

Symposium: Torture Justifiable?

Torture, Necessity, and Supreme Emergency: Law and Morality at the End of Law

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TORTURE, NECESSITY, AND SUPREME EMERGENCY: LAW AND MORALITY AT THE END OF LAW

Zachary R. Calo*

I. INTRODUCTION

"Torture[.]" Jean Bethke Elshtain writes, "invariably appears on the 'never' list of the 'forbiddens' of human politics."¹ Few issues, after all, are more settled in law and ethics than torture. As one commentator notes, "no other practice except slavery is so universally condemned in law and human convention as torture."² Torture is a practice that Cesare Beccaria, in a statement reflective of the new Enlightenment morality of the eighteenth century, denounced as a "residue of the most barbarous centuries[.]"³ "[T]he eradication of the moral and legal basis for torture[.]" Christopher Kutz writes, "has been one of the defining features of post-Enlightenment liberal politics."⁴ Freedom from government torture is now unquestionably established as a foundational human right. Indeed, the importance and clarity of the prohibition against torture is most evident from its seminal role in the modern human rights movement. The Universal Declaration of Human Rights, the founding document of the movement, and the International Covenant on Civil and Political Rights establish that no person shall be subjected to torture. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment elaborates on this principle in a singular document, further emphasizing the defining role that this issue has had in the human rights movement. Enlightenment political ideals, fulfilled in the idea of universal human rights, have embraced the principle that torture must be prohibited absolutely and unqualifiedly.

In addition to its particular role in the human rights movement, opposition to torture also has been of seminal importance in constructing the liberal political imagination. As David Luban argues, torture is

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¹ Jean Bethke Elshtain, *Reflection on the Problem of "Dirty Hands,"* in TORTURE: A COLLECTION 77 (Sanford Levinson ed., 2004).

² John Alan Cohan, *Torture and the Necessity Doctrine*, 41 VAL. U. L. REV. 1588 (2007).

³ CESARE BECCARIA, ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS 3 (Richard Bellamy ed., 2003).

⁴ Christopher Kutz, *Torture, Necessity and Existential Politics*, 95 CAL. L. REV. 235, 239 (2007).

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fundamentally at odds with the liberal vision of politics and humanity because of the relationship it creates between torturer and victim: “The self-conscious aim of torture is to turn its victim into someone who is isolated, overwhelmed, terrorized, and humiliated. Torture aims to strip away from its victim all the qualities of human dignity that liberalism prizes.”⁵ “Liberalism[,]” by contrast, “incorporates a vision of engaged, active human beings possessing an inherent dignity regardless of their social situation. The victim of torture is in every respect the opposite of this vision.”⁶ In fact, far from merely being in tension with liberal ideals, torture serves as a practice against which these ideals were defined and established. As Michael Ignatieff remarked, “There is not much doubt that liberal democracy’s very history and identity is tied up in an absolute prohibition of torture.”⁷

Opposition to torture has found a voice not merely in the secular morality of modernity, but also in religious traditions.⁸ The human rights movement has drawn deeply from the well of theological thought, even if unknowingly or unwittingly, particularly with respect to notions of human dignity.⁹ Of course, religious traditions have had a far-from-consistent message on torture. As Jeremy Waldron notes, “Torture historically has not always been beyond the pale from a Christian point of view.”¹⁰ Yet, it must be said that the ethical imperative against torture which has acquired such currency in the modern period is as much due to the labors of religious communities as it is to the high politics of human rights. Lutheran theologian Helmut Thielicke, writing in the mid-twentieth century, offered the following comment on torture: “If we make ourselves fundamentally unpredictable, i.e., if as Christians we think that torture is at least conceivable—perhaps under the exigencies of an extreme situation—we thereby reduce man to the worth of a convertible means, divest him of the *imago Dei*, and so deny the first commandment.”¹¹ “Eternal as well as temporal issues” are at stake in

⁵ David Luban, *Liberalism, Torture and the Ticking Time Bomb*, 91 VA. L. REV. 1425, 1430 (2005).

⁶ *Id.* at 1433.

⁷ MICHAEL IGNATIEFF, *THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR* 136 (2004).

⁸ On religion and human rights, see WILLIAM T. CAVANAUGH, *TORTURE AND EUCHARIST* (1998); *TORTURE IS A MORAL ISSUE: CHRISTIANS, JEWS, MUSLIMS, AND PEOPLE OF CONSCIENCE SPEAK OUT* (George Hunsinger ed., 2008).

⁹ John Witte, Jr., *Law, Religion and Human Rights*, 28 COLUM. HUM. RTS. L. REV. 1, 5–6 (1996).

¹⁰ Jeremy Waldron, *The Injury Done by Christian Silence to Public Debate over America’s Use of Torture*, 2 J.L. PHIL. & CULTURE 1, 10 (2008).

¹¹ HELMUT THIELICKE, *THEOLOGICAL ETHICS, VOLUME 1: FOUNDATIONS* 646 (1966).

the issue of torture, Thielicke concludes.¹² The Catechism of the Catholic Church similarly provides that, “*Torture* which uses physical or moral violence to extract confessions, punish the guilty, frighten opponents, or satisfy hatred is contrary to respect for the person and for human dignity.”¹³

In law and ethics, and in worldviews, secular and sacred, opposition to torture has found clear expression unrivaled in the modern period. This principled opposition both reflects, and in no small measure helped to establish, the parameters of liberal politics. The seminality of this principle makes the recent debate over torture’s permissibility all the more astounding. No respectable thinker would propose reexamining laws concerning the rights of racial minorities or women, both of which have had an equally significant role in the drama of liberal politics. Yet, many thoughtful and morally serious thinkers have proposed that there might be circumstances in which torture is legally and morally permissible. In fact, Thomas Crocker has gone so far as to propose that “substantial academic consensus may exist that in extreme circumstances one could imagine justifying the practice of torture as a lesser evil to avoid the greater evil of many thousands, or even millions, of innocent deaths.”¹⁴ What accounts for this seeming blind spot in the principled liberalism for which opposition to torture has been a *sine qua non*? As David Luban has compellingly argued, intelligence gathering “is the only rationale for torture that liberal political culture admits could even possibly be legitimate.”¹⁵ When confronted with a “looming catastrophe,” captured most vividly in the ticking time bomb scenario, many liberals are unable to sustain their principled rights-based opposition to torture.¹⁶ Torture under conditions of necessity, notes one commentator, “poses a dramatic challenge to our personal beliefs about right and wrong[.]”¹⁷ Thus, while most liberals support the principle that freedom from torture is a fundamental and inviolable human right, they are unable to reject in toto the argument that torture might be permissible “in gravely dangerous situations[.]”¹⁸

Given the challenge that exigent political circumstances pose to liberal principles, it is not surprising that the topic of necessity has been

¹² *Id.* at 647.

