

## DEHUMANIZATION, LESSER EVIL AND THE SUPREME EMERGENCY EXEMPTION<sup>1</sup>

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### INTRODUCTION

Terrorism is usually defined as “an organized use of violence to attack non-combatants for political purposes,”<sup>2</sup> and it is widely considered to be egregiously immoral: “Almost no degree of oppression and no level of desperation can ever justify the killing of civilians.”<sup>3</sup> This definition reflects the widespread public opinion in Western societies, that targeting innocent civilians is morally indefensible – even during war between states. Yet for many, the prohibition of killing civilians during wars is subject to a well-known qualification: it is defeated in the face of an imminent moral catastrophe. To cite the standard example, many believe that the indiscriminate bombing of German cities at the beginning of World War II – when the unlimited spread of the evils of Nazism had been a real, substantial threat – was justified.<sup>4</sup>

The supreme emergency exemption (hereinafter “the Exemption”), is usually justified by the lesser-evil principle. The outcome, in which innocent Germans living in Nazi Germany are killed, is not as bad as the outcome in which the Nazis inflict murder, ethnic cleansing, pocide and enslavement on a massive scale. On this view (whose best-known proponent is Michael Walzer), the direct, intentional killing of innocent civilians in order to prevent such greater evils could be justified by consequentialist considerations.

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<sup>2</sup> Coady [2004] p. 39, compare [2002] p. 9, Walzer [1977] pp. 197-206, [2004] pp. 51-66, [2006] pp. 1-12.

<sup>3</sup> Coady [2004] p. 39.

<sup>4</sup> Walzer [1977] pp. 251-255, [2004] pp. 33-50.

Recently, however, Daniel Statman has advanced a powerful case against Walzer's lesser-evil justification. The consequentialist explanation, he argues, fails to account for an essential feature of the Exemption: when the very existence of a community is at stake (where it is either "us" – the "threatened" collective – or "them" – the "threatening" collective), most people would justify opting for "us," even if the threatening collective is largely comprised of completely innocent people and the threatened collective is very small.<sup>5</sup> In other words, the Exemption appears to be insensitive to numbers. In light of these difficulties, Statman offers a new self-defense-based construal of the Exemption. He argues that "the context most conducive to understanding the special permissions [of intentionally/directly killing innocent people] in face of supreme emergency is that of self-defense," and that self-defense "is the appropriate framework to account for such permissions, if any can."<sup>6</sup>

My aim in this article is to rescue Walzer's lesser-evil-based interpretation; I shall advance an argument from consequences which supports the Exemption, and in particular explains its limited sensitivity to numbers. The paper is structured as follows. In section 1 I discuss Statman's argument against the lesser-evil justification and his argument for the self-defense-based construal of the Exemption. In sections 2-3 I develop an enriched version of consequentialism that I call "rights consequentialism," which is then used to elucidate the Exemption.

## 1. THE SELF-DEFENSE CONSTRUAL OF THE SUPREME EMERGENCY EXEMPTION

Walzer's conviction is simple: if the killing of German civilians was absolutely necessary for preventing the triumph of Nazism, then the bombings were justified. This is because, "Nazism is an ideology and a practice of domination so murderous, so degrading even to those who might survive, the consequences of this final victory is literally beyond calculation, immeasurably awful."<sup>7</sup> As a last resort in such extreme circumstances, the harm caused by preventive terrorism is the lesser evil even if it involves violating the rights to life of many innocent people.

Importantly, Walzer does not appeal to reciprocity and mutuality in making the case for the Allies' terror bombings: the fact that the Nazis systematically broke the rules of war by directly targeting civilians plays no role in the argument.

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<sup>5</sup> Statman [2006] p. 79.

<sup>6</sup> *Ibidem*, p. 62.

<sup>7</sup> Walzer [1977] p. 253.

For him (and, following him, for Rawls<sup>8</sup>), it would have been permissible to bomb the German cities even if the Nazis would have fought in strict accordance to the rules of war. It is the end result – the *post bellum* murderous regime that the Nazis would have established – that justifies the necessary killing of innocent Germans. The consequentialist argument thus concedes that statesmen exercising the Exemption violate the rights of their victims, just like terrorists.

