

HUMAN RIGHTS, EMERGENCIES, AND THE RULE OF LAW

*Evan J. Criddle, Syracuse University & Evan Fox-Decent, McGill University**

ABSTRACT

Experience suggests that public emergencies pose a heightened threat of grave and systematic human rights abuse. To address this threat, international law regulates states' derogation from their human rights commitments through a two-tiered inquiry: First, are circumstances on the ground sufficiently dire to warrant a state of emergency? Second, if a state of emergency is warranted, are the state's responsive measures strictly necessary to address the emergency? This article illuminates the normative basis for international law's two-tiered approach to public emergencies by arguing that human rights are best conceived in Kantian terms as norms arising from a fiduciary relationship between states (or state-like actors) and the citizens and noncitizens subject to their power. States bear a fiduciary duty to guarantee subjects' secure and equal freedom, a duty that flows from their institutional assumption of sovereign powers. The fiduciary theory of human rights clarifies the substantive and procedural principles that guide international law's regulation of public emergencies. It also disarms Carl Schmitt's critique of constitutionalism by explaining how emergency powers can be reconciled with the rule of law.

I. INTRODUCTION

At the heart of international human rights law (IHRL) lies a practical challenge intertwined with a theoretical problem. The practical challenge is that many of the most grave and systematic human rights abuses occur during public emergencies, when states employ extraordinary powers to address threats to public order.¹ In responding to this challenge, each of the leading international and regional covenants on civil and political rights has endeavored to regulate states' entry into and conduct within states of emergency. The "cornerstone[s]" of these

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¹ JAIME ORAÁ, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW 1 (1992); Joan F. Hartman, *Working Paper for the Committee of Experts on the Article 4 Derogation Provision*, 7 HUM. RTS. Q. 89, 91 (1985).

covenants are their derogation clauses,² which permit states to restrict some human rights during emergencies—but only where strictly necessary to address threats to “the life of the nation”³ or the “independence or security” of the state.⁴ This derogation-centric approach enables IHRL to accommodate concerns for public necessity during emergencies, but it also poses a vexing theoretical problem. In what sense are human rights *rights* if they are subject to derogation during emergencies?

In this article, we seek to resolve this apparent paradox by illuminating IHRL’s normative foundations. We argue that human rights are best conceived in Kantian terms as norms arising from a fiduciary relationship between states (or state-like actors) and persons subject to their power.⁵ States bear a fiduciary duty to guarantee their subjects’ secure and equal freedom, a duty that flows from their institutional assumption of sovereign powers. International law authorizes states to exercise sovereign powers on behalf of their people, but subject to strict limitations flowing from the Kantian idea that agents are to be treated as ends always (the principle of non-instrumentalization) and the republican idea that persons are not to be subject to arbitrary power (the principle of non-domination). On this relational account, human rights represent the normative consequences of a state’s assumption of sovereign powers, and are thus constitutive of sovereignty’s normative dimension.

The fiduciary theory of human rights provides a sound philosophical grounding for the central features of IHRL’s derogation regime. Drawing on the Kantian conception of legal order, the fiduciary theory suggests that states may employ emergency powers only where exigent circumstances imperil the state’s ability to guarantee secure and equal freedom, and only where the particular measures employed are strictly necessary for this purpose. States may derogate from nonperemptory human rights norms such as the freedoms of expression, movement, and peaceable assembly in contexts where the strict observance of these norms would conflict with the state’s overarching fiduciary obligation to guarantee subjects’ secure and equal freedom. Conversely, states may never derogate from peremptory norms such as the prohibitions against genocide, prolonged arbitrary detention, or torture, because the violation of these norms could never be consistent with the state’s obligation to guarantee secure and equal freedom. International law recognizes these principles during emergencies—permitting derogation of some norms in some contexts—to ensure that persons are treated always as ends-in-themselves and not merely as means to the state’s ends.

The fiduciary theory also highlights areas in which international and regional tribunals could refine their jurisprudence to safeguard human rights more effectively during emergencies. For example, the fiduciary theory challenges the standard developed by the European Court of Human Rights (ECtHR) that a public emergency must “concern [a state’s] entire population” to

² ORAÁ, *supra* note 1, at 1.

³ Convention for the Protection of Human Rights and Fundamental Freedoms, art. 15.1, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]; International Covenant on Civil and Political Rights, art. 41, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; League of Arab States, Revised Arab Charter on Human Rights art. 4.1 (May 22, 2004), 12 INT’L HUM. RTS. REP. 893 (2005) [hereinafter Arab Charter].

⁴ American Convention on Human Rights art. 27.1, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter ACHR].

⁵ As we discuss in Part III, the state’s fiduciary obligation to respect human rights extends to each person subject to its power irrespective of a person’s civil or political status. For this reason, we use the terms “subject” and “person” when referring to legal persons subject to the state’s power rather than “citizen.” Legal persons may be individuals, but they may also be peoples or other groups that qualify for protection under IHRL.

justify a state of emergency.⁶ In addition, once a state of emergency has been declared, the fiduciary theory favors requiring states to provide or facilitate more robust public notification, justification, and contestation. The fiduciary theory also dictates a more narrowly circumscribed role for judicial deference to state decision-makers under the controversial “margin of appreciation” doctrine. In these and other respects, the fiduciary theory more fully elucidates IHRL’s content and consequences.⁷

The fiduciary theory also offers a principled response to Carl Schmitt’s argument that the rule of law cannot constrain state action during states of exception or emergency. As we shall see, Schmitt believed that legal order consists exclusively in general norms or rules of positive law and decisions of public authorities, but that general norms cannot anticipate the myriad factual scenarios a state might confront within public emergencies or the measures it might determine to be necessary to deal with them. Thus, Schmitt thought, the sovereign cannot be constrained by constitutional norms when he makes decisions concerning the use of emergency powers.⁸

Schmitt has had an enormous influence on scholarship related to emergency powers.⁹ To take one prominent example, Giorgio Agamben’s *State of Exception* chronicles the reliance of earlier twentieth-century writers on Schmitt,¹⁰ applies the German thinker’s ideas to measures adopted by the Bush Administration after 9/11, and maintains that the state of exception “tends increasingly to appear as the dominant paradigm of government in contemporary politics.”¹¹ As evidence of Schmitt’s paradigm, Agamben points to the “military order” issued by President George W. Bush on November 13, 2001, authorizing *inter alia* “indefinite detention” of noncitizens suspected of terrorism and trial by military commissions.¹² Agamben observes that President Bush’s order “radically erases any legal status of the individual. . . . Neither prisoners

⁶ *Lawless v. Ireland*, 3 Eur. Ct. H.R. (ser. A) (1961) (No. 3) (Court), at 56 [hereinafter *Lawless Court*].

⁷ Our primary concern in this article is with a state’s human rights practices within its own territory. We recognize that the fiduciary theory’s application to domestic emergencies will have important lessons for extraterritorial human rights observance, as well, but for present purposes we reserve these questions for further consideration in future work.

⁸ See CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (George Schwab transl. 2005) (rev’d ed. 1934). Of course, Schmitt was not the first to suggest that executive power cannot reasonably be constrained by law during emergencies. See, e.g., THE FEDERALIST No. 23, at 153 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (observing that “it is impossible to foresee or to define the extent and variety of national emergencies, and the correspondent extent and variety of the means which may be necessary to satisfy them,” and asserting that “for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed”).

⁹ See, e.g., GIORGIO AGAMBEN, *THE STATE OF EXCEPTION* (2005); OREN GROSS & FIONNUALA NÍ AOLÁIN, *LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE* (2006) (drawing on Schmitt’s work to develop a theory of sovereign prerogative to take extra-legal action during emergencies); ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 38-39 (2007) (identifying Schmitt as the “philosopher-jurist most often invoked in discussions of emergencies” and deploying Schmittian arguments to defend security-based restrictions on civil liberties); Austin Sarat, *Introduction: Toward New Conceptions of the Relationship of Law and Sovereignty Under Conditions of Emergency*, in *SOVEREIGNTY, EMERGENCY, LEGALITY* 1, 2 (Austin Sarat, ed. 2010).

¹⁰ See, e.g., AGAMBEN, *supra* note 9, at 7-9 (discussing CARL J. FRIEDRICH, *CONSTITUTIONAL GOVERNMENT AND DEMOCRACY* (1950), and CLINTON ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* (1948)).

¹¹ *Id.* at 9.

¹² *Id.* at 3 (discussing *Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833, 57,834 (Nov. 13, 2001)).

nor persons accused, but simply ‘detainees,’ they are the object of a pure de facto rule, of a detention that is indefinite not only in the temporal sense but in its very nature as well, since it is entirely removed from the law and judicial oversight.”¹³ The Schmittian implication is that the U.S. president, like Schmitt’s sovereign, has absolute and unfettered power to identify and confront perceived threats to national security.

While Schmitt sought to contest the relevance of constitutionally entrenched limits on sovereign power within Germany during the inter-war Weimar period, his theory has obvious implications for IHRL. Like municipal constitutions, IHRL cannot anticipate the circumstances under which the sovereign might need to invoke emergency powers, nor can IHRL dictate in advance how those powers might properly be used. On a Schmittian construal, IHRL’s accommodation of restrictions on (some) human rights during emergencies embodies an unstable compromise between liberal legalism and the absolute power to deal with existential threats necessarily held by the sovereign. This compromise is unstable because when push comes to shove Schmitt’s sovereign can simply ignore IHRL, as President Bush did when he authorized indefinite, summary detention of terrorism suspects after 9/11.¹⁴

The fiduciary theory, in contrast, affirms that legal order consists of principles, as well as norms and decisions. Specifically, the fiduciary account draws on the principles of non-instrumentalization and non-domination to provide a seamless, normatively substantial account of IHRL’s application during emergencies: states may derogate from their human rights commitments in emergencies only where such measures are strictly necessary to satisfy their overarching fiduciary obligation to guarantee secure and equal freedom. Such emergency measures preserve, rather than subvert, a Kantian legal order in which no person is subject to another’s unilateral discretionary power. The fiduciary theory, we argue, disarms Schmitt’s critique and contests neo-Schmittian accounts of emergency powers by explaining how derogation from certain human rights norms during emergencies may be consistent with a robust conception of legality rooted in the state-subject fiduciary relationship.

II. INTERNATIONAL LAW’S EMERGENCY CONSTITUTION

In common parlance, the “state of emergency” denotes a legal regime in which public institutions are vested with extraordinary powers to address existential threats to public order.¹⁵ The contemporary state of emergency concept traces its historical origins to the Roman dictator, a temporary officer appointed to provide *ad hoc* leadership in a national emergency (*tumultus*) by repulsing attacks from abroad or quelling internal rebellion.¹⁶ Over the past century,

¹³ *Id.* at 3-4.

¹⁴ See United Nations Economic and Social Council, Situation of detainees at Guantánamo Bay, § 84 (Feb. 15, 2006), available at <http://www.cbsnews.com/htdocs/pdf/ungitmo021506.pdf> (last visited Mar. 16, 2010) (concluding that the U.S. had violated the ICCPR by denying Guantanamo detainees the opportunity to challenge “the legality of their detention before a judicial body” and that their continuing detention “amounts to arbitrary detention”); John Ip, *Comparative Perspectives on the Detention of Terrorists*, 16 TRANSNAT’L L. & CONTEMP. PROBS. 773, 776 (2007) (describing the “U.S. model” for detention of terrorism suspects as “executive-dominated” and “purport[ing] to exclude all human rights norms”); cf. Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (holding that the use of military commissions was inconsistent with Common Article 3 of the 1949 Geneva Conventions).

¹⁵ ORAÁ, *supra* note 1, at 7; see generally GROSS & NÍ AOLÁIN, *supra* note 9.

¹⁶ See AGAMBEN, *supra* note 9, at 41-42 (discussing the Roman dictatorship and defining *tumultus* as “the caesura by means of which, from the point of view of public law, exceptional measures may be taken” (quoting ADOLPH

governments throughout the world have declared states of emergency in response to a variety of real and perceived crises, including not only the paradigmatic threats of foreign military intervention and insurrection, but also political unrest, general civil unrest, criminal or terrorist violence, labor strikes, economic emergencies, the collapse of public institutions, the spread of infectious diseases, and natural disasters.¹⁷ One 1978 study estimated that thirty states—roughly one-fifth of the states then in existence—were in states of emergency.¹⁸ Since then, states have delivered over a hundred notifications to the U.N. Secretary-General pursuant to Article 4(3) of the International Covenant on Civil and Political Rights (ICCPR), citing national emergencies as justification for suspending their usual international obligations to respect civil and political rights.¹⁹

States of emergency are critically important from a human rights perspective because the suspension of legal order or important aspects thereof during emergencies often paves the way for systematic human rights violations. It is no coincidence that many of the most egregious human rights abuses associated with the conflict in Sudan’s Darfur region such as genocide and crimes against humanity followed Sudan’s 1999 declaration of a state of emergency.²⁰ Nor is it a coincidence that the United Kingdom has attracted international criticism over the years for invoking Article 4(3) to limit civil and political rights in response to terrorist attacks in Belfast, London, and New York City.²¹ The same political pressures that prompt states to declare states of emergency also generate strong incentives for states to violate their human rights obligations during emergencies.

States of emergency also challenge states’ commitment to the rule of law. While the rule of law has been defined variously, most scholars agree that the concept requires, at a minimum, public institutions that decide disputes impartially and non-arbitrarily according to pre-established legal principles.²² Emergencies may compromise legal order by generating political pressures to augment executive power at the expense of legislative and judicial institutions. Some commentators have lamented that courts often dial down the intensity of judicial review during emergencies in deference to the executive branch, enabling the executive to sidestep ordinary legal restraints, compromise basic civil liberties, and undermine public confidence in

NISSEN, *DAS IUSTITIUM: EINE STUDIE AUS DER ROMISCHEN RECHTSGESCHICHTE* 76 (1877)). In Rome, the declaration of a *tumultus* “usually led to the proclamation of a *iustitium*”—the temporary cessation of public law. *Id.* at 41.

¹⁷ See, e.g., U.N. Treaty Collection Database: Status of Treaties, Ch. IV (ICCPR), available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Nov. 12, 2009) [hereinafter ICCPR Derogation Notifications].

¹⁸ Daniel O’Donnell, *States of Exception*, 21 INT’L COMM’N JURIST REV. 52, 53 (1978).

¹⁹ See ICCPR Derogation Notifications, *supra* note 8 (listing 135 state derogation notifications from 30 states).

²⁰ See International Commission of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, 19, ¶ 49 (Jan. 25, 2005); U.N. Econ. & Soc. Council, Sub-Comm’n on Human Rights, *Report of the United Nations High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights*, 12-13, ¶ 39, U.N. Doc. E/CN.4/2005/3 (May 7, 2004).

²¹ See U.N. Treaty Collection (ICCPR), *supra* note 17 (notifications of United Kingdom & Northern Ireland (May 17, 1976, Dec. 23, 1988, Dec. 18, 2001)); Michael P. O’Connor & Celia M. Rumann, *Into the Fire: How to Avoid Getting Burned by the Same Mistakes Made Fighting Terrorism in Northern Ireland*, 24 CARDOZO L. REV. 1657 (2003).

