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ARTICLE

Extra-Positive Legal Measures: Returning to First Principles in the Emergency Powers Debate

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This article will argue that, in times of emergency, executive power should be limited by fundamental constitutional principles rather than by positive law. Measures taken by states during the COVID-19 pandemic have raised questions of state power in times of emergency to a global level of relevance not seen since the War on Terror. In response to these state measures, it may be intuitive to take the view that the courts should strictly uphold the rule of law. However, this article will argue that, in limited circumstances, the executive is justified in acting contrary to positive law if this action is judicially determined to be consistent with fundamental constitutional principles. This article will use Oren Gross' controversial "extra-legal measures model" as a foil. Where this article's model proposes that the state act outside the positive law, but within the ambit of fundamental constitutional principles, Gross' model calls for the executive to act outside of the legal order altogether. This article draws on a wide range of sources from the emergency powers debate, including seminal War on Terror cases, a case study of Abraham Lincoln's suspension of habeas corpus during the civil war, and the work of John Locke.

I Introduction

The rise of COVID-19 has raised questions of state power in times of emergency to a global level of relevance not seen since the War on Terror. Governments have imposed restrictions on the lives of citizens to curb the spread of the virus. In *Borrowdale v Director-General of Health*, the High Court stated that, in times of crisis, "keeping a weather eye on

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the rule of law assumes particular importance".[1] The notion that the rule of law should be strictly upheld in times of crisis is an intuitive view, but not the only position possible.

Over time, theorists have advanced the position that the state should be allowed to free itself from the constraints of positive law when this is necessary for the public good. This article will evaluate and defend a position in this tradition. This article argues that, in limited circumstances, the executive is justified in acting contrary to positive law if this action is judicially determined to be consistent with fundamental constitutional principles.

I propound my own model, which will use Oren Gross' extra-legal measures model as a foil. Whereas my model proposes that the state act outside the positive law, but within the ambit of fundamental constitutional principles, Gross' model calls for the executive to act outside of the legal order altogether. My model seeks to capture the benefit of Gross' model while avoiding its flaws.

In Part II, I will evaluate Gross' model and identify several problematic assumptions within it. In Part III, I will draw on historical sources, mainly the work of John Locke, in an attempt to correct these assumptions and develop a model of extra-positive legal measures. This will lead to an exposition and defence of what I term "the fundamental principles model". In Part IV, I will describe this model and defend it from objections.

II Contemporary Extra-Legal Measures Models and Their Flaws

A *The Grossian picture of extra-legal measures*

Extra-legal measures models locate executive action in emergencies outside the law. Gross' model "calls upon public officials to act outside the legal order while openly acknowledging their actions".[2] The motivating force behind Gross' model is to allow the executive to act flexibly and free from the constraints of "business-as-usual" models while preventing emergency norms from seeping into normality by establishing a clear distinction between legality and extra-legality.[3] Whether an extra-legal action is legitimate depends on whether it is ratified or denounced ex-post by "the people" acting through legal and political systems.[4]

Two main arguments are generally advanced in defence of extra-legal measures models. The first is derived from the limits of rule-following in times of emergency. As Clement Fatovic argues, "the unique and irrepressible nature of emergencies" renders each emergency distinct and makes the law ineffective in dealing with it.[5] Thus, in Locke's terms, where "a strict and rigid observation of the laws may do harm", it may be necessary to empower the executive to act outside the law, or against it, for the public good.[6] The need for extra-legal measures is born from the limits of time and language. No piece of

1 *Borrowdale v Director-General of Health* [2020] NZHC 2090, [2020] 2 NZLR 864 at [291].
2 Oren Gross "Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?" (2003) 112 Yale LJ 1011 at 1099.
3 At 1097.
4 At 1099.
5 Clement Fatovic *Outside the Law: Emergency and Executive Power* (Johns Hopkins University Press, Baltimore, 2009) at 2.
6 John Locke "The Second Treatise of Government: An Essay Concerning the True Original, Extent, and End of Civil Government" in *Two Treatises of Government* (Mark Goldie (ed), Everyman, London, 1993) 115 at [159].

law can contemplate every possible situation and the executive has the unique ability to act quickly in a situation where time is limited.

The second principal argument, advanced by Oren Gross, is the danger of exceptional powers granted to the executive seeping into normality. Once the executive is legally granted exceptional powers, there is an inherent risk that these powers "will become an integral part of the regular legal system".[7] Gross provides a number of examples of this occurring.[8] For instance, the State of Israel has been in a continual state of emergency since 1948. The state of emergency, which has recently been used by Israel to issue regulations which respond to COVID-19, was originally conceived as a temporary measure in response to the War of Independence.[9] However, the emergency powers gradually seeped into the everyday life of Israel and are now "a permanent feature of the life of the state".[10] Powers, given the force of law, have a powerful inertia. By locating emergency measures totally outside the law, it becomes far more difficult for the executive to claim the continued application of emergency powers in moments of normality.[11]

These are persuasive arguments, but the following section will offer two critiques of Gross' model. First, it implicitly assumes a utilitarian theory of ethics. Secondly, Gross' model does substantial harm to the ideal of the rule of law, specifically due to its focus on ex-post ratification.

B *Normative flaws in Gross' model*

(1) Implied utilitarianism: Gross' unstated assumption

Gross and other theorists who advance models that emphasise executive power sometimes fall into the trap of implied utilitarianism. It can be somewhat tempting to think of emergency situations as simple questions of balancing the rights of one against the well-being of many. Thus, Gross locates the basis of extra-legal measures in "the greatest good for the greatest number of people".[12]

A similar trend can be seen in the defence of executive power by Eric Posner and Adrian Vermeule. Although not extra-legal measures theorists, they define liberty and security as "valuable goods that contribute to individual well-being or welfare" with the goal being "to choose the joint level of liberty and security that maximizes the *aggregate welfare* of the population".[13]

The problem with presupposing utilitarianism is not that utilitarianism is wrong per se. Rather, a utilitarian view of emergencies rests on a set of normative assumptions that are difficult to justify. First, there may simply be other relevant normative concerns at play. Rather than well-being existing as the only relevant metric, there may be a whole nexus of rights, duties and virtues at play in an emergency. Take Robert Nozick's view of "rights-as-

7 Gross, above n 2, at 1072.
8 At 1069–1096.
9 Elena Chachko and Adam Shinar "Israel Pushes Emergency Powers to Their Limits" (28 April 2020) The Regulatory Review <www.theregreview.org>.
10 Gross, above n 2, at 1074.
11 At 1133.
12 At 1023.
13 Eric A Posner and Adrian Vermeule *Terror in the Balance: Security, Liberty, and the Courts* (Oxford University Press, New York, 2007) at 38 (emphasis added).

side-constraints" as an example.[14] Nozick would disagree that liberty is a goal or end to be 'maximised', rather, the liberty of others directly limits what goals or ends we may pursue.

