recognized today that times of national emergency put legality to its greatest test.[1] In such times we rely on political leaders, using sovereign prerogative, to act in the national interest. John Locke famously defined that prerogative as the "power to act according to discretion, for the public good, without the prescription of the Law, and sometimes even against it. . . . [T]here is a latitude left to the Executive power, to do many things of choice, which the Laws do not prescribe."[2]

Yet, political leaders may go too far, threatening the values that define our national identity. Thus, in June 2004 the United States Supreme Court sharply rejected George W. Bush's assertions that he had unchecked unilateral authority to lock up indefinitely any person he declared an "enemy combatant" in the global "war on terrorism." Writing for the Court, Justice Sandra Day O'Connor declared that a "state of war is not a blank check for the President."[3] And more recently, the Supreme Court ruled that foreign nationals held at Guantanamo Bay have a right to pursue habeas challenges to their detention.[4] Justice Anthony M. Kennedy, writing for the majority in *Boumediene v. Bush* and *Al Odah v. U.S.*, wrote that the Constitution's Suspension Clause "protects the rights of the detained by a means consistent with the essential design of the Constitution. It ensures that, except

[1] David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*. New York: Oxford University Press, 1999. Also John Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11*, Chicago: University of Chicago Press, 2005.

[2] John Locke, *Second Treatise on Civil Government*, C. B. Macpherson, ed., Indianapolis, IN: Hackett Publishing, 1980, sections 159–160.

[3] See *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004).

[4] *Boumediene v. Bush/Al Odah v. U.S.*, 553 U.S. (2008).

during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the 'delicate balance of governance' that is itself the surest safeguard of liberty."[5]

Nevertheless, the tensions between sovereignty and legality that arise in times of emergency seem hardly to be put to rest even by such decisions. While scholars such as Bruce Ackerman have tried to identify ways to reconcile the demands of emergency and the procedures of legality,[6] in the aftermath of 9/11 most scholars have suggested that the United States faced a rather stark choice – between the prerogatives of sovereignty to respond to conditions of emergency and strict adherence to the rule of law.[7] Drawing on theorists such as Carl Schmitt and Giorgio Agamben, many have recently articulated tensions between sovereignty and legality that conditions of emergency bring to the fore.[8]

Agamben suggests that sovereignty is the power to decide on an exception and remove a subject from the purview of "regular" law. In the use of such terminology, of course, Agamben draws on Schmitt's famous definition: "the sovereign is he who decides on the state of exception."[9] This definition reflects Schmitt's interest in the personal element of the decision and in the agonistic and borderline relation of exception and norm. Schmitt, who was a prominent legal and political theorist of Weimar and Nazi Germany, understood the exception in relation to a state of emergency, a situation of economic and political crisis that imperils the state and would require the suspension of regular law and rules to resolve.[10]

Both capture "the essence of the state's sovereignty, which must be juridically defined correctly, not as the monopoly to coerce or to rule, but as the monopoly to decide."[11] At its core, Schmitt insists sovereignty embodies a conception of power that is decisionist. Sovereignty cannot, of course, live

[5] *Id.*, at 574.
[6] Bruce Ackerman, "The Emergency Constitution," *Yale Law Journal* 113 (2004), 1029.
[7] See Laurence Tribe and Patrick O. Gudridge, "The Anti-Emergency Constitution," *Yale Law Journal* 113 (2004), 1801.
[8] See Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, 2nd ed., George Schwab trans. Cambridge, MA: MIT Press, 1932, 1985; Also Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, Daniel Heller-Roazen, trans. Stanford: Stanford University Press, 1998.
[9] Schmitt, *Political Theology*, 5.
[10] See Nasser Hussain, "Thresholds: Sovereignty and the Sacred," *Law and Society Review* 34 no. 2 (2000), 495.
[11] Schmitt, *Political Theology*, 13.

without the concept of norm that it subtends and is parasitical upon, but that only leaves the matter more relational and agonistic.