²² See, e.g., T.R.S. ALLAN, *CONSTITUTIONAL JUSTICE: A LIBERAL THEORY OF THE RULE OF LAW* (2001); LON FULLER, *THE MORALITY OF LAW* (1964); JOSEPH RAZ, *The Rule of Law and Its Virtue*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 210 (1979); N.E. SIMMONDS, *LAW AS A MORAL IDEA* (2007); Andrei Marmor, *The Rule of Law and Its Limits*, 23 LAW & PHIL. 1 (2004).

the rule of law.²³ Once legal restraints are relaxed or abandoned, emergency powers can become permanently entrenched, facilitating the further abuse of public powers long after the crisis has passed.

Recognizing the dangers that accompany states of emergency, international law limits the circumstances under which states may legally derogate from their international obligations to respect, protect, and fulfill civil and political rights.²⁴ Each of the leading international and regional conventions on civil and political rights—the ICCPR,²⁵ African Charter on Human Rights,²⁶ American Convention on Human Rights (ACHR),²⁷ Arab Charter on Human Rights (Arab Charter),²⁸ and European Convention on Human Rights (ECHR)²⁹—employs a two-stage inquiry to evaluate the legality of a state’s derogation from general human rights standards: First, are circumstances sufficiently dire to justify initiating a state of emergency? Second, if a state of emergency is justified, what measures may a state employ to address the emergency’s threats to public order? International law addresses each of these inquiries independently through a two-tiered analysis that mirrors the law of armed conflict.³⁰ Just as international law distinguishes legal norms regulating the initiation of an armed conflict (*jus ad bellum*) from norms regulating the conduct of hostilities (*jus in bello*), so too it distinguishes norms regulating a state’s initiation of a state of emergency from norms regulating a state’s conduct within emergencies. For ease of exposition, we refer to these two bodies of law in the discussion that follows as “*jus ad tumultum*” and “*jus in tumultu*.” Collectively, this law comprises the emergency constitution of international law.

International Law Regulating Entry into a State of Emergency (Jus ad Tumultum)

Bruce Ackerman has observed that the “paradigm case for emergency powers has been an imminent threat to the very existence of the state, which necessitates empowering the Executive to take extraordinary measures.”³¹ Recognizing that human rights cannot be enjoyed

²³ See, e.g., DAVID DYZENHAUS, *THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY* (2006).

²⁴ While public emergencies may also have profound consequences for economic, social, and cultural rights, the derogation and limitation clauses that constitute IHRL’s emergency constitution focus exclusively upon civil and political rights. Accordingly, we also limit our discussion to civil and political rights, reserving for another day the fiduciary principle’s application to emergency restrictions on economic, social, and cultural rights.

²⁵ ICCPR, *supra* note 3.

²⁶ The African Charter on Human Rights and Peoples’ Rights, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5, does not contain a derogation provision, but it has been suggested that a derogation clause would be superfluous because the Charter’s broad individual duties permit restriction on human rights during emergencies. See Amrei Müller, *Limitations to and Derogations From Economic, Social, and Cultural Rights*, 9 HUM. RTS. L. REV. 557, 594 (2009).

²⁷ ACHR, *supra* note 4.

²⁸ Arab Charter, *supra* note 3.

²⁹ ECHR, *supra* note 3. Although the European Charter of Rights and Freedoms does not address emergencies expressly, it similarly provides that limitations are permissible only “[s]ubject to the principle of proportionality” and as “necessary [to] meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.” E.U. Charter art. 52, ¶ 1.

³⁰ See AGAMBEN, *supra* note 9, at 42 (“The relation between *bellum* and *tumultus* is the same one that exists between war and military state of siege on the one hand and state of exception and political state of siege on the other.”); Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE J. INT’L L. 47 (2009) (defending the law of war’s bifurcated structure).

³¹ Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1031 (2004).

fully without public order, international law permits states to impose heightened restrictions on human rights during emergencies as necessary to preserve essential public institutions. Thus, the ICCPR, ECHR, and Arab Charter each allow states to derogate from certain human rights where national crises pose a demonstrable threat to “the life of the nation.”³² The ACHR similarly permits derogation where “war, public danger, or other emergency” threatens the “independence or security of a State Party.”³³ Although these broad standards invite further explication, each contemplates that states of emergency will be legally permissible only where genuine public emergencies undermine the institutional prerequisites for the enjoyment of human rights by imperiling the “life,” “independence,” or “security of the state.”

Among international and regional tribunals, the European Commission on Human Rights (European Commission) and the ECtHR have been most active in clarifying the contours of *jus ad tumultum*. In *Lawless v. Ireland*,³⁴ the ECtHR defined a “public emergency” as a “danger or crisis” that is (1) present or imminent, (2) exceptional, (3) concerns the entire population, and (4) constitutes a “threat to the organized life of the community.”³⁵ Other international and regional bodies have followed the ECtHR’s lead when determining whether circumstances within a particular country are adequate to justify a state of emergency. For example, the Inter-American Commission on Human Rights has embraced the European Commission’s formulation of the applicable legal standards, reasoning that an armed conflict would not support a state of emergency unless it was finite in duration and compromised “the continued viability of the organized community as a whole.”³⁶

To ensure that international law’s restrictions on the commencement of states of emergency are taken seriously, each of the leading covenants on civil and political rights obligates states to notify the international community promptly—either directly or through an intermediary—when they suspend their human rights obligations during national crises.³⁷ Although none of these conventions requires states to notify their own people when they suspend their international human rights obligations, the U.N. Commission on Human Rights has suggested that states must exercise emergency powers in compliance with applicable requirements of municipal law, including requirements governing the declaration of a state of emergency.³⁸

³² See ICCPR, *supra* note 3, art. 4.1; ECHR, *supra* note 3, art. 15.1; Arab Charter, *supra* note 3, at art. 4.1.

³³ ACHR, *supra* note 4, art. 27.1.

³⁴ 1 Eur. Ct. H.R. (Ser. B) (1960-61) (Commission Report) [hereinafter *Lawless Commission*]; *Lawless Court*, *supra* note 5.

³⁵ *Lawless Court*, *supra* note 6, at 56; see also *Lawless Commission*, *supra* note 34, § 90, at 82. Eight years later in the *Greek Case*, the ECtHR clarified that a national crisis would be sufficiently “exceptional” under the *Lawless* test if “the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.” Denmark, Norway, Sweden, and the Netherlands v. Greece (the *Greek Case*) (Nov. 5, 1969), 1969 Y.B. Eur. Conv. on H.R. 1 (Eur. Comm’n on H.R.), at 70, ¶ 113 [hereinafter *Greek Case*].

³⁶ See Judicial Guarantees in States of Emergency, 9 Inter-Am. Ct. H.R. (ser. A) at 40, OEA/ser.L./VI/111.9, doc. 13 (1987) (requiring finite duration); Claudio Grossman, *A Framework for Examination of States of Emergency Under the American Convention on Human Rights*, 1 AM. U.J. INT’L L & POL’Y 35, 45 (1986) (translating the Inter-American Commission’s Report on Nicaragua, OEA/Ser.L/V/II.62, doc.10, rev.3 (Nov. 29, 1983), at 121-22 (original in Spanish)).

³⁷ See ICCPR, *supra* note 3, art. 4; ECHR, *supra* note 3, art. 15(3); Arab Charter, *supra* note 3, art. 4.3; ACHR, *supra* note 4, art. 27.3.

³⁸ See Comm’n on Human Rights, General Comment No. 29, States of Emergency (Article 4), UN Doc. CCPR/C/21/Rev.1/Add.11 (2001).

In sum, each of the leading human rights conventions obligates states to establish the need for a state of emergency before proceeding to consider whether particular actions taken in response to an emergency are appropriate. Each convention furnishes discrete substantive and procedural criteria for evaluating whether exigent circumstances justify entry into a state of emergency. In this manner, each seeks to safeguard human rights by limiting states' recourse to emergency powers.

International Law Regulating State Action Within a State of Emergency (Jus in Tumultu)

Once a state demonstrates that an actual or imminent crisis satisfies the criteria for a state of emergency (*jus ad tumultum*), international law's focus shifts to the legality of a state's responsive measures (*jus in tumultu*). Under the ICCPR, ECHR, ACHR, and Arab Charter, national emergencies do not give states carte blanche to exercise public powers indiscriminately without regard to the humanitarian costs. Instead, each of these covenants regulates states' exercise of emergency powers by imposing substantive and procedural limitations on state action within a state of emergency.

International law limits executive and legislative discretion within states of emergency by prohibiting states from employing emergency powers beyond the temporal and geographic scope specified in their notice of derogation. The ECtHR affirmed this principle in *Sakik and Others v. Turkey*³⁹ when it considered Turkey's suspension of human rights protections in territories outside those identified in the state's derogation notice. The court explained that it "would be working against the object and purpose of [the ECHR's derogation provision] if, when assessing the territorial scope of the derogation concerned, it were to extend its effects to a part of Turkish territory not explicitly named in the notice of derogation."⁴⁰ Applying this principle, the court held that Turkey's derogation notice was inapplicable to the case at hand and that the state's delay in presenting detainees before a judge in territories not covered by its derogation notice violated its commitments under the ECHR.⁴¹

Even within the scope of a state's derogation notice, states must tailor their responsive measures to minimize the potential impact on human rights. Some human rights norms such as the *jus cogens* prohibitions against torture, slavery, and the arbitrary deprivation of life or liberty are not derogable under any circumstances.⁴² Other norms such as the rights to freedom of movement, expression, and association are subject to state derogation, but only "to the extent strictly required by the exigencies of the situation."⁴³ The influential *Siracusa Principles on the Limitation and Derogation Principles in the ICCPR* suggest that any measures a state undertakes to restrict or suspend human rights during emergencies must be supported by a valid state

³⁹ *Sakik and Others v. Turkey*, App. No. 23878/94-23883/94, 26 Eur. H.R. Rep. 662 (1997).

⁴⁰ *Id.* at 683; see also *Abdulsamet Yaman v. Turkey*, App. No. 32446/96, 40 Eur. H.R. Rep. 49 (2005), ¶¶ 68-69, at 12 (holding that Turkey abused its emergency powers by suspending human rights in territories beyond those identified in its formal notice of derogation).

⁴¹ *Sakik*, *supra* note 39, at 683-85.

⁴² See ECHR, *supra* note 3, arts. 2-4, 7; ACHR, *supra* note 4, arts. 4, 5.2, 6, 9; ICCPR, *supra* note 3, arts. 6-8, 15; Arab Charter, *supra* note 3, art. 4.2.

⁴³ ECHR, *supra* note 3, art. 15 (emphasis added); see also ACHR, *supra* note 4, art. 27 (providing that a state-party "may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation"); Arab Charter, *supra* note 3, art. 4.1; ICCPR, *supra* note 3, art. 4.

ground, a pressing public need, a legitimate aim, and proportionality.⁴⁴ States must strictly observe peremptory human rights norms during emergencies, and they may suspend non-peremptory human rights only if their responsive measures would comply with the geographic and temporal scope of the derogation, as well as a substantive conception of proportionality that requires states to use only those measures that minimally restrict the freedoms ordinarily protected by the suspended treaty rights.

Challenges to International Law's Emergency Constitution

By prescribing principles and procedures to guide state action during national emergencies, international law seeks to ensconce human rights firmly within the rule of law. Yet international law's emergency constitution arguably fails to satisfy the requirements of the rule of law insofar as its constituent principles remain unclear, contradictory, and subject to inconsistent application.⁴⁵ As we have seen, the ICCPR, ECHR, ACHR, and Arab Charter offer different accounts of the conditions that trigger states of emergency, and their use of vague formulations such as threats to the "life of the nation" provide insufficient guidance to state decision-makers. For example, although the ECtHR has asserted that exigent circumstances must affect an entire national population to constitute a genuine "public emergency,"⁴⁶ state notices of derogation suggest that states believe localized instability within a particular region could also trigger a limited state of emergency.⁴⁷ Once courts move beyond *jus ad tumultum*, additional uncertainties and inconsistencies muddle international law's *jus in tumultu*. Human rights conventions contain competing catalogues of non-derogable norms that differ markedly from one another in length and content.⁴⁸ Moreover, none of the leading conventions specifies precisely how much deference courts should give states when derogating from their human rights obligations, leading to conflicting judicial practice.⁴⁹ These persistent uncertainties and inconsistencies have compromised the credibility of international law's emergency constitution, undermining public confidence in the rule of law during states of emergency.

If international law's approach to states of emergency lacks coherence in many respects, the best explanation may be that the international community has yet to develop a robust theory to explain the philosophical basis for human rights as legal obligations. A theory of human rights is needed to elucidate the normative basis of IHRL and to justify the emergency constitution's

⁴⁴ *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 7 HUM. RTS. Q. 3, 4, ¶ 10 (1985) [hereinafter *Siracusa Principles*]; see also Tom R. Hickman, *Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism*, 68 MOD. L. REV. 656, 665 (2005) (arguing that the "strictly required" standard is more demanding than the proportionality standard that conditions rights limitations in non-emergency contexts).

⁴⁵ See Marmor, *supra* note 22, at 5-7 (identifying clarity, internal consistency, consistency of application and other conditions of the rule of law as supported by "a fairly wide consensus").

⁴⁶ *Lawless Commission*, 1 Eur. Ct. H.R. (ser. B), § 90, at 82.

⁴⁷ See ICCPR Derogation Notifications, *supra* note 8.

⁴⁸ The Arab Charter and ACHR lead the field with sixteen and eleven articles, respectively, addressing peremptory norms. See ACHR, *supra* note 4, arts. 3-6, 9, 12, 17-20, 23; Arab Charter, *supra* note 3, arts. 5, 8-10, 13, 14, 15 ¶ 6, 15, 18-20, 22, 27-30. The ECHR identifies only four norms as non-derogable. ECHR, *supra* note 3, arts. 2-4, 7.