Of course, it is possible to present a philosophical argument for utilitarianism and against other theories of ethics. However, in the legal context of a modern, pluralist society, there may be a range of views amongst the citizenry, some of which perceive certain things as intrinsic moral goods. Utilitarianism cannot properly account for value that cannot be reduced to the happiness of the majority, such as the values of tikanga Māori. Although a coherent philosophical defence of utilitarianism might be possible, pluralist states are arguably bound by a broader duty to adopt an underlying moral framework that can accommodate a wide range of conceptions of ethics.[15]

The second problem with presupposing utilitarianism is that it rests on the dubious assumption that all moral goods are commensurate. Utilitarianism assumes that all goods can be reduced to well-being and traded directly against one another. For example, Posner and Vermeule present a binary view of liberty and security, where increasing one value decreases the other and the goal is to find the 'optimal' balance between both.

Stephen Holmes has criticised the empirical validity of models based on trade-offs, which he refers to as "hydraulic models", where increasing one value automatically decreases another.[16] Reality is far more complex. We may be faced with trade-offs between different forms of security, for example, where limited resources require only fighting one enemy. Further, there may be situations where guaranteeing liberty will increase security, for example, by ensuring domestic morale.[17] Situations like Gross' "ticking bomb scenario", where it is necessary to torture one person to stop a bomb going off, are overly simplistic and unlikely to occur in reality.[18]

However, beyond the problem of trade-offs being hydraulic, the underlying assumption of commensurability is questionable. As Isaiah Berlin argues, it may be the case that "goods" like liberty and security do not share a common standard of measurement and cannot be traded off against one another.[19]

A final problem with utilitarianism in an emergency context is that calculations of aggregate well-being do not take distributive inequalities into account. In an emergency, the state must decide how to allocate the costs of an emergency. For example, this could mean imposing the cost of imprisonment on a suspected terrorist in order to protect the majority from the costs of an attack.

Mark Stein, a utilitarian philosopher, states that "[u]tilitarianism, as a theory of distributive justice, tells us to help those who can most benefit, those who can gain the greatest increase in welfare."[20] This definition leads to distributive inadequacy in two situations. First, emergencies are likely to involve interactions between majorities and ethnic, religious, or political minorities.[21] Secondly, emergencies necessarily involve the distribution of rights and duties. In both cases, utilitarianism would hold distributive

14 Robert Nozick *Anarchy, State, and Utopia* (Basic Books, New York, 2013) at 28–29.

15 See John Rawls *Political Liberalism* (Columbia University Press, New York, 1993).

16 Stephen Holmes "In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror" (2009) 97 Cal L Rev 301 at 317.

17 At 318–323.

18 Gross, above n 2, at 1097.

19 Isaiah Berlin "Two Concepts of Liberty" in Henry Hardy and Roger Hausheer (eds) *The Proper Study of Mankind: An Anthology of Essays* (Pimlico, London, 1998) 191 at 237–242.

20 Mark Stein *Distributive Justice and Disability: Utilitarianism Against Egalitarianism* (Yale University Press, New Haven, 2006) at 1.

21 See *Korematsu v United States* 323 US 214 (1944).

inequality to be justified if aggregate utility was increased. This is highly problematic given the plight that vulnerable minorities face.

In this section, I have not shown that utilitarianism is entirely undesirable. Rather, I have argued that there are good reasons to suppose that it cannot be assumed that utilitarianism is the correct moral framework to govern situations of emergency. Later in this article, I will present a competing ethical framework derived from classical natural law theory.

(2) The rule of law

Despite its outward appearance, Gross' extra-legal measures model is motivated by the rule of law. Gross seeks to preserve the ideal of the rule of law by limiting its operation in certain cases.[22] Thus, to defeat Gross' argument, it is not enough to simply say that he violates the rule of law. Rather, it is necessary to show that Gross' model is more harmful to the ideal of the rule of law than it is beneficial.

(a) Discarding the identity thesis: The harm of Gross' model to the rule of law

The crucial problem with Gross' extra-legal measures model is that it seeks to create a legal "black hole"—a "lawless void" which undermines the idea that all state actions should be legally authorised.[23] As David Dyzenhaus argues, Gross' model threatens Hans Kelsen's "identity thesis", the idea that the state is totally constituted by law and that state action outside of law has no authority.[24]

Put another way, this is a problem of justification. Gross must give an account of what gives extra-legal measures valid coercive authority. Of course, Gross may simply bite the bullet and say that extra-legal measures do not require any legitimacy from within the legal order. However, biting the bullet in this way raises the burden on Gross to show that the damage done by his model to the rule of law is justified. If another theory arose that combined the benefits of Gross' theory with a justification that did away with the need to bite the bullet, then this theory would be preferable, by Gross' own logic.

In response to this problem, Gross seems to argue that extra-legal measures can be made legitimate after the fact through political processes. The following section will critique this idea.

(b) Ex-post ratification: The lost value of ultimate vindication

The starting point for any discussion of the ratification of extra-legal measures must be the point of view of those who are at risk of being harmed by the executive. Whether or not an executive action is "ratified" is also a question of whether victims of executive violence will have access to justice. The vulnerability of potential victims of executive action gives them a right to demand that any process of ratification of such action is just and certain. The key question for Gross must be whether his model of ex-post ratification satisfies this demand.

22 Douglas Casson "Emergency Judgement: Carl Schmitt, John Locke, and the Paradox of Prerogative" (2008) 36 Politics & Policy 944 at 949.

23 David Dyzenhaus "The Rule of Law Project" (2016) 129 Harv L Rev Forum 268 at 268.

24 David Dyzenhaus "*Schmitt v. Dicey*: Are State of Emergency Inside or Outside the Legal Order" (2008) 27 Cardozo L Rev 2005 at 2010.

Evaluating ex-post ratification is difficult given how widely Gross casts the net of which processes may ratify executive actions. For Gross, ex-post ratification may be political (for example, the re-election of a particular party), legal (for example, the exercise of discretion not to prosecute) or social.[25] Gross argues that one process may "correct" another,[26] characterising his model as a process of deliberation where all members of society take moral responsibility for the actions of the executive.[27] This may suggest that Gross intends ex-post ratification to function as a model of systemic deliberation.[28] The political and legal systems participate in a dialogue that engages every actor and agency composing them. Out of this dialogue emerges a legitimate determination, with different actors "correcting" the judgements of others.

This kind of emergent deliberative decision-making may present a valid solution to *political* problems; however systemic deliberation fails to adequately solve *legal* problems. This is because deliberative systems lack any coherent rule of recognition to determine what will constitute a legitimate and final result. While legal systems may never be certain as to matters of doctrine, the legal system is designed to guarantee finality in individual cases. This is particularly important given the importance of ensuring that vulnerable victims of executive action receive a final determination of their grievances.

