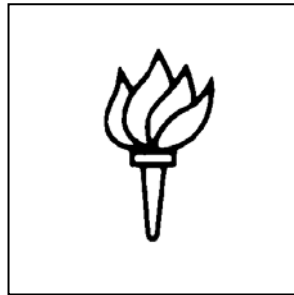


# NEW YORK UNIVERSITY SCHOOL OF LAW

**PUBLIC LAW & LEGAL THEORY RESEARCH PAPER SERIES  
WORKING PAPER NO. 17-45**



Reflections on “Supreme Emergency”

*Jeremy Waldron*

November 2017

## Reflections on “Supreme Emergency”

Jeremy Waldron<sup>1</sup>

Towards the end of *Just and Unjust Wars*, Professor Walzer introduces a discussion that many have found alarming because it seems to compromise what is otherwise a firmly deontological view of the rules of armed conflict expressed in the rest of the book. I’m talking about Chapter Sixteen, which is entitled “Supreme Emergency” and which canvasses the possibility that a society desperate to avoid military defeat when the stakes are very, very high, might understandably—justifiably? Well, we’ll come to that in a moment, but certainly understandably—resort to methods of waging war that are ordinarily forbidden.

### 1. Britain 1939-42

Walzer’s book is “a moral argument with historical illustrations” (*Wars* 251).<sup>2</sup> The illustration he provides for this discussion is the predicament of Britain in the early 1940s when Winston Churchill responded to the possibility of defeat at the hands of Nazi Germany by ordering the large-scale area bombing of German cities, a strategy calculated to bring death and terror to the ordinary men, women, and children living in those cities, leading hopefully to a collapse of civilian morale. Was this a crime—murder—as deliberate attacks on civilians in wartime must ordinarily be judged? Or was the wrongness of it offset or mitigated or excused or at least made understandable by the supreme emergency Britain faced when it stood almost alone against Germany in 1940.

The history is complicated by the fact that Churchill used the phrase “supreme emergency” twice in relation to hard wartime choices, but actually

---

<sup>1</sup> University Professor, School of Law, New York University.

<sup>2</sup> References like this in the text are references to MICHAEL WALZER, *JUST AND UNJUST WARS, A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* (Third edition, 2000).

neither of them referred to any decision about terror-bombing of cities. Churchill spoke of “supreme emergency” in a memo to Cabinet in 1939 dated December 16, 1939 (*Wars* 251). This was before he became Prime Minister. As First Lord of the Admiralty, he proposed mining Norwegian territorial waters to force German vessels carrying iron ore from Sweden to “come onto the high seas,” making themselves more vulnerable to attack.<sup>3</sup> He acknowledged that this would be a technical violation of international law, but he said

We are fighting to re-establish the reign of law.... Our defeat would mean an age of barbaric violence.... We have a right, and are indeed bound in duty, to abrogate for a space some of the conventions of the very laws we seek to consolidate and reaffirm. Small nations must not tie our hands when we are fighting for their rights and freedom. The letter of the law must not *in supreme emergency* obstruct those who are charged with its protection and enforcement. It would not be right or rational that the aggressive Power should gain one set of advantages by tearing up all laws, and another set by sheltering behind the innate respect for law of its opponents.<sup>4</sup>

It is a little like Abraham Lincoln’s question in response to Justice Taney’s decision in *Ex parte Merryman*: “Are all the laws but one to go unexecuted and the government itself go to pieces lest that one be violated?”<sup>5</sup> And, in its dismissive reference to “small nations,” it is uncomfortably like the Athenian attitude in the Melian dialogue: large states will exact what they can, small states will bear what they must.<sup>6</sup>

Walzer discusses this memo at length at the end of Chapter Fifteen of his book (*Wars* 245-50). He makes it clear that Churchill did not then contemplate anything like the wholesale repudiation of central parts of the laws of war that forms the focus of the discussion in Chapter Sixteen. And he condemns Churchill’s

---

<sup>3</sup> I owe this background to Henry Shue, *Liberalism: The Impossibility of Justifying Weapons of Mass Destruction*, in *ETHICS AND WEAPONS OF MASS DESTRUCTION: RELIGIOUS AND SECULAR PERSPECTIVES* \_\_, 139-40 (Sohail Hashmi and Steven Lee eds., 2004)

<sup>4</sup> Winston Churchill, *THE SECOND WORLD WAR*, Vol. 1: *THE GATHERING STORM* 547 (1948), my emphasis.

<sup>5</sup> *Ex parte Merryman* 17 F. Cas. 144 (C.C.D. Md. 1861). For Lincoln’s response, see \_\_\_\_.

<sup>6</sup> For Walzer’s discussion of the Melian dialogue, see *Wars* 5-13.

use of the language of “supreme emergency” in the memo as “rhetorical heightening” of a quite ordinary crisis in the course of military life (*Wars* 251).

Churchill became Prime Minister on May 10, 1940 and he deployed the phrase “supreme emergency” a few days later when Britain was in a much more desperate situation. On May 19, 1940, it seemed the battle for France might be lost. And Britain did indeed face the probability then of catastrophic defeat. Churchill’s broadcast speech on that day included the following passage:

After this battle in France abates its force, there will come the battle for our Island—for all that Britain is, and all the Britain means. That will be the struggle. In that supreme emergency we shall not hesitate to take every step, even the most drastic, to call forth from our people the last ounce and the last inch of effort of which they are capable. The interests of property, the hours of labor, are nothing compared with the struggle of life and honor, for right and freedom, to which we have vowed ourselves.<sup>7</sup>

Notice that in this speech Churchill did *not* use “supreme emergency” to justify the infringement of what he called earlier in the same speech “the unwritten laws of war.”<sup>8</sup> He certainly didn’t use it to justify any proposal about bombing. The bombing of civilian areas—which is supposed to be the response to supreme emergency worth considering—did not begin in earnest until mid-1942, by which time the Battle of Britain had been over for more than eighteen months, the immediate threat of invasion had receded, Hitler had commenced his doomed invasion of the Soviet Union, and the United States had entered the war against Germany.<sup>9</sup> No, in the broadcast speech of May 19, 1940, Churchill used the idea of supreme emergency to justify the commandeering of life, labor and property *within Britain*. On another occasion we might debate this also: i.e., the proposition

---

<sup>7</sup> Broadcast speech of May 19, 1940.

<sup>8</sup> Churchill said, *ibid.*: “I am sure I speak for all when I say we are ready to face [the “hideous apparatus” of German aggression]; to endure it; and to retaliate against it—to any extent that the unwritten laws of war permit.”

<sup>9</sup> Walzer talks about “the terrible two years that followed the defeat of France, from the summer of 1940 to the summer of 1942, when Hitler’s armies were everywhere triumphant” (*Wars* 255). But he acknowledges in the middle of the chapter that “the supreme emergency passed long before the British bombing reached its crescendo” (*Wars* 261). See also *Arguing*, 46.

that supreme emergency might justify a government in imposing extreme burdens upon—maybe as Hayek would say the enslavement of<sup>10</sup>—its own population. But that is not the concern of Chapter Sixteen of *Just and Unjust Wars*.

Still, with some adjustments, one can entertain and work with a not-too-fanciful hypothetical version of the British illustration.<sup>11</sup> At a time when Britain and its dominions stood alone against Germany, defeat at the hands of Hitler's forces would indeed have been a national catastrophe of the highest order; Churchill's rhetoric of "a new dark age" was by no means an exaggeration.<sup>12</sup> And Britain's offensive options in mid-1940 were almost non-existent. One can imagine that a debate in the War Cabinet about the area bombing of German centers of civilian population might have commenced at that stage, in the spirit of "This is our last resort. If we bomb their cities, we can undermine their civilian morale. Until other offensive options present themselves, this is the only thing we can do." One can imagine the language of "supreme emergency" being used in this way. And so the question Walzer is putting to his readers is a valid one: how should we think about the burning of cities in order to kill and terrorize large numbers of their civilian inhabitants, night after night, for years if necessary—something absolutely forbidden by the laws of war—in this extremity, in the supreme emergency constituted by the prospect of otherwise unavoidable British defeat?

