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Making Sense of ‘Public’ Emergencies¹

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In this article, I seek to make sense of the oft-invoked idea of ‘public emergency’ and of some of its (supposedly) radical moral implications. I challenge controversial claims by Tom Sorell, Michael Walzer, and Giorgio Agamben, and argue for a more discriminating understanding of the category and its moral force.

Emergencies are situations, often unforeseen, in which there is a risk of significant harm and a need to act urgently if the harm is to be averted or minimised. We encounter emergencies throughout our lives, and often allow them to shape our behaviour. Who has never sought to account for resorting to an unusual degree of force, failing to fulfil a promise, crossing a red light, or for any other sort of *prima facie* wrongdoing by citing an emergency? Some theorists and policy makers believe that there exists a special category of emergencies that pose distinctly greater challenges than others, and merit an independent focus. They tend to single them out as ‘public emergencies’.

Given the widespread and sometimes inconsistent uses of the category, I first ask in this article whether there really are emergencies that are so distinctive as to warrant resort to a specific ‘public’ designation. I argue that there are distinctively ‘public’ emergencies and that the label, although vague, helps bring out important contrasts. By virtue of their role and position in the world, governments must often contend with additional moral considerations that do not apply to ordinary agents, or do not apply in the same ways. Thus, whenever a government is responsible for handling an emergency, additional considerations come into play and affect the justifiability of what it might do in response. Public emergencies, I shall argue, are emergencies that interfere with a government’s performance of its role(s). As a result, such emergencies may have distinctive moral implications. That being said, my purpose in this article extends beyond mere definitional concerns. I also want to demystify some popular and theoretical misconceptions about public emergencies. Most notably, I want to confront and disentangle a number of conflicting claims that morality may be more demanding, relaxed, or altogether different in times of public emergency. While so doing, I will emphasise the heterogeneity of the category, and argue that different public emergencies may have widely differing characteristics and implications. Although the writings of moral and political theorists Tom Sorell and Michael Walzer constitute my principal foil in the article, I address the works of various other commentators along the way. I conclude with a few remarks on the importance of formal declarations to the justifiability of some governmental responses to public emergencies. These considerations set the stage for further study of the relationship between public emergencies and the rule of law as an ethic of governance.

The ‘Public’ Character of Emergencies: A Few Notes on Methodology

Can an independent inquiry into the idea of ‘public emergencies’ teach us anything important about emergencies? Before entering the thick of the argument, I believe that a few methodological remarks about the use of the label ‘public’ are in order. First, it is important to note that the label can be misleading. According to the *Oxford English Dictionary*, the word may qualify that which ‘belongs to, affects, or concerns the community or nation.’² In this sense, academic and policy designations of wide-scale or collectively-threatening emergencies as ‘public’ seem at least minimally fitting. Yet, as the editors of the *OED* are keen to add in a caveat: ‘The varieties of sense [of the word ‘public’] are numerous and pass into each other by

¹ I wish to thank Kimberley Brownlee, Alon Harel, Victor Tadros, Elizabeth Angell, Rahul Rao, Victor V Ramraj and, most importantly, John Gardner for discussion, comments, and criticism. I also wish to thank the Rhodes Trust, the Oxford Centre for Ethics and Philosophy of Law, and the Social Sciences and Humanities Research Council of Canada for their financial support.

² ‘public, *a. (n.)*’ in *Oxford English Dictionary* Online 2nd ed Oxford, Oxford University Press 1989, online: <http://dictionary.oed.com/cgi/findword?query_type=word&queryword=public>.

many intermediate shades of meaning. The exact shade often depends upon the substantive qualified, and in some expressions more than one sense is vaguely present'. In other words, the public-private distinction is notoriously multifaceted. Depending on the purpose for which it is used, it may reveal different aspects of reality while masking others: state/non-state, public good or private property, private home and public street, and so forth. The designation of an emergency as 'public' does not escape the complexity and confusion inherent in the distinction. For example, on the basis of the definition introduced at the beginning of this paragraph, even a discrete individual emergency could meet the 'public' threshold, to the extent that it is a kind of emergency that should concern not just the affected individuals but their fellow-citizens - consider murderous assaults or rape attempts.

If significant emergencies involve a risk of serious harm, and serious harm is by and large a proper matter of public concern, then a fairly wide assortment of significant emergencies may be said to be public. Admittedly, principled limits such as those set by the oft-discussed 'harm principle' may be invoked to restrict the legitimate scope of public concern. Depending on how these limits are articulated, the range of public emergencies properly called as such may vary. Yet more often than not, commentators who invoke the label 'public emergency' are not considering discrete individual emergencies. They speak instead of emergencies that are so significant as to constitute potential justifications for emergency measures, states of emergency, martial law, and the like. They want to talk about emergencies that governments, law, and sometimes even morality, may not be able to address in a normal manner, if at all. Therefore, their analyses tend to distinguish between relatively isolated individual emergencies and what they term 'public emergencies.' For example, Tom Sorell writes that:

There are important differences between, on the one hand, public emergencies - emergencies facing whole states or large number 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.³

Sorell then goes on to focus on 'the more extreme' and 'general' emergencies - his examples include a 'state of all-out war' and of a 'violent civil war involving genocide'⁴ - as paradigmatic public emergencies against which we should contrast private emergencies.⁵ Sorell's tendency to assimilate public emergencies with worst-case scenarios may be explained by his ultimate aim, which is to provide an account of the defensibility of exceptional powers that governments sometimes employ to deal with especially severe emergencies. The move is relatively unsurprising, given the common tendency to assume that exceptional powers of this sort are most relevant in cases of emergencies that pose grave threats to law, order, social norms and state institutions, not to mention collective and moral survival. Yet, such a broad-brush use of the public-private distinction threatens to obscure more subtle ways in which some emergencies may present greater, or different, challenges for state and law than those of discrete individual emergencies. Sorell's approach may also obscure a more nuanced assessment of the types of state powers and responses suitable to different types of emergencies.

To be fair, Sorell is not oblivious to such subtleties. For example, he affirms that '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 Harbour is very strained in many ways as well.'⁶ Notice some of the various distinctions at play in this sentence. One of the central differences between the 2001 British foot-and-mouth emergency and the Second World War is quantitative - irrespective of any other contrasts the Second World War affected people on a much wider scale, and put many more lives at stake. The attacks of September 11 and Pearl Harbour cannot be so easily distinguished. Similar numbers of people were killed and wounded, and the scope of the material destruction was comparable in many ways. If a difference exists, it seems to be a much more qualitative one - for example, one attack included a civilian target and was perpetrated by non-state actors, whereas the other was aimed at a military base and was the act of a state. Upon close reading, Sorell alludes to conceptual tools that could help make sense of these basic distinctions. On the one hand, he repeatedly stresses

³ Tom Sorell 'Morality and Emergency' *Proceedings of the Aristotelian Society* 103 (2002) pp 21-37 at p 22.

⁴ Sorell *loc cit* 2002 pp 27, 31

⁵ Sorell *loc cit* 2002 pp 26-27, 31-33, 36-37

⁶ Sorell *loc cit* 2002 p 35

the relationship between considerations of scale and the 'public' character of emergencies.⁷ On the other, he emphasises that some emergencies endanger matters that are already the inherent responsibility of governmental agencies. For example, he argues that, even if there is no 'human disaster' involved, it seems legitimate for a government to take necessary steps to ensure a country's survival.⁸ 'It even seems legitimate,' he adds, 'for the desirability of national survival to go without saying for the corresponding national governments.' According to him, 'There are attachments, like that of a government to a nation [...] which confer special responsibility'.

Unfortunately, Sorell fails to differentiate and delineate these quantitative and qualitative dimensions and systematically discuss their ramifications. Instead, he tends to conflate them. Remember that, according to him, public emergencies are 'emergencies facing whole states or large numbers of people, *and* which are usually the responsibility of public agencies and their officials'.⁹ As I suggested above, this approach obscures important nuances. It is true that some emergencies may be both large-in-scale and the inherent responsibility of governmental agencies and their officials. It might even be true that such emergencies place unique demands on the polity. However, since these dimensions do not necessarily go hand-in-hand in a given emergency, it seems methodologically sounder to distinguish them.

A few more preliminary remarks are in order. As I already mentioned, one of the main reasons for my interest in 'public emergencies' is the abundance of theoretical and political claims that some such emergencies warrant drastic and unusual responses from governments and their representatives. Yet cautionary tales are almost as abundant. For example, Oren Gross and Fionnuala Ní Aoláin, who focus on violent emergencies threatening state governance, suggest that:

The vast scope of powers [conferred on or invoked by governments in some public emergencies] and their ability to interfere with fundamental individual rights and civil liberties and to allow governmental regulation of virtually all aspects of human activity - as well as the possibility of their abuse - emphasize the pressing need for clearly defining the situations in which they may be invoked.¹⁰

Paradoxically, Gross and Ní Aoláin state their doubt that precise definitions can ever exist. Admittedly, when discussed *in abstracto*, the contours of emergencies that might justify different responses will unavoidably be somewhat vague. However, I believe that, once fleshed out, quantitative and qualitative parameters unveiled by a close reading of Sorell's work may well reveal themselves as key grounds for assessing the propriety of various governmental responses.