⁴⁹ See, e.g., Oren Gross, *Once More unto the Breach: The Systematic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies*, 23 YALE J. INT'L L. 437 (1998); Oren Gross & Fionnuala Ni Aolain, *From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 14 of the European Convention on Human Rights*, 23 HUM. RTS. Q. 644 (2001).

two-tiered structure, its categorical distinction between derogable and nonderogable human rights, and its subjection of state emergency powers to external review. Until human rights theory catches up with contemporary human rights norms and practices, the international community will continue to struggle with basic questions regarding the content of *jus ad tumultum* and *jus in tumultu*, including the conditions that would justify an emergency declaration, the appropriate scope of *jus cogens*, and the margin of appreciation (if any) that international tribunals would owe to states that derogate from their human rights obligations. A theory of human rights is necessary, as well, to address the Schmittian argument that sovereign discretion displaces legality during national crises.⁵⁰

III. FIDUCIARY STATES, HUMAN RIGHTS, AND EMERGENCIES

We propose a theory of human rights that supports the central features of international law's emergency constitution, addresses confusion over the scope and application of human rights, and lays a firm foundation for human rights protection in future emergencies. Specifically, we argue that human rights emanate from a fiduciary relationship between public institutions and persons subject to public powers. As fiduciaries, public institutions bear legal obligations to safeguard their subjects against domination—the threat of arbitrary state action. Public institutions must also satisfy the Kantian principle of non-instrumentalization by ensuring that all persons are regarded always as ends-in-themselves and never as mere means. On this fiduciary theory of the state, human rights come into focus as institutionally grounded legal constraints that arise from a state's assumption of sovereign powers. Because a state's fiduciary obligations are constitutive of its legal authority, public institutions cannot violate these obligations during emergencies without undercutting their claim to represent their people as a sovereign actor. This fiduciary theory explains why some human rights are derogable during national crises while others are not, and it offers principled criteria for distinguishing derogable rights from nonderogable rights. The fiduciary theory also furnishes substantive and procedural principles that clarify the two-tiered structure of international law's emergency constitution.

The Fiduciary Theory of Human Rights

In previous writings, we have argued that human rights' fiduciary character is best appreciated from the perspective of Immanuel Kant's conception of fiduciary relations.⁵¹ According to Kant, all persons have an innate right to as much freedom as can be reconciled with the freedom of everyone else.⁵² The purpose of law on this account is to honor the dignity of all persons by enshrining legal rights within a regime of secure and equal freedom for all, such that no person can unilaterally impose terms of interaction on others. Within Kant's regime of secure

⁵⁰ See SCHMITT, *supra* note 8, at 17; Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011 (2003). To be sure, international law's approach to emergencies suffers not only from theoretical and doctrinal incoherence but also from serious compliance gaps. Efforts to elucidate IHRL's theoretical basis and requirements are essential to clarify what counts as compliance with IHRL. Such clarity may in turn facilitate state accountability for human rights violations during emergencies.

⁵¹ See, e.g., Evan Fox-Decent & Evan J. Criddle, *The Fiduciary Constitution of Human Rights*, 15 LEGAL THEORY 301 (2010) [hereinafter Fox-Decent & Criddle, *Fiduciary Constitution*]; Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT'L L. 331 (2009) [hereinafter Criddle & Fox-Decent, *Jus Cogens*].

⁵² *Id.* at 63.

and equal freedom, fiduciary obligations ensure that those who exercise unilateral administrative powers over others' legal or practical interests are precluded from denying others' innate right to equal freedom through domination or instrumentalization.

Kant illustrates these principles in *The Doctrine of Right* when he asserts that children “have by their procreation an innate (not acquired) right to the care of their parents until they are able to look after themselves . . . without any special act being required to establish this right.”⁵³ When parents unilaterally create a person dependent upon them for survival, they thereby incur moral and legal duties to provide for their child's basic wellbeing. The child's innate right to equal freedom can be respected and the demands of legality satisfied only if the law ensures that parents treat their child as a person—as a being with dignity—and not as a thing that can be abused or abandoned at their discretion.

Kant's conception of legal right supplies a sound philosophical justification for the republican conception of public officials and institutions as fiduciaries for their people.⁵⁴ Like other fiduciaries, the state's legislative, judicial, and executive branches all assume discretionary powers that are institutional, purposive, and other-regarding. Private parties are not legally entitled to exercise the state's powers and thus are particularly vulnerable to public authority, despite their ability within democracies to participate in democratic processes. The state's monopolization of public powers over its people can be understood therefore as a fiduciary relationship mediated by legality—rather than a relationship of domination or instrumentalization—only if a principle of legality prevents public institutions from exploiting their position to set unilaterally the terms of interaction with their people. The fiduciary principle is a principle of legality that does just this: it authorizes the state to exercise public powers for and on behalf of its people, but subject to strict legal constraints that safeguard subjects' inherent dignity as free and equal beneficiaries of state action.

We have argued previously that a state's overarching fiduciary duty to its people is to establish a regime of secure and equal freedom, and that the fiduciary character of public administration requires respect for human rights.⁵⁵ Because a state assumes the public powers associated with sovereignty, it also assumes a fiduciary obligation to establish legal order on behalf of the citizens and noncitizens subject to its powers. All persons enjoy *equal* freedom within a Kantian legal order because every person is presumed to possess a capacity for rational self-determination or agency, the agency of one person is normatively indistinguishable from the agency of another, and the law is presumed to protect the agency of every person. Thus, within Kant's legal order, the only lawful freedom possible is equal freedom. In practice this means that the law apports restrictions on personal freedoms evenhandedly such that no person is entitled

⁵³ IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 98-99 (Mary Gregor trans., Cambridge Univ. Press 1991). In the parent-child context, the act of procreation is important because it explains why a child that is dependent upon humankind for survival would place particular persons (but not others) under fiduciary obligations. In contrast, the question of attribution is less problematic within ordinary state-subject relationships, because states affirmatively assert their authority to exercise administrative power and possess the *de facto* power to back up these assertions.

⁵⁴ See, e.g., PA. CONST. of 1776, art. IV. (“[A]ll power being . . . derived from the people: therefore all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them.”); John Locke, *An Essay Concerning the True, Original Extent and End of Civil Government* (1690), reprinted in *SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME, AND ROUSSEAU* 1, 87 (Sir Ernest Barker ed., 1948) (describing legislative power as “a fiduciary power to act for certain ends”).

⁵⁵ See Fox-Decent & Criddle, *Fiduciary Constitution*, *supra* note 51; Criddle & Fox-Decent, *Jus Cogens*, *supra* note 51; Evan J. Criddle & Evan Fox-Decent, *Deriving Peremptory Norms from Sovereignty*, 103 PROC. AM. SOC. INT'L L. (forthcoming).

to dominate or instrumentalize another. Further, the state bears an obligation to guarantee that this regime of equal freedom remains *secure* by enforcing the law through impartial and proportionate means. Just as the state bears a duty to adopt and enforce laws protecting persons from private domination and instrumentalization, the fiduciary principle dictates that the state itself must forebear from adopting laws, policies, or practices that deliberately victimize or arbitrarily threaten persons subject to its powers. Human rights are constitutive of state sovereignty on this account because they supply a normative framework within which the state can establish a secure order of equal freedom, an order marked by the absence of domination and instrumentalization. In this sense, all public powers are constrained and constituted by the state's fiduciary duty to respect, protect, and fulfill human rights.

On the fiduciary theory, norms qualify as human rights if they satisfy certain formal and substantive criteria. Lon Fuller's "internal morality of the law" sets out the formal criteria that international norms must satisfy before they merit treatment as human rights.⁵⁶ First, human rights norms must embody general and universal principles rather than ad hoc and particularized commands. Second, human rights norms must be public so that the state and its people can adjust their policies and actions accordingly. Third, compliance with human rights norms must be feasible, not impossible. Fourth, the content of human rights norms must be clear and unequivocal to guide state action. Fifth, human rights norms must be internally consistent and consistent with one another. Sixth, human rights norms must be prospective rather than retroactive. Seventh, human rights norms must be relatively stable over time so that states can plan for the future. These seven formal criteria, which constitute necessary conditions for the establishment of legal order, ensure that the state is able to fulfill its overarching fiduciary duty to establish order under the rule of law—legal order—for the benefit of its people.

In addition to Fuller's formal criteria for legal order, the fiduciary theory also prescribes three substantive desiderata that international norms must satisfy to qualify as human rights. First, under a principle of *integrity*, human rights must have as their object the good of the people rather than the good of the state's institutions or officials. Second, a principle of *formal moral equality* requires fairness or even-handed treatment of persons subject to state power; human rights must regard individuals as equal co-beneficiaries of fiduciary states. Third, a principle of *solicitude* dictates that human rights must reflect proper solicitude toward the legitimate interests of a state's subjects. Collectively, these criteria support the fiduciary theory's thick substantive account of human rights as legal rights derived from the fiduciary obligations all states bear as sovereign actors, irrespective of whether they have consented to particular human rights conventions.

Distinguishing Peremptory Norms from Other Human Rights

The fiduciary theory also establishes a principled framework for distinguishing peremptory norms from other human rights: human rights qualify as peremptory norms if a state's compliance with these norms is always necessary to accomplish the state's fiduciary mission of guaranteeing secure and equal freedom. Some international norms such as the prohibitions against slavery and racial discrimination qualify as *jus cogens* on this account because states cannot violate these prohibitions without undermining their own claim to treat all persons as equal co-beneficiaries of state action. Other state practices that exploit individuals as

⁵⁶ FULLER, *supra* note 22.

mere instruments of state policy or as obstacles to the realization of state objectives are likewise inconsistent with states' basic fiduciary obligation to guarantee individuals' secure and equal freedom. For this reason, international norms that prohibit grave offenses such as genocide, crimes against humanity, summary executions, forced disappearances, prolonged arbitrary detention, torture, and cruel, inhuman, and degrading treatment all qualify as *jus cogens*. States cannot violate these norms under any circumstances without forfeiting their claim to possess sovereign authority because such practices always instrumentalize their victims and, as such, are never consistent with a regime of secure and equal freedom. The fiduciary theory thus buttresses existing IHRL by affirming the peremptory status of various norms that are characterized as nonderogable in leading human rights instruments such as the ACHR, ECHR, and ICCPR.

The fiduciary theory also paves the way for expanding the circle of peremptory human rights beyond the norms currently enshrined in multilateral treaties, with significant consequences for IHRL in times of emergency. We have argued that the fiduciary theory's criteria dictate that states must afford all individuals the fundamental protections of due process such as the right to notice of criminal charges, an opportunity to be heard and present evidence, and adjudication by an independent and impartial tribunal.⁵⁷ The Guantánamo Bay regime of indefinite detention and trial by ad hoc military commissions, as well as the practice of secret rendition to foreign prisons, plainly violate detainees' peremptory rights to due process under the fiduciary theory.⁵⁸ Similarly, public corruption on any scale violates *jus cogens* because self-dealing behavior by public officials is the antithesis of the state's fiduciary obligation to secure legal order for the benefit of the people.⁵⁹ These international norms are binding upon states regardless of whether states have ratified particular human rights conventions, irrespective of whether the persons victimized are domestic or foreign, and without concern for the particular exigent circumstances under which the state acts. For all public officials and institutions, compliance with *jus cogens* is a constitutive constraint upon the exercise of sovereign powers.

Not all human rights are peremptory, of course. Some international norms such as the freedoms of expression, movement, and peaceable assembly are widely accepted as human rights, yet do not qualify as *jus cogens* because the fiduciary principle permits—and may even require—the state to restrict their exercise in certain contexts. A state's fiduciary duty to guarantee secure and equal freedom for its people arguably entitles the state to enact laws which require manufacturers to place warnings on its products that notify the public of possible health risks and other dangers. For instance, municipal courts have found that such laws infringe tobacco companies' freedom of expression, but that the infringement is justifiable given the risk to health their products pose.⁶⁰ Although such laws restrict free expression, they do not violate

⁵⁷ Criddle & Fox-Decent, *Jus Cogens*, *supra* note 51, at 370-71.

⁵⁸ *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

⁵⁹ *Id.* at 371-72. Conversely, some norms that are widely characterized as *jus cogens* such as the principle of *pacta sunt servanda* and the prohibition against piracy do not qualify as *jus cogens* under the fiduciary theory. *See id.* at 375-77.

⁶⁰ *See, e.g.*, Canada (Attorney General) v. JTI-Macdonald Corp., 2007 SCC 30, [2007] 2 S.C.R. 610 (upholding legislation that requires tobacco manufacturers to include graphic product warnings notwithstanding that the legislation infringes the manufacturers' constitutionally protected right to freedom of expression); Consolidated Cigar Corp. v. Reilly, 218 F.3d 30 (1st Cir. 2000) (recognizing that commercial speech is protected expression but nonetheless rejecting a First Amendment challenge to health warning requirements on cigar packaging), *overruled on other grounds in* Lorillard Tobacco Corp. v. Reilly, 533 U.S. 525 (2001); Commercial Brands, Inc. v. United States, - F. Supp. 2d -, 2010 WL 65013 (W.D. Ky. 2010) (upholding detailed warning labels on cigarette packages as "sufficiently tailored" to the federal government's "substantial interest").

human rights on the fiduciary theory because they are necessary and proportional means to guarantee the public's security from unilaterally imposed risks. Unlike violations of peremptory norms, which are never consistent with a state's fiduciary duty to its subjects, a state fulfills its overarching fiduciary obligation when it adopts restrictions on human rights that are essential to establish a regime of secure and equal freedom. Yet the state's general obligation of solicitude to individual freedom also dictates that restrictions on liberties such as freedom of expression must be no more intrusive than are strictly necessary from the point of view of secure and equal freedom. Thus a state may not regulate private expression based solely upon the political, religious, or cultural viewpoint expressed, nor may it exercise permanent, plenary control over the content of private media and communications networks. The fiduciary theory thus furnishes a general framework for defining the scope of nonperemptory human rights: a state may adopt laws, policies, or practices that restrict the exercise of human rights only to the extent strictly necessary to satisfy its overarching fiduciary duty to guarantee secure and equal freedom.⁶¹

Although the schedules of peremptory and nonperemptory norms that appear in leading human rights conventions are generally consistent with the fiduciary theory, human rights do not derive their fundamental normative authority from state consent. Rather, the authority of human rights derives from their role as constitutive constraints emanating from the state's institutional assumption of sovereign powers. States must honor human rights as a function of the fiduciary obligations that accompany their exercise of sovereignty—even if they have yet to ratify relevant human rights conventions.⁶² This is not to say, of course, that state consent and ratification of human rights conventions are irrelevant. Treaties signal the international community's best provisional estimate of the determinate content of particular human-rights norms and the legal consequences of their breach. Consent also renders a state liable under the relevant treaty for a breach of the treaty's provisions, as well as generating liability for the remedial consequences stipulated in the treaty. But the basic normative authority of human rights remains traceable to the protection they afford against the threats of domination and instrumentalization engendered within the fiduciary relationship between public institutions and the persons subject to their powers.

The fiduciary account of the normativity of human rights dispels the apparent oddness of supposing that restrictions can apply to a right that is suspended pursuant to a valid derogation: if the right is suspended, what is left to restrict?⁶³ It may seem that a proportionality analysis loses its anchor since by hypothesis the treaty right to which restrictions would apply has been suspended. Under the fiduciary theory, however, derogation suspends only the treaty-based

⁶¹ See ICCPR, *supra* note 3, art. 19 (noting that the right to freedom of expression is subject to legal restrictions in order to protect others' rights, national security, public order, and public health or morals); ECHR, *supra* note 3, art. 10.1 (same); ACHR, *supra* note 4, art. 13.2 (same). In a similar vein, the ICESCR permits states to restrict economic, social, and cultural rights, provided that such restrictions are consistent with "limitations . . . determined by law," "compatible with the nature of these rights," and "solely for the purpose of promoting the general welfare in a democratic society." International Covenant on Economic, Social and Cultural Rights, art. 4, Dec. 16, 1966, S. Exec. Doc. D, 95-2 (1978), 993 U.N.T.S. 3.

