Emergency’s Challenges

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Abstract  The final chapter examines several of the overarching challenges that are raised by “emergencies,” regardless of specific contexts in which that term is invoked. It focuses on five types of general concerns, namely the normalization of the exception, the problematics of balancing between the competing values of security and liberty, the manipulability of the very use of the concept of “emergency” to frame a given situation or state of affairs, the “Us versus Them” character of emergency situations that, in turn, exacerbates some of the previously identified challenges, and the capacity to exercise international monitoring and supervision when a government declares a state of emergency.

1 Introduction

Modern realities of global terrorism and the attendant counter-terrorism measures present a major challenge to the traditional separation between the norm and the exception. On the one hand, terrorist threats increase in magnitude; even nuclear attacks carried out by non-state actors are now deemed plausible. On the other hand, the proliferation of global networks of terrorism result in a greater frequency of terrorist attacks. The increased frequency of terrorist attacks (or of threats thereof) and the vulnerability of nationals of most constitutional democracies to threats of terrorism, mean that governments have to contend on a more regular basis with the specter of terrorism. Such contraction of time and space, brought about by technological innovation, the communications revolution, and advances in transportation, increasingly challenges any capacity to keep emergency and normalcy separated, bringing new threats to states while significantly reducing the state’s available time for response.

Nor are the challenges facing nations and governments in this context limited to terrorism and its attendant threats. As this volume amply demonstrates, the range
of issues to which the label “emergency” has been attached, is quite wide ranging, encompassing, inter alia, health care emergencies, economic crises and more.

This final chapter will examine several of the overarching challenges that are raised by “emergencies,” regardless of specific contexts in which that term is invoked. It focuses on four types of general concerns, namely the normalization of the exception, the problematic of balancing between the competing values of security and liberty, the manipulability of the very use of the concept of “emergency” to frame a given situation or state of affairs, the “Us versus Them” character of emergency situations that, in turn, exacerbates some of the previously identified challenges, and the capacity to exercise international monitoring and supervision when a government declares a state of emergency.

2 Normalizing

In constitutional democracies, emergency powers are structured around an assumption of separation, defined by the belief in our ability to separate emergencies and crises from normalcy, counter-terrorism measures from ordinary legal rules and norms, confining the application of extraordinary measures to extraordinary times, and insulating periods of normalcy from the encroachment of vast emergency powers. However, if, as Fionnuala Ní Aoláin and I argue elsewhere, 1 bright-line distinctions between normalcy and emergency are frequently untenable, with the exception merging with the rule and emergency government becoming the norm, then fashioning legal tools to respond to emergencies in the belief that separation will serve as a firewall that protects human rights, civil liberties, and the normal legal system as a whole may be inadequate and misguided.

Emergencies are conceptualized in terms of a dichotomized dialectic. The term “emergency” connotes a sudden, urgent, usually unforeseen event or situation that requires immediate action, often without sufficient time for reflection and consideration. The notion of “emergency” is inherently linked to the concept of “normalcy” in the sense that the former is considered to be outside the ordinary course of events or anticipated actions. To recognize an emergency, we must have the background of normalcy. The concept of emergency is informed by notions of temporal duration and exceptional danger. For normalcy to be “normal,” it has to be the general rule, the ordinary state of affairs. Emergency must constitute no more than an exception to that rule—it must last only a relatively short time and yield no substantial permanent effects. The belief that a clear line can be drawn between normal times and times of exceptional threats to the nation underlies all models of emergency powers. Application of emergency powers is designed to be of a temporary nature, to serve as a bridge between pre-crisis and post-crisis normalcy. 2

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1 Gross and Ní Aoláin (2006), 171–243.
2 Gross and Ní Aoláin (2006), 172–174.
Rather than remaining exceptional, emergencies become entrenched and prolonged. Faced with the continuous threat, or fear, of terrorism, emergency regimes tend to perpetuate themselves, regardless of the intentions of those who originally invoked them. Once brought to life, they are not so easily terminable. Temporary emergency powers become the norm, the ordinary state of affairs. Time-bound emergency legislation is often the subject of future extensions and renewals, despite Lord Devlin’s caution that “It would be very unfortunate if the public were to receive the impression that the continuance of the state of emergency had become a sort of statutory fiction which was used as a means of prolonging legislation initiated under different circumstances and for different purposes.”3 It is commonplace to find on the statute books legislative acts that had originally been enacted as temporary emergency or counter-terrorism measures, but subsequently transformed into permanent legislation. Sunset clauses and renewal requirements become nothing but mere bumps on the otherwise smooth road to the normalization of the exception.

The entrenchment of states of emergency and the attendant emergency powers is facilitated further by the inability to define, ex ante, what an “emergency” may be. The very concept of “emergency” is an elastic one and as such its invocation is often left in the hands of the government or the executive branch. Even where parliament plays a role in declaring or renewing a state of emergency, it is often no more than a mere rubber stamp to the executive wishes. Few situations can solidify broad national consensus behind the government. Times of crisis and emergency can and do.4 Moved by perceptions of substantial physical threat, motivated by growing personal fear of being the next victim and by hatred toward the terrorists, and frustrated by the continuance of terrorist activities, the public, and its elected representatives, may “rally ’round the flag”5 by supporting and calling on the government to employ more radical measures. This stifles robust debate about the responses to the crisis and help explain not only such phenomena as rushed legislation but also, more generally, the general acquiescence, indeed support, for the expansion, extension, and enhancement of governmental powers in times of crisis. As Harold Koh noted in a related context, the American president almost always wins in matters of foreign affairs due to the combination of executive initiative, congressional acquiescence and judicial tolerance.6

Thus, on October 18, 2017, when the newly appointed United Nations Special Rapporteur on Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Prof. Fionnuala Ní Aoláin, presented her first report to the Third Committee of the General Assembly,7 she chose to place as the first key issue that would be the focus of her mandate’s work, the “proliferation of

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3Willcock v. Muckle, 2 K.B. 844, 853–54 (1951) (Devlin, J.).
4Gross (2003), 1035–1036.
5Russett (1990), 34.
6Koh (1988), 1255; Koh (1990), 117–149.
7UN Doc. A/72/43280.
permanent states of emergency and the normalization of exceptional national security powers within ordinary legal systems of states.”

In a further report, Ní Aoláin warned that, “the challenge for human rights protection has been the absorption of emergency statutes into the ordinary legal framework, including counter-terrorism legislation, essentially normalizing the exception.”

