

DAVID DUQUETTE

FROM RIGHTS TO REALISM: INCOHERENCE IN
WALZER'S CONCEPTION OF *JUS IN BELLO*

1. INTRODUCTION

There is little doubt that Michael Walzer made a significant attempt in *Just and Unjust Wars*¹ to strengthen the moral rules of the war convention. He put forth two major considerations that effectively made the justification of killing in warfare significantly more difficult than had been generally thought. One is a sharpened distinction between *jus ad bellum* and *jus in bello* that allows each to be judged independently, so that the having of just cause does not in itself slant the judgment of whether war is being waged justly. The other is an amplification of the principle of discrimination between combatants and noncombatants and the making of noncombatant immunity a focal requirement. As a result, the moral bar is set rather high for just warfare, as evidenced in Walzer's survey of historical examples where we find an abundance of military decisions and actions that fail the moral tests.

Nonetheless, I will argue that there is a systematic tension in Walzer's conception of just warfare that allows for a significant compromising of his fundamental principle of noncombatant immunity. Moreover, I will suggest that, in particular areas where he attempts to provide moral justification for limiting or overriding this principle, he displays an incoherence in tilting toward realism, an ironic result to be sure given his explicit rejection of realism in the very first chapter of his book. It may be that moving into a realm of action that, so to speak, is beyond good and evil is necessary in order to avoid taking moral idealism to the point where the practical burdens of acting justly become unbearable. However, it is the conceptual and moral incoherence of this move within Walzer's conception of just war that I am interested in exploring, not the issue of whether realism itself is acceptable or inevitable.

In this chapter I will explore specifically Walzer's articulation of the principle of noncombatant immunity, his account of the moral obligations and their limits regarding collateral damage to noncombatants, and the justification for the lifting of immunity for noncombatants under a supreme emergency.

2. DISCRIMINATION AND NONCOMBATANT IMMUNITY

The focal principles for limiting how and when killing can occur in warfare so that it can be thought *just (jus in bello)* fall under the concept of discrimination. Combatants and noncombatants are distinguished according to the rights they possess in warfare. Soldiers have “war rights” that they possess equally, on both sides of a war, which means they can target each other for killing, although that should be limited and guided by strategic purpose, among other considerations, rather than being directed by emotions such as hatred, revenge, etc. (e.g., prisoners of war cannot be tortured, summarily executed, and the like). Civilians do not have these war rights but rather possess the full range of conventional moral rights, regardless of which side of the conflict they find themselves, and these rights cannot be altered for expediency sake: hence, the requirement of noncombatant immunity from undue harm and from being targeted. Walzer frames these principles in the following way. “The first principle of the war convention is that, once war has begun, soldiers are subject to attack at any time (unless they are wounded or captured).”² “The second principle of the war convention is that noncombatants cannot be attacked at any time. They can never be the objects or the targets of military activity.”³ However, because noncombatants are frequently put in danger because of their proximity to battle, care must be taken to avoid harming them. This doesn’t mean stopping a battle because civilians in the vicinity might be harmed, but rather, based on the recognition of their rights and the reality of battle, appropriate effort be made not to harm them. “But what degree of care should be taken? And at what cost to the individual soldiers who are involved? The laws of war say nothing about such matters; they leave the cruelest decisions to be made by the men on the spot with reference only to their ordinary moral notions or the military traditions of the army in which they serve.”⁴ The fundamental question here is, if we ground the war convention on a conception of basic human rights, as opposed to a utilitarian view that makes all rights vulnerable to a cost/benefit judgment, what is the extent of the commitment required to noncombatant immunity when it comes into serious tension with waging war effectively?

In his book, Walzer clearly is committed to enhancing the protections afforded to noncombatants in traditional just war theory, with regard to both the principle of discrimination of combatants and noncombatants and the principle of double effect, which holds that one can only intend an acceptable effect (destroying military targets) and that the “evil effect,” for example, harms inflicted on noncombatants, must not be the

intention of military attacks.⁵ Moreover, there is the proportionality rule, which states that “the good effect is sufficiently good to compensate for allowing the evil effect . . .”⁶ This principle allows soldiers to fight justly, for it allows good and evil effects to be weighed against each other such that evil effects can be justifiable, provided the proportion is right.

