# An Unexceptional Theory of Morally Proportional Surveillance in Exceptional Circumstances

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## Proportional surveillance in exceptional times

How much surveillance is morally permissible in the pursuit of a socially desirable goal? Almost everyone agrees that there are limits to the amount of surveillance to which we can permissibly subject persons. Most also believe that the amount of permissible surveillance increases when the surveillance promotes a socially desirable goal. It makes a difference, for example, if surveillance can help prevent crime or improve health. Beyond agreement on these minimal points of consensus, however, opinions rapidly diverge. Specifically, there is widespread disagreement on the question of how to weigh the balance between the badness of surveillance and the achievement of socially desirable goals. How *exactly* does promoting a socially desirable goal by a certain amount affect the amount of morally permissible surveillance? Call this **the proportionality question of morally permissible surveillance**.[[1]](#footnote-1)

The proportionality question has received renewed attention during the 2020 Coronavirus pandemic. The proximate reason for this is that governments in many countries have responded to the pandemic by implementing, redirecting or expanding state surveillance, most controversially in the shape of collection and use of cell-phone location data to support a strategy of contact tracing, testing and containment.[[2]](#footnote-2) (Ferretti et al., 2020; Singer & Sang-Hun, 2020; The European Commission, 2020) These initiatives have drawn vocal criticism. (7amleh – Arab Center for Social Media Advancement et al., 2020; Morley, Cowls, Taddeo, & Floridi, 2020; Stanley & Granick, 2020) Proponents of such surveillance initiatives often point to the fact that the Coronavirus pandemic constitutes a global health emergency, and explicitly or implicitly claim that the exceptional situation justifies surveillance measures that would ordinarily be impermissible. Once again, we face the question of where to draw the line – are such surveillance measures a step too far, or do the exceptional circumstances in which we find ourselves, with much of the global economy and millions of lives on the line, justify even such radical intrusions into our privacy?

Behind the proportionality question lies a further question, which is often overlooked. In fact, it seems to me that disagreements regarding the proportionality of surveillance in exceptional circumstances often turn on underlying disagreements regarding this prior question. The question is this: in what way does a state of emergency affect the proportionality of morally permissible surveillance? The question may seem trivial, but two very different answers are possible, and the choice between them has radical implications for how we must answer the proportionality question.

On one view, a state of emergency has the effect of suspending or altering at least some of the constraints on morally permissible action that apply under ordinary circumstances. Let us call the application of this view to the proportionality question **the qualitative difference view** of proportional surveillance in a state of emergency. On the qualitative difference view, there is a certain threshold, where the stakes become so great that the proportionality condition itself changes, either by becoming altogether void, or (more plausibly) by allowing greater amounts of surveillance relative to the social good achieved.

On another view, the only difference between states of emergency and ordinary circumstances is that the stakes are greater in a state of emergency. Let us call this **the quantitative difference view** of proportional surveillance in a state of emergency. On the quantitative difference view, morally proportionate surveillance is a continuous, strictly increasing function of the social goods achieved by surveillance.

The difference between the two views is hopefully clear. If the qualitative difference view is true, then there are situations, perhaps such as the current Coronavirus pandemic, during which the ordinary proportionality condition does not apply. If a proportionality condition applies at all, it requires a much less demanding ratio between social goods achieved and the badness of the surveillance performed. On the quantitative difference view, on the other hand, the proportionality condition applies in exactly the same way in a state of emergency as in ordinary circumstances. The only difference is that the stakes are higher, i.e. that the goods achieved through surveillance are greater, but the way we balance the badness of surveillance against these goods is unchanged.

The overall objective of this article is to argue against the qualitative and for the quantitative difference view. I proceed by first setting out in somewhat greater detail how we must understand the qualitative difference view (section two). I then present a series of problematic implications of adopting the qualitative difference view and argue that jointly these give us sufficient reason to reject it (section three). This entails that our account of morally permissible surveillance should be unexceptional, i.e. the quantitative difference view: there is no morally significant difference between proportionality in ordinary circumstances and proportionality in emergencies, simply a spectrum of smaller to greater potential goods and bads of surveillance. In order to flesh out the implications of the quantitative view, I briefly sketch an unexceptional theory of proportional surveillance in exceptional circumstances (section four). The last section (five) summarises and concludes.

