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Sanford H. Kadish
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Respect for Life and Regard for Rights in the Criminal Law*

Sanford H. Kadish†

In this essay Dean Kadish searches for underlying principles that explain the pattern of rules of the criminal law governing when life may be taken. Finding neither "the sanctity of life" nor any other single general principle sufficient, he looks more particularly for narrower principles identifiable in discreet categories of rules; specifically those governing intentional killings of aggressors, intentional killings of bystanders, omissions and unintended killings. He identifies a number of principles and policies, several in acute tension and conflict, including the right to resist aggression, the principles of autonomy and proportionality and the calculus of social advantage. He concludes by illustrating how these principles bear on some of the more controversial questions of life and death confronting the criminal law today.

Life is a unique kind of good because it is the necessary condition for the enjoyment of all other goods. Therefore, every person by and large tends to value his life preeminently, and any society must place a high value on preserving it. As Professor Hart observed, "our concern is with social arrangements for continued existence, not with those of a suicide club."¹ But while the aim of survival affords "a reason why . . . law and morals should include a specific content,"² it obviously does not afford a reason why that content should include placing the survival of every person above all else. For although we value our

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† Dean and Morrison Professor of Law, School of Law, University of California, Berkeley.

1. H.L.A. HART, THE CONCEPT OF LAW 188 (1961).
2. *Id.* at 189 (emphasis deleted).

own lives preeminently, it does not follow that we equally value other people's lives; their lives may conflict with rights we claim or with goods we value, including our own lives. Hence, any society must face the problem of deciding when the life of some should yield to the claims or interests of others.

On the one hand, our society, like all others, has, over the centuries, produced a substantial consensus as to how these issues should be resolved. On the other hand, that consensus tends continually to be shaken by new events and new challenges. So in recent years we have been divided and perplexed by such problems as bombing civilians in war, mass starvation elsewhere in the world, abortion, euthanasia, human medical experimentation, obtaining organs for transplant, and deciding who should be kept alive for how long by life sustaining devices.

Having stated these issues, however, I shall not mention them again until the end, because my principal subject will be the received consensus itself rather than the current uncertainties about its application. I shall dwell, rather, on those relatively settled judgments and understandings concerning the taking of human life that we seem to have arrived at. My purpose in doing this is to try to get at what it is that lies beneath those judgments and understandings. I undertake this inquiry for its own sake—it will not solve the hard questions I referred to. Still, insofar as it exposes what we agree on and why, it may, as a by-product, contribute something to the debate on the issues of the day that trouble us.

Where, then, shall we look for those settled understandings? I propose we look to the criminal law insofar as it deals with actions that result or tend to result in loss of life. For in its provisions that direct when life should be taken, when it may be taken justifiably, and when taking it is prohibited and when permitted, we have a body of formulations that have evolved over time through reflective and tested examinations of what we regard as of greater or lesser value and of what we regard as right and what wrong. We have, in short, some kind of map of our sentiments with respect to life to serve as a basis for securing our bearings on where we have come to stand.

Before proceeding to draw that map, let me acknowledge that it cannot be a precise indication of our settled sentiments. One reason is that some problems of justified killing are, as we shall see, not clearly settled in the criminal law. Insofar as we shall have to speculate on what the law would be, we will be compromising with our model of drawing inferences from the settled consensus. Another reason is that there are considerations other than our attitudes toward the wrongness and undesirability of actions that affect how we shape the criminal law.

Some conduct that tends to result in loss of life might be judged strongly undesirable and yet be unprohibited by law—either because it cannot be prevented by criminal threat, or, if it can, then in too small a degree in light of the undesirable consequences the attempt at prevention would entail. For similar reasons, some conduct that tends to preserve lives might be judged strongly desirable and yet be un-compelled by the criminal law. We will have to be careful, therefore, in drawing conclusions too hastily from what the criminal law does or does not prohibit, compel or tolerate.

It will be helpful to state at the outset one such instance of a need for caution. I refer to excused actions—those that are relieved of criminal liability out of regard not to a judgment of the nature and quality of the action (which would make them justified, rather than excused), but to the condition of the actor in the circumstances. So we should say of an excused action not that the actor was right to do as he did, but, for one reason or another, that more could not fairly be demanded of him, at least by the criminal law.³ Although it may not always be clear whether some particular defense (even self-defense, for example) operates as an excuse or a justification, to the extent that it is the former it does not represent the kind of judgment that serves our purposes. The same is true, of course, of homicidal actions that are partially excused, in the sense that a lesser punishment is indicated, for here too the judgment turns on the situation of the actor rather than on the rightness of the action.

I

MAPPING THE RULES OF THE CRIMINAL LAW

In presenting the rules of the criminal law, I will start with actions intended or known to kill.⁴ These are actions which are generally prohibited by the criminal law of our own and every legal system, and typically with the severest penalties. The victim's consent to an in-

3. See Austin, *A Plea for Excuses*, 57 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 1-2 (1956-57). As an example, compare section 53.1 of the recently superseded German Penal Code of 1871, which provided that, "No act constitutes an offense if it was necessary in self-defense or in defense of another," with section 53.3, which provided that, "Excessive self-defense or defense of another is not punishable if the perpetrator has exceeded the limits of defense by reason of consternation, fear or fright." 4 THE AMERICAN SERIES OF FOREIGN PENAL CODES, THE GERMAN PENAL CODE OF 1871, at 41-42 (1961).

4. I have chosen not to burden these notes with complete citations to authority for the well-known legal doctrines discussed. See generally W. LAFAVE & A. SCOTT, CRIMINAL LAW 381-407 (1972); MODEL PENAL CODE §§ 3.01-12, Comments (Tent. Draft No. 8, 1958); Note, *Justification: The Impact of the Model Penal Code on Statutory Reform*, 75 COLUM. L. REV. 914 (1975); Note, *Justification for the Use of Force in the Criminal Law*, 13 STAN. L. REV. 566 (1961).

tended killing is not a defense. Taking one's own life was a felony at the common law. Today it is no longer a crime, although attempted suicide is sometimes criminal and aiding another to commit suicide virtually always is criminal.

