Chapter 5
Basic Challenges for Governance in Emergencies

François Tanguay-Renaud

Abstract What are emergencies and why do they matter? In this chapter, I seek to outline the morally significant features of emergencies, and demonstrate how these features generate corresponding first- and second-order challenges and responsibilities for those in a position to do something about them. In the first section, I contend that emergencies are situations in which there is a risk of serious harm and a need to react urgently if that harm is to be averted or minimized. These conceptual features matter morally, since it is precisely to them that those who invoke emergencies to justify otherwise impermissible actions tend to appeal. The basic first-order challenge facing emergency responders is two-fold. It is, first, to identify how these features shape circumstances of action in ways that affect (or do not affect) which reasons for action and which corresponding courses of conduct are justifiably available to them. In situations when emergency responders are compelled to make authoritative determinations due to significant contestability and indeterminacies in the contours or materialization of the said features, their challenge is then also to make these determinations legitimately. In the second section, I argue that second-order challenges having to do with the foreseeability of emergencies, the value of exposure to them, and their preventability further compound the predicament of emergency responders. I conclude by saying a few words about one last morally salient feature shared by many, though not all, emergencies considered in the chapter—namely, their public dimension.

F. Tanguay-Renaud (✉)
Department of Philosophy, Osgoode Hall Law School, York University,
4700 Keele Street, Toronto, ON M3J 1P3, Canada
e-mail: ftanguay-renaud@osgoode.yorku.ca

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5.1 Setting the Stage and Two Sets of Basic Challenges

"Everyone's troubles make a crisis," writes Michael Walzer. "'Emergency' and 'crisis' are cant words, used to prepare our minds for acts of brutality" (Walzer 1977, 251). In light of provocative assertions of this sort, one cannot help but wonder: is "emergency" really such a cant and malleable concept? History gives us numerous reasons to think it may be. How many times in the last century alone have heads of state invoked looming or ongoing emergencies as grounds for imposing harsh "emergency measures" on their populations? How frequently have state-governments sought to account for attacking, invading, or occupying foreign territories by pointing to urgent threats to the interests of their constituency or to those of others?[1] Indeed, for some leading emergency theorists, it is the very manipulability of the idea of emergency that accounts for its practical salience. According to Carl Schmitt, for example, while it is not *everyone's* troubles that make an emergency, the existence of an emergency is still contingent on *someone's* say-so. It is the mark of a society's "sovereign," Schmitt famously writes, that he decides whether there is an emergency as well as what must be done to eliminate it (Schmitt 2005, 12).

In this chapter, I want to dispute this way of thinking about emergencies and their moral importance. I intend to do so, first, by outlining the specific features of the concept that I take to be both definitive and morally significant and, second, demonstrating how these features generate corresponding first- and second-order challenges and responsibilities for those in a position to do something about them. To borrow language from the European Convention on Human Rights,[2] my focus will primarily be on "war" and "other public emergencies" and the basic, emergency-specific challenges they pose for those—notably, governments and their agents—who strive to handle them appropriately, that is, in a morally justified way. I speak of "basic" challenges to reflect the fact that the challenges with which I will be concerned here are not inherently public. In other words, except for some remarks made in conclusion, my focus will not be on the public dimension of the emergencies in question and its distinctive moral implications, but on their character as emergencies *simpliciter* and the challenges they may pose as such. Thus, the scope of my argument will sometimes extend beyond cases of war, civil conflicts, and the like, and so will some of my illustrations. Still, I intend to concentrate my attention on these emergencies in particular, since they typically feature additional complexities of scale, which a focus on more discrete or individual emergencies would risk eliding. Note also that, to reflect contemporary reality and for the sake of simplicity, I will tend to assume that governments and their agents are those who are best placed to address these emergencies appropriately. In doing so, I do not mean to rule out the possibility that other (domestic or international) entities or individuals may sometimes be in as good a position, or even be better placed, to address them.

[1] Amongst the many existing studies, useful starting points include Ramraj and Thiruvengadam (2010), Scheppele (2006), and Loveman (1993).

[2] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) s 15(1).

So it is untrue that whatever someone—sovereign or anyone else—declares to be an emergency is in fact an emergency (accounting, of course, for the possibility that anyone may, through their behaviour, create emergencies for themselves and others). All, including those in relevant positions of authority, can be wrong about the existence of emergencies. The concept of emergency is a normative concept and has contours that impose at least some limits on what situations can properly be described as such. Emergencies, I will contend, are situations in which there is a risk of serious harm and a need to react urgently if that harm is to be averted or minimized. These features—i.e. urgency, the potential for serious harm, needed response for harm avoidance or minimization—matter conceptually since not all situations encompass them, or encompass them in the same way. Only emergencies do. When one of these features is missing, an event is not an emergency. Thus, as I discuss at greater length later, a fast unfolding risk of serious harm whose materialization cannot realistically be averted or minimized does not constitute an emergency. If anything, it is a tragedy, a disaster. Consider also an urgent risk of a mere inconvenience or trifling harm. Such risk can at best be metaphorically analogized to an emergency. A fresh ketchup stain on my white shirt may be akin to an emergency in that I am urgently required to soak it in water if I want to avoid it becoming indelible. All else being equal, though, it is not *really* an emergency.

The identified features also matter morally, since those who invoke emergencies to justify otherwise impermissible actions tend to appeal precisely to them in doing so. For Schmitt, who assumes that the "sovereign" is only ever constrained in his actions by the limits of his power and whatever social and political forces he deems prudent to take into account, the moral importance of these features is largely irrelevant.[3] Yet, one would be ill-advised to follow him down this nihilistic path. Although an anarchist attitude vis-à-vis the law and social conventions is—irrespective of its rightness or wrongness—intelligible, amoralism is not. Morality, as I understand it here, refers to the true, or valid, reasons that people have—reasons that apply to whomever they address and whose scope is determined by their content.[4] Thus understood, morality is often described as the art of life. In virtue of its very nature, it applies to all agents capable of understanding it, irrespective of their interest in it, of who they are, of what they feel about it, and of the predicaments in which they find themselves. Of course, reasons for action that differ in strength or type from those ordinarily at play may sometimes prevail in emergency situations. This is why some emergencies are thought to have special moral salience and warrant certain departures from 'normality.' In other words, morality is not inflexible. What it demands and permits can differ depending on the circumstances, such as in some emergency contexts. Thus, morality does not simply cease to apply in such situations. To put the point more concretely, if we take morality to be the true or

[3] Although Schmitt contends that his methodological ambitions are purely descriptive, many passages of his relevant work—such as his assertion that states have a right of self-preservation (Schmitt 2005, 12)—sit awkwardly with this contention.