For the sake of clarity, let me emphasise that the law often insists on the fulfilment of very specific criteria before a given 'emergency measure' can be imposed. For example, Canada's Emergencies Act, 1988, reserves the most draconian powers for what it deems to be the most serious emergencies and authorises more limited measures for less serious emergencies. At one extreme, the existence of a 'war emergency' (s 37) grants the federal government a wide margin of discretion to make orders or regulations that it 'believes, on reasonable grounds, are necessary or advisable for the dealing with the emergency' (s 40). At the other end of the spectrum, a 'public welfare emergency' (s 5) caused by a large-scale natural catastrophe, a pandemic, or an industrial accident, allows for a relatively limited set of listed measures that must be closely tailored to the nature of that emergency (s 8). So-called 'public order emergencies' and 'international emergencies,' which pose more serious, or differently challenging, threats to the integrity of the Canadian state, its legal system, and its normal provision of government, occupy a middle position and allow for a number of more invasive and unusual measures (ss 19 and 30). Note that legally-stated criteria for emergencies and the precise nature of the powers and measures made possible by the fulfilment of these criteria

⁷ Sorell *loc cit* 2002 pp 22, 26-27, 31, 35

⁸ Sorell *loc cit* 2002 p 36-37

⁹ Sorell *loc cit* 2002 p 22 [Emphasis added]

¹⁰ Oren Gross and Fionnuala Ní Aoláin *Law in Times of Crisis: Emergency Powers in Theory and Practice* Cambridge, Cambridge University Press 2006, pp 5-6

may conceivably be spelt out in even finer detail.¹¹ They may also be left more broadly open, as in the case of the European Convention on Human Rights which allows for derogations from many Convention rights in time of 'war or other public emergency threatening the life of the nation.'¹² Such technical variations can be explained by the fact that the law, when it borrows a moral concept like 'emergency,' may adjust or restrict its meaning to suit its various purposes. However, this *modus operandi* should not cause us to forget that responses to emergencies, legal or otherwise, are ultimately answerable to morality. Legal definitions, like other governmental claims, do not have the final word. The ultimate grounds for assessing responses to emergencies are the characteristics of these emergencies as they actually unfold in the world, in all their complexities.

Therefore, prior to any investigation of what actual legal systems say about emergencies, one must reflect upon what may cause some of them to possess different, or greater, moral implications than others. This is precisely what I intend to do in the sections ahead. While doing so, I will strive to provide a more consistent, transparent, and, hopefully, useful account of why and how the idea of 'publicness' may matter - an account that is more explicit and nuanced than Sorell's, and perhaps less of a hostage to the kind of responses whose defensibility it might serve to appraise.

Public Emergencies and the Moral Position of Governments

Governments as Moral Agents

A sound understanding of why some emergencies may pose more radical, or different, challenges than others to governments and law begins with the realisation that governments are moral agents, and therefore have moral responsibilities. Here, I follow Joseph Raz in distinguishing 'the state, which is the political organization of society, its government, the agent through which it acts, and the law, the vehicle through which much of its power is exercised'.¹³ Given the deep interconnections between these notions, they are often used interchangeably. For example, legal and political theory literature sometimes refers perfectly intelligibly to states as moral agents. At times, I have myself been venially guilty of crisscrossing the taxonomy suggested by Raz. However, to the extent that a more rigorous approach may clarify my argument and allow for key distinctions, I will endeavour to respect it.

Now, I do recognise that an understanding of governments as moral agents is controversial. It is often argued that governments are fictional entities, and that fictional entities are not agents. Actions can perhaps be intelligibly imputed to fictions, the argument goes, but fictions cannot act *per se*. While this article is not the place for a full-blown inquiry into the possibility of irreducible governmental agency, some limited observations seem nonetheless apposite. First, those who raise the fiction objection tend to forget that, at least in principle, a human being may govern a society all by herself. Louis XIV may have been exaggerating when he (allegedly) replied '*L'État, c'est moi!*' to those who advocated national representative institutions and a separation of powers. Yet, such a claim may not have seemed so fanciful if made by Orwell's Big Brother, Chaplin's Great Dictator, or Lon Fuller's Rex. It might even be harder to write off if voiced by the hands-on, all-powerful ruler of a minute, sparsely populated island state. If living human beings are not fictions and may be agents, and if, at least in principle, they can govern alone, must not those who claim that governments can never be agents be wrong?

¹¹ For example, the Liquid Fuel Emergency Act 1984 (Commonwealth of Australia) deals specifically with emergencies related to the shortage, or likelihood of shortage, of liquid petroleum, a liquid petroleum product, a liquid petrochemical, methanol or ethanol.

¹² Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) s 15(1)

¹³ Joseph Raz *The Morality of Freedom* Oxford, Oxford University Press 1986 p 70

Perhaps the fiction objection has more bite against our big and multifaceted modern governments. After all, it is true that modern governments tend to be institutionalised and multi-layered, to manage highly populated, territorially significant welfare states, and to depend for so doing on the actions of countless politicians, civil servants, and otherwise enlisted individuals. Given such features, is it not misleading to refer to these governments as agents? As recent theoretical literature points out, the elaborate corporate nature of modern governments does not prevent genuine governmental agency.¹⁴ All governments have a complex normative framework - i.e. a constitution, written or unwritten - that constitutes and divides labour between their various organs, lays out principles of governance, and institutes authoritative decision making and control mechanisms. By complying with this framework to a reasonable extent (insofar as it provides for sufficient constraints against internal inconsistencies), individual members allow their government *qua* corporate entity to form judgments and exhibit attitudes as a coherent whole, and to make reasonably consistent decisions on the evaluative propositions that they present to it for consideration. Thus, governments can arrange for things to be done, and be held responsible for them. This is the assumption on which I will proceed, not only because I find it persuasive, but because treating governments as moral agents provides an unparalleled lens through which one can make sense of what it means, generally speaking, to speak of some emergencies as 'public.'

Contingently or Inherently Public Emergencies?

Contingently Public Emergencies?

When confronted with an emergency, a government may be in a distinctive moral position for a number of contingent and inherent reasons. The contingent reasons include, though are not limited to, what Sorell terms considerations of scale. When emergencies are large-in-scale, governments and their officials are often better, and sometimes even uniquely, situated to address them. Typically, governments have means and resources that are unavailable to individuals or small groups, such as extensive *de facto* authority, significant control over the use of force, considerable economic power, and relevant expertise. Thus, when the magnitude of an emergency makes it necessary, they tend to be able to coordinate more effectively, distribute resources more efficiently, react more forcefully, and fund and implement more accurate prediction and prevention strategies while individuals and non-governmental groups can sometimes play a part in minimising emergency-related harm in such situations, emblematic government agencies like the military and emergency services are often able to create a much more efficient and significant impact. Conversely, discrete individual emergencies or emergencies of a relatively small scale are often best addressed by those in the predicament (or those who are close to it), especially when they arise unforeseeably. Thus, even when a government undertakes to protect personal homes against fire, it usually refrains from hiring specialised fire monitors to alert the fire department in case of emergency. As a general rule, this would be inefficient, if not counter-productive, since ordinary citizens are usually best placed to fulfil this task. Consider also the case of the bystander who is the only person able to provide ready assistance to a man being mugged on the street.

As intuitive as they may seem, these assessments of situational competence are merely contingent. For example, the government of a poor and weak state might not be in a position to tackle large-scale emergencies effectively. A government that is usually able to address such emergencies appropriately may also be unable to do so in a particular instance. When this is the case, it may be best for individuals and non-governmental groups to deal with the situation instead. Similarly, whereas some people may be best placed to tackle certain types of individual emergencies on their own, others may not. So there are really two sets of issues that Sorell ambiguously subsumes under the lone heading of 'scale'. Of course, the characteristics of an emergency - its scale, but also its urgency, the sense of harm it threatens, its complexity, and so forth - will generally determine the types of responses needed. However, the

¹⁴ See especially Philip Pettit 'Responsibility Incorporated' *Ethics* 117 (2007) pp 171-201, and the papers in Toni Erskine *Can Institutions Have Responsibility? Collective Moral Agency and International Relations* London: Palgrave, 2003.

appropriateness of a needed response may itself be influenced by the capacity or competence of the potential responder(s). I will come back to the broader relevance of this last point in the following sections. For the moment, note only that one might choose to label as 'public' those emergencies to which governments are best able to respond. But I have serious doubts about the wisdom of using the label in such a contingent way. On the one hand, such use unnecessarily obscures the possibility that governmental and non-governmental agents may be equally well-situated to respond to an emergency, or that they may be able to play complementary roles. It also fails to account for another important sense in which we deem some emergencies to be 'public,' that is to say, when it is the government's inherent responsibility - or, some might prefer to say, its inherent duty - to tackle them. Could this second application of the label provide a sounder basis for classification?

The General Duty of Emergency Assistance

The last question invites an investigation of when, if ever, it is a government's duty - or obligation - to address an emergency. Having a duty means having a reason to do (or not to do) something that is not hostage to one's goals and is also a reason not to act for certain conflicting reasons. It seems to me that, like all agents, governments have general moral duties related to emergency assistance and prevention.

Consider, for example, the general duty to rescue that is often said to find its roots in the value of human solidarity. If such a duty exists, as I believe it does, it binds all moral agents. Although, strictly speaking, modern governments are not human agents (despite depending on their human members to act) and may not be able to act in solidarity *qua* humans, it still makes sense to claim that their duties find ultimate explanation in human values such as solidarity. This reasoning falls in line with the 'humanistic principle' that has been defined and defended by Joseph Raz as 'the claim that the explanation and justification of the goodness or badness of anything derives from its contribution, actual or possible, to human life and its quality.'¹⁵ This principle serves as an important reminder that, although a government's worth is irreducible to the value of the particular individuals that comprise it, that worth still derives from its value for human beings. Governmental agency does not, or so I will assume, have a moral value prior to, and independent of, its value for humans - the opposite stance being rather reminiscent of fascist thought.

Attempting to articulate the content of the general duty to rescue, T M Scanlon affirms that 'If you are presented with a situation in which you can prevent something very bad from happening, or alleviate someone's dire plight, by making only a slight (or even moderate) sacrifice, then it would be wrong not to do so'.¹⁶ Scanlon claims that no one could reasonably disagree that moral agents have such a duty, and save for some extreme libertarians, other theorists tend to agree with him. There are disagreements about the scope of the duty; for example, some merely speak of a duty that 'stops at the brink of danger',¹⁷ or of 'easy rescues and other acts of aid for persons in grave peril' that can be performed with 'minimal risk, cost, and inconvenience'.¹⁸ However, most theorists agree that one should be willing to face at least some danger, risk, cost, inconvenience, or sacrifice to rescue people in grave peril. Note that, in practice, the characteristics of possible rescuers will often influence the contours of their duty. For example, a rescue that would have a light or moderate cost if performed by a government could require a tremendous sacrifice from an ordinary human agent. Whereas a government may only have to sacrifice the temporary use of a few well-equipped coastguard boats to rescue a sailor caught in a storm, an ill-equipped windsurfer could lose her life. Therefore, following from the point made in the last section, we could argue that the scope of an agent's duty to provide emergency assistance varies according to capacity, competence, and other relevant characteristics.