To these primary prohibitions, however, there are exceptions which have a special interest for us because they rest on a judgment that intentional killings in certain circumstances are right actions. These exceptional circumstances include cases in which the person killed is not a wrongdoer as well as those in which he is. The latter are more familiar, and I will start with them.

Capital punishment has been defended even by natural rights philosophers, like Kant and Locke, and has historically been the typical penal response to the most feared or serious crimes. Although its moral legitimacy has been challenged,⁵ it is, on the whole, an accepted part of our jurisprudence.⁶

Law enforcement officials may kill in other circumstances as well. At common law, they may kill where reasonably believed necessary to prevent "violent" felonies, even those against property, and to apprehend any felon. Under some modern statutes, reflecting an enhanced regard for the life of the felon, they are limited to killing to prevent crimes that threaten death or serious bodily injury or to prevent the escape of a suspect who is armed or otherwise poses a threat to life if left at large.⁷

5. See the opinions of Justices Brennan and Marshall in *Furman v. Georgia*, 408 U.S. 238 (1972).

6. It is noteworthy that popular sentiment in some states compelled reinstatement of capital punishment after courts invalidated it for a variety of reasons. In California, voters reinstated the death penalty by a 2-to-1 vote in a popular referendum held after the California Supreme Court held it unconstitutional. *Note on the Constitutional Status of Capital Punishment*, in S. KADISH & M. PAULSEN, *CRIMINAL LAW AND ITS PROCESSES* 209 (3d ed. 1975). It is also noteworthy that capital punishment is sanctioned in the European Convention on Human Rights. Article 2(1) provides: "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." COUNCIL OF EUROPE, *EUR. CONV. ON HUMAN RIGHTS, COLLECTED TEXTS* (8th ed. 1972).

7. See MODEL PENAL CODE §§ 3.07(2)(b), (3) (Proposed Official Draft 1962); *Note, Justification: The Impact of the Model Penal Code on Statutory Reform*, 75 COLUM. L. REV. 914 (1975). The older tradition of the common law, found also in some European countries, allowing a broader privilege to kill for law enforcement purposes, is reflected in the European Convention on Human Rights, Art. 2(2): "Deprivation of life shall not be regarded as inflicted in contravention of this Article [see note 6 *supra*] when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection." COUNCIL OF EUROPE, *EUR. CONV. ON HUMAN RIGHTS, COLLECTED TEXTS* (8th ed. 1972).

Private persons may justifiably take life largely in the same circumstances in which law enforcement officials may, though, unlike such officials, they are never duty-bound to do so. A person is also privileged to kill in an overlapping but more specifically defined class of cases: he may kill an unlawful aggressor where it reasonably appears necessary to avoid either the imminent loss of his life or the imminent infliction of serious bodily injury upon him (which need not necessarily threaten his life, as in the case of kidnapping and forced sexual intercourse). A person may use force to defend his property; but, except to the extent that the threat to his property also constitutes a "violent felony," he may not go so far as to kill. To this exception, however, there are further exceptions. At common law one could kill to prevent being unlawfully dispossessed from one's home or, indeed, to prevent any threat to property occurring through a forcible entry of his dwelling. The latter exception survives in modern statutes as well.

There is division on whether an obligation to run away, when one knows he can safely do so, qualifies the right to kill in defense of one's person. The common law permitted a person to hold his ground, as do most states today. Those that require retreat, however, do not require that one run from his home or place of business.

Killing by a private person in defense of another is today generally allowed in the same circumstances as killing in defense of self. The common law and a few old state statutes restrict this privilege to kill on reasonable appearance of necessity to cases in which the victim stands in a specified close relation to the defender. And some jurisdictions have required the defender in all cases to act at his peril, disallowing the defense if it turns out, contrary to appearances, that the apparent victim was really the aggressor.

Turning now to intentional killings to preserve one's own life or the life of one or more other persons, where the person killed is known *not* to be a culpable aggressor, we reach less certain legal ground. First, consider the case where the actor's choice is to take one innocent life in order to save multiple lives. The Model Penal Code found support in the common law for its proposal that one is generally justified in breaking the law where doing so is the only way to avoid an evil the legal system would regard as greater.⁸ Although there is authority that denies the extension of this principle to homicidal conduct, the authors of the Model Penal Code meant it to extend here as well, on the footing that the death of two persons is a greater evil than taking the life of one, and there is authority that supports their view.⁹

8. MODEL PENAL CODE § 3.02, Comments at 6-7 (Tent. Draft No. 8, 1958).

9. The commentary to section 3.02 of the Model Penal Code states:

[R]ecognizing that the sanctity of life has a supreme place in the hierarchy

Where the actor's choice is to take one innocent life in order to save one other, whether himself or someone else, so that reliance upon a numerical calculus of lives is unavailable, the law may not be stated with confidence. Laws and cases on the issues are scarce or non-existent, and I will have to speak much more speculatively.

I should think we need to distinguish those cases where the person killed constitutes a part (although an innocent part) of the circumstances imperiling the actor, from those where he is a bystander whose life is conscripted in the service of the actor's or another's survival. The first set of cases, the "innocent threat" cases, are those typically in which the threatener is excused or is otherwise non-punishable, and is known to be so by the defender. The threatener may at the time be acting under duress,¹⁰ he may be legally insane, or he may be a small child. He may even be committing no "legal" action at all, as when one acts in his sleep or when one's body is used as a physical instrument by another. It is fairly clear that one who kills such a person in these circumstances, when necessary to save himself, is not punishable under Anglo-American law. It is probable, though by no means certain, that his action would be regarded as an instance of justifiable self-defense rather than simply as excusable, and that a third person would be equally justified in intervening on his behalf.¹¹

of values, it is nonetheless true that conduct which results in taking life may promote the very value sought to be protected by the law of homicide. Suppose, for example, that the actor has made a breach in the dike, knowing that this will inundate a farm, but taking the only course available to save a whole town. If he is charged with homicide of the inhabitants of the farm house, he can rightly point out that the object of the law of homicide is to save life, and that by his conduct he has effected a net saving of innocent lives. The life of every individual must be assumed in such a case to be of equal value and the numerical preponderance in the lives saved compared to those sacrificed surely establishes an ethical and legal justification for the act. . . . So too a mountaineer, roped to a companion who has fallen over a precipice, who holds on as long as possible but eventually cuts the rope, must certainly be granted the defense that he accelerated one death slightly but avoided the only alternative, the certain death of both.