¹³ CATECHISM OF THE CATHOLIC CHURCH § 2297 (rev. ed. 1994).

¹⁴ Thomas Crocker, *Overcoming Necessity: Torture and the State of Constitutional Culture*, 61 SMU L. REV. 2 (2008).

¹⁵ See Luban, *supra* note 5, at 1436.

¹⁶ *Id.* at 1439.

¹⁷ Paola Gaeta, *May Necessity Be Available as a Defense for Torture in the Interrogation of Suspected Terrorists?*, 2 J. INT’L CRIM. JUST. 786 (2004).

¹⁸ See Luban, *supra* note 5, at 1436.

perhaps the most important and contested aspect of the torture debate. The topic most commonly arises in the context of considering whether necessity justifies the illegal actions of a government official who authorized torture under conditions of grave danger. As John Alan Cohan observes, "Much of the extensive commentary on [torture] has alluded to the necessity doctrine as justification for torturing a suspect who likely has information concerning a 'ticking bomb[.]'"¹⁹ In this respect, the debate over torture and necessity is not narrowly about torture, but also about the authority of legal norms and the implications of exigent political circumstances, and is ultimately about the nature of liberalism itself.

The concern of this Article is not primarily with the particulars of this scholarly debate, but it is important that a brief survey of representative positions be offered. In general, the debate about torture and necessity features two competing positions. The first line of argument proposes that necessity defeats the binding prohibition against government-sanctioned torture. A number of arguments have been advanced in support of this principle. Judge Richard Posner, for one, argues that with respect to using torture to "ward off a great evil[.]" the law should "trust public officers to perceive and act on a moral duty that is higher than their legal duty."²⁰ Confronted with a situation in which torture was the only available means of potentially "averting the death of thousands, even millions," the political leader would have "the moral and political duty" to authorize torture.²¹ This duty, he adds, is found in the law of necessity, "understood not as law but as the trumping of law by necessity[.]"²² It is this law of necessity which "justifie[s]" extralegal action by political officials.²³ Posner does not address with specificity the procedure by which this justification becomes operative, though the clear thrust of his argument is that the president should not be subject to criminal punishment if torture was sanctioned under true conditions of necessity. The law of necessity thus represents for Posner a supervening legal principle to which the "law must adjust" in times of emergency.²⁴

Posner justifies torture during emergency situations by relying on a law of necessity rooted in the Constitution and the inherent authority of the Executive. Other commentators, by contrast, have argued for utilizing the criminal law defense of necessity which establishes that

¹⁹ See Cohan, *supra* note 2, at 1587.

²⁰ RICHARD POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 85 (2006).

²¹ *Id.* at 86.

²² *Id.* at 158.

²³ *Id.*

²⁴ *Id.*

“[s]ome acts that would otherwise be wrong are rendered rightful by a good purpose, or by the necessity of choosing the lesser of two evils.”²⁵ This line of argument has been adopted, in more or less similar form, by a number of commentators. John Alan Cohan, for instance, concludes “that the way to handle torture in an extreme emergency is to recognize that, while torture is prohibited, necessity provides an overriding justification under the circumstances.”²⁶ Adam Raviv similarly concludes, “The defense of necessity or justification can serve as an effective means of policing the extreme interrogation of terrorism suspects in ticking bomb situations.”²⁷ Offering yet another expression of this perspective, John Parry argues that, “If torture provides the last remaining chance to save lives in imminent peril, the necessity defense should be available to justify the interrogators’ conduct.”²⁸ Parry further develops this claim in an article co-authored with Welsh White. While acknowledging that “[t]orture is categorically illegal under international law, the federal Constitution and statutes, and state law[,]” White and Parry argue that the “necessity defense should be available” for any government agent prosecuted for torturing under conditions of danger in order “to gain information that would avert a future terrorist act[.]”²⁹ They emphasize that torture should remain illegal. Torture, they argue, remains wrong in most all circumstances and, for reasons both “moral and pragmatic[.]” should not be brought within the purview of lawful activity.³⁰ Their proposal for permitting the necessity defense in select situations thus differs fundamentally from Alan Dershowitz’s oft-commented upon torture warrant proposal, which would bring authorized torture within the bounds of law. Yet, even while torture remains outside of law, the defense of necessity, when applicable, provides an excuse from criminal punishment.

Against the argument that necessity justifies torture is the contrary claim that the prohibition against torture binds political officials regardless of circumstance. For proponents of this view, the legal prohibition against torture cannot be conditional, but rather binds

²⁵ John Alan Cohan, *Necessity, Political Violence and Terrorism*, 35 *STETSON L. REV.* 903, 905 (2006) (quoting GLANVILLE WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* 198 (1957)).

²⁶ See Cohan, *supra* note 2, at 1631.

²⁷ Adam Raviv, *Torture and Justification: Defending the Indefensible*, 13 *GEO. MASON L. REV.* 135, 157 (2004).

²⁸ John T. Parry, *Escalation and Necessity: Defining Torture at Home and Abroad*, in *TORTURE: A COLLECTION*, *supra* note 1, at 158.

²⁹ John T. Parry & Welsh S. White, *Interrogating Suspected Terrorists: Should Torture Be an Option?*, 63 *U. PITT. L. REV.* 761, 764 (2002).