¹⁵ Raz *op cit* 1986, pp 194ff

¹⁶ T M Scanlon *What We Owe Each Other* Cambridge, Belknap Press 2000 p 224

¹⁷ A M Honoré 'Law, Morals and Rescue' in: James M Ratcliffe (ed) *The Good Samaritan and the Law* pp 225-242 Gloucester, Peter Smith 1981, p 231

¹⁸ H M Malm 'Bad Samaritan Laws: Harm, Help, or Hype' *Law and Philosophy* 19 (1999) pp 707-750 at p 707

Yet we intuitively feel that governments should provide emergency assistance beyond the threshold of mere inconvenience or even moderate cost or sacrifice. We tend to think of governments as morally obligated to do more. For example, many consider that the American government owed it to the inhabitants of New Orleans to rescue them, by hook or by crook, from the devastation caused by Hurricane Katrina in August 2005. After years of neglected maintenance of the levee system, inadequate public education regarding the risk and severity of hurricanes in the region, and inadequate planning and preparedness training across jurisdictional levels, there was a sense in which the government was partly responsible for causing the peril faced by its citizens.¹⁹ Consequently, many would argue that it was morally required to go out of its way to minimise and remedy the ensuing harm. While I do not dispute that causing an emergency may sometimes give rise to duties, I think that the deeper assumption at work in the previous example is that the government was inherently responsible for the implementation of the preventive measures listed above. It was part of its job, or in common philosophical parlance, part of its role. Therefore, critics assume, the government had obligations above and beyond the generic and somewhat contingent demands of human solidarity. I believe these claims are valid.

Of Roles, Liberal Governments, and Inherently Public Emergencies

Roles and Morality

The general idea that roles may come with special duties that are less or not at all contingent on an agent's individual characteristics is fairly uncontroversial. Like H L A Hart, I understand the notion of role expansively to include the moral position of those who make promises.²⁰ In modern societies, it is widely accepted that promisors acquire new duties, and that these duties may be emergency-related. For example, someone may promise to come to another's aid in certain perilous circumstances and, thus, be under a duty to do so even if the risks involved are high. People may also acquire more extensive duties to provide emergency assistance by joining a profession that involves more extensive responsibilities of this kind - consider the case of medical doctors, firefighters, police officers, and lifeguards. In the words of Tony Honoré, 'If the fireman, policeman, or life-saver risks life and limb to help the imperiled, he deserves and receives praise, because there is an element of self-sacrifice or even heroism in his conduct, though what he does is clearly his duty.'²¹ Honoré even suggests that people, such as experienced mountaineers, who hold themselves out as ready to effect rescues may incur additional duties by virtue of their claims. Furthermore, it is often assumed that people may find themselves bound by more extensive duties associated with roles that they have not necessarily chosen, such as parenthood. Shouldn't parents sometimes have to risk their own safety for the safety of their children to a greater extent than other people? I do not dispute that the definition and specific moral implications of different roles may vary from one society or culture to another. Nor do I take issue with those who argue that the types of considerations that ground the more stringent duties associated with various roles may differ from one to the next. However, I believe that the idea that some roles involve more stringent duties to provide

¹⁹ Some commentators even insisted on describing Hurricane Katrina as two major disasters, one natural and the other man-made. Eg L K Comfort 'Fragility in Disaster Response: Hurricane Katrina, 29 August 2005' *The Forum* 3 (2005) Article 1 at p 5, online: <<http://www.bepress.com/forum/vol3/iss3/art1/>>. Although hyperbolic, this description brings out starkly the significance of the government's responsibility.

²⁰ Hart writes that 'If two friends, out on a mountaineering expedition, agree that one shall look after the food and the other the maps, then the one is correctly said to be responsible for the food, and the other for the maps, and I would classify this as a case of role-responsibility.' H L A Hart *Punishment and Responsibility: Essays in the Philosophy of Law* Oxford, OUP Oxford 1968, p 212

²¹ Honoré *loc cit* 1981, p 230

emergency assistance - preventive, concurrent, or *ex post facto* - holds at least part of the answer as to why we feel that governments should do more than ordinary individuals in response to certain emergencies.²² Simply put, I believe that the role of government is more demanding.²³

Before saying anything more about governments, I want to further discuss the concept of a role. Roles in the relevant sense are 'social,' in that they are parts that agents may play in their relationships with others. Specifically, they are parts with distinctive social functions or purposes.²⁴ To play a role is to relate to (one or many) other persons through a relationship that imposes a configuration of normative expectations - which may reflect duties, rights, powers and so forth - about how one should behave. These expectations are generally a function of the social purpose(s) of the role. In simpler terms, roles are ethics of how agents ought to relate to others in given social contexts. Roles single out role-playing agents for the application of various reasons, permissions, and so on, which they emphasise, mould, and systematise. They simultaneously afford these agents with exclusionary reasons not to act for (some or all) conflicting reasons. Thus, some say that role-based ethics of action tend to prioritise themselves. Of course, the matter is often more complicated: agents tend to enter into a range of different relationships and play multiple roles concurrently. In an ideal world, such roles would not conflict, but in the real world, they often do. When that is the case, it is up to the conflicted role-player to choose which ethic of action to follow. As a rational and moral agent, the conflicted role-player should opt for a rationally undefeated and morally acceptable ethic of action (of which there might be more than one to choose from). But to add further complexity, what if none of the conflicting role-based ethics constitutes such an acceptable option?

At this point, it is important to appreciate that agents *qua* agents - not *qua* role-players - are the basic units to which reason and morality apply. To the extent that certain (or all) roles played by some agents require them to act immorally, agents should refrain from playing them. To the extent that some roles guide agents to act immorally, they are bad roles; their exclusion of conflicting reasons for action is unjustified. Some philosophers take the opposite stance and argue that role-playing undermines the very idea of a basic unity of agency. For example, Alasdair MacIntyre maintains that role-playing disrupts the unity of an agent's moral life because 'we are taught to think and feel' in terms of the roles that we play, and not in terms of 'the unity of life' of the agent who plays those roles.²⁵ According to him, our modern lives are partitioned 'into a variety of segments, each with its own norms and modes of behaviour,' which leads to a 'fragmentation of morality'.²⁶ However, morality is not something that can be evaded or selectively partitioned.²⁷ It may be so partitioned from the point of view of a given role, but a role-based normative assessment remains just that, an assessment from a point of view that may be defeated. Roles do not shield agents either wholly or partially from the reach of morality. On the contrary, to the extent that they are good (or justified) roles, they *add* considerations that agents should take into account when determining how to behave. Were MacIntyre to tell the single mother who is also a firefighter, a homeowner, a committed friend, a soup kitchen volunteer, and her ailing mother's sole source of support that modernity has not taught her 'to think and feel' about the unity of her life, she might well reply that life itself has compelled her to learn how to manage its complexity.

²² A complementary reason is that, unlike ordinary individuals, governments do not have a well-being of their own - i.e. independent of the well-being of the governed - that weighs against going to great lengths to assist others in emergencies.

²³ It does not matter in any significant way for the purpose of my argument whether the role of government is understood as a complex combination of different roles or as a single role with highly demanding and complex dimensions. I tend to think that there is such a thing as *the* general role of government, but that a government *qua* agent may also assume more specific roles, for example, by entering into private contracts. More argument would be needed to establish this position, but I assume it here.

²⁴ See generally R S Downie *Roles and Values: An Introduction to Social Ethics* London, Methuen 1971 pp 121-128

²⁵ Alasdair MacIntyre *After Virtue: A Study in Moral Theory* 3rd edn London, Duckworth 2007 p 204

²⁶ MacIntyre *op cit* 2007 pp 204-205

²⁷ For a specific defence of this claim elaborated in relation to roles: A I Applbaum *Ethics for Adversaries: The Morality of Roles in Public and Professional Life* Princeton, Princeton University Press 1999.

I will come back to the issue of immoral demands that roles sometimes make of role-bearers when focusing, below, on the pressures that some extreme emergencies may exert on the unified, non-jurisdictional view of morality that I just asserted. For the moment, however, I want to underscore the fact that, as agents, governments and their representatives are also in the position of having to deal appropriately with the many *additional* demands of their roles.

A Liberal Ethic of Governance

If we conceive of the relationship of state governance as imposing a general ethic of action on governments in their dealings with the governed, it makes sense to inquire into the compass of the legitimate 'role of government.' The main problem with following a path of inquiry like this one is that the compass of the said role is one of the most controversial issues of contemporary political philosophy. To the extent that they recognise the legitimacy of at least some forms of government, political traditions disagree vigorously about what the role ideally entails. At one end of the spectrum, some argue that governments should be no more than 'night-watchmen', whose role is limited to the protection of the governed against force and fraud. At the other end, some stand for far-reaching governmental duties to meet the overall needs of the governed and shape, even improve, society and its members through (often quite invasive and micromanaged) intervention. I do not intend to resolve this deep-seated and multifaceted controversy here.

Instead, I propose to build on the work of theorists whose middle-ground position reflects the aspiration of many contemporary governments. I am referring to the liberal idea put forward by John Rawls and recently reinterpreted by Arthur Ripstein, according to which there ought to be a significant division of responsibility between governed and government. According to Ripstein's very general articulation of the claim, it is a government's 'responsibility to protect important liberties and opportunities, and also to set up and enforce important schemes of social cooperation that are prerequisite to an acceptable life for all'.²⁸ The idea, grounded in an ideal conception of justice, is that certain types of individual misfortunes, obstacles, and needs should be held in common through the intercession of governments, and be treated as everyone's problem. However, once appropriate governmental institutions are in place, the governed are expected to take special responsibility for their own lives. Note here that, despite my personal sympathies for this kind of approach, I am appealing to it primarily because of its remarkable ability to expose important facets of the relationship between governments-as-we-know-them and emergencies. To the extent that the reader reasonably believes that the legitimate role of government is somewhat wider or narrower, he or she should feel free to recast the insights presented here in terms of how he or she conceives the parameters of the role, *mutatis mutandis*.

