

Supreme Emergencies Revisited*

Daniel Statman

I. INTRODUCTION

Apart from realists who believe that *inter arma silent leges*, and save for scoundrels who have no respect for human life, everybody agrees that there are moral constraints on what may be done in wartime. Yet, when the threat from the enemy is grave enough, even decent people concede that some, if not all, of the rules of war can be broken. Following the terminology suggested by Michael Walzer in *Just and Unjust Wars*, such cases are commonly referred to as cases of “supreme emergency.”¹ Walzer’s well-known example of such an emergency is the situation of the United Kingdom in the days of the Blitz during World War II, when the bombing of German cities seemed to be the only available way to stop, or at least to slow down, the Nazi aggression. On Walzer’s view, since in those days (though not later in the war) the situation was one of supreme emergency, Churchill was morally justified in ordering such bombing in spite of the fact that it involved a direct and intentional attack on the innocent.² I shall call permissions to break accepted rules of war—especially to kill the innocent—“Special Permissions” (SPs). I shall employ the expression “supreme emergencies” to refer to situations which meet the following three conditions: (a) some group faces the

* For helpful comments on earlier drafts, I am greatly indebted to Yitzhak Benbaji, Michael Gross, David Heyd, Iddo Landau, Saul Smilansky, Nick Zangwill, Noam Zohar, and two referees for *Ethics*. I am particularly grateful to Jeff McMahan, who went far beyond his duty as editor in his comments, suggestions, and constant encouragement. Finally, I wish to thank Naomi Harari for her research assistance.

1. Michael Walzer, *Just and Unjust Wars* (New York: Basic, 1977), chap. 16 (hereafter *JUW*). See also Walzer, “Emergency Ethics,” in his *Arguing about War* (New Haven, CT: Yale University Press, 2004), chap. 3, 33–50 (hereafter *EE*).

2. Walzer might object to my use of “morally justified” in this context. He prefers formulating the problem in terms of (moral) ability (“Can soldiers and statesmen override the rights of innocent people?” [*JUW* 254], “political leaders can do whatever is required to meet the danger” [*EE* 34]) or in terms of permissibility (“the license of supreme emergency” [*EE* 44], “an account of when it is permissible [or necessary] to get our hands dirty” [*EE* 46]).

grave threat of an evil such as massacre or enslavement,³ (b) conventional means, diplomatic or military, are unable to counter the threat, and (c) unconventional means of the kind that fall under SPs can prevent the otherwise inevitable catastrophe.

How, then, could Churchill's decision be justified, that is, a decision to target human beings indiscriminately as a means to protect Britain from Nazi aggression? More specifically, how could such a decision be justified if the validity of the rules of war in ordinary, nonemergency situations is accepted? Walzer's answer is not entirely clear, but he seems to suggest that in supreme emergencies we are allowed to turn to a utilitarian, or consequentialist, way of thinking. For instance, he says that when a community's very existence is at risk "the restraint on utilitarian calculation must be lifted,"⁴ and later, reflecting on his argument, he speculates that "perhaps it is only a matter of arithmetic."⁵ Recent critics of Walzer have also interpreted him this way, as if in supreme emergencies he replaces his rights-based outlook with a consequentialist one.⁶

A similar move away from accepted moral constraints is familiar from the discussion on the legitimacy of torture. In its first stage, all agree that torture is terrible and must be strictly forbidden. Then the stakes are raised and we are asked to think of the "ticking bomb" example: a terrorist hides a nuclear device in the town center, you catch him, and he refuses to reveal where the bomb is hidden. It is then suggested that if there is no other way to find and neutralize the bomb, you are morally allowed to torture the terrorist. Such permission to torture is often thought also to rely on a kind of utilitarian reasoning, which is evident from the way the ticking bomb example is formulated. It almost always stresses that while, on one side of the scales, there is

3. Limiting supreme emergencies to such extreme circumstances is critical lest they become "the fatal leak that releases the torrent that bursts the dam" (Henry Shue, "Liberalism: The Impossibility of Justifying WMD," in *Ethics and Weapons of Mass Destruction*, ed. Sohail Hashmi and Steven Lee [Cambridge: Cambridge University Press, 2004], 139–62, 149). For an alarming illustration of such a release, see Uwe Steinhoff, "How Can Terrorism Be Justified?" in *Terrorism: The Philosophical Issues*, ed. Igor Primoratz (Hampshire: Palgrave Macmillan, 2004), 97–109.

4. Walzer, *JW*, 228.

5. *Ibid.*, 254.

6. See Brian Orend, "Just and Lawful Conduct in War: Reflections on Michael Walzer," *Law and Philosophy* 20 (2000): 1–30, 25; Darrell Cole, "Death before Dishonor or Dishonor before Death? Christian Just War, Terrorism, and Supreme Emergency," *Notre Dame Journal of Law, Ethics and Public Policy* 16 (2002): 81–99, 97; Alex Bellamy, "Supreme Emergencies and the Protection of Noncombatants in War," *International Affairs* 80 (2004): 829–50, 838; and Christopher Toner, "Just War and the Supreme Emergency Exemption," *Philosophical Quarterly* 55 (2005): 545–61, 549 ("The central argument for the supreme emergency exemption is straightforwardly an argument from consequences").

only one person, that is, the terrorist, on the other side, there are many thousands, if not millions, of innocent lives. This formulation creates the impression that permission to torture relies on a comparison between the number of human lives at stake, a comparison typical of utilitarianism.

The first purpose of my article is to show that this interpretation of the justification for SPs is doubly wrong: it misrepresents the logic of utilitarianism, and it ill describes the kind of justifications that supporters of such actions have in mind. My second purpose is to point to the framework that can do this justificatory work or, at any rate, is implicitly assumed to do it, that is, the framework of self-defense. My third and main purpose is to show that the required justification for killing the innocent, at some point, will have to rely on collectivist premises. Finally, I seek to show that none of the arguments for SPs can withstand criticism.⁷

II. SPs, UTILITARIANISM, AND SELF-DEFENSE

As mentioned above, Walzer contends that collectives have a right to kill the innocent if it is the only way to protect themselves from enslavement and massacre. But this is not utilitarian reasoning. According to utilitarianism, individuals or collectives are allowed to give priority to their own lives over the lives of others, only after it has been demonstrated that such preference will lead to better results overall. In the case of a relatively small collective threatened by a larger one, it seems particularly problematic from a utilitarian point of view that many thousands of the aggressive collective were to be killed in order to save a smaller number of members of the attacked collective from genocide or severe oppression.