The counterargument to this might be that I am wrongfully conflating two issues. Gross might argue that the matter of whether victims receive a final determination is a different question from whether society ratifies an executive action. It could be that there can be both a certain answer for the victims of executive action and a more gradual process of systemic deliberation for the general question of ratification. The former might be a judicial process, and the latter might be a matter of pure social fact. For example, it might be that victims of executive action successfully win a civil suit against the state and receive damages. However, subsequently, there might be a significant negative media response to the outcome of the case and a subsequent Act of Indemnity passed by the legislature. In this scenario, the victims receive a certain remedy while the system as a whole arrives at a different result.

The problem with this counterargument would be that it ignores the fact that a key importance of legal certainty is the social dignity provided by final vindication. Vindication may have a range of meanings in a legal context, including the marking of a wrong,[29] and the affirmation of constitutional values.[30] In the context of claims against the executive, it has a key function of publicly restoring dignity to a victim of state abuse.[31]

Under the status quo, courts are the final, if not infallible, determiners of individual cases.[32] Once a citizen receives a judgment, and they have exhausted their right to appeal, they are entitled to treat their individual case as resolved. This finality has a distinctive

25 Oren Gross and Fionnuala Ní Aoláin *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press, Cambridge, 2006) at 138–139.

26 Gross, above n 2, at 1115.

27 At 1129.

28 See Jane Mansbridge and others "A Systemic Approach to Deliberative Democracy" in John Parkinson and Jane Mansbridge (eds) *Deliberative Systems: Deliberative Democracy at the Large Scale* (Cambridge University Press, Cambridge, 2012) 1.

29 *Taunoa v Attorney General* [2007] NZSC 70, [2008] 1 NZLR 429 at [367].

30 *Vancouver (City of) v Ward* [2010] 2 SCR 28 at [28].

31 See *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent's Case*].

32 See HLA Hart *The Concept of Law* (2nd ed, Oxford University Press, Oxford, 1994) at 141.

value in allowing those who have suffered wrongs to have their rights decisively vindicated by an authoritative source.

Under Gross' model, the value of this vindication will be undermined. Obviously, on a practical level, the finality of court decisions could still exist in Gross' world. In a narrow sense, a given claim will still be decided with finality by the courts. However, the underlying ethos of ex-post ratification undermines the value of vindication. This is because the primary value of vindication is social: a public and authoritative recognition that one's rights were violated. If a society embraces ex-post ratification as an ethos, thereby denying the authoritative finality of judicial decisions, the social value of vindication through the courts will be greatly diminished. In reducing the value of vindication, Gross' model threatens the dignity of victims of state abuse. As such, given the unique importance to this debate of those at the receiving end of state violence, ex-post ratification is an undesirable method of legitimating extra-legal measures.

(c) Is a valid justification possible?

In the above sections, I have shown that Gross' model is normatively flawed on two main levels. First, it rests on an unwarranted assumption of utilitarianism. Secondly, it significantly undermines the rule of law and fails to save itself via ex-post ratification. In the following sections, I argue that we can construct a model of extra-positive legal measures that avoids these problems while achieving Gross' benefits by returning to the work of Locke.

III The Historical Roots of Extra-Legal Measures

A *Lockean prerogative*

An important intellectual forerunner of Gross' theory of extra-legal measures is John Locke's theory of prerogative. While Gross cites a range of sources for his view, including the actions of Abraham Lincoln and Thomas Jefferson, Locke's argument has particular importance due to his status as an authoritative figure within the liberal tradition.[33] Locke argues that there are many things "which the law can by no means provide for", legislation is limited by time and the inherent constraints of language.[34] As such, it will sometimes be necessary for the executive to act without positive legal authorisation or even against the explicit letter of the law in order to preserve "the public good".[35]

Gross, in his article introducing the extra-legal measures model, interprets Lockean prerogative as the ability to act outside the law for the social good.[36] Gross pictures prerogative as the power to utilise an extra-legal normative principle to override the law. He argues that Locke sees the good of the people as "a functional litmus test" for the evaluation of prerogative, rather than a legal norm that legitimates it.[37]

However, this is an incomplete view of Locke. For Locke, the public good—the norm which legitimates prerogative—has a legal character. Locke states "public good and advantage" shall in some cases require that "the laws themselves should in some cases

33 Gross, above n 2, at 1106–1111.
34 Locke, above n 6, at [159].
35 At [160].
36 Gross, above n 2, at 1103.
37 Gross and Aoláin, above n 25, at 120.

give way" to "this *fundamental law* of nature and government".[38] For Locke, the public good was a fundamental law that trumped positive law. Due to the executive's position of being able to act quickly in the face of legislative delay, the executive "has by the *common law of nature* a right to make use of [its power] for the good of the society".[39] Moreover, this prerogative power is limited by "*a law antecedent and paramount* to all positive laws of men".[40] It is therefore wrong to say that, in acting beyond the scope of positive law, the executive enters a purely extra-legal space. Rather, derogation from ordinary law took place within a higher legal order.

This higher legal order is natural law and Locke's concept of "the public good" is rooted in natural law theory.[41] Locke's model of natural rights was founded on self-ownership, the idea that all people have liberty and ownership over their own person as a result of God's will.[42] The state derived its legitimacy from a social contract between free individuals in a state of nature.[43] When the state is formed, citizens entrust their natural rights and powers to it. The state has no power outside of the sum of power entrusted to it by the citizenry. The state is a fiduciary trust, lacking intrinsic authority apart from that derived from the natural rights of the governed.[44]

It is therefore overly simplistic to argue that prerogative was exercised in a purely "extra-legal" space. For Locke:[45]

> … the state of exception, though outside the scope of positive law, is still a *legal space*, because it is governed by natural law, i.e., by the law that, as much as possible, political society and its members should be preserved.

The end of government—the protection of the rights of citizens—trumps positive law. The power of the executive to act "for the benefit of the community" exists because the executive serves "the trust and ends of government".[46] As a corollary of this, the prerogative of the executive is also limited by the end for which it exists. The prerogative can go no further than the preservation of the common good.

Gross and Fionnuala Ní Aoláin argue that Locke supports a presumption in favour of the correctness of executive action.[47] This is based on Locke's statement that:[48]

> … prerogative can be nothing but the people's *permitting* their rulers to do several things of their own free choice where the law was silent, and sometimes too against the direct letter of the law, for the public good and their *acquiescing* in it when so done.