⁶² Cf. ORAÁ, *supra* note 1, at 26-27, 253 (observing that states that are not parties to human rights conventions have not resisted the application of principles from derogation clauses).

⁶³ This puzzle supports Hickman's view that derogation is "of a different order to qualifications and limitations on rights." He defends a "derogation model" in which there is robust judicial supervision of emergency powers, but that supervision is not justified in terms of guaranteeing the proportionality of rights limitations, since derogation, he claims, is "a mechanism to provide for governmental freedom of action by *releasing* states from their obligations to observe protected rights." Hickman, *supra* note 41, at 658-59 (emphasis in original).

obligation to respect, protect, or fulfill particular human rights. As we further explain now, persons continue to possess those rights because they arise from the state-subject fiduciary relationship, and so these rights can be subject to appropriately proportional limitations when a state derogates from a particular treaty provision that enshrines them. Properly understood, a valid derogation releases states from their *treaty* obligations, and permits restrictions on human rights consistent with *jus in tumultu*, as discussed below, where the rights subject to restriction are understood to flow from the state-subject fiduciary relation rather than a treaty.

Fiduciary Principles Governing Derogation from Human Rights in Emergencies

The fiduciary theory's relational account of human rights clarifies why nonperemptory human rights are properly characterized as "rights" while nonetheless being subject to derogation during emergencies. Traditionally, legal and political theorists have struggled to explain why ordinary human rights are derogable during emergencies, because they have envisioned human rights as abstract, timeless, inalienable rights that all human beings possess solely by virtue of their shared humanity.⁶⁴ Once human rights are recast in relational terms, these conceptual difficulties fade. On the fiduciary theory, human rights are not abstract or timeless natural rights; instead, they are relational entitlements that reflect persons' moral capacity as self-determining agents to place public institutions under legal obligations. Because human rights derive from the fiduciary character of the state-subject relation, their scope and application are likewise defined relationally according to the state's fiduciary duties.

Genuine public emergencies such as foreign military aggression or civil war raise special concerns for the state-subject fiduciary relation because they compromise the state's institutional capacity to guarantee secure and equal freedom. Where a public emergency renders a state unable to provide a credible check on privatized coercion, citizens and noncitizens within the affected region may be vulnerable to physical violence and arbitrary deprivations of property. The fiduciary theory addresses the threats that arise within emergencies by authorizing the state to impose heightened restrictions on nonperemptory human rights—including, where applicable, derogations from human rights conventions—in order to restore a regime of secure and equal freedom. To satisfy the fiduciary principle, however, any such emergency measures must comport with the principle of formal moral equality and must be strictly necessary to reestablish legal order. For example, outside an emergency the fiduciary theory would permit few restrictions on persons' freedom of movement since such broad restrictions are not necessary to guarantee secure and equal freedom. During a natural disaster or pandemic, however, the fiduciary principle might well authorize a state to restrict travel or impose a public curfew temporarily in order to safeguard public safety and preserve governmental services that are essential to legal order. Similarly, during a military insurrection, the fiduciary principle would authorize a state to employ administrative detention without prompt presentation to a judicial tribunal (a practice ordinarily prohibited under the ICCPR) if ordinary judicial administration had been interrupted. Even within an emergency, however, administrative detention must not be employed arbitrarily or for deliberate victimization, nor can such practices be justified solely on the basis of protecting others' freedom. Under the fiduciary theory, an individual's detention

⁶⁴ See, e.g., JACK DONNELLY, INTERNATIONAL HUMAN RIGHTS 18 (1998); RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHENASIA, AND INDIVIDUAL FREEDOM 68-83, 155 (1993); ALAN GEWIRTH, HUMAN RIGHTS: ESSAYS ON JUSTIFICATION AND APPLICATIONS 1 (1982).

must comport with a legal regime that treats all persons subject to the state's sovereign authority as equal co-beneficiaries and aspires to provide equal freedom for all—including the detainee herself.⁶⁵ The fiduciary theory thus frames IHRL's derogation regime as a principled effort to honor the equal freedom and dignity of citizens and noncitizens by addressing the unique threats of domination and instrumentalization that arise when public emergencies temporarily overwhelm the state's capacity to guarantee secure and equal freedom. Viewed from this perspective, state derogation from human rights conventions during public emergencies does not constitute an exception to human rights norms so much as an extension of human rights' internal logic.

The fiduciary theory thus provides a sound philosophical foundation for international law's two-tiered approach to states of emergency. Under the fiduciary theory, a state may not declare an emergency unless exigent circumstances frustrate the state's ability to provide secure and equal freedom through reliance on the laws, practices, or procedures that apply outside an emergency (*jus ad tumultum*). Once a state determines that this threshold has been crossed and invokes emergency powers, the state must refrain from restricting human rights any further than strictly necessary to restore the state's ability to guarantee secure and equal freedom (*jus in tumultu*).

The process states employ when conducting this two-stage derogation analysis also has great significance under the fiduciary theory: public institutions must exercise their powers through a deliberative decision-making process that honors subjects' dignity as free and equal agents. Three principles of the fiduciary theory are particularly salient in the context of public emergencies: justification, notification, and contestation. When states decide to invoke emergency powers, they must provide an appropriate public *justification* for their derogation decisions, detailing the relevant factual circumstances and explaining why both the invocation of emergency powers generally and the specific responsive measures chosen are strictly necessary to address the public emergency. A state's entry into a state of emergency and any laws, policies, or practices adopted in response to the crisis must be subject to public *notification*, ensuring that those whose rights are curtailed receive appropriate notice. Further, when public officials derogate from ordinary human rights, their decisions must be open to public *contestation* to ensure that emergency powers are not abused to dominate or instrumentalize the state's subjects. Observance of these principles demonstrates an appropriate respect for individual dignity, mitigating concerns that emergency powers will be employed in a manner inconsistent with the fiduciary authorization of public power. In the sections that follow, we consider further how these principles could be applied in practice to strengthen both tiers of international law's emergency constitution.

The Content and Consequences of Jus ad Tumultum

As we have seen, the leading conventions on civil and political rights limit emergency powers to crises threatening the "life of the nation" or the "independence or security" of the state. These conventions leave many important questions unanswered, however, because they do

⁶⁵ See Philip Pettit, *Deliberative Democracy, the Discursive Dilemma, and Republican Theory*, in PHILOSOPHY, POLITICS, AND SOCIETY 138, 155 (2003) ("[P]eople should have discursive standing in relation to government: they should relate to government as parties that can only be interfered with when it is claimed—and that claim can be put to the test—that interference is justified by common avowed or readily avowable interests.").

not fully elucidate the principles that govern states' entry into states of emergency. For example, how dire must a national crisis be before it can be considered to threaten the "life of the nation" or the "security of the state"? Must a state of emergency affect the entire territory of a member-state before international law will permit a state of emergency? May states derogate from their human rights obligations in order to take preemptive action against potential future threats?

The fiduciary theory offers a principled framework for clarifying these and other controversial aspects of *jus ad tumultum*. The starting point for this analysis is the state's overarching fiduciary obligation to furnish a regime of secure and equal freedom. A declaration of a state of emergency becomes necessary when exigent circumstances frustrate the state's ability to guarantee secure and equal freedom without temporarily employing laws, policies, or practices that would constitute a breach of fiduciary duty under other circumstances. While all exercises of coercive force by the state demand justification, the state bears a special burden to justify restrictions on personal freedoms when it asserts that exigent circumstances necessitate recourse to powers that would ordinarily violate the fiduciary principle.

The fiduciary theory confirms conventional wisdom regarding *jus ad tumultum* in some respects and contradicts it in others. Recall that the ECtHR established four criteria in *Lawless* for determining whether exigent circumstances justify a state of emergency: a "public emergency" must be (1) present or imminent, (2) exceptional, (3) concern the entire population, and (4) constitute a "threat to the organized life of the community."⁶⁶ The fiduciary theory supports three of the *Lawless* criteria (subject to important clarifications), but rejects one criterion—the requirement that emergencies concern the entire population—as inconsistent with the state's obligation to guarantee secure and equal freedom for all subjects.

The fourth *Lawless* criterion fits comfortably within the fiduciary theory and provides a natural starting point for *jus ad tumultum* analysis. To justify the state's recourse to emergency powers, national crises must threaten "the organized life of the community" in the sense that they disrupt the state's ability to guarantee its subjects' secure and equal freedom. Thus framed, the fiduciary theory stakes out an intermediate position between the view that all credible threats to individual life and liberty justify recourse to emergency powers⁶⁷ and the competing view that states may employ emergency powers only where the survival or independence of the political community as a whole is at stake.⁶⁸ A state's concern for its national security need not amount to a Sisyphean quest for absolute public safety at the expense of human rights; rather, a state satisfies its fiduciary obligation to secure legal order if it prohibits the illegitimate use of coercive force such that no private party or alien power may dominate or instrumentalize its subjects with impunity, and enforces the prohibition with proportionate means. The state's ability to discharge this fiduciary obligation may be compromised, as the *Siracusa Principles* suggest, in a civil war or natural disaster that threatens "the existence or basic functioning of [public] institutions indispensable to ensure and protect [human] rights."⁶⁹ Only such genuine public

⁶⁶ *Lawless* Commission, 1 Eur. Ct. H.R. (ser. B), § 90, at 82.

⁶⁷ POSNER & VERMEULE, *supra* note 9, at 12 (arguing that "there is a straightforward tradeoff between liberty and security" and that the "real risk is that civil libertarian panic about the specter of authoritarianism will constrain government's ability to adopt cost-justified security measures").

⁶⁸ See *A and Others v. Secretary of State for the Homeland Dept.*, [2004] U.K.H.L. 56, [2005] 2 A.C. 68, ¶¶ 91, 97 (Belmarsh case) (Lord Hoffmann, dissenting) (defining the "life of the nation" as a country's historically rooted "institutions and values"); Hartman, *supra* note 1, at 91 (arguing that public emergencies must "imperil the nation as a whole and its ability to function as a democratic polity").

⁶⁹ *Siracusa Principles*, *supra* note 35, at 7, ¶ 39.

emergencies justify recourse to heightened human rights restrictions under IHRL's emergency constitution.

One important implication of the fourth *Lawless* criterion is that terrorist violence will rarely justify a state's recourse to emergency powers. On the fiduciary theory, terrorist groups such as Al Qaeda and Lakshar-e-Taiba do not constitute full-fledged threats "to the organized life of the community" unless: (1) they have the capacity to launch an attack that would prevent the state from credibly guaranteeing secure and equal freedom (or such capacity is imminent), and (2) the state cannot address these threats without derogating from its human rights obligations. These standards might be satisfied if a state uncovers compelling evidence that a terrorist organization has obtained or will soon obtain a weapon of mass destruction capable of paralyzing essential public institutions. For example, suppose a state determines that a terrorist group has a chemical or biological weapon, which it intends to employ shortly within the national capitol, and which would plunge the country into political chaos. The state might justifiably impose random searches of commercial buildings, homes, and vehicles within the vicinity until the danger passes—even if these measures arguably would require derogation from ICCPR Article 17.⁷⁰ Even under such extraordinary circumstances, however, the state would still bear the burden to show that it cannot adequately address the threat to legal order without derogating from its ordinary human rights obligations and that the measures employed are the least intrusive available to address the threat. In contrast, threats of terrorism against civilian or non-essential governmental targets would not ordinarily justify recourse to emergency powers because such threats do not imperil the institutional prerequisites for legal order, and because random searches, which disproportionately burden the persons directly affected, are inconsistent with a regime of secure and equal freedom.

The fiduciary theory also supports the first *Lawless* criterion, which requires that a public emergency be "present or imminent." States may not employ emergency powers to address future threats to public order that are merely hypothetical or lack credible evidence. Thus, a state's mere "apprehension of potential danger" from terrorism, civic unrest, or economic turmoil would not justify emergency measures absent a plausible showing that such measures are strictly necessary to avert a present or imminent crisis that would disrupt legal order.⁷¹ That this inquiry may in practice turn on difficult empirical questions of credibility and risk perception does not undermine its importance as a criterion in *jus ad tumultum* analysis; it simply underscores the state's fiduciary obligation to evaluate potential threats cautiously and deliberatively, with appropriate solicitude to those who would bear the burden of rights-infringing measures.⁷²

Consistent with *Lawless*'s second criterion, the fiduciary principle also precludes states from employing emergency powers unless "the normal measures or restrictions permitted by [international law] for the maintenance of public safety, health and order are plainly inadequate."⁷³ Emergency powers are "exceptional" in the sense that they are contingent upon the existence of exigent circumstances that frustrate the state's ability to satisfy its basic

⁷⁰ See ICCPR, *supra* note 3, art. 17(1) ("No one shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence . . .").

⁷¹ Cf. *Siracusa Principles*, *supra* note 35, at 8, ¶¶ 40-41 (asserting that "[i]nternal conflict and unrest . . . cannot justify derogations" and that "[e]conomic difficulties per se cannot justify derogation measures.").

⁷² Cf. Matthew C. Waxman, *The Use of Force Against States that Might Have Weapons of Mass Destruction*, 31 MICH. J. INT'L L. 1, 57-77 (2009) (observing that claims of state necessity to use force preemptively turn on evidentiary burdens).

⁷³ *Greek Case*, *supra* note 35 at 70, ¶ 113.

fiduciary obligation. Only where exigent circumstances render generally applicable laws, practices, and procedures inadequate under the fiduciary principle can a state invoke emergency powers to justify restrictions on internationally protected freedoms. That emergencies are “exceptional” is not to say, however, that they are necessarily short in duration, as some have insisted.⁷⁴ Under the fiduciary theory, a state may maintain a state of emergency as long as the crisis justifying emergency action persists—for decades, if necessary—provided that the state complies with *jus in tumultu* and abandons emergency powers immediately once the circumstances necessitating recourse to emergency powers have passed.⁷⁵ The fiduciary theory thus draws a distinction between permanent or institutionalized states of emergency, which are anathema to the fiduciary principle undergirding international law’s emergency constitution, and entrenched emergencies, which may satisfy the fiduciary principle so long as they retain their conditional, “temporary” character.⁷⁶

In each of the foregoing respects, the fiduciary theory offers a secure theoretical framework for the ECtHR’s approach to *jus ad tumultum*. But the fiduciary theory also challenges the status quo insofar as it rejects the ECtHR’s assertion in *Lawless* that exigent circumstances must “concern” a country’s “entire population” to justify the exercise of emergency powers.⁷⁷ The fiduciary principle dictates that a state’s obligation to guarantee secure and equal freedom extends to all persons subject to the state’s powers. To the extent that a state is unable to satisfy this fiduciary obligation in any isolated region—or for discrete groups within the country as a whole—the fiduciary principle authorizes the state to employ emergency powers to the extent strictly necessary to reestablish public order for those adversely affected. When addressing such geographically or demographically limited public emergencies, the state need not demonstrate that crisis conditions adversely affect the rest of the populace. For example, the Columbian government might reasonably resort to emergency measures to address threats posed by paramilitary insurgent groups, even if those groups’ operations are confined to geographically limited regions of the country.⁷⁸ This approach to emergency powers arguably tracks the practice of international, regional, and municipal tribunals more closely with respect to localized emergencies than the canonical *Lawless* test.⁷⁹ Hence the ECtHR and other international and

⁷⁴ See Gross & Ni Aolain, *supra* note 49, at 644 (“Only a truly extraordinary crisis that lasts for a relatively brief period of time can be a derogation-justifying emergency.”).

