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### Can Discourse Ethics Be Applied To Emergencies?

Brenna Giblin  
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***CAN DISCOURSE ETHICS BE APPLIED TO EMERGENCIES?***

**Using Responses To COVID-19 To Determine Whether Discourse Ethics Is Applicable To  
Emergencies And Emergency Powers**

**A Thesis Submitted to  
The Regis College  
Honors Program  
in Partial Fulfillment of the Requirements  
for Graduation with Honors**

By

Brenna Giblin

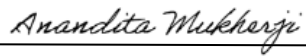
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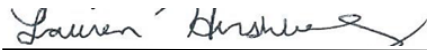
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Dr. Ian Zuckerman, Thesis Advisor



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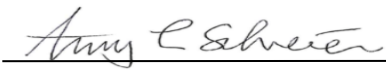
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Dr. Amy Schreier, Director of the Regis College Honors Program

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Major: Politics

## Can Discourse Ethics Be Applied to Emergencies?

### Using Responses To COVID-19 To Determine Whether Discourse Ethics Is Applicable To Emergencies And Emergency Powers

Thesis Advisor: Dr. Ian Zuckerman

Thesis Reader: Dr. Lauren Hirshberg

Thesis Reader: Dr. Anandita Mukherji

Emergencies arise unexpectedly and when they occur, it is the job of our governments to respond to them. They often do so by using emergency powers, designed to return the nation back to its original state. Ensuring that our responses to emergencies are ethical is essential if we wish to return to a state of normalcy. To ensure that everyone is treated fairly, not only during the emergency, but also during the rebuilding and healing periods of the post-emergency world, we must critically analyze our emergency response. In this paper, I propose that Discourse Ethics, a normative theory suggesting that through moral discourse those affected by an action can come to an agreement as to the valid, i.e., moral, course of action, can help us determine ethical responses to emergencies. I apply Discourse Ethics to examples of emergency powers used during the COVID-19 pandemic and come to the conclusion that the best way for Discourse Ethics to be applied to emergencies is before the emergency power is implemented, in the emergency preparedness stage. This is because Discourse Ethics works best when there is time to build consensus and when power differentials are able to be set aside.

## Preface

The work I did over these last few years at Regis University to receive a Bachelor of Arts in Politics has led to this moment. While I never expected to write a Capstone/Honors Thesis on Discourse Ethics (explained latter), COVID-19, and Emergency Powers, I feel like I am meant to critically consider and contribute my thoughts about this topic. These are topics that are pertinent to our modern era and they are something we should be thinking about for the future.

Although COVID-19 was not something I ever could have fathomed happening when I began at Regis University in 2018, it has become a part of the modern way of life and will forever change the way in which my children and my generation's posterity will interact with and live in this world. It felt it prudent to write about this topic for this very reason. History has shown us that we are not good at making our responses to emergencies ethical, as evidenced by major historical events like nuclear meltdowns and 9-11. We have no idea whether another life shattering event will affect humanity in the future, but we cannot afford to not be prepared.

Part of this preparedness means that we need to think critically about how we approach future emergencies. When I first read about Discourse Ethics, I thought that it would be extremely interesting to apply it to emergencies and more specifically the emergency powers our government has implemented in response to COVID-19. This is the result of this thought. It is unique and has never been attempted before, but I did come to some fascinating conclusions. I will let you determine whether they are correct for yourself, but until then, I hope you enjoy my exploration of Discourse Ethics applicability to COVID-19, other emergencies, and emergency powers.

## Introduction

COVID-19 has made an immense and far-reaching impact on the world around us. It will leave physical, emotional, and generational impacts for years to come. We should not have been that surprised by it, however. According to Divi Sridhar, a professor of Global Public Health at the University of Edinburgh, “It was clear to scientists that one of the greatest threats to humanity was a pandemic, specifically a fast-moving respiratory pathogen.... The WHO picks up on average 3,000 signals of potential new outbreaks every month” (Sridhar, paragraph, 2). Clearly, COVID-19 was predictable. Emergencies, and in this case, pandemics, will occur and we are not able to control when or how they do. But what is within our control is our response to them, and therefore, the long-term outcome of the pandemic.

For that very reason, ensuring that our responses to emergencies, and specifically to COVID-19, are ethical is essential if we wish to return to a state of normalcy. It is also essential if we wish to ensure that everyone is treated fairly, not only during the emergency, but also during the rebuilding and healing periods of the post-emergency world. To make the world a more ethical and fair place, we need to consider emergencies in light of a theory of ethics, so as to make sure that everyone in the post-emergency world is not any worse off than they were before.

I wish to discuss how Discourse Ethics, a modern philosophical theory of morality, would illuminate and approach the responses to COVID-19 and whether it can be applied to future emergencies in this way. I have chosen this theory, rather than a traditional theory of ethics because I believe it can prove useful in preventing unethical actions amid an emergency because it requires discussion, reason, compromise, and acceptance. One can meet everyone's needs, while still allowing the discussion to reach a fair and equal outcome for everyone. The



fact that Discourse Ethics comes to an agreement everyone can live with, and allows for different outcomes under different circumstances, makes it the best theory of ethics to use. Most other theory of ethics end up with permanent solutions, for example, as noted in the Stanford Encyclopedia of Philosophy, Kantian Ethics would suggest that you must follow any moral law that passes the maxim test, and you must refrain from any that does not (Johnson, Section 5). Discourse Ethics on the other hand allows for different outcomes under different circumstances, and because emergencies are never the same twice, it ends up being more applicable than a traditional theory of ethics to those changing circumstances.

In *Between Facts and Norms*, one of the main books Jurgen Habermas (a founder of Discourse Ethics) wrote about his theory, he offers a way to analyze the public sphere (media, such as news and social networks) and its ability to fulfill its democratic function (meaning its ability to allow for free and impartial discussion of legislation and laws) (Habermas and Rehg, pg. xxxii). This would be the easiest way to analyze a law, or in our case, emergency power stemming from COVID-19, but I chose to go a different way. Discourse Ethics also allows for an analysis of laws through judicial review. This is because “[t]he constitutional state represents the crucial set of legal institutions and mechanisms that govern the conversion of the citizenry's communicative power into efficacious and legitimate administrative activity: law “represents . . . the medium for transforming communicative power into administrative power.”” (Habermas and Rehg, pg. xxviii). The constitutional state is not connected with the public sphere, but the judicial system is. It is important in implementing, protecting, and analyzing both popular sovereignty and individual rights. This makes it a great place for us to analyze both the public sphere and the institutions that create and implement laws such as those passed in emergencies. Using Discourse Ethics, I wish to look at the United States’ state and federal governments’ eviction moratoriums,

masks mandates, and stimulus checks. To do so we will begin by examining the theory of Discourse Ethics and the basics behind Karl-Otto Apel's (another founder of Discourse Ethics) and Habermas' theory of morality.

Habermas and Apel argue that we can determine an action's ethical validity by engaging in moral and reasonable discussion about it until we reach a unanimous decision. However, Discourse Ethics does receive its fair share of major criticisms and we will examine how discourse ethicists would respond to them. To answer our question, we must also consider what constitutes an emergency and emergency powers. Finally, before we turn to our case studies, we will briefly see how Habermas thinks Discourse Ethics plays a role in emergencies such as natural disasters or COVID-19, specifically in the use of emergency powers. He does not completely believe that Discourse Ethics can be applied to times of emergency.

The next sections will attempt to show that Discourse Ethics can be put to practice using the examples of eviction moratoriums, mask mandates, and stimulus checks. Using the public discourse, the two main discourse principles, and the parameters of ethical discourse laid out in the previous section, we will analyze the governmental responses to COVID-19 in order to determine what Discourse Ethics would say about their validity, and therefore their morality.