There is a further reason why the endorsement of SPs by Walzer and others is misrepresented when understood as a move toward utilitarianism. According to utilitarianism, if some action is right, it is ipso facto also mandatory, except in very rare situations where two courses of action have precisely the same utility. Hence, on utilitarian grounds, if the intentional killing of thousands of people is morally right, because it leads to more utility than any other course of action, then such an operation would have to be not only permissible, but mandatory. But

7. The arguments discussed (and rejected) here seek to establish the moral justification for SPs. A different group of arguments seeks to defend SPs without presuming to show that they are morally justified. This group includes the "tragedy" solution, the argument from dirty hands, and the argument from the nonsovereignty of morality. I discuss the former in my "Moral Tragedies, Supreme Emergencies and National-Defense," *Journal of Applied Philosophy* 23 (1996): 311–21.

neither Walzer, nor any other supporter of SPs, would accept such a conclusion.

At this stage, one might suggest that what grounds SPs is a weighted form of utilitarianism, according to which the interests of fellow citizens have greater weight vis-à-vis those of outsiders and which would therefore justify actions which the simple utilitarian calculation would condemn. Indeed, public policy generally proceeds on the assumption that states are justified in giving the interests of their citizens considerably greater weight than those of outsiders, so why not in the case of SPs too? Well, first, it seems to me a bit awkward to refer to this view as a version of utilitarianism. Second, and more importantly, even supporters of partiality in morality who contend that we are allowed to give greater weight to special relationships do not suggest that we are allowed to kill in order to save the lives of our relatives, friends, or compatriots. Hence, even if a state's general policy of preferring its own citizens can be justified, it cannot include a right to kill noncitizens in order to preserve the lives of citizens.

Similarly, it would be a mistake to connect SPs to the philosophical dispute between deontological absolutists, who contend that harming an innocent person is morally forbidden whatever the results, and moderate deontologists, who believe that this rule can be outweighed if enough is at stake.⁸ Moderates refer to extreme cases where the killing of one innocent child, for example, is necessary to save thousands, or even millions, of human beings, and they argue that in such cases the agent-relative restriction against killing the innocent is overridden. It might be thought, then, that SPs are based on this kind of reasoning. But moderate deontologists generally set the threshold for the overriding of constraints quite high. For example, in order for it to be permissible to kill one innocent person as a means of saving others, the number of people saved would have to be high—one hundred or perhaps even one thousand. But these ratios greatly exceed those that Walzer and other defenders of SPs find acceptable in supreme emergencies. It's possible, indeed, that Walzer would accept that a community could have an SP to kill more people than it would save if that were necessary to save the community as a whole from annihilation.

If neither utilitarianism, nor moderate deontology, is the right framework to understand the permission to torture and kill in supreme emergencies, what, then, is the right framework? I suggest we make a fresh start by paying attention to three features of these situations, the significance of which is usually overlooked. The first is that the emergencies under discussion have to do with threats from human beings,

8. For this distinction, see Shelly Kagan, *Normative Ethics* (Boulder, CO: Westview, 1998), 79.

such as enslavement and massacre, not threats from natural causes, such as earthquakes or floods. The second is that the emergency is typically formulated in terms of some particular community, not in universal terms. On this point too, Walzer is a bit ambiguous, as noted by Orend,⁹ but, for the most part, he conveys the impression that, in supreme emergencies, soldiers and statesmen act “for the sake of *their own political community*.”¹⁰ While, with a stretch of the imagination, Churchill’s actions could be presented as aimed at the protection of the entire world from the Nazis, not just at the defense of Britain, I am certain that Walzer would make the same argument even if the threat to some community did not involve a threat to people from other communities or to the world in general.

The third feature which is usually overlooked in discussions of SPs is that the problematic actions, which are nevertheless permitted because of the supreme emergency, are directed toward members of the collective that is the source of the threat, not toward members of third parties. This feature is especially manifest in the ticking bomb scenario which is used to justify torture. In almost all formulations of this scenario, either the terrorist who planted the bomb is himself captured or at least one of his partners or comrades is.¹¹ Similarly with the intentional killing of the innocent: those targeted always belong to the collective which is seen as the source of the deadly threat.

What emerges out of these observations is that the context most conducive to understanding SPs in the face of supreme emergency is that of self-defense. In standard cases of self-defense, the potential victim is not concerned about the maximization of utility in the world but in the protection of her own life; the threat comes from human action, not from some natural catastrophe; and the defensive action is directed at the person or persons who are behind the aggressive threat. I contend, then, (a) that self-defense is what most writers have in mind when they endorse SPs and (b) that self-defense is indeed the appropriate framework to account for such permissions, if any can. Admittedly, there is one respect in which attacking entire civilian populations, by saturation bombing, for example, is not like self-defense, namely, many of the attacked individuals are not part of the threat and are not responsible for it. This respect will indeed be the main focus of discussion in the following sections.

9. Orend, “Just and Lawful Conduct in War: Reflections on Michael Walzer,” 27.

10. Walzer, *JW*, 254; italics added.

11. Torture in the real world has been used against innocent friends or family relatives of the captured terrorist too, but it is much harder to find moral-philosophical defenses of such torture than to find defenses of torturing the terrorist himself (except in imaginary examples in which it is the torture of an innocent family relative vs. the destruction of the entire world).

Thus understood, SPs are doubly limited. They apply only to threats from human beings, and the actions they license must be directed at the aggressive collective. If the threat is from a natural disaster (e.g., a hurricane) or if protection from it requires killing people from a third (and innocent) party, then SPs are unavailable. Just as individuals are not allowed to kill innocent bystanders in order to save their own lives, collectives are not allowed to do so either.