The sovereign exception is, as Agamben puts it, "a kind of exclusion," and, as if recapitulating the distinction between law and equity, he says that "What is excluded from the general rule is an individual case. … [W]hat is excluded … is not, on account of being excluded, absolutely without relation to the rule. On the contrary, what is excluded in the exception maintains itself in relation to the rule in the form of the rule's suspension. The rule applies to the exception in no longer applying, in withdrawing from it."[12] As Jill Stauffer explains, "Agamben traces Schmitt's argument about sovereignty: the sovereign decides on the state of exception such that what the sovereign declares exceptional is still legal. A state of emergency is a 'zone of indistinction' between exception and rule – it is both and neither. Of course, Schmitt aimed to justify that form of sovereign power while Agamben's analysis instead teases out its lasting implications."[13]

Agamben's *Homo Sacer* points to the formative and continuing influence of a vision of sovereignty that is by no means completely extinguished by electoral democracy or the rule of law. However, he is distinctly less useful in understanding the historical mutations and contemporary arrangements of sovereign power under these conditions. Indeed, it may be that existing scholarship is so caught up in the Schmitt/Agamben opposition of sovereignty and law that we have been inattentive to the myriad of ways in which law imagines, anticipates, and responds to emergencies, ways in which sovereign prerogative is either irrelevant or operates within the terrain of ordinary legal procedures.[14] As Paul Kahn puts it, "The sovereign power is not just at the border of law, but deep within the law as well."[15]

One way of beginning to break through those binary conceptions is to recognize that, in the Hobbesian social contract tradition, law itself issues from emergency or, if not emergency, then a slightly lesser kind of urgency. In its most influential iteration, in Hobbes' *Leviathan*, the liberal account describes a state of disorder from which all prudent reasoning persons seek

[12] Agamben, *Homo Sacer*, 17–18.
[13] Jill Stauffer, "The Thought of Freedom: A Possible Coming Sovereignty," unpublished ms., 10.
[14] See Cass Sunstein, *Laws of Fear: Beyond the Precautionary Principle*, Cambridge: Cambridge University Press, 2005.
[15] Paul Kahn, "The Question of Sovereignty," *Stanford Journal of International Law* 40 (2004), 63.

to flee.[16] Recall, for Hobbes the state of nature does *not* refer to a historical condition; in this regard, he parts company with Locke who believed that all societies evolved out of such a state. For Hobbes, the state of nature, is an *analytic* condition: it is the state that societies always threaten to revert back to given the right set of conditions.

Seen in this light, law is constituted in the effort to escape an impending state of emergency; indeed, law is what makes possible the defeat of catastrophic disorder and violence. In this reckoning, then, emergency is both jurisgenerative[17] – it is the ever-present threat of chaos that creates the need for law – and the very antithesis or negation of law – it is the uncontrollable force that threatens to extirpate law's ordering effects on social life. Once law has been established to maintain social order, emergency remains as law's nemesis, the unruly force that would overturn the rules and regimes so carefully constructed by the principles and practices of legality. In this picture, the specter of emergency plays a crucial role in law's justificatory logic; law appears as the bulwark between civilization and its breakdown.

Another way to get beyond the oppositional logic that animates many discussions of sovereignty, emergency, and legality is to examine the quotidian, or ordinary, modes through which political authorities anticipate and respond to emergency and to attend to their distributional effects. Thus anticipating emergency and responding to it may be embedded within an existing regulatory apparatus. Administrative agencies are often charged with articulating and enforcing rules that attempt to anticipate and prevent emergencies.[18] For example, the Transportation Security Administration is responsible for regulating passenger and freight transportation in the United States in a manner that will safeguard against catastrophic accidents and attacks.

Yet regulatory agencies and administrations do not occupy the entire field of law's response to emergency. Thus criminal law's response has been

[16] Thomas Hobbes, *Leviathan*, Cambridge: Cambridge University Press, 2002.

[17] See Robert Cover, "Nomos and Narrative," in *Narrative, Violence, and the Law*, Martha Minow, Michael Ryan, and Austin Sarat, eds., Ann Arbor: University of Michigan Press, 1995.