To conclude our discussion of Discourse Ethics, we will turn more in depth to the use of Discourse Ethics under emergency circumstances. It is here that I will add my own input and critical thinking to the problem of how discourse ethics can be used under exigent situations. The question, as I will point out, becomes not if Discourse Ethics can be applied to emergency situations and emergency powers, but when Discourse Ethics should be applied during emergencies and the use of emergency powers. I will argue that by using Discourse Ethics to prepare for emergencies and continuing those same conversations once we truly know the effects

of the situation, Discourse Ethics can be a valuable theory in responding to natural disasters, unforeseen circumstances, and even a worldwide pandemic.

## Discourse Ethics

### *The Basics of Discourse Ethics*

“Some presuppositions of discourse have universally valid moral content” (Kettner, pg. 299). According to Dr. Matthias Kettner, a professor of philosophy at Witten/Herdecke University in Germany, in the 1960’s a German philosopher by the name of Karl-Otto Apel conceived that sentence and gave birth to discourse ethics (Kettner, pg. 299). It would later be used and developed further by another German philosopher by the name of Juergen Habermas. In 1983 he wrote *Moral Consciousness and Communicative Action* and in 1991 *Justification and Application*. According to James Finlayson, a philosopher who works at the University of Sussex, these two books create Habermas’ theory of Discourse Ethics, and elaborate on how discourse can be used to produce valid norms, or ways of acting, that all of society should follow (Finlayson, pg. 76).

Discourse Ethics is different than most theories in that in that it does not tell us what is right or what is wrong. Rather, it is meant to help us determine if someone has a “valid claim to rightness” in doing an action (Finlayson, pg. 77). It does not even attempt to tell us whether it is right or wrong to steal, instead it attempts to tell us whether that person is morally “right” in stealing. To do this Habermas lays out two principles.

The first, known as the discourse principle, “states that “[o]nly those action norms are valid to which all affected persons could agree as participants in rational discourse. (Between Facts and Norms, 107)”” (Finlayson, pg. 79). This means that no action can be deemed right if either one of two things occurs; either not everyone affected by an action participated in the discourse about said action, *and/or*, not everyone who participated in the discourse agreed that

said action was moral. It is considered weaker and less controversial than” (Finlayson, pg. 79) the second, known as the moral principle (Finlayson, pg. 81).

The second principle states ““a norm is valid *if and only if* the foreseeable consequences and side effects of its general observance for the interests and value-orientation of each individual could be freely and jointly accepted by all affected. (The Inclusion of the Other, 42; translation amended)”” (Finlayson, pg. 81). Here Habermas is attempting to universalize the discourse principle by stating that all, in this case, individuals should have the ability to accept reasonably and freely any and all outcomes emanating from said future action. This means that they must not be coerced nor tricked into accepting the outcomes but do so upon their own volition. The participants of a discourse must also come to an agreement as to the outcome of the discussion. Otherwise said action cannot be valid, and hence, not moral.

Discourse Ethics universalizes its norms, which occurs when someone asks what the consequences of an action might be if everyone made the same choice, one example of which might be that if everyone lied no one would trust anyone. This universalization of norms makes Discourse Ethics a normative, deontological theory (Finlayson, pg. 77). It gives us a way to find both positive and negative norms (Finlayson, pg. 82) by showing us which norms to avoid (because some participants of the discussion are unable to accept the consequences) and which ones to jump on (because the positive norm only holds good consequences for everyone), while at the same time ensuring that everyone’s perspectives are considered. However, there is still one question we need to answer; how do we determine if something could be accepted “freely and jointly” by everyone?

Habermas offers up the discourse principle: those affected by the outcome of an action must be involved in discourse about said action, that that discourse must be rational, and

to ensure a moral outcome, we must follow the rules of discourse (Finlayson, pg. 86). Dr. Matthias Kettner, who also worked with Apel and Habermas, in his essay *Discourse Ethics: Apel, Habermas, and Beyond*, offers up five parameters for us to follow if we wish to create “moral discourse”:

Parameter 1: Reasonable Articulation of Need-Claims (RANC)

All participants in a discourse should be capable of articulating any need-claim they take to be morally significant.

Parameter 2: Bracketing of Power Differentials (BPD)

Differences in all forms of power that exist between participants, both within and outside of argumentation, should not be any participant’s good reason in discourse for endorsing any moral judgment.

Parameter 3: Non-Strategic Transparency (NST)

All participants should be able to convey their articulations of morally significant need-claims truthfully and without strategic reservations.

Parameter 4: Fusion of Moral Horizons (FMH)

All participants should be able to sufficiently understand articulated need-claims in the corresponding moral horizons of the participants who articulate them.

Parameter 5: Comprehensive Inclusion (CI)

Participants should constrain what their community of discourse can accept as good reasons by the following requirement: that participants must anticipate whether their reasons can be rehearsed by all non-participant

others who figure specifically in the content of any moral judgment that results consensually from the participants' discourse (Kettner, pg. 311).

Each of these parameters offers concrete ways of proving whether a discourse is ethical or not. The discourse must follow all five parameters, which can be reduced to three aspects because parameters 1 (RANC), 3 (NST), and 4 (FMH) all deal with the ability of the participants to reason and be openminded. First, all parties present in the discourse must have reason, and therefore be able to articulate their own needs and understand others' needs as well. Participants must also avoid manipulating the situation, their articulation of their needs, or other participants', in order to have their need prioritized above all others unfairly.

Second, a participant should not use any power differences between participants as a reason for accepting a moral stance over another. These power differentials bring up injustices and institutional oppressions that we are attempting to leave outside of the conversation. We need to realize that there are power imbalances in the social and cultural spheres, and that those imbalances can create amoral and immoral actions through selfish and intrapersonal motivations.

Finally, all participants should only accept reasons as valid if other non-participants who would be concretely affected by the outcome of the discourse could repeat, recount, and relate to said reason. For example, if one wanted to accept that everyone should receive free education because one wanted everyone to have a better future, one must also consider whether taxpayers are able to relate to the notion of wanting a better future for everyone. If the two principles of Discourse Ethics are followed and the standard set out for moral discourse is adhered to as well, a valid, and ethical, norm should emerge from the conversation.

### *Critiques of Discourse Ethics*

Despite its common sense, there are critics of Discourse Ethics, such as Joel Whitebook, a professor of medical philosophy at Columbia University, who would argue against discourse ethics because of its primary principle, the discourse principle. Understanding these critiques of Discourse Ethics is important to the question of whether Discourse Ethics is applicable to emergencies, and if it is, how it is applicable. This is important because emergencies require emergency powers, which often remain long after the initial emergency has passed, and the powers, as I will talk about later, often care less about the morality of their actions and their effect on nature and instead care more about how we can return to a state normalcy. COVID-19 is one of those emergencies in which the emergency actions could last a long time or even possibly become seasonal, like the flu. Long lasting emergency powers can cause society to follow emergency standards still in place, which, unless discussed, might be unethical and immoral, creating an unethical post-emergency world. This also applies to future generations and COVID-19, as unethical COVID-19 responses could create an unethical world for our posterity and their families. I am now going to go through the critics and dispute them to show that Discourse Ethics can be applicable to situations, such as emergencies like COVID-19, which will affect the future and nature.