---

<sup>10</sup> F.A. HAYEK, *THE ROAD TO SERFDOM* (1944).

<sup>11</sup> Walzer talks explicitly about the stylizing of his illustrations: "[T]he cases are necessarily sketched in outline form. In order to make them exemplary, I have had to abridge their ambiguities" (*Wars*, xxii). He stylizes what is at stake in the British example: "The danger [of German victory] was a general one. But suppose it had existed for Britain alone. Can a supreme emergency be constituted by a particular threat—by a threat of enslavement or extermination directed against a single nation?" (*Wars* 254).

And necessarily he has to leave out other aspects of the strategic situation, such as that the direction of RAF resources to city-bombing Europe imperiled the protection of absolutely essential and vulnerable supply lines in the Atlantic. This is the argument of JONATHAN DIMBLEBY, *THE BATTLE OF THE ATLANTIC: HOW THE ALLIES WON THE WAR* [p. 444-ish?] (2016).

<sup>12</sup> See the passage quoted in text accompanying footnote 15, *infra*, from Winston Churchill, broadcast speech of June 18, 1940.

## 2. The scale of the problem

It is very important to approach the question on this scale, which is why the original Norwegian example would not have been helpful in focusing Walzer's discussion. Because "supreme emergency" characterizes the fate of a whole community or civilization, any response to it of the sort that Walzer is contemplating is always going to involve a major change in tactics or strategy. It is never going to be about the shooting of this or that prisoner, the killing of this or that civilian, or the mining of this or that harbor. The closest Walzer comes to contemplating a singular event under these auspices is his discussion of the possibility that the nuclear incineration of one or two Japanese cities might have been considered a response to a supreme emergency faced by the United States. He considers that and rejects it (*Wars* 263-8). I suppose there are philosophers who can concoct hypothetical cases involving the destruction of civilization unless this particular man is tortured or that particular hospital blown up, but such hypotheticals are far-fetched and corrupt. The advantage of Walzer's more-or-less real life examples is that they demonstrate the scale on which these matters actually arise.

So, the discussion of supreme emergency in Chapter Sixteen contemplates a large-scale violation of the laws of war. Walzer sometimes phrases it as a breach (or "shattering") of "*the war convention*" (*Wars* 251 and 259, my emphasis)—that is, of the fundamental principle that demands discrimination between combatants and civilians as possible targets of armed operations.<sup>13</sup> The deaths of tens or hundreds of thousands of people are likely to be involved.<sup>14</sup> But more than just the alarming scale of the arithmetic; it is that we are tempted in circumstances of supreme emergency to take up a position in the realm of utilitarian arithmetic, which it is the whole point of the laws of war to keep us away from. Supreme emergency pushes us up against what are supposed to be "the final limits of war-making" (*Arguing* 36). The response that Walzer's protagonist is contemplating is a game-changer, which is why (as we will see) the challenge of the Chapter

---

<sup>13</sup> One of Walzer's section headings is "Overriding the Rules of War" (*Wars* 255).

<sup>14</sup> "To kill 278,966 civilians (the number is made up) in order to avoid the deaths of an unknown but probably larger number of civilians and soldiers is surely a fantastic, godlike, frightening, and horrendous act" (*Wars*, 262).

Sixteen discussion is so important. Sometimes, in order to pose the choice starkly, Walzer talks of a *determinate* crime (these many thousands of civilians murdered) versus the *immeasurable* evil (*Wars* 259) that we are trying to avoid. But, let me repeat, the issue of scale is not just about the numbers. The shattering of the war convention that is being contemplated consists precisely in the first place in the resort to such calculations. “My own action is determinate ... only as to its direct consequences, while the rule that bars such acts is founded on a conception of rights that transcends all immediate considerations” (*Wars* 260).

If we accept that emergencies of this kind and on this scale may arise and measures of this kind and on this scale may be necessary or inevitable in response to them, then we may begin to wonder whether war—certainly war on the colossal scale of World War Two—is the sort of thing that can be regulated at all. I don’t mean that we should actually doubt that it is the sort of thing that can be governed by law, but in relation to certain circumstances we should at least be willing to ask. And I believe it would have been *unseemly* to finish a book like *Just and Unjust Wars* without considering the questions that are posed in this difficult late chapter.

### 3. Is the British example too easy?

The British illustration has a number of special features that are useful for advancing Walzer’s discussion. But they leave us with some questions. The war by the British, standing almost alone against Nazi Germany, was a just war and the stakes were staggeringly high and civilization-wide. As Churchill said in June 1940:

The whole fury and might of the enemy must very soon be turned on us. Hitler knows that he will have to break us in this island or lose the war. If we can stand up to him, all Europe may be free and the life of the world may move forward into broad, sunlit uplands. But if we fail, then the whole world, including the United States, including all that we have known and cared for, will sink into the abyss of a new Dark Age, made more sinister, and perhaps more protracted, by the lights of perverted science.<sup>15</sup>

---

<sup>15</sup> Winston Churchill, broadcast speech of June 18, 1940.

Everyone agrees that the Germans needed to be stopped—Walzer talks rightly of “evil objectified in the world . . . in a form so potent and apparent that there could never have been anything to do but fight against it” (*Wars* 253)—and it is not fanciful to insist that the Nazi onslaught needed to be stopped “by any means necessary.” But is this case too easy?

A couple of possible complications need to be explored. First, what if the stakes are not the loss of a civilization, but simply the loss of a national political community? Walzer explores this at length—he invites us to consider what we should think if it was only *British* national survival that was at stake—and he reckons that community, rather than civilization, is key to whatever grip the supreme emergency discussion has on us. We will discuss this in section 8.

Secondly, if “supreme emergency” refers to the likely destruction of a national community, then we have to ask whether this applies even to communities whose survival *we* do not relish, though their own members do. Does the application of the supreme emergency idea depend on a war’s being just, so that it could not apply to both sides in a conflict like the Second World War? Or does it, like other aspects of *ius in bello* (on Walzer’s otherwise plausible account)<sup>16</sup> float free of *ius ad bellum*? Is the lifting of *in bello* constraints in an emergency something that might work for our enemies as well as ourselves? Should we think of Adolf Hitler as facing a supreme emergency in 1944-45—the pending destruction of his “Thousand Year Reich”—just as Churchill faced a supreme emergency in 1940? We will discuss this in section 7.

As we will see, this is not just a question for Professor Walzer to answer, as though one could go either way and his say-so binds us as to the terms of all subsequent discussion. “Supreme emergency” is not the name of a *proposal* Walzer is making and he has no legislative authority over it. We want to follow the logic of his argument. The normative implications of the supreme emergency idea have to be responsive to the underlying considerations. Why must extreme measures be contemplated, or why is it inevitable that they will be contemplated, in a supreme emergency? Unless we answer that, or unless we figure out the range of possible answers, we will not be able to tell who gets or who should get the benefit

---

<sup>16</sup> For general discussion of the independence of *ius in bello* from *ius ad bellum*, see *Wars* 34-47.



(such as it is) of Walzer’s argument. That is the main thing I want to consider in this paper and this is the approach that I shall take.

