

Emergency Ethics

Volume I

Edited by

A.M. Viens and Michael J. Selgelid



The Library of Essays on Emergency Ethics, Law and Policy

Emergency Ethics

Volume 1

The Library of Essays on Emergency Ethics, Law and Policy

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Series Preface

Emergencies, of one sort or another, have become a normal feature of the contemporary world. Increasing media and political attention is given to catastrophic natural events, large-scale industrial accidents, famines, public health scares, financial crises, civil unrest and, of course, terrorist attacks and armed conflict, as well as to the calamities that befall particular individuals and groups. While these emergencies differ greatly in their causes, their effects and the challenges to which they give rise, an extensive literature is developing that illustrates how in different ways they all give rise to distinctive ethical, legal and political problems. Some of these relate to the jolt that emergencies give to our everyday moral assumptions as to what is acceptable treatment of each other, some give rise to doubts as to the adequacy of existing constitutional arrangements, others bear on the quality and effectiveness of emergency provisions and services.

Each volume in this series includes essays which contribute to the analysis of the nature, significance and management of emergencies from the overlapping concerns of ethics, law, politics and government, and the professional perspectives of emergency services, including policing, and military and medical involvements. Specific attention is given to the ethical dilemmas that arise in abnormal circumstances, the threat to civil liberties involved in some aspects of risk management, especially with respect to terrorism and civil unrest, and the political challenges presented by the slower moving disasters of climate change and global poverty. This is complemented by research concerning the important details that affect operational issues in such matters as disaster relief, emergency powers, international cooperation, media management and recovery programmes. A separate volume is devoted to the cascade of literature on the ethical and political problems that arise in relation to conducting research on emergencies.

The volumes are intended to assist those engaged in scholarly research by making available an extensive sample of the most important current essays on emergencies. Essays are reproduced in full with the original pagination for ease of reference and citation. The editors are selected for their special expertise in the study of ethics, law and policy relating to emergencies. Each volume represents the editor's selection of essays and includes an extensive introduction to the relevant literature.

TOM CAMPBELL

Series Editor

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Introduction

Emergencies raise important practical and theoretical challenges. What is the meaning of ‘emergency’ for example, and how should we respond to various kinds of emergencies that arise? Beyond personal emergencies that individuals might experience – for instance, suffering from a heart attack while hiking on a deserted mountain – there are public emergencies that threaten large numbers of people. Such emergencies can cause massive disruption to society and negatively affect the physical and psychological well-being of its members.

Emergencies are events, often unforeseen, that pose extreme risk of harm, burden or loss. Public emergency events include public health crises (for example, pandemics), natural disasters, wars and other violent conflicts. Often the responses required to mitigate or avoid the threats posed by emergencies must be rapid. *Inter alia*, this means that there may be little time for deliberation about alternative response measures. Such features of emergencies highlight their moral significance.

The risk of great harm to a significant number of people – or otherwise severe impairment of, or interruption to, their daily lives – as well as the need to act urgently if untoward consequences are to be averted – test the boundaries of what we take to be morally and legally permissible. What we might allow individuals or collectives to do in times of normalcy may no longer be sustainable in the face of emergency events. Given their high stakes, emergencies present pressing questions about (1) how we should treat each other in times of crisis and (relatedly) (2) what are ethically acceptable responses to extreme events.

The essays in this volume demonstrate the normative significance of emergencies and provide multi-disciplinary perspectives on the ethics of emergency response. We have divided the volume into five sections, which focus, in turn, on (1) the nature and significance of emergency, (2) ethical issues in emergency, (3) ethical issues in emergency public policy and law, (4) war, terrorism and supreme emergencies and (5) public health and humanitarian emergencies.

The Nature and Significance of Emergency

While there is often consensus regarding which events constitute emergencies, it may not (always) be entirely clear (1) what are the defining features of emergencies and (2) what is the significance of these events in our lives and/or for the institutions that govern them. While we often refer to particular events – such as threats to public health (for example, pandemic influenza), natural hazards (for example, earthquakes) and armed conflicts – as paradigmatic emergencies, ‘emergency’ is a contested concept. While most people agree that emergencies are events that present a significant risk of harm and require responses under conditions of urgency and necessity, we need to understand better the salient characteristics of such

events in order to understand better their moral significance and what kind of responses they warrant.

In ‘Definition of Sovereignty’ (Chapter 1), Carl Schmitt begins his book *Political Theology* with one of the most well-known and often quoted lines in academic discussion of emergencies: ‘Sovereign is he who decides on the exception’ (p. 3). The exception to which Schmitt refers is an event that constitutes a threat to the political, legal or economic order and requires the application of extraordinary measures by the state to mitigate or eliminate the threat and restore a level of stability that is commonly found during times of normalcy. For Schmitt (Chapter 1),

[t]he exception, which is not codified in the existing legal order, can at best be characterized as a case of extreme peril, a danger to the existence of the state, or the like. But it cannot be circumscribed factually and made to conform to a preformed law. (p. 4)

This raises questions about (1) what constitutes an emergency, (2) whether or not we should privilege an objective versus subjective definition of emergency and (3) whether or not there are canonical features of emergency situations that, despite Schmitt’s claim, could be factually circumscribed in some way within law. The main implication of Schmitt’s notion of what constitutes an emergency is that it may end up excluding some of the events that we would ordinarily consider to be emergencies or, conversely, including events that we may think are not rightly classified as emergencies.

Tom Sorell, in ‘Morality and Emergency’ (Chapter 2), provides what is rightly considered to be the standard reference in the recent literature concerned with emergency ethics. Sorell (Chapter 2) begins by defining an emergency as ‘a situation, often unforeseen, in which there is a risk of great harm or loss and a need to act immediately or decisively if the loss or harm is to be averted or minimised’ (p. 16). In emergencies, he claims, some individuals and groups feel free to act in selfish, duplicitous or even brutal ways towards each other as a means of coping. This behaviour results, according to Sorell, because people feel their moral inhibitions relax. Sorell argues that the commonly perceived need to provide an urgent response to emergencies can often be unduly moralistic and carry with it an ignorance of the psychological realities involved with many people’s ability to conform to moral standards in extraordinary circumstances.

François Tanguay-Renaud, in ‘Making Sense of “Public” Emergencies’ (Chapter 3), provides a thoroughgoing analysis of the notion of a public emergency, raising challenging objections to previous conceptualizations provided by people such as Carl Schmitt, Tom Sorell and Michael Walzer (see Chapters 1, 2 and 16, respectively). As Tanguay-Renaud rightly points out, it is worth beginning with an analysis into the nature of emergency in order to determine whether there actually exists a special category of emergency that merits independent focus, and whether such events present distinctive challenges and/or require extraordinary responses. He argues that there are events that should be designated as public emergencies and that these events are distinguished by the ways in which they can interfere with a government’s performance of its role(s). *Inter alia*, this raises questions about whether morality is (or should be) more demanding, relaxed or different during times of emergency. Tanguay-Renaud concludes by considering the relationship between justifiably making a

formal declaration of emergency and the rule of law as an ethic of governance, which nicely foreshadows some of the issues that will arise in Parts III and IV of the volume.

Ethical Issues in Emergency

The nature and significance of emergencies highlight why they can have distinctive moral implications. As suggested above, particular moral considerations might be more demanding, relaxed or even absent in times of emergency. The possibility of such changes in the requirements of morality gives rise to important and interesting questions about the structure and scope of moral concepts within emergencies.

Naomi Zack, in 'Lifeboat Ethics and Disaster: Should We Blow Up the Fat Man?' (Chapter 4), is concerned with the kind of extreme cases that emergency situations raise for moral theory and how different moral theories, such as consequentialism and deontology, assess such cases. Working through a series of thought experiments and real life cases – the fat man in the cave, cannibalistic speluncean explorers, traveller Jim, mercy killing after Hurricane Katrina and the conscience of Huckleberry Finn – Zack maintains that our conclusions about these extreme cases are important not only for working through moral problems in the context of emergency but also for what these cases teach us about moral theory in general. Though our moral intuitions in emergency circumstances may seem to favour deontology over consequentialism, according to Zack, the level of moral ambiguity in some of these cases shows that deontology will not be able to provide a satisfactory moral theory to cover all cases within emergency ethics.

Per Sandin and Misse Wester, in 'The Moral Black Hole' (Chapter 5), examine the commonly held belief that, in emergency circumstances, people will be disposed to exhibit a level of anti-social and immoral behaviour that is much greater than during times of normalcy. The belief that people will resort to selfish, exploitative and/or violent behaviour in emergencies has led some philosophers and policy-makers to argue for the need to employ extraordinary measures to mitigate or reduce the effect of such behaviour. If we do not take measures to curtail emergencies, then this will threaten to create a breakdown of moral norms – or 'the moral black hole'. Sandin and Wester argue that the commonly held belief that people will display panic reactions or selfish/exploitative behaviour (such as looting and price gouging) during emergencies is false because such reactions are rare – with the exception of antagonistic situations such as war and armed conflict. They conclude that we should be hesitant to apply moral black hole arguments when deciding which particular measures should be undertaken during times of emergencies.

In 'Disappearing without a Moral Trace? Rights and Compensation during Times of Emergency' (Chapter 6), Simon Wigley examines the issue of whether or not the moral force of rights is extinguished during emergencies. This will be particularly important with respect to claims for compensation that are made by individuals or groups who have been made victims in virtue of having their rights transgressed during these circumstances. If the moral force of rights is not extinguished during emergencies, then those who transgress the rights of others can have an obligation to compensate victims for rights violations. If the moral force of rights is extinguished, however, then any obligations regarding compensation would need

to be based on other kinds of reasons. While this issue remains a live one for rights theorists in times of normalcy as well as in times of emergency, according to Wigley, the nature of emergency circumstances are such that agents should not be obligated to bear the burden that can result from needing to respond in particular ways to such unforeseeable and unavoidable circumstances – even if such responses transgress the rights of others. As such, determination of what remedy is owed to persons who have had their rights transgressed during emergencies does not resolve the question of who should be responsible for providing that remedy.