[4] On this broad understanding of morality, see e.g. Raz (2004, 2–3).

valid reasons that people have for acting, we may, in ordinary or non-emergency contexts, be capable of recognizing and codifying these reasons into moral precepts—such as, *arguendo*, the Golden Rule, the categorical imperative, justice as fairness, respect for basic human rights, and the rule of law. It can appear that emergencies are exactly those situations in which morality, understood merely as those precepts, ceases to apply. However, while emergencies may well depart from normality, morality—that is, true or valid reasons—is not also left behind. Different reasons, or reasons of different force, may be at play in emergencies, but reasons nonetheless.[5]

So, one of the very real challenges of emergencies—such as wars or other violent conflicts—for those who have to contend with them is to identify and assess their salient features and craft responses that give them their due (some may prefer the term 'proportionate') moral importance, in light of all relevant circumstances, without going overboard and abusing the label. At this point, the following objection is somewhat predictable: aren't the features of emergencies listed above so vague that, in most situations, at least some human determinations will be required about the extent to which they obtain in fact and are morally salient? The answer to this question must admittedly be a qualified one. As I suggested, the concept of emergency refers to needs for action (to be understood as including both acts and omissions). More specifically, emergencies involve a specific kind of need for action: a need to act to avoid or minimize serious harm. The idea of need in question has some definite objective contours. For example, soldiers who lie on the battlefield bleeding to death clearly need emergency treatment. Their need is entrenched in the sense that treatment is categorically necessary, in any realistic possible future we can devise, if they are to survive. Some pressing needs are also non-substitutable in the sense that nothing else than φ would fulfil them as well or nearly as well—e.g. intake of some sufficiently hydrating substance is necessary, in a non-substitutable way, to avoid dehydration.[6] Then again, it is true that the claim that there are no alternatives to φ will sometimes, depending how specifically φ is defined, be debatable. Likewise, what constitutes serious harm—which the concept of emergency assumes we have a

[5] I defend this claim in Tanguay-Renaud (2012, 30–36). It is true that certain doomsday scenarios threatening the annihilation of human civilization and the subversion of the very foundations of morality may challenge its applicability. The point is that these supreme moral emergencies are the rarest of the rare, the unlikely exception to the exception, and that it is clearly inadvisable to take them as paradigms for the understanding of the relationship between emergencies, morality, and appropriate responses. On this point, see further Tanguay-Renaud (2009, 47–50).

[6] On categorical needs—elaborated in terms of the necessity to avoid serious harm and understood in contrast to mere instrumental needs—and the entrenched and non-substitutable character of many such needs, see Wiggins (1987, 1–57). Wiggins's account of needs remains one of the most insightful to date, despite being lacking in nuance in some notable respects. For example, while he sometimes seems to assume that needs to avoid serious harm must, as a conceptual requirement, be morally compelling, we can easily think of cases where this is not the case. A moral monster like Hitler, afflicted by a fatal though easily curable disease, may well need treatment, while saving him is not a morally compelling goal. Something similar may also be said of the need to rescue the individual in poor health who, after careful and measured deliberation, has decided to end his life.

forceful reason to avoid—is itself somewhat indeterminate and, thus, may at times be contestable. Some cases of serious harm are quite uncontroversial, and provide clear examples of the moral content of the concept. Consider the case of the person being violently tortured to the point that she will undoubtedly be left in a permanent vegetative state if no action is taken. Think also of cases where it is obvious that one thing would be significantly more harmful than another—*ceteris paribus*, for the political institutions of a decent state to collapse, as opposed to being temporarily inhibited. At bottom, though, the assessment of harm and its seriousness requires at least some judgment and, therefore, may on occasion leave room for reasonable disagreement. If, as a matter of ordinary meaning, harm to people is what makes them worse-off than they were, or are entitled to be, in a way that affects their future well-being or flourishing, then we must appeal to a value-based explanation of what makes it so whenever we use the concept of harm. Detailed accounts of the content of that value-based explanation may be disputable, and lead to conflicting claims about the harm potential of a particular emergency. Consider, for example, the various plausible answers that could be given to the question of how harmful—as well as to whom, and in what ways—the Taliban's destruction of the Buddhas of Bamian actually was.

The existence of such areas of contestability may lead some to think that responses to given events should only be treated as responses to *emergencies* when the urgent necessity of these responses, and the seriousness of the harm they seek to avoid, are unambiguous. There is perhaps a grain of truth in this thought, to which I will eventually return in the last section of the chapter. At this stage, however, it is important to realize that emergencies will also exist in situations where it is debatable how serious the harm at issue really is and whether a given response is strictly necessary to avert it. In such situations, authoritative determinations may have to be made by those who are in a position to make them. Yet, *pace* Schmitt, such determinations must themselves be justified since, like all other forms of human conduct, they are themselves subject to moral appraisal. Here, I do not wish to revisit the deep and extensive literature on what makes exercises of practical authority justified, inside or outside the political context.[7] Suffice it to say that whatever the correct grounds for their justification—be they voluntarist or non-voluntarist—authorities cannot escape evaluation in such terms.

Thus, the basic challenge facing authorities in emergencies is two-fold. It is, first, to identify how emergencies shape (or do not shape) circumstances of action in ways that affect which reasons for action and which corresponding courses of conduct are justifiably available, in the sense of not being morally defeated by other, more compelling ones. For example, does the fact that a rogue regime possesses a few weapons of mass destruction, and threatens to use them unjustly, justify a defensive yet pre-emptive military campaign, as opposed to a trade embargo or other such robust diplomatic manoeuvres? Insofar as it does justify a military campaign, what

[7] For a remarkably succinct and cogent survey of the theoretical literature on the question of legitimate practical authority, see generally Green (2010).

kind of campaign, given, *inter alia*, the number of innocent civilians who may be killed in the process? Does the fact that a country transitioning out of a bloody civil war is on the brink of reverting to that state justify targeted killings of agitators or, say, their exemplary and retroactive punishment in defiance of the rule of law? The second basic challenge is that, when authoritative determinations are required due to significant indeterminacies and contestability, those who make them must ensure that their exercises of authority are themselves justified. Depending on one's theory of legitimate authority, one may ask, for example, whether such decision-makers are better placed than others to assess that a military campaign or targeted killings would be just, necessary, and proportionate. On might also ask whether, in the circumstances, they have been appropriately authorized by those in whose names they purport to make decisions. Of course, while all emergency-related determinations have to be morally justified, not all of them have to be justified *qua* exercises of authority. This is because, conceptually speaking, authority is exercised over *others*, as a means of altering their normative position.[8] It is my focus on governmental responses to emergencies—which characteristically involve authoritative determinations—that leads me to emphasize this additional, yet important, layer of complexity.