⁷⁵ See Inter-Am. C.H.R., *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*, at pt. II, subdiv. E, § 14, OEA/Ser.L/V/II.62 doc. 10, rev. 3 (Nov. 29, 1983); ACHR, *supra* note 4, art. 27, §§ 1, 3 (allowing for derogations for as long as necessary to address an emergency).

⁷⁶ See U.N. Human Rights Committee, July 24, 2001, ICCPR art. 4, General Comment No 29, ¶ 2, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001) (“Measures derogating from the principles of the Covenant must be of an exceptional and temporary nature.”).

⁷⁷ See J.E.S. FAUCETT, *THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 308 (2d ed. 1987) (“The emergency must be nation-wide in its effects, so that however severe the local impact of an emergency may be, it will not, in the absence of that condition, be a ‘public emergency’”); ORAÁ, *supra* note 1, at 28-39 (observing that a public emergency must affect the whole population, or at least the whole population within a limited area); NICOLE QUESTIAUX, *STUDY OF THE IMPLICATIONS FOR HUMAN RIGHTS OF RECENT DEVELOPMENTS CONCERNING SITUATIONS KNOWN AS STATES OF SIEGE OR EMERGENCY*, U.N. ESCOR, 35th Sess., Provisional Agenda Item 10 at 15, U.N. Doc. E/CN.4/Sub.2/1982/15 (1982) (asserting that a public emergency must affect “the whole of the population”).

⁷⁸ See ICCPR Derogation Notices, *supra* note 17 (Columbia (Apr. 11, 1984)).

⁷⁹ See Ronald St. J. Macdonald, *Derogations Under Article 15 of the European Convention on Human Rights*, 36 COLUMBIA J. TRANSNAT’L L. 225, 240-41 (1997) (“In fact, the manner in which the Convention has been applied in Northern Ireland and Turkey allows states to take measures in a severely affected area of the nation that would not

regional tribunals could easily abandon *Lawless*'s third requirement and embrace the fiduciary principle without disavowing their own prior decisions.

One important implication of the fiduciary theory is that states may not exercise emergency powers pursuant to undeclared, de facto public emergencies. Commentators have observed that de facto emergencies have proliferated as states have endeavored to skirt international monitoring of their human rights compliance.⁸⁰ Under the fiduciary theory, however, states' obligation to treat their subjects always as self-determining agents entails a responsibility to notify the public regarding the state's use of emergency powers and the circumstances upon which the state relies to justify its emergency declaration.⁸¹ This requirement that states proclaim a formal state of emergency "puts the citizenry on notice of the intent of the governing authorities and may provide a chance for public discussion and response, or at least fair warning of limitations" on the exercise of human rights.⁸² The notice requirement ensures that the public has an opportunity to understand their legal rights and participate in shaping the state's response to the crisis at hand.

In sum, the fiduciary theory suggests that public emergencies may take a variety of forms, including not only traditional emergencies such as armed conflicts and internal political unrest but also other challenges to public order arising from grave financial distresses, public health crises, and natural disasters. In each of these contexts, a state may derogate from its human rights obligations only if it can demonstrate that the crisis at hand overwhelms the capacity of public institutions to guarantee subjects' secure and equal freedom through the application of generally applicable laws.

The Content and Consequences of Jus in Tumultu

The fiduciary theory also illuminates the content and consequences of *jus in tumultu*. When states restrict the exercise of human rights during emergencies, the fiduciary principle requires a reasoned public justification concerning the particular emergency measures employed. As Jerry Mashaw has observed, "[u]nreasoned coercion denies our moral agency and our political standing as citizens entitled to respect as ends in ourselves, not as mere means in the effectuation of state purposes."⁸³ Conversely, when states publicly justify their emergency measures, they respect persons subject to their power as self-determining agents endowed with dignity. The burden lies on states, therefore, to provide a "specific justification of each measure

be strictly necessary in other areas where the threat is less significant."); cf. *A and others v. Secretary of State for the Home Department*, [2004] UKHL 56 ([2005] 2 AC) (Belmarsh case).

⁸⁰ See GROSS & NI AIOLAIN, *supra* note 9, at 305, 320-21.

⁸¹ *Silva et al. v. Uruguay*, Comm. No. 34/1978, Decision by Hum. Rts. Comm. Under Art. 5(4) of the Optional Protocol to the ICCPR, ¶ 8.3 (Apr. 8, 1981) (affirming that the state bears the burden to justify a state of emergency by "giv[ing] a sufficiently detailed account of the relevant facts" to "legitimize [its] departure from the normal legal regime prescribed by the Covenant"); see also Human Rights Comm., Concluding Observations: Israel, P21, U.N. Doc. CCPR/C/79/Add.93 (Aug. 18, 1998) (criticizing Israel for providing insufficient information "on the implementation of the Covenant in practice and on the factors and difficulties impeding its effective implementation").

⁸² Hartman, *supra* note 1, at 99; see also STEVEN SLAUGHTER, *LIBERTY BEYOND NEO-LIBERALISM: A REPUBLICAN CRITIQUE OF LIBERAL GOVERNANCE IN A GLOBALISING AGE* 193 (2005) (articulating the republican conception of citizenship as "an ongoing stake in the public deliberation of the political operation of the state").

⁸³ Jerry L. Mashaw, *Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance*, 76 GEO. WASH. L. REV. 99, 104 (2007).

taken in response to an emergency, rather than an abstract assessment of the overall situation.”⁸⁴ A state’s failure to provide a reasoned justification for particular emergency measures renders those measures unlawful on their face, as the U.N. Human Rights Committee has recognized.⁸⁵

The principal focus of justification at the *jus in tumultu* stage falls on the principle of necessity: states may restrict human rights only to the extent “strictly required” to restore public order.⁸⁶ Courts and publicists generally agree that the necessity principle requires states to identify the range of measures available to address an emergency and then to determine which of these measures are proportional to the desired end.⁸⁷ The fiduciary theory clarifies that the end against which emergency powers’ proportionality must be measured is the restoration of subjects’ secure and equal freedom. General derogation clauses in human rights conventions must be understood, therefore, to permit restrictions on human rights only where a state’s responsive measures are no more intrusive than strictly necessary. In assessing proportionality for these purposes, states should address the severity, duration, and scope of emergency measures, as well as consider the measures’ compatibility with domestic law and other international obligations.⁸⁸

Arguably a special justification is required if a state gives notice that it intends to derogate from treaty provisions which themselves contain limitation clauses, such as those addressing the rights to a public trial,⁸⁹ peaceable assembly,⁹⁰ and freedom of association.⁹¹ The fiduciary theory allows states to employ limitation clauses during and outside states of emergency where such action is “necessary” to safeguard subjects against domination and instrumentalization. Such may be the case, as the ICCPR and other conventions recognize, where the state adopts nondiscriminatory laws, policies, or practices to advance “national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.”⁹² For example, ICCPR Article 14.1 arguably permits courts to restrict the public’s access to sensitive evidence introduced in terrorism trials in

⁸⁴ Hartman, *supra* note 1, at 106.

⁸⁵ *Silva et al. v. Uruguay*, Comm. No. 34/1978, Decision by Hum. Rts. Comm. Under Art. 5(4) of the Optional Protocol to the ICCPR, ¶ 8.3 (Apr. 8, 1981) (“[I]f the respondent Government does not furnish the required justification itself, as it is required to do under article 4(2) of the Optional Protocol and article 4(3) of the Covenant, the Human Rights Committee cannot conclude that valid reasons exist to legitimize a departure from the normal legal regime prescribed by the Covenant.”).

⁸⁶ See ICCPR, *supra* note 3, art. 4.1.

⁸⁷ See, e.g., THEORY AND PRACTICE OF THE EUROPEAN COURT ON HUMAN RIGHTS 1062 (4th ed. 2006) (“The condition of ‘strictly required by the exigencies of the situation’ implies that States have to provide a careful justification for the derogation measures they have taken; the extent of the derogation must be strictly related to the situation.”); Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT’L L. 715, 758-60 (2008); Daniel O’Donnell, *Commentary by the Rapporteur on Derogation*, 7 HUM. RTS. Q. 23, 27 (1985) (asserting that states bear a “duty to assess the need for each particular measure with all due care, if possible before it is adopted or, if not, as soon after adoption as possible”).

⁸⁸ See Grossman, *supra* note 35, at 51; Hartman, *supra* note 1, at 108; cf. Inter-Am. C.H.R.: Advisory Opinion on Habeas Corpus in Emergency Situations, 27 I.L.M. 513, ¶ 39, at 522 (1988) (observing that emergency measures will have violated international law if they “lasted longer than the time limit specified, if they were manifestly irrational, unnecessary or disproportionate, or if, in adopting them, there was a misuse or abuse of power”).

⁸⁹ ICCPR, *supra* note 3, art. 14.1.

⁹⁰ *Id.* art. 21.

⁹¹ *Id.* art. 22.

⁹² *Id.*

the interest of “national security,”⁹³ but under the fiduciary theory basic elements of due process would have to remain in place because these are required as a matter of *jus cogens*.⁹⁴ To the extent that such restrictions are necessary to safeguard public security, a state may justifiably adopt them pursuant to the limitation clause in Article 14.1 without filing a notice of derogation.⁹⁵ On the other hand, it appears unlikely that the fiduciary principle would ever authorize a state to *derogate* from the right to a public trial on “national security” grounds, since virtually any permissible restriction on this right could be justified based on the limitations clause of Article 14.1. The ultimate implication is that most permissible restrictions on human rights, such as restrictions under Article 14.1 and mandatory product warnings, will take the form of permanent limitations rather than temporary derogations. In practice, the fiduciary principle will rarely authorize a state to derogate from human rights treaty provisions that contain general limitation clauses.

The fiduciary theory also supports the traditional rule that states may not violate peremptory human rights norms under any circumstances during emergencies. States must refrain from exploiting any person as a mere instrument of public policy through abusive practices such as prolonged arbitrary detention or torture that deny her status as an equal co-beneficiary of state sovereignty. In addition, emergency measures must always take the form of general rules—not ad hoc commands—in order to satisfy the peremptory norm of non-discrimination. As human rights experts have recognized, this requirement of nondiscrimination in emergencies constitutes a nonderogable “principle of legality” that prevents “arbitrary restrictions on human rights.”⁹⁶ A state may not therefore subject persons residing lawfully within its borders to administrative detention without offering a particularized, nondiscriminatory justification that satisfies the fiduciary principle.⁹⁷ Nor may a state subject non-citizens to indefinite administrative detention based solely on concerns for the welfare of its citizens.⁹⁸ Prolonged incommunicado detention is likewise prohibited.⁹⁹ In each of these respects, the fiduciary theory confirms the conventional wisdom that some measures a state might employ to restore public order are simply beyond the scope of state emergency powers under international law.

⁹³ ICCPR, *supra* note 3, art. 14.1. *But see* William Glaberson, *War Crimes System Is Still on Trial*, N.Y. TIMES, Aug. 10, 2008, at A27 (criticizing “secret filings,” “closed sessions,” and “unexplained mysteries” in Salim Hamdan’s trial by U.S. military commission).

⁹⁴ *See* Criddle & Fox-Decent, *supra* note 51, at 370-71.

⁹⁵ Of course, even if the state relies exclusively upon limitations clauses, the fiduciary principle obligates the state to justify any heightened restrictions on human rights and provide a full and fair opportunity for public contestation.

⁹⁶ Bert Lockwood Jr., et al., *Working Paper for the Committee of Experts on Limitations Provisions*, 7 HUMAN RIGHTS Q. 35, 44 (1985). Restrictions on human rights are “arbitrary” under the fiduciary theory if they violate the fiduciary principle by transgressing the standards of formal moral equality, integrity, or solicitude.

⁹⁷ *But see* *Ashcroft v. Iqbal*, 566 U.S. -, 129 S. Ct. 1937, 1944 (2009) (upholding an order dismissing as inadequately pleaded a civil action alleging that the U.S. Attorney General and the Director of the Federal Bureau of Investigation “detained thousands of Arab men” and subjected them to harsh conditions “solely on account of [their] religion, race, and/or national origin and for no legitimate penological interest”).

⁹⁸ *See* *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001) (holding that “indefinite detention of aliens [who were admitted to the United States but subsequently ordered removed] would raise serious constitutional concerns” and construing U.S. law “to contain an implicit ‘reasonable time’ limitation” for administrative detention).

⁹⁹ *See* *De La Cruz-Flores v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 115, at 61, ¶ 127 (Nov. 18, 2004) (“[I]nternational human rights law has established that incommunicado must be exceptional and its use during detention may constitute an act against human dignity, since it may produce a situation of extreme psychological and moral suffering for the detainee”) (internal quotation marks and citations omitted).

Similarly, the fiduciary theory confirms the requirement that states must provide notice concerning their derogations from human rights conventions, but it suggests that this requirement exists primarily for the benefit of a state's subjects, not the international community *per se*. Traditionally, notification requirements have been understood primarily as devices to facilitate international monitoring; when states provide notice of derogation pursuant to their treaty commitments, international and regional tribunals and other states-parties are better equipped to check human rights abuses.¹⁰⁰ States have often ignored notification requirements during emergencies, however, viewing such provisions as mere procedural technicalities.¹⁰¹ The fiduciary theory, on the other hand, suggests that such notification requirements are central to the state-subject fiduciary relation: states must justify emergency measures publicly to honor their obligation to treat subjects as ends-in-themselves and not as mere means to the state's ends. Subjects must receive notice regarding the legal and practical consequences of public emergencies in order to appreciate how emergency measures will impact their rights and obligations.¹⁰² The notice requirement also affirms the fiduciary character of state legal authority by empowering individuals to contest emergency measures. At a minimum, therefore, emergency proclamations must identify the circumstances constituting the public emergency, the particular rights suspended, the state's responsive measures, and the state's reasons for selecting those measures.¹⁰³ Whenever states derogate from their human rights commitments, public notice and justification are essential to secure individuals against domination and instrumentalization and affirm a relationship in which the state serves as a fiduciary for those subject to its powers.¹⁰⁴

Just as the fiduciary theory supports public notification of emergency measures, it also dictates that individuals—rather than states-parties alone—have standing to contest violations of *jus ad tumultum* and *jus in tumultu* before independent human rights commissions, as well as through the political process and domestic judicial review. The principle of contestability in public emergencies derives from the republican principle of nondomination, securing persons against arbitrariness and state capture. Phillip Pettit describes the principle's application as follows:

[I]f the state's power of interference is to be rendered non-arbitrary then whatever other devices are in place, people must be able to contest the decisions made by

¹⁰⁰ See ICCPR, Gen. Cmt. No. 29 – States of Emergency (art. 4), ¶ 17, July 24, 2001 (asserting that the international notification regime is necessary to allow human rights bodies to discharge their functions, as well as to permit other states-parties to monitor compliance); Hartman, *supra* note 1, at 105 (observing that during the drafting of ICCPR Article 4, “the notification requirement was . . . intended to stress the limitations on the derogation privilege and to facilitate international supervision”).