It is also worth noting that the oxymoronic phenomenon of permanent emergencies has relatives in other types of emergencies, namely de facto, complex, and covert emergencies. Like the permanent emergency, so too these other types, deviate from the model emergency notion under which emergency is merely an exception to an otherwise normal state of affairs. De facto emergencies arise in situations when restrictive governmental powers are exercised without formal acknowledgment of the existence of an emergency; complex emergencies is characterized by “[a] great number of parallel or simultaneous emergency rules whose complexity is increased by the ‘piling up’ of provisions designed to ‘regularise’ the immediately preceding situation and therefore embodying retroactive rules and transitional regimes.”

The “piling up” effect is often one of the practices that facilitate the creation of a legal and political culture which supports an extended emergency regime. The system becomes self-defined and reliant upon the legislative support structures created by the emergency and “normal” supports are lost in the process, thus making the return to normality more difficult. Complex states of emergency also sustain the enactment of repressive laws assuming the features of ordinary law. Thus, the complex emergency is facilitative of both hidden and permanent emergencies. Finally, covert emergencies may be recognized when parliaments and courts acquiesce to “[t]he minimal interpretations of certain [human] rights that stripped [the rights] of much of their content. This tactic has the effect of, at worst, seeking to create effective covert derogations and, at best, of redefining the rights so that they emerged only in a diluted form of practice.”

3 Balancing

The metaphor of balancing and the use of “balancing tests” are dominant features in legal discourse. They have become so ubiquitous across many jurisdictions around the world that some have identified “a transition from ‘balancing’ as a feature within fundamental rights adjudication to ‘balancing’ as an emblematic characteristic of entire legal systems and cultures.” It has even been suggested that the concept of balancing constitutes an element of the “ultimate” rule of law. Since the terrorist

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8Ní Aoláin (2017).
9UN Doc. A/HRC/37/52 (2018), para 16.
10Questiaux (1982), para 118.
11Fenwick and Phillipson (2011), 867.
12Bomhoff (2008), 556.
13Beatty (2005).
attacks of September 11, 2001, the metaphor of balancing has been invoked so regularly to explain the need for a trade-off between liberty and security that it has become an “ambient feature of our political environment.”

The general critiques of balancing tests are well known and need not be repeated here. What does merit special note, however, is that in situations involving extreme emergencies (real or perceived) an act of balancing between security and liberty is likely to be biased. Furthermore, the pressures exerted by acute exigencies on decision-makers, coupled with certain unique features of crisis mentality and thinking, are likely to result in a systematic undervaluation of one interest (liberty) and overvaluation of another (security) so that the ensuing balance would be tilted in favor of security concerns at the expense of individual rights and liberties. The systematic nature of those biases suggests that failure to address them may turn mistakes and errors into cognitive pathologies, i.e., decision methods that are not only mistaken but irrational.

Individuals operate under certain cognitive limitations and biases that may prevent them from capturing the real probabilities of the occurrence of certain types of risks and uncertainties. Because accurate risk analysis requires information pertaining to both the magnitude of the risk and the probability of that risk materializing, such cognitive limits color our risk assessment and create a strong tilt toward putting undue emphasis on certain potential risks. While similar observations hold true in a wide variety of areas, the risks involved in acute national crises, in general, and in violent threats, in particular, coupled with other factors that undermine rational decision-making, have a special tendency to trigger such cognitive limitations and biases due not only to their potential magnitude, but mostly due to the manner in which they are perceived.

Our bounded rationality leads us to rely on cognitive heuristics—shortcuts that we use when making decisions—as a means of countering the lack of sufficient time to properly evaluate the situation or the complexity of the problem facing us. Being “cognitive misers,” individuals utilize shortcuts in order to minimize the effort involved in processing information and to make decisions as expeditiously and painlessly as possible. Generally, the use of heuristics makes perfect sense and is rational as it “reduce[s] the time and effort required to make reasonably good judgments and decisions.” However, the most common heuristics may create patterns of mistaken assessments. Those patterns are further reinforced when heuristics are applied in times of crisis.

The availability heuristic means that individuals tend to link their assessment of the probability of an occurrence of a particular event to their ability to imagine similar

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14Waldron (2007), 455.
15Noll and Krier (2000), 327.
16Simon (1957), 198.
17See, e.g., Finucan et al. (2000), 5–8.
18Fiske and Taylor (2017), 37.
19Plous (1993), 109.
20Plous (1993), 131–44.
events taking place.\textsuperscript{21} The easier it is to recall an event—the more familiar we are with it, for example, from personal experience—the more we are likely to overestimate the likelihood of its occurrence in the future.\textsuperscript{22} Moreover, the stronger and the more vivid and salient the images that are associated with a particular event are—the closer they are in space or time, the more emotionally exciting they are, or the more concrete and “image provoking” they are—the more such events are going to be perceived as likely to occur in the future, even if not experienced personally.\textsuperscript{23} As the two pioneers in this field, Amos Tversky and Daniel Kahneman, note: “[T]he impact of seeing a house burning on the subjective probability of such accidents is probably greater than the impact of reading about a fire in the local paper.”\textsuperscript{24} The images linked to the September 11, 2001, terrorist attacks—the planes hitting the Twin Towers, the towers crumbling down, firefighters and police officers battling against time, and people jumping to their death—were exceptionally powerful. The attacks have been followed by repeated official warnings of pending attacks and periodic changes in the ill-conceived and ill-executed official color-coded terror alert level,\textsuperscript{25} and the prominence of the wars in Afghanistan and Iraq. Those have further fed the terrorism frenzy, increasing the imaginability of various potential hazards and hence their perceived riskiness and the concomitant sense of individual and national insecurity. Individuals tend to overestimate the likelihood of dramatic events that attract significant media coverage and attention and underestimate the risks of “mundane” events that are, in fact, more—perhaps even much more—likely. That being the case, we can expect greater attention and public pressure, and consequently more resources, to be directed at controlling, minimizing, insuring against, or preventing (to the extent possible) the former.\textsuperscript{26} Overestimation of the likelihood of such risks would also mean that when put on the balancing scales and be compared to other, competing, interests, we are likely to perceive such risks as weighing the scales down more than they actually ought to.