#### 4. A proposal for a legal doctrine?

Let me elaborate that last point. When I accepted the invitation to participate in this conference—an invitation for which I am most grateful, by the way—I thought I would criticize supreme emergency as a doctrinal proposal, reading Walzer in Chapter Sixteen as though he were presenting a form of “threshold deontology” (as it is sometimes called by moral philosophers),<sup>17</sup> an idea which given the opportunity I would like to contest.<sup>18</sup>

I was inclined to evaluate Chapter Sixteen by asking, in Richard Arneson’s words, “Is Walzer’s supreme emergency doctrine coherent and plausible? Should supreme emergency become a principle of just war theory?”<sup>19</sup> Like Arneson, I wanted to press questions about the discontinuities that the proposal seemed to involve: differences of degree among emergencies that seemed to trigger a qualitatively different approach to the laws of war.

But I took the precaution of re-reading the chapter. I think now that Walzer’s discussion of “supreme emergency” should not be approached as a normative proposal—to be evaluated and criticized by smart young philosophers born in peacetime—but as a meditation on the whole enterprise of subjecting this terrible business of war to rules of restraint on the killing and mayhem that may

---

<sup>17</sup> Threshold deontology is the view that side-constraints on action (like the rule against torture) apply absolutely up to a point; but when the stakes get too high the erstwhile has to yield to consequential pressure. And that is supposed to be a good thing. Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus Ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE J. INT’L L. 47, 112 (2009) says that Walzer’s view of supreme emergency bears a family resemblance to threshold deontology. For threshold deontology, see MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 158 (1997), Eyal Zamir and Barak Medina, *Threshold Deontology and Its Critique*, in their collection LAW, ECONOMICS, AND MORALITY (2010), and Larry Alexander, *Deontology at the Threshold*, 37 SAN DIEGO L. REV. 893 (2000).

<sup>18</sup> See Jeremy Waldron, *Torture and Positive Law* (2005), in his collection, TORTURE, TERROR, AND TRADE-OFFS: PHILOSOPHY FOR THE WHITE HOUSE 217 (2010).

<sup>19</sup> Richard Arneson, *Just Warfare Theory and Noncombatant Immunity*, 39 CORNELL INTERNATIONAL LAW JOURNAL 663, at 687 (2006).

legitimately be inflicted. I see the chapter on supreme emergency now as more reflective than argumentative. And I'd like to pay tribute to it as such.

If we *were* contemplating a doctrine called “Supreme Emergency,” presented as a legal proposal, i.e., as a proposed modification of the laws of war—I say we should not be considering it as such, but *if* we were—then Professor Walzer would have to be pestered with a whole bunch of questions. There would be questions about the definition of “emergency” and “supreme”; about the standard of “imminence,” and whether it needed to be insulated from extension to accommodate the measures contemplated;<sup>20</sup> about the meaning of “necessity” and the interplay between necessary and sufficient conditions<sup>21</sup> that would be required to prevent the use of Supreme Emergency as a just a permission to lash out when one's situation was hopeless or as just to be seen as doing *something* even when something is never going to be enough; about whether the doctrine was to be understood as a justification (like the defense of necessity in criminal law) or as the basis of an excuse (like the defense of provocation); about whether we should understand it as proposal for setting up derogation mechanism from the laws of war, analogous to the mechanism embodied in Article 15 of the European Convention on Human Rights;<sup>22</sup> about whether such derogation might cover infringements of all kinds (including, for example, the use of forbidden weapons) or whether there might be certain acts (like torture, for example)<sup>23</sup> that remained prohibited even in the light of Supreme Emergency; and so on.

---

<sup>20</sup> Cf. the stretching of the concept of “imminence” to make the use of drone-based targeted killing possible: Amos Guiora and Laurie Blank, *Targeted Killing's 'Flexibility' Doctrine that Enables US to Flout the Law of War*, THE GUARDIAN, August 10, 2012.

<sup>21</sup> See the discussion of necessary and sufficient conditions in Jeremy Waldron, *Security and Liberty: The Image of Balance* (2003), in TORTURE, TERROR, AND TRADE-OFFS 20, at 44: “It is never enough for the government to show that reducing a given liberty is a necessary condition for combatting terrorism effectively. It may be a necessary condition, and yet—because sufficient conditions are unavailable—the terrorist threat may continue unabated.”

<sup>22</sup> ECHR Article 15 (1): “In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.” See also Article 4 (1) of the International Covenant on Civil and Political Rights.

<sup>23</sup> See ECHR, Article 15 (2) and ICCPR, Article 4 (2).

Walzer has a certain amount to say that is germane to these topics, though the derogation model, as far as I understand, is not one he has explored.<sup>24</sup> A possible reason for this is that, unlike the ECHR, the laws of war are already oriented to emergency conditions: they already address “time of war,” which the ECHR regards in itself as a triggering condition for derogation. So some would insist that since the laws of war are already designed to cope with the stress of emergency, an additional provision for derogation—over and above what “time of war” already involves—should not be added just because the emergency can be reckoned extreme. A suggestion of this kind raises issues connected to the debate about monism and dualism in the juridical mechanisms used in constitutional theory to address states of emergency.<sup>25</sup> Unfortunately we cannot explore that here.

## 5. The moral interpretation

If it is not treated as a legal proposal, how else might we regard the discussion in Chapter Sixteen of *Just and Unjust Wars*? I suppose it might be intended as a straightforward moral argument: the use of certain measures or tactics might be morally justified, or permitted, or something one has a right to or even an obligation, whatever the positive law says. Walzer uses all these terms: justifiability, permission, entitlement, moral requirement. And naturally enough, many moral philosophers have evaluated Walzer’s discussion in the light of moral theory.

---

<sup>24</sup> The closest he comes is a negative observation in *Arguing*, 34: “moral limits are never suspended—the way we might, for example, suspend habeas corpus in a time of civil war.”

<sup>25</sup> A dualist believes in the necessity of a separate legal regime to deal with states of emergency. A monist believes that, since constitutional rights have been designed with the vicissitudes of public life and its emergencies in mind, they should not be abandoned whenever an emergency arises. Refer to Ian Zuckerman, *One Law for War and Peace? Judicial Review and Emergency Powers between the Norm and the Exception*, 13 *CONSTELLATIONS* 522 (2006). Zuckerman cites Benjamin Constant as a persuasive monist: “There are, no doubt, for political societies, moments of danger that human prudence can hardly conjure away. But it is not by means of violence, through the suppression of justice, that such dangers may be averted. It is on the contrary by adhering, more scrupulously than ever, to the established laws, to tutelary procedures, to preserving safeguards. ... Any moderate government, any government resting upon regularity and justice, is ruined by every interruption of justice, by every deviation from regularity.” (Benjamin Constant, *Spirit of Conquest and Usurpation and their Relation to European Civilization* in *CONSTANT: POLITICAL WRITINGS* 136 (Biancamaria Fontana ed., 1988).

It need not be regarded as a moral proposal for legal change (which would take us back to section 4). It might be seen instead in the light of what Jeff McMahan calls deep moral theory,<sup>26</sup> a basis for normative thinking about the laws of war which does not necessarily yield legal proposals. I have some general reservations about this kind of inquiry.<sup>27</sup> But I guess it may be warranted if the point of the discussion is guarded moral reflection, not changes in doctrine.

A moral assessment of supreme emergency would require us to pay attention to the issue of thresholds and discontinuities.<sup>28</sup> I don't mean in the sense of actually telling us (numerically or otherwise) where the thresholds ought to be set: deep moral reflection is not that sort of enterprise. But the very idea of there being differences of degree among emergencies that seem to trigger a qualitatively different approach to the laws of war bears critical attention. Is that how normativity could conceivably operate in this realm? Does supreme emergency as a moral idea make sense, even if its non-administrability is conceded?