Special Permissions, then, belong in the same moral drawer, so to say, as conventional wars, in the sense that if they are morally justified, it is through self-defense. On the face of it, under the right to self-defense, SPs are harder to justify, because they involve the indiscriminate killing of thousands of innocent human beings. Yet, in a different sense, SPs might be easier to justify if we consider what is being defended. In supreme emergencies, what's at stake is no less than "massacre and enslavement," which means that the armed resistance against the aggressor can be seen as a direct implication of the individual right of self-defense. By contrast, in ordinary, nongenocidal wars, what's at stake—national sovereignty, territorial integrity, culture, self-government—is of lesser value, and it is not at all clear that the right to kill in individual self-defense can ground a right to kill in order to protect these latter values.¹²

If I am right in assuming that the appropriate normative context for SPs is self-defense and not utilitarianism, then one can immediately see how misleading the common formulation of the ticking bomb example is. On this formulation, the dilemma is between the torture of one terrorist, on the one hand, and the possible deaths of many thousands of innocent people, on the other. But assuming that the captive terrorist bears direct responsibility for the threat, for example, he himself planted the bomb, he can be tortured even if refraining from doing so will not have such a momentous result. Even if the threat is only to one human being, the terrorist might still be tortured, because (a) he is responsible for the threat and (b) it is within his power to neutralize the threat and stop the torture the minute he agrees to reveal the location of the bomb.¹³ Furthermore, torture should be allowed even if the number of people being tortured is larger than the number of people threatened by the bomb. The rule that emerges is that when-

12. For a powerful argument that the right to self-defense cannot ground a right to kill in these circumstances and, therefore, that there is no valid justification for wars of national defense, see David Rodin, *War and Self-Defense* (Oxford: Oxford University Press, 2002); and Richard Norman, *Ethics, Killing and War* (Cambridge: Cambridge University Press, 1995), chaps. 4–6.

13. See Michael Moore, "Torture and the Balance of Evils," *Israel Law Review* 2–3 (1989): 280–344, 323.

ever an individual is responsible for a deadly (unjustified) threat,¹⁴ he might be injured, tortured, or killed (depending on the particular circumstances), if it is necessary to protect a potential victim from the threat. This applies regardless of whether other people are also responsible for it (and hence are also candidates for such treatment) and regardless of the number of people threatened. The approval of torture in such cases does not express a temporary or permanent abandonment of a deontological ethics in favor of a utilitarian one but follows from the logic of the right to act in self-defense.

I turn now to the most perplexing case of SPs, that is, to the assumed permission to intentionally kill the innocent in times of supreme emergency. How could such killing be justified on the basis of self-defense? Surely self-defense does not allow killing human beings just because that's the only way to save an individual life. To recycle an old example: the fact that I desperately need a heart transplant is not sufficient to justify killing a person in order to harvest her heart, even if otherwise I will die in the long line for transplants. In our case, the additional required condition is that the targeted person be, in some sense, an aggressor. But how could this condition be satisfied in the case of attacks resulting in the indiscriminate death of thousands of civilians? Wouldn't such attacks contradict the most fundamental deontological intuitions forbidding the sacrifice of some human beings in order to save others?

III. THE ARGUMENT FROM MINIMAL RESPONSIBILITY

I mentioned earlier that SPs can be used only against members of the aggressor collective. But, as indicated at the end of the previous section, many members of the aggressing country bear no, or only minimal, responsibility for the aggression, which seems to imply that they ought to be treated as third parties and, as such, be disqualified as legitimate targets for attack. If some street cleaner in Berlin (I apologize for this stereotype) was not responsible for the Blitz or for the Holocaust, how could it have been right to kill him by saturation bombing of Berlin, while it would have been wrong to use similar measures against members of other collectives, even if such use could achieve the same (or even better) results in terms of self-defense?

There are two possible routes to take here. One tries to show that the killing of civilians can be justified using standard doctrines of individual responsibility. I will explore this route in this and the following section. The other, which will be discussed in Section V, connects such justification to a collectivist view of wars.

Back, then, to our street cleaner in Berlin. In common terminology,

14. I talk about deadly threats just to simplify matters. I would say the same about the threat of serious injury or other threats that normally justify killing in self-defense.

he would be an innocent bystander, so killing him would be problematic even for those who accept that innocent attackers might be killed in self-defense. The first way to justify killing such citizens would be to deny their innocence, that is, to claim that they are, in some minimal way, morally responsible for the threat posed by the Nazis. But what kind of responsibility would we have to ascribe to them in order to make their killing justified? It is sometimes thought that what is required to substantiate the right to self-defense is the kind of responsibility required by criminal law, the intuition being that if one is below the threshold sufficient for the attribution of criminal responsibility, one is also below the threshold sufficient to be regarded as a legitimate target under this right. But this analogy is flawed, as argued conclusively by Noam Zohar.¹⁵ In self-defense situations, there is a forced choice between lives: it is either him or me. If we, potential victim and aggressor, are equally morally responsible for this forced choice, I have no right to take his life in order to save mine. But if he is more responsible than I am for the forced choice between our lives, then I am entitled to require that he pay the price for his wrongful behavior. The point is that the measure of responsibility required in this context, in Zohar's words, is only that needed "to tip the scales." And one might be more responsible than another for creating a forced choice between lives, without thereby being responsible enough to face criminal charges, a fortiori without deserving to be punished by death. I shall call this argument the "Argument from Minimal Responsibility" (AMR).

According to AMR, for a potential victim, V, to have a right to kill some person, P, in self-defense, P has to be causally related to the threat to V and has to be minimally responsible for this threat. The Argument from Minimal Responsibility fits McMahan's recent thesis that "if the Pursuer were *in some measure responsible* for the unjust threat she poses, that would establish an obviously relevant moral asymmetry between you and her and would constitute a sufficient basis for the permissibility of your killing her if that were necessary to defend your life."¹⁶ McMahan's emphasis on moral responsibility as the ground of liability to attack leads him to consider the radical idea that such responsibility would be sufficient to regard one as liable for attack even in the absence of an actual causal connection between one's acts and the threat to V, for example, if one tried but failed to create an unjust threat or if one did not even make such an attempt but "*would* have created the threat, or

15. Noam Zohar, "Collective War and Individualistic Ethics," *Political Theory* 21 (1993): 606–22, sec. 2.

16. Jeff McMahan, "The Ethics of Killing in War," *Ethics* 114 (2004): 693–734, 720; italics added. For simplicity, I have replaced "pursuer" by "attacker."

would create a similar threat, if he could.”¹⁷ If this idea is accepted, then the number of people who might become legitimate targets under AMR widens even more.

Much more needs to be said about AMR to substantiate it as a general theory of self-defense. My goal here, however, is not to issue a final verdict about AMR but to show (a) how it could be thought to justify SPs and (b) why it, nevertheless, fails in doing so.