Prospect theory and probability neglect suggest that individuals tend to give excessive weight to low-probability results when the stakes are high enough and the outcomes are particularly bad (or, in fact, particularly good).\textsuperscript{27} In cases of high-magnitude, low-probability risks, attention is directed almost exclusively to outcomes rather than to the likelihood of such outcomes materializing. Terrorist threats are particularly challenging in this regard. Individuals perceive risks as more “serious,” the more “dreaded” and “unknown” they are. As risks become increasingly dreaded

\textsuperscript{21} Tversky and Kahneman (1973), 207; Tversky and Kahneman (1982), 11.
\textsuperscript{22} The flip side is that unavailability might lead to underestimation, and as a result also underreaction. This may have accounted to the intelligence failure in foiling the attacks of September 11 and comprehending the true nature of the risk. See, e.g., Sunstein (2007), 535; Bazerman and Watkins (2004), 15–41.
\textsuperscript{23} Plous (1993), 126.
\textsuperscript{24} Tversky and Kahneman (1982), 11.
\textsuperscript{25} Loewenstein and O’Donoghue (2006), 201; Zimbardo (2003); Shapiro and Cohen (2007); Paul and Park (2009).
\textsuperscript{26} Slovic (2004), 984–989.
\textsuperscript{27} Kahneman and Tversky (2001), 17; Slovic (2004), 982–983.
and unknown, “people demand that something be done about them regardless of the probability of their occurrence, the costs of avoiding the risk, or the benefits of declining to avoid the risk.” A risk is “dreaded” if people perceive it to be involuntary and potentially catastrophic, and one over which they lack control. It is “unknown” if it is new and not well understood, among other things. Terrorist attacks are “dreaded” risks and as such are considered to be of an especially serious nature. At the same time, the range of “modern” terrorist threats creates what Kai Erikson calls a “new species of trouble,” that makes analytical risk assessment extremely difficult and increases our reliance on affective assessment.

In the context of high-magnitude, low-probability risks, individuals often demonstrate probability neglect, i.e., the failure to assess at all the probability that a certain scenario will materialize, but instead focus exclusively on the worst possible outcome—the worst-case scenario. This has been famously captured by former Vice President Dick Cheney’s statement that “If there’s a one percent chance that Pakistani scientists are helping al Qaeda build or develop a nuclear weapon, we have to treat it as a certainty in terms of our response.” Such predictions are especially potent—and at the same time likely to be biased—when the expected outcome is “affect rich,” as when it involves not merely a serious loss, but one that produces particularly strong emotions.

Individuals also entertain myopic perspectives about the future in that they tend to undervalue and discount future benefits and costs when comparing them with present benefits and costs. While a strong governmental response against terrorism is perceived by the public as socially beneficial, the longer-term costs to individual rights and liberties tend to be overly discounted. That such future costs seem mostly intangible and abstract, especially in comparison with the very tangible sense of fear for one’s person and loved ones, coupled with a feeling of increased security as a result of governmental action and a sense that government’s infringements on civil liberties target “others” (as discussed in Sect. 5), only exacerbate this facet of our risk assessment.

The problems identified above are further aggravated in times of crisis and emergency due to the push of such circumstances towards group polarization. Of the various explanations for group polarization, several are of special significance in our context, namely emotional contagion, social interactions, and over-confidence.

Strong emotions such as fear, hysteria, panic, outrage, and xenophobia are invoked by violent emergencies. Such emotions carry a pronounced effect on people’s perceptions of, and reactions to, risk as they act as multipliers of (perceived) likelihood

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28Wells (2004), 925.
29Slovic (2000), 985–986.
30Erikson (1994); Slovic (2004), 985.
31Quoted in Suskind (2006), 61–62.
32Sunstein (2002a), 66; Sunstein (2002b), 1137–1144; Sunstein (2005).
33Sunstein (2007), 527–528, 531–532.
34Sunstein (2007), 524–529.
of risk.\(^\text{35}\) That effect is then amplified and re-amplified as a result of emotional contagion. Individuals are highly responsive to emotions expressed by others. Some emotions, such as fear, are particularly contagious. People also shape their opinions (particularly their expressed opinions) and adjust them so as to be in sync with the dominant position within the relevant reference group since they like to “belong” and to be favorably perceived and counted by others.\(^\text{36}\) This is especially so the less people feel that they know about a certain issue; they would tend then to rely on the judgments of those “in the know.” Decision-making that takes place under conditions of uncertainty is particularly prone to suffer from distortions that result from the interplay of informational and reputational influences and cascades. “In an informational cascade,” writes Cass Sunstein, “people cease relying … on their private information or opinions. They decide instead on the basis of the signals conveyed by others … It follows that the behavior of the first few people can, in theory, produce similar behavior from countless followers.”\(^\text{37}\) Matters of national security almost always present significant information asymmetries among the various branches of government and between the government and the public and are thus especially prone to the effects of informational cascades. Informational cascades may also partially explain the tendency of “civilians”—including not merely the public at large but also the judicial and legislative branches of government as well as individuals within the executive branch—to defer to the judgment of military experts in such matters.\(^\text{38}\) Informational and reputational cascades may, in fact, be manipulated by availability entrepreneurs who have particular stake in the outcomes of the policy making process and seek to shape and influence public discourse so as to control the policy selection process.\(^\text{39}\) In the context of national security issues the military-industrial complex may fulfill such a role.\(^\text{40}\) Such interest groups, seeking to influence national policy towards increased spending on defense and national security and according greater weight to national security concerns in setting national priorities, enjoy the benefits of possessing and controlling specialized information and expertise about potential national security risks and of being highly organized. This may not only lead other organizations institutions, such as the courts, to accord a significant margin of appreciation and deference to the judgments of national security entrepreneurs, but it may also mold the general public’s perception of the risks that terrorists, wars or emergencies present to the nation.\(^\text{41}\) Thus, if availability entrepreneurs acting in the area of national security present certain risks as highly likely to occur (or of special magnitude) their position is likely to influence greatly decision-makers and the public at large. Moreover, the combination of emotional contagion and consensus

\(^{35}\) Sunstein (2007), 544–45; Sandman (1989), 45.

\(^{36}\) For discussion of “reputational cascade” see Sunstein (2003), 74–95.

\(^{37}\) Sunstein (2003), 55.

\(^{38}\) Gross (2003), 1034.

\(^{39}\) Kuran and Sunstein (1999), 727; Sunstein (2007), 539. See also Walker Wilson and Fuchs (2009).

\(^{40}\) Eisenhower (1961). See also Hanson and Kysar (1999a, b), 722–743; Hanson and Kysar (1999a, b).

\(^{41}\) Sunstein (2003), 54–95.
leading to the prioritization of a “dominant position” will increase the ability of availability entrepreneurs to shape and influence public opinion and policy-making through reputational cascades, i.e., when people think they know what is right, and yet they conform to the crowd in order to maintain the good opinion of others.