At this juncture, one may rightly point out that an inquiry into the moral salience of emergencies that restricted its focus to the need to avoid serious harm would overlook one crucial feature. Emergencies are not only important but also *urgent* needs. Assuming that serious harm would ensue in the absence of a certain reaction, an emergency's urgency is a function of how rapidly this reaction must occur. Urgency and harm operate on different axes of salience. While these axes may coalesce in the most exigent emergencies, they may also diverge. Meeting a need may be urgent, but a matter of moderately harmful consequences. Conversely, a need may be a matter of little urgency, yet be otherwise very important, as measured by the amount of harm that would be occasioned if it were not met. Assuming, though, that we hold the harm variable constant, it becomes easy to see how various needs to avoid harm may be assessed in terms of what Thomas Scanlon calls a "hierarchy of relative urgency" (Scanlon 1975, 660–661). Of course, in some large-scale scenarios—such as wars, civil conflicts, and the like—emergency responders may simultaneously be confronted to many perils with differing levels of harm potential. In such cases, further variations on the axis of urgency can generate exceedingly complex moral dilemmas. Accordingly, it is important always to bear in mind the compounding effect of these two types of variations when assessing the overall challenges posed by large-scale, multifaceted emergencies such as international or civil wars. For the moment, however, I will continue to assume the simpler picture for the sake of clarity.

The concept of emergency implies a high degree of urgency, i.e. immediacy or near immediacy. This feature tends to limit the opportunities that emergency responders have to act if they are to avert harm. In other words, urgency tends to make some reactions less substitutable—or, so to speak, more necessary—for the

[8] On this point, see Gardner (2010, 83–89).

purpose of harm avoidance. Therein lies the specific moral salience of the urgency dimension: urgency may make some courses of conduct related to harm avoidance more rationally eligible than they would otherwise be. Thus, even if, ideally, it would be better for a government to take the path of diplomacy and multilateralism in lieu of attacking another state in self-defense, it may not have the opportunity to do so if it faces an ongoing neo-colonial invasion. When serious harm is threatened and there is no time to engage in otherwise-favorable courses of action, it may become justifiable to take less ideal paths.

Urgency as a moral feature also has its loose ends. It is true that some emergencies are so urgent that, when faced with them, one should not ask oneself what to do, but react to the situation as one sees it. Otherwise, both thought and action may simply come too little, too late. Think, for example, of a soldier who jumps swiftly out of the way of a bullet shot in her direction. However, most emergencies are not so urgent as to preclude all deliberation. While in some cases, deliberation, although possible, only amplifies the emergency—think of endless deliberations about how best to address ongoing global warming—in many others, a necessarily limited amount of deliberation is critical to an appropriate response.[9] Consider the case of the military surgeon who (to some extent at least) must weigh pros and cons before proceeding to an emergency surgery, or the squad leader who ought to assess (at least minimally) risks to her soldiers as well as chances of success before launching a rescue operation of an endangered captured squad member. Before attacking other territories in self-defense and risking the killing of innocents, one would also hope that state-governments deliberate at least minimally. With a traditional separation of powers model, a full legislative debate may not be possible given time constraints. The executive branch of government might be the only organ in a position to devise and implement a quick enough response. Yet some deliberation still ought to take place. Thus, in all these cases, an important question for emergency responders will no doubt be how urgent the emergency really is. And here again, when the degree of urgency is significantly unclear, authoritative determinations may be needed. However, this additional level of complexity must not detract us from the basic moral salience that an urgency-constrained set of opportunities for the avoidance of serious harm will often have in fact.

5.2 Second-Order Basic Emergency Challenges

5.2.1 Emergencies, Foreseeability, and the Importance of Prevention

The account just given of the moral significance of emergencies, and the challenge of assessing it correctly, may seem intuitively accurate—at least when considered in the context of emergencies that could not reasonably be expected. In such situations,

[9] This point is eloquently articulated in Scarry (2011).

one typically needs to take action swiftly while the stakes are high. Available opportunities for thought and action are fixed by immediate circumstances, and emergency responders have no relevant influence over them given the suddenness of the situation. They are often confronted with the emergency due to no unreasonableness of their own, and are constrained to act on reasons as they encounter them at the time. But what about emergencies that are intentionally provoked or are somehow predictable, and whose occurrence may have been avoided, or characteristics mitigated, by preventive measures or altogether different choices of prior conduct? Confronting an emergency may be an urgent necessity at time t_2, in the sense of being impossible to evade, but what if one could have ensured at antecedent time t_1 that the emergency would not occur, or would occur in a mitigated form? Although they have no direct bearing on what constitutes an emergency from a conceptual standpoint, such challenging questions seem to speak to the moral salience of emergencies. In fact, some theorists even assume that the only genuinely significant emergencies are those "such that people are not likely to plan to be in that kind of situation" (Gert 2004, 72–73).[10] What should one make of such assertions?

Early deliberations, advanced planning, and anticipatory decisions are central features of rational activity. However, to be able to plan ahead appropriately and behave accordingly, one must often have some idea of the circumstances for which to plan. It might be objected that one can always insure or save money so as to be better able to deal with whatever situation may arise, without knowing anything about it in advance. However, the strength of this objection is relatively limited with regard to emergencies. There are many cases of emergencies in which no amount of money could make up for the serious harm incurred due to lack of planning and preparation—e.g. (from the standpoint of an individual) violated sexuality and associated psychological trauma, ruined reputation, unremediable physical handicap, death or (from a more collective perspective such as that of a state) collapsed institutions and mass casualties. Furthermore, the fact that money *could* have been saved or insurance bought in anticipation of any possible emergency does not itself entail that these precautions are the most reasonable or morally appropriate, compared to others. Foreseeability matters because it tends to affect the ways in which we can respond to emergencies by shaping our opportunities to prepare for them appropriately or avert them altogether.