Inherently Public Emergencies

The overarching point I want to make in the rest of this section and the ones that follow is that some emergencies may compel governments to play their role - or, perhaps more accurately, to discharge the social functions grounding their role - differently than usual.²⁹ Referring to Rawls and Ripstein's idea of a significant division of responsibility between ordinary individuals and government, I identified the general parameters of the role of government as the protection of important liberties and opportunities, as well as the creation and enforcement of important schemes of social cooperation. One of the ways in which liberals tend to flesh out this position is by advocating a prominent role for governments in the provision of (economic) 'public goods.' Markets break down with respect to the provision of

²⁸ Arthur Ripstein 'Three Duties to Rescue: Moral, Civil, and Criminal' *Law and Philosophy* 19 (2000) pp 751-779 at pp 756-758

²⁹ Depending on the level of generality at which the parameters of the role are defined, it might sometimes be even more accurate to say that a government has a different role to play in the face of an emergency. The argument in this section should be read with this slight caveat in mind.

certain important goods (because of their ‘indivisibility’³⁰). All liberals accept that it is part of a government’s general role to exercise its powers of regulation and taxation to provide these goods (or at least to ensure their provision through private means).³¹ Commonly mentioned public goods are national defence, police and fire protection, social order, public health and sanitation, highways, street lighting, ports and canals, water and sewer works, and education.

This idea provides a highly plausible explanation for why so many people felt that it was part of the government’s role to ensure the proper maintenance of the levee system in New Orleans. Not only had the government openly undertaken to maintain the levees, thus creating expectations that it would do so properly, but the levee system was a public good. Of course, I do not wish to deny that governments *qua* agents may sometimes undertake to provide other kinds of services, and do so legitimately. I am saying, however, that an emergency that endangers the provision of goods that governments have a duty to ensure may intelligibly be labelled ‘public.’³² As I suggested earlier, if we feel that governments have duties that exceed the mere demands of human solidarity in such emergencies, it is because some such duties are already inherent in the role governments should play. An emergency may require a government to go to greater lengths than usual and take extraordinary avenues to fulfill its role. Since emergencies often introduce forceful and conflicting reasons for action and may alter the moral landscape of a situation, a government may be under a duty to resort to different, sometimes much more radical or extraordinarily preventive, means to respond.

Of course, a government that was failing to fulfil its role appropriately prior to a public emergency may attempt to invoke the emergency as an excuse for not discharging it or for resorting to unjustifiable, perhaps shockingly radical, means of discharging it.³³ At this point, however, I am setting aside governments that seek to evade their role to focus on the implications of emergencies for those that strive to play their role legitimately. My point is that legitimate ethics of state governance pre-exist emergencies and determine their publicness. They determine which emergencies fall within the sphere of a government’s responsibilities, and they give shape to its duties in relation to such emergencies. Although often neglected, this idea is not new. For example, it is partly on the basis of a similar insight that Michael Walzer frames his notorious ‘supreme emergency’ argument. He writes that:

³⁰ See generally Joseph E Stiglitz *Economics* 2nd edn New York, Norton 1997 p 157; John Rawls *A Theory of Justice* Revised edn Oxford, Oxford University Press 1999, s 42.

³¹ See generally Samuel Freeman ‘Illiberal Libertarians: Why Libertarianism is not a Liberal View’ *Philosophy and Public Affairs* 30 (2002), pp 105-151 at pp 119-120; Liam Murphy and Thomas Nagel *The Myth of Ownership: Taxes and Justice* Oxford, Oxford University Press 2002, pp 45-46.

³² Some may wonder why Sorell (*loc cit* 2002 p 22) insists that public emergencies are ‘usually the responsibility of public agencies and their officials’. One reason might be that, like me, Sorell considers that governments have a basic moral duty to provide at least some emergency assistance that does not flow from their governmental role, but from their unadorned status as moral agents. However, if this interpretation is accurate, I am not convinced that emergencies that fall outside the ambit of the role of government, and in relation to which governments have no duty to intervene *qua* governments, may intelligibly be understood as inherently public. Indeed, duties to provide emergency assistance in such cases may be shared by governments as well as a plethora of other moral agents. One possible explanation for Sorell’s terminological choice is that governments are sometimes the only agents in a position to provide the needed assistance without making unacceptable sacrifices. When this is the case, governments may well be the only agents with a duty, or at least an undefeated duty, to act. Yet, *pace* Sorell, such emergencies may not be so much public emergencies as emergencies *tout court*. Another possibility is that Sorell considers that inherently public functions that governments delegate to private actors are, in a way, no more their own, yet, in another sense, they remain part of the compass of the general role of government. If this is what he means, his choice of terminology is rather imprecise. Finally, Sorell may be referring to situations in which an emergency threatens a public good, but where there is no government in place to address it - consider the case of widespread violence in a failed state like Somalia. Although this interpretation is plausible and worth mentioning, I doubt that it is what Sorell had in mind, given his sustained emphasis on ‘the state’ elsewhere in his article.

³³ This kind of governmental behaviour and some typical forms of abuse associated with it constitute one of Naomi Klein’s main *loci* of criticism in *The Shock Doctrine: The Rise of Disaster Capitalism* London, Allen Lane 2007.

no government can put the life of the community itself and of all its members at risk, so long as there are actions available to it, even immoral actions, that would avoid or reduce the risk. It is for the sake of risk avoidance or risk reduction that governments are chosen. That is what political leaders are for; that is their first task.³⁴

Walzer's premises are contentious. Moreover, his general understanding of roles differs in important respects from the one I have defended above. I challenge Walzer on these issues below, but it is interesting to note here, in passing, the role-based structure of his approach.

At last, we have what I think is a suitably articulated notion of 'public emergency.' Of course, more needs to be said about such emergencies. Like all emergencies, public emergencies may vary in term of the nature, degree and extent of the harm they threaten, the risk of their occurrence, and their immediacy. Thus, questions about what governmental responses are justifiable necessarily extend beyond discussions of publicness. It is only when we take such distinctions of degree seriously that the full complexity of public emergencies comes to light.

Taxonomising Public Emergencies

H P Lee begins his seminal study of emergency powers in Australia by remarking that, during the life of every state, there will arise occasions when peace and tranquillity - which he assumes to constitute the normal state of affairs - may be disrupted by natural, economic, or violent emergencies. He adds that: 'Unless effectively contained such aberrant conditions will reach such a critical stage that a nation's constitutional and legal framework will be shattered'.³⁵ By envisioning the kind of emergencies that cause political and legal institutions to be shaken to their core, Lee is guilty of a sin similar to Tom Sorell's: the sin of focusing on worst-case scenarios and neglecting important distinctions of degree. Lee goes even further down this path by explicitly assuming that there is an unavoidable slippery slope and that all public emergencies may lead to generalised disarray. Although such slides into social and institutional chaos are possible, I believe that we should resist the assumption that all public emergencies are of this sort.

Some emergencies seriously endanger the well-being of the governed in ways that may affect the governmental provision of legitimate goods and services, but do not come even close to threatening to cause the collapse of the legal system or of entire governmental apparatuses. For example, isolated assaults or rape attempts often constitute emergencies that interfere with governmental efforts to protect the governed against crimes. Assuming that it is part of a government's legitimate role to provide such protection, I see no reason why these discrete individual emergencies may not also, *pace* Sorell and others, bear the label 'public'.³⁶ Typically, such isolated public emergencies do not pose any significant threat to governmental apparatuses. Moreover, they are unlikely to require governments to resort to any special means beyond ordinarily legitimate criminal law, criminal process, and law-enforcement mechanisms.³⁷ Consider also the case of more wide-scale emergencies, such as sudden floods, that constitute urgent threats to specific public goods such as public health and sanitation, transportation systems, and certain aspects of social order, eg associated waves of looting. Experience shows that many such wide-scale emergencies pose no real threat of general governmental collapse.

³⁴ Michael Walzer 'Emergency Ethics' in *Arguing about War* New Haven, Yale University Press 2004, pp 33-50 at p 42.

³⁵ H P Lee *Emergency Powers* Sydney, The Law Book Company Limited 1984, p 1

³⁶ In fact, philosophers from a wide array of political traditions conceive of crimes as 'public wrongs.' Eg R Nozick *Anarchy, State and Utopia* Oxford, Blackwell Publishing 1974, p 67; R A Duff and Sandra Marshall 'Sharing Wrongs' *Canadian Journal of Law and Jurisprudence* 11 (1998) pp 7-22.

³⁷ Compare: Oren Gross 'Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?' *Yale Law Journal* 112 (2003) pp 1011-1130 at p 1087, who assumes that, by definition, public '[e]mergencies call for extraordinary governmental responses.'

A possible difference is that, in the latter kind of situations, governments may be compelled to respond in unusual ways in order to fulfil their role. A government may need to involve particularly equipped and more efficient agencies such as the military and free up substantial funds. It may need to seize control of essential services that it normally relies on individuals or private corporations to provide. Otherwise effective schemes of social cooperation may need to be modified - consider, at a general level, the possible need to bypass constitutionally-entrenched federalism limits where they exist. Sometimes, a government may even need to limit the constitutionally-entrenched rights of individuals and groups. In such situations, the issue of moral justification ought to be at the forefront of a government's consideration when it designs its responses. Of course, it is also conceivable that special governmental responses may be needed to respond to isolated public emergencies, perhaps especially if the failure of ordinary means would lead to unconscionably widespread harm. Consider the possibility of grave acts of public sabotage that jeopardise essential government services, and thus indirectly threaten the population that relies on them. Here, as always, justifiability ought to guide a government's response. For example, it ought to keep in mind that the threshold for a justified (ordinary) criminal law response is likely to be lower than for a justified resort to emergency powers that lack the same procedural and substantive safeguards. To paraphrase Sorell, what is in the balance clearly matters, at least up to a certain point. I add this last qualification to underline that the counter-emergency means to which governments might resort may also be subject to moral limits that have very little, if anything, to do with what hangs in the balance. Some theorists speak, *inter alia*, of the prohibition against torture or against intentionally and deliberately killing the innocent in such terms. Others, like Bernard Williams, speak in more general terms of a 'Basic Legitimation Demand' that governments not become 'part of the problem' by resorting to terror in their efforts to protect the governed from harm.³⁸

The temptation to overlook the issue of justification is especially strong in relation to emergencies that not only endanger the provision of specific public goods, but also the general provision of government (and, thus, of all services that governments may legitimately provide). Here again, there may be variations in terms of the degree and extent of harm threatened, the risk of its occurrence, its immediacy, and so forth. For example, a grave, though isolated, act of treason against a government may not present the same risks as a full-blown civil war. In other cases, the threat to governance may be confined to specific portions of a state - think of active combat zones in a country like Sri Lanka. It may also affect the state in its entirety, or be international in scope. Nonetheless, general emergencies for political and legal institutions are those that tend to prompt theorists to start speaking of 'moral black holes' and governmental officials to start thinking about pressing the panic button.³⁹ I am one of those who believe that there are no such things as moral black holes and that morality applies to moral agents at all times and places (perhaps making some allowance for genuine doomsday scenarios). Yet as I have argued, this does not mean that the demands of morality are inflexible. In fact, they may vary depending on the situation. One implication is that we should not dismiss without scrutiny claims that, with respect to emergencies threatening the 'the life of the nation',⁴⁰ 'the

³⁸ Bernard Williams *In the Beginning Was the Deed* Princeton, Princeton University Press 2005, p 4. For a discussion of other important moral dimensions that straightforward balancing metaphors about security tend to obscure or disregard, see Jeremy Waldron 'Security and Liberty: The Image of Balance' *Journal of Political Philosophy* 11 (2003) pp 191-210.