National security related risks, in general, and high-magnitude, low-probability threats, in particular, are especially susceptible, for example, to governmental “probability inflation” since they involve acute informational asymmetries between the Executive and other government branches and the public, resulting in greater deference towards the Executive. At the same time, the more confident “trusted” officials are in the correctness of their own assessments, that might, in and of itself, breed more radical responses to the perceived threats. As Sunstein suggests, “people with extreme views tend to have more confidence that they are right, and ... as people gain confidence, they become more extreme in their beliefs.” Once again, the significant asymmetries in information between the experts and everyone else may contribute further to such confidence by the “experts” in the correctness of their positions. Over-confidence is often buttressed by notions of self-fulfilling prophecies and the observable tendency to prefer information that is consistent with one’s previously held views, or to interpret information in ways that confirm those views. This may also account for an attitude of suspicion and even disregard towards divergent positions that are advocated by “civilians.” At the same time, the phenomenon of “Monday morning quarterbacking” (known in scholarly circles as the “hindsight bias”) means that people tend to believe that they knew and assessed correctly all along a particular risk and its probability, even though the risk was completely unanticipated. The problem is that if people, in hindsight, believe that the risk was more foreseeable and still occurred that might be interpreted to mean that not enough measures had been taken in order to prevent the harm from taking place. That may lead “experts” whose professional reputations depend on their ability to anticipate threats and foil them to claim that the only reason for the failure to prevent the threat from materializing must be that they (i.e., the nation) were forced to fight the threats “with one hand tied behind their back” and to put the blame for the failure to act on those who are castigated as “soft on terrorism.” This may also contribute to the adoption of even more draconian counter-terrorism measures today then would have otherwise been justified by the circumstances.

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42Masur (2007), 1325.
43Masur (2007), 1329.
44Sunstein (2005), 100. See also Rachlinski (2003), 1172–1173.
45Horwitz (2003), 17; Plous (1993), 231–234.
46See, e.g., Guthrie et al. (2001), 799–803.
4 Framing

Words are a source of immense power. We use words not only to communicate and express our thoughts, but also to shape thought itself. Rhetorical power is a way of constituting the audiences to whom it is addressed “by furnishing [listeners] with the very equipment they need to assess its use—the metaphors, categories, and concepts of… discourse.” These rhetorical devices are not neutral, value-free tools. Rhetors select them, consciously or unconsciously, to fit their purposes and to accord with their own, and their audience’s, values, worldview, and perception of reality. Governments choose and utilize them carefully not only vis-à-vis their own domestic audiences, but also to represent the status, values, and positioning of the state vis-à-vis other states, international institutions and organizations, and international and transnational legal and political forums.

The framing of issues and outcomes significantly shapes choices—whether pertaining to private decisions or to public policy. “Frames are powerful nudges.” Individuals use frames as interpretive emotional filters through which they make sense of events around them and messages they receive. Reliance on framing means that whoever manages to control the framing of information greatly influences, and can manipulate, the interpretation and meaning that recipients of that information are likely to attach to it.

The language used in the framing of the relevant events and issues (indeed, the language used to describe what the issues are and which of them are, in fact, relevant) is not only shaped and informed by reality, it is, in and of itself, constitutive of what that reality may be. Rather than being formed by, and discoverable through, exogenous situational contexts, rhetoric precedes and informs the impact of such situations. Meaning “is not discovered in situations, but created by rhetors.” In the United States, for example, no one plays the role of the national rhetorician more than the President—“the nation’s chief storyteller, its interpreter-in-chief.” Presidents, argues Kathleen Hall Jamieson, “respond to moments with words that tell us what the moments mean and then, with words, recommend to the nation and to the Congress courses of action.” While the Office of the President is continuously defined and redefined by its occupants in their interactions with the people, it also

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47Tulis (2017), 203.
48Lakoff (2009), 13.
49Lakoff G (2009), 15.
50Thaler and Sunstein (2008), 37.
51Thaler and Sunstein (2008), 13.
52Vatz (1973), 156.
53Compare Vatz (1973), 154, with Bitzer (1968), 2.
54Vatz (1973), 157. See also Berg (2009), 17–22.
55Stuckey (1991), 1.
56Shifting language: trading terrorism for extremism (2005). See also Campbell Kohrs and Jamieson Hall (1990), 3.
shapes and defines the national identity of the people. It is through presidential rhetoric that the “national fabric is woven.”

The rhetoric of emergency, crisis and war, works as “rhetoric of investiture,” explaining and legitimating the need to concentrate powers in the executive. Governmental powers expand in times of crisis. War rhetoric leads to greater public acceptance, and even active demand by the public, of government exercising expansive powers and authorities in order to overcome the threat and restore peace and security. The same rhetoric also ensures the concentration of those expansive powers in the hands of the executive, strengthening it at the expense of the other two branches. The executive’s perceived ability to act swiftly, secretly, and decisively against threats to the nation becomes superior to the ordinary principles of limitation on governmental powers and individual rights. The government’s ability to frame the terms of the public discourse is greatly determinative not only of eventual outcomes and policy decisions, but also of their perceived acceptability and legitimacy. As Wojtek Wolfe suggests, in the context of the wars in Afghanistan and Iraq, President Bush “utilized framing effects and threat rhetoric in order to successfully accomplish risky foreign policy shifts … [in which the administration] presented a situation to the public that implied a need for decisions to be made under risk or uncertainty, allowing prospect theory to be applied to the president’s framing of the issues.” At the same time, emergency and war rhetorics contribute to the erosion of processes of deliberation and “decay of political discourse,” replacing “discussion structured by the contestability of opinion inherent to issues with a competition to please or manipulate the public.”

In seeking to manipulate public opinion and decision-making, the framing of the relevant issues is critical. Policy choices are frequently shaped more by the framing of outcomes than by the substance of the issues at stake. Thus, in order to increase public support for its actions, the government (and particularly the executive branch) may seek to manipulate information pertaining both to the magnitude and probability of potential or to the costs and benefits of pursuing different measures in response to such risks (more on framing in the next Section).