These critics, according to an article written by Bogdan Olaru in *Autonomy, Responsibility, and Healthcare*, a journal of philosophy in healthcare, argue that “the anthropocentrism of discourse ethics ... and ... the question of future generations” (Olaru, pg. 144) poses a major threat to the discourse principle. Additionally, they question whether Discourse Ethics can be justifiably used to determine a valid outcome. According to Joel Whitebook, Habermas separates internal and external nature by the use of “communicative



action”, or communication in a community. This causes him to rely on communication to define our autonomy and responsibility towards others (Olaru, pp. 144, 145). This means that Discourse Ethics can only be applicable to situations where communication, specifically discourse, occurs, which, because of biological differences, is not possible between humans, animals, and nature. In the end critics end up asking a similar question to: “can the model of discourse ethics be pertinent in the context of the planetary ecological crisis as long as it presupposes a communicative competence” (Olaru, pg. 145)? We find ourselves asking if nature and animals are unable to communicate, how can they share their reason? How can they, as Habermas puts it, “participate in rational discourse (BFN, 107)” (Finlayson, pg. 79)?

One way discourse ethicists have responded to the humancentric critique of the discourse principle is by utilizing the idea of “solidarity” (Rehg, pg. 409). By entering into discourse and allowing others to critically think about our reasons, part of the principles of discourse requires that we enter into “solidarity”. Therefore, because “In the original version of U [the second principle of Discourse ethics], “solidarity” and “justice” turn out to be two sides of the same coin” (Rehg, pg. 409) and justice is promoted through requiring that everyone agree or disagree with the outcome of the discourse, we end up promoting and entering into a space of justice and solidarity. This solidarity can then, and indeed should, extend to others outside of the conversation. We can, after all,

acknowledge that, for many moral issues, one cannot enter into a rational discussion with everyone affected. Rather, one should strive to maximize the positive effects of limited participation for one’s capacity to judge a question responsibly. On this approach, idealizations direct our attention to those features of real discourse that are more likely to indicate which arguments are

better. Thus, rather than enter a discourse with an ideal universal audience, one attempts to model oneself on its members and to seek out interlocutors who also exhibit their characteristics: people who are well-informed, open-minded, relatively free of psychological hang-ups, and so on. And rather than attempt to gain the consent of all those possibly subject to a general norm – some of whom may not be so reasonable, lacking either the capacity or good will for dialogue – one strives to understand the perspectives and needs of all concerned. (Olaru, pg. 410).

The acknowledgement that it is not entirely reasonable to expect *everyone* affected to participate in the dialogue, and together with a sense of “solidarity”, allows us to reasonably consider the needs of animals and nature in our discourse. So long as we follow the parameters of ethical discourse by ensuring that we include participants who can reasonably articulate the needs of those not involved in the conversation, our discourse can produce a valid norm or moral action.

Another objection often raised against Discourse Ethics entails consideration of future human generations. Put simply, “It seems difficult for discourse ethics to take into consideration the future generations because their non-existence renders them incapable to participate in a communicative action” (Olaru, pg. 153). We can assume moral actions will affect future generations, and since these actors are not around to actively participate in the discussion of what to do, how can our discourse truly fulfill the two Discourse Ethics principles? Furthermore, even if we agree that both currently living and future generations share equal rights it still is not enough (Olaru, pg. 156). After all,

We share not only equal rights with all real and possible (future) communicative actors but also a collective responsibility for finding solutions

to all problems which can be debated in an argumentative manner. Is this form of responsibility as solidarity a sufficient condition to motivate my own moral behavior? As many critiques have pointed out, it is hardly conceivable that in virtue of some self-awareness of my language ability and of my membership to a communicative community, I will act in such a way that the hypothetical welfare of non-existing communicative actors will always be considered.

(Olaru, pp. 156, 157).

Is the discourse principle truly capable of being realized through solidarity and communicative action?

How do we reconcile the first principle of Discourse Ethics with this idea that we need to include the interests of future generations in our discourse, despite not having a truly motivating reason to do so? I would argue that critics have answered this question in their pursuit to challenge the discourse principle. They note that for Apel and Habermas, practical reason and our communicative action necessarily require us to be in solidarity with others, although this might prove an issue. At the same time however, they also concede that:

The concept of solidarity, as foundation for a new ethics of responsibility for the future, does not change the fact that our personal responsibility is morally accountable but introduces a primordial coresponsibility with respect to the global and indirect effects of our actions. We share not only equal rights with all real and possible (future) communicative actors but also a collective responsibility for finding solutions to all problems which can be debated in an argumentative manner. (Olaru, pg. 156).

This concept of responsibility implies a required action or set of actions, prompting a strong reason to include in our discourse the interests of animals, future generations, and others affected by the outcome of the discussion. As noted above it is possible to do so with a surrogate, someone who has similar interests, or someone who could reasonably consider the needs of others. The responses of discourse ethicists to these major critiques show that it is possible to negate them if we keep those who are unable to participate in the actual discourse in mind.

Another critique of Discourse Ethics, and other idealistic, critical theories is that, when it comes down to it, it is not applicable to the public sphere. This is because Discourse Ethics requires public criteria for success or failure of a norm or action, and as Raymond Geuss points out “[t]hat criteria are ‘public’ must mean that ... they can be formulated in a way which makes them neutral between competing views” (Geuss, pp 89, 90). Essentially, Discourse Ethics cannot be applicable to the public sphere, which includes the discussion of emergencies and emergency powers, because there is no way in which we can be neutral when trying to determine what is better or worse because there are so many different interests and competing cultural, societal, and even ethical views (Geuss, pp. 89, 90).

This does not negate the need for Discourse Ethics, however. The way in which our institutions and society is set up requires us to not be neutral if we wish to fix them. Despite this, we are also able to come to some neutral criteria, such as what standard of living is suitable. And in the areas in which we are unable to come to an agreement, it is still essential to consider them because these issues are so ingrained in our institutions. To make life better for everyone, we must consider the inequalities, especially in today’s modern world. Therefore, Discourse Ethics can be applicable to emergencies in the larger context. This is important for our discussion because it allows us to understand that Discourse Ethics is an important theory to think about

when it comes to emergencies, and COVID-19 specifically. The main critiques of Discourse Ethics do not affect the need to incorporate this theory into our discussion of emergencies. In fact, they show the importance of doing so, because these critiques are essential to keep in mind as we think about how we are applying Discourse Ethics to future emergencies, especially since they are direct critiques about how Discourse Ethics affect the future of nature and generations. However, as we have shown, the critiques outlined above do not negate Discourse Ethics because there are ways to satisfy the critics and ways in which Discourse Ethics can incorporate nature and future generations into the conversation.

Discourse Ethics, then, appears to be a reasonable theory of morality, applicable to everyday situations. Does that mean it is also applicable to situations that do not occur every day, say, for example, COVID and other community emergencies like natural disasters? To fully understand this question, we must first consider how we respond to emergencies. This will help understand how, if at all, Discourse Ethics can help analyze and can be applicable to future emergencies and their consequences.

## Emergencies And Emergency Powers

### *What Is an Emergency?*

An emergency, in the modern sense of the word is defined as “[a] juncture that arises or ‘turns up’; *esp.* a state of things unexpectedly arising, and urgently demanding immediate action” (“Emergency”, entry 4). Under this definition, can COVID-19 be considered an emergency? I would say yes. COVID-19 showed up rather suddenly on our radars and spread across the world rather unexpectedly and quickly too. We were quickly able to see how deadly it could be and that fighting this virus required “immediate action” (“Emergency”, entry 4). For this very reason COVID-19 became and continues to be an emergency.