Also, Walzer enhances the principle of “double effect” by amplifying it with what he calls the principle of “double intention,” which is that waging war justly means (a) intending only the good, thus not intentionally targeting or harming noncombatants and (b) actively considering the harms that can occur to noncombatants as a result of particular military strategies and seeking to either avoid them if possible, or at least minimize them.⁷ According to Walzer, “subject only to the proportionality rule – a weak constraint – double effect provides blanket justification,”⁸ that is, it not only will do little to limit unintended but foreseeable deaths but will actually provide a too easy justification of these evils in terms of military necessity. Leaving aside for the moment the issue of how to decide the right proportion, the principle, especially as understood in a utilitarian vein by Henry Sidgwick, effectively subordinates moral judgments to military considerations – the goal of military victory will tend to justify the means because excessiveness of means will be thought of functionally, as what is unnecessary to serve the goal, instead of by appeal to a strict moral constraint based on human rights, independent of what leads to victory.

Hence, for Walzer, double intention requires a positive commitment to save civilian lives over and above not intending to harm them.

And if saving civilian lives means risking soldier’s lives, the risk must be accepted. But there is a limit to the risks that we require. These are, after all, unintended deaths and legitimate military operations, and the absolute rule against attacking civilians does not apply. War necessarily places civilians in danger; that is another aspect of its hellishness. We can only ask soldiers to minimize the dangers they impose.⁹

How far must soldiers go to minimize the dangers and harms to non-combatants and at what cost to themselves? Walzer says this is difficult to determine and suggests that there is no formula for guidance, that the degree of risk to civilians that is permissible will vary with the circumstances. Generally, limiting harm to noncombatants means “that the foreseeable evil be reduced as far as possible . . . aware of the evil involved, he [the actor] seeks to minimize it, accepting costs to himself.”¹⁰ But again, to what extent are harms minimized, at what cost? Given the variability of circumstances, Walzer declares it is best “to say simply that civilians have a right that ‘due care’ be taken.”¹¹

Despite his criticism of the way that the concept of “military necessity” or the “reason of war” is traditionally used, as if it carried some intrinsic moral weight when it is really about probability and risk assessment,¹² Walzer himself seems to appeal to the idea of military effectiveness to support his claim that there are limits on the constraints required by non-combatant immunity. “The limits of risk [in protecting civilians] are fixed, then, roughly at that point where any further risk-taking would almost certainly doom the military venture or make it so costly that it could not be repeated.”¹³ In a nutshell, soldiers must take risks so that civilians are not killed, but not to the point where soldiers cannot win battles in fighting the war – and the war must be waged and won.

3. JUSTIFYING COLLATERAL HARM TO CIVILIANS

Despite the significant thrust of the added requirement of double intention, and the number of examples used to illustrate the significant burdens it places on commanders and their soldiers, there are some places in his account where Walzer appears to be too willing to provide a somewhat questionable justification for lowering the limits of noncombatant immunity. In particular, there is the matter of whether and to what extent the coercive placing of civilians on the field of battle or in the line of fire by enemy soldiers or their commanders effectively relieves or reduces responsibility for harmful effects on those civilians caused by soldiers with good intention.

In discussing the British blockade of Germany in World War I, Walzer initially finds unacceptable the claim that the suffering of the civilian population, while the direct result of interdiction actions by the British, was “inflicted” upon them by the Germans themselves who “pushed civilians to the front line of the economic war” so that “the British could not help but kill them in the course of legitimate military operations.”¹⁴ However, in a footnote he appears somewhat supportive of the idea that the responsibility for unintended consequences of an army’s actions can be lessened in light of the responsibility of the enemy for forcibly placing the civilians in harm’s way. While a soldier “cannot kill civilians simply because he finds them between himself and his enemies,” when it is no longer possible to get a “clear shot” at a legitimate military target because enemy soldiers have placed civilians in the way, responsibility for their deaths falls on the shoulders of those soldiers, even though the deaths were directly inflicted by the other side.¹⁵ Here it seems that the responsibility of the attacking armies is limited by the responsibility that the enemy army has not to expose its own civilian population, in a sort of an

inverse ratio of responsibility: the actions of the enemy army, in so far as they diminish the possibilities of avoiding harm to civilians, lowers the moral threshold of responsibility for the army that fires on civilians, unavoidably, in trying to fire at the enemy. So, if there is no feasible way of minimizing harm to civilians because of the tactics of the enemy, does this mean the civilian deaths inflicted by those firing are not thought to be morally wrong, or unjust? Even in a legitimate military operation, are not the rights of noncombatants unchanged regardless of the reasons for civilians being made vulnerable in the field of battle? The shifting of moral responsibility to the enemy for the harms inflicted upon civilians seems effectively to alter their rights, for justifying actions that can be seen ahead of time to directly cause civilian deaths seems to override the restriction on the direct killing of civilians, or at least to lessen the force of their claim of immunity against soldiers, especially when the soldiers have good intention.