Deontological moral theories, in contrast to consequentialist theories, do not assess the morality of conduct (entirely) in terms of the goodness of the states of affairs that are brought about. According to deontologists, there are certain forms of conduct that are intrinsically wrong and ought not to be performed. This is not to say that deontologists think the effects of conduct are morally irrelevant. They merely think that certain kinds of conduct are always prohibited (regardless of how good their consequences might be). This is especially relevant in the context of emergency, where the potential to mitigate or avoid the negative consequences for a large number of people can lead many people to think the right thing to do will depend on which option reduces the most harm, loss or burden. Larry Alexander, in ‘Deontology at the Threshold’ (Chapter 7), employs examples of personal and public emergencies in the analysis of the structure and application of threshold deontology. Absolute deontologists claim that no amount of good could ever justify certain forms of conduct. For example, torturing a terrorist to obtain information to prevent an attack that would kill 100,000 innocent persons. Threshold deontologists claim that, while certain forms of conduct remain intrinsically wrong, there may be circumstances in which we could be morally justified in performing them. Emergencies will often be circumstances in which a relevant threshold is met and we would be justified in undertaking forms of conduct that in times of normalcy (where the threshold is not met) would be prohibited. Alexander ultimately argues that the best conception of deontology would be a version of threshold deontology that upholds a prohibition to use another person as a resource without her consent.

David Wiggins, in a selection from his *Ethics: Twelve Lectures on the Philosophy of Morality* (Chapter 8), considers the status of the doctrine of double effect (DDE) in the context of emergency. According to the DDE, which Wiggins (Chapter 8) maintains ‘appears to muster the resources of ordinary morality for circumstances of hazard, emergency, and dire necessity’ (p. 142), it can be permissible to cause harm to others as a side-effect of trying to bring about some good outcome – where that harm, while potentially foreseeable, was unintentionally inflicted. If we maintain the DDE, which some philosophers do, then one’s intentions and motives to perform some action can have a direct bearing on the permissibility of that action. The DDE is, however, controversial and other philosophers argue we should reject it. What makes the DDE relevant for morality in times of emergency is that it appears to accommodate emergencies within the scope of ordinary moral theory. Put another way, the kinds of extreme cases that emergency circumstances bring to light need not be seen as situations in which we need distinct moral concepts (or to posit the existence of a moral black hole).

In ‘The Ethics of Emergencies’ (Chapter 9), Ayn Rand provides an example of how a particular kind of moral theory seeks to engage with how morality might change during times of normalcy. According to Rand’s moral theory – that is, rational egoism – individuals ought to act only in ways that promote their self-interest. The view that our moral obligations are

mainly aimed at protecting and promoting our own well-being, and thus avoiding sacrifices to our own well-being for the sake of others, may seem apt (at least to some) in the context of emergency. Rand is not just making the psychological claim that people *will* be self-interested in emergency; she argues that they *should* be self-interested – both in times of emergency and normalcy. Nevertheless, she maintains that the normative authority of moral standards presupposes certain background conditions of normalcy – and that it is only when those conditions are in place that moral standards should authoritatively bind us. According to Rand (Chapter 9), while we should distinguish

between the rules of conduct in an emergency situation and the rules of conduct in the normal conditions of human existence ... [t]his does not mean a double standard of morality: the standard and the basic principles remain the same, but their application to either case [will differ]. (p. 153)

When one's survival is at stake it can be permissible to transgress moral standards because morality is supposed to promote our well-being and, *a fortiori*, our survival.

Ethical Issues in Emergency Public Policy and Law

Emergencies often, though not always, create exceptional political situations that demand an urgent and necessary response, which differs in nature from normal methods of dealing with pressing political problems. The declaration of emergency may allow governments to act in ways that in ordinary times would be illegal or immoral. The various political and legal means employed by governments in order to avert or mitigate emergencies raise a number of important ethical questions that require examination and analysis. Some of the most interesting ethical issues for public policy and law that arise in these contexts concern how situational features of emergency – in particular, necessity – may lead to modifications of the obligations and responsibilities that underpin the interactions between citizens that are typically under the purview of regulation by the state. The contributions to this section focus on some of the permissible and impermissible ways in which we treat each other and property during emergency.

In 'Specifying Rights Out of Necessity' (Chapter 10), John Oberdiek makes a positive case for a particular, and under-appreciated, conception of rights using the context of emergency: specified rights. According to the most prominent conception of rights (that is, generalized rights), the content of a moral right is context-independent – a right stands against (or for) the same behaviour in all circumstances. Specified rights, however, can stand against different behaviour in different circumstances. Focusing on property rights, Oberdiek makes the case for rights specification looking at a familiar emergency case: a hiker stranded on a mountain who will die of hunger and/or exposure if he does not break into a locked, unattended cabin. He argues that our moral rights are all predicated upon more fundamental moral reasons, and that attention to these more fundamental reasons reveals why situational features of emergency, such as necessity, can explain why one could have a property right to one's cabin in times of normalcy that does not exist during times of emergency. In the example above,

according to Oberdiek, there would be no right-based obligation for the hiker to compensate the cabin owner for breaking into his cabin to ensure survival.

In “‘Necessity Knows No Law’: On Extreme Cases and Uncodifiable Necessities’ (Chapter 11), Alon Harel and Assaf Sharon examine the category of extreme cases in which severe and extraordinary measures would need to be taken in order to avoid catastrophic consequences. They focus primarily on cases such as torturing terrorists and shooting down planes in 9/11 situations. Harel and Sharon begin by rejecting proposed deontological and consequentialist solutions to this kind of problem. In extreme emergency cases, according to these authors, the violation of moral standards, as such, in order to save large numbers of people (or property) is not what is most morally pernicious; rather, it is the idea of principled or rule-governed violation of such standards that is most troubling. Harel and Sharon argue that individuals who undertake forms of conduct that violate moral standards in emergencies should not be guided by rules or principles, but instead should be guided by particular context-dependent judgements. Harel and Sharon conclude their analysis by arguing that the solution for how we ought to approach the category of extreme cases follows from the Kantian conception of human dignity.

Arthur Ripstein discusses, ‘In Extremis’ (Chapter 12), what is taken by many to be a surprising claim made by Immanuel Kant in his *Doctrine of Right* – that is, that a shipwrecked sailor who dislodges a fellow sailor from a plank in order to save his own life would be morally culpable, but not punishable. Similar to the issues discussed in Chapter 7 by Alexander, many people take this case to show that deontologists, in extreme circumstances like emergencies, will and should resort to considerations about consequences when determining the permissibility of, or liability for, an action. Ripstein’s project in this chapter is to show that despite its apparent contradiction, it is possible to read Kant here in a way that not only generalizes his claim that such an act would be culpable but not punishable, but that it can also provide a satisfying account of the distinction between justification and excuse in criminal law. This concerns a perennial question relevant to the context of emergency: Should the criminal law enforce a moral obligation to save those who can be easily rescued – and does necessity provide a justification for failure to do so? Ripstein argues that if a moral obligation to rescue in emergency is created and enforced by criminal law, it can take on a variety of different contents, including, for instance, making one’s property temporarily available to those who need it or allowing others to make use of it justifiably in your absence.

In ‘Looting, Law, and Lawlessness’ (Chapter 13), Stuart P. Green focuses on looting in the context of emergency. As he acknowledges, looting should not be seen as a simple act with static moral content. Acts of looting should be seen as spanning an extraordinary wide continuum from predatory and exploitative cases based on opportunities for unjust enrichment to cases of necessity that result from forces beyond a person’s control when they find themselves hungry and exposed to the elements. Green begins by examining whether acts of looting should be understood as ordinary acts of burglary or larceny that just happen to take place in the context of emergency, or whether looting has a special moral element that for example, deserves greater punishment than burglary or larceny. He then goes on, in acknowledging the wide continuum of moral content possible in various acts of looting, to question whether it would make sense to distinguish between so-called ‘bad looting’ and ‘good looting’, where we might think that the latter is morally excusable when an otherwise law-abiding offender takes property

necessary for immediate survival when suffering from fright, fatigue, hunger, exposure and/or disorientation, such as what has been observed in video footage of emergencies like Hurricane Katrina in the United States. Green concludes by considering some practical implications of his analysis of looting, in particular rejecting the view maintained by some that the proper response to looters in an emergency is to shoot them on sight.

In ‘The Ethics of Price Gouging’ (Chapter 14), Matt Zwolinski provides one of the best analyses of the ethical issues surrounding price gouging, a practice that is typically associated with times of emergency. According to Zwolinski (Chapter 14), ‘[p]rice gouging occurs when, in the wake of an emergency, sellers of a certain necessary goods sharply raise their prices beyond the level needed to cover increased costs’ (p. 267). While most people hold that price gouging is immoral – and in many jurisdictions it is a civil or criminal offence – because it exploits individuals and groups who are made vulnerable during emergencies, he argues that this commonly held moral condemnation of price gouging is largely mistaken. In support of this claim, Zwolinski rebuts three widely held beliefs about the morality of price gouging: (1) laws that prohibit the practice of price gouging are morally justified; (2) price gouging is morally impermissible (regardless of whether it should be illegal); and (3) the practice of price gouging reflects poorly on the moral character of those who engage in it (regardless of whether the practice is morally impermissible). Regardless of whether one ultimately agrees with Zwolinski’s conclusions, he provides a robust analysis of the central ethical issues surrounding price gouging in an emergency that should be considered by anyone interested in the topic.

War, Terrorism and Supreme Emergencies

Wars and terrorism often present threats to the very core of civil society. Sometimes such threats are so imminent and serious that we might think such events constitute what have been called ‘supreme emergencies’. A supreme emergency is, according to Michael Walzer (2006, p. 253)¹, ‘an ultimate threat to everything decent in our lives, an ideology and a practice of domination so murderous, so degrading even to those who might survive, that the consequences of its final victory [are] literally beyond calculation, immeasurably awful’. If these events are threats of something utterly unthinkable from a moral point of view, then what may we permissibly do in order to prevent or mitigate them?