COVID-19 can be considered an emergency and emergencies often require the use of emergency powers or radical solutions, and therefore, it is important to our analysis to understand what Discourse Ethics would say about emergencies and the use of emergency powers. Discourse Ethics has a problem with emergency powers. Habermas put it this way, “[c]ivil society must beware of sacrificing individual liberty, tolerance towards the diversity of life-styles and readiness to take on the perspective of the other – all these democratic virtues of an open society – on the altar of an imaginary stage of security that we cannot reach anyway” (Habermas: “The Paris”, Question 3, paragraph 2) implying that Discourse Ethics might not be able to help assess emergencies and emergency powers if we take away basic rights are emergency powers traditionally do. But what are emergency powers?

### *What Are Emergency Powers?*

It is common knowledge that extreme times call for extreme measures. Emergency powers are defined as a “power[s] granted to or used or taken by a public authority to meet the exigencies of a particular emergency (as of war or disaster)” (Merriam-Webber). When

governments use their power to meet needs during emergencies, often by reducing or taking away certain freedoms that would normally be protected, they are using those emergency powers. However, it is not that simple. Often today's emergency powers are modeled after Roman dictatorships (Ferejohn, 211).

This means that under emergency powers, rights are often suspended or taken away all together (Ferejohn, 222). The traditional republican sense of emergency powers is:

[A] virtuous executor of emergency powers—Cincinnatus called away from his plow—who steps forward for a sharply defined period of time to defend the institutions of the republic, and then returns to his farm. In the republican model, the executor called by others (a senate) to the special position of dictator, which is dormant within the constitution, and is automatically dismissed when the emergency ends. He needs no more authority than his own (republican) virtue. He is not suspected of any other motive than pursuit of public safety; his disinterestedness and impartiality are assured (Ferejohn, pp. 219, 220)

The Roman dictatorship form of emergency powers is a story of emergency powers that suggests that they are only around to bring back the status quo, to return things to how they once were.

On the other hand, the more modern style of emergency power more closely rests on the idea that the head of state still needs wide held support to take extreme measures, causing the legislator to have a crucial role in enacting and legitimizing emergency powers (Ferejohn, pp. 219, 220). Both forms of emergency power include a temporary suspension of rights, privileges, and even ways of life and both have the same goal of returning to normalcy, hence why today's emergency powers still are likened to traditional Roman dictatorship style emergency powers.

This suspension of rights creates a power differential, which should give us pause to consider whether emergency powers are right or wrong.

*Should Emergency Powers Be Regulated?*

Not everyone agrees with this idea modern version of emergency powers, however. Carl Schmitt argues that emergencies occur so regularly now that it is essential for governments to have discretionary power that they can use to return the world to a state of normalcy. (Scheuerman, pg. 547). William Scheuerman, who wrote about Schmitt's notion of emergency powers, notes that:

[o]ne can sensibly read Schmitt's reflections on emergency power as an analogous attempt to undermine what he considered to be an overstated normativistic juxtaposition of exception or emergency to general law: exceptional or emergency situations turn out not only to be ubiquitous, but they also cannot be neatly separated from so-called legal normalcy. This, in part, is why he was skeptical that emergencies could be tamed or regulated by constitutional devices (e.g., Article 48) and also why he believed that an element of so-called originary discretionary power was indispensable to political and legal affairs, despite conventional legal and constitutional ideas to the contrary (Scheuerman, 561).

Schmitt believed that to return a country to its normalcy during emergencies, it is necessary to give whatever discretionary power is needed to the government. In fact, in *Dictatorship*, Schmitt says that "[t]he crucial fact is that the authorisation to take an action that the given situation necessitates has been replaced by a number of limited functions" (Schmitt, pg. 173). Here he is arguing that the necessary power the government requires to return to a state of normalcy has



been hampered and challenged by the regulation and outline of what constitutes an emergency power and what emergency powers the government can take. For Schmitt, to return to normalcy means that there can be no supervision or consideration of the costs of an action, which if implemented the way Schmitt viewed it, could give a countries' leader the ability to implement unfair, unethical, and immoral regulations and solutions to a crisis.

However, emergency powers and their outcomes must be critically analyzed for the very reason that they are extreme measures. Emergency powers are required to get a country or community through an emergency, to return the state of the nation and the lifestyle to the way things once were. The biggest issue with that is that

[f]ollowing a disaster, people of low SES [Social Economic Status] face many barriers to receiving aid to help them rebuild their homes and meet their other needs. Research indicates they may also have trouble getting access to housing and other resources. The stress linked to lack of resources may have emotional and behavioral health consequences. People of lower SES after a disaster may be more likely to experience distress and depression. Additionally, they may have physical health problems that people of higher SES do not" (Department).

This means that people who are underrepresented and poor are likely to suffer more during emergencies, and our uses of emergency powers often forget this. They assume everyone is impacted equally by the emergency, and in doing so, ignore the most vulnerable.

Emergency powers can also last too long and do more harm than good. Take the example of 9/11. President G. W. Bush responded to the attack on the World Trade Center by beginning a 20-year long war in Afghanistan and Iraq. The 117<sup>th</sup> Congress passed the

Authorization for Use of Military Force Resolution, which granted him this power, just one week after 9/11 (“Public”). It allowed

the President ... to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons (“Public”, Section 2).

However, the use of this emergency power far exceeded its original purpose. 18 years after the terrorist attack of 9/11, President Trump used the Authorization for the Use of Military Force Resolution to go to war with Iran, claiming that Iran’s action of housing members of Al-Qaeda was sufficient cause to apply the Authorization Resolution and go to war with Iran without the consent of Congress (Siemion). This is just one example of emergency powers being used too long and outside of the scope of its original intentions. 9/11 should give us pause to consider the efficacy and longevity of future uses of emergency powers.

While Carl Schmitt raises a critical point, that during emergencies, the best way to return to normalcy is to allow the government to implement whatever regulations and laws it needs to, his viewpoint goes a little too far. The issue is not with emergency powers as Schmitt argues, but with their undefinable scope and timetable, which if not reined in by ethical consideration, could lead to another Holocaust, another 20-year long war, or something even worse. This is because emergency powers inherently require the government to take unilateral decisions, and once a government has that power, it is not easy to take it back from them.

Bruce Ackerman, a professor of law at Yale Law School has a response to Schmitt. He notes that “European nations have had a long and unhappy historical experience with explicit emergency regimes. Speaking broadly, these regimes have tended to give executives far too much unfettered power, both to declare emergencies and to continue them for lengthy periods. This is a fatal mistake” (Ackerman, pg. 1047). Giving governments long-term, unilateral decision making over how to respond to an emergency is not a very bright thing to do because once a government has power, they do not like letting it go.

Even Schmitt eventually admitted that emergency powers need to have some sort of checks and balances, otherwise they may get out of hand. He amended his argument by noting that in the German Constitution, the article which allowed the German government to suspend most, if not all, of the other Articles of the Constitution in times of emergency, Article 48, should have been “legally codified” (Scheuerman, pg. 554) before they used it, but it never officially was (Scheuerman, pp. 553, 554). While for Schmitt, those checks and balances that prevent emergency powers from going too far might be through “legal codification” (Scheuerman, pg. 554), we should also consider whether a theory of ethics might do that same thing. To find out, I suggest using Discourse Ethics to analyze eviction moratoriums, mask mandates, and stimulus checks.

### Case Study One: U.S. Supreme Court & the CDC Eviction Moratorium

In August of 2021, the United States Supreme Court issued a ruling on a case in which the Alabama Association of Realtors claimed that the Center for Disease Control and Prevention overstepped its authority by reimplementing and extending an eviction on a moratorium that Congress passed in 2020 to help relieve the burden of the COVID-19 pandemic. They argued that, although the CDC is allowed to take measures “to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession” (Alabama, pg. 2), it overstepped its authority by implementing an eviction moratorium. But why is this analysis critical to the question of whether Discourse Ethics can be applied to emergencies? It is crucial because the eviction moratorium was an emergency power and applying Discourse Ethics to an emergency action can help us understand if and how Discourse Ethics might apply to emergencies. Therefore, analyzing this case using Discourse Ethics will help us directly answer our question.