Central to Walzer's position is the idea that "the structure of rights stands independently of political allegiance; it establishes obligations that are owed, so to speak, to humanity itself and to particular human beings and not merely to one's fellow citizens."¹⁶ Of course, the obligation to minimize risks to civilians in the field of battle (fighting well) stands in tension with an obligation not to shift risks to soldiers to the extent that would jeopardize the war effort (winning), the responsibility to win the war resting on obligations soldiers have to their own country and fellow citizens. So the principle of noncombatant immunity is not absolute and some harms can be justified. Nonetheless, it is clear that the equality of the rights of all civilians is to some extent compromised both by political allegiance and by the circumstances in which some civilians find themselves.

But there is a further complication beyond determining whether soldiers are actually following or acting consistently with the ethical rules of war, and this involves circumstances under which those rules can be broken for the sake of a just cause. The level of the stakes, such as the continued existence of a political community, requires that the outcome of a war be considered in judging military decisions and that "the restraint on utilitarian calculation must be lifted" but without forgetting that "the rights violated for the sake of victory are genuine rights, deeply founded and in principle inviolable."¹⁷

4. OVERRIDING RIGHTS AND SUPREME EMERGENCY

Walzer considers two approaches to the justification of the overriding of rights. The one he calls the "sliding scale" expresses the "truth" about

war rights as “the more justice, the more right,” meaning “the greater the justice of my cause, the more rules I can violate for the sake of the cause – though some rules are always inviolable,” or “put in terms of outcomes: the greater the injustice likely to result from my defeat, the more rules I can violate in order to avoid defeat,” with some rules being inviolable.¹⁸ The problem with this approach, according to Walzer, is not only that the war convention does not provide a “range of actions, over which the sliding scale might move, between legitimate combat and inadmissible violence” but also that “[t]he sliding scale makes way for those utilitarian calculations that rules and rights are intended to bar.”¹⁹ Moreover, the effect of the sliding scale is to erode war rights in a piecemeal fashion, enabling soldiers with just cause, or who believe their cause is just, “to do terrible things and to defend in their own consciences and among their associates and followers the terrible things they do.”²⁰ However, according to Walzer, to respond to this position with a “moral absolutism,” the claim that the rules of war provide prohibitions that can never be violated under any circumstances – “do justice even if the heavens fall” – is not a plausible moral doctrine for most people.²¹

Walzer’s alternative doctrine that “stops just short of absolutism” is phrased as “do justice unless the heavens are (really) about to fall.”²² This “utilitarianism of extremity” allows that “in certain very special cases, though never as a matter of course even in just wars, the only restraints upon military action are those of usefulness and proportionality.”²³ Although the rules of war do accommodate and make adjustments for the “everyday extremities of war” they cannot accommodate this larger idea of “extremity” which is about breaking the rules altogether. The argument from extremity, Walzer claims, “permits (or requires) a more sudden breach of the convention, but only after holding out for a long time against the process of erosion. The reasons for holding out have to do with the nature of the rights at issue and the status of the men and women who hold them.”²⁴ Moreover, the rights at issue are not really eroded or undercut by “extremity” because “they are still standing at the very moment they are overridden: that is why they have to be *overridden*.”²⁵

According to Walzer, supreme emergency is defined by criteria relating to (a) the imminence of the danger and (b) the nature of the danger.²⁶ Contrary to the view that imminence of danger is in itself enough to warrant extreme measures, Walzer holds that the danger must also be of an “unusual and horrifying kind” that falls within a “region of desperation and disaster,” involving a radical “threat to human values.”²⁷ The paradigm example was the Nazi threat, a “threat to human values so radical that its imminence would surely constitute a supreme emergency.”²⁸

Assuming that this threat involved the likely enslavement or extermination of a people, even if restricted to a single nation like Britain, then one might argue that the rights of innocent people can be overridden for the sake of the safety and survival of this particular political community. Here we have the ultimate necessity in warfare, captured in the circumstance of an imminent catastrophe against which there is a moral urgency (necessity) to act (e.g., by the aerial bombardment of enemy civilian populations). As Walzer makes clear, this is not to be understood on analogy to an act of self-defense in domestic society, for an individual defending his or her life against an attacker is not morally permitted to attack innocent people – one can only attack those who attack you first. “But communities, in emergencies, seem to have different and larger prerogatives. . . . For the survival and freedom of political communities – whose members share a way of life, developed by their ancestors, to be passed on to their children – are the highest values of international society.”²⁹ Moreover, according to Walzer, “Nazism challenged these values on a grand scale, but challenges more narrowly conceived, *if they are of the same kind*, have similar moral consequences. They bring us under the rule of necessity (and necessity knows no rules).”³⁰

In an essay entitled “Emergency Ethics,”³¹ Walzer acknowledges not only that “supreme emergencies put morality itself at risk” but that it is philosophically provocative and paradoxical to argue both that the constraints of morality always apply and that political leaders can do whatever must be done when collective survival is at stake.³²