However, this statement is more accurately characterised as a general account of what makes prerogative legitimate under the social contract. It should not be read as a presumption to be applied in particular circumstances. Indeed, in the very same

38 Locke, above n 6, at [159] (emphasis added).
39 At [159] (emphasis added).
40 At [168] (emphasis added).
41 See Marc de Wilde "Emergency Powers and Constitutional Change in the Late Middle Ages" (2015) 83 Law Hist Rev 26.
42 Locke, above n 6, at [27].
43 At [22].
44 Marc de Wilde "Locke and the State of Exception: Towards a Modern Understanding of Emergency Government" (2010) 6 Eur Const Law Rev 249 at 263.
45 At 256.
46 Locke, above n 6, at [161].
47 Gross and Aoláin, above n 25, at 121.
48 Locke, above n 6, at [164] (emphasis added).

paragraph, Locke describes how the extent of permissible prerogative was to vary with the virtue of individual princes.[49]

Marc de Wilde argues that Locke presupposes a certain priority amongst natural rights: the right to the survival of the people trumps their rights to liberty and property.[50] However, this reading is not entirely correct. The only reason that a rational being gives up the liberty of the state of nature is to "better … preserve himself, his liberty and property".[51] By giving up the anarchic liberty of the state of nature, citizens in a Lockean society actually extend their liberty, as they no longer have to contend with the insecurity of a stateless society. Thus, the priority that Locke presupposes is not a hierarchy where the survival of the people trumps liberty and property. Rather, the limitation of liberty by prerogative, in order to secure the survival of the people, is justified only because in the absence of the state there can be no liberty.

B *Extra-positive legal measures: Emergency powers in the classical natural law tradition*

Locke was not alone in the way that he saw prerogative. De Wilde argues that Locke forms part of a tradition of natural law thinkers stretching back to Thomas Aquinas, who were interested in "develop[ing] a specific *legality of the exception*, i.e., a set of objective criteria that were used to determine the lawfulness of the executive's emergency actions".[52]

(1) Non-utilitarian common good

From Cicero's maxim *salus populi suprema lex esto*[53] to Gross' contemporary writings, the notion of "the public good" is at the heart of many models of emergency power.[54] As already stated, for Gross and others, the public good is conceived in a utilitarian manner. However, this is different from the historical positions of Locke and Aquinas. For Aquinas, the public good was "a truly *common* good, not reducible to the good of [individuals] taken separately or merely summed". [55]

Locke, like modern authors, viewed the public good in terms of security and preservation.[56] However, he perceives security as the long-term preservation of rights, rather than aggregate utility. This view is derived from the state's role as a trustee of natural rights.[57] Locke shares with other theorists a view that security consists of the preservation of the state. Yet, for Locke, the state is only valuable insofar as it continues to exist as an institution that upholds rights. Thus, the public good was intimately linked to the long-term preservation of rights.

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49 At [164].
50 De Wilde, above n 44, at 260.
51 Locke, above n 6, at [131].
52 De Wilde, above n 44, at 256 (emphasis in original).
53 "The good of the people is the supreme law".
54 Cicero *De Legibus Book III* (Francis Barham (translator), Edmund Spettigue, London, 1842) at 3.8.
55 John Finnis "Aquinas' Moral, Political, and Legal Philosophy" (16 March 2021) Stanford Encyclopaedia of Philosophy <https://plato.stanford.edu> (emphasis in original).
56 De Wilde, above n 44, at 259.
57 Locke, above n 6, at [22]–[24].

(2) The natural law limits of emergency powers

Just as natural law justified extra-legal measures, so too did it limit them. Fatovic writes that Lockean prerogative remained in "strict compliance with the moral and legal order that matters most".[58] The limitation on prerogative was the corollary of its justification; prerogative could go no further than the good of the community required.[59] Here "the good of the community" is a question of long-term rights preservation, rather than majority wellbeing.

Although both Locke and Aquinas thought natural law limited the power of rulers, they did not think it was possible to hold rulers subject to these limits. Aquinas argues that the sovereign is not "exempt from law" in the sense of the law not applying to it, rather the sovereign cannot realistically be subject to its coercive power.[60] However, the sovereign is still held ultimately subject to the natural law by God.[61] Locke held a similar position in ordinary circumstances, though he saw the people as holding a right to revolt against tyranny.[62]

Thus, for classical natural law theorists, the natural law was morally binding but practically unenforceable. Modern extra-legal measures thinkers have often continued in this tradition, by arguing that extra-legal measures cannot be subject to straightforward legal limitation. Consequently, Gross presents his theory of ex-post ratification, and Fatovic argues for "virtue" as a limiting device on executive power.[63]

The view that natural law is unenforceable is illogical. On a natural law view, the end for which society is constituted whether it be the common good, human liberty or something else, is the ultimate source of state authority. If the executive is not subordinate to the ultimate source of its own authority, all talk of natural law becomes mere rhetoric.

IV Extra-Positive Legal Measures: The Fundamental Principles Model

A *From natural law to fundamental constitutional principles*

Lockean thought presents solutions to the two problems discussed in Part II(B). First, considering the historical view of natural law thinkers allows us to move beyond the constraints of implied utilitarianism. Thinkers like Locke and Aquinas had a much deeper conception of the role of the state than the preservation of aggregate utility. Thus, Locke and Aquinas give judges and theorists access to a more expansive normative framework, which can potentially accommodate a wider range of views from among the population.

For example, on a Lockean understanding, "preservation" would still be considered a component of the public good, but preservation would only be valuable insofar as it facilitated the long-term preservation of rights. Liberty and security cease to be capable of being straightforwardly traded-off against one another. Rather, "[t]he life of the nation is

58 Fatovic, above n 5, at 41.
59 At 40.
60 J Budziszewski *Commentary on Thomas Aquinas's Treatise on Law* (Cambridge University Press, Cambridge, 2014) at 403–404.
61 At 403–404.
62 Locke, above n 6, at [203]–[209].
63 See Fatovic, above n 5, at 253–276.

not coterminous with the lives of its people."[64] The life of the nation is the preservation of its institutions and, above all, its values.

The historical, natural law view of the public good also helps to solve Gross' problem of justification. The answer that Aquinas and Locke would give to Dyzenhaus' invocation of Kelsen's identity thesis would be that extra-legal measures are legitimated by normative principles that have the status of law. Moreover, as all law has its ultimate roots in these principles, Lockean prerogative represents a return to first principles, rather than an abandonment of law itself. In contrast to Gross' justification, this natural law justification of Lockean prerogative is ex-ante rather than ex-post.

However, a consequence of this natural law approach is that we can no longer truly say that emergency measures are located entirely outside the legal order. We might be able to keep calling a fundamental principles model "extra-legal" if we drew a distinction between "constitutional" and "legal" powers.[65] However, for the sake of simplicity, it is better to abandon the label "extra-legal" and instead describe emergency powers as "extra-positive" legal measures, meaning outside the positive law but within the legal order.