³⁰ *Id.* at 762.

universally, regardless of the exigencies of a particular moment. That necessity offers no justification for torture is clearly established in international law. One scholar summarizes the matter in stating that “the right not to be subjected to torture cannot be derogated from, in any circumstances. No emergency situation may allow a state to suspend or curtail this fundamental right. In international criminal law[,] torture is banned, both in times of peace and in times of war[.]”³¹ Yet, more significant even than the unconditional prohibition of torture in international law is the superstructural role this principle has in upholding the integrity and coherence of all liberal rights. The prohibition against torture is foundational to a rights-based political regime, and to whittle away at this prohibition harms the moral authority of liberalism and the political value of all rights. The efficacy of liberalism, it is maintained, is derived from a deontological commitment to certain human rights from which no derogation is permissible. To excuse torture in difficult cases undermines all rights.

The argument that necessity cannot override the prohibition against torture rests on general claims about the authority of law in emergency situations, but also reflects views about the particularly abhorrent nature of torture. Scholars have long debated the question of whether and why torture is different than other forms of violence.³² The argument that torture is different, and thus justly prohibited by law without exception, generally considers the damage done to both victim and torturer. Michael Ignatieff, for one, has argued that “[a]n absolute prohibition is legitimate because in practice such a prohibition relieves a state’s public servants from the burden of making intolerable choices, ones that inflict irremediable harm both on our enemies and on themselves, on those charged with our defense.”³³ Jeremy Waldron has similarly considered the ways in which religious notions of human dignity make torture distinctly problematic.³⁴ What is interesting, however, is that the belief that torture undermines and threatens our moral traditions in a particularly violent way supports the argument that the legal ban must remain sacrosanct. Christopher Kutz summarizes this line of thinking in writing that

[n]ecessity really does justify overriding some kinds of rights claims in many instances, but these are rights of a

³¹ See Gaeta, *supra* note 17, at 787.

³² See Henry Shue, *Torture*, 7 PHIL. & PUB. AFF. 124, 124-43 (1978), for an important contribution to this debate.

³³ IGNATIEFF, *supra* note 7, at 142.

³⁴ See generally Waldron, *supra* note 10.

fundamentally different nature from the ones involved in the ticking-bomb example. Criminal theorists have over-generalized the appropriate normative scope of the necessity defense by confusing those rights whose abrogation the defense can legitimately justify with all rights.³⁵

Waldron makes a similar claim that the legal absolute is appropriate for torture because “certain things might just be repugnant to the spirit of our law, and . . . torture may be one of them.”³⁶ He proceeds to argue that torture holds an “emblematic” and “archetyp[ical]” role within “the spirit of our law[.]”³⁷ Thomas Crocker echoes similar themes in arguing that permitting torture under necessity “alters the structure of constitutional commitments with consequences that are difficult to predict or imagine.” Such an action undermines the “fundamental dignity, autonomy, and liberty of persons” which is the foundation of “constitutional culture.”³⁸ While necessity might justify certain actions, the prohibition of torture is so central to democratic liberal principles that exigent political circumstances cannot justify derogation.

This paper proposes that neither of these two lines of argument proves ultimately satisfying. The argument that law must bind unconditionally, even in the midst of an emergency situation, fails to reckon with the limits of law or, as Eric Posner and Adrian Vermeule claim, fails “to come to grips with the inevitability of tragic choices.”³⁹ This position attempts to bind politics within law in a way that fails to account for the possibility of moments for which law cannot provide an adequate response. As Dietrich Bonhoeffer wrote from prison during World War II,

In the course of historical life there comes a point where the exact observance of the formal law of a state . . . suddenly finds itself in violent conflict with the ineluctable necessities of the lives of men; at this point responsible and pertinent action leaves behind it the domain of principle and convention, the domain of the

³⁵ Kutz, *supra* note 4, at 257.

³⁶ Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1717 (2005).

³⁷ *Id.* at 1717 (discussing the emblematic idea); *id.* at 1748 (discussing the archetype and spirit of our law themes).

³⁸ Crocker, *supra* note 14.

³⁹ Eric A. Posner & Adrian Vermeule, *Should Coercive Interrogation Be Legal?*, 104 MICH. L. REV. 671, 677 (2006).

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normal and regular, and is confronted by the extraordinary situation of ultimate necessities, a situation which no law can control.⁴⁰

The argument that law must bind applies ordinary legal logic to a state of affairs that lies beyond legal rationality. At the same time, the argument that political necessity excuses torture fails to take seriously the implications of this action. To countenance torture and bring it within the bounds of lawful conduct not only undermines foundational legal norms but assaults the moral order and humanistic achievements on which civilization depends. In short, those arguing for a deontological approach to torture fail to take necessity seriously enough, and those arguing for a utilitarian approach to torture do not take order seriously enough.

This Article offers an alternative to these dominant lines of debate in the form of Michael Walzer's account of supreme emergency. Walzer does not specifically address the question of supreme emergency to torture, but his writing on this subject, first developed over three decades ago, engages issues now being considered again in the torture debate. His perspective, in broad outline, provides that extreme circumstances might require political officials to violate legal norms. At the same time, he does not locate the principle of necessity within law, nor does he establish necessity as an excuse to legal punishment. To do so, he implies, would domesticate a moment properly understood as participating in the darkness of political tragedy. In his most important claim, Walzer instead presents necessity as an ethical concept that derives its meaning from the obligations among persons in political community. By neither denying the reality of necessity nor locating necessity within law, Walzer reframes the debate about legal authority and political action in the midst of crisis.

One might question the value of this project for our present moment. As David Luban writes,

The real torture debate . . . isn't about whether to throw out the rulebook in the exceptional emergencies. Rather, it's about what the rulebook says about the ordinary interrogation—about whether you can shoot up Qatani with saline solution to make him urinate on himself, or

⁴⁰ Dietrich Bonhoeffer, *Christ, the Church, and the World*, in THEOLOGICAL FOUNDATIONS FOR MINISTRY 559 (1979).

threaten him with dogs in order to find out whether he ever met Osama bin Laden.⁴¹

Would our public and academic discourse not be better served by clarifying foundational legal principles rather than obfuscating the debate with theoretical speculation? I do not disagree with Luban's assessment of the central challenges in the torture debate. Yet, we should not embrace an overly narrow account of the "real" issues, for there is not the stark divide Luban implies between "real" and "exceptional" circumstances. In the end, it is important to consider law's authority during exceptional circumstances as a means of clarifying the scope of law's authority during more ordinary times. The debate about torture and necessity has raised foundational questions about the nature of law within a liberal democracy premised on the priority of human rights. The opening provided by this moment of political reflection should not be dismissed. Walzer's thought is thus not offered as a substitute for thinking about more technical questions of legal interpretation. It is offered as a way of clarifying this analysis. By pushing law's authority to its limits, we can better define the principles which govern legal rationality in ordinary time. Hard cases perhaps make bad law, but hard cases also force us to confront our assumptions about the meaning of liberalism at its limits.