And what does the impulse to take such an approach tell us about moral sensibility generally? Some see Walzer's argument as yet another example of weak-kneed deontology, "blinking" before a consequentialist onslaught spearheaded by rhetoric about the heavens' falling. We start by saying there is an absolute duty not to target civilians; it remains murder even in the midst of war; civilians have a right not to be targeted; and that right should not have to yield to the exigencies of emergency calculations. That's the official position. But then—

---

<sup>26</sup> Jeff McMahan, *The Ethics of Killing in War*, 114 ETHICS 693, at 730 (2004).

<sup>27</sup> See the discussion in Jeremy Waldron, *Deep Morality and the Laws of War*, in OXFORD HANDBOOK OF ETHICS AND WAR (Seth Lazar and Helen Frowe eds., 2015).

<sup>28</sup> Cf. the observation in Richard Arneson, *Just Warfare Theory and Noncombatant Immunity*, 39 CORNELL INT'L L.J. 663, 687-8 (2006): "[T]he basic logic of [Walzer's] position supports killing innocent bystanders under far broader circumstances." Arneson elaborates the point in a footnote: "Any proposed definition of absolute catastrophe or supreme emergency would necessarily appear arbitrary. Wherever one draws the line that separates supreme emergency from a lesser problem, the question arises, why draw the line there and not elsewhere? Walzer provides no answer. A further difficulty is that wherever one draws the line, one must justify the extraordinary difference in the permissibility status of a violation of noncombatant immunity that occurs just below the line compared to a similar violation that occurs just slightly above it."

as I said in an article about torture— most so-called deontologists turn out to be moderates when the numbers get too high:<sup>29</sup>

They are willing to abandon even cherished absolutes in the face of what Robert Nozick once called “catastrophic moral horror.” For a culture supposedly committed to human rights, we have amazing difficulty in even conceiving—without some sort of squirm—moral absolutes. Academics in particular are so frightened of being branded “unrealistic” that we will fall over ourselves at the slightest provocation to opine that of course moral restraints must be abandoned when the stakes are high enough. Extreme circumstances can make moral absolutes look ridiculous, and those in our position cannot afford to be made to look ridiculous.<sup>30</sup>

So Darrell Cole condemns the Chapter Sixteen discussion for “the horrors that Walzer's consequentialism may countenance,”<sup>31</sup> and cites it as an instance of what G.E.M. Anscombe pointed to when she said that “modern moral philosophy ... constructs formally beautiful theories of ethics, which always allow someone to commit dreadful acts in the name of doing something that is the ‘morally right’ thing to do.”<sup>32</sup>

Admittedly this assessment is complicated by the issue of “dirty hands” that seems to be implicated in Walzer’s discussion.<sup>33</sup> Despite some loose terminology, Walzer is emphatically not saying that it would have been, morally speaking, *alright* for Churchill to have ordered the bombing of cities and the deliberate killing of civilians during the crisis of the early 1940s. The decision never ceased to be a crime and Churchill and his colleagues (and, I guess, the British people in

---

<sup>29</sup> *Arguing* 35-40 seems like an example of this dialectic.

<sup>30</sup> Jeremy Waldron, *Torture and Positive Law*, 105 COLUMBIA LAW REVIEW 1681, at 1713 (reprinted in WALDRON, *TORTURE, TERROR AND TRADE-OFFS.*). The Nozick reference is to ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 30n (1974).

<sup>31</sup> Darrell Cole, *Death Before Dishonor or Dishonor Before Death? Christian Just War, Terrorism, and Supreme Emergency*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 81, 90 (2002)

<sup>32</sup> *Ibid.*, 87.

<sup>33</sup> See Michael Walzer, *Political Action: the Problem of Dirty Hands* (1973), in his collection *THINKING POLITICALLY: ESSAYS IN POLITICAL THEORY* 278 (2007).

whose name these decisions were taken) had to bear “the burdens of criminality” (*Wars* 260). “[T]he destruction of the innocent, whatever its purposes, is a kind of blasphemy against our deepest moral commitments. This is true even in a supreme emergency, when we cannot do anything else” (*Wars* 262). The point about dirty hands is that Walzer wishes to maintain whatever tension exists here.<sup>34</sup> What Churchill and the others did in this supreme emergency was both justifiable and wrong. (And both terms—“justifiable” and “Wrong” have something approaching their full-blooded sense; neither of them is ironic or in scare-quotes.) It was necessary, perhaps. But it was similar to some of what their worst enemies were doing (*Arguing* 49). And it was incumbent on Churchill and the others to “abhor the immoral acts to which [they were] driven” (*Arguing* 48). Walzer is not sanitizing or “domesticating” these decisions; they are more “properly understood as participating in the darkness of political tragedy.”<sup>35</sup>

This is heady stuff, and it is easy (and unhealthy) to get over-intrigued by the possibility that Churchill and the others made themselves mass murderers because (to adapt a saying of Machiavelli’s) they loved their country more than the salvation of their own souls.<sup>36</sup> (This is the sort of thing my graduate students love.) But instead of embracing a toxic form of amoralism, we may want to see the ambivalence of this verdict as embodying the uncertainties and paradoxes in any reflections that are elicited by the British illustration from the 1940s. We don’t have a determinate conclusion here: what they did was both right and wrong but they had to do it. A plurality of strident and all-things-considered normative judgments is precipitated out of our reflections and there is no escaping either from any one of them or from the tension between them. This is not conventional moral analysis. It is not trolleyology or reflective equilibrium. It is not in any way business-as-usual for moral philosophy. It is not what Anscombe was crying out

---

<sup>34</sup> Cf. Richard Miller, Review of *Just and Unjust Wars* in 16 J.L. & RELIGION 1013, 1016 (2001).

<sup>35</sup> This phrasing is from Zachary Calo, *Torture, Necessity, and Supreme Emergency: Law and Morality at the End of Law*, 43 VAL. U. L. REV. 1591, 1598 (2009).

<sup>36</sup> See Max Weber, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 126 (H.H. Gerth and C. Wright Mills eds., 1991) and also to Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2 PHILOSOPHY AND PUBLIC AFFAIRS 160, 175-6 (1973).

against, but nor is it bad faith: I don't accept that "Walzer appears to be attempting to hold onto an absolutist moral position without being willing to accept all of its consequences."<sup>37</sup> Instead we should say: when you explore the limits of what is possible in the normative regulation of human extremity, this is the sort of mess you come up with.

## 6. The circumstances of the regulation of armed conflict

"Supreme Emergency" is not proposed in Chapter Sixteen of *Just and Unjust Wars* as a legal doctrine and I believe it is also not proposed (in any straightforward sense) as a moral idea. The tone of Walzer's writing is open-ended and paradoxical, rather than dogmatic. Conclusions are put forward, but they are put forward tentatively, "not without hesitation and worry" (*Wars* 254) and not without the gravest warning "to be careful" with them (*Arguing* 33), given the panic and hysteria that will inevitably accompany the circumstances in which such thoughts practically arise. I think we can make best sense of the tensions and contradictions, the provocations and paradoxes that Walzer repeatedly mentions (in *Arguing* 33, 35, 45, and 50), by asking what we should expect when we explore the limits of the application of normative analysis. Supreme emergencies, says Walzer, "put morality itself at risk" (*Arguing* 33). Let me explain what I think he means by that.

There is a sense in Walzer's discussion that in certain circumstances, *the bottom drops out of our ability to argue our way legally or morally through a problem*, because the assumptions that normally underpin such arguments have been shaken or have otherwise evaporated. Some of that involves the chaos, horror, rage, and fear at the level of individuals that characterizes large scale combat—the fog of war and the outer reaches of human endurance and the capacity for self-restraint. We may ask: what limits do these aspects of war impose on the good sense and practicability of legal and moral rules of various kinds?<sup>38</sup> That's one set of considerations to reflect upon—and they are very important.