³⁹ On the basis of a careful historical survey, G L Negretto and J A Aguilar Rivera argue that: '[T]he aftermath of independence in Latin America led to a protracted process of factional struggle, in which the legitimacy of newly established regimes was constantly challenged by warring elite. In this context, the use of exceptional measures was a permanent necessity. However, in the absence of adequate mechanisms, governments were usually forced to act beyond or against the constitution, hoping that they could later justify these measures, given the constraints of the situation. This was a dangerous expedient.' G L Negretto and J A Aguilar Rivera 'Liberalism and Emergency Powers in Latin America: Reflections on Carl Schmitt and the Theory of Constitutional Dictatorship' *Cardozo Law Review* 21 (2000) pp 1797-1823 at p 1804.

⁴⁰ Eg Constitution of the Republic of South Africa Act 108 of 1996 (South Africa) s 37(2).

framework of rights itself',⁴¹ or 'the organised life of the community of which the state is composed',⁴² morality permits, or even requires, governmental behaviour that would otherwise be unacceptable.

Unfortunately, given the already significant breadth of this article, I cannot afford to say much more about the justifiability of given governmental responses to given public emergencies. Instead, I want to focus on a commonly-encountered line of argument that permeates much of today's popular and theoretical discourse about the justifiability of governmental behaviour in times of severe public emergencies. I am referring to Michael Walzer's paradoxical contention that governments are sometimes permitted to sidestep absolute moral limits when confronted with 'supreme emergencies.' Much, I think, can be learned by scrutinising and questioning the premises of Walzer's *in extremis* reasoning. In particular, such scrutiny may rectify some familiar misconceptions about the moral position of governments in relation to public emergencies writ large, as well as about morality in general.

Moral Absolutes, Roles, and Supreme (Public?) Emergencies

Moral Absolutes and Michael Walzer's Supreme Emergencies

A very wide array of theorists believe that there are moral absolutes. By absolutes, I mean norms that are always valid and never overridable, justifiably infringed, or otherwise subject to exception. At a high level of generality, most familiar moral theories accept the existence of such absolutes. For example, deontologists tend to ground their theories in broad, universally-applicable absolutes such as the Golden Rule, the law of love, or 'categorical imperatives'. They also often expound entire systems of subordinate, more specific, absolute principles. Utilitarians, who are known for their pervasively contingent moral stances, also treat their basic injunction to act so as to produce the greatest good for the greatest number as absolute. Much the same is true of other forms of consequentialism. Even so-called moral particularists tend to acknowledge that there may be some moral absolutes, although at less abstract levels of thinking - i.e. absolutes on which morality and moral thought do not depend.⁴³ Of course, debate about moral absolutes continues. However, the debate does not appear to focus so much on the possibility of moral absolutes, as on how many there are, and at what level of thinking, or specificity, they may exist.

To the extent that one's stance on moral absolutes may affect one's stance on the flexibility of morality, it is also likely to affect one's stance on what may justifiably be done in the face of an emergency. Michael Walzer thinks that there are moral absolutes, and not only at the highest levels of generality. According to him, ordinary individuals must not intentionally kill the innocent, even in extreme situations. His stance is absolutist: 'A moral person will accept risk, will even accept death, rather than kill the innocent'.⁴⁴ Yet there is a twist. Walzer believes that governments and their officials are in a different moral position insofar as they may be confronted with another possibly conflicting absolute. As I noted earlier, he thinks that 'no government can put the life of the community itself and of all its members at risk, so long as there are actions available to it, even immoral actions, that would avoid or reduce the risk'.⁴⁵ When governments cannot live up to this additional absolute without urgently violating the first - i.e. when there are no alternatives available and the two absolutes genuinely conflict - then, Walzer tells us, there is a 'supreme emergency'.

⁴¹ Alan Brudner 'Guilt Under the Charter: The Lure of Parliamentary Supremacy' *Criminal Law Quarterly* 40 (1998) pp 287-325 at p 292

⁴² *Lawless v Ireland (No 3)* [1961] 1 EHRR 15 at p 31 (para 28) (European Court of Human Rights)

⁴³ Eg Jonathan Dancy 'Moral Particularism' in: E N Zalta (ed) *The Stanford Encyclopedia of Philosophy* (Summer 2005 Edition), online: <<http://plato.stanford.edu/archives/sum2005/entries/moral-particularism/>>.

⁴⁴ Walzer *op cit* 2004 p 41

⁴⁵ Walzer *op cit* 2004 p 42

Instead of speaking of 'supreme emergencies,' many theorists invoke the category of 'moral dilemma' - often qualified as 'tragic' - to characterise situations in which moral absolutes conflict irreconcilably. The dilemma is tragic, they say, when the conflicting absolutes are incommensurable, so that no matter how morally sensitive agents in the predicament may be, they are doomed to act immorally.⁴⁶ The supreme-emergency argument is of a different kind. Walzer does not claim that the two absolutes he defends are incommensurable. On the contrary, he claims that in a genuine supreme emergency, the prohibition on killing the innocent is 'devalued'⁴⁷ in relation to the possibility of 'a far greater immorality'.⁴⁸ The prohibition may be 'overridden',⁴⁹ in what would amount to a 'justified'⁵⁰ response. Thus, whereas in the moral dilemma category there is no right answer to the problem, in supreme emergency scenarios, it is assumed that a government should choose the 'necessary' course of action over the rights of the innocent.

Note that the nature of the 'should' in the last sentence is ambiguous. Is it moral? On the one hand, Walzer writes that, in a supreme emergency, 'the disaster that looms before us *devalues morality* itself and leaves us free to do whatever is militarily necessary to avoid the disaster, so long as we don't produce an even worse disaster'.⁵¹ On the other hand, he claims that the doctrine of 'supreme emergency is a way of manoeuvring between two different and characteristically opposed understandings of morality'.⁵² The first, he takes to reflect the 'absolutism of rights,' which fixes 'the everyday constraints on war-making (and on all adversarial engagements)'.⁵³ The other is utilitarianism, according to which 'innocence is only one value that must be weighed against others in the pursuit of the greatest good of the greatest number'.⁵⁴ Although normally limited by absolute rights, utilitarianism 'reimposes itself' *in extremis* for governmental agents.⁵⁵ Thus, Walzer does not think that there are moral black holes or that one may ever disregard morality as a whole.⁵⁶ It seems best to understand him as speaking of two sets of moral considerations that are, if not completely incommensurable, in extreme tension with each other in times of supreme emergency.

Challenging Walzer's Account

Disputing the Centrality of Governments

One may challenge Walzer's moral calculus from a variety of angles, two of which I want to discuss. My first point is structural. What, if anything, makes *governments* justified in infringing considerations that are unqualifiedly absolute for other agents? What makes them so special? At various points in his work, Walzer flirts with the idea of representation. Recall, for example, the passage reproduced earlier, in which he argues that governments may be justified in protecting the life of the community through immoral actions at least partly because they 'are chosen.' This strand of argument in Walzer's work is far from seamless. If representation is such a decisive factor, one may ask, why revolutionary or dissenting groups with plausible claims to represent their political community are not in the same moral position? Walzer seems

⁴⁶ Eg John Gardner and Timothy Macklem 'Reasons' in: Jules Coleman and Scott Shapiro (eds) *The Oxford Handbook of Jurisprudence and Philosophy of Law* pp 441-475 Oxford, Oxford University Press 2002 at p 473; Bernard Williams 'Conflicts of Values' in: *Moral Luck* pp 71-82 Cambridge, Cambridge University Press 1981 at p 74; Thomas Nagel 'War and Massacre' in: *Mortal Questions* pp 53-74 Cambridge, Cambridge University Press 1979.

⁴⁷ Walzer *op cit* 2004 p 40

⁴⁸ Walzer *op cit* 2004 p 50

⁴⁹ Walzer *op cit* 2004 p 34 See also Michael Walzer *Just and Unjust Wars: A Moral Argument with Historical Illustrations* New York, Basic Books 1977, p 259.

⁵⁰ Walzer *op cit* 2004 p 54

⁵¹ Walzer *op cit* 2004 p 40 [Emphasis added]

⁵² Walzer *op cit* 2004 p 35

⁵³ Walzer *op cit* 2004 pp 35, 39

⁵⁴ Walzer *op cit* 2004 p 35

⁵⁵ Walzer *op cit* 2004 pp 40, 50

⁵⁶ Note further that Walzer thinks that a justifiable governmental response to a supreme emergency must be proportionate in addition to being necessary. The threat must also be imminent. See Walzer *op cit* 1977 p 231.

to concede the point, at least partially, when he recognises that non-state terrorist groups responding to threats genocidal in character may be able to invoke a supreme emergency to justify extreme measures.⁵⁷

One may press the point even further and ask why representation should be a decisive factor at all. Walzer speaks of a governmental contract through which the governed cede some of their rights and powers to their (representative) government. Yet he concurrently concedes that 'individuals have no right to save themselves by killing the innocent' that they could transfer to governments in anticipation of supreme emergencies.⁵⁸ Thus it is unclear what role he understands representation to play in his argument for dissociating governments from some of the most important demands of ordinary morality. To be sure, Walzer argues that the role of representation has to be understood in tandem with a claim about the value of community. Governmental representation, he claims, is not merely representation of individuals. It is representation of individuals and of the political community. Walzer argues that the value of the political community is not reducible to the sum of its parts, and thus that it adds something to the representation equation (and to the prerogatives of the representative government). Notice, however, that by making this move, Walzer shifts the emphasis of his argument away from representation towards an appreciation of the value of what is represented. Given the case that he is attempting to build, this move is perhaps unavoidable. As C A J Coady remarks, 'representation, by itself, does not do much to alter one's moral status: it extends one's powers and capacities, though it also restricts them in various ways, but the question of moral limits and freedoms will be largely a matter for ordinary moral assessment of the institutional purposes for which these powers have been created'.⁵⁹ In other words, it is the purpose and value of governmental action, more than any independent fact about representation, that is the linchpin of Walzer's argument.