In ‘The Ethics of Emergency’ (Chapter 15), Michael Ignatieff considers implications of the suspension of laws, and usual protections of rights and liberties, during times of emergency (for example, involving terrorism). ‘If laws can be abridged and liberties suspended in an emergency,’ he asks (Chapter 15), ‘what remains of their legitimacy in times of peace?’ (p. 301). If declarations of emergency, and calls for suspension of law, are matters of executive prerogative, there are dangers that the executive powers in play may be subject to abuse. Ignatieff argues that suspension of laws and rights protections are only legitimate when temporary – and only when such measures are necessary and effective in protecting the rights enshrined, and rule of law embodied, by legitimate democratic constitutions over the long run. Protection against abuse requires that exercise of the executive powers in question is

¹ Michael Walzer (2006), *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, New York: Basic Books, p. 253.

itself subject to constitutional law and various checks and balances – including constraints by judiciary and legislative branches of government, and justification to the public and/or international community. '[S]unset clauses [and] preset limitations on the duration of emergency legislation,' according to Ignatieff (Chapter 15), 'remain the legislature's chief weapon in making sure that emergency exceptions do not become the rule' (p. 327). At least some rights, furthermore, should be considered non-derogable even during times of emergency. Equality and human dignity, according to Ignatieff (Chapter 15), must be protected 'in times of safety and times of danger alike' (p. 329); and things like 'torture, cruel and unusual punishment, extrajudicial execution, and penal servitude' (p. 322) must always remain off-limits.

In 'Emergency Ethics' (Chapter 16), Michael Walzer explores the concept of 'supreme emergency' and ethical implications thereof. Walzer (Chapter 16) defines supreme emergency as a situation that 'exists when our deepest values and collective survival are in imminent danger' (p. 338) – and he questions whether morality is binding under such circumstances. While it is generally impermissible intentionally to kill innocent persons, (usually) even during times of war for example, does such a prohibition legitimately hold even when the killing of innocents is necessary for a community's survival? If the defeat of the Nazis, and survival of British society, required the British bombing of German cities (and intentional targeting of innocent non-combatants) during World War II, for instance, was such bombing morally acceptable? Walzer (Chapter 16) reaches the paradoxical conclusion that the killing of innocents is *always* immoral but may nonetheless be 'morally defensible' in a supreme emergency (pp. 338–39). His point is that the prohibition against the killing of innocents is always in play, placing real limits on what is morally permissible. The importance of (states) obeying such a prohibition, however, may be outweighed by utilitarian considerations in extreme situations (that is, when enough utility is at stake). The fact that a moral constraint against killing innocents may sometimes be outweighed by other (that is, utility) considerations does not, according to Walzer, mean that there are exceptions to the rule that intentionally killing innocent persons is wrong. Walzer's supreme emergency doctrine is explicitly communitarian in nature. We rightly place high value on the (survival of the) political community, according to Walzer (Chapter 16), because '[i]t is a feature of our lived reality, a source of our identity and self-understanding' (p. 353).

C.A.J. Coady provides a critique of Walzer in 'Terrorism, Morality, and Supreme Emergency' (Chapter 17). Coady (Chapter 17) defines terrorism as 'the organized use of violence to attack noncombatants or innocents ... or their property for political purposes' (p. 357). According to this definition (1) both state and non-state actors sometimes engage in terrorism and (2) the bombing of German cities during World War II, as discussed by Walzer, itself involved terrorism (on the part of the British). While Walzer allows that this kind of terrorism on the part of state actors may be morally defensible in the context of a supreme emergency, he denies that the killing of innocents by substate terrorists can ever be legitimate. Coady thus questions why appeal to supreme emergency – if this provides a legitimate excuse for state actors to override moral prohibitions against the killing of innocent persons – should never be available to substate actors, who may themselves represent political communities whose existence is threatened. Accusing Walzer of 'pro-state bias', Coady (Chapter 17) 'conclude[s] that the attempt to restrict the supreme emergency exemption to

states is unpersuasive. Either it applies more generally or it does not apply at all' (p. 372). Part of the problem with Walzer's account, according to Coady (Chapter 17), is that the concept of supreme emergency is 'conceptually opaque' and 'open to divergent interpretations' (p. 372). Exactly what kind of (political) communities may face supreme emergency for example, and how severe must threats to them be in order for supreme emergency to be realized?

Daniel Statman further explores the topic of supreme emergencies involving armed conflict in 'Supreme Emergencies Revisited' (Chapter 18). Statman points out that Walzer's position is commonly believed to involve the idea that utilitarian thinking applies during supreme emergencies. However, Statman (Chapter 18) denies that utilitarian reasoning is really what is at work here. Utilitarian goals would not always be achieved via 'special permission' (SP) to kill innocents during a supreme emergency because for example, '[i]t's possible ... 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' (p. 378). The logic behind SPs, according to Statman, is more in line with that of self-defence. Because an individual is not entitled, in the name of self-defence, to kill other 'individuals [who] are not part of the threat and are not responsible for it' (p. 379), however, Statman (Chapter 18) questions whether, or why, this should be considered legitimate in self-defence of communities. The British bombing of German cities for example, would have killed children who were in no way responsible for or part of the Nazi threat to Britain during World War II. Conceiving the problem in terms of the ethics of collectives (versus individuals), Statman (Chapter 18) raises – but ultimately rejects – the suggestion that:

[m]ere membership in an aggressive collective should ... 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. (p. 391)

He concludes that there is no defensible argument for SPs.

In 'Supreme Emergencies without the Bad Guys' (Chapter 19), Per Sandin questions whether special permissions (to do what would usually be considered morally impermissible) that, according to some, apply to supreme emergencies involving antagonistic adversaries should apply to supreme emergencies that arise when the survival of a community is threatened by 'non-antagonistic threats' – for example, pandemics, tsunamis, earthquakes and so on. Sandin considers two alternative frameworks for thinking about supreme emergency ethics and argues that, while they both apply to supreme emergencies resulting from non-antagonistic threats, neither approach is defensible. The two frameworks of supreme emergency ethics considered by Sandin are those proposed by Michael Walzer and Brian Orend. Sandin rejects Walzer's communitarian doctrine of supreme emergency ethics (applied to the context of non-antagonistic threats) on the grounds that it places implausibly extreme weight on the value of community survival. In contrast with Walzer, Orend advocates a *prudential* account of supreme emergencies. Supreme emergencies, according to Orend, involve true moral dilemmas: whatever we do will be morally wrong. Because morality therefore cannot provide a guide to action in the context of supreme emergencies, according to Orend, communities are inevitably/instinctively guided by prudential rules of action instead. Orend purports to

provide the kinds of prudential rules that should guide community action in the event of a supreme emergency. Sandin, however, argues that the rules proposed by Orend are ultimately rules of (consequentialist) morality rather than prudence.

Public Health and Humanitarian Emergencies

Public health emergencies present serious threats to the health of large groups or entire populations. When the health of the public is at stake, important questions are raised about what is morally required to prepare for and/or respond to such a threat – and whether the means used to protect the public's health should be subject to a different kind of moral assessment during emergencies. Humanitarian emergencies, which can include famines, civil conflicts and genocide, constitute deep social crises in which large numbers of people die from violence, displacement or poverty. Much of the work of international, quasi-governmental and non-governmental agencies focus on such events, and the ethical issues involved in preparing for and responding to such events is (as is warranted) gaining more attention.

Thérèse Murphy and Noel Whitty consider human rights implications of the securitization of public health in 'Is Human Rights Prepared? Risk, Rights and Public Health Emergencies' (Chapter 20). There are numerous well-known ways in which infectious diseases may have adverse effects on security. Such diseases may compromise militaries, jeopardize economies and erode governmental capacities and trust in government. Numerous recent events have led to heightened concerns about the security implications of public health. These include the UN Security Council's portrayal of HIV/AIDS as a security threat, the SARS pandemic of 2003 and the anthrax attacks in the USA following the events of 11 September 2001. A consequence of such events, and the growing problem of emerging and re-emerging infectious diseases more generally, has been the strengthening of WHO's International Health Regulations (2005) and the perceived need for 'public health emergency preparedness' and 'global public health security' (Chapter 20, p. 415). Given that emergency public health response measures may be at odds with human rights, Murphy and Whitty (Chapter 20) ask '[H]ow should a human rights lawyer respond to the panoply of new linkages between health and security and, more specifically, the increasing focus on public health emergency preparedness?' (p. 423). One of their main conclusions (Chapter 20) is that 'thinking about "rights as risk" should be a key aspect of human rights preparedness' (p. 438). The human rights agenda that is, is likely to be promoted if organizations are made better aware of the risks – for example, legal/political consequences – of non-adherence to human rights requirements.

In 'Ethics and Global Climate Change' (Chapter 21), Stephen M. Gardiner claims that the problem of climate change has received inadequate attention by moral philosophers. While climate science involves a substantial degree of uncertainty, Gardiner (Chapter 21) argues that crucial questions concern 'how we decide what to do under such circumstances' (p. 455). Addressing the question of whether resources should focus on *abatement* of greenhouse gas emissions versus *adaptation* to the effects of climate change, Gardiner argues that we should ultimately do both – and that at least some abatement measures would have short-term (economic) as well as long-term benefits. While there is 'widespread endorsement of the view that stabilizing emissions would impose a cost of "only" 2 percent of world production [that is,

aggregate gross national products]’, (p. 463) furthermore, Gardiner (Chapter 21) argues that this is a reasonable price to pay in order to reduce the likelihood of environmental catastrophe (even if there is major uncertainty regarding the consequences of climate change and controversy surrounding the most cost-effective means of addressing it). Additional ethical questions considered by Gardiner concern how the costs of addressing climate change should be distributed. Gardiner argues that developed nations responsible for the most emissions in the past should shoulder more of the costs of abatement (despite the fact that developing countries are likely to benefit most from abatement). Gardiner (Chapter 21) concludes by explaining the ‘Kyoto debacle’ as an intergenerational tragedy (p. 481): because the costs of addressing climate change would fall on the present generation, while the benefits would be enjoyed by future generations, there are egoistic disincentives for the present generation to take action. This problem, according to Gardiner (Chapter 21) will ‘arise anew for each subsequent generation’ (p. 481).