The argument from extremity permits (or requires) ... a sudden breach of the convention [that immunizes civilians from killing], but only after holding out for a long time against the process of erosion [of the convention] ... The reasons for holding out have to do with the nature of the rights at issue and the status of men and women who hold them. These rights ... cannot be eroded or undercut; nothing diminishes them; they are still standing at the very moment they are overridden: that is why they have to be *overridden* ... [The statesman] has no choice but to break the rules: he confronts at last what can meaningfully be called necessity.<sup>9</sup>

In taking advantage of the Exemption, statesmen use terrorism for the greater good: “In rare ... cases, it may be possible, not to justify but to find excuses for terrorism.” Walzer opposes the current forms of terrorism because, contrary to the terrorist attacks at the beginning of World War II, they cannot be excused by lesser-evil considerations; current terrorist attacks “threaten mass murder in order to oppose ... something less.”<sup>10</sup>

So much for Walzer's argument for the Exemption; the difficulties that Statman points out, however, show that at least on the face of it the theoretical framework underlying Walzer's convictions lacks the resources for explaining the Exemption's insensitivity to numbers. For, in its simplest form, consequentialism asserts that actions are morally justified insofar as they enhance aggregate utility. But suppose that a small community (“Small&Decent”) is threatened by a great aggressive state (“Great&Evil”); the threat that Great&Evil poses is focused: it does not put neutrals (i.e., other communities or states) under risk. Suppose further that the only way the leaders of Small&Decent can prevent the total extermination of their community is to use weapons of mass destruction. As it is usually understood, the Exemption authorizes the leaders of Small&Decent to do so, even if they would thereby kill *more* innocent people than they save; that is, even if they produced *less* utility than they would had they not acted on the Exemption. This is

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<sup>8</sup> Rawls [1999] pp. 98-99.

<sup>9</sup> Walzer [1977] p. 231.

<sup>10</sup> Walzer [2006] p. 7.

because in exercising the Exemption, soldiers and statesmen act “for the sake of their own political community.” Walzer himself is quite explicit:

Can soldiers and statesmen override the rights of innocent people for the sake of their own political community? I am inclined to answer the question affirmatively, though not without hesitation and worry ... [A] world where entire peoples are sometimes massacred is literally unbearable. 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. Nazism challenged these values on a grand scale, but challenges more narrowly conceived, if they are of the same kind, have similar moral consequences.<sup>11</sup>

It therefore emerges that the Exemption actually counters act-consequentialism. Neither the *numbers* of innocent people saved by taking advantage of the Exemption, nor the *magnitude* of harm prevented thanks to doing so, seem essential for its justification.<sup>12</sup>

Walzer cannot rescue the argument by appealing to moderate deontological theories. These theories attribute to innocent people a nearly absolute right to life, yet allow infringing this right if necessary for preventing a sufficiently great evil. But moderates exploit utilitarian measures in calculating the magnitude of the evil, the prevention of which renders it permissible to kill the innocent. Hence, such theories also counter the Exemption rather than support it: for, as the Small&Decent-Great&Evil case shows, the Exemption is ego-centric on the state level.

Statman's solution suggests a radically different interpretation of the Exemption. He suggests placing it within a framework of ideas generated in the context of personal defensive rights, analogizing the threatening collective to the aggressor and the threatened collective to the victim. The analogy vindicates the intuition that the leaders of Small&Decent are justified in destroying Great&Evil by means of weapons of mass destruction. After all, the ethics of self-defense is mostly insensitive to numbers; if necessary for his survival, a victim has the right to kill in self-defense *ten* culpable aggressors who threaten his life. Thus, once individuals are classified as elements of a survival-threatening collective, it does not really matter how many of them there are. Second, the self-defense construal of the Exemption elucidates another important feature of it: the Exemption is irrelevant in cases in which the supreme emergency is caused by Nature. The US may

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<sup>11</sup> Walzer [1977] p. 254.

<sup>12</sup> Statman [2006] p. 62.

not redirect to Libya an asteroid that is about to hit New York, even if this is necessary for saving hundreds of thousands of New Yorkers. Likewise, the ethics of self-defense allows a victim to kill an aggressor posing a lethal threat to his life, but prohibits using an innocent bystander as a human shield.