In a way, then, we are back to the question of the moral position of governments in relation to their role in society, asking what they may justifiably do to secure public goods. To fully grasp the ramifications of Walzer's argument in this regard, it is crucial to appreciate the following point. Even if one accepts, as I did earlier, that something like 'national defence' is a public good that governments ought to provide, it does not necessarily follow that governments may ever justifiably commit immoralities in the process. In the context of his discussion of supreme emergencies, Walzer seeks to bridge this gap by assigning an overriding moral importance to 'the life of the community.' I shall discuss this argument at greater length in the next section. For now, notice only that if the life of the community really has the supreme moral importance that Walzer ascribes to it - not only for governments who represent it, but for all of us who are part of it - then it is puzzling why he does not recognise that, *in extremis*, any agent who is in a position to defend it effectively may be justified in doing so. In fact, his method of constructing asymmetry in this regard seems slightly disingenuous. Individuals, he says, must uphold the rights of innocents even in life-threatening situations of *self-defence*.⁶⁰ Governments must also uphold these rights, but may be justified in overriding them when necessary to defend the *life of the community*. Is it really so inconceivable that ordinary individuals could ever be in a position to safeguard the life of the community by having to kill innocents? I will spare the reader the many colourful scenarios that could apply. To be fair, Walzer sometimes claims that the types of dilemmas exemplified by supreme emergencies - which he generically terms 'dirty hands' dilemmas⁶¹ - do not only confront governments and their officials. 'No doubt,' he writes, 'we can get our hands dirty in private life also, and sometimes, no doubt, we should'.⁶² That is to say, we all may sometimes, and even sometimes

⁵⁷ Walzer *op cit* 2004 p 54

⁵⁸ Walzer *op cit* 2004 p 42

⁵⁹ C A J Coady 'Politics and the Problem of Dirty Hands' in Peter Singer (ed) *A Companion to Ethics* pp 373-383 Oxford, Blackwell 1993 at p 377.

⁶⁰ See Walzer *op cit* 2004 p 41. At one point, Walzer even speaks of 'the supreme emergency of self-defense.' Walzer *op cit* 1977 p 254. This way of using of the expression is out of line with his more general use, as I explained it earlier.

⁶¹ Walzer *op cit* 2004 p 46 argues that one of 'the effect[s] of the supreme-emergency argument' is 'to provide an account of when it is permissible (or necessary) to get our hands dirty' (in the sense explained in the text).

⁶² Michael Walzer 'Political Action: The Problem of Dirty Hands' *Philosophy and Public Affairs* 2 (1973) pp 160-180 at p 174.

should, do 'the right thing [...] in utilitarian terms' even if acting in this way would leave us 'guilty of a moral wrong' in absolutist terms.⁶³ Yet Walzer argues that governments are significantly more likely to face 'dirty hands' scenarios. He also seems to think that *only* governments - *qua* institutional role-bound 'structures for organising collective action' - may appropriately dirty their hands when the situation is one of 'supreme emergency.'

In light of my earlier discussion of the place of roles in moral thinking, this last claim is puzzling. If Walzer really thinks that it is always morally wrong to violate the right of innocents not to be killed intentionally, and if a given ethic of governance sometimes requires such action, then it is a bad ethic, at least to the extent of the required immorality. When using the terminology of justification or permission, which merely implies the perpetration of a *prima facie* moral wrong or of no wrong at all, Walzer avoids this criticism. However, he also regularly departs from this language in favour of a more uncompromising approach. For example, he speaks of violations of the (absolute) rights of the innocent in supreme emergencies as 'great immoralities.'⁶⁴ He even seems to acknowledge the instability of his conception of the role of government when he writes that we, as moral agents, may 'have a right to avoid, if we possibly can, those [governmental and other] positions in which we might be forced to do terrible things.'⁶⁵ When one appreciates that whatever a government does is done by individuals acting on its behalf, and that these individuals may well not be absolved of individual responsibility simply because they act on behalf of the government, the discomfort underlying this concession becomes unambiguous. Notice, however, that this specific tension dissolves if we posit that, given the importance of political communities, it is not only governments but all of us who are absolutely prohibited from putting the life of the community and those of its members at risk so long as there are actions available to us that would avoid or reduce the risk. Then, alleged paths of escape from absolutes into role-based hiding places fade away, and the tragic sense of the dilemma takes its starkest form.⁶⁶ Of course, one may argue that Walzer supposes that *ought* implies *can* and that only governmental agencies and their representatives are in a position to defend the community in situations of supreme emergency. However, even if this observation were to hold true most of the time, it would remain a contingent truth. The deeper question is whether an agent - individual or governmental - whose intervention would be effective and necessary to defend the life of the community may, or even must, intervene, despite having to violate the rights of the innocent in the process. Here, either Walzer is a 'rights absolutist' or he is not. Those who think that he is (or should be) tend not to speak of supreme emergencies as providing all-things-considered justifications. Instead, they invoke the language of excuses, which does not deny wrongdoing in any way.

This last, often implicit, assertion does not end the debate. Indeed, isn't morality more lenient at the level of excuses towards *governments* facing supreme emergencies? Some argue that it is, emphasising that the power of judging and acting in such situations, like in so many other significant public emergencies, is a 'hot potato' that people are often more than happy to surrender to governments. Thus, the argument goes, if governments 'do their best to cope in a situation that probably no one else would handle better,' shouldn't that be good enough? Should we not expect morality to be more charitable towards them in such circumstances?⁶⁷ Of course, the fact that an agent is dealing with an emergency, perhaps especially an unforeseeable one, that requires quick unplanned action may affect the standard of behaviour to which this agent should be held. However, the validity of this point extends to all agents, not only governments. The argument that governments would probably do a better job of responding to some emergencies obviously makes the matter more specific, but is it really a sufficient reason for being more lenient towards them? Consider the following example. Police

⁶³ Walzer *loc cit* 1973 p 161

⁶⁴ Walzer *op cit* 2004 p 50

⁶⁵ Walzer *loc cit* 1973 p 165

⁶⁶ This way of thinking appears to permeate the work of Henry Shue, another supreme emergency theorist. Shue speaks of 'we' and 'one' as having to contend with supreme emergency predicaments, but does not clarify the matter any further. See Henry Shue 'The Impossibility of Justifying Weapons of Mass Destruction' in: S H Hashmi and S P Lee (eds) *Ethics and Weapons of Mass Destruction: Religious and Secular Perspectives* pp 139-162 Cambridge, Cambridge University Press 2004 at pp 146, 154.

⁶⁷ This is the position advocated by Sorell *loc cit* 2002 p 34. Compare: Shue *loc cit* 2004

officers are often in a better position than us to deal with various types of violent emergencies, and are often more likely to be successful in addressing them. They are trained for such situations, they are better equipped, they tend to be more readily obeyed, and so forth. Arguably, however, even when acting under emergency-related pressures, police officers should be held to higher standards of reasonableness - of composure, care, accuracy - than the rest of us. They should certainly not be held to lower standards. We expect them to be at least equally, if not more, level-headed than other individuals, and we conceive of any higher demands placed on them as functions of the role they assume. I believe that the same is true of governments in general with respect to an even wider array of emergencies, including the supreme. With greater resources, information, authority, as well as opportunities for contingency planning and training come greater responsibilities and greater expectations of virtue and reasonableness.⁶⁸ Throughout history, many governments have clearly failed to live up to such expectations in times of emergency and, as a result, may not deserve of our charity or leniency. On the contrary, many of them may warrant outright moral censure.

Human Communities and the Moral World

In more ways than one, the confinement of the logic of supreme emergencies to governments is unstable. Yet, even if we deny that it should be so confined, supreme emergencies may still be conceivable. The more common challenge to Walzer's calculus questions its very premises. As one author has recently observed, 'the prohibition on intentionally killing innocent people functions in our moral thinking as a sort of touchstone of moral and intellectual health'.⁶⁹ It is not the aspect of Walzer's thinking that I wish to question here. Instead, I want to focus on the other side of the dilemma: the allegedly supreme, overriding importance that Walzer attaches to 'the life of the community.' Much has already been written on this point, so I shall focus on aspects relevant to my wider argument.

Emphasising the importance of 'the political community', Walzer writes that:

When our community is threatened, not just in its present territorial extension or governmental structure or prestige or honor, but in what we might think of as its *ongoingness*, then we face a loss that is greater than we can imagine, except for the destruction of humanity itself. We face moral as well as physical extinction, the end of a way of life as well as of a set of particular lives, the disappearance of people like us.⁷⁰

Of course, the bare mention of 'our community' is too thin. The disintegration of a political community living according to fascist ideals would be no great loss. However, assuming an acceptably thicker account, the importance of communal ties is apparent. Communities tend to be valuable as shared repositories of language, values, and practices that enable and inform many of the substantive goods that compose our lives as individual human beings. They also provide ongoing historical narratives within which we are able to locate our lives and give them meaning. However, it is not sufficient to point to the undoubted value of 'the political community'. In a day and age in which our political affiliations are increasingly plural and multi-layered as a result of mass migration, globalisation, and communications, one may wonder to which political communities Walzer is referring. Interestingly, he avoids focusing explicitly on the emblematic political community that is 'the nation.' One reason for this evasion may be that, historically speaking, 'most nations have always been culturally diverse, problematic, protean and artificial constructs that take shape very quickly and come apart just as fast'.⁷¹ Instead, Walzer seems to privilege state communities - but does not defend his

⁶⁸ Some theorists even take the further step - perhaps one too many - of claiming that excuses are generally not available to governments, owing to the nature of their agency and the nature of their role. See eg Andrew P Simester 'Necessity, Torture, and the Rule of Law' in: Victor V Ramraj (ed) *Emergencies and the Limits of Legality* pp 289-313 Cambridge, Cambridge University Press 2008 at pp 300-302.