To begin our analysis, we must analyze the case through two requirements. First, is the outcome valid under the discourse and moral principles, and second, whether the discourse surrounding the decision meets the parameters set out for valid, and therefore moral, discourse. When we answer these questions, we will get a better idea of the validity of the Center for Disease Control’s eviction moratorium and the Supreme Court’s decision to end the moratorium.

Our first question then becomes: Is it possible and reasonable for all whom might be affected by the CDC’s decision eviction moratorium to agree to and accept the all the effects of said moratorium? According to the Supreme Court of the United States, “The equities do not justify depriving the applicants of the District Court’s judgment in their favor. The moratorium has put the applicants, along with millions of landlords across the country, at risk of irreparable

harm by depriving them of rent payments with no guarantee of eventual recovery” (Alabama, pg. 7). That is to say that it is not reasonable for the defendants in this case (who happen to be realtors and property owners) to accept the consequences of the moratorium because they had not been paid for months, and they would not be paid for many future months either.

Logically, it was reasonable to implement a moratorium because of the impacts that COVID-19 had on the economy and the fact that we did not know whether evictions would have caused an increase in the number of COVID cases in the nation. In fact, the Supreme Court seems to have agreed with Congress’ original implementation of an eviction moratorium but were skeptical about the CDC’s ability to implement one once Congress refused to renew it (Alabama, pg. 2- 4). However, according to the moral principal eviction moratoriums would not be a valid or moral norm because they unfairly impose the costs of the moratorium upon realtors and property owners.

To complete our understanding of the morality of the eviction moratorium and the Supreme Court’s decision, we must also turn to the five parameters of moral discourse to ascertain the validity of the discourse, and thereby the validity of an eviction moratorium. Parameter 2 (BPD) is one we can look at. We can determine if the participants in a discourse put aside their “power differentials” or not. We can see how the Supreme Court tackled this question. They talk about how they see

[t]he CDC’s moratorium ... relate[ing] to interstate infection far more indirectly: If evictions occur, some subset of tenants might move from one State to another, and some subset of that group might do so while infected with COVID-19. See 86 Fed. Reg. 43248–43249. This downstream connection between eviction and the interstate spread of disease is markedly different from

the direct targeting of disease that characterizes the measures identified in the statute. Reading both sentences [of the statute allowing the CDC to take measures to stop the spread of communicable diseases] together, rather than the first in isolation, it is a stretch to maintain that §361(a) gives the CDC the authority to impose this eviction moratorium (Alabama).

With this we can see they are saying that the law does not conform to the principles of moral discourse which asks us to leave our “power differentials” behind because the CDC rests its case on their authority, which the Supreme Court has deemed a stretch at this point.

The 5<sup>th</sup> parameter (CI) says that all participants must “anticipate whether their reasons can be rehearsed by all non-participant others who figure specifically in the content of any moral judgment that results consensually from the participants’ discourse” (Kettner, pg. 311). It asks us to determine if the reasons given in a discussion for a certain action can be reciprocated and repeated by others outside of the conversation. Parameters 1(RANC), 3 (NST), and 4 (FMH) are the ones that deal with ability to communicate and openness to communicative action. The Supreme Court has no need to analyze these parameters in this case however, as the judicial system provides a basis for the reasoning behind all legislation, ensuring that the average citizen is able to understand and communicate with law, specifically in this case, the emergency law.

This example of eviction moratoriums shows us that Discourse Ethics can be applicable to emergencies and emergency powers. That is why it is essential to our question of whether, and if so, how Discourse Ethics can be applied to emergencies. We can analyze the case through the two principles of discourse and the five parameters of moral discourse. In the case of the eviction moratorium, our analysis allowed us to come to the conclusion that under the two principles of discourse ethics, the eviction moratorium does not hold up nor does it hold up under the moral

discourse parameter of power differentials. However, we are missing one crucial detail, the empirical evidence to support our conclusions above. To truly figure out if the conclusions above are correct, one only needs to ascertain what forms of evidence, or lack of, is needed post-discourse to figure out a person's ability to reason, articulate, and understand multiple sides of a disagreement.

### Case Studies Two & Three: Mask Mandates & Stimulus Checks

As we have seen, Discourse Ethics can be applied to emergency powers when looking at Supreme Court cases. Now, I would also like to consider mask mandates and stimulus checks without using Supreme Court cases because it can give us a unique insight into how Discourse Ethics might be applicable to emergencies and emergency powers. This is because both incorporate the public health crisis and the economic downturn that COVID-19 produced. They are also perhaps two of the most stringent and long-lasting effects of COVID-19 emergency powers that we have seen.

Although mask mandates and stimulus checks are less easy to determine evidence for without consistent, written down, explicit reasoning behind them, such as Supreme Court decisions, I believe this discussion is essential to our perusal of Discourse Ethics and emergencies because it allows us to consider empirical evidence for our decisions above and it also allows us to consider when we might apply Discourse Ethics. We have seen in *Case Study One*, that Discourse Ethics can be applied to emergencies and emergency powers, but we still need to determine where Discourse Ethics is most applicable in relation to analyzing emergency powers and whether the action that came from the emergency power is ethical and valid. More specifically, it is important for us to determine whether Discourse Ethics is best applicable and helpful before, during, or after emergencies. This is the best way to figure out where Discourse Ethics is most applicable to emergencies in the future.

Using the two principles of Discourse Ethics, we can begin to see how we might draw from certain places for evidence. Our main question, then, is, using the principles of Discourse Ethics is: Can the entire population of a state or local municipality reasonably and freely, along with in consensus, accept all consequences of wearing a mask or receiving stimulus checks?



Well, this would depend on the reasonability of wearing a mask and stimulus checks, the freedom involved in the decision to create mask mandates and send out stimulus checks, and the consensus of the population to wear masks and receive stimulus checks. Without these three elements, mask mandates and stimulus checks cannot be considered valid moral actions.

Our quest for evidence begins with whether mask mandates and stimulus checks were reasonable. We must ask what makes it reasonable and what makes it unreasonable. It is important to consider all perspectives and use the most logical to determine the reasonability of an outcome. For example, it could be reasonable to require masks because we know that masks help reduce the transmission of COVID-19 (Royo-Bordonada, pg. 2), but unreasonable because we know masks sometimes cause health issues for those who wear them for quite some time (Rosner) and for children who are unable to remove the mask (Fenneld). In relation to stimulus checks, we would need to consult experts in finance to determine all the effects of stimulus checks and how they either help or hinder Americans. The evidence for reasonability can be obtained at any point, including before, during, or after the discussion and implementation of an action.

What about the freedom to make the decision to impose a mask mandate or send stimulus checks? We must consider that in a representative democracy, such as the United States, elected officials have the power to speak for the people, precisely because the people give them the power to do so. We call this consent of the governed and was a founding principle in the United States (“Declaration”). We have the freedom to influence our representatives, but also understand that they are the voice of the people. In the end, the decision to implement mask mandates or to send out stimulus checks is superfluous simply because we live in a democratic republic. We already have the freedom to decide our government, including their goals and

actions, and therefore we inherently have the freedom to choose whether or not to send out stimulus checks. This evidence is available to analyze at any point during the discussion or implementation of an action.