[M]oral limits are never suspended – the way we might, for example, suspend habeas corpus in time of civil war. But there are moments when the rules can be and perhaps have to be overridden. They have to be overridden precisely because they have not been suspended. And overriding the rules leaves guilt behind, as a recognition of the enormity of what we have done. . . .³³

Walzer refers to his illustration provided in *Just and Unjust Wars* of the British decision to bomb German cities in the early 1940s and to intentionally aim at residential areas in order “to kill and terrorize the civilian population, to attack German morale rather than German military might.”³⁴ It is clear, he admits, “that the intention was wrongful, the bombing criminal,” but “if there was no other way of preventing a Nazi triumph, then the immorality – no less immoral, for what else can the killing of the innocent be? – was also, simultaneously, morally defensible. That is the provocation and the paradox.”³⁵

Walzer attempts to alleviate any skepticism that greets his account by explaining the paradox in terms of two opposing views of morality, the

absolutism of the theory of rights versus the “radical flexibility” of utilitarian theory. According to the conception of rights, innocent human beings must never be targeted intentionally, while for utilitarianism “innocence is only one value that must be weighed against other values in the pursuit of the greatest good of the greatest number.”³⁶ Because the claims of both moral conceptions are significant and important, such that claims on one side cannot totally defeat those on the other, “we must negotiate the middle ground.”³⁷ On the one hand, moral absolutism cannot win out because consequences can have great moral significance and we cannot refuse to consider what it means to “do justice even if the heavens fall.” On the other hand, utilitarianism, which puts great weight on attaining goals and allows this to excuse morally questionable goal promoting acts, tends to be “speculative and arbitrary” in assigning and measuring and particularizes cost/benefit analysis in a way that discriminates different constituencies – everyone’s utilities do not count the same in situations of adversity and war. While this weakness in utilitarianism is what leads to an appeal to rights in order to properly establish the conventional constraints on warfare, the appeal to rights is itself based on certain “minimal fixed values” which when put at risk lessens these constraints such that utilitarianism reasserts itself as the “utilitarianism of extremity.”³⁸ According to Walzer,

‘Supreme emergency’ describes those rare moments when the negative value that we assign – that we can’t help assigning – to the disaster that looms before us devalues morality itself and leaves us free to do whatever is militarily necessary to avoid the disaster, so long as what we do does not produce an even worse disaster.³⁹

Despite Walzer’s casting of his paradox in terms of two opposed moralities that, in a sort of dialectical way, make competing demands upon us (which helps to shed light on a pervasive tension Walzer recognizes in *Just and Unjust Wars* between fighting well and winning), he seems here to arrive at a kind of realism (already hinted at in his treatment of collateral damage to human shields), despite his explicit rejection of realism in the first chapter of his book. Moreover, there are several important considerations that belie the notion that supreme emergency can be understood in the context of a kind of moral paradox or dilemma produced by equally relevant competing moralities.

First, as Walzer himself recognizes, the utilitarianism that overrides the constraints of rights in a supreme emergency is one that in war attaches only negative utilities to the enemy. It is difficult to see how this particularized utilitarianism can count in any commensurate way as a morality in opposition to rights claims if it gives up an equality of values. If we

hold that morality applies universally to all people but then, due perhaps to extreme threats to our safety or existence, attach positive values only to our own utilities then the ultimate guiding consideration is not utilitarianism, but self-interest. A consistent utilitarian approach, if it is to be taken as a wide moral perspective, would allow the possibility that our safety and existence may not be required in order to satisfy the greatest good for the greatest number in a global context. Of course, in this context the calculations will be extraordinarily difficult to make because of the scope of knowledge required about the utilities of all other peoples. Moreover, there is the cultural difficulty of remaining impartial in these calculations regarding the value of one's own society versus the number of innocent lives taken in another.

Here is where we get to the center of the weakness in Walzer's principle of supreme emergency and indeed of his conception of the constraints that noncombatant immunity places on warfare generally. Rather than seeing supreme emergency in terms of a moral paradox created by competing moralities we should see it as a matter of partiality in the application of moral principles or rules to one's own. This is blurred somewhat by Walzer's claim that it is the threat to "our deepest values and collective survival" that triggers a supreme emergency. We have to be clear about *whose* values and survival are at stake. We may be convinced that our basic values are shared by the majority of peoples globally and that their survival depends upon ours but we will believe this primarily not because we have the best impartial and objective arguments for it but rather because of an acculturated disposition. When Walzer holds that the constraints that rights place on warfare can be lifted when the basic values underlying those rights are threatened – making it sound as if violating rights in a particular situation is for the sake of preserving rights in a more basic way – the underlying implication is that it is *our* rights that are most important and for which the rights of others can be sacrificed.⁴⁰ If we generalize this rationale to apply to any society or culture the existence of which is at stake in a war, then we have, in principle, realism in the appeal to the prerogatives of survival. Indeed, could not an aggressor nation-state make an appeal to supreme emergency when in the course of a war the existence of its political community is threatened by imminent defeat?