Statman's interpretation is supported by the Advisory Opinion of 8 July, 1996, of the International Court of Justice. Discussing a forced choice between “us” and “them” in a nuclear conflict, the court formulated the Exemption in the language of self-defense. In section 103 (entitled *Legality of the Threat or Use of Nuclear Weapons*), it states,

The court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a state in extreme circumstances of self-defense, in which the very survival would be at stake.<sup>13</sup>

The Exemption can be justified, if at all, as an aspect of the ethics of self-defense.

But once this is fully acknowledged, it should be clear that Exemption is morally flawed. Following Jeff McMahan,<sup>14</sup> Michael Otsuka<sup>15</sup> and others, Statman presumes that it is the *responsibility* for an unjust threat that forms the basis for liability to defensive killing. In exercising the right of self-defense, the potential victim is enforcing justice in the distribution of harm. In fact, the self-defense argument, as it is understood by Statman, is a non-utilitarian argument from consequences: the outcome in which the harm is shifted from the innocent victim to the responsible attacker is better, *in terms of distributive justice*, than an outcome in which the attacker harms the victim.

It should come as no surprise that Statman concludes that the self-defense argument for the Exemption fails: even if ordinary civilian members of the “threatening collective” do, in a certain sense, pose a threat by virtue of their being elements in this collective, they are nevertheless not responsible, let alone culpable, for this threat. Redirecting harm to those people does not enforce justice in the distribution of harm. After all,

even if a forced choice between the lives of Jews and the lives of German children did exist, that is, the former could be spared only by bringing about the killing of

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<sup>13</sup> Available at <http://www.un.org/law/icjsum/9623.htm> (visited December 27, 2009).

<sup>14</sup> See McMahan [2005]. For a more restrictive view see McMahan [1994].

<sup>15</sup> Otsuka [1994].

the latter such killing could not be justified, because the latter did not bear even minimal responsibility for the above forced choice.<sup>16</sup>

In examining the idea that mere membership in the German people makes those children liable to defensive killing, Statman says that

holding [them] responsible for what other members in [their] groups do would be ridiculous. The ... notion of membership fails to explain why the very fact of his having a German citizenship suffices to turn [a street cleaner] into a morally legitimate target for attack, a fortiori with young German children."<sup>17</sup>

The Exemption, Statman concludes, is morally baseless.<sup>18</sup>

## 2. RADICAL EVIL AND DEHUMANIZATION

Statman is right that standard versions of consequentialism lack the resources for elucidating the Exemption. Consequentialism, however, could be enriched in various ways. Moreover, it appears that more nuanced and complex versions of consequentialism attractively elucidate the Exemption, particularly its relative insensitivity to numbers. On the reading I shall present shortly, the Exemption's relative insensitivity to numbers conveys a simple lesson: the evil prevented by statesmen who justifiably exploit the Exemption is *worse* than the massive harmful deaths that they cause. That is, the Exemption's limited responsiveness to utilitarian considerations suggests that disutility is not the disvalue that statesmen are trying to minimize by justifiably acting on the Exemption. Indeed, I shall suggest that the destruction of Small&Decent might well be worse than the killing of two million innocent members of Great&Evil, under (what I call) "rights consequentialism."

How could anything be worse than the death of innocent people? Consider Daniel Haybron's hypothesis:

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<sup>16</sup> Statman [2006] p. 68.

<sup>17</sup> *Ibidem*, p. 76. Statman might argue that the innocent are bystanders rather than attackers. He says, for example that the street cleaner is "...an innocent bystander, so killing him would be problematic even for those who accept that innocent *attackers* might be killed in self-defense."

<sup>18</sup> On a closer look, Statman might be read slightly differently: he appreciates the attraction of granting special permission to killing the innocent in supreme emergencies, but cannot find a justification for it in the accepted moral theories. This article seeks to fill the gap and provide such a justification.