How, then, could AMR widen the group of legitimate targets for attack in cases of supreme emergency? The street cleaner in Berlin was probably responsible for the Nazi policy and Nazi atrocities only in a loose and indirect way. But for the sake of killing in self-defense, such weak responsibility would suffice to tip the scales, because he was more responsible for the choice between his life and the lives of the Jews and other potential victims of the Nazis than these victims were. Why was he more responsible? One could think of a number of possible explanations: though he himself was not a soldier, he paid taxes, voted for the Nazi party, encouraged his sons when they went to the army, and did nothing to help Jews or other victims of Nazi oppression and nothing to stop the deterioration of his country to barbarism in the 1930s and the 1940s.¹⁸

The moral responsibility of the street cleaner (and many of his friends) was quite slight; hence, it would have been unreasonable to kill them in order to save a smaller number of potential victims of Nazism. But since killing them would (we are supposing) have saved a larger number of such innocent victims, the small moral asymmetry would have been sufficient to tip the scale and permit the killing.

Let us make this example as viable and as convincing as possible. Let us assume that the “Manhattan Project,” which started as a response to the German atomic program, had been completed a year or so earlier than it actually was. That’s not a wild assumption. Let’s further assume

17. Ibid. Whether one can be held responsible for acts one would have done, but in fact didn’t, is part of the debate on moral luck. See especially Michael Zimmerman, “Luck and Moral Responsibility,” in *Moral Luck*, ed. Daniel Statman (Albany: SUNY Press, 1993), 217–34.

18. The (albeit minimal) responsibility of noncombatants is stronger in democratic countries than in totalitarian ones, because, in the former, civilians are active participants in their governmental policies (a point emphasized by Gabriel Palmer-Fernandez, “Innocence in War,” *International Journal of Applied Philosophy* 14 [2000]: 161–74, 164–66). Nevertheless, even in nondemocratic countries, civilians are more responsible for the forced choice than the potential victims of their country’s aggression. It is true that in such countries the ability of individual citizens to change the policies of the country is seriously limited, but when most of them enthusiastically identify with such policies, this limited ability would not make such a difference. For the overwhelming support for the Nazi regime among German society, see, e.g., David Bankier, *The Germans and the Final Solution* (Oxford: Blackwell, 1992).

that had the United States dropped two or three atomic bombs (of the sort later used against Japan) on Berlin, that would have ended the war immediately. None of Hitler's shelters in Berlin or around it could have protected him from the effects of these bombs. Finally, had the war come to its end this way, with a German defeat in 1944, the lives of millions would have been spared, including close to a million Hungarian Jews who were murdered in 1944–45 and all the Allied casualties incurred in the invasion and in the last phases of the war. (This atomic attack on Berlin might also have brought an end to the war with Japan, thereby saving even more human lives.) Let us grant two assumptions: (a) that the use of atomic bombs (had the Allies had them) against Germany would have been the only way to save all of those lives and (b) that it would have been sufficient to achieve the saving of those lives. Our problem is, How could the saving of these lives be permissibly brought about at the expense of killing so many innocent Germans? To this, AMR replies by saying that these Germans were not innocent or, more accurately, that they were not as innocent with regard to creating the relevant forced choice as the potential victims of Nazism were. Hence, in this imaginary situation, it would have been morally acceptable to drop atomic bombs on Berlin. (If one accepts the speculation raised by McMahan that in order to avert an unjust attack, it can be permissible to attack those who would have created the threat, then, given that most Germans strongly identified with Nazi policy, it would be even easier to see how attacking the street cleaner and his friends could be permissible.)

In real life situations, there are serious epistemological difficulties in determining that some state of affairs involves a forced choice between lives of the sort just illustrated. The move from interpersonal defense to intercollective defense is a move toward great uncertainty and ambiguity. So often politicians convince themselves and their countries that they have “no other choice” but to use force, while retroactively it is revealed that there were other routes out of the crisis which were overlooked, ignored, or underappreciated. But the epistemological difficulties apply to ordinary wars too, not only to supreme emergencies. The question that concerns me here is whether SPs could be justified even if these difficulties could be overcome.

I said at the beginning of this section that AMR is based on standard doctrines of individual morality. However, on closer scrutiny, we can now see that for AMR to be effective, that is, to cover a significant portion of the targets of SPs, it must assume some kind of collectivism. I explained above that the street cleaner in Berlin might be said to bear at least minimal responsibility for the Holocaust, because he did nothing to help Jews or other victims of Nazi oppression and nothing to stop the deterioration of his country to barbarism in the 1930s and the 1940s.

But the (moral) expectation that he take such steps is based on the very fact of his being German, not on any individual misbehavior on his part. A foreigner living in Berlin, or even in some other part of the world, might have been able to do something to stop the Nazis or to help their victims, but the expectations from her would have been weaker than those expected from the Germans. When a collective goes astray, be it a nation, a religion, or a firm, it is first the members of the collective that we expect to protest and to strive to correct the situation (even at a personal price to themselves) and, only second, nonmembers. Since I devote a whole section to collectivism later on, I shall not pursue this point further here, but just put on record that since moral collectivism is, on my opinion, a problematic view, its connection to AMR taints the latter too.

The Argument from Minimal Responsibility seems to undermine the fundamental distinction of *jus in bello*, that is, the distinction between combatants and noncombatants. If AMR justifies killing civilians of an aggressive country in supreme emergencies, there could be no reason to think it shouldn't apply to nonemergency situations too, that is, to ordinary wars.¹⁹ However, the fact that on AMR, noncombatants with minimal responsibility might be legitimate targets for attack does not imply that they are as legitimate targets as combatants. There might be good moral or practical reasons for limiting the killing in war to combatants while acknowledging that "in principle," noncombatants might also be attacked if there is no other way to prevent a real catastrophe. As a theory of SPs in supreme emergencies, this is precisely what AMR suggests, that is, that killing civilians is acceptable only if the attacked collective cannot be defended by conventional fighting against combatants—which is the case in supreme emergencies, as explained at the outset. Thus, accepting AMR does not entail giving up the moral relevance of the distinction between combatants and noncombatants in ordinary wars.