---

<sup>37</sup> John Coverdale, *An Introduction to the Just War Tradition*, 16 PACE INT'L L. REV. 221, 275–76 (2004).

<sup>38</sup> I tried to say something about this in Waldron, *Deep Morality and the Laws of War*, \_\_\_, when I spoke of the problem of "the reasonableness of the burdens that the laws and customs of armed

Let me step back a bit. In political philosophy, the difficulties that might arise out of such extremities are sometimes discussed under the heading of “the circumstances of justice,” by which is meant those aspects of the human condition, such as limited altruism and moderate scarcity which make justice as a virtue and a practice both possible and necessary.”<sup>39</sup> It is thought, for example, that desperate scarcity undermines the talk of justice that is usually associated with distributive issues. David Hume said this about necessity

Suppose a society to fall into such want of all common necessaries, that the utmost frugality and industry cannot preserve the greater number from perishing, and the whole from extreme misery: It will readily, I believe, be admitted, that the strict laws of justice are suspended, in such a pressing emergence, and give place to the stronger motives of necessity and self-preservation. Is it any crime, after a shipwreck, to seize whatever means or instrument of safety one can lay hold of, without regard to former limitations of property?<sup>40</sup>

When the circumstances of justice fail in this way, the result is not a neat *alternative* set of moral prescriptions, but rather some radical uncertainty about whether we can think normatively at all. We don’t say that the drowning man in a shipwreck who seizes a spar that another is clinging to, shaking him off it, is perfectly entitled or permitted to do that; we may feel an inclination in that

---

conflict lay upon combatants. The laws of war (especially *ius in bello*) have to be administered not only in circumstances of moral disagreement, but in circumstances of panic, anger, and great danger. The moral burdens they impose have to be shouldered by those whose lives may be imminently at risk as a result of compliance. ... What is true of danger is also true of anger. We impose certain absolute prohibitions that have to stand up against and curb the worst excesses of the anger that combat involves... [A] delicate balance must be struck; for the most part, the laws of war must work around the emotions like fear and anger that the circumstances of warfare impose rather than assuming they do not exist (just because morally they should not exist). Moreover, we must not assume that this is a balance that can be arrived at in the philosopher’s armchair....”

<sup>39</sup> The phrase is from JOHN RAWLS, *A THEORY OF JUSTICE* 109-12 (Revised edition, 1999); the description is from JEREMY WALDRON, *LAW AND DISAGREEMENT* 102 (1999).

<sup>40</sup> DAVID HUME, *ENQUIRY INTO THE PRINCIPLES OF MORALS*, Section III, 1. And Hume, *ibid.*, applied this also to war. “The rage and violence of public war; what is it but a suspension of justice among the warring parties, who perceive, that this virtue is now no longer of any use or advantage to them?”



direction, but really we do not know what to say. The bottom has dropped out of the conditions which usually make sense of our talk of entitlements, obligations, and permissibility.

Maybe it's a little like P. F. Strawson's concept of presupposition, as when we say "The present King of France is bald" lacks a truth-value—is neither true nor false—because since France is a republic one of the presuppositions of any talk about "the present King of France" is lacking.<sup>41</sup> Now "lacks a truth value" is a (relatively) tidy thing to say about a proposition, but practical discourse is not just propositional. It is prescriptive and its prescriptivity goes awry when its presuppositions fail. We don't know what to say—what prescriptions to issue—to the man who unseats another from the single available spar in a shipwreck. We blurt things out and we kind of contradict ourselves.

That's all about necessity as one of the circumstances of justice. Well, similarly, we may think about something we might call the failure of the "circumstances" of laws of armed conflict.<sup>42</sup> Think of some of the things the regulation of war depends on: it depends on a shared sense that war will not continue forever, that it will yield to peace; that people have memories; that humans do have self-control; that people crave a decent self-image; that a fearful man does not just become an animal; and so on.

Now, at the individual level, Walzer believes we have discovered that law can and should make normative demands on combatants, even in the extremes of individual necessity. "From the standpoint of the combat soldier, war is a rapid succession of supreme emergencies: his life is constantly at risk. But we are very reluctant to allow soldiers to save themselves by killing innocent and helpless people" (*Arguing* 41). At the individual level, necessity does not represent a failure of the circumstances of the laws of armed conflict. And self-restraint is not an impossibility.

---

<sup>41</sup> P.F. Strawson, *On Referring* 59 MIND 320 (1950).

<sup>42</sup> For use of "the circumstances of \_\_\_\_" formula in other contexts, e.g., the circumstances of politics or the circumstances of Dworkinian integrity, see WALDRON, *LAW AND DISAGREEMENT* 102, 159-60, and 189-92.

It is simply not the case that individuals will always strike out at [the] innocent ... rather than accept risks for themselves. We even say, very often, that it is their duty to accept risks (and perhaps to die); and here as in moral life generally, 'ought' implies 'can.' We make the demand knowing that it is possible for people to live up to it." (*Wars* 252)

But Chapter Sixteen of *Just and Unjust Wars* reflects on a different set of considerations relevant for understanding the challenge of regulating and limiting warfare. This is the challenge posed by how high the *overall* stakes are in some conflicts, not just in terms of individual combatants' lives or well-being, not just in terms of this or that value, but of whole social schemes of value. That is what Walzer means by supreme emergency.

Philosophers sometimes make fun of moral absolutists by saying they believe "*Fiat justitia ruat caelum.*" But since no one really knows what "*ruat caelum*" means—is it supposed to be an astronomical concept?—it is easy enough for either side to say, from the comfort of the philosopher's armchair, that justice should or should not be done when the heavens are in danger of falling.<sup>43</sup> But the imminent destruction of a whole horizon of value—of the sort that a Nazi victory in the Second World War might have led to—is the closest we have come in real-world experience to the heavens really falling. "Nazism was an ultimate threat to everything decent in our lives, an ideology and a practice of domination so murderous, so degrading even to those who might survive, that the consequences of its final victory were literally beyond calculation, immeasurably awful" (*Wars* 253). And Walzer is exploring the possibility that when this sort of thing is in prospect, the conditions—the presuppositions—for sensible talk of normative constraints on war-making may have collapsed.

Not all wars pose this kind of supreme emergency. War is not always over ultimate values "where the victory of one side would be a human disaster for the other" (*Wars* 253). But the illustration from the Second World War—stylized though it is—shows that this possibility is not out of the question. And so we have

---

<sup>43</sup> Much the same is true of philosophers' attachment (usually without explanation) to Robert Nozick's phrase "catastrophic moral horror." Can we say anything here about the connotations of "catastrophic"? Or, for that matter, about "moral horror"?

to say something about it. By which I mean: it is incumbent on us, who for fifteen chapters have been reading about the regulation of war, to reflect finally on what might be at stake in a country's going to war—what are the stakes of victory and defeat—and to consider whether all our talk of rules, restraints, and conventions is practicable in that context. It is something—I mean *thinking about this* is something—that it would be indecent or unseemly not to do.

In more recent work, Michael Walzer has talked about “the triumph of just war theory” (*Arguing* 3). Against all the odds, in a century of unprecedented carnage and savagery, a sense that there are norms and restraints on war-making has actually been upheld. Not perfectly, but systematically. And people accept that now in the military, in politics, and in the academy, whose realist predecessors did not accept it seventy years ago. However, we know some wars have been fought and some future wars will be fought in circumstances where everything seems to be at stake. If our present faith in the rules of war is justified then they have to be able to operate in that very high stakes environment, and we need to have something to say about the prospect that they can't. That is the topic of Walzer's Chapter Sixteen.