¹⁰¹ See Hartman, *supra* note 1, at 99 (observing that none of the “four states parties whose reports were examined at the Human Rights Committee's Twenty-first session in March-April 1984 . . . had provided any notification under Article 4(3)"); O'Donnell, *supra* note 87, at 26 (“complete failure to notify . . . ha[s] occurred regularly”).

¹⁰² O'Donnell, *supra* note 87, at 25 (noting the statement of ICCPR draftsman Rene Cassin that the “real purpose of Article 4 was to require States to take a decision in public when they were obliged to restrict such rights”) (citing U.N. Doc. E/CN.4/SR 127, 14.6 (1949)).

¹⁰³ See Inter-American Commission on Human Rights, Report on Bolivia, OEA/Ser.L/V/II.53 doc.6 (July 1, 1981), at 22, 63-64; Silva et al. v. Uruguay, Comm. No. 34/1978, Decision by Hum. Rts. Comm. Under Art. 5(4) of the Optional Protocol to the ICCPR, ¶ 8.2 (Apr. 8, 1981); ICCPR General Comment No. 29: State of Emergency (Article 4), ¶ 17 (“[T]he notification by States parties should include full information about the measures taken and a clear explanation of the reasons for them, with full documentation attached regarding their law.”).

¹⁰⁴ See CHARLES TILLY, WHY? 19 (2006) (observing that reason-giving has a relational character, in that it confirms, establishes, negotiates, and repairs relations between the giver and receiver).

various arms of government. They must have access to the reasons supporting those decisions and they must be able to contest the soundness of those reasons or the degree of support they offer to the decisions made. Moreover they must be in a position, ideally, to expect that such contestations will be heard, will be impartially adjudicated and, if necessary, will be implemented against those in government. . . . It is only in the event of democracy having this deliberative cast that contestability, and ultimately non-arbitrariness, can be furthered.¹⁰⁵

In short, states must afford the public an opportunity to contest emergency measures to ensure that all subjects have a voice and that all relevant interests are taken into account in the formulation and management of a state's response to an emergency. This opportunity for public contestation must remain open for the duration of an emergency to prevent temporary emergency measures from ossifying into permanent or institutionalized emergencies. Whenever states violate *jus ad tumultum* or *jus in tumultu*, persons adversely affected must have access to independent review to ensure that state emergency measures have an "objective justification" in international law's emergency constitution.¹⁰⁶ To the extent that oversight bodies such as the U.N. Human Rights Committee do not permit individuals to contest state emergency measures directly, their complaint procedures must be reformed to satisfy the fiduciary principle.

A Margin of Appreciation?

In practice, international and regional tribunals have paid considerable deference to states' declarations of emergency and the measures they adopt to contend with them. Within the European human rights system in particular, the ECtHR has accorded an express "margin of appreciation" to state assessments, holding that national authorities are often better placed to ascertain whether a public emergency exists "by reason of their direct and continuous contact with the pressing needs of the moment."¹⁰⁷ In *Ireland v. United Kingdom*, the ECtHR asserted that the ECHR contemplates "a wide margin of appreciation" to state decision-makers because "national authorities are in a better position than the international judge to decide both on the presence of . . . an emergency and on the nature and scope of the derogations necessary to avert it."¹⁰⁸

¹⁰⁵ Philip Pettit, *Deliberative Democracy and the Discursive Dilemma*, 11 PHIL. ISSUES 268, 281-82 (2001).

¹⁰⁶ Report of the Human Rights Committee, U.N. GAOR, 34th Sess., Supp. No. 40, at 20, U.N. Doc. A/34/40, ¶ 78 (1979); see also U.N. Hum. Rts. Committee, 1985 Report on Chile, UNGAOR. A/39/40 (1984), 83-84, ¶¶ 444, 449 [hereinafter 1985 Report on Chile] (finding that "what was called an emergency in Chile had nothing to do with what was intended by the same term in Article 4").

¹⁰⁷ *Brannigan & McBride v. United Kingdom*, (1994) 17 E.H.R.R. 539, 556 (quoting *Ireland v. United Kingdom*); see also *Aksoy v. Turkey*, (1997) 23 E.H.R.R. 553, 555, 571; *Sen v. Turkey*, ECHR 17 June 2003, ¶ 25. *But see Lawless Court*, *supra* note 6, at 55 (noting that "it is for the Court to determine whether the conditions laid down in Article 15 for the exercise of exceptional right of derogation have been fulfilled in the present case").

¹⁰⁸ 1 Eur. Ct. H.R. 15, ¶ 207 (1961); see also *Murray v. United Kingdom*, 19 Eur. H.R. Rep 30, ¶ 90 (1994) ("A certain margin of appreciation in deciding what measures to take both in general and in particular cases should be left to the national authorities."). Other international organs have invoked the margin of appreciation doctrine but have not applied it as consistently or systematically as the ECtHR. See, e.g., Inter-Am. Ct. Hum. Rts., Proposed Amendments to the Naturalizations Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4184 of Jan. 19, 1984, ser. A, no. 4, ¶¶ 36, 58-59, 62-63, available at http://www1.umn.edu/humanrts/iachr/b_11_4d.htm (last visited Mar. 16, 2010) (noting "the margin of appreciation which is reserved to States when it comes to the establishment of requirements for the acquisition of nationality and the determination whether they have been

Such deference to states is not, however, unlimited. In subsequent cases, the ECtHR has stressed that the ultimate “burden lies on [states] to justify their acts.”¹⁰⁹ When states have not satisfied this burden, the court has repeatedly found violations of Article 4(3). For example, in *Brannigan & McBride v. United Kingdom*, the court held that the United Kingdom had abused its emergency powers by prolonging the detention and interrogation of two residents of Northern Ireland without an adequate justification.¹¹⁰ Similarly, in *Aksoy v. Turkey*, the court concluded that a two-week delay in presenting a citizen-detainee before a judge “exceeded the Government’s margin of appreciation” because it “could not be said to be strictly required by the exigencies of the situation.”¹¹¹ Unlike the wider margin of appreciation accorded states when assessing whether circumstances justify declaring a state of emergency, the ECtHR generally “undertake[s] more exacting scrutiny of measures the government chooses to take” in response to the emergency.¹¹²

The concept underlying the “margin of appreciation” doctrine is deference. As David Dyzenhaus notes, deference can be understood in two ways, as either “deference as submission” or “deference as respect.”¹¹³ Whereas deference as submission requires judges to submit without more “to the intention of the legislature, on a positivist understanding of intention,” deference as respect “requires not submission but a respectful attention to the reasons offered or which could be offered in support of a decision, whether that decision be the statutory decision of the legislature, a judgment of another court, or the decision of an administrative agency.”¹¹⁴ In the context of emergency derogations, deference as respect provides a compelling framework for review because it recognizes the legitimacy of the primary role states play in guaranteeing human rights. At the same time, deference as respect insists that the legitimacy of this very role depends on those states offering reasoned justifications for declarations of emergency and derogation measures. That is, deference as respect takes seriously arguments based on subsidiarity and the idea that national authorities may be in a “better position” to assess and respond to crises,¹¹⁵ but requires those authorities to offer robust justifications that are worthy of respect. Such justifications help to ensure that temporary political pressures do not overwhelm the state’s commitment to respect, protect, and fulfill human rights. On the fiduciary theory, this requirement of reason-giving is a legal duty because it is part of the state’s obligation to guarantee secure and equal freedom.

complied with”); HRC: Hertzberg et al. v. Finland, U.N. GAOR Human Rights Comm., 37th Sess., Supp. No. 40 at 161, ¶ 10.3, U.N. Doc. A/37/40 (1982) (recognizing that “a certain margin of discretion must be accorded to the responsible national authorities”).

¹⁰⁹ Murray, *supra* note 108, at 15, ¶ 38.

¹¹⁰ 258 Eur. Ct. H.R. (ser. A) (1993).

¹¹¹ 23 E.H.R.R. 553, 573 ¶ 183 (1997); *see also* Demir and Others v. Turkey, (1998) E.C.H.R. 88, ¶ 52 (“In the Court’s opinion, the mere fact that the detention concerned was in accordance with domestic law . . . cannot justify under Article 15 measures derogating from Article 5 section 3.”).

¹¹² Macdonald, *supra* note 65, at 258.

¹¹³ Dyzenhaus’s discussion of deference is in the context of municipal judicial review of administrative action and working out the appropriate relationship between the legislature, courts and administrative agencies, but it is just as relevant here. David Dyzenhaus, *The Politics of Deference: Judicial Review and Democracy*, in THE PROVINCE OF ADMINISTRATIVE LAW 278, 286 (Michael Taggart, ed., 1997).

¹¹⁴ *Id.*

¹¹⁵ *But see* Gross & Ni Aolain, *supra* note 49, at 638-41 (challenging the view that during emergencies national authorities are better positioned than the ECtHR and that subsidiarity requires national rather than supranational institutions to take primary responsibility for protecting human rights.)

More specifically, under the deference-as-respect fiduciary model, states would be afforded a certain margin of appreciation, but as a rule the scope of the margin would be circumscribed by the range of measures least restrictive of the derogated rights. Furthermore, the state would bear the burden of showing that the measures were strictly necessary and proportionate, on an objectively defensible interpretation of the facts at the relevant time (as they could best be known on a good faith basis).¹¹⁶ Truly egregious circumstances may warrant more restrictive measures, but those circumstances could not be invoked to violate *jus cogens* norms, and as with the adoption of the least restrictive means, such measures would have to be objectively defensible and consistent with a rigorous principle of proportionality that requires the state to show that the measures adopted were indeed strictly necessary.¹¹⁷

The Fiduciary Basis of International Law's Emergency Constitution

In sum, international law's emergency constitution derives its normative force from the Kantian principle that states bear fiduciary obligations to safeguard their subjects against domination and instrumentalization. States must comply with the core requirements of *jus ad tumultum* and *jus in tumultu* to ensure that their subjects are treated always as ends-in-themselves and not as mere means to the achievement of state objectives. The basic requirements of international law's emergency constitution are binding upon all states, as the Inter-American Court has recognized, irrespective of whether states are parties to the particular conventions in which these requirements find expression.¹¹⁸ Whether or not states have ratified particular human rights conventions, the fiduciary principle dictates that they must not restrict preemptory human rights under any circumstances, and they may employ emergency powers to restrict other human rights only where such measures are strictly necessary to guarantee subjects' secure and equal freedom.

IV. CARL SCHMITT'S CHALLENGE TO INTERNATIONAL LAW'S EMERGENCY CONSTITUTION

As noted in the Introduction, the fiduciary theory of human rights offers a powerful response to Carl Schmitt's argument that the rule of law cannot constrain state discretion during emergencies. While IHRL essentially presupposes that international law can govern emergencies, this crucial presupposition requires a sustained defense in light of the practical and theoretical seriousness of Schmitt's critique. Over the past decade, Schmitt's theory of emergency powers has cast its shadow across the entire spectrum of scholarship on emergency powers. Schmitt's influence is evident not only in the work of admirers such as Agamben, but also in the writings of more liberal-leaning scholars such as Oren Gross and Mark Tushnet, who

¹¹⁶ See Hartman, *supra* note 1, at 125 (defending a "middle ground" position for scrutiny of emergency measures that mitigates a purely objective test based on a retrospective view of the facts by allowing states to show that they acted on a good faith assessment of facts that are uncertain at the relevant time).

¹¹⁷ See Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT'L L. 715, 760 (2008) (arguing that proportionality flows from inquiry into whether a derogation or measures taken under it are necessary); *cf.* Hickman, *supra* note 41.

¹¹⁸ *E.g.*, 1985 Report on Chile, *supra* note 106, at 44-45, ¶¶ 95-99 (holding that Chile, which was not a party to the ACHR, was bound by the *jus ad tumultum* principles expressed therein); ORAÁ, *supra* note 1, at 26 (noting that the Inter-American Commission has applied "[t]he same principles governing the assessment of the existence of a public emergency . . . to States non-parties to the Convention").

have despaired of legality in emergencies and have resorted to Schmitt to support extra-constitutional approaches to emergency powers.¹¹⁹ David Dyzenhaus, who defends the idea that a substantive conception of the rule of law can govern emergencies, explicitly pitches his theory of the rule of law as a response to “Schmitt’s challenge.”¹²⁰ If Agamben is correct that Schmitt’s conception of emergency powers has become the dominant national-security paradigm, disarming Schmitt’s challenge may have profound consequences not only for international legal theory but also for the observance of human rights in practice.

We turn now to the fiduciary theory’s response to Schmitt’s challenge, and in particular, to how the fiduciary model provides a normative structure capable of regulating public power even in the absence of positive norms. We argue that Schmitt’s challenge rests on a mistaken assumption that legal order consists exclusively of norms and decisions—ignoring the constitutive role of broader principles—and that the fiduciary principle, which is a principle of legality, offers a sound theoretical basis for constraining emergency powers and holding states to account for their violations of human rights during emergencies.

Schmitt announces at the outset of *Political Theology* that “[s]overeign is he who decides on the exception.”¹²¹ By this Schmitt means that the sovereign is he who “decides whether there is an extreme emergency as well as what must be done to eliminate it.”¹²² Because “the precise details of an emergency cannot be anticipated, nor can one spell out . . . how it is to be eliminated,” the power to decide on the exception “must necessarily be unlimited.”¹²³ Schmitt was able to make this claim because he believed that the realm of the legal or juristic consists in exclusively two elements: general norms and particular decisions.¹²⁴ Legal norms, however, are not self-executing, and even if their meaning were transparent and agreed to by all, they cannot exhaustively anticipate the shape an emergency will take nor determine what must be done to eliminate the unforeseeable. Thus the sovereign’s power to decide on the exception, Schmitt thought, cannot be checked by general norms. And because only decisions on the exception are capable of safeguarding the “normal” legal order, Schmitt could conclude that “[l]ike every other

¹¹⁹ See, e.g., Oren Gross, *Chaos and Rules*, *supra* note 50; Mark Tushnet, *Emergencies and the Idea of Constitutionalism*, in *THE CONSTITUTION IN WARTIME* 124 (Mark Tushnet, ed. 2005). For example, Gross has criticized Schmitt’s theory that emergencies are not subject to norms, yet in the end he seems unable to resist the gravitational pull of Schmitt’s argument that national crises may justify departures from legality. Compare Oren Gross, *The Normless and Exceptionless Exception: Carl Schmitt’s Theory of Emergency Powers and the “Norm-Exception” Dichotomy*, 21 *CARDOZO L. REV.* 1825, 1828, 1867 (2000) (arguing that Schmitt’s theory of the exception is normatively “indefensible”), with Gross, *Chaos and Rules*, *supra* note 50, at 1023 (advocating a model of emergency powers whereby “public officials . . . may act extralegally when they believe that such action is necessary for protecting the nation and the public in the face of calamity, provided that they openly and publicly acknowledge the nature of their actions”).