The main problem with AMR lies elsewhere. Even if it succeeds, it does not cover all targets of killing in supreme emergencies, because many targets—young children, opponents of the regime, and, of course, its victims—do not bear even indirect or loose responsibility for the forced choice between their lives and the lives of potential victims of the regime. Thus, even if a forced choice between the lives of Jews and the lives of German children did exist, that is, the former could be spared only by bringing about the death of the latter, such killing could not be justified, because the latter did not bear even minimal respon-

19. McMahan, "The Ethics of Killing in War," 726, is willing to bite this bullet when he acknowledges that on the "responsibility criterion" it is sometimes morally preferable to kill noncombatants than to kill combatants.

sibility for the above forced choice. This objection seems to me decisive. Even if AMR could be defended as a general theory of self-defense, it wouldn't establish moral permission to use atomic bombs (or massive saturation bombing) against Berlin in order to stop the Holocaust or Nazi aggression in general.

Perhaps AMR could be supported by the doctrine of double effect (DDE): since, according to AMR, the attack on many German civilians in residential areas was justified in the imagined circumstances and since the killing of children was not an intentional objective of such attack but an undesirable side effect, the attack could be justified.²⁰ However, it is unclear what DDE says about dropping a bomb on a group of people knowing that some are legitimate targets while others are not; hence, I don't think DDE can be trusted where AMR has failed.²¹

IV. THE ARGUMENT FROM SHIFTING RESPONSIBILITY

Maybe we could justify killing children in supreme emergencies by importing a common line of argument from human shield cases. In such cases, an aggressor, A, threatens to kill a victim, V, who can defend himself only by shooting at A. To prevent this defensive act, A holds a young child in his arms. May V defend himself by shooting at A, even though doing so would inevitably cause the death of the innocent child? Michael Moore notes that "it is common to suppose, morally and legally, that he may do so."²² A way to justify this permission is to rely on the analogy between this case and that of killing a hostage. Assume that instead of holding a child in his arms as a physical shield, A points his gun at the child and threatens to kill her unless V surrenders and puts down his weapon (and is then murdered by A). In this case, it seems quite obvious that V may defend his life by shooting at A, even if as a response (or, as A would no doubt say, "as a *result*") this child would be murdered by A.

If one accepts the view that V is not morally obliged to sacrifice his life in order to save the life of the child hostage (even if the child's life could indeed be thus spared with no further problematic results), then only a small stretch is required to justify shooting the child directly in the human shield case. After all, how much moral weight can be assigned to the fact that in one case, the aggressor intends to kill the child hostage by holding her in the line of fire, while, in the other, he intends to do

20. The idea of using DDE to respond to supreme emergencies is developed recently by Bellamy, "Supreme Emergencies and the Protection of Noncombatants in War." It is explicitly rejected by John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), 104–5.

21. For a discussion of these issues, see Jeff McMahan, "Self-Defense and the Problem of the Innocent Attacker," *Ethics* 94 (104): 252–90.

22. Moore, "Torture and the Balance of Evils," 322.

so by using his own gun? In both cases, the responsibility for the child's death can be seen as resting exclusively with the aggressor-murderer, and though it would be morally nice if V sacrificed his life to save the child, he is not to be reproached for failing to do so. I shall refer to this argument as the "Argument from Shifting Responsibility" (ASR).

We can now see how ASR is supposed to solve the problem at hand. If, in the ways assumed by AMR, (most of) the adult members of the enemy collective are responsible for the threat to some other collective, then they are legitimate targets for attack, if (and only if!) such attack is the only way to defend the potential victims of their aggression. If such an attack also brings about the death of young children, it is terrible, but the responsibility lies completely with the aggressors. Unlike AMR, ASR does not offer any justification for the permission to kill the innocent in supreme emergencies, but it does offer the potential victims (or third parties coming to their aid) a way of shifting the responsibility for this unjustified act to the aggressor.

But while ASR might seem plausible in some cases, particularly in the case of shooting through one innocent shield in order to defend a potential victim's life, there is a proportionality constraint that limits the amount of harm that one may cause while still shifting the responsibility to the agent who has created the forced choice. If I have to shoot through ten innocent shields in order to kill the aggressor, it is less obvious that I can shift all the responsibility to him. Beyond a certain proportionality limit, responsibility tends to shift back to the agent. I should add to this that ASR is most convincing when supplemented with the basic idea of DDE, namely, when the harm caused is foreseen but unintended. Hence, it is more plausible to say that the responsibility shifts to the aggressor when he holds the innocent shield, or when he shoots at her, than if I kill an innocent bystander as a means of incapacitating the aggressor. The problem is that in the cases of killing the innocent under discussion, neither of these two limiting conditions is satisfied. The number of "shields" is significant, and the harming of them direct and intentional.

Furthermore, ASR seems to lead to conclusions which are hard to accept. If the permission to shoot at human shields can be widened in the way suggested by ASR, it seems to imply that any time the responsibility for a forced choice between my life and that of some person, P, lies in the hands of some third agent, A (rather than in the hands of nature), I am allowed to kill P in order to save my life, regardless of P's blameworthiness or innocence in creating the threat. On ASR, I can always relegate the moral toll for P's death to A. To appreciate how permissive ASR is, consider its relation to the debate on innocent threats and innocent aggressors. Some believe that since, in such cases, the person regarded as a threat or an aggressor is completely innocent with

respect to creating the forced choice between his life and that of the potential victim, the victim has no right to kill her in self-defense. Obviously, they would hold this view even if it turned out that the innocent threat was tied, so to say, into the relevant causal chain by the intentional act of some third party. From their point of view, the crucial fact is the moral status (in the relevant sense) of the person whom the victim wishes to kill, and if she is innocent, there is no way to justify killing her in self-defense. So clearly on this view, ASR cannot be true. But even if one allows the killing of innocent threats and aggressors, one is not thereby committed to ASR, because in ASR the people killed are not even aggressors (or threats), but bystanders. They are neither morally nor materially noninnocent; they have done nothing that poses a threat to the potential victim.

What ASR seeks to achieve is a kind of denial of the victim's part in the killing, by transferring the killing, so to say, in its entirety, to the aggressor. This transference is supposed to show that although the killing carried out by V is unjustified, it is still somehow morally all right, or at least imposes no blame upon V, because all blame is absorbed, so to say, by A. But this just doesn't work. That A is to blame for creating a situation in which V can save his life only by killing an innocent person, P, does not entail that V cannot also be blamed for actually killing that person.

Insofar as justifying SPs is concerned, then, the path suggested by ASR is not promising. The justification for killing the innocent in supreme emergencies—if such a justification exists—will have to rely on a different line of argument altogether. This different approach will be the topic of the next section.