II. "SUPREME EMERGENCY" AND THE OVERRIDING OF LAW

Walzer's most important work on necessity appears in the context of his writing on "supreme emergency." Walzer, it should be noted, does not typically use the language of necessity, nor does he write as a legal scholar concerned with such matters as executive authority or the criminal law defense of necessity. A political philosopher, Walzer develops the concept of supreme emergency in the course of examining whether it is permissible to target civilian populations during a just war.⁴² His response, in brief, is that during a supreme emergency it might be permissible, perhaps obligatory, that a political leader take actions that "override the rights of innocent people and shatter the war convention."⁴³

Walzer defines supreme emergency in exceedingly narrow terms. His aim is to establish "radical limits to the notion of necessity" and to

⁴¹ David Luban, *Torture, American-Style*, WASH. POST, Nov. 27, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/25/AR2005112501552.html>.

⁴² MICHAEL WALZER, *JUST AND UNJUST WARS* (1977) (Walzer first took up this question in his 1977 book, *Just and Unjust Wars*).

⁴³ *Id.* at 259.

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remove the concept as far as possible from the reality of ordinary politics.⁴⁴ A supreme emergency exists, he thus writes, only “when our deepest values and our collective survival are in imminent danger[.]”⁴⁵ The existence of this state of affairs is determined by reference to the imminence and nature of a threat.⁴⁶ Neither criterion alone is sufficient to give rise to a supreme emergency. Only a threat that is simultaneously both imminent and of extreme danger might be termed a supreme emergency. The threat, in short, must be “of an unusual and horrifying kind.”⁴⁷

There is a certain imprecision to this definition of supreme emergency, as there unavoidably must be. As a result, Walzer turns to historical examples, in particular, the Nazi threat to England between 1940 and 1942, to illustrate supreme emergency. Nazism, Walzer writes, “was a threat to human values so radical that its imminence would surely constitute a supreme emergency[.]”⁴⁸ It is only when confronted by an “ultimate horror[.]” such as this that the “rule of necessity” permits violating the rights of others in order to “save a nation[.]”⁴⁹ It is in light of this principle that Walzer concludes that the British bombing of German civilian targets was permissible.⁵⁰ Yet, Walzer adds that the circumstances had so changed after 1942 that this conduct was no longer permitted.⁵¹ The supreme emergency had ended. Absent this precondition, it was no longer morally permissible “to override the rights of innocent people” for the sake of national preservation.⁵² On this point Walzer is particularly clear: extralegal action that violates human rights cannot be justified simply to minimize losses or hasten the end of conflict.⁵³ For these reasons, Walzer concludes that the bombing of Hiroshima was without justification. Only when a threat is truly civilizational in nature – that is, when it threatens to destroy the nation’s “commitment to continuity across generations” – does acting outside of law become a possibility.⁵⁴

⁴⁴ *Id.* at 261.

⁴⁵ MICHAEL WALZER, ARGUING ABOUT WAR 33 (2004).

⁴⁶ WALZER, *supra* note 42, at 252.

⁴⁷ *Id.* at 253.

⁴⁸ *Id.* at 253.

⁴⁹ *Id.* at 254.

⁵⁰ *Id.* at 261.

⁵¹ *Id.*

⁵² *Id.* at 259.

⁵³ *Id.* at 266.

⁵⁴ WALZER, *supra* note 45, at 43. Walzer does not specifically address the scope of the warrant to act outside the law, nor the process by which a political official determines which rules might be overridden. It seems clear, however, that a political official should limit extralegal action as much as is practicable and should only violate a law when doing

During supreme emergency, necessity becomes the rule against which ordinary laws are judged. The “rule of necessity” provides the “highest values” to which the leader is obligated.⁵⁵ It is thus no longer fidelity to law, but fidelity to a higher order of responsibility that defines the vocation of the political official. However, if supreme emergency warrants political officials to operate without regard to ordinarily binding legal norms, what becomes of law’s authority? Does the rule of necessity negate the legal principles that govern political conduct under ordinary circumstances? Walzer’s response to these questions most vividly reveals the relationship between supreme emergency and the approaches to necessity offered in the torture debate referenced above.

Walzer’s position is that law does not bind during a supreme emergency because ordinary legal logic ceases to meaningfully address the strained state of affairs. Supreme emergency, he writes, “describes those rare moments when the negative value that we assign—that we can’t help assigning—to the disaster that looms before us devalues morality itself and leaves us free to do what is militarily necessary to avoid the disaster[.]”⁵⁶ During these uncommon situations, the “rights normality[.]” which ordinarily binds political conduct, ceases to hold value. The “moral stakes” are simply too high for ordinary rules.⁵⁷ In making such claims, however, Walzer does not argue that supreme emergency negates the validity of the underlying legal norm. The norm remains valid. It is rather that the exigencies of the moment compel fidelity to a higher rule of necessity. The rule of necessity has greater pull than the ordinary laws of the state, yet the rule exists outside of law. It is not a principle within law. It is other than law. As such, the demands of law remain incontrovertible even as radically contingent circumstances require deviation from law. In Walzer’s phraseology, a supreme emergency requires that laws be “overridden” but not be “set

so is necessary to the immediate objective of overcoming the threat posed by supreme emergency. Walzer’s case study of bombing civilian targets seemingly indicates that the decision to inflict unlawful violence against others must be assessed in a fact specific manner. The warrant which a leader acquires during supreme emergency to violate laws is not a blanket authority. The leader is not transmuted by virtue of necessity into an unalloyed sovereign who might act without respect to the bindingness of law. The ruler remains embedded within the web of the law, and a decision to authorize violence that operates against these norms must emerge out of a deliberate and morally serious process of reflection.