[18] William Petak, "Emergency Management: A Challenge for Public Administration," *Public Administration Review* 45 (1985), 3. Also Bonnie Honig, "Bound by Law? Alien Rights, Administrative Discretion, and the Politics of Technicality: Lessons from Louis Post and the First Red Scare," in *The Limits of Law*, Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey, eds., Stanford: Stanford University Press, 2005.

preoccupied with two kinds of emergency threats: those posed by states and those posed by terrorist groups. Under the former, we think of trials of perpetrators of state-sponsored atrocities, such as genocide and crimes against humanity.[19]

In the case of terrorist threats, the law's response *has* clearly been aimed at anticipation and prevention – though this itself has emerged as a subject of intense controversy.[20] Indeed, the most pressing constitutional issues of the day now involve questions such as the following: Does the executive branch enjoy inherent powers to order wiretaps of alleged terrorist suspects in the absence of congressional authorization or judicial warrants? Does the executive have inherent powers to authorize the use of "unorthodox" interrogation techniques for terrorist suspects? Should terrorist suspects be entitled to the full panoply of rights and procedures that come with trials before Article III courts? And how can we characterize the powers claimed by the executive branch? Are they either legal or illegal, or is it important to use another characterization altogether such as "extralegal"? These controversies raise the larger question of how we should go about striking the proper balance between civil liberties and collective security in an age of terrorism.

At the most basic level, then, the need to anticipate and prevent terrorist-sponsored catastrophes has raised foundational questions about the substance and procedures of the criminal law.[21] Predictably enough, the answers to these questions often fall back on classic Hobbesian arguments: that in the face of catastrophic violence, the interests of security trump all. And yet this logic is peculiarly self-defeating: the law's draconian efforts to anticipate and prevent terrorism threaten to erode its distinctive status as a *normative* tool of social order.

As we shift our attention to the civil law, strategies for anticipating and preventing emergencies are perhaps still less controversial. In the world of civil law, emergencies originate not in Al Qaeda plots but, for example, in corporate malfeasance. The paradigmatic instance remains the Bhopal disaster, and the paradigmatic response involves the assignment of risk: the

[19] See Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust*, New Haven, CT: Yale University Press, 2001.

[20] See James Renwick and Gregory F. Treverton, *The Challenges of Trying Terrorists as Criminals*, Santa Monica, CA: Rand Corporation, 2008.

[21] *Id.*

law shifts risk to the party best able to assess and manage it.[22] In the case of emergency, the costs of amelioration are so staggeringly high, that emphasis must be on prevention. This also is a central argument of Judge Richard Posner's *Catastrophe: Risk and Response*.[23] For Posner, the law often falters in response to emergencies as a result of the "bafflement that most people feel when they try to think about events that have an extremely low probability of occurring even if they will inflict enormous harm if they do occur."[24]

What all this suggests is the need to think beyond the drama of the sovereign suspension of legality to appreciate the more ordinary ways through which law anticipates and responds to emergency. It suggests the need to put today's responses to emergency in historical and institutional context, to remind ourselves of continuities and discontinuities in the ways emergencies are framed and understood at different times and in different institutions. And, in all this, it suggests the need to be less abstract in the way we discuss sovereignty, emergency, and legality. Instead, we need to concentrate on officials and the choices they make in defining, anticipating, and responding to conditions of emergency as well as the impact of their choices on embodied subjects, whether citizen or stranger.

The chapters in *Sovereignty, Emergency, Legality* take up these challenges. Indeed in one sense *Sovereignty, Emergency, Legality* might be accurately described as engaging the work of a second generation of post-9/11 scholarship, one that seeks to get beyond binary conceptions to explore new analytic possibilities. This book begins with a chapter of historical exegesis, examining the roots of legal restrictions on emergency power and a chapter examining the institutional practices of courts, especially their use of the so called "collateral bar" rule in situations of emergency. Subsequent chapters re-theorize the relationship of sovereignty, emergency, and legality, moving away from Schmitt and Agamben toward new understandings.

Sovereignty, Emergency, Legality is the product of an integrated series of symposia at School of Law at the University of Alabama. These symposia bring leading scholars into colloquy with faculty at the law school on

[22] William Bogard, *The Bhopal Tragedy: Language, Logic, and Politics in the Production of a Hazard*, Westview, CT: Westview Press, 1989. Also Paul Shrivastava, *Bhopal: Anatomy of a Crisis*, Cambridge: Ballinger, 1987.
[23] Richard Posner, *Catastrophe: Risk and Response*. New York: Oxford University Press, 2004.
[24] *Id.*, 9.

subjects at the cutting edge of interdisciplinary inquiry in law. That colloquy is represented here in the commentaries that accompany each chapter.