Second, Walzer's explanation of the lack of parallel between how moral constraints operate upon communities or leaders of communities and how they limit the behavior of human individuals in situations of self-defense also reveals a realist sort of appeal. While *individuals*, whether in domestic society or in warfare, cannot appeal to supreme

emergency in order to have their own self defense override the rights of others, for example, by targeting innocent people (“A moral person will accept risk, will even accept death, rather than kill the innocent”),⁴¹ political and military leaders are limited in the risks they can impose on their people, specifically those under their authority.

[N]o government can put the life of the community itself and all of its members at risk, so long as there are actions available to it, even immoral actions, that would avoid or reduce the risks. 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.⁴²

Underlying this “argument from representation” there is – in the spirit of Edmund Burke – an appeal to the “value of community,” and a claim that commitment to continuity across generations, the *ongoingness* of a community, is a moral value so fundamental that when faced with extinction it can override the moral limits that normally govern behavior.

With this communitarian appeal, Walzer has moved not only beyond the fundamentality of universal moral rights but also beyond any globally contextualized utilitarianism. Moreover, the appeal to communitarianism as if it were a sort of moral principle in competition with individual rights is misleading, for it is actually either a sociological thesis about how social formations tend as a matter of course to prevail over individuals and/or it is an ideology that posits the value of community as having priority over the value of the individual, on the presumption that the individual can only have a meaningful existence within a community. Hence, while individuals can be put at risk, the community cannot, or will not. The ideological character of this position is evidenced in Walzer’s comment that “[i]f the political community were nothing more than a neutral framework within which individuals pursued their own versions of the good life, as some liberal political philosophers suggest, the doctrine of supreme emergency would have no purchase.”⁴³ This leads one to wonder whether such liberal societies are therefore morally expendable, in contrast to communitarian ones. Perhaps Walzer does not believe any liberal societies in the proper sense actually exist, but it would seem rather strange to suggest that the moral question of whether it is ever permissible to intentionally kill innocent civilians depends on whether it is a communitarian society directing the killing.

Again, apart from this ideological component, this stance implies realism in suggesting that certain social and cultural realities inevitably trump individual rights when the stakes are high enough. Given the power and influence of a communitarian social system over its members, how could it be otherwise? The “ought implies can” principle seems to

indicate, in this context, that it is just not practical to expect that a political community can risk its existence for the sake of innocent individuals. Does this mean that the survival of a (or our) particular community can trump the survival of other communities, that have done no harm and are perhaps also struggling to survive under emergency conditions, should the existence of these communities for some reason be in mutual conflict? Moreover, what if the innocent lives to be sacrificed are not just those of a determinate number of individuals but of a whole ethnic or racial group? Can a political community that stands for justice make that sacrifice without contradiction?

Third, the very evaluative language Walzer uses to capture the moral tension that exists under a supreme emergency reveals his ambivalence as to whether the targeted killing of noncombatants can really be morally justified. On the one hand, moral rules always govern human behavior and can never be suspended, meaning they always have a hold on us no matter what the situation. On the other hand, the moral rules can be overridden in a situation of supreme emergency, for reasons already considered. When this happens, as when the British in 1940 killed and terrorized the German population in bombing their cities, Walzer says flatly “the intention was wrongful, the bombing criminal; its victims were innocent men, women, and children.”⁴⁴ What the British did was *immoral* but simultaneously “morally defensible” because the consequences of not committing the immoral act were too great. Walzer claims that these are *moral* consequences that can be ignored at our physical and moral peril. However, we have seen that the weight of the term ‘moral’ here is a matter of the posited value of the *ongoingness* of a community, of the strength and depth of attachment to a community. But has not Walzer mixed together the moral and the psychological in such a way as to allow the latter to effectively determine “justification” of killing the innocent? This really is not rational moral justification but is, rather, a “justification” by appeal to collective egocentrism, to the privileging of what is ours.