MODEL PENAL CODE § 3.02, Comments at 8 (Tent. Draft No. 8, 1958).

A number of states have recently adopted formulations of the lesser-evil principle as parts of their criminal codes. See Note, *Justification: The Impact of the Model Penal Code on Statutory Reform*, 75 COLUM. L. REV. 914 (1975). Wisconsin, however, excludes homicidal actions. See WIS. STAT. ANN. § 939.47 (1958). And compare Fletcher, *The Individualization of Excusing Conditions*, 47 S. CAL. L. REV. 1269, 1278 (1974): "German scholars, influenced by the Kantian tradition, have rejected the possibility of justification where the act is one of killing an innocent person."

10. Insofar as duress may excuse homicidal conduct. It often may not. *E.g.*, CAL. PENAL CODE § 26 (West 1970). See also W. LAFAVE & A. SCOTT, CRIMINAL LAW 376 (1972).

11. As Professor Fletcher has observed, the issue has not squarely been faced in the Anglo-American law. Fletcher, *Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory*, 8 ISRAEL L. REV. 367, 370 (1973). The Model Penal Code does allow the use of necessary defensive force in these cases. MODEL PENAL CODE § 3.11(1) (Proposed Official Draft 1962) (definition of "unlawful force"

The second set of cases, the "innocent bystander" cases, are those in which one creates a deadly peril to a person uninvolved in one's own peril in order to preserve himself—seizing another to use as a shield against danger, for example. Here there is no authority for finding a justification.

We have so far spoken of actions intended to kill. But actions may take life even if not so intended. How does the criminal law deal with these? The key concepts are recklessness and negligence. Both denote a significant departure from a minimally acceptable standard of care: in the case of recklessness, in awareness of the risk being created; in the case of negligence, in culpable unawareness of it. Whether conduct will be so regarded, and hence be criminal, turns on whether the risk to life it portends is substantial—it need not be highly probable—and whether creating this risk can be justified in terms of the otherwise socially desirable consequences of the conduct and the non-existence of less risky ways of achieving them.¹² Hence, unintentional killing in the course of driving a car is a serious crime if the risk of killing was needlessly increased by highly unsafe driving. But though the mere action of driving a car creates a risk of life, the driver will not be criminally responsible for a resulting death simply on that account. This consequentialist assessment applies even where the risk to life is very great indeed, as in the case of constructing bridges and tunnels, as well as in that of many other routine and accepted activities of modern life. Here, though loss of a certain number of lives could

against which defensive measures are privileged). The commentary to this section of the Model Penal Code states:

The reason for legitimizing protective force extends to cases where the force it is employed against is neither criminal nor actionable—so long as it is not affirmatively privileged. It must, for example, be permissible to defend against attacks by lunatics or children and defenses to liability such as duress, family relationship or diplomatic status are plainly immaterial. We think that it is also immaterial that other elements of culpability, e.g. intent or negligence, are absent. Whatever may be thought in tort, it cannot be regarded as a crime to safeguard an innocent person, whether the actor or another, against threatened death or injury which is unprivileged, even though the source of the threat is free from fault.

Id. § 3.04, Comment 5, at 29 (Tent. Draft No. 8, 1958). Other commentators also support the right to take all necessary defensive measures. See J. SMITH & B. HOGAN, *CRIMINAL LAW* 262 (3d ed. 1973); Radbruch, *Jurisprudence in the Criminal Law*, 18 J. COMP. LEG. & INT'L L. 212, 218 (3d ser., 1936). Professor Noonan has suggested that St. Thomas found justifiable the killing of an innocent person in self-defense. Noonan, *An Almost Absolute Value in History*, in *THE MORALITY OF ABORTION* 24-25 (J. Noonan ed. 1970).

12. See Wechsler & Michael, *A Rationale of the Law of Homicide: I*, 37 COLUM. L. REV. 701, 744 (1937) [hereinafter cited as Wechsler & Michael], identifying the relevant factors as: "(1) the probability that death or serious injury will result; (2) the probability that the act will also have desirable results and the degree of their desirability, in the determination of which the actor's purposes are relevant; (3) if the act serves desirable ends, its efficacy as a means, as opposed to the efficacy of other and less dangerous means."

be predicted in advance with very great statistical probability, there is no criminal liability for consequential deaths. Crime is committed only where the persons engaging in the activity can be shown to have created excessive risks, which were not inherent in such activity.

Risking just one's own life is another matter. Some statutes prohibit specified activities out of a concern for the risk to those who engage in them. But there is not and never has been any general prohibition against a person risking his life, as there once was against his taking it.

The final body of law I shall mention concerns omissions to act, which may, of course, be intentional or unintentional. At the common law one is not criminally obliged to save another's life, no matter how easily he could do so. The principal qualification arises where the law otherwise imposes a duty to act, as in the case of a close relative, or where one has agreed to act, explicitly or implicitly.¹³ Specific statutes sometimes make punishable the failure to act to rescue a person in peril where one can do so without danger to himself.¹⁴

II

ACCOUNTING FOR THE RULES

So much for the map. We are now ready to consider what we can make of it. What underlying principles or patterns of thought can be perceived in this variety of legal rules that prohibit, require, justify, and permit actions that tend to cause death? In the following I will first consider whether and how far the several principles associated with the precept of the sanctity of life can account for the whole of the map of the rules. I will then consider particular segments of that map and test the explanatory force of a variety of possible theories.