⁶⁹ C A J Coody *Morality and Political Violence* Cambridge, Cambridge University Press 2008 p 297. Of course, innocence is a notoriously contested concept that bears different meanings for different writers, but I now wish to bracket this line of inquiry.

⁷⁰ Walzer *op cit* 2004 p 43

⁷¹ Linda Colley quoted in Thomas M Franck 'Clan and Superclan: Loyalty, Identity and Community in Law and Practice' *American Journal of International Law* 96 (1990) pp 359-383 at p 365.

choice. At one point, he even acknowledges that ‘the state is nothing more than [...] a particular structure for organizing collective action that can always be replaced by some other structure’.⁷² Perhaps even more noteworthy, Walzer seems to discount the possibility that, in some societies and for some people, forms of communal ties that are not usually conceived as political are as, if not more, important - eg family relationships, friendships, religious and professional affiliations. Thus, the elevation of ‘the political community’ to a supreme status is problematic.

Many of the deep tensions permeating Walzer’s argument seem to come from this misplaced emphasis. Communities do play a fundamental role in our lives. We are social animals, and we would not be who we are without our communities. However, individual human beings are, and ought to be considered, the supreme loci of value, or as some might say, the ultimate moral units. Walzer’s talk of communities as having some sort of ‘transcendence’ and ‘different and larger prerogatives’ sits awkwardly with this proposition.⁷³ In consistence with the humanistic principle that I endorsed earlier, communities matter not in themselves but to their individual members, whose shared way of life they embody and inform. Their value does not transcend the value of human life. Thus, an emergency that endangers a community’s ties and its way of life, but does not threaten innocent human lives - eg a war waged in accordance with the *jus in bello* - could hardly be said to threaten what is of supreme moral importance. Admittedly, there may be more intricate situations in which there is a threat of both moral and physical extinction, endangering ‘the end of a way of life as well as of a set of particular lives.’ Some commentators claim that in such a situation, we need to decide between two versions of the humanistic premise: ‘(1) treat every person as having ultimate moral value and (2) never treat any person only as a means’.⁷⁴ They add that, in some interpretations, an emergency response that takes the life of some innocents to save a much larger number from, say, genocide might satisfy (1) while violating (2). Yet, they also often remark, rather troublingly, that this kind of distinction is ‘disturbingly difficult to see’ and that such situations are extremely rare, if not ‘factually implausible.’ Others take a firmer stance and resist drawing any correlation between the category of supreme emergency and a notion as fluid as political community. Instead, they tend to reject Walzer’s category entirely.⁷⁵

Should we dispense with the category altogether? One argumentative strategy may be to try to reformulate the puzzle in terms of the Rawls-inspired liberal view on the basis of which I developed my account of public emergencies earlier. Consider the following line of argument.⁷⁶ Only a developed and integrated set of governmental institutions can deliver justice by distributing benefits and burdens in a way that each citizen can accept, and in a way that each has adequate assurance that others are shouldering their fair share. The development of that set of institutions will take many generations. If things go in the right direction, each generation will have greater assurance than the previous one that progress is being made with justice. This process will itself increase the ability of the institutions to deliver justice: assurance that others are shouldering their fair share will be fostered by developing institutions which will, in turn, tend to foster support for those institutions, discouraging violation of their rules. The government will then be in a position to deliver justice more effectively. There will be, as it were, a virtuous circle of governmental institutions. Some public emergencies may threaten this virtuous circle. They may erode assurance, encourage free-riding and, therefore, undermine the ability of the state to deliver justice. They may then also undermine the legacy of the institutions that we leave to future generations, and may stand in the way of our obligation to create conditions that foster the development of just institutions. This kind of threat is a threat to justice, and a threat to justice may have dire consequences for the well-being of future generations. Therefore, more extreme measures may be taken to counter such public emergencies than ought otherwise to be permitted. Quite simply, the development of institutions that can deliver liberal justice is a long-term project that should not easily be allowed to be derailed.

⁷² Walzer *op cit* 2004 p 49

⁷³ Walzer *loc cit* 1977 p 254

⁷⁴ Shue *loc cit* 2004, p 151 holds this view most explicitly, but he is not alone in assuming it.

⁷⁵ Eg G E M Anscombe ‘Modern Moral Philosophy’ *Philosophy* 33 (1958) pp 1-19 at p 17; Coady *op cit* 2008 pp 299-300

⁷⁶ This line of argument was suggested to me by Victor Tadros.

Now, even if we follow this line of argument, the characteristics of the public emergency at issue and the nature of 'the more extreme measures' that would be necessary to address it will remain central considerations. For example, we might think that the suspension of democracy for the sake of sustaining democracy in the long term is often worth it, particularly if we think that democracy primarily has instrumental rather than intrinsic significance.⁷⁷ But should we tolerate the killing of innocents today as a means of ensuring the long-term progress of just institutions? Some, like Henry Shue, may well argue that given the dire consequences that the demise of just institutions could have for all, there may be some way of justifying such killings if the retardation in development would be powerful enough and the number of innocent deaths sufficiently low. Yet, here again, we are no doubt up for a tough argumentative showdown between absolutists, for whom the value of each human life always defeats institutional considerations, and a variety of more permissive theorists. Indeed, this line of thinking does not provide us with any more readily obvious and clear-cut 'supreme emergency' trump card, despite the fact that, by avoiding Walzer's insistence on political communities, we may be on more solid ground to start building a justificatory case for some otherwise unthinkable trade-offs.

Then again, if we shift our focus to threats to the sheer possibility of human life, some disturbing scenarios that are significantly harder to discount emerge. Consider emergencies that threaten the very possibility of human-life-as-we-know-it. Think, for example, of a global nuclear war, which might yield a world in which the survivors lapse into a bestial condition in order to survive in an environment in which nothing usually deemed necessary for human flourishing remains. This type of emergency, I take it, is what Henry Shue calls 'supreme moral emergency' or what David Wiggins calls a 'dire emergency.' In Shue's words, the category encompasses emergencies that endanger 'the moral fabric of the life of at least a large portion of humanity.' They are emergencies that represent a 'threat to principled social life in general' characterised by 'the unprincipled exertion of sheer force'.⁷⁸ In Wiggins's words, they are emergencies which, under a stern enough interpretation, jeopardise the survival of 'human civilization' or 'the very conditions under which ethical choice itself is possible'.⁷⁹ They are emergencies that even deontological theorists who ground their rigidly absolutist positions in non-consequentialist, highly-general foundational principles, would need to acknowledge as undermining of absolutism.⁸⁰ These are emergencies that may render intelligible Walzer's paradoxical idea that some emergencies can make 'great immoralities morally possible'.⁸¹ Indeed these are emergencies that are, as it were, ultimate. In a passage antecedent to any arguments about communities, Walzer himself seems to recognise the unique, even foundational, nature of such hypothetical moments: 'How can we, with our principles and prohibitions, stand by and watch the destruction of the moral world in which those principles and prohibitions have their hold?'.⁸² One can very well make sense of this contention without having to follow Walzer any further.

Note here that, by threatening to undermine the efficacy and justifiability of all norms in such a radical way, supreme moral emergencies also unavoidably imperil the possibility of the ideal of the rule of law - and even of law *tout court* - to the point that it may not be very relevant to speak of the possibility of a *legal* response. In fact, it seems to me that the dangers of abuse and mistake associated with a category as earth-shattering as 'supreme moral emergency' would be so great that governments should not even attempt to account for it pre-emptively. Of course,

⁷⁷ This view of democracy is not without its detractors. For a recent defence of the intrinsic value of democracy: Thomas Christiano *The Constitution of Equality: Democratic Authority and Its Limits* Oxford, Oxford University Press 2008.

⁷⁸ Shue *loc cit* 2004 pp 148-150

⁷⁹ D Wiggins *Ethics: Twelve Lectures on the Philosophy of Morality* London, Penguin Books 2006 pp 258-259

⁸⁰ Some are very reluctant to do so. Eg Alan Gewirth 'Are There Any Absolute Rights' in: Jeremy Waldron (ed) *Theories of Rights* pp 91-109 Oxford, Oxford University Press 1984.

⁸¹ Walzer *op cit* 2004 p 50. Walzer's terminology is ill-chosen. If I say that it is 'intelligible, it is more as a figure of speech than literally. Like Wiggins (*op cit* 2006 p 259) remarks, in such dire predicaments, 'there will be no question of the agent's emerging from the terrible situations in which he has had to take part with the claim that he did the morally good act or the act that it was simply right to do. The whole question of the string 'permissibility' and 'impermissibility' of various acts, already miles away, is far out of sight.'

⁸² Walzer *op cit* 2004 p 37

such emergencies are conceivable. The point is that they are the rarest of the rare, the unlikely exception to the exception, and that it is clearly inadvisable to take them as paradigms for the study and systematisation of the relationship between public emergencies, morality, and appropriate governmental responses.⁸³ In all other cases, governments should strive to respond to emergencies in fully justified ways and, to the extent that there are any moral absolutes, respect them while so doing.

One Last Provocation: Publicly Declared Emergencies

By way of conclusion to this article, I deem it important to say a few things about one last and disturbingly widespread way of thinking about public emergencies. Although the leap back to more conceptual considerations might seem abrupt to the reader, a discussion of public emergencies would not be complete without exposing the existence of this different conception.