Garrett Hardin’s ‘Living on a Lifeboat’ (Chapter 22) is largely concerned with problems associated with overpopulation. He argues that individual sovereign nations should be thought of as lifeboats: each with a limited carrying capacity. With regard to humanitarian emergencies associated with famine in particular, Hardin is critical of charitable world food banks. Emergencies involving food shortages, according to Hardin, are things that individual countries should expect and plan for. Countries’ failure to store food surplus in times of plenty, in order to meet needs in the event of drought and/or crop failure, reflects bad governance. Food aid from rich to overpopulated poor countries, he argues, provides a disincentive for rulers of the latter to implement more prudent food (and population) policies. Such charitable giving, according to Hardin, also makes matters worse in other ways. On a natural population cycle (absent charitable giving), according to Hardin, the emergency that arises when a country’s population exceeds its carrying capacity would ultimately be a blessing (though one that involves suffering) – because the population in question would be reduced back to (or somewhat below) the country’s carrying capacity. The problem with food aid, he argues, is that it produces a ‘ratchet effect’: the recipient population (already beyond carrying capacity) is allowed to keep growing and growing, meaning that the magnitude of future emergencies will be even greater. ‘The process is brought to an end’, according to Hardin (Chapter 22), ‘only by the total collapse of the whole system, producing a catastrophe of scarcely imaginable proportions’ (p. 490).

Onora O’Neill likewise employs the lifeboat analogy to analyse problems of famine in ‘Lifeboat Earth’ (Chapter 23). While Hardin asks us to think of individual countries as lifeboats, however, O’Neill asks us to think of the world itself as one big lifeboat. Starting with the premise that humans have a right not to be killed – and associated duties not to kill and/or duties to prevent others from killing – O’Neill argues that humans have duties to prevent and postpone famines. O’Neill considers the case of a lifeboat which is sufficiently well equipped, with food and so on, to maintain survival of passengers until time of rescue. If some passengers decide to deprive other passengers of food (despite the fact that there is plenty for everyone), then the deaths of the latter would involve killing rather than merely allowing to die. The situation of the world at present, according to O’Neill, is quite similar to this. Because some people die (from starvation) as a result of (for example, investment/business) decisions and actions taken by others, the deaths in question involve killing rather

than merely a failure to prevent them. One person can violate another's right not to be killed, according to O'Neill, when the former's actions play a causal role in bringing about the latter's death whether or not the death in question is immediate, foreseen or intended. 'Even on a sufficiently equipped earth', according to O'Neill (Chapter 23), 'some persons are killed by others' distribution decisions. The [geopolitical/economic] causal chains leading to death-producing distributions are often extremely complex. Where they can be perceived with reasonable clarity we ought ... to support policies that reduce deaths' (p. 507).

In 'Famine, Affluence, and Morality' (Chapter 24), Peter Singer posits that it should be relatively self-evident that 'if it is in our power to prevent something bad from happening, without thereby sacrificing anything of comparable importance, we ought, morally, to do it' (p. 517). If one can easily save a child from drowning for example, then one should do so. The muddying of one's clothes that might occur in the process is morally insignificant in comparison with the badness of the death that would otherwise occur. Because the physical proximity of those we might help is irrelevant to the moral duty in question, the principle put forward by Singer demands that relatively well-off persons in rich countries do much more to prevent starvation (and other kinds of suffering) in poor countries. We should sacrifice luxury items like fancy clothes and restaurant dinners for example, because the money we spend on things like these could be used to save people's lives – and the two kinds of things are, obviously, not of comparable importance. Singer points out that adoption of his principle would entail a radical revision of our moral categories and consumerist way of life. Provision of aid to poor countries is usually thought to be a matter of charity – something it would be good or generous to do, though not required. According to Singer (Chapter 24), however, we have a moral obligation to prevent 'as much suffering as we can without sacrificing something of comparable moral importance' (p. 524).

In 'Distribution and Emergency' (Chapter 25), Jennifer Rubenstein questions how limited/inadequate international aid resources should be distributed among different kinds of projects. While debate about this issue is usually framed around the distinction between development aid and emergency aid (and the question of which should receive priority), Rubenstein argues that this distinction distracts attention from what really matters. The problem, according to Rubenstein, is that emergencies are often conceived as events; and for psychological reasons we are prone to think that bad situations with event-like features are less normatively acceptable (and thus more important to respond to). This kind of thinking may lead to inappropriate prioritization of emergency aid over development aid; and (within emergency aid) to inappropriate prioritization of event-like emergencies over chronic emergencies and/or protracted crises. Bad situations (emergencies or otherwise) that involve events, however, are not necessarily more severe than longer-term, ongoing crises; and bad situations that involve events are not necessarily more amenable to improvement. Because event-like features are (for these and other reasons) morally irrelevant, according to Rubenstein (Chapter 25), international aid allocation decisions should be made on the basis of 'widely accepted distributive principles, such as those based on need, desert, "do no harm," maximizing overall benefit, and responsiveness to special obligations' (p. 533), regardless of the extent to which an event is involved. Evaluation of projects on the basis of such principles, according to Rubenstein, would not systematically favour emergency aid (that is, to address urgent situations, which may or may not be event-like) over development aid, or vice versa.

Conclusion

A persistent theme of the essays collected in this volume is that emergency situations might warrant treating people in ways that would be considered impermissible during times of normalcy. This underscores the importance of having clear and rigorous accounts of what constitutes an emergency and what situational features could justify modifying the moral standards that govern human relationships. Reflection on how morality might change during times of emergency is not only useful for analysis of the moral issues that arise in emergency situations themselves; such reflection is instructive regarding morality more generally. There is an important need for continued and expanded investigation into the concept of emergency and ethical implications of emergencies. As the first edited collection exclusively focused on emergency ethics, we hope this volume serves to support and stimulate such investigations.

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Part I

The Nature and Significance
of Emergency

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Definition of Sovereignty

Carl Schmitt

Sovereign is he who decides on the exception.¹

Only this definition can do justice to a borderline concept. Contrary to the imprecise terminology that is found in popular literature, a borderline concept is not a vague concept, but one pertaining to the outermost sphere. This definition of sovereignty must therefore be associated with a borderline case and not with routine. It will soon become clear that the exception is to be understood to refer to a general concept in the theory of the state, and not merely to a construct applied to any emergency decree or state of siege.

The assertion that the exception is truly appropriate for the juristic definition of sovereignty has a systematic, legal-logical

1. [Tr.] In the context of Schmitt's work, a state of exception includes any kind of severe economic or political disturbance that requires the application of extraordinary measures. Whereas an exception presupposes a constitutional order that provides guidelines on how to confront crises in order to reestablish order and stability, a state of emergency need not have an existing order as a reference point because *necessitas non habet legem*. See George Schwab, *The Challenge of the Exception* (Berlin, 1970), pp. 7, 42.

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foundation. The decision on the exception is a decision in the true sense of the word. Because a general norm, as represented by an ordinary legal prescription, can never encompass a total exception, the decision that a real exception exists cannot therefore be entirely derived from this norm. When Robert von Mohl² said that the test of whether an emergency exists cannot be a juristic one, he assumed that a decision in the legal sense must be derived entirely from the content of a norm. But this is the question. In the general sense in which Mohl articulated his argument, his notion is only an expression of constitutional liberalism and fails to apprehend the independent meaning of the decision.

From a practical or a theoretical perspective, it really does not matter whether an abstract scheme advanced to define sovereignty (namely, that sovereignty is the highest power, not a derived power) is acceptable. About an abstract concept there will in general be no argument, least of all in the history of sovereignty. What is argued about is the concrete application, and that means who decides in a situation of conflict what constitutes the public interest or interest of the state, public safety and order, *le salut public*, and so on. The exception, which is not codified in the existing legal order, can at best be characterized as a case of extreme peril, a danger to the existence of the state, or the like. But it cannot be circumscribed factually and made to conform to a preformed law.

It is precisely the exception that makes relevant the subject of sovereignty, that is, the whole question of sovereignty. The precise details of an emergency cannot be anticipated, nor can one spell out what may take place in such a case, especially when

2. [Tr.] *Staatsrecht, Völkerrecht und Politik: Monographien*, vol. 2 (Tübingen, 1862), p. 626.

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it is truly a matter of an extreme emergency and of how it is to be eliminated. The precondition as well as the content of jurisdictional competence in such a case must necessarily be unlimited. From the liberal constitutional point of view, there would be no jurisdictional competence at all. The most guidance the constitution can provide is to indicate who can act in such a case. If such action is not subject to controls, if it is not hampered in some way by checks and balances, as is the case in a liberal constitution, then it is clear who the sovereign is. He decides whether there is an extreme emergency as well as what must be done to eliminate it. Although he stands outside the normally valid legal system, he nevertheless belongs to it, for it is he who must decide whether the constitution needs to be suspended in its entirety.³ All tendencies of modern constitutional development point toward eliminating the sovereign in this sense. The ideas of Hugo Krabbe and Hans Kelsen, which will be treated in the following chapter, are in line with this development. But whether the extreme exception can be banished from the world is not a juristic question. Whether one has confidence and hope that it can be eliminated depends on philosophical, especially on philosophical-historical or metaphysical, convictions.

There exist a number of historical presentations that deal with the development of the concept of sovereignty, but they are like textbook compilations of abstract formulas from which definitions of sovereignty can be extracted. Nobody seems to have taken the trouble to scrutinize the often-repeated but completely empty

3. [Tr.] As already noted in the introduction, Schmitt, in his study of dictatorship (*Die Diktatur*), considered the powers of the president to be commissarial in nature, that is, to be understood in the context of article 48. In the case of an exception the president could thus suspend the constitution but not abrogate it—an act characteristic of a sovereign form of dictatorship.

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phraseology used to denote the highest power by the famous authors of the concept of sovereignty. That this concept relates to the critical case, the exception, was long ago recognized by Jean Bodin. He stands at the beginning of the modern theory of the state because of his work "Of the True Marks of Sovereignty" (chapter 10 of the first book of the *Republic*) rather than because of his often-cited definition ("sovereignty is the absolute and perpetual power of a republic"). He discussed his concept in the context of many practical examples, and he always returned to the question: To what extent is the sovereign bound to laws, and to what extent is he responsible to the estates? To this last, all-important question he replied that commitments are binding because they rest on natural law; but in emergencies the tie to general natural principles ceases. In general, according to him, the prince is duty bound toward the estates or the people only to the extent of fulfilling his promise in the interest of the people; he is not so bound under conditions of urgent necessity. These are by no means new theses. The decisive point about Bodin's concept is that by referring to the emergency, he reduced his analysis of the relationships between prince and estates to a simple either/or.