V. SPs AND THE MORALITY OF COLLECTIVES

In both AMR and ASR, the victims' membership in the enemy collective is insufficient by itself to justify killing them in cases of supreme emergency. In AMR, they are killed because of their contribution to creating the forced choice between their lives and those of the attacked side, though the expectations regarding this contribution do result from their membership in the collective. On ASR, they are killed because of the responsibility of their own leaders in creating the forced choice between their lives and the lives of the potential victims of the aggression. By contrast, the view I turn to now contends that they are killed because of their very membership in an aggressive collective. I shall call this new argument the "Collective Argument" (CA).

The basic idea of CA is straightforward. Wars cannot be reduced to conflicts between a given number of individuals on the one hand and a given number of individuals on the other. Rather, wars are conflicts

between collectives,²³ and though collectives are made up of individuals, they are not identical to any list of the individuals that constitute them.²⁴ Hence, the rules governing the use of lethal measures in wars are not identical to those governing such use in the relations between individuals. In particular, membership in an aggressive collective may make one more morally vulnerable than one would be if judged only as an individual. Via such membership, individuals might be killed in circumstances in which qua individuals they would be safe. Qua members of an aggressive collective, individuals might be killed in self-defense by the attacked side, even if they are innocent as individuals. Hence, the special permission the Jews would have had to kill millions of Germans in the imagined scenario described earlier. Beyond the individual responsibility and contribution of (most) individual Germans to the Holocaust, there was also the responsibility and contribution of the Germans as a collective, which would cover those Germans the killing of whom could not be justified according to the principles of individual morality.²⁵

The initial reaction of many readers to the very notion of collectivist morality will be moral repulsion. How could any individuals be harmed, let alone killed, just because of their membership in some collective? I devote most of this section to showing that CA is not obviously wrong or repulsive and that it deserves a decent hearing. After doing so, I shall argue that, nevertheless, CA suffers from serious shortcomings that make it an unstable foundation for SPs.

Let me start with Christopher Morris's argument for the use of nuclear weapons in response to a nuclear attack by an enemy. According to Morris, the prohibition against (intentionally) killing the innocent is to be found in contractarian morality. Such a prohibition is normally mutually advantageous; hence, as long as it is kept, it is binding on rational agents. However, "should another unilaterally return to a state of nature, for example, by launching a nuclear attack, then P ['It is wrong directly to kill innocent human persons'] and all other principles

23. See Walzer, *JW*, 36 ("the war itself isn't a relation between persons but between political entities and their human instruments"); and Christopher Kutz, "The Difference Uniforms Make: Collective Violence in Criminal Law and War," *Philosophy & Public Affairs* 33 (2005): 148–82.

24. For the general metaphysical approach that underlies this claim, see David Wiggins, "On Being in the Same Place at the Same Time," *Philosophical Review* 77 (1968): 90–95.

25. In EE, Walzer makes a strong connection between the notion of supreme emergencies and the idea of collectives, saying explicitly that "supreme emergency is a communitarian doctrine" (45). But the community he has in mind is the threatened one, while the community CA is interested in is the aggressive one; hence, Walzer cannot be seen as a friend of CA.

of justice become mere counsels of (non-moral) prudence.”²⁶ The victims of such attack are no longer committed to the common rules of war and, in particular, are not bound by the prohibition to intentionally kill the innocent. Special Permissions are the result of the return to a state of nature.

Even in this state of nature, argues Morris, attacks on third parties are not allowed. But since *qua* individuals, innocent members of the aggressive collective are no less innocent than members of third parties, the claim that only the former are legitimate targets must rely on some kind of collective morality. The metaphysical and ethical elements of this collectivist view are not made explicit by Morris, but that he is committed to such a view is undeniable.²⁷

An explicit development of the idea of a collectivist ethics in the context of war is suggested by Noam Zohar.²⁸ On Zohar’s view, human beings are both individuals and members of collectives, and this dual reality “properly yields a dual morality.”²⁹ In wars, such dual morality directs us to regard some members of the enemy society solely as individuals while subsuming others under their collective identity as “the enemy people.” The key factor, argues Zohar, is participation: combatants are those marked as participating in the collective war effort, whereas the rest of the enemy society retain their status as individuals.³⁰

While both Morris and Zohar assume a dual—individualist and collectivist—perspective, they have different views on the implications of the assumed dual morality. For Morris, our obligation to persons as “natural individuals” provides some protection for a member of the enemy collective who happens to be in my country when his collective launches an attack. I am bound to him as a natural individual.³¹ But the perspective of natural individuals will not suffice to protect the innocent members of the enemy collective residing in their cities when a nuclear device is used against them. By contrast, on Zohar’s view, this perspective requires that noncombatants are never legitimate targets for attack.³²

26. Christopher Morris, “A Contractarian Defense of Nuclear Deterrence,” *Ethics* 95 (1985): 479–96, 492.

27. Morris explicitly refers in n. 36 of his paper to Walzer’s discussion of supreme emergencies and concedes that the bombing of German cities by Britain in the early years of the war might have been justified according to his own theory too.

28. Zohar, “Collective War and Individualistic Ethics.”

29. *Ibid.*, 618.

30. *Ibid.*

31. Morris, “A Contractarian Defense of Nuclear Deterrence,” 495.

32. This view seems a bit inconsistent with Zohar’s ideas about the conditions for self-defense mentioned earlier (text near n. 15). Surely at least some noncombatants are more responsible for the forced choice between their lives and those of the other side; hence, it is not the case that they should never be considered legitimate targets for attack.

Zohar's view would appear the least helpful because it strictly forbids the killing of noncombatants. But on reflection, his argument can provide unexpected assistance. First, Zohar provides a defense of the need for a "dual morality" without which no collectivist argument could get off the ground. Second, one illustration Zohar uses to advance the idea of the moral standing of collectives seems to support a conclusion that runs counter to his own suggestion about the morality of wars. I refer to affirmative action, which Zohar takes as a powerful illustration of the rights people have qua members of collectives and not qua individuals. The moral force of demands for such action often depends on the notion that there are claims and obligations between groups,³³ particularly when such demands have to do with compensation for past wrongs done to one group by another. But, typically, when such claims are accepted, the right to reparation is granted to all members of the relevant group, by virtue of membership alone, with no regard to their individual merits or demerits. Thus, Zohar is willing to accept that at times one might be (morally and legally) entitled to various privileges merely by virtue of membership in some collective. But if so, why can't one also be expected to bear various burdens and accept vulnerabilities and losses by virtue of such membership? Surely membership in collectives shouldn't confer only (moral and other) benefits on its members! Moreover, if membership cannot impose duties and burdens, then, at least in some cases of affirmative action, it cannot provide privileges either, because, in such cases, affirmative action is action by the previously oppressing, unjust collective toward the one that was previously oppressed and discriminated against. Without a collectivist framework, individual members of the oppressing group cannot be expected to bear the burden, monetary and other, of their (or their ancestors') acts of oppression, implying that the oppressed group cannot hope for compensation.