As I suggested earlier, the idea of emergency implies a lack of real alternatives if serious harm is to be avoided. It implies necessity or, in Harry Frankfurt's words, "something that [one] cannot help needing" (Frankfurt 1984, 6). In cases in which one could have planned ahead, but in which one did not want or care to plan, it seems more problematic than in reasonably unexpected cases to characterize the situation as one in which there were no alternatives, no opportunity to "help needing." Although such characterization might be possible at time t_2 immediately preceding the emergency, if it was not at earlier time t_1 or t_0, the fact that the predicament

[10] Note that Gert recognizes that emergencies that are unlikely to be foreseen are only a "kind of emergency situations" and, thus, that emergencies can very well be foreseeable.

was somewhat foreseeable may give a related claim of emergency an aura of bad faith. The necessity of harm avoidance at time t_2, although indisputable, may be felt to be, as it were, less genuine or less authentic. One way of articulating this thought in rational terms is to note that in some situations the first-order reasons supplied by an emergency—linked primarily to its urgency and gravity—may be excluded, either fully or partially, by second-order considerations related to the emergency's foreseeability. Commentators sometimes seek to put this point across by arguing that those who embark on a course of action that foreseeably leads them to confront a preventable emergency implicitly consent to, or assume, inherent risks. Others speak of forfeiture, either full or partial, of the ability to invoke the emergency as a justification for otherwise impermissible behaviour.

This is not to say that foreseeability always changes emergency responders' moral position in this way. Surely, emergency responders ought not anticipate and seek to prevent every single emergency that could conceivably be foreseen. If this were the salient threshold, all circumstances in which what I have termed "unexpected emergencies" could arise would have to be pre-emptively managed or averted, leading to a constant worry that everything that goes up may one day come down and generate an emergency! Regress in foreseeability would be infinite and make life and attempts at societal governance very daunting indeed. Therefore, to understand the relevance of foreseeability to the moral salience of emergencies, we must consider when the first-order reasons supplied by these emergencies—that is, the urgent needs to avert or mitigate serious harms—may lose some of their rational standing due to foreseeability-related concerns. In the following sections, I consider some key issues that are either directly or indirectly relevant to such a challenging and crucial assessment.

5.2.2 When Emergency Prevention Matters

The answer to the general second-order puzzle about emergency prevention introduced in the last section depends, I think, on a multivariable case-by-case evaluation of: the risk of emergency—that is, the probability that serious harm will urgently need to be avoided or minimized, and its discoverability; the gravity of the harm at risk; the value of the course of action that would expose agents to the emergency; and the burdens and costs associated with emergency prevention or avoidance. As a rule of thumb, the higher the risk of emergency, the more serious the harm at risk, the lower the value of the course of action leading to exposure, and the lighter the burden of emergency prevention, the more one ought to seek to pre-empt, avoid, or minimize an emergency (and vice-versa). Thus, the significance of foreseeability may be a matter of degree. I have already spoken about the question of harm, but more must now be said about the other variables just introduced, as well as about their interrelations. I discuss them in turn.

5.2.2.1 Risk and Risk Assessment

That the notion of risk is intrinsically connected to the concept of emergency should come as no surprise. It is only when there is a risk of serious harm that a need to react urgently to avert or minimize its materialization can arise. The risk of harm primarily at issue is the actual risk of harm in the physical world, as opposed to the epistemic risk as it may be estimated by emergency responders. This is because they are susceptible to making mistakes as well as neglecting probabilities, and morally significant risks are facts that exist irrespective of neglect and mistakes. For example, in emergency settings, ignorance of relevant facts, unaccustomed thinking, and emotions like fear may cause rational judgment to go awry. This is not to say that emotions cannot be rationally helpful in emergencies, as in the case of the soldier driven by raw fear to jump out of the path of a rocket fired in his direction. I am also not denying that moral agents may be trained to assess and handle risks better, or that epistemic aids such as safety standards may be fixed *ex ante*. However, even with all the precautions in the world, errors in judgment may still happen: excusable errors that do not ultimately reflect badly on their makers perhaps, but errors nonetheless.

Here, one should not make the mistake of discounting too readily the significance of the knowableness, or discoverability, of a risk, and the challenges it may pose to potential emergency responders. Indeed, it seems reasonable to think that, in order to weigh for or against prevention, risks must be epistemically available as grounds for action. This conclusion seems to flow from the fact that an agent cannot take steps to avoid harm unless he or she is able to foresee it, based on the evidence available. Of course, even for those who seek to know a risk, knowledge may be elusive for reasons such as lack of resources, concealment (think of military strategy), scientific uncertainty (think of complex risks of pandemics), or absence of time between the creation of the risk and its materialization. However, even if a risk is not fully cognizable, it must at least partially be in order to be capable of grounding avoiding action. Knowableness seems to matter to a risk's moral significance, and this means that even partial knowableness might sometimes affect it (or, at least, affect our evaluation of what responses are morally acceptable in the circumstances).[11]

Another important feature of the risk *problématique* that has captured the attention of emergency theorists is its temporal scope. Just as the risks of emergencies may be ephemeral, they may also persist over time. Some speak of long or chronic emergencies, even of permanent ones.[12] There is some truth to such accounts, but

[11] In fact, as Victor Tadros (2011, 217–240) points out, evidence-relative risks, as opposed to genuine fact-relative or merely belief-relative risks, may sometimes play an even more morally significant role than I allow here.

[12] Cf. Rubenstein (2007) on chronic challenges linked to underdevelopment and lack of access to basic resources in some parts of the world. Another oft-cited example is the so-called ever present threat of terrorism. Given the pervasive nature of the phenomenon (however defined), it is often argued that the fight against it is urgent, although likely to be very long and unlikely to be won like a traditional war. Some even argue that it cannot terminate definitively.

various qualifications are in order. Let us consider a paradigmatic example of what could be described as a "prolonged emergency": a protracted all-out war. From the perspective of a state, the risk of harm may be continuously high, calling for relentlessly urgent planning and vigilance. The same might be said from the point of view of soldiers and civilians in or near combat zones. However, instead of focusing on the general risk of harm, the emphasis could also be placed on the multiple risk*s* of emergenc*ies* that constitute the so-called prolonged emergency. If, from the perspective of soldiers and civilians, their life is constantly at risk, it is at least partly because of a succession of more discrete emergencies in the form of ground attacks, air raids, and so forth. In the case of states, combined attacks may heighten the risk of harm, but a war in the traditional, perhaps non-nuclear, sense is also constituted by successive campaigns, missions, and offensives, each of which may be more or less probable, urgent, and harmful to the recipient. Therefore, all-out wars may be said to be "states of emergency" for both individuals and states—in the sense of periods in which the occurrence of many specific and successive emergencies is highly probable. This way of thinking about prolonged emergencies permits the breaking up of overall risks into manageable units that rational agents may seek to address based on each unit's distinctive characteristics. This approach also accounts for the possibility that some emergencies may lead to further emergencies, in the sense of causally increasing their probability. For example, a series of attempted political killings may set a civil war in motion.