“Do justice even if the heavens fall” may be impractical psychologically because of the extreme consequences, but it clearly is not immoral. Doing justice absolutely is implied in the fulfilling of moral duty, whether we think of it as fulfilling a moral maxim, as actualizing a virtue, or acting according to a utilitarian calculation or rule.⁴⁵ However, taking on the guilt of killing the innocent, thereby becoming a “moral criminal,” can hardly be described as a moral act, no matter what the reason for doing it. The doctrine of “dirty hands” may explain why someone who adheres to certain moral rules will violate them and act immorally for the sake of a larger good, but this cannot make the violation morally permissible.⁴⁶

Just as being moral can never be immoral, but in certain situations impractical, so being immoral can never be moral, but it can be practical given certain ends, such as survival. The idea that sometimes “it is permissible (or necessary) to get our hands dirty” is really just a way of saying that sometimes practicality wins out over morality. To say that this equates with moral permissibility is not just to state a formal paradox but to utter an incoherence. Even Machiavelli, who understood the value of dissembling in order to make immoral actions appear moral, was clear that things done in the service of “raison d’etat” could not seriously be captured in Walzer’s claim that “moral communities make great immoralities morally possible.”⁴⁷ The consummate realist understood that it wasn’t a matter of the moral right of a state or community to exist but of its natural impetus to survive.

5. WALZER’S PRACTICAL MORALITY

My claim that Walzer falls into an incoherent tilt toward realism does not imply his embracing of realism in any full-blown manner. If realism means that in war anything goes and that we cannot make meaningful moral judgments about conduct in warfare, then clearly Walzer rejects realism in this sense. A fundamental premise of his work is that conduct in warfare can be judged and can either be given moral justification or moral criticism.⁴⁸ Moral argument regarding warfare is meaningful because “arguments and judgments shape . . . *the moral reality of war*.”⁴⁹

It is important to stress that the moral reality of war is not fixed by the actual activities of soldiers but by the opinions of mankind. That means, in part, that it is fixed by the activity of philosophers, lawyers, publicists of all sorts. But these people don’t work in isolation from the experience of combat, and their views have value only insofar as they give shape and structure to that experience in ways that are plausible to the rest of us.⁵⁰

Practical morality, therefore, is realistic in taking into account both the experience of war and the perceptions and judgments that are often made in relation to that experience. Of course, this involves not merely describing the judgments made and justifications commonly given.

We can analyze these moral claims, seek out their coherence, lay bare the principles that they exemplify. We can reveal commitments that go deeper than partisan allegiance and the urgencies of battle. . . . And then we can expose the hypocrisy of soldiers and statesmen who publicly acknowledge these commitments while seeking in fact only their own advantage.⁵¹

How far can this method go in articulating a coherent conventional morality for *jus in bello*? Only so far as experience lends itself to a coherent

moral treatment, which may be more limited than Walzer presumes. We arrive at the margins of coherence when confronted with moral dilemmas, such as situations of “forced choice,” where there may be compelling considerations for departing from the moral rules of warfare. Walzer has attempted to capture such departures within the overall framework of his moral conception of rights and his practical method, perhaps at the expense of the overall coherence of his conception of rights (in the vein of Gödel’s Proof, the system cannot both be complete and without contradiction). Are the parameters of just warfare better recognized by justifying exceptions to the moral rules of war and the constraints they impose, or is the coherence of morality better served by recognizing that certain exceptions, particularly those that fly squarely in the face of basic moral principles, cannot be morally justified? Moreover, if, as Walzer recognizes, necessity in warfare is never about inevitability but about probabilities and risks,⁵² there always must be significant doubt as to whether a decision from supreme emergency is the right thing to do. Such a decision might be taken with even greater caution if it were understood to involve a transgression that cannot be given moral sanction.

At the end of the last chapter of his book, discussing war crimes by officers and their soldiers, Walzer recognizes that the necessities generated in the conflict between collective survival and human rights, in which we experience the “ultimate tyranny of war,” result in “the ultimate incoherence of the theory of war.”⁵³ We must, he admits, call those who in a supreme emergency override the rules of war and kill innocent people “murderers,” albeit with a good cause. They have “dirty hands” in that, although they did what they had to do given their charge and responsibilities, they “must nonetheless bear a burden of responsibility and guilt. They have killed unjustly, let us say, for the sake of justice itself, but justice itself requires that unjust killing be condemned.”⁵⁴ However, after presenting Thomas Nagel’s conclusion, from his essay “War and Massacre,” that “the world can present us with situations in which there is no honorable or moral course for a man to take, no course free of guilt and responsibility for evil,” Walzer counters that we have more than moral indeterminacy, for political leaders must choose the “utilitarian side of the dilemma” and thus “must opt for collective survival and override those rights that have suddenly loomed as obstacles to survival.”⁵⁵ They are not free of guilt but they are, apparently, justified. However, here moral justification must lack coherence, as the language Walzer uses suggests. If to target and kill innocent people is murder, then it cannot be morally right, and if it is morally right it cannot be murder but justified killing. One cannot give back with one hand what is taken away with the other.