While it may be the case that the natural law picture is unpalatable today, the notion of inalienable rights is popular and widely accepted. Further, certain modern authors have endorsed varying versions of the notion that substantive and procedural principles are embedded in the constitutional order.[66]

Indeed, theorists who argue against the idea of extra-legal measures often do so by invoking the notion of unwritten normative principles which are embedded in the legal order. Dyzenhaus contrasts "naïve positivism", which views law narrowly in terms of legal rules determining outcomes with no human discretion, with his own view that law is "a complex set of norms, principles, and practices".[67] Furthering this point is the example of Louis Freedland Post, who was an Assistant Secretary of Labour in the Woodrow Wilson administration.[68] Post sought to subject decisions to deport statutorily-authorised deportations of anarchists to constitutional principles because "he was bound to exercise [his] authority in accordance with the fundamental legal principles to which he took his legal order to be committed".[69]

What we call "constitutional principles" serves the same role as what Aquinas and Locke called natural law. That is, they provide the end for which government exists, the "rule and measure" of all state action. These principles both allow and limit action outside of the positive law. It is necessary to contrast this Lockean position with Dyzenhaus' position.

Dyzenhaus argues that, even in times of emergency, judges have a constitutional duty to uphold the rule of law in the face of legislative or executive challenges.[70] Dyzenhaus characterises the rule of law as substantive, distinct from mere "rule by law". Similar to Lon Fuller's idea of the "inner morality of law", Dyzenhaus argues that the principles of

64 *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 [*Belmarsh Detainees*] at [91] per Hoffmann LJ.

65 See Casson, above n 22.

66 See, for example, Ronald Dworkin "Law's Ambitions for Itself" (1985) 71 Va L Rev 173; and *Riggs v Palmer* 22 NE 188 (NY 1889).

67 David Dyzenhaus "Emergency, Liberalism, and the State" (2011) 9 Perspect Politics 69 at 74–77.

68 At 74.

69 At 74.

70 David Dyzenhaus *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press, Cambridge, 2006) at 67.

the rule of law are "structural principles of the integrity of the legal order".[71] However, for Dyzenhaus, these principles are substantive as well as procedural.[72] From this description, we can see that there are important similarities between Dyzenhaus' model and the Lockean theory of extra-positive measures, as demonstrated in this article. I agree with Dyzenhaus that there are certain substantive principles that constrain state action.

The fundamental difference between Dyzenhaus' view and my model is that I take the position that fundamental principles empower as well as constrain the executive. Actions outside the positive law are sometimes just, if the actions accord with the principles that both Dyzenhaus and this article agree exist. Indeed, if we accept the fundamental importance of these substantive principles, this conclusion seems to follow naturally.

B *A case study in fundamental principles reasoning: Lord Hoffman in* Belmarsh

Lord Hoffmann's dissent in *A v Secretary of State for the Home Department* (*Belmarsh Detainees*), while not explicitly Lockean by any means, is a good example of reasoning based on fundamental principles. For Lord Hoffmann, "threatening the life of the nation" meant a threat to the continued existence of the United Kingdom as an entity, rather than a mere threat to the life of citizens.[73] Moreover, Lord Hoffmann identified the essential properties of the United Kingdom as a social organism as "its own political and moral values".[74] By appealing to the "instincts and traditions" of the British people, Lord Hoffmann rooted his argument in constitutional principles that emerged from the history of the United Kingdom.[75]

Lord Hoffmann then identified the kinds of cataclysmic situations where extraordinary measures might be justified, such as the Spanish Armada and World War Two.[76] These situations were not only imminent threats to the existence of the United Kingdom, they threatened the essence of Britain as a political community defined by its liberal traditions, institutions and values.[77] Thus, as with Locke, Lord Hoffmann identifies the preservation of the state with the preservation of its role as a rights-protecting institution. Moreover, for Lord Hoffmann, protection of fundamental rights is not just a reason for the state's existence, it is an essential property of the state's nature. In other words, a totalitarian Britain would cease to be Britain.

Lord Hoffmann's judgment also highlights the value of fundamental principles reasoning in preserving the role of the court in the face of executive arguments based on expediency or military necessity. As utilitarian reasoning depends on the pure question of allocating costs and benefits, the actor with the greatest empirical knowledge or competence will always win. Once the costs and benefits of each course of action are known, the outcome will be decided.

In line with this, Thomas Poole argues that the executive attempts to reduce issues before the court to questions of "risk", that is, the likelihood that a threat to security will be actualised.[78] In doing so, the executive adopts the framework of implied utilitarianism

71 At 10.
72 At 2.
73 *Belmarsh Detainees*, above n 64, at [91].
74 At [91].
75 At [86].
76 At [91].
77 At [91].
78 Thomas Poole "Harnessing the Power of the Past? Lord Hoffmann and the Belmarsh Detainees Case" (2005) 32 J Law Soc 534 at 553.

and attempts to locate the debate within a domain of "special knowledge" relative to that of the courts.[79] If all that matters is the calculation of risk or utility, the judiciary will always defer to the executive as it is the executive who has greater access to empirical knowledge and data essential to decision-making in emergencies.

Poole portrays Lord Hoffmann's dissent as a counterpoint to the attempt of the executive to locate the debate within a domain of special knowledge.[80] By relying on constitutional principles, Lord Hoffmann grounded the case in the "shared store" of British constitutional values, rather than the privileged world of military intelligence.[81] This argumentative move by Lord Hoffmann has two effects. First, it grounds the debate in a subject matter that the general public can understand and comment on. Secondly, it grounds the debate in an area where the courts arguably have particular expertise over the executive, as we generally trust courts to authoritatively determine issues of constitutional principle.

Lord Hoffmann levels the playing field of institutional competence, by moving the debate into an area where the courts have a normative expertise that matches the executive's empirical expertise. As already shown, the flawed nature of utilitarianism means that shifting the debate into a more complex normative terrain is a positive. Thus, Lord Hoffmann's judgment highlights the potential of fundamental principles reasoning to overcome the executive dominance created by implied utilitarianism.

C *A description of the fundamental principles model*

Putting the previously discussed historical ideas into practice, governments should be both empowered and limited by fundamental principles in times of emergency. Political measures may play a role in this process of regulation, particularly in fostering a "culture of justification" which sustains the substantive and procedural components of legality.[82] Although they lie outside of the positive law, emergency powers based on fundamental principles are legal in character. As such, we must look to the courts to play a large part in their enforcement.

The test for a valid extra-positive legal measure might look something like this:

(1) Is this measure evidently necessary to preserve the common good? If so, to what extent is this the case?
   (a) *Imminence of Crisis:* Is there a crisis that is "immediate, imminent, and impending"?
   (b) *Evidence of Crisis*: Would the imminent and threatening nature of this crisis be recognisable to a reasonable citizen living in a democratic society?
   (c) *Threat to the Common Good by Crisis:* Does this crisis threaten the continued existence of democratic, rights-respecting society or the rights of a large number of citizens?
   (d) *Necessity of Measure:* Is there no realistic alternative to the measure in question? Is the measure proportionate and rationally connected to the resolution of the crisis?