Significantly, a study of presidential war rhetoric in the United States has shown that presidents have used dramatic narrative filled with emotionally charged language

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57 Berg (2009), 9.
58 Campbell Kohrs and Jamieson Hall (1990), 6.
59 Campbell Kohrs and Jamieson Hall (1990), 113.
60 Rossiter (1948), 288–290.
61 Koh (1990), 117–149.
62 Montesquieu (1748), 154; Lobel J (1989), 1386.
63 Wolfe (2008), 1.
64 Tulis (2017), 176.
65 Tulis (2017), 178–79. See also Tulis J (2017), 179; Kelley and Martinez (2002).
66 See, e.g., Hasen (1990); Stohl (1976), 82–95; Slovic et al. (1982), 483; Slovic (2004), 981. See also Loewenstein and Mather (1990), 161–65.
to identify major threats by clearly identifiable enemies to the nation and the American way of life that must be immediately and forcefully met.\(^{67}\) Presidential war rhetoric often exhorts the audience—the American people—to unanimity of purpose and total commitment. It distinguishes between “us” and “them” and harnesses that distinction to constitute the audience as a “united community of patriots that is urged to repulse the threat with all available resources.”\(^{68}\) War rhetoric not only constitutes the “united community of patriots;” it also identifies and names the enemy.\(^{69}\) Presidential rhetoric identifies and addresses two socially constructed target populations, i.e., “us” who need protecting and the “dangerous others” who threaten us.\(^{70}\) (See the next Section for further discussion of this point).

“Emergency,” “War,” and “national security,” are often invoked as “god terms,” i.e., a rhetorical absolutes that impart the capacity to demand sacrifice, “for when a term is so sacrosanct that the material goods of this life must be mysteriously rendered up for it, then we feel justified in saying that it is in some sense ultimate.”\(^{71}\) As such, a “god term” is an enabler on multiple levels. At the same time, the terms say very little about their specific content because only the actual content can speak for itself.\(^{72}\) The seductive attributes of the war frame have not been lost on presidents even outside the context of armed conflict, invoking the term in the context of the war on poverty, war on drugs etc. Indeed, the war frame confers legitimacy on a wide spectrum of presidential actions, including many that would have otherwise been strongly challenged. As Richard Jackson comments: “[T]he discourse of the war on terrorism … set the logic and possibilities of policy formulation in the first instance … [and] helped to create the wider legitimacy and social consensus that [is] required to enact … policy.”\(^{73}\)

The use of the language of emergency and war also justifies appeals for national and individual sacrifice while, at the same time, undermining the possibility of robust opposition because opponents could be, and were, easily castigated as being unpatriotic, defeatists, fifth columnists, soft on terror, and even putting soldiers in harm’s way. Tulis notes that in the context of the War on Poverty, the war rhetoric “puts doubters under the suspicion of being in favor of poverty” and of being “unpatriotic, immoral, or both.”\(^{74}\) As George Orwell suggests in his *Principles of Newspeak*, “The purpose of Newspeak [is] not only to provide a medium of expression for the worldview and mental habits proper to the devotees of Ingsoc, but to make all other modes of thought impossible. … [A] heretical thought … should be literally unthinkable, at least so far as thought is dependent on words.”\(^{75}\)

\(^{67}\) Campbell Kohrs and Jamieson Hall (1990), 105–18.
\(^{68}\) Campbell Kohrs and Jamieson Hall (1990), 111.
\(^{69}\) Campbell Kohrs and Jamieson Hall (1990), 111.
\(^{70}\) Schneider and Ingram (1993); Morone (2003).
\(^{71}\) Johannesen et al. (eds) (1970), 90.
\(^{72}\) Weaver (2015), 212.
\(^{73}\) Jackson (2007), 354.
\(^{74}\) Tulis (2017), 171.
\(^{75}\) Orwell (1964), 246.
Framing is closely linked to the phenomenon of anchoring. Amos Tversky and Daniel Kahneman demonstrated that when needing to make numerical estimates and judgments, the first number with which a decision-maker is presented has a demonstrably disproportionate effect on that person’s ultimate choice. That first number becomes the anchor to which all future assessments are then tied even when the anchor is clearly irrelevant. Anchors strongly influence the ultimate decision, in so far as they would be taken as the starting points against which adjustments are made and as influences on subsequent decisions and actions. This concept can be readily applied to the War on Terror. Anchoring the traumatic events of September 11 in the context of “war” has greatly shaped and influenced the responses to the attacks. The baseline for future reference—the first “number” with which we were presented—was “war.” Everything followed from that. Using the rhetoric of war, the President was able to frame the threats facing the nation and the responses to these threats away from a criminal law model and instead anchor them in a decidedly war model. The media and public quickly picked up the message that the attacks of September 11, 2001 were not a crime, but an act of war against the United States. For example, George Will wrote in the Washington Post on September 23, 2001 that, “[t]he goal is not to ‘bring terrorists to justice,’ which suggests bringing them into sedate judicial settings—lawyers, courtrooms, due process, all preceded by punctilious readings of Miranda rights. Rather, the goal is destruction of enemies.” Once put in place, the war frame was repeated over and over again until it was eventually used reflexively rather than reflectively, becoming normalized rather than conceived of as aberrational and exceptional.

5 Othering

The biases mentioned in Sect. 3 and the problems of framing, discussed in Sect. 4, suggest that under extreme circumstances governmental overreaction against terrorist and other violent threats is a likely outcome. This is buttressed further by prevalent characterizations of violent emergencies in dichotomized and mutually exclusive “us versus them” terms.

Shortly after the terrorist attacks of 9/11, President George W. Bush announced that, “[e]very nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists.” Similar language is often used in emergencies

76Kahneman and Tversky (2001), 457–458.
77Kahneman and Tversky (2001), 457–458.
78Kahneman and Tversky (2001), 457–458; Plous (1993), 145–146.
79Will (2001).
80Gross and Ní Aoláin (2006), 220–227.
81Bush (2001).
across jurisdictions. The contours of conflict are drawn around groups and communities rather than individuals. Such distinctions need not be taken as given; counterterrorism measures often actively produce and construct a suspect community. What is critical, though, is the identification of such a community of “others.” In times of crisis the dialectic of “us versus them” serves several functions. It allows people to vent fear and anger in the face of actual or perceived danger, and direct negative emotional energies toward groups or individuals clearly identified as different. The same theme also accounts for the greater willingness to confer emergency powers on the government when the “other” is well-defined and clearly separable from the members of the community. The fact that the targets of emergency and counterterrorism measures are perceived as outsiders, frequently foreign ones, has important implications when communities set out to strike a proper balance between liberty and security in times of crisis. The clearer the distinction between “us” and “them” and the greater the threats “they” pose to “us,” the greater in scope the powers assumed by government and tolerated by the public become. Balancing takes place not between security and liberty as such, but rather between our security and their liberty.