And what about a consensus? It is important to note here that Discourse Ethics is a theoretical framework that we should follow if we wish to create the world that ought to be, meaning that Discourse Ethics understands that consensus is something we should work towards and not something that can ever be achieved. This means Discourse Ethics, rather than looking at the empirical consensus of an action, looks more at the openness of the public sphere for people to consent. To find evidence for this, we could look at how open and free the public sphere, for example, social media, media outlets like Fox or CNN, was at the time in which mask mandates or stimulus checks were put into place. It would be best to determine this evidence pre discourse or during the conversation because the freedom of the public sphere changes so quickly, especially in emergency situations, although we are able to obtain this evidence post discourse and implementation as well.

We must also look for evidence from the five parameters of moral discourse as well if we wish to use Discourse Ethics. Parameters 1 (RANC), 3 (NST), and 4 (FMH), the ones that deal with ability to communicate and openness to the present communicative action, are extremely hard to judge during an actual discourse, let alone afterword. We can look for ways to do so, however. By surveying the participants in the discussion and looking at their previous open-mindedness, and by developing a definition of rationality and ability to sufficiently articulate needs, we can narrow down how each participant figures into parameters 1 (RANC), 3 (NST), and 4 (FMH). In the case of mask mandates for example, we could turn to the politicians who implemented a masks mandate's previous voting record and promotion, or lack thereof, of public

health and individual liberty. On the other hand, determining whether a politician is rational or not would depend on our definition of that very word, which is a discussion for a whole other paper. We must obtain this evidence during the discussion or pre-discourse to ensure the discourse is actually moral. It is possible to obtain this evidence post discussion, however, as mentioned, if we want to make sure the discourse is moral, we need to obtain this evidence pre-discourse to ensure that the people included in the discussion are following the rules of moral discourse.

Parameter 2 (BPD) is different than parameters 1 (RANC), 3 (NST), and 4 (FMH) in that it has an element that we can find evidence for post-discourse. We could determine if the participants in a discourse put aside their “power differentials” or not. In the case of mask mandates, we could look at the speech of scientists versus the speech of the average citizen to determine whether scientists used their power differential to advocate for, or against, masks. We could also look at the way in which the news, social media, and everyday discussion present information, and determine whether they use authority figures, titles, or other words that show power to claim their evidence is the one we should listen to. This applies to stimulus checks as well. Typically, when asking this question, people turn to authority figures and rely on that authority to give them the right answer. For example, the San Diego Union-Tribune asked thirteen people their opinions on stimulus checks, but through the lens of their profession. They made sure to include either the person’s university, institute, or corporation next to their name to give them credit as an authority figure on the subject (Molnar). This is important because they only asked people their opinion based on their profession and authority opinion and never touched the personal side of their opinions. Discourse Ethics asks us to put aside our authority and look at whole picture and to look at all the evidence. This evidence could be obtained at any

time during the discourse or implementation, but as with Parameters 1 (RANC), 3 (NST), and 4 (FMH), to make the discourse moral, we would need the evidence before the actual discussion occurs.

The 5<sup>th</sup> parameter (CI) says that all participants must “anticipate whether their reasons can be rehearsed by all non-participant others who figure specifically in the content of any moral judgment that results consensually from the participants’ discourse” (Kettner, pg. 311). It is much like the issue of consensus when it comes to Discourse Ethics because it requires us to look for evidence in the public sphere, because it asks us if all non-participant actors can accept and understand the reasons for an action. The evidence for parameter 5 (CI) is best determined during the discussion or post discussion, mainly because it asks us to determine and “anticipate” whether the reasons can be accepted by others, although it is possible to determine this evidence post discourse and implementation.

We can see that when we analyze mask mandates and stimulus checks outside of our legal and judicial systems, we can find empirical evidence to back up our claims made about judicial rulings. It also can help us think about when the best time to apply Discourse Ethics to emergencies might be. For example, most of the evidence we saw must be gathered by us before or during the discourse to *ensure* an ethical outcome, although it is possible to obtain the evidence post-discourse or implementation of an action.

This is important to our question of how Discourse Ethics applies to emergencies because it allows us to see that the best time to use Discourse Ethics would be before an emergency occurs. It would not be best to do during an emergency because emergencies require immediate action and there is often extraordinarily little time to discuss a course of action. Applying Discourse Ethics post-emergency would also not work solution because the emergency has

already occurred and the actions have already been taken, therefore that the action can not be changed, even if we could determine whether it was ethical or not. To finish off our case studies, we will now turn to a Supreme Court Case that covers the social emergency powers that stemmed from COVID-19. There we can really see whether Discourse Ethics can truly be applied to emergencies.

#### Case Study Four: State of South Carolina & Mask Mandates

For much of 2020, most of the United States had some form of a mask mandate. This meant that wherever you went, you had to wear a mask in an attempt to stop the spread of COVID-19. While the United States Supreme Court has never directly looked at the question of the constitutionality of mask mandates, state Supreme Courts have. I will look at a case presented to the Supreme Court of South Carolina, which came to the conclusion that mask mandates were not valid. I wish to look at this case because it will further strengthen our ability to analyze emergency powers and discourse ethics. It will allow us to combine what we have determined in our previous case studies and cement our answer to the question of whether Discourse Ethics can be applied to emergencies and emergency powers.

First, we will use the principles of Discourse Ethics to determine the mask mandate's validity. As before, to understand their validity, we must first ask whether the outcome valid under the discourse and moral principles. Second, we will look at whether the discourse surrounding the decision meets the parameters set out for valid, and therefore moral, discourse. When we answer these questions, we will get a better idea of the validity of mask mandates and the South Carolina Supreme Court's decisions.

Our first question comes in a different form from the one posed in the section on eviction moratoriums. It is, is it possible and reasonable for all whom might be affected by mask mandates to agree to and accept the all the effects of said mandate? According to the Supreme Court of South Carolina,

Petitioners also argue both provisos deprive children of their constitutional right to a free public education and equal protection of the law. This Court will presume an act is constitutional unless its "repugnance to

the constitution is clear and beyond a reasonable doubt." Article I, section 3 of the South Carolina Constitution prohibits the denial of equal protection of the law. Success on an equal protection claim requires "a showing that similarly situated persons received disparate treatment." *Id.* at 504, 808 S.E.2d at 814. In this case, there is no evidence that any students are receiving disparate treatment. Indeed, there cannot be any argument of disparate treatment, as the provisos apply equally to all students and all public K-12 schools. Accordingly, Petitioners' equal protection argument is without merit.

(State of South Carolina)

The Supreme Court of South Carolina is saying here that neither a mask mandate nor a ban on mask mandates violates anyone's constitutional rights or freedoms and is therefore reasonable. Therefore, under the moral and discourse principles of Discourse Ethics, mask mandates are valid actions. The Supreme Court of South Carolina is pointing out that mask mandates do not disproportionately affect people to such a degree that it violates the principles of Discourse Ethics. It is possible and reasonable for all whom might be affected by mask mandates to agree to and accept the all the effects of said mandate.

To complete our understanding of the morality of the mask mandates and the State Supreme Court's decisions, we must also consider the five parameters of moral discourse to ascertain the validity of the discourse, and thereby the validity of masks mandates. Parameters 1 (RANC), 3 (NST), and 4 (FMH), deal with ability to communicate and openness to the present communicative action and are extremely hard to judge. As discovered in *Case Studies 2 and 3*, these are better judged in the moment and during the discussion than speculated upon in judicial opinions.