This duality of judgments, where actions are decidedly both right and wrong, just and unjust, does not seem for Walzer to indicate an incoherence in his moral conception because, realistically, utilitarian or communitarian considerations ultimately win out, and given what is at stake this will perhaps be more right than wrong. This final stance certainly does not square easily with Walzer's rights-based conception of the rules of war where "[c]onsiderations of utility play into the structure at many points, but they cannot account for it as a whole. Their part is subsidiary to that of rights; it is constrained by rights."⁵⁶ If rights were the consistent guiding principle, then we would expect that in supreme emergencies the more morally correct thing to do would be not to sacrifice the rights of the innocent, even if it meant a grave threat of our collective defeat. We might still make this sacrifice and consider it somehow excusable given the costs of not doing so, but it would clearly lack moral justification on the basis of rights.

6. CONCLUSION

In this chapter, I have examined tensions and incoherence in Walzer's account of noncombatant immunity. While Walzer claims initially that the principle of noncombatant immunity holds absolutely and without exception with regard to risks that individual combatants must take to protect noncombatants (risks that may be very difficult for combatants to accept), when the risks endanger the political community that the campaign is intended to protect, then self-defense seems to have the final word regarding the killing of the innocent. To think of this decision as a *moral* one because, prior to resorting to the supreme emergency action, we have been guided by recognized moral rules that require us to resist such action unless and until there is no alternative, is to ignore the fact that fighting well morally is being subordinated to necessity. Despite Walzer's attempt to characterize this as a sort of higher moral necessity, based on the ultimate value of the existence of a particular community, at this point he actually has made a significant concession to the idea that in reality survival trumps moral behavior.

A coherent ethic of war does not absolutely prohibit that harm come to noncombatants, but it must articulate the limits of such harm with consistent adherence to the doctrine of noncombatant immunity, based on consistent adherence to the doctrine of rights, if that is its basis. Such a position will, however, recognize that (as Hume said regarding mitigated skepticism) despite the conceptual truth about the limits of what we can know and justify, instinct can prove too strong for principle. In the case of warfare, this may well mean that exceptional violations to the rules of war

are practically too difficult to avoid and thus can be understandable, and perhaps at some level excusable, but never morally justified.

NOTES

1. Michael Walzer, *Just and Unjust Wars: A Moral Argument With Historical Illustrations*, 2nd edn. (New York: HarperCollins, 1992).
2. Walzer, *Just and Unjust Wars*, p. 138.
3. Walzer, *Just and Unjust Wars*, p. 151.
4. Walzer, *Just and Unjust Wars*, p. 152.
5. Walzer, *Just and Unjust Wars*, p. 153.
6. Walzer, *Just and Unjust Wars*, p. 153.
7. Walzer, *Just and Unjust Wars*, pp. 153–156.
8. Walzer, *Just and Unjust Wars*, p. 153.
9. Walzer, *Just and Unjust Wars*, p. 156. Further on the page, Walzer's analogy with the risks that occur in domestic society and how they can be relaxed in emergency situations seems weak. Military necessity does not, *pace* Walzer, work exactly like civil emergency, and not just because in war the standards are relaxed. War is a decision by the parties that enter into it, whereas a civil emergency is not, certainly not when the emergency is a result of accident, natural disaster, etc.
10. Walzer, *Just and Unjust Wars*, p. 155.
11. Walzer, *Just and Unjust Wars*, p. 156. As Brian Orend points out, "due care" seems to involve soldiers taking greater risks to themselves in order not to target civilians or harm them collatorally, meaning that "soldiers use only certain kinds of weapons . . . , move in more closely on targets . . . , gather and analyse intelligence on the precise nature of suspected targets, perhaps provide some kind of advance warning to nearby civilians, and certainly plan the tactic in advance with an eye towards minimizing civilian casualties." *Michael Walzer on War and Justice* (McGill-Queen's University Press, 2000), pp. 119–120.
12. Walzer, *Just and Unjust Wars*, pp. 144f.
13. Walzer, *Just and Unjust Wars*, p. 157.
14. Walzer, *Just and Unjust Wars*, p. 173.
15. Walzer, *Just and Unjust Wars*, p. 174.
16. Walzer, *Just and Unjust Wars*, p. 158.
17. Walzer, *Just and Unjust Wars*, p. 228.
18. Walzer, *Just and Unjust Wars*, p. 229.
19. Walzer, *Just and Unjust Wars*, pp. 229, 230.
20. Walzer, *Just and Unjust Wars*, p. 230.
21. Walzer, *Just and Unjust Wars*, p. 230. However, the idea of the moral equality of soldiers on each side of a war, as well as the moral equality of all citizens regardless of political allegiance, will not likely be plausible to most people either. In any case, plausibility should be a matter of the rational implication of a principle and not whether people are simply willing psychologically to follow it through in action, as Walzer seems to suggest. Appeal to this sense of plausibility goes against the thrust of Walzer's own tendency to challenge the overly permissive conventional wisdom on the justified killing of civilians.
22. Walzer, *Just and Unjust Wars*, pp. 230–231.