Such thinking about wars, civil conflicts, and other so-called prolonged emergencies presents them as situations that are significantly more morally complex than many of the moral and political theorists who write about them assume.[13] This complexity should not be avoided. Understanding the plethora of discrete moral dilemmas with which prolonged emergencies are typically rife is essential to making complete sense of them, and the challenges they pose. Different individuated emergencies, with different urgency and harm components, may justify different individuated responses than those for which the overall character of the war is otherwise thought to account. Of course, the converse is also possible. Various individuated risks will sometimes conflict in ways that make certain emergency responses—that would be justified if taken on their own—unjustified, all things considered. Indeed, emergencies will sometimes conflict with each other. With such moral assessments, the devil tends to be in the details, and we must not shy away from addressing these details, as well as the compounded complexities they entail for emergency prevention. The flipside of this argument is that situations involving long-term risks that, from the relevant standpoints, are devoid of such discrete and successive urgent moments should likely not bear the label ''emergency" at all. As one social commentator notes in respect to such situations: "How long might the Long Emergency last? A generation? Ten generations? A millennium? Ten millennia?

[13] More recent engagements with just war theory, such as McMahan (2009), go some way towards remedying this methodological defect by focusing on the responsibility of various individual players in wars. Yet, the background unit of evaluation tends to remain whether one is fighting in a just or unjust *war*, as opposed to more discrete campaigns or missions.

Take your choice. Of course, after a while, an emergency becomes the norm and is no longer an emergency" (Kunstler 2005, 8).[14]

Is this account of prolonged emergencies too cut and dry? What about enduring second-order risks of first-order risks of emergencies? Here, I am referring to the possibility of meta-emergencies, at times also dubbed states of emergency, about the incidence of emergencies—that is, emergencies that might be grounded in second-order risks that currently unknown and unascertainable first-order risks of emergencies may come into being (or secretly already are). The portrait of protracted warfare that I painted earlier assumed the existence of more or less ascertainable first-order risks that could be addressed at face value. Although it is true that some risks may be ascertainable in this way, it is the nature of war that not all will be. Part of the art of warfare are tactics like strategizing in secret, coming up with unprecedented maneuvers, taking one's enemy by surprise, demoralizing it through shock and awe, and infiltrating it on all conceivable fronts. Sometimes, all that is known (and knowable) from an attacked party's perspective are the generic types of risks that could possibly arise in times of war, such as food shortages, civil disorder, treason, bombings, and so forth. It may be uncertain whether these or other potential threats will ever come into being and, in the eventuality that they do (or already secretly are), it might be impossible to anticipate where, when, and how. Yet, it might also be the case that if preventive action were not taken immediately, it would be too late to react if and when those threats materialize. Therefore, to avert or minimize harm, states may need to make decisive and immediate provisions for such uncertain possibilities, as rough and approximate as these provisions may be, given the information at hand.[15] Governments may need to impose rules seeking to tie up possible loose-ends while there is still time, and instruct immediate preventive food rationing, tighter checks on people with access to sensitive information, public order policies like curfews, if nothing more drastic. They may also need to establish in advance who would be responsible for evaluating and responding to different kinds of potential urgent needs, and develop coping routines and mechanisms. Such pre-emptive approaches to uncertainty are often grouped under the headings of "contingency planning" or "emergency preparedness."

[14] A similar type of criticism could be directed at states such as Brunei Darussalam, Swaziland, Israel, Egypt and Syria that claimed for many decades—and in many cases still claim—to be facing perpetual emergencies justifying resort to harsh "emergency powers" to control their populations. See e.g. Reza (2007). The further point to be made, of course, is that unjust regimes treating insurgent movements as emergency threats to their subsistence generally fail to acknowledge that they themselves—*qua* unjust regimes—can generate prolonged emergencies that may, or should, be resisted (given their more harmful character overall). No doubt, the "Arab Spring" uprisings of 2011 against oppressive dictatorships ruling through "emergency measures" are a sobering reminder of this possibility.

[15] Such cases are distinguishable from emergencies characterised by temporally distant, though highly probable harm, in which we *know* that if we do not act now, harm will likely result at a later point. Consider for example the case of early Canadian settlers who needed to store food in the summer to be able to survive the winter. In so-called meta-emergency cases, it is uncertainty as to the very existence of serious risks that is the operative variable. Note, however, the reservations expressed in the next paragraph.

Earlier, I suggested that, all else being equal, the lower the risk of emergency, the less reason one has to bother with it. Could we not argue that second-order risks are too hazy and remote ever to warrant special attention? As I tried to show in my discussion of warfare, such a general conclusion would seem counter-intuitive. Although, at a given point in time, first-order risks of emergencies may be unknown and unascertainable, the likelihood (or second-order risks) of such risks ever coming into being (or already secretly existing) may be somewhat foreseeable given the context. Once we accept this line of reasoning, it becomes easier to see how probabilities about the very incidence of risks of emergencies may point to a need for immediate contingency planning, and have moral implications. What is debatable here is not whether so-called second-order risks matter, but whether we are in fact dealing with a different, or ''meta,'' kind of emergency. Arguably, a first-order risk and a second-order risk of the incidence of this risk are merely facets of the same overall risk. The overall risk may be very low or hazy but, as I observed earlier, to the extent that it is at least partially knowable, even if only through experience, it may matter morally. In the same way as a virtual certainty, a mere possibility of emergency may be balanced with other variables—such as the gravity of the harm risked, the value of the activity exposing one to the risk, and the burdens of prevention—to assess the reasonableness of prevention. Therefore, so-called second-order risks of emergencies can also contribute to shaping the landscape of reasons for action applicable to emergency responders (including counter-emergency planners) and, in the same breath, the morally justified courses of action available to them.