You will have better luck generating dissent if you refer to Hitler or the Holocaust merely as bad or wrong ... such tepid language seems terribly inadequate to the moral gravity of the subject matter. Prefix your adjectives with as many “verys” as you like; you still fall short.<sup>19</sup>

Avishai Margalit and Gabriel Motzkin explain this conviction in terms of disrespect and humiliation:

The Germans were unique ... because ... they denied the idea of a common humanity both theoretically and practically. They embodied this denial of humanity in the way in which they fused humiliation and extermination in their ridding the world of the Jews.<sup>20</sup>

This conviction can be articulated as follows: certain murders are *dehumanizing* in virtue of two conditions that they meet. First, the agent of the killing acts on the basis of the (false and immoral) belief that his victim is of no moral worth, and as such fails to be a subject of moral rights. I shall call the belief in question the “dehumanizing belief.” The dehumanizing killing is *explained* by the killer's dehumanizing belief. Second, the final end of the murderer is informed and reasoned by the dehumanizing belief: by committing the dehumanizing killings, the agent considers himself as promoting the good. Murders that meet these conditions are dehumanizing, and as such are worse than ordinary first degree murders. On my proposed reading, the lesser-evil considerations to which Walzer appeals imply that statesmen can be justified in preventing radical – or dehumanizing – evil, by actively causing injustice that involves no dehumanization.

In the remainder of this section I should like to explore in more detail what it means for a rights violation to be dehumanizing. I do so by explicating the attitudes that are embodied and expressed by dehumanizing killings. In the next section, I will explore the moral difference that dehumanization makes, in light of the fact that any unjustified killing seems to involve some derogation of the moral status of the victim.

Consider the entrenched distinction that our legal tradition draws between degrees of murder.<sup>21</sup> Famously, the law does so by distinguishing between intentionality, recklessness and negligence. A person who commits a reckless killing is

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<sup>19</sup> Hybron [2002] p. 261.

<sup>20</sup> Margalit, Motzkin [1996] p. 83.

<sup>21</sup> The next three paragraphs are based on Rodin [2004] (Rodin, however, would reject my conclusions).

culpable for bringing about unintentional bad consequences that are unreasonable and unjustified under the circumstances. Subjective recklessness is a mental state, and as such constitutes *mens rea*: the agent foresees the risk of harm that she inflicts and this mental state is the basis of her criminal liability. Negligence (which is very similar to objective recklessness), is the failure to take reasonable precaution in the face of foreseeable risk. The negligent agent might lack any mental state that can function as *mens rea*. Therefore, negligence is usually an essential element in civil lawsuits, but of little importance in criminal law. When the negligence is sufficiently gross and harmful, it might be a ground for criminal liability, despite the absence of the mental state which is usually required for incriminating an offender and administering punitive measures against her. The distinction between intentionality and recklessness is manifested by the fact that the punishments that the legal system tends to inflict on an agent of an intentional killing are more severe than the punishment to which the agent of a reckless killing would be subjected.

The doctrine of double effect is another manifestation of the conviction that underlies this legal tradition. On the standard formulation of the doctrine, one may almost never directly kill another person, even if this is a necessary means for bringing about the greater good. The doctrine says that subject to constraints of proportionality and necessity, one may nevertheless use the necessary means to achieve a good end, even if one foresees that using such means will result in the death of the innocents. One (problematic) way to explain the doctrine relies on the conviction that unintentional killing is not as wrong as intentional killing, even if the death caused in the former case was foreseeable.<sup>22</sup>

Philosophers are skeptical of the moral significance of the distinction between intentionality and recklessness. The moral standing of the distinction between intentionality and foreseeability is doubtful as well. There is no standard theoretical explanation as to why a killer who wanted the victim's money, and for that purpose sold him poisonous food, deserves a less severe punishment than a killer who shot his mother in order to inherit her. True, the foreseeable killing was unintentional; possibly, the reckless killer could have hoped that the victim will not eat the food; he is after the victim's money, not her death. In the latter case, the killer sought his mother's death because he could not inherit her in any other way. However, skeptics would question the relevance of this fact, calling attention to a common intuition that in those cases, the reckless killing is as wrong as the intentional murder. Similar doubts were expressed with respect to the doc-

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<sup>22</sup> See e.g., Kamm [2000] p. 23.



trine of double effect. Skeptics argue that the fact that the agent had no direct intention to kill the victim is irrelevant; for them, if all other things are equal, an unintentional killing that prevented a moral catastrophe is as wrong as the intentional killing that prevented it. In other words, skeptics argue that the permissibility of an act is determined by the level of risk that this act involves; whether this risk was intentional or foreseeable is morally insignificant.<sup>23</sup>