79 At 552.
80 At 553–554.
81 At 554.
82 Dyzenhaus, above n 67, at 76.

(2) To what extent does this measure violate fundamental constitutional norms?
   (a) To what extent does this measure violate fundamental procedural norms (for example, due process) embedded in the constitutional order?
   (b) To what extent does this measure violate fundamental substantive norms (for example, the right to life) embedded in the constitutional order?
(3) Given that the preservation of society is only valuable if society continues to guarantee the rights and freedoms of a liberal democracy, is (1) sufficient to justify (2)?

If this test, or a similar one, was satisfied, positive law would not be sufficient to limit the executive's actions. Conversely, even if a right did not exist in positive law, that right would be applied to limit the executive if it elected to act extra-legally. For example, even in a state where the right to privacy is not guaranteed by any explicit constitutional provision, it might still be applied as a fundamental substantive norm.

A key element of (1) is the criterion of "evident necessity". This is an idea derived by de Wilde from the work of Locke.[83] "Necessity" requires that the measure taken is truly necessary. This necessity must also be "evident": universally apparent and obvious.

A modern statement of this Lockean idea of evident necessity was given in Murphy J's dissent in *Korematsu v United States*, where it was stated that a public danger must be: "'immediate, imminent, and impending' as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger".[84]

D *Case study two: Lincoln's suspension of habeas corpus*

In order to gain a deeper understanding of the fundamental principles model, it is useful to apply it to Abraham Lincoln's suspension of habeas corpus as President during the American Civil War. Lincoln, via a range of orders which gradually increased in scope, purported to suspend the writ of habeas corpus for various Confederate soldiers and supporters. Though his actions were indemnified by the Habeas Corpus Suspension Act 1863, their legal status before this Act is questionable.[85]

Lincoln's actions are of particular relevance to this article for two reasons. First, the scale of the crisis to which they were responding creates a prima facie case of the type of situation where the fundamental principles model might apply. Secondly, Gross himself discusses Lincoln's actions during the Civil War as a possible example of extra-legal measures, albeit with the caveat that other interpretations are possible.[86] This article argues that another plausible interpretation is the fundamental principles model.

There are, broadly speaking, three ways of interpreting the legal basis of Lincoln's actions during the Civil War:

(1) Lincoln's actions were an example of the use of inherent executive power, within the scope of the Constitution's Suspension Clause;
(2) Lincoln's actions were an example of extra-legal measures; and
(3) Lincoln's actions were an example of extra-positive legal measures, as they were justified by constitutional principles.

83 De Wilde, above n 44, at 262.
84 *Korematsu*, above n 21, at 234 per Murphy J.
85 Amanda L Tyler *Habeas Corpus in Wartime* (Oxford University Press, Oxford, 2017) at 170; and Habeas Corpus Suspension Act, 12 Stat 755 (1863).
86 Gross, above n 2, at 1110–1111.

If we rely only on Lincoln's own words in an attempt to discern his intent, the answer is inconclusive. At times, Lincoln refers to the necessity of his decision to "call out the war power of the Government", generally characterising his actions as within the scope of the constitution.[87] However, as Amanda Tyler argues, Lincoln's constitutional arguments were likely incorrect as the Suspension Clause is more coherently regarded as a legislative power.[88]

Lincoln also justified his use of extraordinary powers to Congress in a manner suggestive of Gross' extra-legal measures model and ex-post ratification:[89]

> ... whether strictly legal or not, [extraordinary measures] were ventured upon under what appeared to be a popular demand and a public necessity; trusting then, as now, that Congress would readily ratify them.

However, while Gross' interpretation is entirely possible, it is also feasible to interpret Lincoln's actions according to the fundamental principles model.

At times, Lincoln refers to a duty that seems to be rooted in the constitutional order, but not authorised by any strict law. In relation to overriding habeas corpus, he states: "would not the official oath be broken if the Government should be overthrown when it was believed that disregarding the single law would tend to preserve it?"[90] The President's Oath of Office does not explicitly authorise the overriding of habeas corpus, but does require that the President "preserve, protect and defend the Constitution".[91] Thus, Lincoln may have been arguing that he possessed a general duty of protecting the constitutional order and that this duty could justify the overriding of individual laws in times of emergency. Expanding this interpretation, we may view Lincoln's actions as not authorised explicitly by any specific constitutional provision but justified by principles rooted in the constitutional order.

This interpretation is one way to resolve the apparently contradictory nature of Lincoln's statements. That is, we may regard Lincoln as viewing his actions as "strictly"[92] or "technically"[93] illegal but within the scope of his valid authority. In this sense, the President's "war powers" were not specifically justified by the Suspension Clause, but were implicitly mandated by the fundamental role of the President to defend the constitutional order. This bears similarity to the notion of Lockean prerogative; the executive's power of prerogative flowed from its fundamental duty to ensure the preservation of political society.

Further, Lincoln justifies his measures in the manner contemplated by (1) of the test described above. First, Lincoln repeatedly emphasises the overwhelming necessity of his actions.[94] If it did not respond, the United States risked being "too weak to maintain its own existence" and it was therefore necessary for the state "to resist force employed for its destruction by force for its preservation".[95] Lincoln refers to the war as a "people's contest" and explicitly states that he believes that the "plain people understand and

87 Abraham Lincoln "July 4, 1861: July 4th Message to Congress" Miller Center <millercenter.org>.
88 Tyler, above n 85, at 159.
89 Lincoln, above n 87.
90 Lincoln, above n 87.
91 United States Constitution, art I, § 1, cl 8.
92 Lincoln, above n 87.
93 Daniel Farber "Lincoln, Presidential Power, and the Rule of Law" (2018) 113 Nw U L Rev 668 at 691.
94 Lincoln, above n 87.
95 Lincoln, above n 87.

appreciate" the fundamental freedoms at stake.[96] The danger of the Civil War was obvious to any rational, rights-respecting person; it was a threat to which a response was *evidently necessary*.

Fundamentally, Lincoln's notion of the preservation of the Constitution aligns with Locke's understanding of the common good. Lincoln emphasised that the Union's cause was a struggle to maintain "that form and substance of government whose leading object is to elevate the condition of men; to lift artificial weights from all shoulders".[97] Lincoln describes the Civil War as a test of the "experiment",[98] raising the question of whether a republic could preserve its law and internal integrity.[99] Thus, for Lincoln, as for Locke, the value of preserving the United States was intrinsically connected with preserving the liberty of its people and its institutions.