A. *An Approach Through General Principles: The Sanctity of Life*

It is clear, of course, that we value life very highly. Most intentional killings are punishable with law's most severe sanctions, and even reckless and negligent killings are made criminal. But it is equally clear that we do not give the preservation of life all possible weight. One tradition of thought would give it this weight. I have in mind the sanctity-of-life principle in its strongest sense: the "good and simple moral principle that human life is sacred,"¹⁵ either because it is

13. See Hughes, *Criminal Omissions*, 67 YALE L.J. 590 (1958).

14. See Feldbrugge, *Good and Bad Samaritans, A Comparative Survey of Criminal Law Provisions Concerning Failure to Rescue*, 14 AM. J. COMP. L. 630 (1966).

15. WORKING PARTY, BOARD FOR SOCIAL RESPONSIBILITY, CHURCH OF ENGLAND, ON

the gift of God or because of some more general religious commitment, and that it therefore may never be taken by man. One finds these sentiments, for example, in Tolstoy, Schweitzer, and the Buddhist precepts of reverence for life. This absolute view may contribute something to understanding some of our laws, such as the law on suicide and consented killings. But its systematic contradiction by the variety of situations in which the law permits life to be taken and risked suggests that it cannot, at least without qualification, provide an understanding of what is beneath the law.

A variant of this tradition of thought would defend a somewhat weaker version of this principle—namely, that one may never intentionally choose to take the life of another, for whatever end. Thus, cases of justified killing have been accounted for on the ground that they do not constitute intentional killings. This argument has its source in the double-effect principle advanced by Saint Thomas Aquinas and other Catholic theologians. It distinguishes two effects of an action, the one consisting of what the actor intended, either as an end in itself or as a means to some end, and the other consisting of what he foresaw but did not intend in this sense. In all cases where killing is justified, so the argument runs, there is no intentional choice to take life, because the actor does not, strictly speaking, intend the effect of his action to cause death, but is simply aware that his action will have that effect. Thus, when one uses deadly force against an assailant to save one's own life, one's action in causing the death of the assailant is not the *intended* effect, but the *known* effect, of *that* action. The intended effect is to remove the threat and no more. The defender, therefore, is not choosing the death of his attacker as a means of preserving his own life, but is choosing the only means available to counteract the threat, though aware it will result in the assailant's death.¹⁶

The doctrine of double effect does not provide that knowing killings may not be serious crimes and wrongs, but only that this weaker sense of the sanctity-of-life principle is not necessarily violated when they occur. This weaker version, then, still leaves us uninformed of the *theory* on which killings are justifiable or acceptable when they are not intentional in the strict sense. Beyond that, however, the distinction is so alien to our intuitive common sense as to seem sophistical.

DYING WELL—AN ANGLICAN CONTRIBUTION TO THE DEBATE ON EUTHANASIA 24 (1975) (published by the Church Information Office).

16. See Finnis, *The Rights and Wrongs of Abortion: A Reply to Judith Thompson*, 2 PHIL. & PUB. AFFAIRS 117, 138-39 (1973); Foot, *The Problem of Abortion and the Doctrine of Double Effect*, 5 OXFORD REV. 5 (1967) [hereinafter cited as Foot]. See also G. GRISEZ, ABORTION: THE MYTHS, THE REALITIES AND THE ARGUMENTS 267-346 (1970).

For if I shoot a man between the eyes because he is assailing me with upraised dagger, it seems strange to allow me to say I did not choose to take his life, but that I chose only to prevent the attack. Although the former was not a logically necessary condition of the latter, it was actually necessary in the circumstances—or I, at least, acted on that assumption.¹⁷ Only the ghost of an absolute ban on intended killing is left if it excepts such a killing as this. The double-effect doctrine seems to me much like a fiction in the law, serving to preserve appearances for a principle that has lost its sufficiency.

Although one may reject the sanctity-of-life principle in the two senses already discussed, an even weaker sense may still be defended. The principle may be taken to assert not an absolute priority of life or an absolute ban on intentional killing, but a presumption in favor of life and against killing, so that there can be exceptional circumstances in which the value of life is outweighed by other values or in which killing may be justified on other grounds. This explanation indeed is consistent with the rules of the law, but since it leaves us unenlightened as to what those exceptional circumstances are, it does not greatly advance us.

Another and still weaker sense, however, is not only consistent with the law, but is undoubtedly demanded by it. Specifically, this sense entails an aspect of the principle of equality; namely, that all human lives must be regarded as having an equal claim to preservation simply because life itself is an irreducible value. Therefore, the value of the particular life, over and above the value of life itself, may not be taken into account. In this sense the sanctity-of-life principle does not purport to say when life may be taken or risked, but only requires that in making the judgment certain considerations be ruled out. The life of the good man and the bad stand equal, because how a man has led his life may not affect his claim to continued life; the life of the contributing citizen and the dependent or even parasitic one stand equal, because knowing how a man will use his remaining life may not affect his claim; and the life of a child and the life of a nonagenarian stand equal, because it is irrelevant how much life a person has left.¹⁸

17. Consider Professor Hart's trenchant critique of the double-effect principle. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 124-25 (1968).

18. The work of the once-popular philosopher, Josef Popper-Lynkeus, developed this theme. An entry on him by Paul Edwards is in 6 THE ENCYCLOPEDIA OF PHILOSOPHY (P. Edwards ed. 1967). Edwards paraphrases a passage of Popper as follows:

Let us suppose that the angel of death were to allow Shakespeare and Newton, in the most creative periods of their lives, to go on living only on condition that we surrender to him 'two stupid day-laborers or even two incorrigible thieves.' As moral beings we must not so much as consider an exchange of this kind. It would be far better if Shakespeare and Newton were to die. One

In this sense, the principle reflects an important constraint on how we approach judging when life may be taken, which we must have in mind as we undertake to disentangle what lies beneath such judgments.