5.2.2.2 The Value of Risky Behaviour

Some courses of action are clearly better or worse than others. Contrast the declaration of an unjust war of aggression with an innocent state's wholly proportionate and necessary self-defensive response to a threat or, perhaps even more revealing, with a humanitarian intervention aimed at rescuing a foreign minority group from genocide. In fact, activities are sometimes so valuable that the value of engaging in them outweighs associated risks. The risks incurred while driving at 140 km/h through a 100 km/h zone may not be outweighed by the value of arriving at a party on time, but they may well be by that of getting one's pregnant wife in painful labor to the maternity ward in due course. Accordingly, the value of a risky activity may influence which associated risks, including risks of emergencies, ought to be proactively avoided and which may reasonably be discounted.

The value of an activity does not necessarily depend on the good consequences of its performance. Risk taking may itself form part of what makes an activity worth pursuing. Just as virtually any human activity involves some risk, intrinsically valuable risk-taking is a pervasive feature of human life. Think, for example, of the value of love affairs, business ventures, extreme sports or, in the international realm, the value of standing up for a friendly nation in the face of adversity. Many

such activities have their intrinsic value enhanced by their inherent riskiness. Their riskiness counts against them consequentially, but in favour of them non-consequentially.

Of course, I am not hereby denying that riskiness may also count *against* an activity non-consequentially (*i.e.* irrespective of deleterious consequences). Criminally prohibited inchoate wrongs, such as attempted arson or murder, or conspiracies, reflect this fact, and there is little doubt that the moral position of perpetrators may be affected accordingly.[16] International inchoate wrongs, such as attempted aggressions, fall in the same category. My aim here is to emphasize that the intrinsic value (and, to a lesser extent, intrinsic disvalue) of some risks is an oft-neglected second-order factor in practical thinking about emergencies—a factor that may have significant ramifications for the reasonableness of different ways of planning for and responding to them.

Now, it is noteworthy that the (positive) value to be derived from risk-taking on both consequential and intrinsic accounts might only justify disregarding risks beyond some minimal level of care and restraint. A purported war hero ought to use appropriate and reliable equipment, and ensure levels of fitness and skill sufficient to allow her to carry out her heroic acts. A state-government ought to do at least some basic risk assessment before standing up for another nation in a way that could trigger a bloody international conflict that would significantly harm its members. Such minimal thresholds of care pertain to the domain of value to the extent that they represent a balance between valuable and non-valuable aspects of activities—risks, consequences, and others—in a way that makes the realization of value possible through the activity. The tension inherent in these thresholds comes out perhaps most clearly in cases of valuable activities for which it is unclear whether any amount of precaution could even minimally bring the inherent risks of emergencies under control. An incurable coronary patient, who also happens to be an army doctor, may increase her life expectancy by living a life of contemplation and quiet inactivity. However, what if she wants to continue working hard at her stressful career in order to serve her country and fellow soldiers, even at the risk of a sudden and fatal heart attack? What about the members of a persecuted minority group who insist on going out in the open to work, shop and, perhaps also, try to influence general public opinion, despite the presence of a dangerously racist and militarized majority?

In both cases, it may be reasonable to proceed with the more dangerous path, despite the deep loss of control over related risks that such a decision would entail. With respect to the coronary patient, there is no easy answer, and her options may well be incommensurable. Each may have its costs and benefits both consequentially and intrinsically speaking, resulting in two very different, yet rationally undefeated, life paths. With respect to the minority group members exposing

[16] As noted by Suzanne Uniacke (1994, 83–84), "in the case of a hijacker holding hostages who kills in self-defence in a shoot-out with police, it very clearly makes a difference to the normative background that the hijacker has foreseeably and *wrongfully* created the circumstances in which he is endangered."

themselves to the dangerously racist majority, prudence may recommend restraint. However, many may also share Tom Sorell's intuition that the risks of emergencies at issue are risks for which the relevant "preventive treatment is whatever cures racism, rather than avoiding action on the part of [those who may be victims of it]" (Sorell 2002, 24).[17] Since it is unlikely that individual minority group members would be in a position to cure racism by themselves, could they not reasonably disregard related risks and continue with their activities in the morally tainted environment? Some may anticipate the prudent mother's objection, imploring her daughter to avoid all contacts with the oppressive majority if she has the opportunity to do so, perhaps adding that if she goes ahead and gets into trouble, she will have courted it. This is where the question of value comes into play. One way of rationalizing Sorell's intuition in the face of the mother's objection is to posit that the value of being able to go out in the open freely to work, shop, and carry on with life is so important as to make it reasonable to discount racism-related risks. Here again, it might be a matter of incommensurable choices for those involved, assuming that they indeed have safer alternatives. They might reasonably choose to be prudent and avoid confrontation, or be courageous, affirm their beliefs, and face the potential consequences. In such cases, then, it may be that the moral salience of foreseeable risks of emergencies must not only be assessed in terms of their consequential and intrinsic (dis)value. The reasonableness of responses to such risks may also need to take into account the value for potential emergency responders of deciding for themselves how to respond.

At this point, it bears emphasizing that, unlike the minority group members taken individually, their political leadership or the government of the state in which they reside may be in a position to do something about the occurrence of the unwelcome incommensurable dilemmas they face. When this is the case, they may have a correspondingly strong reason, if not a duty, to do so. Other states may also have strong reasons to demand change and, sometimes, even to intervene in more direct ways. Thus, the preventability of emergencies, assessed in light of the burdens associated with it, also seems to matter a great deal to how emergencies should feature in our practical thinking and behavior, as well as in that of our governments.

5.2.2.3 Burden of Emergency Prevention and Emergency Preventability

The relevance of foreseeability to the moral salience of emergencies depends largely on their preventability, because foreseeability is a precondition for purported harm prevention and, as such, loses much of its significance when prevention is impossible. To put the matter crudely, what is unavoidable remains unavoidable whether it is foreseeable or not. That being said, the preventability of an emergency is rarely

[17] This intuition applies to a much broader array of daily situations, such as threats of terrorism for air travelers or risks of rape for women who interact with men. Should airplane users stop flying, and women seek to seclude themselves from men?

an all-or-nothing issue. Thus, it is often possible to inquire whether one should try to take preventive action, or if it would be reasonable to refrain from doing so. We have seen that, generally speaking, considerations of harm seriousness, risk, and value of emergency exposure are relevant to such assessments. Yet, the picture would not be complete without adding that emergency prevention can be more or less burdensome and costly, and that this feature also has a direct bearing on its reasonableness.