## The qualitative difference view of proportional surveillance exceptional circumstances

The fundamental issue at stake in this chapter is how to specify our theory of morally proportional surveillance, particularly as it pertains to the difference between ordinary circumstances and a state of emergency. In this section, I will first set out in more detail what a condition of proportionality for morally permissible surveillance might look like on the qualitative difference view. I next motivate the qualitative difference view by illustrating how it resembles recognized positions in the literature. This sets the stage for the next section, in which I present a series of objections to the qualitative difference view.

The qualitative difference view as I have sketched it above is the idea, that in certain exceptional circumstances, the proportionality condition for morally permissible surveillance changes to allow forms or amounts of surveillance that would otherwise be disproportionate. In a state of emergency, the view holds, there are moral exceptions. More precisely, I will say that **the qualitative difference view of proportionality for morally permissible surveillance** holds that:

1) There is some threshold *T*, for the goods achievable by surveillance (e.g. averting or mitigating the effects of a global pandemic), where the proportionality condition changes.

2) an act ϕ of surveillance is proportional in the sense relevant to moral permissibility *below* T *iff* the ratio of the goods that ϕ’ing brings about over the bads that ϕ’ing brings about is equal to or greater than some constant *k1*, where *k1* is greater than 1:1 (e.g. 2:1, 3:2, 4:3, etc.).

3) an act ϕ of surveillance is proportional in the sense relevant to moral permissibility *at or* *above* T *iff* the ratio of the goods that ϕ’ing brings about over the bads that ϕ’ing brings about is equal to or greater than some constant *k2*, where *k2* is (much) smaller than *k1* but equal to or greater than 1:1.

Let me clarify three features of the definition. First, the ratios are required to be equal to or greater than 1:1 in order to ensure that proportionality requires as a bare minimum that the act does more good than bad. *k1* specifically must be not merely equal to but greater than 1:1 to allow for the possibility that *k2* is equal to 1:1. Beyond these requirements, however, there can be different views on what the proper ratios for proportionality are.

Second, I assume that actions that bring about *no* bads need not satisfy a proportionality condition. While independently plausible – surely proportionality is only a requirement of actions that bring about at least *some* bads – this also ensures that we will never encounter a fraction with zero in the divisor. (cf. Thomsen, 2020, pp. 21-22, discussing a requirement of surplus goods)

Third, I shall speak for the moment of the “goods” and “bads” that surveillance brings about, as placeholders for the values that go into weighing proportionality. In the context of public health surveillance these might be (very broadly) increased health on the one side (goods) and decreased privacy on the other (bads). I will assume that goods and bads are in principle quantifiable and comparable – else how would we asses proportionality in the first place? – but I postpone further discussion until section four below.

What are we to think of the qualitative difference view? The notion of moral exceptions in times of emergency is neither novel nor specific to the context of surveillance of public health. Recent years have witnessed the burgeoning development of a sophisticated theory of morally proportional surveillance, which relies on concepts and arguments developed within the just war theory literature. (Macnish, 2015, 2018; Rønn & Lippert-Rasmussen, 2020; Thomsen, 2020) Arguably the most developed debate on the idea of moral exceptions in times of emergency can similarly be found there. As the most prominent example, Michael Walzer has argued that there can exist “supreme emergencies”, under which we may set aside at least some of the *jus in bello* constraints that ordinarily impose limits on morally permissible action in war.[[3]](#footnote-3) (Walzer, 1977) Specifically, Walzer believes that it may in such situations be morally permissible to intentionally harm innocents to avert the threat.

The idea of supreme emergency as developed in just war theory does not, of course, transfer directly to the present context. The three most important differences are that the just war theory of moral exceptions under supreme emergencies a) applies to antagonistic threats, i.e. to situations where great harm is threatened by an agent intending to do harm, b) is restricted to moral disasters of a magnitude possibly beyond even the Coronavirus pandemic, and c) targets the principle of discrimination, which prohibits intentionally harming innocents, rather than the principle of proportionality.