I will not try to defend here the recklessness/intentionality distinction. Nor will I argue for the foreseeability/intentionality distinction. The analysis of radical evil that I offer assumes that these well-entrenched legal distinctions loosely capture a deep (albeit elusive) moral truth: the degree to which a particular right violation is wrong, depends (among other things) on the degree to which the right violation is disrespectful. I assume, in other words, that killings involving a right violation are wrong not only because of the harm that the killing causes to the victim (and to his family, friends etc.), but also because of the disrespect it expresses. Unlike liability to compensation ruled by civil courts, the punishment that criminal courts inflict on murderers is (usually) insensitive to the degree to which the killing was harmful to the victim, to his or her family, or to society. Murder is considered to be the capital crime under criminal law by virtue of being an expression of disrespect for humanity and for the rights that humans possess by virtue of their humanity. Therefore, the wrongness to which criminal law responds is articulated by the "morality of respect," viz. the moral code that is "compromised by constraints that spring from our recognition of others as mature agents on an equal moral footing."<sup>24</sup>

In distinguishing between intentionality and recklessness and between intentionality and foreseeability, criminal law aims to accommodate elements from the morality of respect; the legislator (truly or falsely) assumes that in most cases an intentional killing is more disrespectful than a reckless killing. This partly supports the doctrine of double effect: a foreseeable killing that is justified by lesser-evil considerations is not at all disrespectful, even if the right of the victim is violated and he or she is used as a means for a further end. The point I would like to underscore is that this approach to morality motivates a distinction between additional degrees of murders; a distinction that responds to the role of the dehumanizing belief in explaining killing. Thus, some rights violations embody the dehu-

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<sup>23</sup> Anscombe [1979]; Ford [1970].

<sup>24</sup> I am here employing Jeff McMahan's two-tiered morality of killing that he expounds in McMahan [2002] pp. 235-242. Compare Benbaji [2005] pp. 606-607, where I propose a two-tiered ethics of self defense.

manizing belief in a way that makes them more disrespectful than ordinary first degree murders.

Consider murders whose explanation makes no reference to the killer's denial that humans are subject of rights by virtue of their humanity. Indeed, most murders can be explained solely on the basis of a "narrow" conception of rationality that modern philosophy took from economics.<sup>25</sup> Within this framework, it is assumed that rationality is the maximization of subjective value. A rational agent maximizes the extent to which his objective is achieved. This conception of rationality is narrow in the sense that individuals' objectives are presumed to be self-centered. They do not take interest in one another's interests. Now, it is certainly possible that killing a victim is a means for promoting one's self-interest; the resolution of ordinary cases of first degree murders usually involves identifying a motive that many decent people share. Ordinary murderers kill for the sake of money and/or power and/or other goods that many perfectly dignified people want.

Thus, in explaining those ordinary murders we do not have to attribute the dehumanizing belief to their agent; and therefore, this belief need not play any causal role in explaining the murder. True, by using their victims as a means for their material ends, first degree murderers treat them disrespectfully; this treatment shows lack of respect for the victim's value as a human being. Still, typical murderers do *not* hold the dehumanizing belief and therefore, it does not motivate them nor does it have any other role in explaining their deeds.

How do "ordinary" murderers respond to the moral standing of humanity? Most first degree murderers lack the capacity to form the dehumanizing belief; they lack the capacity to form beliefs that reach this level of abstraction. Others are merely weak-willed: they harm their victim while judging that: (first) their victim *is* a subject of rights and that (second) this makes her killing undesirable. Murderers of yet a third group fail to appreciate the weight of the rights of the victims, because moral considerations are not very important to them. They act out of their own self-interest, but acknowledge that their victims are subjects of rights and that this fact constitutes a (rather weak) consideration against killing them. In all of these cases, the murderers commit the crime *despite* the fact that they know that they are violating their victims' right to life.

Consider now murders whose explanation would be impossible without referring to the dehumanizing belief. For example, a murderer whose final end is killing (certain) innocent people.<sup>26</sup> The killing is not a means to a further end; it is

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<sup>25</sup> For a standard formulation, see Gauthier [1979] p. 547.