¹²⁰ DYZENHAUS, *supra* note 23, at 35-54.

¹²¹ SCHMITT, *supra* note 8, at 5.

¹²² *Id.* at 7.

¹²³ *Id.* at 6-7.

¹²⁴ *Id.* at 10. As Dyzenhaus points out, Schmitt’s theory of sovereignty is tied closely to his understanding of “the political,” a pre-juristic “moment” centered on the friend/enemy distinction. Enemies pose threats to the existence of political and legal order, and so, according to Schmitt, the sovereign must have unlimited power to identify and beat back those threats. DYZENHAUS, *supra* note 23, at 34; CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 5 (1976). In the text we focus on Schmitt’s claims about the nature of legal order. These claims pose an independent argument that cannot be dismissed on liberal grounds that the friend/enemy distinction is normatively irrelevant because inconsistent with the moral equality of individuals.

order, legal order rests on a decision and not a norm.”¹²⁵ That is, even during normal times the sovereign retains an unlimited power to declare and deal with emergencies. By virtue of this power, the sovereign “stands outside the normally valid legal system,” but also “belongs to it, for it is he who must decide whether the constitution needs to be suspended in its entirety.”¹²⁶ Liberal legalists are therefore fooling themselves if they think that constitutional or other legal norms have purchase except at the discretion and sufferance of the sovereign.

Let us consider Schmitt’s assumption that legal order consists in only norms and decisions. A corollary of Schmitt’s conception of legal order is that it takes no account of principles or the constitutive role they might play in legal order. Schmitt can perhaps concede that the interpretation of norms (at least during normal times) may be guided by principles embedded within a legal tradition, much as inclusive legal positivists and incorporationists respond to Dworkin’s hard cases by allowing moral principles to play a role in adjudication while denying that they are part of the concept of law.¹²⁷ The more natural reading of Schmitt, however, is that he is an exclusive legal positivist. For exclusivists such as Raz, principles can temper decision-making, but they are always extra-legal standards judges can refer to or not at their discretion.¹²⁸ Similarly, on Schmitt’s positivist legal theory the sovereign and his delegates may but are not required to use principles to inform the interpretation of norms. And, if an emergency is declared, access to principles is cut off at the root because the norms that principles may influence are “destroyed in the exception.”¹²⁹ Principles thus have no independent standing during normal times, and no standing at all during a state of exception.

In elaborating the fiduciary theory above, we have relied on two theorists, Fuller and Kant, who vigorously dispute the idea that legal order is intelligible as such without recourse to principles. For Fuller those principles are found in his internal morality of law, while for Kant they are the constitutive normative elements of his regime of secure and equal freedom. As noted, the major principles within the fiduciary model begin with a Kantian principle of respect for agency and dignity. Respect for agency and dignity within a fiduciary context implies more determinate principles of non-instrumentalization and non-domination. Within the state-subject fiduciary relationship in particular, these normative precepts crystallize in principles such as integrity, formal equality, solicitude, and equal security under the rule of law. We have argued that these principles underpin human rights,¹³⁰ but it is important to see that the principles intrinsic to the fiduciary model do much more than this: fiduciary principles also control exercises of discretionary power where there is no explicit norm in place to guide the power holder. As we shall see below, the fiduciary model’s principled control of discretion enables it to answer Schmitt’s challenge.

Dyzenhaus observes that for Schmitt the problem of the exception is akin to the problem of discretionary decision-making in ordinary cases; *i.e.*, decision-making within legal order when

¹²⁵ SCHMITT, *supra* note 8, at 10.

¹²⁶ *Id.* at 7.

¹²⁷ For a recent defense of inclusive legal positivism and incorporationism, see Matthew Kramer, *Moral Principles and Legal Validity* 22 *RATIO JURIS* 44 (2009).

¹²⁸ See, e.g., JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 195-237 (1994).

¹²⁹ SCHMITT, *supra* note 8, at 12.

¹³⁰ See Criddle & Fox-Decent, *Jus Cogens*, *supra* note 51, at 361-68; Fox-Decent & Criddle, *Fiduciary Constitution*, *supra* note 51.

determinate legal rules do not supply an answer.¹³¹ Similarly, for positivists such as Hart, Dyzenhaus says, “the moment of discretionary judgment in a penumbral case is a kind of mini state of emergency of exception.”¹³² These moments pose a conundrum from the point of view of legality that resembles the puzzle posed by emergencies: in the absence of a controlling norm of positive law, on what basis can a judge (or anyone) second-guess the legality of an executive decision, especially if that decision is taken under valid statutory authority that confers an unqualified discretion?

Dyzenhaus’s answer to both puzzles is common law constitutionalism, the theory that legal principles reside within the common law, are constitutive of legality, and inform (or should inform) statutory interpretation and exercises of discretion.¹³³ For Dyzenhaus, common law constitutionalism implies a joint commitment on the part of legislatures, executives, and judges to a “rule-of-law project.”¹³⁴ The project consists in the legislature enacting laws capable of being interpreted by officials and judges in such a way that their implementation respects principles of due process, reasonableness, and equality, all of which is informed by the idea that “the legal subject has to be regarded as a bearer of human rights.”¹³⁵ When either the legislature or the executive appear to lose their rule-of-law nerve, it falls to judges on review to keep the other branches within the project by imposing procedural safeguards or reading down legislation in accordance with common law values.¹³⁶

Dyzenhaus’s reply to ‘Schmitt’s challenge’ begins with an admission that the judicial record in emergency situations is at best mixed: judges are often spineless and overly deferential to the executive. But sometimes they are not, and sometimes their decisions are of real benefit to detainees held indefinitely in legal black holes or “grey” holes, without due process or other rule-of-law safeguards.¹³⁷ The mixed record thus shows that judges can play a meaningful role upholding the rule of law in the face of legislative or executive resistance. Even at the limit, where the resistance is extreme and reinforced by unambiguous legislation, the role of the judge in legal order is still to uphold the rule of law, so judges are duty-bound to decry its subversion. That is, contrary to Schmitt’s claim that only an (executive) sovereign with unlimited power can declare and deal with emergencies, Dyzenhaus’s discussion of national security cases arguably shows that if judges properly understand their role within legal order, they can regulate the use of emergency powers and publicly denounce attempts to evade the rule of law.

Not all are convinced that Dyzenhaus has met Schmitt’s challenge. One of Dyzenhaus’s critics, Thomas Poole, claims that Dyzenhaus fails to explain where common law values such as

¹³¹ DYZENHAUS, *supra* note 23, at 60-61. *But see* AGAMBEN, *supra* note 9, at 31 (rejecting the idea that there is an analogy to be drawn between the state of exception and “lacunae in the juridical order” on grounds that the state of exception represents a suspension of legal order rather than a deficiency in determinacy to be mended by judges).

¹³² DYZENHAUS, *supra* note 23, at 60.

¹³³ *Id.*; *see also* T.R.S. ALLAN, *CONSTITUTIONAL JUSTICE: A LIBERAL THEORY OF THE RULE OF LAW* (2003); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996); Mark Walters, *The Common Law Constitution in Canada: Return of Lex Non Scripta as Fundamental Law?* 51 U. TORONTO L.J. 91 (2001); Benjamin C. Zipursky, *Minimalism, Perfectionism, and Common Law Constitutionalism: Reflections on Sunstein’s and Fleming’s Efforts to Find the Sweet Spot in Constitutional Theory*, 75 FORDHAM L. REV. 2997 (2007).

¹³⁴ DYZENHAUS, *supra* note 23, at 3.

¹³⁵ *Id.* at 12-13.

¹³⁶ *See, e.g.*, *Liversidge v. Anderson*, [1942] AC 206 (Lord Atkin, dissenting) (finding that a wartime detention regulation permitting detention without trial must be read objectively rather than subjectively).

¹³⁷ *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *see also* DYZENHAUS, *supra* note 23, at 205 (asserting that black holes give detainees no protections, while grey holes offer a façade of legality but nothing substantive).

equality, fairness, and reasonableness come from, “save that they are inherent in the very notion of legality, which, given that this is precisely the subject in dispute, rather begs the question.”¹³⁸ Moreover, Poole says, even as stated these values “do not offer a coherent blueprint for judicial decision making.”¹³⁹ Poole objects that “we are not told why these particular common law values should outweigh (always? generally?) other, countervailing values, such as security or even national preservation.”¹⁴⁰ Part of the difficulty common law constitutionalists such as Dyzenhaus face, he says, is that the common law’s normative content in the public sphere tends to be “soft-edged . . . as well as susceptible to change.”¹⁴¹ Intriguingly, Poole qualifies as “harder-edged” procedural rules such as parliamentary sovereignty, as well as private law concepts such as the “importance attached to contract and, above all, property.”¹⁴² He appears prepared to acknowledge, in other words, that private law concepts can give rise to a coherent blueprint for judicial decision-making.

The fiduciary theory, we argue now, offers a fresh reply to Schmitt’s challenge that deepens the argument in favor of common law constitutionalism and furnishes the resources necessary to answer Poole’s objections. We shall also see that the fiduciary theory explains international law’s unique *de jure* capacity to govern a sovereign’s declaration of emergency and the measures adopted to deal with it, thus tying international law to common law constitutionalism within a seamless account of public law.

Consistent with common law constitutionalism, the fiduciary theory trades on the idea that legal order is constituted by principles as well as norms and decisions. We have seen already that principles of central concern in this context include principles of integrity, formal moral equality and solicitude. These principles follow from application of the deeper normative principles of non-instrumentalization and non-domination to the fiduciary circumstances of the state and subject. These same deeper principles guide the elaboration of the rule of law under the fiduciary theory, and explain why the fiduciary state owes its subjects a series of common law duties (duties owed without the prompt of statute) when its administrative action touches them. These include duties of due process or procedural fairness, purposiveness in the sense of using entrusted powers exclusively for the purposes for which they are conferred (the duty of reasonableness in commonwealth jurisdictions), reason-giving, transparency, and proportionality. Legal principles such as these provide a bulwark against the possession and use of arbitrary power, and thereby embody in a more determinate form the requirements of non-instrumentalization and non-domination. The flagrant violation of any of them would offend the foundational idea that public decision-makers occupy a fiduciary position *vis-à-vis* the people they serve. Each principle is thus justified as a necessary and constituent part of the overarching fiduciary relationship.

The fiduciary theory’s response to Schmitt’s challenge, then, is to provide an account of how the principles and duties of common law constitutionalism play a constitutive role within legal order, which in turn explains how they are intrinsic to legality. They are intrinsic to legality because they constitute the normative dimension of the fiduciary relationship that makes legal

¹³⁸ *Id.*

¹³⁹ Thomas Poole, *Constitutional Exceptionalism and the Common Law*, 7 INT’L J. CONST. L. 247, 264 (2009); see also Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1096 (2009) (dismissing attempts to extend the rule of law to all administrative action as “hopeless fantasy”).

¹⁴⁰ Poole, *supra* note 139, at 265.

¹⁴¹ *Id.* at 268.

¹⁴² *Id.* at 269.

order possible. The story of ‘where the values come from’ is not an insistence that they are inherent to legality because they are (sometimes) deployed by common law judges on review, but a separate account in which the idea that principles are intrinsic to the common law is presented as the conclusion of the inquiry rather than as a premise or an article of faith.

With its nonpositivist and principle-rich legal theory in place, we can see now how the fiduciary theory can disarm Schmitt’s main argument that the sovereign must be able to decide on the exception because general norms cannot anticipate the unforeseeable in a time of crisis. Let us assume *arguendo* that, as Schmitt claims, general norms cannot anticipate the contingencies that may arise in at least some emergencies. The point is irrelevant from the perspective of the fiduciary theory because legal principles immanent to the sovereign’s fiduciary relationship to his subjects remain in place, and these supply standards that municipal judges and others can use to assess the legality of the sovereign’s chosen measures. To put the point starkly, the sovereign may be able to declare martial law and suspend a variety of norms, but, under the fiduciary theory, he cannot suspend the overarching fiduciary principle that authorizes him to establish legal order on behalf of his subjects. He cannot do so because that principle is triggered by his mere possession of sovereign powers. He may of course have the *de facto* means of violating the relevant legal principles and duties that attach to his office by dint of the fiduciary principle, but then he would be acting as an unauthorized usurper of public power rather than as a sovereign.

The fiduciary theory is particularly well-suited to the regulation of executive power in emergencies because it is premised on a normative structure in which the power-holder often holds discretionary power that affords a wide margin of appreciation. In some cases, the power is not controlled by specific norms apart from those derived from context-sensitive fiduciary principles. Perhaps the best example is the parent-child case. Kant thought that parents had to care for and manage their children, but how precisely this is to be done, within fiduciary limits, is determined by the parents. Another good example is someone who holds a power of attorney. As Pettit points out, when one person is entitled to interfere in my affairs but only on condition that she further my interests and take my opinions seriously, the power-holder “relates to me, not as a master, but more in the fashion of an agent who enjoys a power of attorney in my affairs.”¹⁴³ Once again the agent is not constrained by particular rules or norms save those that proscribe self-dealing and others that flow from fiduciary principles. Like the parent and the agent with a power of attorney, the sovereign in an emergency enjoys a margin of appreciation but is nonetheless accountable to public, fiduciary standards.

We are now in a position to address Poole’s objections to common law constitutionalism. As discussed above, the fiduciary theory offers a non-question-begging account of the source and basis of principles in legal order, including the principles and duties of common law constitutionalism. The thornier issue is whether the fiduciary theory and international law’s emergency constitution can combine to provide meaningful guidance to policy-makers and judges. It is important to recall at the outset that Poole’s critique of common law constitutionalism on this issue is nuanced. Poole does not say, as do some critical legal studies scholars, that *all* legal decision-making is irremediably indeterminate.¹⁴⁴ He instead makes a more modest and more plausible point: decision-making in the public sphere is indeterminate,

¹⁴³ PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 23 (1997).

¹⁴⁴ See, e.g., Mark Tushnet, *Defending the Indeterminacy Thesis*, 16 QUINNIPIAC L. REV. 339, 341 (1997); Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1524 (1991).

especially during emergencies, because the principles that govern it are “soft-edged.” The hard/soft distinction is intended to distinguish law that can provide a ‘coherent blueprint for judicial decision making’ from law that cannot.