⁵⁵ WALZER, *supra* note 42, at 254.

⁵⁶ WALZER, *supra* note 45, at 40.

⁵⁷ Michael Walzer, *Political Action: The Problem of Dirty Hands*, in TORTURE: A COLLECTION, *supra* note 1, at 73.

aside, canceled, or annulled.”⁵⁸ This arrangement, Walzer often notes, is similar to civil disobedience.⁵⁹

By characterizing the rule of necessity in this way, Walzer refuses to grant supreme emergency any final autonomy. The rule of necessity remains an aberration, even as it operates authoritatively. As a consequence, the rule of necessity does not free political officials from judgment for the extralegal actions they authorize during a supreme emergency. Necessity for Walzer is not a supervening legal norm that excuses judgment. It is a temporary warrant which permits the ruler to operate apart from law, in a parallel source of authority. But the rule of necessity must ultimately return to the law as it operates in ordinary time. Freedom and limitation exist in creative tension during supreme emergency. The ruler who acts in contravention of law does so with freedom from the immediate bounds of law, yet cannot escape the final judgment of law. The rule of necessity is not an end in itself, but finds its ultimate resolution only in a return to law that inaugurates judgment upon actions taken in supreme emergency. Although Walzer does not “defend any particular view on punishment[,]” warranted extralegal action undertaken during supreme emergency is necessarily paired with guilt and judgment.⁶⁰ Through the return to law, the authority of the legal order is upheld and the moral order is restored.

In upholding the authority of law, even as it is temporarily overridden by the rule of necessity, Walzer develops a fundamentally different perspective from those who define necessity as excuse and justification. As discussed above, those advancing this latter position argue that the binding authority of law is defeated by a superior legal principle of necessity. The prohibition against torture thus has no effect when violated under certain conditions of necessity. For Walzer, on the other hand, the temporary silence of law during supreme emergency does not negate law but rather triggers a search for a source of political authority outside of law. Walzer finds the authority to act in contravention of law in the realm of ethics and, in particular, in the

⁵⁸ *Id.* at 68.

⁵⁹ *Id.* at 72.

⁶⁰ *Id.* at 73. Although Walzer refers here to formal legal punishment, he speaks of punishment in broader terms. In fact, he adds,

Moral rules are not usually enforced against the sort of actor I am considering, largely because he acts in an official capacity. . . . In any case, there seems no way to establish or enforce the punishment. Short of the priest and the confessional, there are no authorities to whom we might entrust the task.

Walzer illustrates this process of judgment in his discussion of the “[d]ishonoring” of Arthur Harris, who directed the bombing of Germany from 1942 until the end of the war. WALZER, *supra* note 42, at 323–25.

obligations among persons in community. Walzer's account of the enduring authority of the legal norm during supreme emergency thus rests on a broader claim about the relationship between law and morality during supreme emergency. It is to this subject that this Article now turns.

III. LAW, JUDGMENT, AND THE RESTORATION OF MORAL ORDER

A. *Law and Morality in Supreme Emergency*

Much of the debate concerning torture focuses on the question of whether there exists a legal principle that warrants illegal actions under conditions of necessity. For Walzer, by contrast, necessity is best understood as a moral rather than legal category. Above all, the warrant for acting outside law during a supreme emergency is not based in a legal principle but rather in supra-legal moral obligations that inform political life. In short, this Article proposes that supreme emergency rests on establishing law and morality as distinct loci of political authority, with the latter providing the content of responsible action during conditions of necessity. As such, Walzer shifts the discussion of necessity from law to morality.

This division between law and morality is pertinent only during supreme emergency. Under ordinary political circumstances, the public obligations of an official are determined solely by the requirements of law. Moral obligations possess no authority under such conditions to warrant official action in contravention of the law. Law binds unconditionally. In this respect, it is law's morality that must guide officials during ordinary time. In an earlier essay, for instance, Walzer describes the duties of state officials in terms of acting solely within the bounds of law: "The state can thus be described as a purely external limit on group action, but it must be added that the precise point at which the limit becomes effective cannot be left for state officials to decide. For them, the law must be the limit."⁶¹

Walzer advances a broadly positivistic conception of law, at least insofar as he presents law as categorically distinct from morality. At the same time, Walzer views law and morality as necessarily intertwined within the economy of political decision-making. Law, in this respect, is not subject to morality, nor does it lack significant points of contact with morality. A full account of politics must take account of both. This is above all the case during conditions of necessity, which gives rise to

⁶¹ Michael Walzer, *The Obligation To Disobey the Law*, in *LAW AND MORALITY* 129, 140 (Don Welch ed., 1987).

circumstances in which law and morality create dissonant obligations. In particular, the situation creates tension between the obligation to law and the obligation to prevent “nullification” of the community.⁶² Stated differently, supreme emergency creates conflict between laws “founded on a conception of rights that transcends all immediate considerations[.]” and the existential demands of supreme emergency that transcend the ordinary bounds of political life.⁶³

It is impossible to simultaneously uphold both obligations. While in ordinary time, a leader defers to the binding norms of law, during supreme emergency a leader might be required to follow obligations to the community. Thus, there is a tension, indeed a vocational dissonance, at the existential fringes of politics. Law alone cannot offer a full account of political obligation in this moment, and only by opening law to the demands of morality can the crisis be understood.

Even as the source of authority during supreme emergency shifts from law to morality, law continues to establish obligations to which all are subject. Supreme emergency does not negate law or create a zone of autonomy within which a political leader can operate without regard to the law. Nor is political necessity an excuse that lifts the judgment upon those actions that violate law. Rather, during supreme emergency, law and morality exist as dueling and equally authoritative loci of authority. What has changed is that the higher vocation of moral obligation temporarily grants officials the warrant, and perhaps the obligation, to act contrary to law.