Accordingly, Lincoln's logic can be plausibly interpreted in a Lockean way that aligns with the fundamental principles model. However, one issue with a fundamental principles interpretation is the absence of the courts in Lincoln's process. Lincoln acted relatively unilaterally, potentially contemplating legislative approval, but without regard for judicial scrutiny. This point must be conceded; the lack of involvement of the judiciary does separate Lincoln's actions from the model described in this article.

However, aside from this difference, the underlying logic of Lincoln's actions is clearly in accordance with the logic of the fundamental principles model. Lincoln's actions can be seen as evidently necessary to preserve the common good (1), and as actions which balanced the fundamental constitutional principles of the rights to habeas corpus and individual liberty (2). Ultimately, Lincoln made the determination that (1) was sufficient to justify (2), given the overwhelming need to defend individual liberty (3).

While Lincoln's actions may have been justified in essence, the executive certainly exceeded its authority in certain aspects of its application. For example, Lincoln's orders led to the arrest by military officials of thousands of Confederate civilians.[100] It is precisely in cases like this that the necessity of involving the judiciary in the application of the fundamental principles model can be seen. It must be ensured that the scope of the executive's actions goes no further than what the preservation of the common good necessitates. Rather than applying the business-as-usual model, as in *Ex parte Milligan*, it is necessary for a court to hold the executive to a different standard: the legality of the exception.[101]

E *Objections and responses*

This article has discussed how a model based on fundamental constitutional principles answers the two problems of implied utilitarianism and damage to the rule of law, that comes with Gross' picture of extra-legal measures. However, I must also prove that my model solves these problems without sacrificing the benefits of Gross' model: flexibility and preventing emergency from seeping into normality. In this section, it will be argued that the fundamental model does capture these benefits, and is resistant to potential objections.

96 Lincoln, above n 87.
97 Lincoln, above n 87.
98 Lincoln, above n 87.
99 Lincoln, above n 87.
100 Tyler, above n 85, at 168.
101 See *Ex parte Milligan* 71 US 2 (1866).

(1) Flexibility

As already noted, one of the central benefits of extra-legal measures models is their ability to utilise human judgement to develop a quick response to a crisis, where positive law is too limited to provide guidance. This article acknowledges that there may be some situations where acting according to fixed procedure is necessary.[102] However, situations that truly threaten the nation's life, such as invasion or civil war, are more pressing and less foreseeable than emergencies with predictable patterns, like fires or medical crises. Thus, they cannot be subject to recurring patterns and fixed procedures.

However, it might be argued that the model in this article takes away too much flexibility from Gross' theory, by introducing fundamental principles as a constraint. This is where this article's model parts ways with executive primacy theorists. The best argument for extra-legal measures is not "the executive needs to violate rights more often than it does". It is that fixed positive law often lacks the flexibility needed to accommodate the scope of executive action necessary in emergency circumstances. If extra-legal action is to be understood as a defence of the constitutional order, the state should not be restrained by administrative technicalities but equally, it should not abandon respect for rights. Regard for rights and the inflexibility of law are too often conflated, largely because rights are usually enshrined in statute. The key is to devise a model of emergency action that continues to provide fundamental respect for rights but does so in a way that is flexible enough not to constrain the executive.

A fundamental principles model achieves this by getting to the heart of the matter without getting caught in technicalities. The model described in this article fixates immediately on the normative substance of the issue, freeing the executive from the technical constraints of narrowly drafted laws but holding it to the standard of fundamental norms. While this may lead to some loss of flexibility, this will only be in areas where a special concern for rights is needed. In such areas, a lack of flexibility is desirable.

(2) Seepage and grey holes

Another objection to a fundamental principles model might be that it fails to prevent emergency norms seeping into legality. It might be argued that, by declaring that the state of exception is a legal space, the model described in this article dilutes the very idea of law. It might be argued that this model, in giving the executive the licence to pretend that its actions are legally authorised, is nothing more than the realisation of Schmitt's condemnation of liberalism, a Dyzenhausian legal "grey hole" where law is only a mirage.[103] However, a model based on principles will actually encourage more public questioning of emergency actions.

What makes a veneer of legality so powerful is the ability of law to make debate inaccessible to the public. Debates over emergency powers are fundamentally normative. While technical legal issues may be at stake, the underlying, real question is always one between the duties of the state and the rights of citizens. Yet, law has a tendency to steer debate away from the normative and into the procedural and formal. Jenny Martinez

102 Holmes, above n 16, at 301–302.
103 Dyzenhaus, above n 23, at 268.

demonstrates that, following 9/11, the United States Supreme Court used a variety of procedural means to apparently avoid debating issues of substance.[104]

However, even when substantive normative issues are raised, the law has a tendency to frame discussion in a manner that focuses on formality. As Jeremy Waldron argues:[105]

> A legal right that finds protection in a Bill of Rights finds it under the auspices of some canonical form of words in which the provisions of the Bill are enunciated.

The procedural and formalistic framing of normative issues prevents the public from being able to meaningfully contribute to debates concerning them.

However, the sort of fundamental principles jurisprudence envisioned in this article will not have the same effect. On a fundamental principles model, the constitutional principles used to justify and challenge state power will still have the quality of law. However, they combine this legal quality with a purely normative quality. Though constitutional principles are rooted in the legal order, they lack the technicalities of ordinary legal discourse. Even if they are not legal scholars, most citizens have a strong sense of what their country ought to stand for. As Poole argues, constitutional principles may constitute a shared store outside of the privileged access of the executive.[106]

Indeed, normative reasoning based on constitutional principles may seem spurious to many citizens who have a different interpretation of the underlying principles. As such, decisions rooted in constitutional principles will be open to challenge and free of the veneer of legality. Likewise, the danger of emergency "seeping into" normality will be averted, due to the substantially different character of reasoning based on constitutional principles from ordinary legal reasoning.

(3) The problem of judicial deference

Posner and Vermeule argue that not only is the judiciary incompetent to restrict the executive, the judiciary's record of deference means that giving it additional powers (as my model proposes) would be pointless.[107] This claim of a record of deference rests partly on analysis of historical cases, particularly *Liversidge v Anderson* and *Korematsu*.[108] Dyzenhaus states that "as a matter of fact the judicial record in enforcing the rule of law in [emergency] situations is at worst dismal, at best ambiguous".[109] The judiciary's record of deference extends beyond these famous cases, into a general trend which stretched across the 20th century.[110] If Posner and Vermeule's argument is correct, then this article's emphasis on the judicial role is erroneous.