Parameter 2 (BPD) is different than parameters 1 (RANC), 3 (NST), and 4 (FMH) in that it has an element that we can scrutinize post-discourse. We can see that the South Carolina Supreme Court tackled this question of power differentials. They noted that “As we emphasized in *City of Columbia*, our role in this dispute is limited, and “[w]e do not sit as a superlegislature to second guess the wisdom or folly of decisions of the General Assembly.” *Keyserling v. Beasley*, 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996). We reaffirm our holding in *City of Columbia* that Proviso 1.108 is valid and enforceable” (State of South Carolina) and in doing so, note the authority of the state legislator over the state courts. They also mention elsewhere in their decision that they “have no authority to do so” (Richland), meaning they really have no authority to speak on the effects of masks and mask mandates, and that that issue is better left to the state legislator. This once again suggests that they were using the power differential between the court and the legislator to deduce that the legislator would have a better answer to the question of mask mandates. This, under Discourse Ethics means that mask mandates are invalid because they require a power differential to affirm.

The 5<sup>th</sup> parameter (CI), which says that all participants must “anticipate whether their reasons can be rehearsed by all non-participant others who figure specifically in the content of any moral judgment that results consensually from the participants’ discourse” (Kettner, pg. 311), is also easier to determine during the actual discussion. It asks us to determine if the reasons given in a discussion for a certain action can be reciprocated and repeated by others outside of the conversation. As noted earlier, no Supreme Court in the United States has any issue with this as courts provide the reasoning behind all legislation ensuring that the average citizen is able to understand the laws. This makes the court’s decision valid and moral under these parameters.



This case study of mask mandates has cemented our answer to whether Discourse Ethics is applicable to emergencies. We can analyze Supreme Court Cases in relation to the two parameters of Discourse Ethics and the five parameters of moral discourse, meaning that Discourse Ethics is indeed applicable to emergencies. In the case of mask mandates, the mandates are applicable under the two parameters of Discourse Ethics, but not valid under the five parameters of moral discourse because they require power differentials. It also cemented when we should apply Discourse Ethics, because it showed us the importance of analyzing an action prior to an emergency if we wish leave power differentials behind. This is one example of how Discourse Ethics might be applicable to emergencies and emergency powers. However, there are two aspects of the Discourse principles and parameters for moral discourse that have been difficult to analyze. They are the issue of consensus and power differentials. In both cases consensus is never directly assessed, and power differentials are obvious in the court decisions. We need to dive further into this before we can get a full picture of how discourse ethics is applicable to emergency powers.

### Discourse Ethics in Future Emergencies

Our case studies have shown us that Discourse Ethics is not *fully* applicable to emergencies. This is because Discourse Ethics requires consensus for a valid, or moral, action. This is an issue because emergency powers and governmental actions inherently require the use of actions which are often not backed by consensus. Another issue is that Discourse Ethics requires power differentials. Power differentials are inherently part of emergencies and help ensure that we can return to a non-emergent state as quickly as possible. I believe that these issues could be fixed if we were to use Discourse Ethics prior to the emergency to prepare rather than if we used Discourse Ethics during the emergency to determine our responses then.

First, I want to discuss the issue Discourse Ethics has with consensus. While consensus of people affected by an action is important, there are two things we must remember when using Discourse Ethics to determine the validity of an action. First, a 100 percent unanimous consensus, in as large a group of people as we are attempting to apply Discourse Ethics to, is almost impossible to obtain because at least one person will not agree. It is possible to achieve a majority consensus, however, and we live in a society that tends to go with the majorities' desires. Second, we live in a representative democracy. We, by consenting to others governing us, give our power to consent to large national actions, laws, proclamations, and regulations to our representatives when we elect them. As we know, the "consent to be governed" is written into the very founding documents of the United States ("Declaration") and is now shared across the world. In fact, the United Nations included this idea in the Universal Declaration of Human Rights in 1948 (General).

The second issue that Discourse Ethics has with emergency powers are the power differentials that are integrally intertwined with, and required by, emergency powers. In fact,

power is defined as “[a]uthority given or conferred [and] liberty or permission to act” (“Power”). If we think back to the definition of emergency given earlier, we will remember that an emergency is “is defined as “[a] juncture that arises or ‘turns up’; *esp.* a state of things unexpectedly arising, and urgently demanding immediate action” (“Emergency”, entry 4). Even though the traditional republican view of emergency powers is “the temporary suspension of fundamental rights in order to overcome an emergency” (Zuckerman), putting these two definitions together gives us a quite different idea of what emergency powers can be. If we consider their meanings together, emergency powers become an authority, liberty, and permission to act upon a situation that rose unexpectedly and urgently required action. Rather than take away essential human rights, emergency powers can be used to ensure those rights and the safety of a community during a crisis.

However, this is not how people used emergency powers in the past. Take for example when Lincoln suspended the right to habeas corpus in 1861 and when he reduced citizens’ freedom of speech in 1864 (“Civil”). The right to habeas corpus and freedom of speech were, and still are, considered essential rights and yet Lincoln still felt the need to suspend these rights during the Civil War to end the war as quickly as possible to ensuring that the north’s maintained its way of life. Others, besides Lincoln, also used the traditional republican sense of the term emergency powers. Essential liberties were suspended during the COVID-19 pandemic as well. California banned indoor church gatherings for public health and safety reasons, but this seemingly small ban, according to the Supreme Court, inhibited the right to freedom of religion to such a degree that they ruled that the California law was unconstitutional and required California to allow indoor church services (Breslow). Banning or reducing someone’s freedom or natural right is dangerous because it can lead to banning even more rights and freedoms and

eventually a government who feels entitled to do so. An entitled government leads to tyranny, social divisions, devastation, and it sews hatred, jealousy, and other emotions that lead to reduced standards of living, war, and even death. If we wish to avoid this outcome, we must include ethics in our discussion of emergency powers.

It is for this very reason that we have checks and balances. Even if we acknowledge that emergency powers are an attempt to return to normalcy as Schmitt notes, we must still recognize that there is no reason to not include ethics in our attempt to return to normalcy. If we do not do so, then it is possible that we might end up with a government whose use of emergency powers, and the suspension of rights that comes along with it, might never cease. As Habermas notes “[c]ivil society must beware of sacrificing individual liberty, tolerance towards the diversity of life-styles and readiness to take on the perspective of the other – all these democratic virtues of an open society – on the altar of an imaginary stage of security that we cannot reach anyway” (Habermas, “The Paris” Question 3, paragraph 2). If we allow emergency powers to go unchecked, we might never return to normalcy and instead end up with a less equitable and ethical world than we had before.

This is only the tip of the iceberg. In fact, there are many other reasons we should be care about future emergencies. Oren Gross, a professor of law at the University of Minnesota Law School, points out in the Yale Law Journal that in emergencies “the danger is that such emergency-specific accommodation will become an integral part of the regular legal system” (Gross, pg. 1072). He even proposes a new model called the Extra-Legal Model which:

calls for public deliberation and, eventually, for the taking of responsibility by each and every member of the community. ... A crucial element of the model calls on the public to evaluate the government’s actions and determine whether

to ratify them, in whole or in part, ex post. The need for ratification, with the concomitant demand for transparency and candid acknowledgment of what has been done, forces the public to become vested in the outcome. It also promotes public deliberation and discourse about the actions that have been taken on the people's behalf. Such deliberation is important both as a deterrent against governmental agents rushing too easily to exercise unlawful powers and as a means of providing opportunity for an open discussion of such matters in light of the recent crisis and in anticipation of possible future ones (Gross, pg. 1127).

Although not Discourse Ethics, Gross' approach does call on us to discuss and debate emergency powers, just as Discourse Ethics suggests we do. The difference is when to discuss them. Gross believes post- emergency would be best (Gross, pg. 1127). On the other hand, I believe that evaluating them before the emergency is perhaps our greatest weapon against the unethical and immoral use of emergency powers by governments because it allows us to prepare for that very possibility and fix the issue before it occurs.