B. The Ties That Bind: The Sources of Moral Obligation

By locating necessity within the sphere of moral obligation, Walzer avoids equating necessity with lawlessness. Rather, extralegal action taken during supreme emergency is simultaneously warranted and unlawful. Such acts therefore stand between the yes and the no of history—between the transcendent demands of necessity and the norms of law established in ordinary time. Even as necessity calls forth the need to act in contravention of law, law stands in judgment of this decision. As such, the ruler upon whom the necessity of extralegal action is placed must “accept the burdens of criminality[.]”⁶⁴

Justifying the authority of moral obligation within Walzer’s scheme requires understanding what Walzer means by moral obligation. When Walzer refers to moral obligation, he is not speaking of an ethereal code,

⁶² WALZER, *supra* note 42, at 260.

⁶³ *Id.*

⁶⁴ *Id.*

nor is he writing about the subjective moral beliefs a person holds. Rather, Walzer's account of moral obligation emerges out of his understanding of community.⁶⁵ A moral obligation in the realm of politics derives its efficacy from the communitarian relations among persons. The act of necessity, in other words, cannot be isolated from the moral logic of the community. Political officials, even just officials who make the tragic decision to override law, do not stand outside the moral community of which they are a part. The moral life, Walzer notes, is a "social phenomenon[.]"⁶⁶ The decision to override law emerges therefore not from the courageous and defiant will of an isolated leader but from the dialogical nature of moral engagement.

In an essay published a decade prior to *Just and Unjust Wars*, Walzer writes, "Disobedience, when it is not criminally but morally, religiously, or politically motivated, is almost always a collective act, and it is justified by the values of the collectivity and the mutual engagements of its members."⁶⁷ This statement reveals early stirrings of Walzer's understanding of the communal foundations of political morality, a theme which undergirds his later claims concerning supreme emergency. This collectivity, as Walzer describes it, refers to something more capacious and meaningful than the citizenry of a nation-state, although the collectivity will typically take this form. Rather, the community of persons who create obligations are a people united in the project of constructing and sustaining culture, moral traditions, and social order. The decision to act in violation of law, within the context of supreme emergency, is therefore better understood as an affirmation of the duty to sustain the collective rather than as a rejection of the collectivity's moral judgments reflected in law. This broader framework within which necessity should be evaluated is lost when the subject is considered exclusively from the perspective of legal rights.

In general, the moral life of a community does not oppose law but rather feeds its development. As Daniel Warner writes, "for Walzer, . . . the experience of coming up with rules is part of the social process in a liberal society[.]" The rules which take shape to guide a social order "reflect the historic community and the desires of its members."⁶⁸ Under ordinary circumstances, law is properly reflective of the moral life of a political community. Yet, in moments of supreme

⁶⁵ Martin L. Cook, *Michael Walzer's Concept of 'Supreme Emergency'*, 6 J. MIL. ETHICS 138, 146 (2007).

⁶⁶ Walzer, *supra* note 57, at 66.

⁶⁷ Walzer, *supra* note 61, at 130.

⁶⁸ DANIEL WARNER, AN ETHIC OF RESPONSIBILITY IN INTERNATIONAL RELATIONS 117 n.15 (1991).

emergency, law can no longer operate as the sole determinant of just political action. Rather, law and morality, which in ordinary time operate in tandem, become distinct and competing sources of obligation. Obligation to law and obligation to the moral demands of community pull in opposite directions, and necessity pushes the axis of obligation from the former to the latter. When thus faced with an ultimate decision between law and morality, a leader might be called upon to side with the latter. As Walzer writes, when moments of “evil and imminent danger” threaten the survival of the community, the leader must “accept the burdens of criminality here and now[]” for the sake of “our history” and “our future[.]”⁶⁹

Walzer’s claim that moments arise in which the leader must break the law for the sake of the community is a bold assertion that demands further consideration. What is it about the community which demands political officials to break the law? Walzer never discusses this question specifically, but an answer emerges from the general logic of his writings on supreme emergency. Obligation to community holds such authority because community, for Walzer, is ultimately prior to the law. Because law emerges out of the moral life of the community, and is sustained and made meaningful through its participation in the lived life of a people, law possesses no final autonomy from the community. As such, when a supreme emergency imperils the existence of a people, it is not only appropriate but morally obligatory that the ruler break the law for the sake of preserving that upon which the law depends. A community possesses an “ongoingness[]” whose vitality cannot be contained within law alone.⁷⁰ It is important to recall in this context that supreme emergency is a situation in which the survival of people—its ongoingness—is threatened. Such a threat, Walzer notes, is “a loss that is greater than any we can imagine[.]”⁷¹ It would be foolhardy in such a situation to propose that the community perish so that its laws might be upheld.

Viewed in this broader context, Walzer’s approach to political necessity reveals itself to be rooted more in relationality than principle. Put differently, Walzer approaches necessity from the perspective of the duties persons owe rather than the rights they are owed. Walzer pushes liberal discourse away from a procedural and substantive discussion of

⁶⁹ WALZER, *supra* note 42, at 260. Walzer’s position rests on an account of the community that is not unproblematic. He seems at points to absolutize, even sacralize, the community in its “ongoingness[.]” In the least, it is curious to frame the situation in terms of a leader having a moral duty to violate laws that establish the moral obligations one has in relation to other persons. Cook, *supra* note 65, at 144 (emphasis omitted).

⁷⁰ WALZER, *supra* note 45, at 43 (emphasis omitted).

⁷¹ *Id.*

rights toward a broader conception of human relations. Walzer is not, of course, rejecting the concept of rights in toto, but he is supplementing liberal rights talk with a consideration of the moral duties which texture political life. Duty is a central concept, for Walzer, because “[n]o political theory which does not move beyond rights to duties . . . can ever explain what men actually do when they disobey or rebel, or why they do so.”⁷² The limitations of rights are most fully displayed in a supreme emergency, during which the moral vocabulary of duties offers a fuller account of the obligations incumbent upon a political leader. The language of rights might be adequate to describe the ordinary mechanism of government, but Walzer warns of the danger of absolutizing rights in a way that obfuscates the supervening moral obligations to community.