Targeting outsiders is likely to incur little political cost for decision-makers. It may even prove to be politically expedient: While the benefits (perceived or real) of fighting terrorism and violence accrue to all members of society, the costs of such actions seem to be borne disproportionately (even exclusively) by a distinct and ostensibly well-defined group of people. Moreover, inasmuch as violent emergencies may lead to the targeting of “foreigners,” those targeted may lack the most basic of requirements for a meaningful political leverage—the right to vote political officials out of office.

Times of great danger (real or perceived) have brought about a confluence of two mutually reinforcing trends, namely the tendency of the public to fear and hysteria, and nativistic tendencies. In his seminal study, Strangers in the Land, John Higham analyzes the phenomenon of American Nativism, which he defines as “intense opposition to an internal minority on the ground of its foreign (i.e., ‘un-American’) connections.” Higham finds patterns of nativistic attitudes throughout American history, focusing, in particular, on anti-Catholicism, anti-radicalism, and racial nativism. Yet, he also notes that “nativism usually rises and falls in some relation to other intense kinds of national feeling.” Intense moments have led to the intensification and polarization of pre-existing nativistic sentiments. Violent emergencies tend to result in situations where the cost bearers are sufficiently few and powerless, or have certain substantial (perhaps even insurmountable) barriers to their coalescing to fight the government’s actions. Under such circumstances, the danger is that political leaders will tend to strike a balance disproportionately in favor of security and impose

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82Hillyard (1993), 257; Volpp (2003), 147.
83Gross (2003), 1082–1085.
84Cole (2003), 4–5.
85Higham (2002), 4.
86Higham (2002), 4.
87Stuntz (2002), 2165.
too much of a cost on the target group without facing much resistance (and, in fact, receiving strong support) from the general public.\textsuperscript{88}

Research has demonstrated that when people contemplate their mortality they tend to punish or judge more harshly those who violate—or are at least perceived to violate—deeply held cultural values.\textsuperscript{89} The specter of our own mortality tends to lead us to make decisions that reinforce deeply held cultural values. To the extent that “foreign” connotes that which is not part of our group cultural identity and is even perceived to threaten it, it is not hard to see why, in the context of terrorist threats, “foreign” will be particularly targeted.\textsuperscript{90}

The stigma of foreignness is not limited to the distinction of citizenship. Crises tend to lead to focus on identity and solidarity, rather than the formal legal characteristics of citizenship.\textsuperscript{91} Citizens who are somehow identified with the enemy are also seen as outsiders, as the internment of American citizens (together with non-citizens) of Japanese ancestry during World War II demonstrated. “Foreign” connotes, therefore, anything that threatens “our way of life.”\textsuperscript{92} The links to things and influences from abroad can then be easily made.\textsuperscript{93} Race, religion, and eventually ideas and beliefs and associations can, and have been, described as “foreign,” mobilizing significant popular forces against particular groups. As William Wiecek notes: “Since the early nineteenth century, Americans have nurtured a consistent fear that alien ideologies, as well as the foreigners who were thought to be their vectors, were invading the pristine American republic.”\textsuperscript{94} In the aftermath of September 11, the identification of the terrorists as foreigners has followed this pattern. It also serves to explain the particular shock and feelings of betrayal and revulsion that accompany attacks orchestrated by “home grown terrorists.”\textsuperscript{95}

Whether drawn along citizenship, ethnic origin, race, or religion, a sense of clear distinction between “us” and “them” facilitates pushing the emergency powers’ envelope. A bright-line separation between “us” and “them” allows for piercing the Rawlsian veil of ignorance.\textsuperscript{96} We allow for more repressive emergency measures when we believe that we are able to peek beyond the veil and ascertain that such powers will not be turned against us. The portrayal of the sources of danger as “foreign” and terrorists as “others” who are endowed with barbaric characteristics and who are out to destroy us and our way of life is used further to prove the urgent need for radical measures to meet the threat head on.\textsuperscript{97}

\textsuperscript{88}Blasi (1985), 457; Méndez (2002), 383; Stone (2004), 545; Monaghan (1993), 26.
\textsuperscript{89}Rachlinski et al. (2006), 1256.
\textsuperscript{90}Rachlinski et al. (2006), 1250–1252. See also Karst (2006), 1342–43.
\textsuperscript{91}Bosniak (2000); Wells (2005).
\textsuperscript{92}Brown (2010).
\textsuperscript{93}Wells (2004), 909–921.
\textsuperscript{94}Wiecek W (2001), 381.
\textsuperscript{95}Editorial (2005), 18; Guthrie and Tighe (2005), 13; Jenkins et al. (2005), 4.
\textsuperscript{96}Rawls (1999), 102–107.
\textsuperscript{97}Small and Loewenstein (2005), 315–316.
While the distinction between us and them is not unique to the sphere of emergency powers crises lead to heightened individual and group consciousnesses. Indeed, in identifying the enemy, several rhetorical tools are commonly utilized. Stereotyping is often employed with respect both to insiders and to outsiders, emphasizing gallant, noble, and worthy attributes of the former, and negative traits of the barbarian and demonic “other.” The language used is that of “good versus evil,” which may be accompanied, at times, by strong religious overtones. Stereotyping is often employed with respect both to insiders and to outsiders, emphasizing good, noble, and worthy attributes of the former, and negative traits of the latter. Collective derogatory name-calling and identification of the others as “barbarians” are symptoms of that trend. Internal conformities within the community are exaggerated, while divergence from “outsiders” is emphasized. War rhetoric facilitates this drawing of the contours of conflict around groups and communities. Thus, “a discourse of indignation, threat and suffering … communicated within a group, can become the basis for mobilization against an identified enemy.” As Robert Ivie suggests, “a people strongly committed to the ideal of peace, but simultaneously faced with the reality of war, must believe that the fault for any such disruption of their ideal lies with others.” Allegiance to the community and the willingness to sacrifice for the community’s sake—in certain situations, the willingness to make the ultimate sacrifice of one’s own life—receive a higher premium and attention in times of peril that endanger the group. The lines of ins and outs are more clearly and readily drawn.