It sounds like I am tilting towards an understanding of Walzer on supreme emergency that is based on *the psychological impossibility* of statesmen restraining themselves when their backs are to the wall<sup>44</sup> and a proposed breach of the war convention is all that stands between their community and everything that they hold dear. In section 9, I will explore the tension between the “can't” and the “shouldn't” in Walzer's account of the shattering of the war convention in the circumstances he envisages. But before I do that, I want to say a word about two other dimensions of his account.

## 7. A neutral principle?

In the second-to-last paragraph of section 6, I said: some wars are fought in circumstances where everything seems to be at stake. Seems? *Seems so to whom?*

Are we thinking of a “detached observer” here—*us*, the readers, for example—who can objectively identify the values that are at stake? That's what

---

<sup>44</sup> “Back to the wall”—phrase from Stanley Baldwin (*Wars* 252-3)

the British illustration initially suggests: a Nazi victory would be immeasurably awful; as men and women of good will, “we are likely to find ourselves united in fear and abhorrence” (*Wars* 253); so we must explore the implication of *that shared view* of a radical threat to “human values.”

Or is the “seems” rather in the eye of the beholder? If it is thought that supreme emergency may take us beyond the realm of the circumstances of the regulation of combat, must we accept that the challenges and dilemmas Walzer is discussing might arise on either side (or both sides) of a given war? In any war, there may come a point where one side or the other or each of them at different times has to stare down the prospect of catastrophic defeat. Abraham Lincoln had to face the prospect of the loss of the Union in 1862; the Confederacy faced the loss of its distinctive way of life in 1865. We, as observers, may value the preservation of the Union more (much more) than the preservation of Southern way of life (including, as it did, slavery) and so we may be less patient, less accepting of any designation of the possible loss of the latter as a supreme emergency for its members. We have less sympathy for it; the communal form at stake is one we do not regard as of great value. But its members did, and presumably some of the phenomenology of supreme emergency would come along with that *in extremis*.

This is like the debate about “neutral principles” in legal and political philosophy. In a 1974 article, Gerald Dworkin asked whether those in the civil rights movement who participated in civil disobedience would support or tolerate its use in defense of principles they disagreed with.<sup>45</sup> “[T]hose who defend the civil disobedience of Martin Luther King are asked to specify a relevant difference between his actions and those of George Wallace.” Now, their response might be “that the laws that King broke were unjust while those Wallace violated were just” (though Wallace would not accept that).<sup>46</sup> That would be a non-neutral application

---

<sup>45</sup> Gerald Dworkin, “Non-Neutral Principles,” *Journal of Philosophy* 71 (1974), 491.

<sup>46</sup> *Ibid.*, 491-2.

of the principle of civil disobedience. A neutral application would involve trusting the principle's deployment even in the hands of one's ideological opponents.<sup>47</sup>

There will no doubt be limits on our willingness to generalize whatever argument about supreme emergency we accept. The Confederacy example will be at or near those limits for some people. The Nazi example (mentioned on p. 7 above) will be well beyond them: do we really want to acknowledge the loss of the Third Reich and Germany's descent (yet again!) into defeat and shame as a supreme emergency for Hitler and his gang of murderers?

Then there are intermediate cases. It is not hard to sympathize with gallant England and the possible loss of that decent and long-established political community on the damp British Isles. But Britain also faced the loss of its world-wide empire in the Second World War, and American military and political leaders had much less sympathy with that dimension of Churchill's supreme emergency.

Or consider the following case, connected in several ways to the British example. In his book *Retribution: The Battle for Japan 1944-45*, asking why Japan continued to fight despite no realistic prospect of victory, Max Hastings drew an analogy between the situation of Japan in 1944 and the desperate situation of the United Kingdom in June 1940:

Japan's options in late 1944, a Japanese might say, were not dissimilar to those of Britain in 1940. Winston Churchill's commitment to resist Nazi Germany after the fall of France was neither more nor less rational than that of Japan after losing the Marianas. Without allies, Britain possessed no better prospect of encompassing the defeat of Nazi Germany than did Japan of defeating the Americans. Britain's salvation was achieved overwhelmingly through the actions of her enemies in forcing the Soviet Union and the U.S. into the war, not by any military achievement of her own save that of defiance in the face of hopeless odds. ... If the cause of Japanese

---

<sup>47</sup> For the application of this logic to the case of targeted killing—if it is OK for the Americans, is it OK for the Russians etc.?—see Jeremy Waldron, *Justifying Targeted Killing with a Neutral Principle*, in *TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD* (Claire Finkelstein, Jens Ohlin, and Andrew Altman eds., 2012).

militarism seems to posterity immeasurably less admirable than that of British democracy, it engaged its adherents with equal devotion.<sup>48</sup>

Don't we have to consider that devotion as a possible basis of at least the phenomenology of extreme emergency, which might seem—subjectively at least—to have justified the Japanese in some of the more desperate measures they contemplated and took in 1945?

It is tempting to just sort through these possibilities, crediting some and discrediting others. But the question in an exploration of this kind should not be about which applications we are comfortable with—so that we adjust the principles we are manufacturing to match our considered judgments about particular cases in reflective equilibrium—but about where the various factors that Walzer invites us to consider actually lead us. Does the logic of his discussion invite us to understand the predicament of *anyone* who faces (what seems to him or her) a loss of the kind that Walzer talks about? Or are we to factor in our own best estimate of the *objective* value of what is at stake in the emergency.

Another question—disturbing in a somewhat similar way—asks about the relationship between the idea of a just war and what Walzer says about supreme emergency. Does a doctrine of supreme emergency operate independently of *ius ad bellum* (in the way that other doctrines concerning *ius in bello* are supposed to operate)? Indeed, what is the relation between just war and emergency defense of civilization or community? Suppose the collapse of Christian civilization would have been the upshot of the defeat of the unjust Crusaders in the twelfth or thirteenth centuries? Or suppose the end of the war that Nazi Germany waged in Europe had presaged the reduction (as was proposed by some among the allies) of the whole of Germany to deindustrialized pastureland. The loss of a civilization or the loss of a national community is still a loss even if the war that brought it about was waged unjustly.

Some of Walzer's critics and commentators seem to condition the whole possibility of a justified departure from the laws of war in response to supreme emergency on the proposition that the war in question is just. Zachary Calo tells us that "Walzer develops the concept of supreme emergency in the course of

---

<sup>48</sup> MAX HASTINGS, *RETRIBUTION: THE BATTLE FOR JAPAN 1944-45*, 41 (2008).

examining whether it is permissible to target civilian populations *during a just war*.”<sup>49</sup> But I don’t think Walzer ever says that, and it is a further question whether he would have been in a position to defend it if he had.

Maybe it would have been good idea to give us in Chapter Sixteen some sort of illustration of supreme emergency for a community that we would not find appealing though its members surely do. Be that as it may, it is instructive for us to consider such cases, not in order to embarrass Professor Walzer with questions about them, but to challenge ourselves concerning the viability on all sides of this overall normative enterprise.

### 8. Community or civilization?

A connected set of questions concerns the *scale* and the *nature* of what is at stake in a supreme emergency. In the 1940s illustration, the prospect of British defeat raises the specter of (1) the “immeasurable evil” of Nazism over Western civilization (*Wars* 259) with “the abyss of a new Dark Age” and “an age of barbaric violence”;<sup>50</sup> on a more modest scale, it betokens (2) the subjugation and occupation of the Great Britain or, at best, its diminishment by humiliating peace terms into an abjectly neutral facilitator of German dominance in Europe. Prospect (1) represents high civilizational stakes; prospect (2) is communal rather than civilizational—the loss or fatal humiliation of the British national community. Walzer uses language appropriate to both prospects. But he seems to opt—if “option” is the right word—for the *community* interpretation.