C. *The Judgment of Law and the Ruler as Scapegoat*

While moral obligation to community warrants extralegal action during supreme emergency, the law is not ultimately defeated. Rather, the law is upheld and, in the aftermath of supreme emergency, brings judgment upon those violative actions taken, albeit necessarily and rightfully, during the crisis. Walzer treats necessity as a circumstance that justifies extralegal action but does not remove the legal prohibition. In his refusal to make necessity the basis for overturning the legal order, Walzer echoes Dietrich Bonhoeffer’s warning that in moments of crisis, “The true order is completely reversed if the *ultima ratio* itself is converted into a rational law, if the peripheral case is treated as the normal, and if *necessità* is made a technique.”⁷³ By upholding the norms of legal order, even if a deviation is permitted, Walzer refuses to permit necessity to become a principle. Even justifiable actions taken during a state of exception must be denominated transgressive. Walzer writes that the rules “still stand and have this much effect at least: that we know we have done something wrong even if what we have done was also the best thing to do on the whole in the circumstances.”⁷⁴ Permitting necessity to negate law would undermine the civilizational accomplishment of law and, even more so, defeat the moral foundations of the social order that make law meaningful.

This retention of law’s judgment does more than prevent necessity from becoming a freestanding normative principle. The upholding of law also resets the moral foundations of the social order and reunites the

⁷² Walzer, *supra* note 61, at 144.

⁷³ BONHOEFFER, *supra* note 40, at 208.

⁷⁴ Walzer, *supra* note 57, at 68.

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legal and moral spheres of authority. The judgment of law pulls the nation back within the boundedness of law and reinforces those norms from which no escape is permitted. The judgment of law remains, for it is this judgment that restores moral order in the aftermath of tragic violence. While necessity allows for the possibility of transcending the bounds of law, the judgment of law reasserts the moral limits of politics. Through judgment, law and morality, which had occupied distinct spheres of authority during supreme emergency, are again united.

Yet Walzer does not stop here. Legal judgment not only restores the connectedness of law and morality but participates in the process of political redemption. Upholding the rule makes the official who acted out of necessity a scapegoat who bears the sins of the nation. Law makes known these sins for, as Walzer writes, it requires that the official “acknowledge and bear (and perhaps . . . repent and do penance for) his guilt[.]”⁷⁵ The military commander or political official who overrides the rules of war is forced to bear the burden of having done that which was necessary and appropriate. By targeting civilians, Walzer writes, government officials become “murderers, though in a good cause. . . . They have killed . . . for the sake of justice[.]”⁷⁶ They have acquired “dirty hands[.]” in the pursuit of an appropriate end.⁷⁷ Such is the paradox of acting in violation of law under conditions of supreme emergency. That which was “necessary and right was also wrong.”⁷⁸ This is the irreconcilable tension that defines the nature of supreme emergency: it is murderous and good, violative and just, right and wrong.

One might protest that Walzer is simply playing fast and loose with linguistic distinctions that hold little meaning. Yet, this would miss the point. Walzer is not trying to have his cake and eat it too. Rather, he identifies the judgment of law upon just actions as a way of reckoning with the tragic and paradoxical nature of politics. This response to tragedy is ultimately inadequate. In some sense, no response to a supreme emergency could be adequate, given that such a state of affairs, as Gilbert Meilaender observes, offers “no moral solution[.]”⁷⁹ It is perhaps for this reason that Walzer’s tension-filled account of judgment seemingly opens the political to the transcendent. In the ritual of judgment and punishment, which follows supreme emergency, Walzer

⁷⁵ *Id.* at 65.

⁷⁶ WALZER, *supra* note 42, at 323.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Gilbert Meilaender, *Michael Walzer, Just and Unjust Wars*, FIRST THINGS (Mar. 2000), available at http://www.firstthings.com/article.php3?id_article=2561.

reaches after something that is religious in nature.⁸⁰ The scapegoated ruler, forced to bear deserved guilt for just deeds, is sacrificed in a ritual that is sacred as well as legal. Even though it is law that restores normalcy in the aftermath of supreme emergency, law alone cannot account for the moral paradox which confronts a social order at the limits of law.

IV. CONCLUSION: SUPREME EMERGENCY AND TORTURE

Broadly speaking, Walzer's approach to necessity represents a third way between the dominant lines of argument found in the torture debate. On one hand, he rejects the claim that a principle of necessity ought to justify extralegal actions committed by state officials. On the other hand, he rejects an absolutist position that necessity ought to not permit violation of foundational legal principles. In short, we might summarize Walzer's position as follows: there are moments when necessity authorizes and compels officials to act contrary to law, but necessity does not cancel law nor bring such actions within the authority of law. Yet, Walzer ultimately seeks to offer more than a middle way between the demands of law and necessity. This Article has argued, rather, that by establishing law and morality as distinct loci of authority, Walzer moves beyond the either/or approach that defines the current torture debates. His alternative does not diminish the authority of law, but does embed law within a multi-textured framework. In the end, Walzer proposes that a full analysis of right action under conditions of necessity requires taking account of the distinct yet cooperative functions provided by legal and moral norms.

Much has been said about Walzer's views on law, morality, and supreme emergency. How then might his approach to these subjects inform the debate on government-sanctioned torture under conditions of necessity? First, Walzer's writings on supreme emergency complicate the idea of necessity. Supreme emergency represents a moment of potential societal collapse, a "desperate time[]" when "our deepest values and our collective survival are in imminent danger[.]"⁸¹ Necessity, in short, is limited to those incalculably rare moments that threaten the foundations of the social order. Without diminishing the horrific prospects raised by the typical ticking time bomb scenario, this state of affairs does not meet the definition of a supreme emergency. Necessity, for Walzer, represents a genuine existential crisis that cannot be domesticated within ordinary politics.

⁸⁰ *Id.*

⁸¹ WALZER, *supra* note 45, at 33.