This is what is truly impressive in his definition of sovereignty; by considering sovereignty to be indivisible, he finally settled the question of power in the state. His scholarly accomplishment and the basis for his success thus reside in his having incorporated the decision into the concept of sovereignty. Today there is hardly any mention of the concept of sovereignty that does not contain the usual quotation from Bodin. But nowhere does one find cited the core quote from that chapter of the *Republic*. Bodin asked if the commitments of the prince to the estates or the people dissolve

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his sovereignty. He answered by referring to the case in which it becomes necessary to violate such commitments, to change laws or to suspend them entirely according to the requirements of a situation, a time, and a people. If in such cases the prince had to consult a senate or the people before he could act, he would have to be prepared to let his subjects dispense with him. Bodin considered this an absurdity because, according to him, the estates were not masters over the laws; they in turn would have to permit their prince to dispense with them. Sovereignty would thus become a play between two parties: Sometimes the people and sometimes the prince would rule, and that would be contrary to all reason and all law. Because the authority to suspend valid law—be it in general or in a specific case—is so much the actual mark of sovereignty, Bodin wanted to derive from this authority all other characteristics (declaring war and making peace, appointing civil servants, right of pardon, final appeal, and so on).

In contrast to traditional presentations, I have shown in my study of dictatorship that even the seventeenth-century authors of natural law understood the question of sovereignty to mean the question of the decision on the exception.⁴ This is particularly true of Samuel von Pufendorf. Everyone agrees that whenever antagonisms appear within a state, every party wants the general good—therein resides after all the *bellum omnium contra omnes*. But sovereignty (and thus the state itself) resides in deciding this controversy, that is, in determining definitively what constitutes public order and security, in determining when they are disturbed, and so on. Public order and security manifest themselves very differently in reality, depending on whether a militaristic bu-

4. [Tr.] *Die Diktatur*.

reaucracy, a self-governing body controlled by the spirit of commercialism, or a radical party organization decides when there is order and security and when it is threatened or disturbed. After all, every legal order is based on a decision, and also the concept of the legal order, which is applied as something self-evident, contains within it the contrast of the two distinct elements of the juristic—norm and decision. Like every other order, the legal order rests on a decision and not on a norm.

Whether God alone is sovereign, that is, the one who acts as his acknowledged representative on earth, or the emperor, or prince, or the people, meaning those who identify themselves directly with the people, the question is always aimed at the subject of sovereignty, at the application of the concept to a concrete situation. Ever since the sixteenth century, jurists who discuss the question of sovereignty have derived their ideas from a catalogue of determining, decisive features of sovereignty that can in essence be traced to the points made by Bodin. To possess those powers meant to be sovereign. In the murky legal conditions of the old German Reich the argument on public law ran as follows: Because one of the many indications of sovereignty was undoubtedly present, the other dubious indications also had to be present. The controversy always centered on the question, Who assumes authority concerning those matters for which there are no positive stipulations, for example, a capitulation? In other words, Who is responsible for that for which competence has not been anticipated?

In a more familiar vein it was asked, Who is supposed to have unlimited power? Hence the discussion about the exception, the *extremus necessitatis casus*. This is repeated with the same legal-logical structure in the discussions on the so-called monarchical

principle. Here, too, it is always asked who is entitled to decide those actions for which the constitution makes no provision; that is, who is competent to act when the legal system fails to answer the question of competence. The controversy concerning whether the individual German states were sovereign according to the constitution of 1871 was a matter of minor political significance. Nevertheless, the thrust of that argument can easily be recognized once more. The pivotal point of Max Seydel's attempt to prove that the individual states were sovereign had less to do with the question whether the remaining rights of the individual states were or were not subsumable than with the assertion that the competence of the Reich was circumscribed by the constitution, which in principle meant limited, whereas the competence of the individual states was in principle unlimited.

According to article 48 of the German constitution of 1919, the exception is declared by the president of the Reich but is under the control of parliament, the Reichstag, which can at any time demand its suspension. This provision corresponds to the development and practice of the liberal constitutional state, which attempts to repress the question of sovereignty by a division and mutual control of competences. But only the arrangement of the precondition that governs the invocation of exceptional powers corresponds to the liberal constitutional tendency, not the content of article 48. Article 48 grants unlimited power. If applied without check, it would grant exceptional powers in the same way as article 14 of the [French] Charter of 1815, which made the monarch sovereign. If the individual states no longer have the power to declare the exception, as the prevailing opinion on article 48 contends, then they no longer enjoy the status of states. Article

48 is the actual reference point for answering the question whether the individual German states are states.

If measures undertaken in an exception could be circumscribed by mutual control, by imposing a time limit, or finally, as in the liberal constitutional procedure governing a state of siege, by enumerating extraordinary powers, the question of sovereignty would then be considered less significant but would certainly not be eliminated. A jurisprudence concerned with ordinary day-to-day questions has practically no interest in the concept of sovereignty. Only the recognizable is its normal concern; everything else is a "disturbance." Such a jurisprudence confronts the extreme case disconcertedly, for not every extraordinary measure, not every police emergency measure or emergency decree, is necessarily an exception. What characterizes an exception is principally unlimited authority, which means the suspension of the entire existing order. In such a situation it is clear that the state remains, whereas law recedes. Because the exception is different from anarchy and chaos, order in the juristic sense still prevails even if it is not of the ordinary kind.

The existence of the state is undoubted proof of its superiority over the validity of the legal norm. The decision frees itself from all normative ties and becomes in the true sense absolute. The state suspends the law in the exception on the basis of its right of self-preservation, as one would say. The two elements of the concept *legal order* are then dissolved into independent notions and thereby testify to their conceptual independence. Unlike the normal situation, when the autonomous moment of the decision recedes to a minimum, the norm is destroyed in the exception. The exception remains, nevertheless, accessible to jurisprudence

because both elements, the norm as well as the decision, remain within the framework of the juristic.

It would be a distortion of the schematic disjunction between sociology and jurisprudence if one were to say that the exception has no juristic significance and is therefore “sociology.” The exception is that which cannot be subsumed; it defies general codification, but it simultaneously reveals a specifically juristic element—the decision in absolute purity. The exception appears in its absolute form when a situation in which legal prescriptions can be valid must first be brought about. Every general norm demands a normal, everyday frame of life to which it can be factually applied and which is subjected to its regulations. The norm requires a homogeneous medium. This effective normal situation is not a mere “superficial presupposition” that a jurist can ignore; that situation belongs precisely to its immanent validity. There exists no norm that is applicable to chaos. For a legal order to make sense, a normal situation must exist, and he is sovereign who definitely decides whether this normal situation actually exists.

All law is “situational law.” The sovereign produces and guarantees the situation in its totality. He has the monopoly over this last decision. Therein resides the essence of the state’s sovereignty, which must be juristically defined correctly, not as the monopoly to coerce or to rule, but as the monopoly to decide. The exception reveals most clearly the essence of the state’s authority. The decision parts here from the legal norm, and (to formulate it paradoxically) authority proves that to produce law it need not be based on law.

The exception was something incommensurable to John Locke’s doctrine of the constitutional state and the rationalist

eighteenth century. The vivid awareness of the meaning of the exception that was reflected in the doctrine of natural law of the seventeenth century was soon lost in the eighteenth century, when a relatively lasting order was established. Emergency law was no law at all for Kant. The contemporary theory of the state reveals the interesting spectacle of the two tendencies facing one another, the rationalist tendency, which ignores the emergency, and the natural law tendency, which is interested in the emergency and emanates from an essentially different set of ideas. That a neo-Kantian like Kelsen does not know what to do with the exception is obvious. But it should be of interest to the rationalist that the legal system itself can anticipate the exception and can "suspend itself." That a norm or an order or a point of reference "establishes itself" appears plausible to the exponents of this kind of juristic rationalism. But how the systematic unity and order can suspend itself in a concrete case is difficult to construe, and yet it remains a juristic problem as long as the exception is distinguishable from a juristic chaos, from any kind of anarchy. The tendency of liberal constitutionalism to regulate the exception as precisely as possible means, after all, the attempt to spell out in detail the case in which law suspends itself. From where does the law obtain this force, and how is it logically possible that a norm is valid except for one concrete case that it cannot factually determine in any definitive manner?

It would be consequent rationalism to say that the exception proves nothing and that only the normal can be the object of scientific interest. The exception confounds the unity and order of the rationalist scheme. One encounters not infrequently a similar argument in the positive theory of the state. To the question of how to proceed in the absence of a budget law, Gerhard

Anschütz replied that this was not at all a legal question. "There is not only a gap in the law, that is, in the text of the constitution, but moreover in law as a whole, which can in no way be filled by juristic conceptual operations. Here is where public law stops."⁵

Precisely a philosophy of concrete life must not withdraw from the exception and the extreme case, but must be interested in it to the highest degree. The exception can be more important to it than the rule, not because of a romantic irony for the paradox, but because the seriousness of an insight goes deeper than the clear generalizations inferred from what ordinarily repeats itself. The exception is more interesting than the rule. The rule proves nothing; the exception proves everything: It confirms not only the rule but also its existence, which derives only from the exception. In the exception the power of real life breaks through the crust of a mechanism that has become torpid by repetition.

A Protestant theologian⁶ who demonstrated the vital intensity possible in theological reflection in the nineteenth century stated: "The exception explains the general and itself. And if one wants to study the general correctly, one only needs to look around for a true exception. It reveals everything more clearly than does the general. Endless talk about the general becomes boring; there are exceptions. If they cannot be explained, then the general also cannot be explained. The difficulty is usually not noticed because the general is not thought about with passion but with a comfortable superficiality. The exception, on the other hand, thinks the general with intense passion."⁷

5. [Tr.] See Georg Meyer, *Lehrbuch des Deutschen Staatsrechts*, 7th ed., vol. 3, ed. G. Anschütz (Munich and Leipzig, 1919), p. 906.

6. [Tr.] The reference here is to Søren Kierkegaard.

7. [Tr.] The quote is from Kierkegaard's *Repetition*.