This book opens with a chapter by David Dyzenhaus which applies what A.V. Dicey wrote about martial law in a common law constitutional legal order to America's constitutional system. Dyzenhaus considers not only Dicey's writings, but also compares the Supreme Court rulings in *Ex Parte Milligan* (1866) and *Boumediene v. Bush* (2008). Dicey appears to agree with the Court's holding in *Milligan* that military tribunals established by the executive or the legislature may not try civilians as long as ordinary courts of law are open. As Dicey puts it, "'martial law' . . . is unknown to the law of England." However, as Dyzenhaus points out, Dicey took for granted the supremacy of Parliament; because he believed that judges must defer to statutes passed by Parliament, judges could find themselves having to sign off on the establishment of martial law, were Parliament to pass a statute demanding it.

But, as Dyzenhaus emphasizes, there is a difference between power and authority; while Parliament may have the power to do anything it pleases, it does not possess the authority to do so. In his words, "authority is lost when any institution of legal order, no matter its place in the hierarchy, exercises its power in a way that subverts instead of maintaining or enhancing the general project of legality to which all institutions of a legal order are committed."

According to Dyzenhaus, the United States today possesses a "Realist" legal system, meaning that many in the legal academy believe that the history of emergency law reveals that, for all intents and purposes, either executive unilateralism (radical Realism) or legislative unilateralism (moderate Realism) has reigned during emergencies. For Dyzenhaus, however, where the sovereign power is ultimately located is not as important as the quality of the legal order – whether "government exercises its power in accordance with law, in accordance, that is, with the rule of law or legality."

As Dyzenhaus notes, it is easiest to understand this in the context of a common law legal order like Dicey's England. While Parliament is sovereign, it "is constrained in so far as that if it wishes to speak as a *legal* sovereign, it has to speak in the language of the law." In order to overrule common law in a period of emergency, Parliament must pass new laws explicitly stating what the government can do. In this way, the rule of law is preserved, rather than suspended.

Dyzenhaus applies this idea of legal sovereignty to a reading of the *Milligan* decision, in which the U.S. government argued that the executor of martial law had the power to do whatever it deemed necessary. In response, Milligan's counsel argued that, on the contrary, "the President has no authority but that which he gets from law." A five-justice majority sided with Milligan, asserting that neither the executive nor the legislature had the power to establish military tribunals to try civilians unless normal courts were actually closed.

According to Dyzenhaus, "U.S. Supreme Court jurisprudence since 9/11 has tended to reproduce a shuttle between judicial unilateralism and legislative unilateralism, with the latter containing the same dangerous tendency to endorse executive unilateralism, as long as it can claim a statutory warrant." The first Supreme Court decisions following 9/11 were largely consistent with an "institutional process-based approach." However, as Dyzenhaus points out, the *Boumediene* decision did not follow this approach; despite the fact that Congress had passed the Military Commissions Act at the president's request, the Supreme Court ruled that portions of it were unconstitutional.

Justice Scalia picked up on this point in his dissent. He pointed out the inconsistencies between four of the justices' positions in *Hamdan* (that the military commissions were unconstitutional only because Congress had not approved them) and their position in *Boumediene* (that the Combat Status Review Tribunals, CSRTs, established by Congress were not an adequate substitute for habeas corpus). The four justices to whom Justice Scalia refers essentially moved from supporting a form of legislative unilateralism to supporting a form of judicial unilateralism. As Dyzenhaus observes, the majority in *Boumediene* believed that it matters very little which branch of government has the final say; the quality of the power matters far more. Thus, that Congress had authorized the CSRTs could not make up for the fact that they were a wholly inadequate substitute for the writ of habeas corpus in the first place.

As Dyzenhaus explains, even in a common law system in which Parliament is supreme, Parliament cannot throw out the rule of law. Instead, it can explicitly alter it for the duration of an emergency. Thus, parliamentary supremacy "makes the rule of law possible, since it provides the basis for accountability of the executive to law." In considering how sovereignty is affected by emergency, then, Dyzenhaus emphasizes, contra Schmitt

and Agamben, that we must consider more than simply who can make the final decision. More importantly, we must make sure that the sovereign's actions remain within both the state's positive laws and its commitment to the rule of law.