One way of framing the issue might be to say that, all else being equal, the more a foreseeable emergency is preventable, the less reasonable it is to carry on without seeking to prevent or minimize it (and vice-versa). This rule of thumb warrants some important qualifications. First, the nature of the precautions that would be necessary to prevent the emergency must be taken into account. According to Tom Sorell, one should consider whether the requisite precautions would be "morally harmless and undaunting."[18] This formulation, perhaps too lacking in nuance, begs for an explanation that Sorell does not explicitly provide. Presumably, what he has in mind is that if the burden or cost of emergency prevention is onerous, it may entail unreasonable trade-offs. For example, if steps necessary for emergency avoidance are all-things-considered more harmful than the harm to be avoided, and more risky than the risks already incurred, the case for prevention will likely be defeated. Consider the case of soldiers in the field who would need to kill their prisoners of war to eliminate limited risks of mutiny, or the controversial example of resort to torture as—allegedly—the only means of ascertaining some remote risks of emergency. Consider also a situation in which the amount of scarce resources that would need to be diverted to prevent a localized emergency would endanger a larger segment of population even more seriously. The complexity of preventive measures, their chance of success, their side-effects, their costs to the actor, as well as other related situation-specific factors may further compound the equation, weighing either for or against prevention.

Given these intricacies, it helps to think in terms of degrees of preventability. One may conceive of situations in which harmless and relatively straightforward preventive measures could significantly *reduce* the probabilities of emergencies and the amount of harm risked. However, within the same parameters, measures that would virtually *eradicate* those risks may require excessively onerous trade-offs. In such circumstances, taking preventive steps with a view to mitigating emergencies, short of preventing them completely, may be a reasonable option. For example, conducting thorough searches of every commuter using the London Tube, as well as their every piece of luggage, might virtually eliminate risks of bombings inside stations and trains. However, such an approach could be deeply invasive and likely cause massive congestion, if not cause the entire city to grind to a halt. Sweeping schemes of this kind may be contrasted with more moderate and practicable mitigation strategies such as CCTV surveillance, regular police patrols, clearly marked and accessible emergency exits, public reminders not to leave belongings unattended,

[18] Sorell "Morality and Emergency" (n 28) 23.

and the removal of strategically located litter bins and other concealed spaces. As an author fittingly remarks, it is clear that "safety [*i.e.* the prevention of risks] has a price, in terms of its impact on other things we want or value, and there are limits to what we are prepared to pay" (Wolff 2006, 415). So not only might there be minimal thresholds of reasonable care, as I postulated in the last section, there may also be maximal ones. Insofar as this is the case, reasonableness will likely lie somewhere within that range, unless additional considerations such as specific duties of care further complicate the appraisal.

Of course, the possibility of wholly unavoidable and unmitigable emergencies cannot be excluded. However, one should not make the mistake of confusing them with emergencies that are inescapable by specific agents, but preventable by others. In 2005, Mumbai endured a record monsoon season that saw almost a litre of rainfall within 1 day. More than a thousand people were estimated killed, and, as is often the case, the poor were hardest hit, with the highest concentration of deaths found in the city's slums. Could slum dwellers not have minimized the devastating impact of the monsoon, especially since it is a predictable yearly occurrence (albeit usually in a weaker form)? It is possible that, at a rudimentary level, they could have better prepared themselves and their immediate environment. However, given their negligible financial means and lack of access to expertise and material resources, it is nearly certain that they were unable to do anything significant on their own, including relocating. Thus, for scores of urban poor, a flood emergency could well seem unavoidable. Yet, just as in the case of the member of a minority group confronting endemic racism, this is a perspectival observation which does not imply that, all things considered, nothing could be done to prevent the emergency.

The Indian government at all levels, in tandem with local corporations and NGOs, could contribute to the design and construction of infrastructures capable of absorbing and draining heavier rainfalls. If the Indian state was too poor to build sufficiently effective infrastructures, other states, as well as foreign corporations and individuals, were undoubtedly in a position to aid in providing the necessary funds, resources, expertise and skills. When individuals, collectivities and institutions face emergencies that they are unable to prevent on their own, it is often the case that third parties may assist in preventing or minimizing risks. The question then becomes who is in a better position to act preventively and who, if anybody, should bear the burden, or part of the burden, of doing so.[19] Unsurprisingly, this line of questioning tends to loom large in international debates about the legitimacy of United-Nations-led economic and military operations, as well as more state-driven humanitarian interventions aimed at pre-empting bloody conflicts in foreign lands.

What about situations in which harm cannot realistically be avoided at all?[20] Such cases warrant independent treatment. As I already suggested when discussing

[19] On task-efficacy as grounding a duty to govern (and, perhaps, a duty of assistance more generally), see Green (2007).

[20] I resort to the admittedly vague and general concept of "realistically unavoidable harm" to prevent any distracting digression into metaphysical debates about "can" and "could."

the concept of emergency, the existence of such a situation is conditional upon the existence of harm that can be averted or significantly minimized. This relation holds true because emergency is a category of practical thought and, as such, presupposes sufficiency of means to address it. Why? As Anthony Kenny remarked many years ago, "the purpose of practical reasoning is to get done what we want," so that a practical category presupposes a reachable goal (Kenny 1966, 73).[21] If no realistic means would be sufficient for the goal to be achieved, the situation falls outside the scope of the relevant practical category. In the cases that concern us, if nothing can realistically be done to prevent or minimize serious harm, then there is no necessity to take action, and thus no emergency.

One might seek to counter this point by appealing to hypothetical examples of unavoidable and unmitigable harm, like that of a giant asteroid about to collide with Earth. Do we not envisage such *in extremis* threats of (*ex hypothesi*) unavoidable harm as generalized emergencies? In my view, conflicting intuitions may come from the fact that when we imagine such extreme situations, we also tend to envision the social chaos that would likely accompany them. Amidst pre-Armageddon civil disorder, there might be countless threats of avoidable harm calling for urgent reactions, amounting to a general state of emergency. Yet, the imminent and all-encompassing destruction to be brought about by the giant asteroids does not per se constitute an emergency. In a counterfactual world in which such pervasive harm is avoidable or mitigable, its threat would no doubt constitute one. However, where it is realistically unavoidable, a would-be emergency turns out to be a tragedy. In fact, one does not need to think of such far-fetched examples to appreciate the tragic nature of inescapable threats of unavoidable harm. A tragedy arises whenever serious harm becomes unpreventable, as assessed from the standpoint of agents who cannot realistically do anything about it. Large earthquake scenarios involving rescuers too far-off to reach victims in time and a shortage of effective means of rescue, cases of slum dwellers trapped in flooding rooms with no help in sight, instances of non-deflectable missiles fired in error, are perhaps even more vivid illustrations due to their prior historical occurrence and possible recurrence. Of course, this is not to say that inescapable threats of unavoidable harm cannot constitute reasons for action for helpless agents. However, if they do constitute reasons, these reasons will at most be of an expressive nature—*e.g.* reasons for engaging in futile rescue attempts as a means of symbolically demonstrating how much one cares, reasons for telling others one last time what they mean to us, reasons for offering to sacrifice oneself first as a mark of solidarity.