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MORALITY AND EMERGENCY*

by Tom Sorell

ABSTRACT Agents sometimes feel free to resort to underhand or brutal measures in coping with an emergency. Because emergencies seem to relax moral inhibitions as well as carrying the risk of great loss of life or injury, it may seem morally urgent to prevent them or curtail them as far as possible. I discuss some cases of private emergency that go against this suggestion. Prevention seems morally urgent primarily in the case of public emergencies. But these are the responsibility of defensibly partisan agents, and call for the exercise of powers that are legitimately hard to control. Philosophical standards for dealing with public emergency often ignore these facts, and are unduly moralistic as a result.

Moral training and behaviour in keeping with it are geared to the normal case. We are taught not to lie, but on the understanding that telling the truth is not normally dangerous. We are told to keep our promises, but on the understanding that breaking promises does not normally make the difference between starvation and survival. Where situations facing agents overturn these understandings, it is not so clear what they ought to do. Thus, no one would criticise an Albanian in Kosovo for having lied about his ethnic background to a Serb soldier during the Balkan conflict; and no one would blame someone who has promised to look after someone else's groceries for eating them when she finds herself stranded and disabled far from any help. *In extremis* ordinary moral obligations either lapse or may excusably be broken. Doing the right thing is supposed to interfere with well-being or survival only exceptionally, and moral training does not normally treat cases in which there is a risk of suffering violence or death in the same way as situations in which the costs of doing the right thing are negligible or non-existent. A hero or a saint might die before breaking an ordinary moral obligation even *in extremis*; but that would not show that the ordinary moral obligation *had* to be discharged, even *in extremis*. Someone who failed to do so could be blameless.

My interest in emergency is an interest in a special case of a departure from what moral training and conventional morality

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in our sort of community take as normal. An emergency is a situation, often unforeseen, in which there is a risk of great harm or loss and a need to act immediately or decisively if the loss or harm is to be averted or minimised. There are important differences between, on the one hand, public emergencies—emergencies facing whole states or large numbers of people, and which are usually the responsibility of public agencies and their officials—and, on the other hand, emergencies confronting individuals in a private capacity. I shall start with emergency that crops up in an individual life, where the one who has to do something is a person acting in their own right or in a private role and not as an official. I shall be concerned with criteria for excusing and not excusing normally wrong acts done to face emergencies in private life, and with how far it is urgent to prevent or avoid emergencies that can be prevented or avoided. I shall argue that not every kind of private emergency is morally necessary to avoid, even where doing so is quite easy. Prevention and avoidance become morally necessary mainly in relation to public emergencies, which are sometimes hard to prevent or to contain. Because the link between ‘ought’ and ‘can’ is often strained to breaking point in the case of public emergencies, there are limits to how moralistic or harsh the criticism of the *failure* to cope with them should be.

I

To fix ideas, let us consider an example of a private emergency. An elderly man and his adult son are out for a walk after a visit to a pub. The elderly man has a heart condition and starts to experience chest pains. There is no quick means of summoning an ambulance, which may in any case take too long to get there. The son breaks into the nearest car, jump starts the engine, and drives his father to the nearest accident and emergency department, breaking the speed limit dangerously, and nearly running over a child along the way. How are we to judge the agent in such a case? Probably not unsympathetically. Admittedly, he has damaged and stolen other people’s property and nearly killed someone, but only because he thought he had to act quickly to save his father’s life. What is more, he has succeeded in getting his father to people who are in a position to save his life if the

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chest pains are a heart attack. What is even more, he has shown presence of mind and ingenuity in a situation where other people might have panicked or succumbed to indecision. Far from having done anything wrong, it might be said, he has only done what is necessary in an emergency.

The excusing power of emergency is not absolute, and there is something instructive about the types of factor that, intuitively, seem to reduce it. In the example before us, it makes a difference whether the chest pains were an emergency that, as the phrase has it, was 'just waiting to happen'. Suppose that the father has a history of heart problems. When he complains of chest pains after the visit to the pub, they are at first dismissed as indigestion by the son. Suppose that the son had been asked by the father to bring along a car, in case the father started to feel unwell, and the son could not be bothered to find a parking space, so that he had no transport when there was a sudden need for it. Then perhaps he is not so admirable after all. He makes things worse by not having been prepared. In general, the more an emergency is foreseeable and preventable by morally harmless and undaunting precautions, the less the *ad hoc* wrongdoing involved in coping with the emergency is justifiable or excusable, all things considered. This principle explains judgements in the version of the example where the son is casual about the father's heart condition; and it explains our unwillingness to excuse totally those people whose presence of mind in an emergency is counterbalanced by their bringing about the emergency. Someone who ignores weather advice to climbers to stay off a dangerous peak and then predictably gets into life-threatening trouble when he climbs that peak probably places an unjustifiable burden on the rescue services, even if he has to display immense courage and resourcefulness to get himself to a place where the emergency services can help him.

There are cases that straddle the boundary between emergencies waiting to happen and blameless action in a morally tainted environment. A whites-only neighbourhood will sometimes be dangerous for non-whites entering it, however much the non-whites in the neighbourhood only mind their own business while they are there. Is their simply entering the area, when they know what kind of neighbourhood it is, an emergency waiting to happen? If they are assaulted, or face an attack, do they contribute to the emergency? In such a case it is primarily what taints

the environment that makes for the emergency waiting to happen. The normally blameless action of walking along minding one's own business is, if tainted at all, tainted by what taints the neighbourhood—racism. If a non-white entering a whites-only area is on its own an emergency waiting to happen, it is an emergency for which the preventive treatment is whatever cures racism, rather than avoiding action on the part of non-whites. It is a borderline case of an emergency just waiting to happen. When I speak in what follows of 'emergencies waiting to happen', these borderline cases will be disregarded.

Emergencies waiting to happen in the preferred sense can be distinguished from unexpected emergencies and from sought-out emergencies. If emergencies just waiting to happen excuse less than wholly unexpected emergencies excuse, then emergencies that are sought out excuse least of all, if they excuse anything. Someone who, for the thrill of it, only climbs mountains when climbers are warned strenuously against it and frequently has to call in the rescue services; someone who, for the thrill of it, penetrates no-go areas in periods of war, but then feels no scruples about asking others to face great danger in order to get him out; such a person probably does not act excusably at all, even though he will lose his life if he does not call others to the rescue.

Emergencies that no one could reasonably have expected—let me refer to them simply as 'unexpected emergencies'—are at the other end of the spectrum. Why do they excuse as much as they do, morally? For at least two reasons. First, avoiding or minimising significant harm is morally important, and emergencies are cases where significant harm has to be avoided or minimised. Second, the importance of minimising significant harm is usually reflected in the appropriateness of longer and more careful practical deliberation than usual—precisely what unexpected emergency rules out. In unexpected emergencies one is usually forced to decide quickly when the stakes are high. So there is less to be said against whatever it occurs to the agent to do. Again, the usual mechanism for deciding quickly is disabled. The usual mechanism—habit—would probably lead to *bad* choices. One's habitual aversion to breaking into things and stealing, for example, is just what *shouldn't* be engaged when one has to decide how to get treatment for someone else's heart attack, and breaking and entering a car provides a quick solution. One's

usual inclination to run a mile from blood and gore is just what shouldn't be acted upon where there is a chance of being helpful at the scene of a road accident. In an emergency one has often to think quickly *and* in an unaccustomed way. Since these things are difficult, it is excusable to be ineffectual in an emergency. The more effective one is, the greater the achievement, and the more can be excused in the means chosen.

Not all unexpected emergencies are equally daunting, because there are recognised routines for dealing with standard emergencies, and some unexpected emergencies are standard. Lifeboat drills on ships; fire drills in schools; first-aid training; the practice of giving safety instructions to passengers at the beginning of flights: these keep us from being mired in dither if the worst happens. In many developed countries, all of these drills co-exist with construction and maintenance standards that soften the effects of the relevant emergency and that lengthen the time available to reduce the danger or get away from it. Taken together, the drills and standards work to domesticate emergencies. Although they do not take the threat of harm out of emergencies, they keep us from being at a loss in the face of them. Designing public buildings with lots of fire escapes does not necessarily make the occurrence of a fire any less of a danger, but having the fire escapes and going through fire drills makes available a mechanism for dealing with at any rate a medium-sized fire more or less automatically.¹

II

Is it morally urgent for emergency to be avoided where it is predictable, and domesticated where it is not? The same factors that give emergencies their excusing power make them likely to produce major harm if they are not avoided, and it seems reasonable to claim that major harm that can be avoided should be. Furthermore, the greater the harm and the more imminent it seems, the more it may appear to an agent caught up in an emergency that

1. Another way an unexpected emergency can be domesticated is by being protracted to the point where people can adjust to it. The invasion of Kuwait may have been such an emergency; the occupation of France during the Second World War may be a further case. The more what starts out as an emergency can be accommodated in a way of life, however, the less, perhaps, it retains the character of emergency.

anything goes. Not just anything that may avert the harm, but anything the agent can do to make it less bad for himself. A man who dressed as a woman or as a crew member in order to board a lifeboat on the Titanic probably did not do all he could to maximise the smallish looking chances of survival of the women and children, but perhaps that did not seem to matter when his own prospects were so bleak. If any of us were suddenly to be told that a violent tidal wave was about to produce an overwhelming flood, or that a giant piece of space debris was days away from striking Earth and devastating it, it might seem as if anything gratifying that could be done in the time left was permitted, no matter how many scruples that gratifying thing might normally engage. If one knows the end is virtually certain to be near, one may clutch at any pleasure while one can, and perhaps feel thoroughly justified in doing so. And emergencies like the tidal wave or the impending collision with the space debris impose such death sentences on large populations. Whether one actually *is* justified in taking the corresponding liberties is a hard question to answer if the end of the world really is nigh, or is reasonably believed to be. It must depend on the liberty being taken. Credit card fraud or theft before the collision with the space debris takes place is one thing; rape or torture is another. But much of everyday bourgeois morality could seem pointless if the emergency were imminent enough, enveloping enough, and final enough. The moral black hole that some emergencies can threaten to suck us into may seem even more repulsive than the desperate measures that emergencies justify or excuse when there is a way of minimising the harm they bring. So perhaps emergency is urgent to domesticate twice over: first because it can produce a black hole; second, and more mundanely, because it is better to avoid the situation of having to cope, probably hurriedly and ineffectually, with a significant harm.