As I said before, I actually don’t think we should be interested in an *option* on Walzer’s part as between (1) and (2). For again, supreme emergency is not a doctrine he has proposed that stands in need of interpretation; it is an occasion for contemplation on where the limits of the laws-of-war enterprise are likely to be found. (1) and (2) are so bound up with one another in the 1940s illustration that it seems impossible or inappropriate to separate them. But I guess we can imagine a

---

<sup>49</sup> Zachary Calo, *Torture, Necessity, and Supreme Emergency: Law and Morality at the End of Law*, 43 VAL. U. L. REV. 1591, 1599 (2009); my emphasis.

<sup>50</sup> Respectively, these phrases are from Churchill’s broadcast speech of June 18, 1940 and his broadcast speech of May 19, 1940.

civilizational loss without a loss of any national community—for example, if after a German victory in the 1940's Britain, France, Holland, etc. were to become fascist independent states rather than liberal-democratic independent states. And we can imagine the loss of a national community without its necessarily representing the loss of a civilization: for example, the danger to Israel from its enemies from 1948 to 1973 might be seen in this light. As a matter of fact, either type of case might pose the prospect of the radical and thorough-going loss of a whole horizon of value that Walzer has in mind in his discussion.

More analysis may be appropriate, however, for a couple of reasons. (i) It is important because the civilizational aspect enables a move to resist the “supreme emergency” exception (if that is what it is) that the communal aspect does not enable. Also (ii) such analysis may be helpful as a continuation of our discussion in section 8: a civilizational understanding seems more objective and detached; a communal one more open to what we called then a “neutral” application by either side in an armed conflict.

(i) With the stakes conceived as civilizational, it may be easier to make an internal case *against* the wrongdoing that supreme emergency seems to call for. What I mean is that the value of civilization may be present on both sides: there is the threat posed by the emergency; but also the proposed response to the emergency may itself compromise the fabric of the civilization it is our purpose to defend. “Our civilization and morality,” as Walzer puts it, may already comprise “our collective abhorrence of murder, even when it [*murder*] seems, as it always does, to serve some purpose” (*Wars* 262). This will not be a trumping argument, but it is important nonetheless. “[T]he destruction of the innocent, whatever its purposes, is a kind of blasphemy against our deepest moral commitments. (This is true even in a supreme emergency, when we cannot do anything else.)” (*Wars*, 262). It sponsors a way of resisting the practical response to supreme emergency: we resist (for example, we refuse to bomb civilian populations) because that *in itself* would begin the process of the loss of our civilization

(ii) On the second point: when Walzer rescinds from the civilizational dimension of British defeat in the 1940s to the communal dimension, he seems to be asking us a neutral question: “Can soldiers and statesmen override the rights of innocent people for the sake of their own political community?” (*Wars* 254). It



seems like this could apply to any set of statesmen in relation to any political community. And what he says about the importance to people of their national community in *Just and Unjust Wars*, but particularly in *Arguing about War*, could be applied as well to our enemies' political community as to our own. I mean the Burkeian stuff about “ongoingness” (*Arguing* 43, original emphasis), about “political community as a contract between ‘those who are living, those who are dead, and those who are yet to be born,’” and about trying “to carry on, and also to improve upon, a way of life handed down by our ancestors” to pass it on to “recognizable descendants, carrying on and improving upon our own way of life” (*Arguing* 42-3). This commitment to continuity across generations seems morally neutral, by which I mean not that it fails to be valuable or important, but that it seems to apply indifferently so far as concerns the value-content of the shared way of life “developed by their ancestors, to be passed on to their children” (*Wars* 254). Whatever that shared way of life may be, Walzer seems to be saying, its loss will be a generational catastrophe for those who follow it. A threatened community faces the possibility of “moral as well as physical extinction” (*Arguing* 43), but the moral dimension here seems to refer to whatever the positive morality is of the community in question.

(I don't mean to ignore the point that from the inside, i.e. from a non-detached point of view, the internal values of a given community will feel like universal values to their adherents. Nor do I mean to deny that even from a detached point of view, the survival of independent communities is objectively one of “the highest values of international society” (*Wars* 254). The situation with the values here is very complicated, and it is a virtue of Walzer's account that it drives home those complications to us.)

At one point, Walzer says that “[s]upreme emergency is a communitarian doctrine” (*Arguing* 45). I don't want to get into an argument about his philosophical claim that “communities, in emergencies, seem to have different and larger prerogatives” than individuals (*Wars* 254). Walzer is surely right that attachment to community “is a feature of our lived reality, a source of our identity and self-understanding” (*Arguing* 49). But the feature of modern communitarianism that seems most prominent here is the one that subordinates concern for universal values to the survival of community as such. We are not to

judge communities as more or less worthy of survival, and a communitarian doctrine of supreme emergency will not be invested in any such discrimination.

I guess in principle we could take an analogous approach to civilizations. The loss of any civilization is a disaster whether we would judge the content of that civilization as good or bad. But in fact—as the Nazi example illustrates—a civilizational standard does seem to carry with it usually a substantive element of evaluation.

So, in exploring these possibilities—does supreme emergency involve potential loss of community or potential loss of civilization?—we are exploring how far a substantive evaluation of the form of life in question (undertaken from a detached and objective moral viewpoint) is entangled with the plethora of other conflicting judgements that supreme emergency evokes, such as “We have no choice but to do this” and “History will not forgive us if we fail to protect this way of life.”

### 9. “What choice do I have?”

A lot of the best work in Chapter 16 of Walzer’s book is his imagination of the phenomenology of this sort of emergency thinking. What was it like, what would it be like, to face such a supreme emergency and the prospect of communal or civilizational catastrophe that it brought with it? Objectively this involves exploring the facts of the situation, but also people’s responses to those facts: it means exploring “regions of desperation and disaster” (*Wars* 253). In this section, I want to consider the phenomenological dimension, because this, if anything, will take us to the heart of the problem for normativity. What is it like for the bottom to seem to fall out of our sense of moral and legal restraint?

Of course any such account is speculative, except to the extent we have memoirs or recordings of conversations at the time. And all such speculations are fallible and liable to refutation in light of better evidence.<sup>51</sup> But by exploring the kinds of thoughts that must have permeated the consciousness and conversations of the participants, we can begin to articulate the stakes.

---

<sup>51</sup> Mention studies of the Cuban Missile Crisis.

What we see in Walzer's account is movement back and forth between the phenomenology summed up in statements like "I can't help but do this," statements like "I have to do this," and statements like "I am required to do this" (*Wars* 259).

Let's begin with the locutions that suggest actual constraint—his talk, for example, of what one is "forced" to do (*Wars* 261). Walzer asks his readers:

Can soldiers and statesmen override the rights of innocent people for the sake of their own political community? ... *What choice do they have? ...* Faced with some ultimate horror, their options exhausted, *they will do what they must* to save their own people. (*Wars* 254, my emphasis)

It sounds almost like a causal prediction. It is like a sort of inevitability. It might even suggest that a civilization or community has some sort of automatic last-resort defense mechanism in the consciousness and likely behavior of its representatives. In some speculation about the phenomenology of the Hiroshima bombing, Walzer quotes this from Secretary of War Stimson's view of his own and others' state of mind faced with the "choice" about using a weapon of mass destruction: "No man, in our position and subject to our responsibilities, holding in his hand a weapon of such possibilities for . . . saving those lives, could have failed to use it." And, though he disagrees with the Hiroshima decision, Walzer observes that in principle "[t]his is by no means an incomprehensible or, on the surface at least, an outrageous argument" (*Wars* 267).<sup>52</sup>

On the other hand, in the passage from *Wars* 254 that I quoted a moment ago, Walzer writes that the idea of inevitability is not what he is trying to get at:

That is not to say that their decision is inevitable (I have no way of knowing that), but the sense of obligation and of moral urgency they are likely to feel at such a time is so overwhelming that a different outcome is hard to imagine. (*Wars* 254)

---

<sup>52</sup> But Walzer goes on to say: "But it is not the same as the argument I suggested in the case of Britain in 1940. It does not have the form: if we don't do *x* (bomb cities), they will do *y* (win the war, establish tyrannical rule, slaughter their opponents). What Stimson argued is very different. Given the actual policy of the U.S. government, it amounts to this: if we don't do *x*, *we* will do *y*" (*Wars* 267).