To summarize, emergencies matter at a basic, first-order level and pose the practical challenges they do because of the potential for serious harm that they represent and the urgency of the responses needed to avert or minimized that harm. The contours and materialization of such broadly defined featured may require determinations, which relevant authorities may be in a position to provide legitimately.

[21] Of course, ''what we want'' should be read to refer to what we rationally want, as opposed to raw desire.

Even then, though, the justification of responses to emergencies will frequently also depend on second-order considerations, including how foreseeable, valuable, and preventable these emergencies were in the first place.

5.3 Some Concluding Remarks About Public Emergencies

Other features of emergencies may also be morally salient, and affect how they may be addressed. I want to conclude by saying a few words about one such feature—namely, the public dimension that many emergencies considered in this chapter happen to share. Bernard Williams once wrote that the "first political question" is "the securing of order, protection, safety, trust, and the conditions of cooperation," and that the modern state presents itself as its solution (Williams 2005, 3). State-governments, it is widely believed, exist primarily to provide these public goods. Depending on whom one asks, the list is sometimes more or less extended to also include a plethora of other goods and values that markets are thought ill-suited to fulfil. I have argued elsewhere that public emergencies are emergencies that interfere, or threaten to interfere, with the provision of public goods—with international and civil wars perhaps constituting paradigmatic examples (Tanguay-Renaud 2009). Thus, public emergencies are the emergencies towards which state-governments should first and foremost turn their attention, and which they should primarily seek to prevent.

However, in striving to address such emergencies, governments must be careful not to become part of the problems they exist to solve. In Williams's words, they must not resort to terror. So, while they may need to resort to coercion to achieve their legitimate ends, they should always strive to do so consistently with the harm principle, or some similar principle of toleration. That is, their invasions of personal autonomy for the suppression of public emergencies (themselves morally costly) should not be disproportionate to the moral gains on offer. Since governments tend to have significant *de facto* authority over the governed and to be in a position to modify their normative position in radical ways by altering their legal duties, rights, and permissions, they must also strive to do so in accordance with the ideal of the rule of law. In other words, governments must strive to exercise their authority in ways that are clear, prospective, open, stable, consistent, and general, so that the governed are able to conduct their lives in ways that avoid the stigma and disruption of the adverse consequences that can follow from the breach of governmental rules and directives. These moral constraints are *additional* to the ones considered earlier. They apply to state-governments in particular, in virtue of their social power, authority, and the means they employ to discharge their legitimate functions.

Admittedly, these additional constraints are not absolute. For example, governments may sometimes be justified in leaving behind the rule of law for the sake of other, weightier values that can only be vindicated through more flexible means.

Yet, if governments are to avoid becoming part of the central problems they exist to solve, such decisions must not be taken lightly. Thus, although some public emergencies will be unpredictable in their timing, such unpredictability does not mean that rules that are clear, prospective, etc., cannot be ready for when these emergencies occur. Countless jurisdictions possess a myriad of "stand-by" or "backup" emergency laws waiting to be used to deal with public emergencies.[22] These laws are not applicable in normal times because the factual situations to which they relate do not exist, but they remain available on the statute books. Similarly, in most legal systems, swift legislative action often makes it possible to introduce *ad hoc* measures that accord with the rule of law to deal with unforeseen emergencies that are not covered by stand-by legislation. These institutional facts may seem somewhat banal, but they are often ignored in discussions of the particular challenges posed by public emergencies and appropriate means of prevention. In fact, even when *ad hoc* legislation is impossible, governments are still often in a position to provide general notice to the governed that their normative position is about to be changed in unforeseen ways, by declaring a "state of emergency" publicly. Thus, they may at least be able to comply partially with the rule of law.

Although I can only discuss cursorily such additional considerations tied to public emergencies, I mention them in conclusion to contextualize my earlier discussion of *basic* challenges posed by emergencies. In other words, more work needs to be done if a complete picture of the governance challenges posed by *public* emergencies is to be provided.

Notice also that most of my discussion in this chapter has been about emergency justifications, as opposed to excuses that emergencies may provide for impermissible behaviour. However, as I remarked before, many emergencies demand that those who address them assess the parameters of their predicament hastily. Many emergencies also trigger strong emotions. Thus, emergency responders' interpretation of the situations they are facing can at times be distorted, and lead to unjustified wrongful responses on their part. Yet, if their unjustified wrongful responses are understandable in the circumstances, should they be excused in ways that allow them to avoid blame and cognate consequences? This is not the place for a discussion of standards of excuses. Note, however, that while it is often acknowledged that individual emergency responders may be entitled to emergency-related excuses, many theorists resist the ascription of such excuses to the state.[23] One important ground for this reluctance is the thought that excusing states for wrongs perpetrated in emergencies may send the wrong message, and invite an erroneous perception amongst governmental officials that no more is demanded of them in such situations. Given the high stakes typically involved in public emergencies and the importance of moral constraints like the ones just discussed, such "emergency thinking" slippages are not to be encouraged. This is not to say, of course, that state-governments may

[22] See e.g. Emergencies Act, R.S.C., 1985, c. 22 (4th Supp.) (Canada), online: http://laws-lois.justice.gc.ca/PDF/E-4.5.pdf.

[23] See e.g. Simester (2008, 299–304).

never be excused. Yet, it is at least a strong reason to think that appropriate standards for state excuses for wrongdoing in emergencies may be significantly higher than those applicable to ordinary individuals. This, I think, is the grain of truth in the assertions of those who would want us to restrict "emergency thinking" to the clearest cases of emergency, at least insofar as governmental responses are concerned.

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