I doubt that every kind of unexpected emergency is morally urgent to try and avoid, and I doubt in particular that unexpected private emergency is always the site of a black hole. Talk of a black hole may make sense where what is in question is a *general* emergency, as in the midst of an unexpected and overwhelming all-out military attack. In that case it might be reasonable for an agent to think there was no alternative to a policy of every man for himself or no real objection to a policy of anything goes.

Again, if a state of all-out war is what we would be reduced to by the collapse of political institutions, as in Hobbes's prototype of the general emergency, then perhaps what has to be seen to before anything else is the security of those institutions, which may involve elaborate mechanisms for defending the economic, transportation and communication systems, and not only the channels through which legitimate political authority flows. It may well be more urgent to devise these mechanisms—and therefore domesticate general emergency—than to do anything else, a point I shall return to. But many smaller scale emergencies are not like this, and the moral danger they pose is not that of encouraging the idea that all things are permitted or that it is every man for himself.

Legal cases that ostensibly occasion a necessity defence against a charge of murder are relevant here. In one of the most famous, *R v. Dudley and Stephens*,² three men and a boy were cast adrift in an open boat with very little food and water. After 18 days, when all were starving and the boy was the closest of the four to death, two of the men killed him, and all three fed on the body. The third man had previously pleaded with the other two not to kill the boy. Four days later, and nearly on the point of death, the three men were rescued. Though the jury found that they could not have survived except by their acts of cannibalism, the judgement in the case was that the killing of the boy was not necessary, and that it therefore amounted to murder. According to the decision of Judge Coleridge, the boy was killed because he was the weakest and offered no resistance; but any of the men was appropriate to kill if the boy was, Judge Coleridge held. If the decision to kill was always to be left to the subjective judgement of the people affected in a case where all but one could survive, the judgement continued, the weakest would have the least good chance, when what they deserved was an equal chance. Again according to the judgement, it was possible, in some sense, that all three could have been picked up before any died, so that it was unnecessary for anyone to be killed.

The judgement seems to impose a very high standard of reasonableness on starving men, and if the question is not the legal one of the classification of the killing as murder but the moral one of the excusability of the killing, I think that it *was*

2. [1884] Q.B.D. 273.

excusable. On the facts the two men who killed the cabin boy did not resort to the desperate measures they took unduly quickly or casually, nor did they immediately hit upon a plan of killing the weakest in the group. They had proposed drawing lots. In any case, it is asking a great deal for someone *in extremis* to view his own death as no more of a misfortune than that of the other people in the boat with him.³ Things stand differently, of course, if what is at stake is not survival itself but mere freedom from hunger. But after 18 days, it is plausible that survival was indeed at stake. This does not seem to be a case of everything being permitted or of the two men having done what they did out of convenience rather than desperation. It is true that the behaviour of the third man shows that more scrupulousness was possible. But the question before us is whether the process leading up to the killing of the boy showed no scruples at all on the part of the two who killed him. The answer seems to be 'No'. The same conclusion seems to fit where normally forbidden steps are taken not to save oneself, but others, in an emergency.⁴ The intuition

3. There is apparently a tradition in English law of regarding the killing of the innocent, even in the cause of saving a loved one, as legally indefensible. Hale's *Pleas of the Crown* (1736) and Blackstone's *Commentaries on the Laws of England* (1857) both state that a man under duress ought rather to die himself than kill an innocent. See <http://www.lawteacher.net/Criminal/Duress%201.htm>.

4. In *Justification and Excuse in the Criminal Law* (London: Stevens and Sons, 1989), J.C. Smith gives an example from the disaster involving the sinking of the ferry, *Herald of Free Enterprise* at Zeebrugge:

At the inquest ... evidence was given by one of the passengers ... a corporal in the army, that he and a number of other people, apparently dozens of them, were in the water and in danger of drowning. But they were near the bottom of a rope ladder which they might climb to safety. On the ladder, petrified with cold or fear, or both, was a young man unable to move up or down. No one could get past him. The corporal shouted at him for 10 minutes with no effect. Eventually he instructed someone else who was nearer to the young man to push him off the ladder. The young man then was pushed off and fell into the water, and, so far as is known, was never seen again. The corporal and others were then able to climb the ladder to safety.

At the coroner's inquest, the coroner pointed out that that there was no evidence as to the identity or eventual fate of the young man:

There simply isn't any evidence [that the man on the ladder was killed], but even if there were, I would suggest to you that killing in a reasonable act of what is known as self-preservation, but also includes, in my judgement, the preservation of other lives, such killing is not necessarily murder at all.

Even if it *is* murder, it seems morally excusable, because it was only done when other means of removing the man from the escape route had been tried, and because it was done not to save the life only of the one who pushed the ladder man into the water, but to clear an escape route for others, no less innocent victims of the ferry disaster than the petrified figure on the ladder.

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that emergency strips people quickly of their moral scruples or inhibitions does not seem to be borne out in all real cases. By the same token, it does not seem urgent to domesticate emergencies on the ground that they necessarily grease a slippery slope or create a moral back hole.

What about the other ground for supposing that it is urgent to domesticate emergencies: namely that emergencies often threaten significant harm and that because significant harm is always urgent to prevent, steps should be taken to keep well away from emergencies? Even this suggestion is disputable.⁵ After all, certain leisure pursuits, even when not engaged in recklessly, place one at the top of high cliffs or in the midst of raging rivers—dangerous places if any are. Training and the care taken by agents on each occasion can bring it about that not every mountaineering outing and not every white-water rafting holiday is an emergency waiting to happen, but surely there is no clear borderline between an emergency waiting to happen and the responsible pursuit of pastimes with an element of significant danger in them. A proof that avoidable and significant dangers ought to be avoided threatens to outlaw not only emergencies waiting to happen, but *any* activity in which danger is present but contained.

Indeed, from a certain angle, the apparent need to avoid emergencies waiting to happen can seem a contemptible surrender to timidity, safety or the inertness of the couch potato. In other words, it might be thought that what ties together the imperative of domesticating general emergency and of preventing emergencies that are waiting to happen is the repulsiveness for ordinary morality of facing life in any form that is bigger than we are. On this view, emergency can be understood as untamed life or nature breaking out of the confines erected by human prudence, and instead of being the outlying case for moral guidance,

5. 'Be ready for anything' and 'Be ready for the worst things' are injunctions calling for the domestication of emergency, but they seem more at home in an adventurer's code than in a morality for everyone, and they may not even make sense. To begin with, one of the bad aspects of the worst things may be that there is nothing one can do to prepare oneself for them. Again, were it possible to be ready for anything or for the worst things, emergency would not so much be domesticated as abolished. Even if the injunctions make sense, however, they may feed the hubristic illusion that human beings can be equal to any event. And if followed, they distract us in normal life from the usual business of meeting competing but legitimate demands in non-emergency situations. The various invitations to confusion in the slogans we are considering may be hard to resist in an environment in which 'crisis management' is seen as a general skill, but resisted they should be.

with the safe and everyday occupying the centre of our attention, emergency is what we each ought to aspire to be equal to. So we should not avoid it, and perhaps should live life closer to it.

This position seems wrong to me, but it contains a good point. It seems wrong, because it conflicts with the intuitive distinctions between unexpected emergencies, emergencies waiting to happen and sought out emergencies. Indeed, it turns upside down the intuitive valuation of the sought out emergency as the case that excuses least or nothing. But it is right in this sense—that emergency can and ought to be domesticated only within limits. There is an important place in human life for a capacity to face danger *ad hoc*, and some of the risky recreations develop this capacity. That does not mean that just anything dangerous is in place in the pursuit of a dangerous recreation. Someone who mountaineers while roaring drunk or skydives without much attention to the condition of his parachute is adding danger extraneous to what the skill of mountaineering or skydiving is designed for, or disabling himself for confronting the danger proper to mountaineering and skydiving. But the arguments against exposing oneself to the extraneous dangers are not arguments against pursuing the dangerous recreations themselves. It is not as if pursuing the dangerous recreations themselves is disabling. On the contrary, the skills required to pursue them can make one more confident and disciplined in the rest of life, not to mention physically stronger, and more useful to others who need help.

The case of dangerous sports does not abolish or erode unduly the distinction between emergencies waiting to happen and sought out emergencies, but it does show that what is normally an emergency waiting to happen—placing oneself at the edge of a cliff—is not always one. There is probably no skill relative to which mountaineering while drunk is part of testing that skill, and so mountaineering while drunk is *always* a sought-out emergency, the kind it is inexcusable to bring about. In general, if a danger cannot be met intelligibly by an intelligible skill, it is an emergency waiting to happen and is not justified by the good of becoming a more capable and resilient human being. If the danger can be met by a skill, on the other hand, it may be justifiable to do something that carries that danger despite its appearing to be no more than an emergency waiting to happen, and despite the fact that the relevant skill can never be entirely safely exercised.

III

In discussing the question of whether it is always morally urgent to prevent preventable emergency or domesticate the others, I suggested earlier that the answer was plausibly 'Yes' for general emergencies, even if, as has emerged, the answer is 'Not necessarily' for private emergencies. General emergencies, such as violent civil war involving genocide, are not only occasions for great harm; they are also occasions for the serious rupture of moral conventions. When riots break out, people not only fight; they opportunistically commit property crimes while the police or army are trying to deal with violence. Looting is commonplace, for example. When public disorder is widespread and lasts more than a few hours or a few days, there are big movements of people to places unable to feed, shelter or care medically for them. Houses that are abandoned come to be occupied by others or are looted and destroyed. In this way, displaced people become stranded in a no man's land. Economic arrangements are disrupted; rumours multiply and are hard to discredit. People can be separated, with no means of regaining contact. In these circumstances, it is easy to feel deeply cut off from the world, with all connections to people and things that are dear or familiar lost or at risk. In these circumstances, it is natural to distrust others and to keep what one has for those one knows best. It is natural to take pre-emptive action against potential attackers or competitors, there being no recourse to the public authorities that are supposed to protect one against them in normal times. Vulnerability and poverty increase, but without an enlargement of sympathy that might be prompted by vulnerability and poverty in normal times. In this way there can quickly develop a collective slide into a sort of free-for-all. These are the sort of facts that make it morally urgent to prevent general, public emergencies, or to cut them as short as possible where they do occur.