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In defining supreme emergency this way, Walzer establishes “limits” to necessity that radically circumscribe the exercise of extralegal state violence.⁸² Supreme emergency is not, he emphasizes, a “permissive doctrine.”⁸³ In fact, far from encouraging deviation from law, “supreme emergency strengthens rights normality by guaranteeing its possession of the greater part, by far, of the moral world.”⁸⁴ Short of reaching a moment in which “we are face-to-face not merely with defeat but with a defeat likely to bring disaster to a political community[.]” a political official lacks authority to engage in actions that violate the laws of war.⁸⁵ This stands in contrast to the approach taken in the ticking time bomb scenario, which facilely invokes the language of necessity. This tendency to normalize political necessity is reflective of a broader trend within modernity by which “the state of exception . . . has become the rule[.]”⁸⁶ Supreme emergency resists such normalization of the exception.

The implications of Walzer’s position are clear though uncomfortable: there might be moments of genuine political strife in which a society must endure suffering and even defeat rather than upending the legal and moral foundations of the society. Recall that Walzer concludes the bombing of Hiroshima to have been unjust, even though pursued to hasten the end of war and limit the number of military casualties. Considerations such as “the speed or the scope of victory[.]” have no role in determining rightful conduct.⁸⁷ The rights of Japanese citizens, grounded in the principles governing conduct in war, demand respect. In short, there are things that must ultimately be valued more than mere expedience: “our civilization and morality, our collective abhorrence of murder, even when it seems, as it always does, to serve some purpose.”⁸⁸ Walzer thus concludes that “the deliberate slaughter of innocent men and women cannot be justified simply because it saves the lives of other men and women.”⁸⁹ Even amidst the ravages of war, necessity must remain beyond the pale of mere utilitarian calculation. While analogizing between innocent Japanese civilians and the captured detainee in a ticking time bomb scenario is not without problems, the relevant legal norm does not bind because of the status of those whose rights it protects. It binds because it reflects the

⁸² WALZER, *supra* note 42, at 268.

⁸³ WALZER, *supra* note 45, at 50.

⁸⁴ *Id.*

⁸⁵ WALZER, *supra* note 42, at 268.

⁸⁶ GIORGIO AGAMBEN, *STATE OF EXCEPTION* 6 (Kevin Attell trans., Univ. of Chi. Press 2006) (2003) (quoting Walter Benjamin).

⁸⁷ WALZER, *supra* note 42, at 268.

⁸⁸ *Id.*

⁸⁹ *Id.*

deepest moral principles and aspirations of a society. Thus, just as the warrant for extralegal action emerges out of the moral obligation to community, so too do the limits placed on political action. Just as a leader has an obligation to preserve the community for the future, so too does the leader have an obligation to honor the inherited moral traditions. The moral community provides the yes and the no. It empowers as it limits. Absent supreme emergency there is no warrant for contemplating an override of these foundational norms. The prohibition against torture ought to be no different in this respect than laws that prohibit the targeting of civilians.

Even as Walzer radically limits the scope of necessity, he nevertheless maintains that there are moments in which the ordinary authority of law is overturned. During supreme emergency, binding principles of law give way to the dynamic demands of history, and it is to these demands that a political official must respond. Whether under such conditions a leader might authorize torture is a question to which, on Walzer's terms, we cannot give a simple answer. The answer is to be found only in the particularities of history as they present themselves to a community and its leaders. All the same, Walzer's theory cannot be taken to absolutely close off the possibility of torture.

The thrust of Walzer's position is to reject a politics of absolutes. "[W]hen disaster looms[]" and "the heavens are really about to fall[.]" Walzer charges, falling back on the absolutist claim that certain actions simply ought to never be done represents a failure to appreciate the nature of the present evil and the tragic circumstances confronting the polity.⁹⁰ To bind necessity within such a rule is to ignore the radically contingent and tragic nature of the moment necessity creates. Rather than seeking an a priori principle that determines if necessity might justify torture, Walzer suggests that the proper response is to live into history and its vicissitudes and limitations.

A supreme emergency is a moment in which the only response might be an "immoral" response that rejects the "normal defense of rights[.]"⁹¹ This situation is tragic, to be sure, and one from which society must seek rapid escape. But there nevertheless are circumstances in which the call of history demands political officials to draw society into complicity with the tragic potential of human affairs. The tragic nature of the situation cannot be denied, as absolutists seek to do, nor can the immoral response offered be negated, as sought by those offering necessity as a legal justification. Supreme emergency is a situation for

⁹⁰ WALZER, *supra* note 45, at 37.

⁹¹ *Id.* at 47.

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which no simple principled response can be offered.⁹² It is a moment of “paradox” that defies our ordinary rules.⁹³ As such, Walzer’s account of supreme emergency pushes debate away from the question of whether the law of necessity justifies the use of torture and pulls debate into the moral darkness and legal silence that exists at the existential fringes of politics: a place where the leader “knows that he can’t do what he has to do—and finally does.”⁹⁴ In a supreme emergency, “the rule of necessity” —a rule that “knows no rules[]” —is the guiding principle for political officials.⁹⁵ To delimit in advance the content of proper action under a ruleless rule is to deny the nature of supreme emergency. The burden of making a decision about that which must be done falls squarely upon the ruler in this moment.

This position will be unsatisfying to many. It offers no clear principle of action. Yet it is precisely the quest for certainty that Walzer resists. Instead of seeking certainty, Walzer complicates a debate that aims in its dominant form to bind the tragic within legal rationality. Both of the approaches outlined above avoid an encounter with what Augustine describes as the “darkness” of “social life.” Yet, for Walzer, the only adequate response to necessity involves wrestling with the complexities that define the relationship between tragedy and democratic liberalism. It is into that dark space, neither transcendent nor pedestrian, to which the debate must move, so that we might more ably confront what Reinhold Niebuhr describes as “the confusion which always exists in the area of life where politics and ethics meet[.]”⁹⁶

⁹² Oren Gross, *The Prohibition on Torture and the Limits of the Law*, in TORTURE: A COLLECTION, *supra* note 1, at 229, 239.

⁹³ WALZER, *supra* note 45, at 45.

⁹⁴ *Id.*

⁹⁵ WALZER, *supra* note 42, at 254.

⁹⁶ REINHOLD NIEBUHR, MORAL MAN AND IMMORAL SOCIETY: A STUDY IN ETHICS AND POLITICS 25 (1932).