The first of these differences is the most easily dealt with. In just war theory the threat is antagonistic. There is an unjust aggressor who threatens harm to innocents. In the context of public health emergencies, such as the Coronavirus pandemic, the threat will typically be non-antagonistic. There may be persons who act irresponsibly, e.g. by failing to take reasonable precautions to avoid infecting others, but rarely will people intentionally harm others, in the sense of taking actions motivated by the goal of achieving harm, e.g. by attempting to deliberately infect others. Nor is the pandemic itself, of course, an antagonist, except perhaps metaphorically. A pathogen is not a moral agent.

It is difficult to see, however, why the difference in the type of threat should affect whether the state of emergency creates a moral exception. The moral exception is supposedly a result of the magnitude of the harm threatened, not of the specific nature of the harm. Thus, it would seem strange to say that a moral constraint is relaxed or overridden in the case where enormous harm is threatened by attack from an unjust military attack, so that we can permissibly act to avert the threat in ways that would ordinarily be impermissible, but that the same is not true for situations where an equal threat is posed by e.g. a natural disaster. (cf. Sandin, 2009)

Consider next the necessary scale of the moral disaster. Proponents of moral exceptions in supreme emergencies often hold that they are restricted to the most extreme threats, such as genocide or societal collapse. Walzer claims that a supreme emergency arises only when a community faces a threat that is both imminent and extreme. His illustration is the threat of Nazi invasion and occupation of the British Isles during WWII, i.e. replacement of the UK’s liberal-democratic institutions with genocidal fascist tyranny. If the bar for exceptional circumstances is set this high, then it will rarely be met.

Proponents of the idea of moral exceptions in supreme emergencies might therefore hold that as catastrophic as the Coronavirus pandemic has been, the scale of the disaster does not rise to the required level. Even those who believe that the Coronavirus pandemic specifically does not qualify will presumably agree, however, there is *some* point where the infection mortality rate of a disease becomes high enough that a pandemic would constitute a supreme emergency. The global infection mortality rate for the Coronavirus pandemic has been estimated as ca. 0.7%. (Meyerowitz-Katz & Merone) Plausibly, a pandemic with the ca. 50% case mortality rate of Ebola would be more than sufficiently bad to qualify.[[4]](#footnote-4) (Shultz, Espinel, Espinola, & Rechkemmer, 2016) Thus, while it is debatable whether the Coronavirus pandemic is a threat of sufficient magnitude to meet the threshold, it seems indisputable that a pandemic is *in principle* capable of qualifying as an emergency of the required magnitude.[[5]](#footnote-5)

Finally, the most important of the three differences is that the target in just war theory is conventionally the principle of discrimination, which is an (otherwise) absolute constraint on intentionally harming innocents. The central argument for the supreme emergency exemption is the counterintuitive implications of sustaining this constraint in the face of a supreme emergency. Many find the *fiat justitia ruat caelum[[6]](#footnote-6)* spirit of the absolute constraint implausible, when the price of respecting it is a moral disaster on the scale of e.g. genocide or societal collapse.

Proponents of the qualitative difference view can plausibly argue, however, that this difference is not decisive. First and foremost because one plausible modern interpretation of the principle of discrimination is that it is a result of the liability weights attached to individual welfare in our proportionality evaluation. (McMahan, 2004) On this interpretation, the reason why it is wrong to attack innocents is that they are not liable to attack, and that harming them therefore counts dramatically more in our proportionality assessment, potentially to the point of ensuring that an act that intentionally harms the innocent *cannot* be proportional (barring, arguably, the situation where the threat becomes a supreme emergency). To those who resist this interpretation of the principle of discrimination, the proponent can further point out, that it is plausible that a situation which dramatically affects one constraint on our actions will also affect other constraints when similar moral factors are at stake. Thus, if we can override the principle of discrimination *because* the magnitude of harm threatened has exceeded a threshold, it might well also be the case that we can reduce the required ratio for proportionality *because* the magnitude of harm has exceeded the threshold.

## Against the qualitative difference view

In the above I have spelled out and motivated the qualitative difference view. It is, I hope to have shown, both a coherent view, and a view with some initial plausibility due to its similarity to views that have been defended in the literature. In this section, I will argue that regardless of any initial plausibility, the view is vulnerable to such serious objections that we must reject it. We should look instead to the quantitative difference view, which I sketch in the next section.