If mere membership in a collective, then, is sufficient to grant privileges and rights for each and all of its members and, in the same way, impose burdens in the manner just explained, why not say the same about the burdens of war? Mere membership in an aggressive collective should thus be sufficient to justify imposing on a person the burdens of war, including making her a legitimate target for attack (when such an attack is necessary to obstruct the aggression of the collective), regardless of personal responsibility or innocence. In other words, those who want to help themselves to collectivist premises in some normative contexts, for example, in affirmative action, cannot easily escape the implications of these premises regarding the ethics of war. The inference could, of course, go the other way and suggest that affirmative action

33. Zohar, "Collective War and Individualistic Ethics," 618–19.

is unjust. I shall ignore this possibility right now because all I wish to establish at this stage is the initial plausibility of CA. Affirmative action is a plausible doctrine, and if it presupposes CA, then CA should enjoy some initial plausibility too.

True, the burden imposed on individual members of a collective in times of supreme emergencies by their membership is much higher than that imposed on them within the context of compensating a previously oppressed group. But so is the immediacy of the threat and the gravity of the wrong committed by the collective. Insofar as compensation for past oppression and discrimination is concerned, the burdens that members of the oppressing collective need to bear are economic and social. Where present oppression is concerned, involving the threat of massacre and enslavement, the burdens that such members might have to bear are much higher—they might suffer death if that is necessary to protect the attacked collective from their (i.e., their country's) aggression.

I should clarify that I am not suggesting that support for affirmative action necessarily commits one to support CA. There are no doubt arguments for affirmative action which do not assume collectivist premises. Rather, I am using (the collectivist understanding of) affirmative action as a way of conferring initial plausibility to the kind of collectivist thinking which is at the root of CA. Through thinking of affirmative action, we can get a sense of the general attractiveness of CA.

Finally, note that the collectivist justification for killing in war is part of the general justification to kill in self-defense. It is based on the idea that the aggressive collective might be attacked, qua collective, in order to neutralize the threat it poses, just as in individual self-defense. And the point of CA is that to be attacked qua collective means to have its members suffer the results of such attack merely by virtue of being such members. The collectivist proposal, then, in no way justifies attacks on third parties (as collectives or as individuals). To illustrate: if the United States knows for sure that Iran is going to kill millions of Americans with some nonconventional weapon, and if the only way to prevent such an attack is by striking first with its own nonconventional weapon, then, on CA, the United States would be entitled to give priority to the lives of Americans over those of Iranians. But if, for some reason, the United States could defend itself only by striking at a third party, then such a strike would not be permissible, even if refraining from it could mean the destruction of America.

My presentation of the best case for CA has been rather detailed for two reasons. First, after AMR and ASR are rejected, CA seems to be the last resort for proponents of SPs. Second, I believe that something like CA is what many people actually have in mind when they think of supreme emergencies. They implicitly regard the innocents on the en-

emy side as less worthy of protection than the innocents of third parties and a fortiori of the innocents on their own side.

However, as indicated at the beginning of the section, I believe that CA does not withstand criticism. Its main defect is its inability to offer an account of membership that would be thin enough to apply to all (or almost all) potential victims of SPs, while thick enough to establish the moral propriety of killing them. A thin notion of membership maintains that being a member of a collective means nothing more than being one of a number of people who share a particular feature. With regard to the example of Germany, the feature would be “being a German citizen,” which would neatly cover all Germans, street cleaners and others, and thus explain, under CA, the license to kill them in the circumstances described in Section III above. But one can easily see that this notion of membership is far too thin and leads to absurd results. Each of us belongs to infinite groups of people who share with us at least one feature (having a first name starting with a *d*, liking scuba diving, being a parent of four, etc.), and holding us responsible for what other “members” of such groups do would be ridiculous. To go back to our street cleaner, the thin notion of membership fails to explain why the very fact of his having a German citizenship suffices to turn him into a morally legitimate target for attack, a fortiori with young German children.

To get off the ground, then, CA evidently needs a thicker notion of membership, one that includes actual cooperation with other people in the attainment of shared goals. Thick membership means working together with these other people, and being conscious of doing so, that is, of acting jointly as a group. Being a collective member in this sense indeed seems to make one accountable for the collective’s actions, but thus construed, CA seems to collapse into AMR. The reason that AMR was found unsatisfactory was that many targets of SPs—young children, opponents of the regime, and, of course, its victims—do not cooperate in the evil actions of the countries they reside in (or are citizens of) and, hence, are not legitimate targets for attack. The thick notion CA fails to show how they are.

In other words, membership in a collective either requires a minimal degree of participation in its actions, or it does not. If it does, we are back at AMR with its shortcomings. If it does not, membership is too thin a notion to justify regarding one as a legitimate target for killing. If our street cleaner is (minimally) morally responsible for the Nazi aggression and atrocities, the justification for killing him in supreme emergencies lies in AMR. If he is not (which was the main reason for finding AMR unsatisfactory), then CA falls short of showing how killing him could be morally permissible. All the more so with non-German residents, such as visitors to the country, foreign journalists, foreign

diplomats, and so forth, who could not under any conceivable stretch of the imagination be thought to be members of the enemy group. With the failure of CA too, we seem to have reached an impasse in the attempt to justify SPs.

VI. TERRORISM AND SPs

Special Permissions are sometimes used to justify terrorism, and they are also used to justify counterterrorist measures. Let me discuss each of them in turn. By “terrorism,” I refer here to indiscriminate attacks on members of an enemy collective, for example, by crashing aircrafts into buildings, planting bombs in restaurants, and so forth. Groups using such measures often conceptualize their situation as one of supreme emergency. They claim that the threat to their groups is grave, that conventional means, diplomatic and military, are unable to counter the threat, and that unconventional means—namely terrorism—can do so. These are precisely the conditions for a supreme emergency, as outlined at the outset. Thus, it seems that if indiscriminate killing is justified in standard cases of supreme emergencies, like the bombing of German cities in World War II, then terrorism might be justified too.