The next chapter, by Patrick O. Gudridge, takes up the question of how conditions of emergency affect judges' understandings of their roles. He is particularly interested in the extent to which in such conditions judges insist that citizens strictly adhere to legality's forms and procedures. Gudridge presents an intriguing analysis of the famous case of *Walker v. City of Birmingham*, a case in which the Supreme Court refused to reach the merits of a constitutional claim on the grounds that the petitioners had not abided by an arguably unconstitutional injunction. The Court did so by invoking the so called "collateral bar rule." That rule provides that a party may not violate an order and raise the issue of its unconstitutionality collaterally as a defense in a criminal contempt proceeding.

Justice Felix Frankfurter provided vigorous defense of the collateral bar rule in *United States v. United Mineworkers*. The Mineworker's leadership had set in motion a dramatic nationwide strike, flouting a judicial order enjoining that strike. It simply did not matter, Justice Frankfurter thought, whether the judge who issued that injunction initially acted rightly or wrongly. Knowing disregard of the judicial order was contempt. To protect "legal process," judges – especially Supreme Court Justices – are duty-bound to ignore legal substance in bringing to bear legal force. Judges too, Gudridge contends sometimes act as "soldiers" who are "authorized legally to act forcefully independently of ordinarily applicable legal norms."

In *Walker*, the collateral bar rule was again brought to bear. As Gudrigde notes "Justice Stewart's majority opinion agreed that the ordinance and the order were constitutionally questionable. However, respect for the '[j]udicial process . . . is a small price to pay for the civilizing hand of law,' the means to 'give abiding meaning to constitutional freedom.'"

Gudridge asks "Why was it so important, in cases of such obvious significance on the merits to wield judicial prerogative so emphatically?" Here he turns his attention to another case, *Korematsu v. United States*. Fred Korematsu was prosecuted for violating a military order during World War II directing him to report to a relocation center. He disobeyed the order and sued. The Supreme Court reached the merits of his claim and upheld the validity of the order. Thus Gudridge asks, "Why was Korematsu permitted

to challenge the validity of the order he disobeyed when Martin Luther King (and John L. Lewis and the Mine Workers) were not?"

The answer to this question, Gudridge contends, suggests that in times of emergency the law emphasizes and protects its own authority as the touchstone of any decision. As he puts it, "Insubordination vis a vis the military in time of war did not pose a crisis; disregard of judicial orders did." In the analysis of the complex relationships of sovereignty, emergency, and legality, Gudridge argues, "the pertinent sense of emergency must be strongly keyed to institutional perspective." He cautions against decontextualized treatments of states of emergency. Careful examination of judicial responses to emergencies suggests "Judges may not perceive emergencies that other actors are quite sure are at hand; but judges – perhaps unexpectedly from other points of view – may experience crises of their own."

In "The Banality of Emergency" Leonard Feldman attempts to reorient the ways scholars investigate the politics of the emergency. He argues that this field has been too narrowly focused on the theories of Schmitt and Giorgio Agamben, with the result that even scholars critical of these approaches become entangled in Schmitt's outlines of the inside and outside of law. A newer approach, which Feldman's chapter elaborates emphasizes the "prosaic politics of emergency" rather than the extraordinary "state of exception" and recognizes that the true state of exception, a state of unlimited authority for the sovereign, is not created by every extraordinary or emergency measure. Since emergency powers are mainly employed in circumstances less extraordinary than total emergencies, this new approach, Feldman contends, may prove more helpful than Schmitt's model.

Feldman discusses two areas in which the legacy of Schmitt has distorted the discourse on emergency powers. First, he describes the focus on the spatial relationship between sovereign exceptionalism and the ordinary legal order. Contemporary debates often work within this framework, as "extra-legalists" or "neo-Lockeans" argue that emergency powers exist outside of the law and the jurisdiction of courts, and "institutional reformers" attempt to create a legal basis for emergency powers by making them subject to legal checks.

Schmitt himself, Feldman argues, held the more nuanced position that the sovereign exists both inside and outside of the law, but he still focused on the spatial aspect of this relationship. This conception presents problems for scholars attempting to identify as either inside or outside of the