The most obvious objection to the qualitative difference view is that it implausibly entails that situations that differ only to the smallest possible extent in the magnitude of the threat can nonetheless differ enormously in how we ought to morally assess them.[[7]](#footnote-7) This charge of moral alchemy is a well-established challenge for threshold views in ethics, but it seems to me particularly egregious in the present case. (Alexander, 2000) We can illustrate the problem as follows: suppose we define, purely for the purposes of illustration, constant *k1* as2:1, constant *k2* as 3:2, and the threshold T as 100. Now, consider:

**Three scenarios.** In scenario 1, public health surveillance (ϕ1) would avert a public health threat of magnitude 90, at a surveillance cost of 60. φ1 is disproportionate, because it is below the threshold and the ratio of goods over bads is less than 2:1 (90:60 = 3:2). In scenario 2, public health surveillance (ϕ2) would avert a public health threat of magnitude 99 at a surveillance cost of 50. φ2 is also disproportionate, because it is below the threshold and the ratio of goods over bads is less than 2:1 (99:50). In scenario 3, public health surveillance (ϕ3) would avert a public health threat of magnitude 100, at a surveillance cost of 66. φ3 is proportional, because it is above the threshold, and the ratio of goods is equal to or greater than 3:2 (100:66 ≈ 3:2).

The comparative proportionality assessments in *three scenarios* are very counterintuitive. One way of explaining what it is that makes them counterintuitive is to imagine the complaints that the persons harmed by the unaverted health threat in scenario 2 might reasonably make. The ratio of goods over bads produced by surveillance in their scenario would have been substantially better than the ratio in scenario 3. In fact, the ratio in scenario 3 is on a par with scenario 1. And yet, the great increase in the ratio of scenario 2 relative to scenario 1 makes no difference to the permissibility of surveillance in scenario 2, in spite of the fact that the proportionality condition is supposed to be grounded in and sensitive to this exact consideration. On the other hand, the single step in scenario 3 from a threat of magnitude 99 to one of magnitude 100 was sufficient to make surveillance proportional, in spite of the fact that the ratio of goods over bads in scenario 3 is dramatically worse than in scenario 2. As for the change in the magnitude of the threat that generates the moral exception, the change in threat from scenario 1 to scenario 2 is *nine* times as great as the change from scenario 2 to scenario 3, and yet again the former change made no difference to the moral permissibility of health surveillance in scenario 2. Surely, the persons harmed in scenario 2 might say, it is absurd that they were denied protection on this basis?

A second challenge for the qualitative difference view closely related to the first is that it makes our moral assessment implausibly sensitive to how we individuate threats and acts of surveillance.[[8]](#footnote-8) Consider first how we might individuate threats. We might speak e.g. of the Coronavirus pandemic as one threat, but very often threats of the relevant magnitude will be equally (or more) plausibly conceived of as a series of related threats, e.g. the millions of spatially and temporally distributed infections with Coronavirus that jointly constitute a pandemic. If we require threats to be single events, e.g. the impact of a very large asteroid on Earth, then the qualitative difference view will not apply to most of the events that its proponents presumably would want to apply it to. So proponents will likely favour the aggregative view of threats, where separate events can jointly constitute a threat that surpasses T. This raises immediate difficulties however. Suppose again that we define constant *k1* as2:1, constant *k2* as 3:2, and the threshold T as 100. Now consider:

**Distributed threats:** Threat A is a pandemic composed of millions of individual infections, which can be prevented by a programme of health surveillance, ϕ1. In aggregate, averting threat A is a good of 100, equalling threshold T, and the ratio of goods over bads is 3:2, equalling the required proportionality ratio at or above T. Threats B and C, on the other hand, are single, separate events, each of which can be prevented by surveillance programme ϕ2. Averting threats B and C are each goods of 75, while the proportionality ratio of ϕ2 for each threat is 15:8.