B. *An Approach Through the Particulars*

Let me now change direction in the search for these underlying judgments. Instead of further postulating encompassing principles, I propose to proceed in the tradition of the common law lawyer, who starts with the cases and sees what he can make of them. In this context, that tradition entails considering the particular categories of legal doctrine I put earlier and testing the explanatory force of various possible theories with respect to each.

1. *Intentional Killings of Aggressors*

I consider first the body of laws justifying the intentional killing of one threatening another. When the choice is between the life of the victim and the life of his assailant, the answer is unambiguous in every legal system: the victim may kill to save his own life.

It might seem plausible to explain the result in terms of excuse, on the view that however much we should prefer people to desist from taking life, even when their own is at risk, the law must take people as they are and no future criminal threat can deter people from acting to meet an immediate threat to their lives. It is very doubtful, however, that this rationale explains Anglo-American law. First, "people as they are" indeed do regard the response as justifiable. Second, the explanation is fatally inconsistent with the accepted rule allowing third parties to kill the aggressor, since they are not similarly unamenable to the threat of criminal punishment. One may argue that the excuse rationale is seen partially at work in the rule of some jurisdictions exculpating third-party killings only in cases of actual as opposed to apparent necessity—except when the third person intervenes in behalf of close relatives where, presumably, deterrence is less workable. But even putting aside that this rule is outmoded and that it was never applicable when the aggressor was committing a felony (which would be true in virtually all cases), what is entailed in this rule is a qualification of the terms on which mistake is available as an excuse (quite possibly out of regard to the enhanced risks of error when a third party inter-

may call attention, as much as one wishes, to the pleasure produced in countless future ages by Shakespeare's plays; one may point to the immense progress of science which would in the consequence of the prolongation of Newton's life—by comparison with the sacrifice of a human being, these are mere 'luxury values.'

Id. at 403.

venes) rather than a judgment that killing the actual aggressor is not justifiable.

Then if such intentional killings are justifiable, on what theory? One possible response is that, on the balance of utilities, it is better—if one person has to die—that it be the attacker rather than his victim. Why is it better? One reason might be that the life of the victim is of greater value than that of the attacker. There are, however, several objections to this explanation. First, it contradicts the equality principle that the lives of all persons must be regarded, as lives, of equal value. Second, the rule is not confined to life-against-life situations. As we have seen, defensive killings are justifiable when the interest protected is other than life: prevention of such crimes as kidnapping or rape or even lesser felonies, even when life is not imperiled; or prevention of crimes against property committed after a breaking into one's dwelling; or prevention of a deadly assault, where the victim can avoid the need to kill by availing himself of a safe retreat. Can the law really be based on a judgment that all such interests are of greater value than a man's life, even a wicked man's? One might reply that the law makes precisely this perverse judgment and that a more enlightened tradition has striven, with some recent success, to confine defensive killings more closely to life-preserving situations. Even conceding this explanation for the moment, one confronts the non-controlled extension of the rule to cases where several lives are balanced against the life of a single victim. Is it clear that the law's premise is that the lives of two attackers, or even 20 are, in total, of less value than the life of the one victim?¹⁹ For surely the rule allows one attacked to kill all his attackers, however numerous they may be. Finally, we run again into the rule that justifies the killing of innocent threats to life as well as culpable ones. On what grounds can the law conceivably be saying that the value of the life of a mentally deranged attacker or of a small child is of less value than the life of the victim?

But one might try to give a more satisfactory answer to why a calculus of social utilities favors defensive killings. One need not say that the life of the victim is a greater good than the lives of his assailants, innocent or not. One can say simply that permitting the victim or a third party to kill in these cases is, in the long run, "justified as a means to preserving life,"²⁰ since such action will operate as a sanction against unlawful assaults. Certainly this rationale is plausible, at least if we

19. Compare the following observations of Paul Edwards on Popper-Lynkeus' views: "In one place Popper goes so far as to assert that it would be better if all the aggressors in the world, even if they numbered millions, were to be destroyed than if a single human being succumbed to them without resistance." *Id.*

20. Wechsler & Michael, *supra* note 12, at 739.

put aside as perverse legally justified killing in defense of interests other than life.²¹ Even so, it seems to me to miss the target. First, it proves too much. For if the deterrent threat of deadly preventive force by the victim or an intervenor explains our justifying such killings, it would also support deadly *retaliative* force after the attack was thwarted; yet, this extension is plainly not justified under the law. Second, the deterrence rationale proves too little. The argument rests on the contingent fact that justifying deadly defensive force will, in the long run, save more lives by deterring deadly assaults. But suppose this were not the case. Suppose in some jurisdiction law enforcement techniques were so perfected that every wrongful attacker would certainly and promptly be convicted and punished with sufficient severity, even perhaps with capital punishment, to exact the maximum deterrent effect possible. In such a jurisdiction preventive killing by the victim or another could not serve the end of preserving life by adding to the deterrent threat against wrongful attacks. Yet, is it not inconceivable that deadly defensive force against an attacker would for that reason be denied justification? Surely it would be thought unfair to deny the threatened person the use of justified deadly force against his assailant, no matter what was indicated by any longrun, life preserving calculus, because it is *his* life that is at stake.

This intuitive sense of what fairness requires suggests a quite different approach to understanding what may lie behind the law's justifying intentional killing of aggressors—an approach through the identification of moral rights, which require recognition no matter what policy is indicated by a calculus of utilities.

One such approach focuses on the right of the aggressor. Starting with a general right to life possessed by all human beings, the argument is that the aggressor, by his culpable act, forfeits his right to life. This analysis, however, is unsatisfactory on a number of counts. If forfeit means that by his wrongdoing the aggressor allows his life to be taken, it is a Pickwickian sense of "allow" that must be contemplated, since the aggressor would hardly agree that he had any such thing in mind. And even if this difficulty were resolved, there would still be conflict with the accepted principle that one may not, even by an explicit sur-

21. As Wechsler and Michael point out:

The most obvious case of homicidal behavior that serves the end of preserving life is that of the victim of a wrongful attack who finds it necessary to kill his assailant to save his own life. We need not pause to reconsider the universal judgment that there is no social interest in preserving the lives of aggressors at the cost of those of their victims. Given the choice that must be made, the only defensible policy is one that will operate as a sanction against unlawful aggression.