Bruce Ackerman, a professor at Yale Law School, also has important insights into the question of emergencies and emergency powers. He notes that:

[t]he Executive should be given the power to act unilaterally only for the briefest period—long enough for the legislature to convene and consider the matter, but no longer. If the legislature is already in session, one week seems the longest tolerable period; if not, two weeks at most. The state of emergency then should expire unless it gains majority approval. But this is only the beginning. Majority support should serve to sustain the emergency for a short

time—two or three months. Continuation should require an escalating cascade of supermajorities: sixty percent for the next two months; seventy for the next; eighty thereafter (Ackerman, pg. 1047).

Ackerman has a unique idea that would solve half of the problem of emergency powers and how they are used, but it is missing something. Even if we incorporate the idea of the government giving up their emergency powers, it is important to still look at the actions taken during the time in which the emergency powers were legal. Those actions may still disproportionately affect citizens or create an unequal environment for the future, even when the emergency has ended. This is why I am suggesting that we use Discourse Ethics, because as we have seen in the case studies, we can use this theory of ethics at most any point in the discourse.

Finally, one last comment on the fact that it seems like Discourse Ethics cannot be ever fully applicable to emergencies during a crisis because its consensus requirement and its requirement to set aside power differentials. The best response to this critique is that Discourse Ethics is an idealistic theory. That means it is only meant to help us think about the perfect utopia. It recognizes that we are likely to never get to that place however, and therefore, it acts more like a guideline for thinking about situations than as a model we can apply perfectly to them (Habermas, *Between*, pp. 4, 5). In fact, one of the very first notes Habermas makes about Discourse Ethics is that:

Unlike the classical form of practical reason, communicative reason is not an immediate source of prescriptions. It has a normative content only insofar as the communicatively acting individuals must commit themselves to pragmatic presuppositions of a counterfactual sort. That is, they must undertake certain idealizations—for example, ascribe identical meanings to

expressions, connect utterances with context-transcending validity claims, and assume that addressees are accountable, that is, autonomous and sincere with both themselves and others (Habermas, *Between*, pg. 4). ...

Communicative reason thus makes an orientation to validity claims possible, but it does not itself supply any substantive orientation for managing practical tasks—it is neither informative nor immediately practical (Habermas, *Between*, pg. 5).

For Habermas, communicative action, i.e., the result of Discourse Ethics, is really only a theoretical framework that we should follow if we wish to create the world that ought to be. Instead of using Discourse Ethics to determine the overall validity of a norm action, we should be using it to ensure that the action we all agreed upon is ethical. This makes it ideal to use to determine the ethicality of an action before it must be implemented. Despite its flaws, Discourse Ethics is still the ideal theory with which to look at emergencies because of its ability to juxtapose and jump between both the public sphere and governmental institutions.

We already prepare for emergencies and are certainly not wrong to do so. We understand that emergencies arise unexpectedly, and yet, we know that we can put procedures and other outcomes into place to lessen or make the consequences of the emergency easier to deal with. Take for example the State of California. California has building codes in place designed to ensure the safety of inhabitants and occupants of the building in the event of an earthquake (Seismic). This is something they can do to prepare for an earthquake before it actually occurs. By preparing for the worst, they are better able to weather the storm, and in doing so, they can help ensure a more ethical and equitable response.

As with earthquakes, we could have better prepared for an air borne illness such as COVID-19 if we had implemented strategies to deal with it before it occurred. Discourse Ethics can help us ensure that our preparation for an emergency is ethical and fair, unlike the unfair and skewed response we had to COVID-19. If we do our best to follow the guidelines Discourse Ethics sets out to help us achieve an ethical discussion and outcome, we can work our way towards an ideal world, where every action was morally and ethically valid.

An even better example is the idea of Standard Operating Procedures. These are rules developed to guide people in specific circumstances (Rao). The most well-known use of Standard Operating Procedures is in emergent circumstances. In fact, according to an article published in the Indian Journal of Psychiatry, “It is fairly obvious that SOPs ensure a higher standard of medical attention in serious situations ... Also ... SOPs hasten the initiation of therapy for individual patients by increasing the awareness of the need to vigorously and rapidly treat such patients” (Rao, paragraph 9). Essentially, Standard Operating Procedures ensure that two things occur. First, they ensure that an emergency is effectively managed, in a quick, yet accurate, manner, with less loss of control and composure. Second, they allow for a better outcome of the circumstances of an emergency. Without Standard Operating Procedures overseeing emergencies, the damages they do would be even more devastating. By preparing a set of rules or guidelines for how to manage an emergency, Standard Operating Procedures starve off the worst. We can do the same with emergencies and use Discourse Ethics to help us ensure that our guidelines are ethics. Both SOPs and earthquake building codes are notable examples of how one can prepare for emergencies, just as I am suggesting we do with Discourse Ethics as a backbone to ensure an ethical response.



By following the theory of Discourse Ethics and preparing for emergencies ahead of time, we can reassure ourselves that, even amid a future emergency, we are managing our responses in an ethical, moral, valid way. As an idealistic theory it can help us prepare for the worst but imagine the best. Discourse Ethics in specific can help us narrow down what is moral or not through analysis of power differentials, whether everyone agrees, and whether it is reasonable for everyone to accept the consequences of an action. Using Discourse Ethics to prepare for future emergencies will, perhaps, allow us to use eviction moratoriums, stimulus checks, and mask mandates in a more ethical and equitable manner in the future.

### Conclusions

As a theory that suggests that moral dialogue is the best way to create valid actions and norms, Discourse Ethics really requires us to engage in this moral discourse prior to emergency situations if we wish for a moral outcome. As we can see from our COVID-19 response case studies, it is nearly impossible to get a complete picture of the way in which Discourse Ethics was or was not present in those responses. This is because Discourse Ethics has two fundamental issues with emergencies and the powers that are required by those situations.

Consensus in emergencies and the use of power differentials are its fundamental issues with emergencies. Discourse Ethics requires consensus and believes that power differentials led to outcomes that are less than desirable. While consensus is essential, we need to recognize that in a large population it is unobtainable. As for power differentials, while not ideal, they are required in a response to an emergency. This is because power gives someone authority to act, and while I may want to, I am not capable of ensuring people wear masks, are vaccinated, social distance, or taken care of in a completely unexpected time and circumstance.

It is important to note however, that Discourse Ethics is not meant to be practical model. It is built on the idea that we cannot, as human beings, ever achieve our idealizations to their fullest. Rather, Discourse Ethics argues that moral communicative discourse is the best conceivable way to ensure that our ideals are valid. It does not tell us how to achieve those ideals but gives us a way to ensure we are all on the same page.

This does not mean that we cannot strive for those ideals though. Discourse Ethics can be applicable to future emergencies that we know we can prepare for. To give an example, when the federal government or a state government is preparing for a natural disaster, such as a hurricane, we can ask whether they are following the principles of Discourse Ethics and the five

parameters of moral discourse. If this works, who knows what else we might be able to apply Discourse Ethics to? We could use it in medicine, non-emergency legislation, or even the judicial system. But for now, we are only looking at using Discourse Ethics in emergencies.

By using Discourse Ethics to prepare for emergencies, we can create a guideline for ensuring that when emergencies do occur, we are acting ethically and morally when searching for the best solution. We have done this successfully before, but now it is time to include Discourse Ethics in the conversation about emergency preparedness. We need to begin introducing Discourse Ethics into our conversations about future health crises, natural disasters such as fire, earthquakes, hurricanes, and tornados, and even future economic crises where the bubble of a market bursts. If we do so, when we face something like COVID-19 in the future, not only will we be more prepared, but we will have the ability to manage whatever the world throws our way in a more ethical, humane manner.

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