While recent War on Terror decisions by the apex courts of the United States and United Kingdom may not warrant the term "dismal", they can plausibly be described as "ambiguous". The courts have curtailed the executive in some cases, showing deference in others. It often seems arbitrary whether deference is shown or withheld. For example, in *Secretary of State for the Home Department v JJ*, the United Kingdom Supreme Court

104 See Jenny S Martinez "Process and Substance in the 'War on Terror'" (2008) 108 Colum L Rev 1013.

105 Jeremy Waldron "The Core of the Case against Judicial Review" (2005) 115 Yale LJ 1346 at 1381.

106 Poole, above n 78, at 554.

107 Posner and Vermuele, above n 13, at 30–32.

108 *Liversidge v Anderson* [1942] AC 206 (HL); and *Korematsu*, above n 21.

109 Dyzenhaus, above n 70, at 17.

110 Aileen Kavanagh "Constitutionalism, counterterrorism, and the courts: Changes in the British constitutional landscape" (2011) 9 I CON 172 at 173.

held that control orders, which included an 18-hour-curfew, were in breach of the right to liberty contained in art 5 of the European Convention on Human Rights.[111] However, in *Secretary of State for the Home Department v MB*, the same Court held that a 14-hour curfew was not in breach of the same provision.[112] Further, when the apex courts *do* curtail the executive, they often do so by using issues of procedure to seemingly avoid ruling on substantive rights issues.[113] However, despite this seeming ambiguity, recent War on Terror cases actually highlight a significant change in judicial approach.

Aileen Kavanagh and FD Londras argue that, while recent decisions by the apex courts have shown restraint, they highlight a firm retreat from the strong deference of the 20th century.[114] The broad philosophy behind strong judicial deference is captured by Lord Diplock's statement that national security was "the responsibility of the executive",[115] and therefore "par excellence a non-justiciable question".[116] The core of this claim, that national security is per se non-justiciable, has been retreated from by the courts.

Both Kavanagh and Londras argue that cases where the courts have failed to totally protect rights are significant because they demonstrate a heightened standard of review.[117] Across a number of areas, the apex courts resisted attempts by the executive to limit their jurisdiction. Londras notes the refusal of the United States Supreme Court to accept the idea that federal statutes (including the federal habeas corpus statute) did not apply to Guantanamo Bay.[118] Londras also notes the case of *Munaf v Geren*,[119] where it was held that United States citizens had a statutory right to petition the courts for habeas corpus, regardless of where they were held or of the nature of their "bad behaviour".[120] She argues that *Munaf*, alongside *Hamdi v Rumsfeld*, mark significant departures from *Korematsu* in that they demonstrate a lack of willingness by the Supreme Court to accept a process of "othering" whereby a citizen is placed outside the law.[121]

In a British context, Kavanagh argues that a "subtle constitutional shift" has taken place, from a view that national security was non-justiciable, to a doctrine of varying intensity of review combined with a degree of deference.[122] Indeed, in *Belmarsh Detainees*, the United Kingdom Supreme Court explicitly warned of the dangers of "excessive deference".[123] Kavanagh's main case study is *Secretary of State for the Home Department v AF (No 3)*, where the Court considered whether the presence of "special advocates" with clearance was sufficient to ensure the satisfaction of the right to a fair trial where the government was relying on secret evidence in control order hearings.[124] As expected, the Court held that there was a breach of the right to a fair trial. Significantly, Lord Hoffmann stated that the decision "may well destroy the system of control orders which is a

111 *Secretary of State for the Home Department v JJ* [2007] UKHL 45, [2008] AC 385.
112 *Secretary of State for the Home Department v MB* [2007] UKHL 46, [2008] AC 440.
113 Martinez, above n 105.
114 Kavanagh, above n 110; and FD Londras *Detention in the 'War on Terror': Can Human Rights Fight Back?* (Cambridge University Press, Cambridge, 2011) at 214–279.
115 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) at 412.
116 At 410.
117 Kavanagh, above n 110, at 192–193; and Londras, above n 114, at 278.
118 Londras, above n 114, at 251; *Rasul v Bush* 542 US 466 (2004); and *Hamdi v Rumsfeld* 542 US 507 (2004).
119 *Munaf v Geren* 553 US 674 (2008).
120 Londras, above n 114, at 243–244.
121 At 244–245.
122 Kavanagh, above n 110, at 194.
123 *Belmarsh Detainees*, above n 64, at [176].
124 *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, [2010] 2 AC 269.

significant part of this country's defences against terrorism".[125] Despite the Court's acknowledgement that their decision would "destroy" government security policy, the Court proceeded. Thus, the United Kingdom Supreme Court was willing to go so far in their belief that "national security may need to give way to the interests of a fair hearing" as to indirectly undermine the foundation of a "significant" executive measure.[126]

It is thus necessary to take a nuanced view of judicial behaviour. It is true that the courts have failed to prevent various increases in executive power throughout the War on Terror. Yet, it is also true that the attitude that matters of national security are entirely non-justiciable is no longer tenable. Moreover, this is not a sudden shift. For example, Kavanagh argues that the changing position of the British courts was brought about gradually, by decisions like the acceptance of the right of individual petition under the European Court of Human Rights in 1966, and the passing of the Human Rights Act in 1998.[127] Nor was this a foregone conclusion, as in both the United Kingdom and the United States, the Courts were faced with executives which presented arguments for judicial deference "based on domestic precedent".[128] Yet despite the fact that these precedents presented "plausible routes" for the Courts to take a path of strong deference if they wished, the Courts instead elected to take a far more measured approach.[129]

Returning to Posner and Vermeule's argument and its application to the fundamental principles model, the claim that strong judicial deference is inevitable is inconsistent with many recent judicial decisions of the apex courts in the United Kingdom and United States. This is not to say that the courts will never be deferential, or fail to respect rights. Yet the degree of this deference is not the same as it was in the 20th century. This may be due to structural or legislative changes, or it may simply be due to the fact that the culture of liberal democracies has shifted to be far less deferential to authority than it was in the 1940s.[130] Regardless, the overarching claim that the courts will inevitably be so strongly deferential as to be ineffective in constraining the executive cannot be upheld.

V Conclusion

This article has shown that measures that go beyond the positive law, but are constrained by fundamental principles, have a role to play in the emergency powers debate. The fundamental principles model recognises the fact that, in extraordinary situations, blind obedience to the positive law may be destructive. Yet, disobedience to the positive law is only just when it serves as obedience to a higher norm. This article takes as its starting point that the telos of the state is the protection of fundamental rights. Utility, necessity, and the law itself are all subordinate to this end. Though palatable to thinkers as diverse as Locke, Aquinas and Cicero, this idea is not widely shared today. This article seeks to change that.

125 At [70]; and Kavanagh, above n 110, at 188.
126 *AF (No 3)*, above n 124, at [121]; and Kavanagh, above n 110, at 189.
127 Kavanagh, above n 110, at 193–194.
128 Londras, above n 114, at 278.
129 At 278.
130 Kavanagh, above n 110, at 195.