Id. at 736.

render, give up his life or authorize another to take it.²² On the other hand, forfeiture may mean that, wholly apart from what the aggressor may think about the matter, his wrongful act deprives him of any claim he could otherwise make on the basis of his right to life. But to say that his wrongful act deprives him of his right to life is to restate the legal conclusion, and one may question how much it illuminates. First, the theory, in resting forfeiture on wrongdoing, does not explain why the aggressor forfeits his right to life during the attack, but regains it after the attack has unsuccessfully ended. Second, the theory addresses only the liberty of the victim to kill the aggressor in self-defense. It does not deal with any *right* the victim may have to do so. Suppose, for example, the law did prohibit defensive killings. One's sense of the matter is that such a law would be unjust. But the forfeiture theory, as far as it goes, would not impugn such a law or explain why it would be wrong. In other words, the theory tells us why (or rather, that) the aggressor has no moral claim against the deadly force of the victim; it does not tell us why (or even, that) the victim has a right not to be hindered in his use of deadly force against the aggressor. Third, the theory posits that a person does have the general right that others should act in ways that do not imperil his life—a right that the aggressor yields by his action. But such a general right to life is inconsistent with the pattern of the relevant criminal law I have described. Finally, the whole concept of forfeiture by wrongdoing collapses in the case of a threat to life by one who acts without blame—the legally insane attacker, for example, or a very small child. For, as I pointed out earlier, it likely is the law with us, and certainly is the law in many Continental systems, that the person attacked may kill such an attacker to the same extent he may kill a culpable aggressor.

As a way of accounting for the law of justified killing of a deadly attacker, a more satisfactory rights approach than the forfeiture concept, which derives only a liberty of the victim to kill from the loss of the aggressor's right to live, is one that derives the liberty from a right against the state. That right, I suggest, is the right of every person to the law's protection against the deadly threats of others. For whatever uncertainty there may be about how much protection must be afforded under this right, it must at least, if it is to have any content, include maintenance of a legal liberty to resist deadly threats by all

22. One finds, for example, in Locke and Blackstone the two conflicting assertions that one may not alienate his right to life (J. LOCKE, *The Second Treatise of Government*, in *TWO TREATISES OF GOVERNMENT* § 6, at 288-89, § 135, at 375-76 (P. Laslett ed. 1960); 4 W. BLACKSTONE, *COMMENTARIES* *189), but that one may forfeit that right by his actions (J. LOCKE, *supra* § 23, at 302, § 172, at 400-01; 1 W. BLACKSTONE, *supra* at *133). See the discussion in Bedau, *The Right to Life*, 52 *MONIST* 550, 567 (1968).

necessary means, including killing the aggressor. There is, after all, no novelty in positing such a right. The individual does not surrender his fundamental freedom to preserve himself against aggression by the establishment of state authority; this freedom is required by most theories of state legitimacy, whether Hobbesian, Lockean or Rawlsian, according to which the individual's surrender of prerogative to the state yields a quid pro quo of greater, not lesser, protection against aggression than he had before.²³ This liberty to resist deadly aggression by deadly force, and the moral right against the state from which it derives, I will refer to as the right to resist aggression.

The recognition of this right accounts for the law of justified killing of aggressors more satisfactorily than other attempts we have considered. The legal right of the victim to kill an aggressor or any number of aggressors when necessary to save his life clearly follows. The explanation requires no concept of forfeiture of the aggressor's rights through his wrongdoing, which, as we saw earlier, was subject to several serious objections. An account of why the aggressor's rights are overridden need not be given, because under the theory he has none against his victim. The social and personal value of his life is not diminished by his actions; indeed, when there are multiple aggressors, the good of maximizing lives preserved argues against the victim's defensive actions. But since under this explanation the victim has a right to kill, justice requires that his action be legally justified. Neither has the aggressor any right of his own which is being violated. To say he has a right to life in the circumstances would be incoherent, since it would contradict the theory that gives the victim the right to kill him. What the aggressor has, as well as any person, is the right to resist aggression against his life, but that right is not violated by the victim who is only defending against the other's aggression.²⁴ Neither does the theory fail where the person threatening the actor is innocent, as when his action would be excused by the law, because the justification of the victim's defensive action does not arise from the wrongdoing of the threatener but from the right of the victim to preserve his life against a threat to it. The theory is also consistent with the lapse of the right to kill after the threat has ceased, for the right hinges on the presence of the threat. And it is consistent as well with the legal right of a third person to kill the aggressor. In this case, however, the underlying right

23. Professor R. Nozick finds the basis of all moral side-constraints on actions, as well as of the particular side-constraint that prohibits aggression against another, in "the fact of our separate existences" and the "root idea . . . that there are different individuals with separate lives and so no one may be sacrificed for others . . ." R. NOZICK, *ANARCHY, STATE, AND UTOPIA* 33 (1974).

24. *Cf. id.* at 34; I. KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 35-36 (J. Ladd transl. 1965).

is not that of the third person, but that of the victim, since the right of the victim to the law's protection would be violated as much by denying a third person's liberty to intervene as by denying the victim's liberty to defend.

But what would this right to resist aggression imply for threats short of the deadly ones I have so far been considering? Is the right limited to deadly threats, or does it include the right to kill to prevent lesser ones?