23. Walzer, *Just and Unjust Wars*, p. 231.
24. Walzer, *Just and Unjust Wars*, p. 231.
25. Walzer, *Just and Unjust Wars*, p. 231. It is interesting how the discussion of the more significant limits on noncombatant immunity as relates to collateral damage leads to a consideration of how rights can be overridden. Walzer does not provide a detailed conception of the overriding of rights but rather seems to presuppose that the idea is intuitively clear and noncontroversial.
26. Walzer, *Just and Unjust Wars*, p. 252.
27. Walzer, *Just and Unjust Wars*, p. 253.
28. Walzer, *Just and Unjust Wars*, p. 253.
29. Walzer, *Just and Unjust Wars*, p. 254.
30. Walzer, *Just and Unjust Wars*, p. 254. See his essay "World War II: Why Was This War Different" in *War and Moral Responsibility*, ed. Marshall Cohen, Thomas Nagel, and Thomas Scanlon (Princeton, NJ: Princeton University Press, 1974) where Walzer admits that the moral rules of war are not absolute but rather "establish very strong presumptions against certain sorts of actions, like the deliberate killing of noncombatants" (p. 103). However, "[t]hese are not irrebuttable presumptions. . . . It is possible to imagine situations where one would break the rules and accept the moral consequences of doing so" (ibid).
31. Included in his recent volume entitled *Arguing About War* (New Haven CT: Yale University Press, 2004).
32. Walzer, "Emergency Ethics," pp. 33–34.
33. Walzer, "Emergency Ethics," p. 34.
34. Walzer, "Emergency Ethics," p. 34.
35. Walzer, "Emergency Ethics," pp. 34–35.
36. Walzer, "Emergency Ethics," p. 35.
37. Walzer, "Emergency Ethics," p. 36.
38. Walzer, "Emergency Ethics," p. 40.
39. Walzer, "Emergency Ethics," p. 40.
40. See Michael Gelven's chapter "The We-they Principle," in *War and Existence: A Philosophical Enquiry* (University Park, PA: The Pennsylvania State University Press, 1994).
41. Walzer, "Emergency Ethics," p. 41.
42. Walzer, "Emergency Ethics," p. 42.
43. Walzer, "Emergency Ethics," p. 44.
44. Walzer, "Emergency Ethics," p. 34.
45. Thomas Nagel has an interesting response to the criticism that holding to moral absolutes reflects a narrow self-interest in preserving one's own moral purity: "Any theory which defines the right course of action in various circumstances and asserts that one should adopt that course, ipso facto asserts that one should do what will preserve one's moral purity, simply because the right course of action *is* what will preserve one's moral purity in those circumstances. Of course, utilitarianism does not assert that this is *why* one should adopt that course, but we have seen that the same is true of absolutism." "War and Massacre" in *Philosophy and Public Affairs* 1, no. 2 (Winter, 1972), p. 133.
46. See Walzer's essay "Political Action: The Problem of Dirty Hands" in Cohen et al., *War and Moral Responsibility*. The heroism that Walzer finds in Camus' "just assassins" does not seem to convey the sort of moral permissibility required for justification

of killing the innocent. The term “just” can apply only metaphorically to the actions of existential heroes whose actions are in a realm where everything is permitted, beyond good and evil.

47. Walzer, “Emergency Ethics,” p. 50.
48. Indeed, Walzer suggests that appeals to realism often are a form of apologetics, a defense of conduct that may appear unjust, with implicit expression of moral anxiety (40–42).
49. Walzer, *Just and Unjust Wars*, p. 15.
50. Walzer, *Just and Unjust Wars*, p. 15.
51. Walzer, *Just and Unjust Wars*, p. xxix.
52. Walzer, *Just and Unjust Wars*, p. 8.
53. Walzer, *Just and Unjust Wars*, p. 325.
54. Walzer, *Just and Unjust Wars*, p. 323. Here Walzer seems to acknowledge the moral implication of having dirty hands, that the actions in question bring guilt and condemnation rather than justification.
55. Walzer, *Just and Unjust Wars*, p. 326. The quote from Nagel can be found in the essay in *Philosophy and Public Affairs* (cited above), p. 143.
56. Walzer, *Just and Unjust Wars*, p. xxx.