Note first that individually considered, averting the infections of threat A would be disproportional, since 3:2 is below the proportionality ratio for threats below T. Only jointly do the infections constitute a threat of magnitude T. Note also that threats B and C would jointly constitute a threat of even greater magnitude (150). Nonetheless, the single programme (ϕ2), that would avert both of them is disproportional, this despite the fact that the total good it does is much greater (150 vs. 100) and the proportionality ratio more favourable (15:8 vs. 3:2). This is implausible. At the very least, the onus is on the proponent of the qualitative difference view to at once establish how we distinguish the threats that can and should be aggregated from the threats that should not, and to explain why the suggested way of separating threats justifies such radically different moral assessments of the surveillance programmes that could avert them.

Similar problems arise for individuating actions. In the above, I have assumed that we can meaningfully speak of e.g. a health surveillance programme as one action, whose proportionality can be assessed. But very often, surveillance will in fact be equally (or more) plausibly conceived as a set of related actions, potentially millions or billions of individual acts of data-collection that feed into a single database. How are we to assess the proportionality of such actions? If we assess them individually, then again, we are unlikely to find many examples of actions that meet threshold T. It is rare indeed, for a single act to be capable of preventing bads on the scale at stake in exceptional circumstances. More likely, the proponent of the qualitative difference view will hold, as above with threats, that actions can be part of an action set, and that proportionality can be assessed for the action set as a whole.

A first issue with aggregating acts is that there will be cases similar to *distributed threats*, where we must counterintuitively hold certain actions to be disproportional although they do more good relative to bad than other actions that are proportional, simply because the latter are and the former are not part of an action set that jointly averts a threat of at least magnitude T. As with the individuation of threats, the proponent of the qualitative view must both develop an account of how to distinguish actions that should be assessed in aggregate from those that do not and explain why proportionality is different in the two cases. And as with the individuation of threats, it is difficult to see what a plausible such account could look like.

In addition, the aggregation of actions raises a further problem. The problem is that this can force us to say that acts that are individually grossly disproportional are nonetheless both permissible and proportional, simply because they are part of the relevant action set. The quantitative difference view avoids this problem, since it can simply apply the proportionality condition to each individual act, and consistently hold that acts either are or are not proportional. (cf. Alexander, 2000, pp. 899-900) In a slogan, the qualitative difference view requires us to evaluate proportionality on average, while the quantitative difference view allows us to evaluate proportionality at the margin.

The qualitative difference view, I suggested, is not immediately implausible. However, on consideration, we can see that it faces very serious difficulties in the shape of strongly counterintuitive implications. It is implausible that very small differences in the stakes of a threat can make dramatic differences to the proportionality of actions that avert the threat, that we can aggregate threats and actions in a way that means the aggregated threats and actions are subject to different proportionality considerations, and that aggregation allows individually disproportionate actions to become proportional.[[9]](#footnote-9) In sum, I take it that these difficulties should lead us to reject the qualitative difference view.

## An unexceptional theory of proportional surveillance

I have argued above, that we ought to reject the qualitative difference view. This leaves us with the quantitative difference view, and what we may earnestly call an unexceptional theory of proportional surveillance. In this section, I sketch such an unexceptional proportionality condition for morally permissible surveillance in exceptional circumstances. Centrally, I discuss which values to measure and compare, arguing that we should conceive of surveillance as instrumentally bad, and therefore in principle comparable with the goods of preventing disease.

Perhaps the simplest plausible account of a proportionality condition for morally permissible surveillance is the teleological account. On **the teleological account**:

An act ϕ of surveillance is proportional in the sense relevant to moral permissibility *iff* the goods that ϕ’ing brings about are equal to or greater than the bads that ϕ’ing brings about. (Thomsen, 2020)

Let me clarify three features of the teleological account as a quantitative view, and review perhaps the most likely objection.

First, the goods and bads ϕ’ing brings about should be measured, I believe, relative to a counterfactual baseline defined by the goods and bads brought about in each of the relevant action alternatives. It is a point of contention, however, what the relevant action alternatives are for any given act of surveillance. The alternative of *not* carrying out surveillance can be included, in which case the (wide) proportionality consideration makes a separate necessity condition redundant. (Lazar, 2017) Uncontroversially, alternative ways of carrying out the surveillance should also be included, as should alternatives to surveillance that bring about the same goods. There are further persuasive arguments to the effect that action alternatives that bring about *similar* goods must also be included. (Oberman, 2019) As one extends the scope for alternatives that bring about similar goods, however, proportionality becomes steadily more demanding. Eventually, without some restriction of scope, the proportionality condition collapses into the necessity condition of consequentialism: that an action is morally permissible only if it has consequences at least as good as those of any alternative action available (but not, of course, the consequentialist sufficiency claim, that an action *is* morally permissible if it has such consequences).