Walzer refuses to accept this conclusion. While he is ready to grant SPs to states that stand with their backs to the wall, he refuses to grant such Permissions to nonstate agents using terrorism, because in his view “every act of terrorism is a wrongful act.”³⁴ As demonstrated recently by Coady, this pro-state bias is unjustified; hence, those who allow states to use indiscriminate killing in supreme emergencies cannot support an absolute prohibition on terrorism.³⁵ Yet, though in principle acts of terror might enjoy the protection of SPs, in the real world they very rarely meet the necessary conditions for supreme emergencies. The threat which allegedly justifies the turn to terrorism is usually nowhere near a threat of “massacre and enslavement”; nonterrorist means are not seriously explored, while they almost always exist; and terrorism rarely achieves more than can be achieved by nonterrorist means. The point has been convincingly made by others, and there is no need to repeat their arguments here.³⁶

What about Special Permissions for the forces fighting against ter-

34. Michael Walzer, “Terrorism: A Critique of Excuses,” in *Arguing about War*, 51–66.

35. C. A. J. Coady, “Terrorism, Morality and Supreme Emergencies,” *Ethics* 114 (2004): 772–89.

36. See esp. Saul Smilansky, “Terrorism, Justification and Illusion,” *Ethics* 114 (2004): 790–805; and Coady, “Terrorism, Morality and Supreme Emergencies,” 786. Coady’s example of acts of terror that could “mount a strong case” for justification under the supreme emergency clause is the Palestinian Intifada of 2000–2004, which is rather puzzling, because even the Palestinian version of the events does not contend that in October 2000 the Palestinians faced an immediate threat of anything close to massacre or enslavement.

ror? Here too, friends of such Permissions must concede that in principle they can be granted, provided (again) that there is no other way to stop the terror, that the threat is grave enough, and that the indiscriminate killing has a good chance of protecting the group suffering from terror. The main problem is that with many terrorist groups, there is no collective the targeting of which could serve as an efficient means of stopping the terrorist activity. Al-Qaeda is a good example. The threat it poses to Western civilization is enormous, but since it is not part of any specific collective that shelters and supports it, there is no collective whose cities, for instance, could be destroyed in a way that would stop Al-Qaeda terror; hence, such destruction would be pointless. For the same reason, neither AMR nor CA could apply, because both of them assume a strong tie between the members of the targeted collective and "their" terrorist campaign.

The situation is different when the terrorist group is part of a given collective and is conceived by the members of that collective as acting for the sake of their collective goals. In these circumstances, attacking members of the collective indiscriminately might stop the terror activity, and assuming that there is no other way to do so, supporters of SPs would have to allow such attacks.

VII. CONCLUDING REMARKS

The motivation for writing this article came from acknowledging the gap between the moral constraints which apply to ordinary warfare and those applying to supreme emergencies. It struck me as puzzling that while most people in Western democracies fiercely object to targeting the innocent (usually identified with noncombatants) in conventional wars, many of them seem to accept the in-principle killing of thousands of innocents in cases of supreme emergencies. In the absence of clear empirical data about public opinion on these issues, I can only rely on indirect evidence, mainly the attitude to unconventional weapons. The United States, the United Kingdom, and other democracies still invest millions of dollars every year in the production and maintenance of such destructive weapons, activities which are hard to understand unless we assume that the politicians and the military intend to use them in the case of a true emergency. Needless to say, such use would inevitably bring about the deaths of many, many innocent people. It is, of course, possible that the politicians and the military are acting against the will of their people. But until convincing evidence is presented for this hypothesis, I see no reason to accept it. It seems far more reasonable to assume that this implicit intention to use unconventional weapons in supreme emergencies, in fact, accords with the views of a significant number of citizens in these countries.

It is hard to determine whether this represents the majority view

in these countries. My own guess is that while it is all too easy and self-elevating to express categorical objection to such killing, in a situation where it's "us or them," and where the threat is grave enough, most people would opt for "us," even if this means indiscriminately killing "them." I suspect that certainly for politicians and the military, but also for most laypeople, the pull of the realist attitude ("What can we do? We have no alternative") in such circumstances would be very attractive. As mentioned at the outset, philosophers too have endorsed SPs,³⁷ and at least some of those who opposed them have done so on practical grounds (expressing doubt as to whether supreme emergencies, as defined above, ever exist) and not because of a categorical moral resistance to SPs.

I underline this point because underestimating the support for SPs in supreme emergencies takes the sting out of my entire discussion. If the support had been only marginal, then the apparent incompatibility between belief in SPs and some fundamental philosophical doctrines would not be so troubling. But it is not marginal. Hence, we seem to face a tough dilemma: either to reject AMR, ASR, and especially CA and recommend standing by while the bad guys wipe out or enslave entire peoples³⁸—in particular, while they do so to our people—or to say "No" to this recommendation and reluctantly go back and revise the philosophical doctrines that led to it. As far as I can see, there is no third option.

37. In addition to Walzer, "Emergency Ethics," see Rawls, *The Law of Peoples*, 98–99; Michael Slote, *Goods and Virtues* (Oxford: Clarendon, 1983), 95–100; Morris, "A Contractarian Defense of Nuclear Deterrence"; Judith Lichtenberg, "War, Innocence, and the Doctrine of Double Effect," *Philosophical Studies* 74 (1994): 347–68. Note that, of Walzer's critics, some object only to his argumentation, but not to his bottom line, i.e., to the claim that, if necessary, in supreme emergencies, moral rules that would otherwise be valid might be broken. See Orend, "Just and Lawful Conduct in War: Reflections on Michael Walzer"; and Tom Sorell, "Morality and Emergency," *Proceedings of the Aristotelian Society* 103 (2003): 21–37. Bellamy, "Supreme Emergencies and the Protection of Noncombatants in War," rejects Walzer's doctrine of SPs but replaces it with a version of DDE which is so permissive that in terms of noncombatant deaths, the end result—as he concedes (849)—might be the same.

38. This option is explicitly preferred by Toner, "Just War and the Supreme Emergency Exemption," who argues that "we and the world will perish anyway, sooner or later; we cannot change that. But we can at least, in so far as is in our power, let justice be done while we live" (561).