Two contending principles afford different answers to the question of the extension of the right to resist aggression: the principle of autonomy and the principle of proportionality.²⁵ According to the first, there should be no limit on the right to resist threats to the person of the actor or interests closely identified therewith. The unrestricted character of the right follows from the corollary of the principle of autonomy of persons—that no one may be used as the mere instrument of another—for the essence of physical aggression is that the aggressor seeks so to use the life (taken in this larger sense of personhood) of the victim. Insofar, then, as the autonomy principle determines the scope of the right to resist aggression, the kinds of interests of personalty that may be protected by deadly force are unlimited. It suffices that so much force is necessary to protect the interest. The cost to the aggressor of the victim's exercise of his right so to resist carries no weight. A judgment that the victim could not employ all necessary force to protect personal interests within his autonomy—on the ground that the force needed (killing his aggressor, for example) is excessive—means that the victim's right to defend against aggression is to that extent violated, for he then should be obliged to suffer his being used as a means for the benefit of another against his will.²⁶

According to the second principle, the principle of proportionality, the moral right to resist threats is subject to the qualification that the actions necessary to resist the threat must not be out of proportion to the nature of the threat. In compelling this qualification the proportionality principle acknowledges various interests within one's personalty and discriminates among them according to degrees of importance. Because the victim has a right to kill his aggressor when necessary to preserve his life, it does not follow that he may do so to protect lesser interests. If killing the aggressor is the only way to save a significantly

25. For an illuminating treatment of these contending principles, see Fletcher, *Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory*, 8 ISRAEL L. REV. 367, 376-90 (1973).

26. So much appears to be reflected by the laws of Germany and the Soviet Union which, in resisting formal recognition of any such general limitation on the use of necessary deadly force, manifest the force of the autonomy principle. *Id.* at 368, 381.

lesser interest, he must yield it to the aggressor. This qualification is commonly regarded as a principle of justice and is similarly manifested in the range of protective sanctions used by the state to protect various invasions of one's personality. Not all offenses against the person, let alone offenses against his property, carry the severest sanctions. Punishment for offenses generally are scaled in some rough proportion to the enormity of the harm done. It would be thought a basic wrong to the offender, for example, to take his life for a minor theft; and no less a wrong even if it were demonstrable that any lesser punishment would afford less protection against such threats to persons in the community.

I suggest that both of these principles bearing on the extension of the right to resist aggression are reflected in the rules of Anglo-American law. It is the uneasy tension between them that underlies the perennial controversy and changing shape of the law with respect to defining the interests for whose protection one may kill. The proportionality principle is widely in evidence. It is strongly seen in the reform efforts of recent years, such as the proposals of the Model Penal Code, to confine the right to kill generally to cases where killing is necessary to avoid a danger to life.²⁷ It is also evidenced in more settled provisions of law which, while not so strictly defining proportionality, draw the line at some point on what interests deadly force may be used to protect—for example, the various restraints on killing to protect property, the obligation in many jurisdictions to yield one's ground if, by so doing, one can avoid the need to kill to save one's life, and even the denial of a right to kill to prevent an unaggravated battery.²⁸ At the same time, however, the autonomy principle has its influence. Even under recent statutes one may kill to protect one's property where the threat occurs through a forcible entry of one's dwelling. The duty to retreat as a condition of using deadly force has traditionally been a minority rule, and even today many jurisdictions reject it. Indeed, when it is required, there is never a duty to abandon one's home or (in many jurisdictions) similar places, like one's place of business. Moreover, despite efforts to confine the use of deadly force to prevent felonies threatening the life of the person, the law of most states continues to permit its use in a much wider range of situations, such as whenever any degree of force is used by the aggressor.

Now it may be argued that these latter rules are reflections not of the autonomy principle, but of varying judgments of what interests

27. MODEL PENAL CODE §§ 3.04(2)(b), 3.06(3)(d), 307(2)(b) (Proposed Official Draft, 1962).

28. *See, e.g.,* *People v. Jones*, 191 Cal. App. 2d 478, 12 Cal. Rptr. 777 (2d Dist. 1961), in which the court held it no defense to a wife charged with manslaughter of her husband that killing him was her only means to stop his slapping assault on her.

are proportional to taking the life of the aggressor. The argument has force in cases of killing to prevent crimes like kidnapping and rape, for one may plausibly argue that the interests protected are comparable to that of the victim's life. But one cannot say the same of the interest in remaining where one is, or in protecting one's property from an intruder into one's home, or in preventing any felony whenever some force is used. The strong current of sentiment behind such rules can be understood best as a reflection of the autonomy principle, which extends the right to resist aggression broadly to cover threats to the personality of the victim. It is hard to see from where the force behind the elevation of these distinctly lesser interests can come other than from the moral claim of the person to autonomy over his life.

In summary, so far as deadly threats are concerned, the best explanation of the pattern of law governing defensive killing of aggressors is the recognition of the moral right of the victim to kill his aggressor, a right deriving from the right of every person to the fullest protection by the state against such threats. So far as lesser threats are concerned, two contending moral principles are at work: the principle of autonomy, which would extend that moral right to resist aggression to the protection of all facets of the personality of the victim; and the principle of proportionality, which would qualify the extension of that right to interests of the victim commensurate with the life of the aggressor.

2. *Intentional Killing of Bystanders*

The remaining category of justified intentional killings I will consider²⁹ comprises killings committed in the interest of preserving life when the person sacrificed is not a culpable aggressor or even an innocent one, but a non-threatening bystander. The one circumstance in which the law arguably justifies killing such a person is that in which killing him is necessary to avoid the certain death of several. This represents the lesser-evil principle we discussed earlier, in which killing one person is deemed a lesser evil than the death of more than one.