<sup>26</sup> For an important analysis of the notion of final ends, see Frankfurt [1999].

the killing (or the death of the victim) that satisfies the killer. Suppose also, that the desire to kill for the sake of killing is *not* compulsive or irresistible; quite the contrary, the killing satisfies the killer partly because he calmly denies that humans as such are subjects of rights. Of course, things other than the dehumanizing belief might be required in order to complete the explanation of the murder. For example, the fact that the killing of the victim is the killer's final end, might be causally related to the fact that the killer hates the victim. Or, the killer might be a sadist who actually enjoys the very act of killing humans. Still, the fact that the victim is the subject of rights is not, for the killer, even a *prima facie* reason against killing him; the murderer simply denies it. We stipulate that, if the killer believed that the humans are subjects of rights, he would not adopt the killing of the victim as one of his final ends. The agent's desire to kill the victim for the sake of killing is, therefore, causally related to his belief that his victims are not subjects of rights. Such killings, I suggest, embody a denial of the moral significance of our shared humanity – and as such they are more disrespectful than ordinary first degree murders. (Note further that the agent of the murder acts under the guise of the good. The desire that explains this killing is *not* a desire to do wrong. While there might be murderers who are satisfied by the wrongness of their actions; they believe that humans are subjects of rights, and they kill them because by doing so they are violating these rights.<sup>27</sup>)

The evil whose prevention is justified by the Exemption is more radical. In the cases I have discussed so far, the dehumanizing belief functions as a causal precondition: the killing could not be the agent's final end without the agent's denial that humanity is of moral significance. The dehumanizing belief plays a different and more central role in the Nazi cause. The final end of the Nazis was not killing Jews, homosexuals or gypsies; rather, the Nazis were implementing a grand plan – world domination – based on the dehumanizing belief. Hate crimes are a similar phenomenon: the killers aim to promote the good by eliminating members of certain groups.

In sum, it is not simple utilitarianism – i.e., adding up numbers or measuring utilities – that justified terror bombing in the extreme circumstances of World War II. Nazism was evil personified and a Nazi victory would have effectively put a hold on human civilization as we know it. It is the *quality of the evil* that a Nazi victory would have introduced that was at stake. While it involves consideration of the consequences (Nazi victory vs. terror bombing), the ground for granting the

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<sup>27</sup> This phenomenon was masterfully described by Stocker [1979].

Exemption in this case, is not utilitarian in the simple sense of counting the numbers of lives to be lost or saved.

One of the remarks that Christopher Toner makes in arguing against the Exemption, suggestively exemplifies the failure to respond to the moral uniqueness of dehumanization. Following Walzer, he concedes that in rejecting the Exemption we do justice “by letting the heavens fall.” Toner nevertheless argues that, sooner or later, the heavens will fall anyhow: “We and the world will perish ... we cannot change that.” He thus argues that “in so far as is in our power, [we ought to] let justice be done while we live.”<sup>28</sup> Toner presumes that the evil that leaders prevent by exercising the Exemption is an evil that might result from a natural catastrophe. On the reading I have just advanced, the evil prevented is much *worse* than any natural catastrophe. Particularly, it is worse than the unjust killings that the Exemption permits.

### 3. LESSER EVIL AND RIGHTS CONSEQUENTIALISM

The observation that murders that embody the dehumanizing belief are more disrespectful than ordinary (first degree) murders, is at the heart the consequentialist framework which, on the view I am defending, best elucidates the Exemption. It offers a simple explanation to the Exemptions' relative insensitivity to numbers. As such, it revalidates the lesser-evil-based argument that Walzer develops. This section outlines this consequentialist framework.

To begin, note that rights-based political moralities implicitly appeal to the value of consequences. True, theories that take rights seriously tend to present rights as trumping utilities; their basic claim is that it would be morally objectionable to violate a right in order to maximize aggregate welfare. Still, very few theories construe rights as absolute side constraints; most theories deny that violating a right is impermissible, whatever the weight of the violated right and whatever the benefit that will be achieved by violating this right. It is widely believed that in certain circumstances, it would be justifiable to violate (or infringe upon) a person's right in order to protect “competing rights,” i.e., weightier rights of other people. In effect, one's right may be outweighed even by sufficiently weighty utilitarian considerations.