Emergencies, some believe, are 'public' when they are declared or proclaimed to be so by governments. This view takes various shapes. At one extreme, some argue that public emergencies are inevitably constituted, or created, by governmental declarations since, in the words of Giorgio Agamben, 'the only circumstances that are necessary and objective are those that are declared to be so'.⁸⁴ Although it is undeniable that governments may at times generate some worrisome emergencies by acting abusively and creating unjustified threats of harm, it is simply wrong (and an open door to abuse) to think that the existence of a public emergency ultimately comes down to a governmental declaration of any sort. Emergencies are situations in which there is a risk of serious harm and an urgent response is needed to avert or minimise that harm. As such, they often exist (or not) independently of anything that governments say and do about them.

That being said, it is also a mistake to think that a governmental declaration of emergency is 'just that, a claim, inserted into the regular operation of political life'.⁸⁵ The truth, I think, lies somewhere in the middle. Whereas a governmental declaration of emergency is not constitutive of a public emergency, it is neither just another governmental claim. Typically, a governmental declaration of emergency is meant to be performative. It is a distinct speech-act by which a government brings into existence a different normative order, often known as a 'state of emergency'.⁸⁶ The alleged substantive basis for declaring such a state of emergency is usually that the legal order in which the government normally operates does not allow it to address one or more public emergencies as necessary. However, there is an important distinction between the substantive basis of the declaration and the formal act of its utterance. On the one hand, a government's decision to declare and implement a state of emergency may be criticised in substantive terms. For example, given the nature of the emergency, the government may already be in a position to address it appropriately within the parameters of the existing legal order. Likewise, when extraordinary measures are necessary, the ones introduced may be too far-reaching. Criticisms of this type are substantive or content-dependent; they involve an assessment that is dependent on the actual characteristics of the related emergencies. On the other hand, governments' responses to public emergencies may also, on occasion, be criticised for content-independent reasons, such as a failure to declare, or declare properly, the establishment of a state of emergency. In order to make sense of any governmental emergency response and assess its justifiability, one first needs to know whether

⁸³ Compare: Oren Gross 'The Prohibition on Torture and the Limits of the Law' in: Sanford Levinson (ed) *Torture: A Collection* pp 229-253 Oxford, Oxford University Press 2004 at pp 236-239; Gross *loc cit* 2003 p 1134.

⁸⁴ Giorgio Agamben *State of Exception* Chicago, University of Chicago Press 2005 p 30.

⁸⁵ Mark Tushnet 'The Political Constitution of Emergency Powers: Some Conceptual Issues' in: Victor V. Ramraj (ed) *Emergencies and the Limits of Legality* pp 145-155 Cambridge, Cambridge University Press 2008 at p 148 fn 10.

⁸⁶ For the sake of simplicity, I use the notion of 'state of emergency' generically. Other expressions are sometimes used to convey that a state of emergency has been imposed, including 'martial law,' 'state of siege,' 'state of defence,' 'state of exception,' 'state of alert,' 'extraordinary powers,' 'emergency derogations,' and 'emergency powers'.

there is a genuine emergency, and know something about its characteristics. One may then ask whether the response is reasonably tailored to the emergency. To what extent is the response necessary? Is it proportionate? However, when the emergency response specifically involves a significant departure from an existing *legal* order, many theorists and lawmakers think that it must also be formally declared.

Legal instruments that explicitly recognise the possibility of states of emergency almost always require that they be formally and publicly declared (in addition to requiring that they meet various substantive conditions). This generalisation applies as much to state constitutions and legislation as to international treaties.⁸⁷ There are often variations in terms of who may make the declaration, how, with whose approval, for how long, and to which effect, but the basic requirement is almost omnipresent. Interestingly, in the case of legal instruments that explicitly recognise the possibility of states of emergency but do not require a formal declaration, judicial bodies have sometimes been known to read in the requirement. For example in the case of *Cyprus v Turkey*, the European Commission of Human Rights held that, although the European Convention did not explicitly demand that emergency derogations be officially declared, 'article 15 requires some formal and public act of derogation, such as a declaration of martial law or state of emergency, and that, where no such act has been proclaimed [...] art. 15 cannot apply'.⁸⁸ Such insistence on the importance of declarations once again begs the question. If formal declarations are so critical when governments decide to bring about states of emergency in response to actual emergencies, don't we have here a distinct mark of 'the public'? It is certainly true that, as it is understood by theorists and lawmakers, the declaration requirement applies to governments who face emergencies and not to ordinary individuals. In that sense, it is a distinctively public requirement. However, it is also true that governments can often address public emergencies - i.e. emergencies that affect the provision of public goods - within the parameters of the ordinary legal order, without having to declare and implement any special state of emergency or emergency derogations. Thus, the declaration requirement marks a distinct sub-group of public emergencies. The real underlying question is why such a sub-group should be singled out and subjected to special formalities.

The general wisdom is that a government must make a special declaration when, in response to an alleged emergency, it seeks to do what would be illegal in ordinary times. In such situations, as Oren Gross and Fionnuala Ní Aoláin remark, an 'open acknowledgement and engagement in public justificatory exercise is a critical component in the moral and legal choices made by the officials'.⁸⁹ Why is such a move critical in these situations? Here, it is useful to come back to the idea of ethics of governance, focusing this time around on the rule of law, which one author recently described as the 'ethic of civility [...] appropriate for public life'.⁹⁰ The rule of law is both an ethic of governmental accountability and an ethic of autonomy. On the one hand, it insists that governments, like everybody else, must comply with the law of the land and be publicly accountable for their behaviour in the courts. On the other, it imposes a series of formal conditions on the law - eg clarity, prospectivity, openness, stability, consistency, generality - that are meant to ensure that its addressees are capable of being guided by it, and thus that they are able to conduct their lives around it and avoid the stigma and disruption of the adverse normative consequences that may follow from its breach. When, in the face of a public emergency, a government needs to introduce a swift state of emergency that alters its own normative position as well as that of the governed, it puts its commitment to accountability and fair notice under pressure - if it does not outright seek to

⁸⁷ Consider the following examples selected somewhat unsystematically from a vast array of equally-revealing constitutional, legislative, and international law examples: Constitution of India 1950 art 352(1); Constitution of the Republic of South Africa Act 108 of 1996 (South Africa) s 37(1); Constitution of the People's Republic of China (Adopted at the Fifth Session of the Fifth National People's Congress and promulgated for implementation by the Proclamation of the National People's Congress on December 4, 1982) art 80; Loi n°55-385 du 3 avril 1955 (France) Article 1; Emergencies Act 1988 (Canada) ss 6(1), 17(1), 28(1), and 38(1); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 4(1).

⁸⁸ *Cyprus v Turkey* [1979] 4 EHRR 556, Part III (European Commission of Human Rights).

⁸⁹ Gross and Ní Aoláin *op cit* 2006, p 140

⁹⁰ Christine Sydnovich 'Utopia and the Rule of Law' in: David Dyzenhaus (ed) *Recrafting the Rule of Law: The Limits of Legal Order* pp 178-195 Oxford, Hart Publishing 2000 at p 194.

depart from or suspend the rule of law. Of course, the rule of law is no absolute, and partial departures or temporary suspensions may sometimes be justified in the name of other more pressing values. However, even *in extremis*, such departures require governments to, at the very least (and keeping in mind substantive conditions such as Williams's Basic Legitimation Demand), formally notify those whose life might suddenly be affected by extraordinary measures, as well as those who should hold such measures in check.

This rule-of-law constraint stems from the fact that governments tend to have the ability to modify normative positions in all-encompassing ways and alter what rights, duties, powers, permissions, or other constraints apply to whom and in what circumstances. In other words, the declaration requirement is a function of governments' practical authority. The basic assumption is that, as moral agents, governments should strive to exercise their authority justifiably and that, in the case of the establishment of states of emergency or other abrupt normative shifts such as wars, a formal declaration is a precondition for justifiability. The governed and all relevant organs of government must be aware of the disruption in a way that creates a formal disincentive to abuse and, ultimately, stands in the way of a reign of terror. Note here that the fact that an emergency is public and falls within a government's sphere of responsibilities generally implies, except perhaps in some cases of private delegation, that the government bears the burden of justifying any *prima facie* wrongs and illegalities perpetrated in the process of addressing it. However, it is only when the governmental response includes an exercise of authority that results in abrupt and ordinarily illegal normative changes that a special declaration must be made. The deeper assumption seems to be that, in other cases, fuller conformity with the rule of law ensures at least basic accountability and formally satisfactory guidance.

At this point, I am aware that many questions remain unanswered. For example, to what extent should the declaration and implementation of a state of emergency be made according to law? How specific should a formal declaration of emergency be? To what extent, if at all, should it be subject to legislative scrutiny, and perhaps most importantly, review by courts? Given the very real possibility of governmental abuse, how resolutely should governmental emergency responses come under legal control and seek to live up to the wider desiderata of the rule of law? These important questions all belong to a more specific study of the relationship between public emergencies and the ideal of rule of law, and are at the centre of a vibrant contemporary debate.⁹¹ I shall say no more about them here. Note, however, that the issues on which I focused in this article are antecedent to this and other debates related to the management of public emergencies. By clarifying key dimensions of their subject-matter, I hope to have made a valuable, if only embryonic, contribution to their informed resolution.

Of course, one might object that my analysis of public emergencies in this article is not 'antecedent' enough to these further debates, given that it focuses on governments and that public goods - and thus public emergencies - may exist even in the absence of government. However, one should not exaggerate the importance of this last objection. Like Bernard Williams once noted, 'the securing of order, protection, safety, trust, and the conditions of cooperation' is one of the primary issues - if not *the* primary issue - of political theory and the modern state presents itself as a solution to it, as well as to the securing of many other public goods.⁹² In fact, at this historical juncture, state governance remains the main purported answer to the provision of public goods, even though state governments' authority and claims to comprehensiveness are increasingly being eroded. Hence, my decision to focus primarily on state governance. Notice, however, that this choice of emphasis does not preclude that other entities - be they local tribes or international organisations - may also have distinctive duties to answer emergency threats to public goods when a given state's government fails to do it or is simply inexistent.⁹³ That said, a discussion of these sub-state and supra-state emergency dynamics will have to await another day.

⁹¹ See eg the challenging essays collected in Victor V Ramraj (ed) *Emergencies and the Limits of Legality* Cambridge, Cambridge University Press 2008.

⁹² Williams *op cit* 2005 pp 3-9

⁹³ Compare: Leslie Green 'The Duty to Govern' *Legal Theory* 13 (2007) pp 165-185.

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