I think he is trying to convey a sense of persons' being "overwhelmed" (*Arguing* 30), but of their being overwhelmed *with reasons* rather than causally overwhelmed by the circumstances themselves. It is a fine line. In philosophical discussions of coercion, we sometimes distinguish two kinds of threat: (i) in one kind, a person is faced with a threat that simply alters the balance of costs and benefits relating to some action and calls for some sort of rational deliberation;<sup>53</sup> (ii) in a second kind, the threat induces a sort of panic or terror that makes rational deliberation very difficult, and to that extent has something more like a causal impact. An example I have used of type (ii) coercion is that of a person who has been soaked with gasoline and threatened with fire if he does not yield the combination to a safe.<sup>54</sup> That's not exactly the situation we are imagining facing Churchill and his war cabinet: panic and terror as reasons drowning out all other possibilities. Even the option they had "no choice" but to select required deliberation and thought.

Sometimes Walzer uses the language of what we can be expected to bear or put up with. He talks of the prospect facing Churchill as "a loss of value greater than men and women are morally obliged to bear" (*Arguing* 47). Connected with this, there is a sense that in some circumstances we are *morally* overwhelmed, and we say: what choice do I have? There is no option, nothing else to be done, in face of the prospect of "evil objectified in the world ... in a form so potent and apparent that there could never have been anything to do but fight against it" (*Wars* 253).

Peter Winch uses a locution like this—necessity as being morally overwhelmed—in a commentary on the parable of the Good Samaritan.<sup>55</sup> According to Winch, the Samaritan in the parable evidently did not see his helping the man who had fallen among thieves as a matter of discretion, which he might deliberate about. He saw it as a necessity:

---

<sup>53</sup> I have in mind the old Jack Benny routine: "Your money or your life!" (Silence), "C'mon I said 'Your money or your life'" "I'm thinking. I'm thinking!"

<sup>54</sup> See the discussion in Jeremy Waldron, *Terrorism and the Uses of Terror*, in TORTURE, TERROR, AND TRADE-OFFS, 48, at 54-9.

<sup>55</sup> Luke 10: 25-37.

The Samaritan responds to what he sees as a necessity generated by the presence of the injured man. What I mean by introducing this word ["necessity"] can be brought out by considering what someone in the Samaritan's position, and responding as he did, might say if urged by a companion to hurry on so as not to miss his important appointment. "But I can't just leave him here to die."<sup>56</sup>

Evidently the "can't" is not physical impossibility: the priest and the Levite in the parable experienced no difficulty in passing by on the other side after they saw the injured man's plight. But there is something like moral impossibility here, responsive to a necessity that rivets the attention of those who are sensitive to what might be at stake here.

The sensitivity that generates that thought might be regarded as moral sensitivity, but that in itself won't do because Walzer never wants to let go of the equally compelling moral sense—for the bombing case—that the action dictated by the necessity is also one that a good person "can't" perform. (It is after all the murder of thousands of people.) There are "can't"s all over the place here. If there is a basis for experience of the "necessity" (in the normative sense we are exploring) of the bombing option, it comes perhaps from the role that is filled by those who are facing the decision. For Churchill and the others are not just moral agents (as we say) facing a dilemma, like a trolley problem that they have stumbled into. They are designated leaders, representatives of the community whose survival is at stake here, and their overwhelming sense that they *can't* just let Britain be defeated has to do with that status. They have a job to do, not for themselves, but for the community, and they are overwhelmed by that responsibility.<sup>57</sup>

---

<sup>56</sup> Peter Winch, *Who is My Neighbor?* in his book, TRYING TO MAKE SENSE 154, at 157 (1987).

<sup>57</sup> This view is clearest in *Arguing* 45. As an instance of necessity generated by role-morality, It is little like what Robert Cover referred to as "the judicial 'can't'" in the antebellum fugitive slave cases. (See ROBERT COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 122 (1978).) Judges who were anti-slavery in their personal; moral and political convictions maintained that, as judges, they were unable to rely on those convictions in the face of a legally compelling claim that a particular runaway slave had to be returned to his owner. In *Miller v. McQuerry*, 17 F. Cas. 332 (C.C.D. Ohio, 1853), p. 339. Justice John McLean wrote:

We have canvassed a lot of possibilities here. But I have no patience with any question that requires Walzer to settle on just one of them as his “real” view. We are reflecting on what it means for what I called “the circumstances of the laws of war” to fail and for the normative bottom to drop out of our ordinary processes of legal and moral deliberations. In this situation, we may be tongue-tied or we may find our agency and our reasoning tossed back and forth amidst a plethora of prescriptions, none of them determinate, none of them easily reconcilable with any of the others, certainly not reconcilable in a neat theory. There is no settled answer here and I don’t read Walzer as proposing one.

I do want to say that the more we emphasize the chaotic and conflicted character of the phenomenology here, we must expect to see it in response to threats to communities whose survival *we* do not cherish. It may be difficult for us to endorse that or empathize with it in some of the cases mentioned in section 8, but that doesn’t make the phenomenology go away. And I believe there is enough hesitation in Walzer’s own endorsement of the response to supreme emergency in the illustration he has chosen to leave room for recognition of important similarities in these other even more problematic instances.

#### 10. A dangerous doctrine?

Many of Walzer’s critics see his discussion of Supreme Emergency as a doctrinal proposal (in law or morality), and they criticize it as such. Some say that the very act of thinking all this through in Chapter Sixteen is dangerous. George Wright says that “it is important to see the supreme emergency principle as not only incomplete, logically questionable, and unnecessary, but as affirmatively

---

with the abstract principles of slavery, courts called to administer the law have nothing to do. It is for the people, who are sovereign, and their representatives, in making constitutions and in the enactment of laws, to consider the laws of nature, and the immutable principles of right. This is a field which judges can not explore. . . . They look to the law, and to the law only. A disregard of this by the judicial powers, would undermine and overturn the social compact.<sup>57</sup>

The judge’s role allows him to do no other, even as his own deepest convictions cry out against it. (For the sincerity of Justice McLean’s anti-slavery convictions, see his dissent in *Dred Scott v. Sandford* 60 U.S. 393 (1856) at 550.

dangerous as well.”<sup>58</sup> I don’t agree with either assessment. I think the Chapter Sixteen discussion, fraught as it is with uncertainty and hesitation, is indispensable as part of the good faith with which *Just and Unjust Wars* is written. It is indispensable *just as it is* in any mature mediation on the limits of the enterprise that is the subject of the book as a whole.

Above all, we need to remember the subject-matter. Regulating war is not like regulating traffic or securities trading. In the midst of our exultation over what Walzer calls “the triumph of just war theory” (*Arguing*, Ch. 1 title), we must not forget that the theory is supposed to be oriented to practices of blood, terror, anger, and almost the highest stakes that human societies can conceive of. Is regulation of all that going to be possible? Sometimes, in extremity, who knows?

---

<sup>58</sup> R. George Wright, *Combating Civilian Casualties: Rules and Balancing in the Developing Law of War*, 38 WAKE FOREST L. REV. 129, 163–64 (2003).