There can, of course, be emergencies that increase solidarity. The Second World War seems to have brought this about on a large scale in Britain. So, perhaps, on an even larger scale, has September 11, though the solidarity is wearing thinner. But this effect does not seem typical of emergencies in our own day. In Rwanda and the wars in the Balkans, not even grudging co-existence between ethnic populations could be kept going. Even

where one has a natural disaster, and there is no division along ethnic lines, people can still find themselves pitted against one another in a competition for scarce food, water or shelter. If there is massive physical damage and corresponding economic dislocation, the ruthlessness of the free-for-all can be very great. This is one reason why it is morally important for there to be plans in place to keep the slide from reaching the bottom. Not plans devised *ad hoc* by individuals, but the plans of central authorities.

Because of the way the more extreme public emergencies can undermine everyday morality itself at a place and time, I am claiming, it is morally urgent to avoid or domesticate them, or to curtail them once they have broken out. On the other hand, the powers reserved for central governments in times of emergency can sometimes be so great, that exercising these powers can itself be thought to constitute a departure from a morally defensible political and legal order. The greater the powers made available for coping with an emergency, the greater the temptation, perhaps, for an emergency to be declared opportunistically, and to be kept going longer than necessary. Again, the more emergency powers are concentrated in the hands of a single person, as emergency powers tend to be, the more one person's judgement has an authority that perhaps it shouldn't have.

The relation between morality and public emergency is usually broached by asking how to constrain the powers delegated to governments to enable them to cope with emergencies. It is usually thought that the less power is unleashed to curtail the emergency, and the shorter-lived access is to unusually great power, the better. It is as if the burden of proof is on those who would resort to extraordinary means to deal with an extraordinary danger. There is something odd about this assignment of the burden of proof. After all, an emergency is an emergency, and if no latitude were needed in coping with it, it would simply be an everyday call on everyday uses of power. It is true that there should be great obstacles in the way of declaring an emergency where there isn't one, so that extraordinary powers aren't seized for reasons of simple convenience, or kept in force indefinitely;⁶ but where a declared emergency really is one, and

6. As in the U.S.A., where many sets of emergency powers seized by the president during the 1980s have never been withdrawn.

there is evidence of the possible slide into free-for-all, or even, short of this, of considerable economic crisis, extraordinary uses of power seem to me to be in order: they reflect the departure from the ordinary of the situation they are applied to.

It might be thought that if the justification for emergency powers is the restoration or protection of ordinary moral restraint in practice, then the means used must necessarily be consistent with ordinary moral restraint in turn. The most that seems to be true is that the least possible extraordinary power should be used to restore normal life and the normal decencies. How little is the least possible in the circumstances, however, is typically hard to judge, and the judgement is usually left to one person or a small body of people to make in what they take to be the time available. In developed countries the people making the decision will include those who hold high elected office, and officials who have experience of real crises, and whose job it is to operate well rehearsed procedures for dealing with emergencies of different types, once the individual or group in charge has decided which procedure is appropriate. The delegation of powers to a small group makes sense in the light of the fact that in some emergencies time is short, and that inclusive public deliberation requires more time than is available. The division of labour, according to which distinct public officials exist to superintend measures taken against different emergencies; this, too makes sense; and since the plans put into effect are typically developed and refined in normal times, when democratic oversight is in principle available, rather than thought out *ad hoc*, they can have a certain legitimacy. How far, then, is it reasonable to condemn those taking emergency decisions and implementing emergency procedures when these decisions and procedures turn out to fail?

The application of exacting moral standards to public emergencies is in some ways as inappropriate as the application of such standards to private emergencies. Moralising tends to assume normality, or abnormality that can be correlated with the normal by a standard of proportionality. Neither normality nor an ability to proportion powers to an abnormal situation need be present when decent governments confront emergencies. It is different for governments that preside permanently over populations by means of powers like emergency powers—powers that give them maximum latitude. These governments have no moral

excuse, other things being equal, for not developing a higher and higher threshold for the use of these powers, or for abandoning some of these powers over time. But democratic governments that rarely exercise them at all, or rarely exercise them to the full, are in a different case. They are up to a point constrained to follow one or other pre-prepared plan; and if the procedures that yielded the plans are democratically endorsable, then everyone else is up to a point constrained to live with them.

Does this mean that whatever a normally restrained and reasonably prepared government does in the face of emergency is to be forgiven? No, but there is a case for operating a principle of charity even in relation to the actions of the powerful. This is partly because an emergency is an emergency and requires quick action, which may lead to an understandably unsatisfactory outcome. But it is also because we delegate to people the responsibility for making the judgements. This power of judging and acting is not necessarily wrested from us by the power-hungry. Often it is eagerly passed to officials and a government, like a hot potato. So if they do their best to cope in a situation that probably no one else would handle better in the circumstances, that should be good enough. The principle of charity particularly needs to be observed in judging the actions of governments responding to potentially overwhelming aggressive wars, or to prolonged terrorism, but I think it extends to cases like the recent foot and mouth crisis in the UK, and the fuel protests as well. It is true that, in some of these cases, the emergencies were preventable and arguably just waiting to happen. In the case of September 11, the culpable failure of the CIA to develop intelligence networks on the ground in the Afghanistan region is widely thought to have contributed to the unexpectedness of the attack on the Twin Towers. In the case of foot and mouth, lax controls on the import and movement of infected meat in the UK may have been preparing the ground for a huge agricultural and veterinary crisis. These things certainly justify criticism of the governments concerned, and remind us of the important role states have in predicting, preventing, and making preparations that minimise the harm of, emergencies. But they do not mean that just anything that is done to minimise the emergencies should be dismissed contemptuously as too little too late. Even an emergency that is dealt with poorly in the early stages and

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that gets further out of hand than it should, can take great skill to bring under control, and the quality of the action in the final stages should not be denigrated just because of what preceded it.

Clearly it makes a difference what is in the balance. The foot and mouth emergency is not to be compared to the Second World War, and the analogy between September 11 and Pearl Harbor is very strained in many ways as well. The principle of charity needs to be applied first and foremost to the 'supreme' emergency, the kind that poses an imminent and overwhelming threat of great harm on a large scale, including the threat of undermining the recognition of morally important values, like justice and shared humanity. The Second World War is often thought to be such an emergency and to have justified extreme measures against the Germans and Japanese. In Michael Walzer's important study of just and unjust wars,⁷ a whole chapter is given over to 'supreme emergency'. The approach I favour can be indicated best, perhaps, by contrast with his.

Walzer argues that at any rate the early stages of the fight against the Nazis in the Second World War was a supreme emergency, but he denies that even that emergency justified all the tactics employed by the Allies or the British.⁸ He thinks that the terror bombing of German cities that started in late 1940 was unjustified, at any rate for all of the time it was carried out, and he points out that it set a precedent for fire-bombing and atom-bombing the Japanese, an enemy he does not think as evil as the Nazis, who posed less of a military threat as well. He is critical of some of the rhetoric of the wartime leaders in Britain, and also of the moral arguments that were used in public or within the government at the time. He writes,

Soldiers are encouraged to fight fiercely if they believe that they are fighting for the survival of their country and their families, that freedom, justice, civilization itself are at risk. But this sort of thing is only sometimes plausible to the detached observer, and one suspects that its propagandistic character is also understood by many of the participants. War is not always a struggle over ultimate

7. *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977).

8. Page references are to Chapter 16 of Walzer.

values, where the victory of one side would be a human disaster for the other. It is necessary to cultivate a wary disbelief of wartime rhetoric, and then to search for some touchstone against which arguments about extremity might be judged.⁹

Walzer seems to imply that the point of view of the detached observer is the right one to adopt both in a wartime situation, *and* in a study of the abstract question of what makes a just war. But I think this implication is questionable. Just as the judge in the case of Dudley and Stevens seemed to be *too* detached when he pointed out that, for all they knew, the starving men who had been adrift for two weeks might have been rescued at any moment, and so could have refrained from the desperate measure of cannibalising the cabin boy; so the point of view of the detached observer may be the wrong one to adopt in judging the rhetoric and arguments of the civil and military leadership in Britain in the 1940s. One has to imagine one's way into the emergency, including the toll an emergency can inevitably take on how one decides, and the different things in the balance as things get, or are reasonably thought to get, worse. Even those directly involved in a war but in different roles have different prerogatives in relation to detachment. An ordinary citizen in 1940 may have wondered, or a philosopher writing about it today may wonder, whether, when sufficiently many things are taken into account, it really was necessary to go to war. And the things taken into account may legitimately include the question of whether it would be a disaster for humanity if one's country were defeated. But should a government or a military—which has special obligations to a certain citizenry—try to detach itself in the way a citizen might? More, should it hold itself to the very high standard Walzer seems to insist on? Should it have to convince itself that it is, on balance, in the interests of *humanity* to go to war or to launch an attack on an aggressor, before it does either thing? This seems to set the threshold for the justification of an attack on an aggressor unduly high.

It seems legitimate or excusable for a government to take steps it reasonably thinks are necessary for a country's survival, even if, from a sufficiently detached view, the conquest of the country would not be a *human* disaster. It even seems legitimate for the

9. Ibid., p. 253.

desirability of national survival to *go without saying* for the corresponding national governments. This is not to suggest that governments shouldn't do everything they can to settle disputes by non-military means where that is possible. They should. This is not to suggest, either, that governments shouldn't try to formulate domestic and foreign policies that aspire to be acceptable internationally. They should. But it is excusable for governments which fail abjectly in these aspirations to hit out when attacked, and it may be bad for even relatively scrupulous governments—whose first responsibilities are to their citizens—to make decisions always from a perfectly cosmopolitan point of view. There are attachments, like that of a government to a nation, or a doctor to a patient, which confer special responsibility without necessarily being thought to skew judgement. A government, like a doctor, is not supposed to adopt the view from nowhere at the best of times, and neither should we, judging their actions in the worst of times.¹⁰

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10. An earlier version of this paper was read to a meeting of the East Anglia Philosophy Triangle, on 25 May 2002. I thank the audience for their comments. Heather Draper also made valuable suggestions.

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