Second, the teleological account is by definition incompatible with the qualitative difference view, because the qualitative difference view requires that *k1* is greater than 1:1, on pain of allowing that acts above T can permissibly avert disaster even though they bring about even worse outcomes (because *k2* is smaller than *k1* and therefore smaller than 1:1). This constitutes at best a weak reason to doubt the qualitative difference view, however, since proponents of the qualitative difference view can simply interpret the incompatibility as evidence against the teleological account (one person’s *modus ponens* is another’s *modus tollens*).

Third, it is worth noting that a quantitative difference view can be both more restrictive and more permissive than a qualitative difference view. This depends entirely on how the required ratios of each of the views are defined. If the alternatives are a quantitative difference view which defines *k1* as 2:1, and a qualitative difference view which defines *k1* as 2:1 and *k2* as 3:2, then the qualitative difference view will be identical to the quantitative difference view below the threshold, but more permissive above it. This is the most common idea of the relation between the two views. It is not the only possible relation, however. To take just one example, if the qualitative difference view instead defines *k1* as 3:1 and *k2* as 2:1, then the qualitative difference view will be more demanding below the threshold and as permissive as the quantitative view above it.

We have postponed until now a more focused look at the goods and bads of surveillance. The goods of surveillance will often be relatively well-defined. Surveillance that averts or mitigates a global pandemic, for example, brings about goods in the shape of better health. Health is uncontroversially valuable as a constitutive of well-being. It is also quantifiable and measurable as QALY’s.[[10]](#footnote-10) (McKie, Richardson, Singer, & Kuhse, 1998; Williams, 1995) In addition to health, surveillance that averts or mitigates a pandemic might bring about economic goods (e.g. preventing economic losses), social goods (e.g. ensuring the continued ability to enjoy social events), and psychological goods (e.g. avoiding fear, sorrow, and anxiety). These goods are plausibly valuable because they are constituents of or contribute to well-being, and as such, at least in theory, comparable.

The bads of surveillance generally, and public health surveillance specifically, are less well-defined. In a recent, short article, Morley et al suggest that public health surveillance “…may exacerbate problems like social panic, social shaming, the erosion of trust in the government and public health services, or inequality. Furthermore, it may facilitate potentially unethical uses of personal data originally collected for the purpose of contact tracing that may impact privacy, severely and perhaps irreversibly.” (Morley et al., 2020, p. 3) Alan Rubel adds the plausible suggestion that “[t]he possibility of having their health information disclosed may lead to people avoiding care, which is generally detrimental to their health and hence interests regardless of their particular conceptions of the good.” (Rubel, 2012, p. 13) These concerns track plausible bads that have also been recognized in the broader surveillance literature. (e.g. Macnish, 2015; Solove, 2006, 2007) Conveniently, they are also bads whose disvalue can ultimately, like the goods above, be grounded in well-being. This is an advantage, since it ensures commensurability – we will be able to compare goods and bads when weighing proportionality.

## Conclusion

In a time of emergency, it may be tempting to believe, that the constraints on our behaviour, which apply in ordinary circumstances, should no longer bind us. In the face of catastrophe, we may need to resort to radical measures, that would in other cases be morally impermissible. Or so the thinking might go.

In this chapter, I hope to have argued persuasively that at least one version of such views – the qualitative difference view of proportionality in surveillance – is implausible. Whatever we take the proportionality condition relevant to morally permissible surveillance to be, it applies equally to ordinary circumstances and exceptional circumstances.