An advantage of the fiduciary theory is that, like contract, it enjoys the relatively hard-edged normative structure of a capacious but specific class of private-law relationships, *i.e.*, the fiduciary relationship. It is no coincidence that the fiduciary theory’s determinate legal principles such as fairness and reasonableness mirror those used by judges when they assess the legality of a private fiduciary’s actions with respect to multiple beneficiaries.¹⁴⁵ We have discussed above the fiduciary theory’s capacity to justify and specify both peremptory and derogable norms of IHRL. Yet in national security cases where the stakes are high, it may appear that judges are being asked to second-guess a balance struck between liberty and security that only the democratically elected branches are entitled to make.¹⁴⁶ The fiduciary theory highlights three considerations that support a vigorous role for courts and international institutions during national emergencies. The first consideration concerns the function of courts as facilitators of public justification, the second addresses the legal limits of legislative and executive interest-balancing during extreme circumstances, and the third explains how international law and its institutions are uniquely able to stand as arbiters of legality – between the state and its subjects – in times of emergency.

Consistent with the requirements of notice and justification from international law’s emergency constitution, the fiduciary theory demands robust public justifications of derogations from human rights, all in the service of establishing what Etienne Mureinik called a “culture of justification.”¹⁴⁷ This public justification requirement compels decision-makers to own their actions while providing a valuable record that can provide a basis for judicial review. It also serves to invite individuals and groups to participate in decision-making processes that may result in the derogation of human rights. The point of the ‘culture of justification,’ then, is to hold power to account to the people, ensuring that the state takes seriously its obligation to respect individual dignity. Meaningful judicial review during emergencies is an essential safeguard for public justification and so fits congenially within the fiduciary model.

The second consideration supporting a significant judicial role during national crises concerns the types of measures that can be authorized by law to deal with emergencies, as well as actions that may be excused *ex post* if the action is of a kind that cannot be authorized by law. We have seen that under the fiduciary theory states cannot engage in policies that contravene *jus cogens* norms, such as the prohibition on arbitrary killing, because such actions are inconsistent with the state’s fiduciary obligation to guarantee secure and equal freedom. But suppose the state is confronted with a situation where it must decide whether to sacrifice innocent lives in order to save a greater number of innocent lives? In 2006 the German Constitutional Court rendered

¹⁴⁵ See, e.g., *Equitable Life Assurance Society v. Hyman*, [2000] 2 All E.R. 331 (C.A.), *aff’d* [2002] 1 A.C. 408 (H.L.).

¹⁴⁶ See, e.g., *Secretary of State for the Home Department v. Rehman*, [2002] 1 All E.R. 123, 142 (per Lord Hoffman); POSNER & VERMEULE, *supra* note 9; Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 19 (working paper on file with the authors) (arguing that emergencies relegate legislatures and judges to a “marginal, reactive, and essentially debilitated” role).

¹⁴⁷ See Etienne Mureinik, *Emerging from Emergency: Human Rights in South Africa*, 92 MICH. L. REV. 1977, 1986 (1994).

judgment on this very point.¹⁴⁸ Section 14 of the German Air Safety Act purported to give the Minister of Defense authority to order the military to shoot down a hijacked airliner with innocent passengers aboard, but only if doing so were necessary to prevent the plane from being used against human targets. In such a scenario, it is at least arguable that shooting down the plane would not constitute “arbitrary killing”; but for the exigent circumstances and a concern to save the lives of others, the sovereign would never entertain shooting down a passenger plane. Notwithstanding this limitation, the Court struck down section 14, holding that the passengers’ constitutional rights to life and human dignity precluded the state from granting the Minister legal power to kill innocent persons, even if such action would save a greater number of lives. The Court’s judgment is consistent with the Kantian prohibition on treating some as the mere means of others;¹⁴⁹ section 14 arguably regarded the innocent passengers as mere means of those it aimed to save, and not as ends-in-themselves.

The Constitutional Court’s judgment may appear overly indifferent to the 9/11-type consequences that follow from the use of a passenger plane as a weapon. It may seem too hard-line Kantian, and even arbitrary, to privilege the lives of the passengers—lives that will be lost momentarily in any event—over the lives of others that will be lost only if the plane reaches the hijackers’ target. Some might think as well that in a sense the passengers are already effectively dead once the hijackers take control of the plane and exhibit a clear intent to use it as a weapon. By hypothesis the passengers are already dead from the standpoint of the law’s ability to provide for their security. And yet there is no avoiding the fact that if a Minister orders a hijacked airliner shot down, it is the shooting down of the airliner that will actually end the lives of innocent passengers.

Given the normative complexity of these circumstances, we do not intend to argue for a definitive resolution. Instead, we will show that the fiduciary theory subjects the decision-maker to a meaningful legal regime under two plausible accounts of what can be authorized or excused by law. The first is Kant’s strict account. The second is a normatively heterogeneous or mixed account that is generally Kantian but which allows consideration of consequences under a doctrine of necessity when the stakes are especially high.

Kant’s strict prohibition on the taking of innocent life precludes the state from passing legislation that authorizes a minister to shoot down a hijacked airliner. The same prohibition would bar a minister from pleading self-defense (understood broadly to include defense of others) as a justification were he to order a passenger plane shot down without statutory authority. Because the law cannot authorize either the legislation or the order, the Minister cannot plead justification based on saving the lives of others.¹⁵⁰ Nor could the Minister, under

¹⁴⁸ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 15, 2006, 115 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 118.

¹⁴⁹ Consistent with the judgment of the Constitutional Court, Kant denies that law can provide “an authorization to take the life of another who is doing nothing to harm me, when I am in danger of losing my own life,” since an authorization of this kind would place the doctrine of Right “in contradiction with itself.” KANT, *supra* note 53, at 60. The contradiction would consist in an authorization to take innocent life and a duty not to do so, and the contradiction would be within the doctrine of Right because “Right and authorization to use coercion . . . mean one and the same thing.” *Id.* at 58.

¹⁵⁰ See Malcolm Thorburn, *The Constitution of Criminal Law: Justifications, Policing and the State’s Fiduciary Duties* (working paper), available at <http://law.queensu.ca/facultyAndStaff/facultyAndStaffDirectory/thorburn/constitutionOfCriminalLaw.pdf> (last visited Jan. 31, 2010) (applying Kant’s theory of justifications to the Air Safety Act). Thorburn has deployed a Kantian state-as-fiduciary framework to argue that the best way to understand justification defenses is that they exonerate a would-be wrong-doer by presupposing that an otherwise wrongful act

Kant's theory, plead necessity. For Kant, necessity excuses but does not exonerate, and operates only in those circumstances in which the law cannot give the wrongdoer a self-regarding reason for action. For instance, if a shipwrecked sailor faces certain death by drowning unless he shoves an innocent person off a plank, the sailor could claim a necessity defense because the law could not be expected to motivate him to surrender his life; the uncertain threat of even capital punishment is less than the immediate and certain threat of drowning.¹⁵¹ On the other hand, the Minister in the 9/11 scenario could not shoot down a hijacked plane filled with innocent passengers and plead necessity, on Kant's theory, unless the plane threatened the Minister personally.

Under the mixed theory we would assume that the innocent passengers are condemned and beyond law's aegis, and that shooting down the plane can be excused on grounds of necessity that point to the lack of alternatives and protection of the lives of others. Importantly, however, the innocent passengers are still regarded as ends-in-themselves. The law, therefore, cannot authorize the Minister to kill them *ex ante*, nor can it let him plead justification after the fact (because justification implies authorization), as a purely consequentialist or cost/benefit theory might suggest. The result is that under the mixed account there can be no *ex ante* authorization to take innocent life, and so in principle a minister who orders an airliner shot down could be brought before the courts and tried for first-degree murder. In this criminal proceeding, he would carry the burden of proving that the circumstances were such that to save life he had no option but to take (condemned) life. The wrongful act would still remain wrongful in the eyes of the law, but the Minister would be excused given the exigent circumstances. He could not claim that he "stands outside the normally valid legal system,"¹⁵² however, because unlike Schmitt's sovereign he would carry the burden of establishing necessity in open court, with serious consequences to himself should he fail.

Regardless of whether the hard-line Kantian account or the mixed account offers the better approach under the fiduciary theory, the two accounts concur that all exercises of emergency powers are subject to meaningful judicial review, and that such review is necessary to ensure that the state regard all persons as ends-in-themselves.

The third prong of the fiduciary theory's reply to the Schmittian concern about second-guessing the legislature and the executive trades on international law's unique ability to govern *de jure* the claims of sovereign actors during times of emergency. Schmitt's basic claim is that the exception "can at best be characterized as a case of extreme peril, a danger to the existence of the state," and that someone (or some institution) has to have final and unfettered decision-making power over questions of whether there is an "extreme emergency" and what is to be done about it.¹⁵³ When the sovereign declares an emergency and suspends legal order, "the state remains, whereas law recedes," but because "the exception is different from anarchy and chaos, order in the juristic sense still prevails even if it is not of the ordinary kind."¹⁵⁴

is authorized by the state. On Thorburn's model, the individual who defends herself with force against an aggressor is deemed to enjoy an emergency-like and public authorization to use as much force as is strictly necessary to protect her life, even if this means taking the life of the aggressor. Malcolm Thorburn, *Justifications, Powers, and Authority*, 117 *YALE L.J.* 1070 (2008).

¹⁵¹ KANT, *supra* note 53, 60.

¹⁵² SCHMITT, *supra* note 8, at 7.

¹⁵³ *Id.* at 6, 7.

¹⁵⁴ *Id.*

These qualifications show that Schmitt did not think that a declaration of emergency entails dissolution of all order and a retreat to a Hobbesian state of nature. But on Schmitt's construal of the exception, the sovereign and the people would confront one another in something like the state of nature in the following two senses: with legal order suspended there are no norms or standards available to assess the validity of the sovereign's actions, nor any persons or institutions entitled to assess or second-guess those actions. To show that Schmitt is mistaken requires showing that there are grounds available for reviewing the sovereign's emergency declaration and chosen measures, and that there are institutions available with authority to invoke those grounds.

We have suggested already how the fiduciary theory can strengthen Dyzenhaus's argument in favor of common law constitutionalism to meet this challenge. Yet doubts may remain about the likelihood of municipal judges resisting a determined rule-of-law infringing sovereign,¹⁵⁵ and in some cases the sovereign may be able to pack the bench with compliant judges. In these cases especially, international law's emergency constitution can provide critical resources for assessing the validity of a sovereign's actions (resources that dovetail with the principles of common law constitutionalism), while its monitoring and judicial bodies such as the ECtHR supply the requisite institutions. In other words, to the extent that the sovereign and the people confront one another in a state of nature during moments of crises, international law and its institutions can rescue them from this juristic anomie by standing as an impartial arbiter, much as Hobbes claimed that the judge and ultimately the sovereign was able to rescue individuals from the state of nature.¹⁵⁶

The authority of international law to play this role relies on the idea that it exists to serve the people subject to it, consistent with what we elsewhere have called the fiduciary constitution of human rights.¹⁵⁷ This overarching authority also depends on the view that international law is uniquely capable of distributing sovereignty to some legal actors (sovereign states) and not to others. As Patrick Macklem puts it, international law alone can "shape an international political reality into an international legal order by determining the legality of multiple claims of sovereign power."¹⁵⁸ Viewed in this light, only international law stands in a position to distribute sovereignty to states. By the same token, international law enjoys an equally disinterested third-party position with respect to assessments of whether state officials are acting in accordance with legal principles constitutive of their authority to exercise sovereign powers in times of crisis; *i.e.*, principles located in international law's emergency constitution and common law constitutionalism. Moreover, because international law has no interest in possessing the sovereign power it seeks to regulate, it does not threaten the legitimate margin of appreciation left to local decision-makers.

To summarize: the fiduciary theory shows that, *pace* Schmitt and Agamben, national crises need not result in a suspension of legal order. *Tumultum* need not lead to *iustitium*. Just as law can regulate states in times of war through doctrines of *jus ad bellum* and *jus in bello*, so too

¹⁵⁵ See, e.g., Ackerman, *supra* note 31; Posner & Vermeule, *supra* note 146.

¹⁵⁶ See THOMAS HOBBS, *LEVIATHAN* 23 (Edwin Curley, ed. 1994) (1651) ("[A]s when there is a controversy in an account, the parties must by their own accord set up for right reason the reason of some arbitrator or Judge to whose sentence they will both stand, or their controversy must either come to blows or be undecided, for want of a right reason constituted by nature.").

¹⁵⁷ Fox-Decent & Criddle, *Fiduciary Constitution*, *supra* note 51.

¹⁵⁸ Patrick Macklem, *What Is International Human Rights Law? Three Applications of a Distributive Account*, 52 *MCGILL L.J.* 575, 587-88 (2007).

it can regulate states in times of emergency through doctrines of *jus ad tumultum* and *jus in tumultu*. Dyzenhaus is therefore right to conclude that derogation from human rights norms during a state of emergency need not be viewed as derogation from the rule of law, but rather as an extension of the same concept.¹⁵⁹

V. CONCLUSION

We have argued that the fiduciary theory points to a unifying principle capable of justifying, on the one hand, a state's entitlement to declare states of emergency and derogate from ordinary human rights, and on the other, the norms and principles found in international law's emergency constitution; *i.e.*, the norms and principles of *jus ad tumultum* and *jus in tumultu*. This unifying principle is an overarching fiduciary duty owed by states to persons subject to their powers to provide for their secure and equal freedom. On the basis of this duty, states can derogate from ordinary human rights if, and only if, they must do so to manage a crisis that threatens the secure and equal freedom of their people. But to comply with the same duty and therefore be lawful, derogations must conform to norms of notification, contestation, justification and proportionality. Such derogations must also be reviewable by municipal and international tribunals on objective grounds.

Locating the state's authority to declare an emergency within the same conceptual framework as the norms that regulate the use of emergency powers is a significant theoretical accomplishment. By bringing together the two ways in which the sovereign decides on the exception within a single juridical frame of reference, the fiduciary theory shows that international law's two-tiered emergency constitution reflects a unified and credible conception of public law capable of governing states during times of crises.

But the advantages of the fiduciary theory are practical as well as theoretical. We have argued that the fiduciary theory lends clarity and precision to *jus ad tumultum* and *jus in tumultu*. The fiduciary model clarifies the *Lawless* criteria for declaring a state of emergency, affirming that the threat must be present or imminent, exceptional, and a "threat to the organized life of the community," while denying that it must concern the entire population. A consequence of this analysis is that the threat posed by terrorist groups such as Al Qaeda will seldom justify a declaration of emergency. The fiduciary model also mines the resources of common law constitutionalism to enrich the principles of contestation, justification, and proportionality found already in *jus in tumultu*, while strengthening the prohibition on derogation of preemptory norms.

Whereas Schmitt claims that during a state of exception "the state remains, whereas law recedes," on the fiduciary model the authority of the state to govern and represent its people during an emergency rests on its compliance with international law's emergency constitution. If this law recedes, so too does the authority of the state.

¹⁵⁹ David Dyzenhaus, *Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order?* 27 CARDOZO L. REV. 2005, 2038 (2006).