The Government may discriminate and may stop a man from exercising his right to speak when there is a clear and substantial risk that his speech will do great

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<sup>28</sup> Toner [2005] p. 561.

damage to the person or property of others, and no other means of preventing this are at hand, as in the case of the man shouting 'Fire!' in a theater.<sup>29</sup>

I shall rely on these convictions in construing a theory I call "rights consequentialism," that I understand as a version of Amartya Sen's consequentialist theory of rights.<sup>30</sup> In its simplest form, consequentialism rules maximizing aggregate utility: other things being equal, it is more important to attain a given benefit, the greater the benefit and the greater the number of people who will enjoy it. More complex theories would require maximizing *weighted* utilities: other things being equal, the lower a person's rating on the welfare scale, the greater the moral value would be of an outcome in which he enjoys a benefit of a certain size. Theories of rights may weigh certain rights against other rights or against aggregate utilities, by applying the tools that rights consequentialism offers. Rights consequentialism quantifies injustice by measuring the extent to which rights are violated in a given outcome.

Now, the extent to which rights are violated depends on the number of individuals whose rights are violated in this outcome, the number of the violated rights these individuals suffer, and the weight of the violated rights. That is, this version of consequentialism takes rights seriously in that it considers the disvalue of an outcome as dependent not only on the amount of harm it involves, the number of innocent people that suffer it, and the absolute level of well-being of those on whom the harm is inflicted; it depends, additionally, on the extent to which rights are violated by the harmful actions. Hence, all else being equal, preventing harmful violation of rights ought to take *some* priority over preventing harms that do not involve violation of rights.<sup>31</sup> Rights are trumps because rights violation is not just one of several considerations; it is a more weighty consideration than the others.

Rights consequentialism, as outlined thus far, entails two propositions:

(1.) If all other things are equal, an outcome that contains harms involving rights-violations is worse than outcomes that contain no rights violation. Thus,

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<sup>29</sup> Dworkin [1977] p. 204. Compare: "The side constraint view forbids you to violate ... moral constraints in the pursuit of your goals; whereas the view whose objective is to minimize the violation of these rights allows you to violate rights (the constraints) in order to lessen their total violation in the society," Nozick [1974] p. 29. Yet even Nozick says that that "the question of whether these side constraints are absolute, or whether they might be violated in order to avoid catastrophic moral horror ... is one I hope largely to avoid" (*ibidem*, p. 30).

<sup>30</sup> Sen [1982].

<sup>31</sup> For a related view, see Arneson [2001].

some priority ought to be given to preventing harms that involve rights violation.

(2.) "Utilitarianism of rights": if all other things are equal, violating the rights possessed by people of a certain group is worse the larger this group is, the weightier those rights are, and the more of these rights there are.

Further propositions would articulate the commitment of rights consequentialism to the morality of respect: rights violation is worse the more disrespectful it is. Put in terms of consequences, the value of an outcome depends (among other things) upon the extent to which the violation of rights (that this outcome contains) is disrespectful. In particular,

(3.) If all other things are equal, an outcome that contains a dehumanizing violation of rights is worse than an outcome that contains rights violation that does not involve dehumanization. Thus, some priority ought to be given to preventing the former outcome over preventing the latter.<sup>32</sup>

In supreme emergencies, the presumption against a direct violation of the right to life is defeated in order to prevent what seems to be the most disrespectful form of rights violation: massive dehumanization. That is, circumstances are extreme if a dehumanizing, murderous regime is about to prevail. Proponents of the Exemption believe that, if necessary for preventing such an evil, killing innocent people is justified by lesser-evil considerations. The consequentialist morality behind this conviction can be put as follows: if all other things are equal, an outcome involving radical evil is "immeasurably" worse than an outcome involving rights violation that does not involve evil. Hence, violating rights might be justified if it is necessary for preventing evil of this sort.<sup>33</sup>

This is not counterintuitive; many believe that in World War II, the Allies should have bombed Auschwitz as early as possible, in order to put a stop to the ongoing mass murder it facilitated, despite the lives of innocents that such a bombing would have claimed. That is, if the aggregate rights violation is suffi-

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<sup>32</sup> We may formalize as follows: the value of an outcome ( $V$ ) is a function that maps outcomes -  $O(U^W, R, E)$  which contain certain amounts of weighted utility ( $U^W$ ), rights violation ( $R$ ), and dehumanization ( $D$ ) - to the degrees to which the outcome is good/bad ( $G$ ). Thus,  $V:O[U^W, R, D] \rightarrow G$ . The imperative derived from this view is that we ought to maximize  $V$ . The killings committed by rulers in extreme circumstances are justified insofar as they are necessary for maximizing this value. I develop a logic and a semantics of these multidimensional comparisons in Benbaji [2009].