The combination of heightened levels of fear and anxiety and the identification and naming of the enemy who is held responsible for threatening the people may eventually result in a moral panic. The behavior of the clearly identifiable group of “enemies”—real or constructed as such—who are depicted as “folk devils,” is seen as harmful or threatening to the values and even existence of the nation and the people. Moral panics with their identification of “us” not merely as the good folk but also as the “victims” of the behavior of deviant “others” lead to a “tough on crime” mentality among the public, the press, law enforcement agents, politicians,
and the courts.\textsuperscript{109} Thus, facilitated by governmental rhetoric, and further inflamed by media exaggeration,\textsuperscript{110} moral panics, such as those that may come about as a result of high-profile terrorist attacks, in turn create immense pressures on all three branches of government to “do something” about the threat. As politicians and legislators engage increasingly in “symbolic alignments”—in which what counts is not the nature of the target but rather being seen as taking a position “against the devil and on the side of angels”—the focus is clearly put on a particular threat, terrorism, caused by a clearly identifiable group of folk devils, rather than on other types of threat, such as the infringement on civil liberties.

6 Monitoring

The rhetoric of emergency is addressed at one and the same time to both domestic and international audiences. In a modern interconnected world, presidents (and prime ministers) do not operate in isolation. The domestic positioning of an administration or a government has distinct consequences beyond the state’s borders. A national government must carefully consider the risks as well as the advantages of appealing to the generality, globality, and interconnected nature of any threat that is defined domestically in war terms, as other nations, international institutions, and even non-state actors reposition themselves in response.

The subject matter of public emergency presents a background for a head-on collision between state sovereignty and national security on the one hand, and the international involvement in protecting individual human rights against state encroachment on the other hand. Mindful of this conflict and keen to preserve governmental maneuverability in the face of emergency, the drafters of the Convention for the Protection of Human Rights and Fundamental Freedoms,\textsuperscript{111} the International Covenant on Civil and Political Rights,\textsuperscript{112} and the American Convention on Human Rights\textsuperscript{113} included derogation clauses in each of the three documents. Designed to accommodate the needs of the state with the rights of individuals, the derogation clauses seek primarily to allow governmental action infringing recognized individual rights in a period of extreme emergency beyond what governments lawfully could do in times of normalcy. Within the framework of the conventions, the derogation regime acknowledges the possibility of a signatory state derogating from some of the individual rights protected under the conventions in extraordinary times and under specified

\begin{thebibliography}{99}
\item 109 For the latter see, e.g., Cohn Weiss (2006), 1117–1120. See also Hamilton (2012).
\item 110 Goode and Ben-Yehuda (2009), 88–108.
\item 111 Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953).
\item 112 International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368.
\item 113 American Convention on Human Rights, Nov. 22, 1969, O.A.S. Official Records OEA/ser. K/XVI/1.1, doc. 65 rev. 1 corr. 1 (entered into force July 18, 1978), 9 I.L.M. 673 (1970).
\end{thebibliography}
conditions. In times of national danger, states are required to balance security interests and individual rights concerns according to a set of rules that both define the circumstances in which they may exercise emergency measures that infringe upon enforceable human rights and what measures they can use.

The human rights conventions’ derogation regime incorporates both procedural and substantive principles that minimize the danger of usurpation or abuse of the derogation power by establishing a set of criteria through which any particular exercise of that power may be evaluated.\textsuperscript{114} The principle of proclamation requires an official declaration of the existence of a state of emergency. Its purpose is to make public the governmental decision that a state of emergency exists and to reduce the incidence of de facto states of emergency by requiring states to follow formal procedures set forth in their own municipal laws. This requirement is domestically directed. The principle of notification, which obliges a derogating state to notify the other parties to the relevant convention, within a brief period of time, of the derogation enables, in theory, effective international supervision over derogation measures and allows other states to exercise their rights under the convention to ensure that all parties comply fully with the provisions of that instrument.

Even when an act of derogation may be justified under the conventions, the state does not enjoy unfettered discretion with respect to the derogation measures that it wishes to pursue. Such measures can only be taken “to the extent strictly required by the exigencies of the situation.” Derogation measures employed by a government, as well as the fact of derogation itself, must be proportional to the particular threat, both with respect to degree and duration. Another substantive part of the derogation regime is the principle of nondiscrimination on the ground of race, color, sex, language, religion, or social origin. Furthermore, emergency measures taken in the face of a public emergency must not be “inconsistent with [the derogating state’s] other obligations under international law.”

The most important prerequisite for a legitimate derogation from otherwise protected rights is that the circumstances in which the derogation has been effected must constitute a “public emergency” of a certain specified degree—the principle of the exceptional threat. A crisis must be a truly extraordinary exigency to qualify as a derogation-justifying emergency. The derogation system adopts a vision of spasms of crises—episodic and sporadic events, albeit very serious in nature—that last for a relatively brief period of time before the restoration of normalcy. Emphasizing the exceptional nature of emergencies comports with the traditional paradigm regarding the relationship between normalcy and emergency—that of “normalcy-rule, emergency-exception.”\textsuperscript{115}

However, for decades, long before 9/11, the actual jurisprudence under the human rights instruments proved far less robust than the theoretical constructs of the derogation regime seem to suggest. While judicial organs such as the European Court of Human Rights and the Inter-American Court of Human Rights have indicated consistently that they will not abdicate jurisdiction over derogation questions, they have

\textsuperscript{114}Gross (1998), 448–453.

\textsuperscript{115}Gross (1998), 440.
largely assumed a deferential attitude towards governmental assertions of conformity with the requirements of the derogation clauses, challenging the practical significance of their own rulings on their competence to decide these cases. Governments fared well when their decisions concerning the existence of a particular situation of emergency had been reviewed by those judicial bodies. This has been the result of the systemic difficulties that courts confront when they face national crises, and of a consistent failure to come to terms with the inadequacy of traditional paradigms of emergency. The contextual deference motif is also making a more sustained appearance in non-derogation cases, especially those involving due process rights, where invocations and appeals to the scourge of terrorism operate as a means to contextualize the contemporary interpretation of these rights.