One plausible interpretation of the push towards the qualitative difference view is that it is motivated by the combination of a sense of urgency in the face of dramatic or potentially catastrophic circumstances, and an awareness of the difficulty of performing the conventional proportionality evaluation. Not only are many of the empirical factors that go into the equation uncertain and very difficult to clarify, but our theory of proportional surveillance is itself much less developed than one might have hoped. A natural response to these facts is that we cannot afford to waste time attempting, perhaps in vain, to work out what level of surveillance would be proportionate. This sentiment makes the qualitative difference view attractive. If the qualitative difference view were true, then we would have less need to do so. The qualitative difference view *justifies* our favoured response, of leaving proportionality evaluations for situations less urgent, where we can better afford to exploration at our leisure.

There is a kernel of insight in this line of thinking. The kernel is this: it is a very serious problem, given the enormous and growing amount of surveillance being conducted, that we do not have a consensus theory of proportional surveillance that allows us to say with *confidence* and *precision* whether a given practice of surveillance is or is not proportionate in the sense relevant to moral permissibility. Ideally, we want a mathematical model with easily estimatable input variables, which would provide a calculatable answer for any situation.

Beyond that, however, we must reject the urgency motivation for adopting the qualitative difference view as wishful thinking (or, more technically, a fallacy of *argumentum ad consequentiam*). If urgency is to be a spur to action, then let it be a spur towards achieving the ideal theory we need. To take the proportionality of surveillance in exceptional circumstances seriously is to accept that we need urgently to develop a theory of morally proportional surveillance that is genuinely action-guiding.

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1. A closely related debate concerns the *legality* of increased surveillance. There may, however, be forms of surveillance, that are morally impermissible but legal and vice versa. More controversially, there may also be forms of surveillance that are morally impermissible, but which *ought not* be illegal, e.g. because the social costs of criminalisation outweigh the benefits, and vice versa, e.g. because there are social benefits to criminalisation regardless of the fact that the acts are not individually considered morally impermissible (the social utility of criminalising driving on one side of the road is the standard example). The issues of which types of surveillance are and ought to be legal must therefore be considered separately. In the present I shall focus only on the question of moral permissibility. [↑](#footnote-ref-1)
2. Such surveillance is, again, nothing new. Logging of cell-phone location data is an established practice in many countries within the EU, despite sustained criticism by civil rights organisations and being ruled illegal by the ECJ in 2016 (Brown & Korff, 2009; European Court of Justice, 2016) [↑](#footnote-ref-2)
3. Walzer’s theory of supreme emergencies has been the subject of intense, critical debate. (See e.g. Orend, 2005; Primoratz, 2011; Sandin, 2009; Schwenkenbecher, 2009; Statman, 2012; Toner, 2005) For the purposes of the present discussion, only certain issues in that debate are pertinent. I reference these as they arise. [↑](#footnote-ref-3)
4. One should bear in mind, of course, the difference between infection mortality rates and case mortality rates. The point stands, however, for any realistic relation between the two. [↑](#footnote-ref-4)
5. Determining whether the Coronavirus pandemic is or is not a threat of sufficient magnitude is inhibited by the fact that the precise threshold is woefully underspecified in the literature on supreme emergency exemptions. (Schwenkenbecher, 2009) It is not clear, that is, exactly where to set the threshold, or why the threshold must be set precisely there. I return to this point briefly below. [↑](#footnote-ref-5)
6. Traditionally translated as “Let justice be done though the heavens fall”. [↑](#footnote-ref-6)
7. Statman discusses a version of this problem as “the continuum problem”. (Statman, 2012) [↑](#footnote-ref-7)
8. (Statman, 2012) makes a similar argument. [↑](#footnote-ref-8)
9. Some might add that the qualitative view presupposes a non-arbitrary way of specifying *T*. The general difficulty of specifying deontological thresholds is both obvious and well-recognized in the literature. (Alexander, 2000, pp. 905-910; Ellis, 1992) However, it is not entirely clear to what extent this difficulty constitutes a challenge for the implementation or to the plausibility of threshold views. [↑](#footnote-ref-9)
10. The use of QALYs in health-care prioritisation is, of course, controversial. The most important controversies concern the choice of utilitarianism as the theory of priority-setting, as opposed to e.g. theories sensitive to fairness in distribution of goods. In the present I am suggesting only that proportionality assessments can rely on QALYs as measures of health goods. [↑](#footnote-ref-10)