<sup>33</sup> That is, the degree to which  $O_2$  is bad [ $=V(O_2)$ ] is much greater than degree to which  $O_1$  is bad [ $=V(O_1)$ ], even if difference between  $D_2$  and  $D_1$  (i.e.,  $D_2 - D_1$ ) is small. That is,  $V(O_2) - V(O_1)$  is disproportionately greater than  $D_2 - D_1$ .

ciently great, directly violating the right to life of some people in order to prevent this evil might be justified, or even obligatory.

Note, however, that rights consequentialism does not assign *absolute* priority to protecting people from dehumanizing rights violation. Indeed, rights consequentialism yields a modest, non-absolutist reading of the Walzerian characterization of dehumanizing killing as “immeasurably awful.” Imagine a case in which the only way to prevent an accidental nuclear catastrophe is by letting a sociopath (who serves in one of the secret services) interrogate an innocent scientist in possession of a crucial piece of information for preventing the accident. As the scientist does not grasp how important this piece of information is, a dehumanizing interrogation would be necessary. Rights consequentialism would justify a dehumanization of one person, if it is necessary for preventing enormous suffering and death.<sup>34</sup>

The consequentialist argument elucidates two features of the Exemption to which Statman called our attention. Consider first a case mentioned earlier, where an asteroid is about to hit New York and kill hundreds of thousands of New Yorkers; suppose that the only way to save them is to redirect the asteroid to Libya. The Exemption does not authorize the US government to do so, despite the extremity of the circumstances. The consequentialist explanation is simple: the Exemption justifies killing innocents only in order to avoid the evil of dehumanization; the mass death caused by an asteroid is not a case of dehumanization whose prevention justifies the killing of (other) innocent people. Second, and more importantly, the Exemption authorizes the rulers of a small country to use weapons of mass destruction in order to defend it from total extermination, even if in so doing, they would be killing more innocent people than they will be saving. This is because the killings that the Exemption allows are not dehumanizing irrespective of their numbers.

## CONCLUSION

I have proposed a moral theory that supports the special permission to kill innocent civilians in extreme circumstances. The argument consists of two main claims. First, the morality of respect that our legal tradition aims to express in

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<sup>34</sup> In other words, an outcome that involves massive violation of the right to life of innocent people might be worse than an outcome that involves a relatively small degree of dehumanization, despite the fact that the former outcome involves no dehumanization at all. That is,  $O_1(U_1, R_1, D_1)$  is worse than  $O_2(U_2, R_2, D_2)$  even if the  $D_1 > 0$  and  $D_2 = 0$ . This happens when and  $R_1 - R_2$  is sufficiently greater than  $D_2 - D_1 (= D_2)$ . The non-absolutistic flavor of the lesser-evil-based elucidation of the Exemption seems to me an important advantage of it.

various ways, implies that dehumanizing killings are worse than intentional killings not involving dehumanization. Second, the Exemption can be embedded in a rights-sensitive version of consequentialism that accepts the uniqueness of dehumanization. The theory implies that a direct violation of rights might be justified if it is necessary for preventing the prevalence of a dehumanizing regime.

The Exemption is susceptible to a further objection that this paper did not address. Understood in terms of lesser-evil considerations, the Exemption erodes the immunity of noncombatants in non-extreme circumstances. After all, the lesser-evil considerations seem to apply to extreme *and* regular circumstances alike. Exponents of the Exemption assert that, if proved necessary for preventing Nazi mass murder and dehumanization, a direct killing of tens of thousands of innocent people was justified. By this logic, directly killing a proportionally small group of innocent civilians of an aggressive state, in order to prevent a minor evil that would result from the victory of that state, would be justified. The reason is straightforward: if a massive killing of civilians executed in order to prevent a massive murderous dehumanization is permissible, then a limited killing of civilians executed in order to prevent an equally limited murderous dehumanization is permissible as well. I have analyzed this difficulty elsewhere.<sup>35</sup>

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<sup>35</sup> See Benbaji [2010].



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