Undertaking a two-pronged historical analysis, one sees that the judicial bodies under the human rights conventions have, in practice, consistently legitimized the states’ use of emergency powers. First, focusing on the justification for calling the emergency, the case law under the European Convention on Human Rights and its American counterpart has, by and large, upheld states’ drawing on the legitimacy and necessity of particular derogations. The second step involves close scrutiny of judicial proportionality analysis, most notably as deployed by the European Court of Human Rights. Until the attacks of 9/11, this second prong had allowed the Court to scrutinize more robustly the actual practice of states coming before it, often striking down the measures taken by the derogating state as disproportionate to the threat faced, or articulating a lesser means-to-ends analysis. However, post-9/11, we identify a subtle shift in the outcomes of proportionality-based analysis, suggesting that it works increasingly to the respondent state’s benefit in determining whether the measures deployed were proportionate and suitable to the perceived or actual threat at hand. Importantly the proportionality test is being deployed in cases where there is no formal derogation in place, but the state advances claims about the broad context of terrorism as necessary to understand the complexity and contextual implications of its vulnerable position. This is effectively derogation and sustained emergency by stealth. This shift is evident in cases involving non-derogable rights (specifically torture or inhuman and degrading treatment) as well as specific derogable rights, such as due process and liberty, in which the very importation of a weak form of proportionality analysis, allied with pervasive references to the challenges of terrorism and exceptionalism broadly articulated, is weakening the core of the rights under review.

Furthermore, in the aftermath of 9/11, while there has been a proliferation of exceptional powers practice, many democracies avoided formal acknowledgment

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116 See e.g., Lawless v. Ireland, 1 Eur. H.R. Rep. 15, 37 (1961); Ireland v. United Kingdom, 2 Eur. H.R. Rep. 25, 107 (1976); Refah Partisi v. Turkey, 35 Eur. H.R. Rep. 3, 89 (2002); Askoy v. Turkey, 1996-VI Eur. Ct. H.R. 2260, 2281; Sakik v. Turkey, 1997-VII Eur. Ct. H.R. 2609, 2628; see also Ní Aoláin (1995).

117 See e.g., Aksoy v. Turkey, 1996-VI Eur. Ct. H.R. 2260 at 78; see also McCann and Others v. the United Kingdom, 324 Eur. Ct. H.R. (ser. A) at 149–50 (1995).

118 Sec’y of State for the Home Dep’t v. AF (No 3), [2009] UKHL 28, [2010] 2 A.C. 269 33; Sec’y of State for the Home Dep’t v. MB & AF, [2007] UKHL 46, [2008] 1 A.C 440, 484–85, 496–97.
of de facto emergency power usage, and the explicit recognition that additional or layered domestic emergency powers activated derogation obligations under international human rights treaties. In a move connected to the issues raised in Sect. 2, states deploying ordinary legislative measures to enact rights-limiting regulation and to avoid any invocation of exceptionalism in the overt language of emergency regulation, consistently normalized the exception.

Few democratic states have entered security-based derogations under their international human rights treaty obligations since 9/11. Thus, for example, the United Kingdom entered a substantial derogation after the events of 9/11 under Article 15 of the European Convention on Human Rights. Whatever the perceived merits of derogation framing, it is debatable what tangible leeway this derogation subsequently gave the United Kingdom. It is reasonable to assume that a formal derogation brought greater attention to the practices of the United Kingdom as the one democratic state in derogation, and that it became a lightning rod for the cries of foul play. One lesson from the British choice to frame the situation as a public emergency that justified resort to derogation, and the criticism directed at the UK government as a result, is simply not to derogate formally from human rights treaty obligations and avoid ceding the narrative space to the formalized exception. Rather, the working principle might well be that the maintenance of emergency powers is, by and large, not dependent on derogation, as evidenced by the 2000 Crime Act in the United Kingdom. Essentially, the “work” can get done in other ways. The normalization frame is now well in place.

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119 Masferrer (2012), 9.
120 Gross and Ní Aoláin (2006), 228–243; Vladeck (2012), 1300; Dyzenhaus (2006), 17–65.
121 Zwitter et al. (2014).
122 List of Declarations Made by the United Kingdom Regarding the Convention for the Protection of Human Rights and Fundamental Freedoms, Council Eur. Treaty Off. (Oct. 29, 2014), http://www.conventions.coe.int/treaty/Commun/ListeDeclarations.asp?PO=UK&NT=005&MA=999&CV=1&NA=&CN=999&VL=1&CM=5&CL=ENG.
123 Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights (Seventeenth Report): Bringing Human Rights Back In, 2009–10, H.L. 86, H.C. 111, at 7–8 (U.K.) (see in particular paragraphs 11 and 12, where the Parliamentary Committee disputes the executive’s assertion that the conditions exist sufficient to claim a state of emergency relying on the assessment of the Joint Terrorism Analysis Center (JTAC)).
124 Terrorism Act, 2000, c. 11 (U.K.).
The production of legislation that is emergency-driven in character, but framed formally as ordinary, continues unabated. Democracies such as the United Kingdom, France,\textsuperscript{125} the United States, Canada,\textsuperscript{126} Germany,\textsuperscript{127} and Australia\textsuperscript{128} have enacted substantial and far-reaching legislation aimed at containing terrorist or national security threats and virtually all of it has been marshaled through the ordinary criminal law.\textsuperscript{129} The most cogent example of this phenomenon is the conversion in the United Kingdom of decades of exceptional emergency legislation including the Emergency Powers Act and the Prevention of Terrorism Acts into consolidated “ordinary” UK wide legislation at the ending phase of the conflict in Northern Ireland.\textsuperscript{130} We are witnessing “the subversion of legal norms to counter-insurgency ends.”\textsuperscript{131}

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\textsuperscript{125}Gross (2018).
\textsuperscript{126}Privy Council Office, Securing an Open Society: Canada’s National Security Policy (2004).
\textsuperscript{127}See Lichtenberg (2012).
\textsuperscript{128}Since 9/11, Australian states have passed a number of laws authorizing temporary emergency powers. See, e.g., Terrorism (Extraordinary Temporary Powers) Act 2006, (Austl. Cap. Terr.) (Austl.), available at http://www.legislation.act.gov.au/a/2006-21/current/pdf/2006-21.pdf; Terrorism (Emergency Powers) Act 2003 (N. Terr.) (Austl.), available at http://www.austlii.edu.au/au/legis/nt/consol_act/tpa323/; Terrorism (Police Powers) Act 2002 (N.S.W.) (Austl.), available at http://www.austlii.edu.au/au/legis/nsw/consol_act/tpa2002291/.
\textsuperscript{129}See e.g., Terrorism Act, 2000, c. 11 (U.K.); Lane Scheppele (2006).
\textsuperscript{130}The legislation included the Terrorism Act (2000), the Anti-Terrorism, Crime and Security Act (2001), the Criminal Justice Act (2003), the Prevention of Terrorism Act (2005), the Terrorism Act (2006), the Terrorism (United Nations Measures) Order 2006, and the Counter-Terrorism Act (2008).
\textsuperscript{131}McGovern (2011), 223.
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