It is apparent that the right to resist aggression cannot account for the justification of this type of intentional killing. Neither the actor nor those on whose behalf he acts are threatened in their rights by the one whose life is taken. To use the example of the Model Penal Code itself, the families whose lives are imperiled by the deflection of flood

29. I am putting aside capital punishment and the killing of fleeing felons. Both involve either a weighing of utilities—the good of law enforcement versus the good of preserving lives—or the issue of the retributive right of the state to punish. A discussion of these issues would largely illustrate further the dominant themes already indicated in the areas of law covered in this Article.

waters to their homes to avoid the death of a greater number who live in the normal path of the waters are totally uninvolved in the threat to the latter persons. Moreover, the deflection of the waters to their homes is itself an aggressive act against them, which violates their rights not to be used as a means for the benefit of others.³⁰ When the law justifies this action it therefore violates the right we earlier posited to the state's protection against aggression.³¹ That this category of killings is usually explained in terms of the choice of the lesser evil suggests its theory of justification: on a judgment of end results it is better that the fewer number of lives is lost. In the case of the non-threatening bystanders, therefore, a balance of utilities becomes determinative, in which the preservation of several lives justifies the intentional taking of a lesser number, even at the cost of violating a fundamental right the law otherwise recognizes they possess. That is to say, within this category of killings a force is at work manifesting a very different notion of right: rightness in the sense of the desirable social consequence of an action—whether it will produce a net loss or savings of lives.

But stories tell more than propositions. Suppose a terrorist and her insane husband and 8-year old son are operating a machine gun emplacement from a flat in an apartment building. They are about to shoot down a member of the diplomatic corps, whose headquarters the terrorist band is attacking. His only chance is to throw a hand grenade (which he earlier picked up from a fallen terrorist) through his assailants' window. Probably under Anglo-American law he will be legally justified in doing so. His right to resist the aggressors' threat is determinative. The value of preserving even the lives of the terrorist, her legally insane husband and their infant son carry no weight on the scale of rights.

Add to the facts that the victim knows there is one person in an adjoining flat who will surely be killed by the blast. Now he would *not* be legally justified in throwing the grenade (though he might be excused), for his action will not result in a net saving of lives. The right of the person in the adjoining flat (who is no part of the threat against him) not to be subjected to his aggression is, therefore, determinative.

30. See generally Murphy, *The Killing of the Innocent*, 57 *MONIST* 527 (1973).

31. It is true that the non-threatening bystander—like the families toward whose homes the floods are deflected—may possibly have a legal right to resist persons attempting the deflection. It is somewhat strange, but not illogical, to extend a right to the victim to resist, while at the same time freeing the attacker from criminal liability. Even if the law extended this right to the victim, however, the law would still be *partly* violating his right against aggression, which includes the right against the state that the aggressive conduct be criminally prohibited.

Finally, assume in addition that the machine gun is being directed against a companion as well as himself. Under the lesser-evil doctrine the victim will be legally justified in throwing the grenade. The right of the person in the adjoining flat is the same, but that person's claim of right yields to the social valuation that the two other lives are to be preferred over his one life.

This last case reveals the anomaly in the law: that rights prevail over lives in the aggression cases, even multiple or innocent lives, but that lives prevail over rights in the bystander cases like this one or the flood deflection case. As suggested above, we must conclude that, to the extent this is the law, a bystander's right against aggression yields to a utilitarian assessment in terms of net saving of lives. Yet, it should be added, this is not always so, for there are some killings fairly within the net-saving-of-lives, lesser-evil doctrine that it is very doubtful courts would sanction—for example, killing a person to obtain his organs to save the lives of several other people, or even removing them for that purpose against his will without killing him. The unreadiness of the law to justify such aggression against non-threatening bystanders reflects a moral uneasiness with reliance on a utilitarian calculus for assessing the justification of intended killings, even when a net savings of lives is achieved.³²

3. *Unintentional Killings*

I turn now to actions neither intended nor known to cause death, which nonetheless create a risk (of which the actor may or may not

32. It is worth observing that some instances of the net-saving-of-lives principle do not produce this conflict. One such instance was suggested by Mrs. Foot; a physician denies his limited quantity of medicine to one person who needs all of it to survive in order to use it for five persons, each of whom requires one-fifth the supply to be saved. Foot, *supra* note 16, at 9. For reasons we shall see when we reach omissions (involving the distinction between letting someone die and killing him), none of the ill persons has a right over any of the others to receive the medicine. A similar instance is presented by the often-discussed hostage cases, in which a band threatens to kill two persons in their power in order to obtain the death of one person in the custody of another group. Consistent with a rights approach, the group may desist from protecting the wanted person and permit the band to enter and kill him, for in doing so they will effect a net saving of lives and violate no one's rights. Contrariwise, it would be inconsistent with the rights approach were they themselves to kill the one person in their custody.

An instance of a quite different kind is suggested in the commentary to the Model Penal Code itself: "A mountaineer, roped to a companion who has fallen over a precipice, who holds on as long as possible but eventually cuts the rope, must certainly be granted the defense," of the net-savings-of-lives principle "because the only alternative was the certain death of both." MODEL PENAL CODE § 3.02, Comment 3, at 8 (Tent. Draft No. 8, 1958). Here, however, the dangling mountaineer is no bystander. He constitutes a threat, although an innocent one, so that the right to resist aggression suffices to justify cutting the rope.

be aware) that death will result. The law turns the criminality of these actions entirely on a calculus of utilities: how great the probability that life will be lost, how socially important the purposes served by the action, and how feasible the use of less risky measures to achieve the same purpose. While the criminality of intended killings only exceptionally (and, even then, controversially) turns on comparable assessments—that is, in the case of the lesser-evil doctrine—these utilitarian assessments are the standard factors in judging unintended killings. Moreover, this approach to unintended killings is uniformly accepted as sound. It is hard to see how risks to life in the normal processes of living could otherwise be handled by the criminal law, if they are to be handled by it at all.³³ Yet why is it so obviously commonsensical? Why is there so relatively little tension, so few qualms about actions that create unintended threats to people's lives?

There are differences, surely, between intended and risked killings. Professors Wechsler and Michael, in their classic study of homicide law, pointed them out:

[A]cts that are intended to kill and capable of causing death are usually highly likely to do so; and they rarely serve ends other than those to which the homicide itself is a means. On the other hand, acts not intended to kill are not, in general, likely to cause death; and even when they are likely to do so, they necessarily serve some other end, which, frequently enough, is desirable.³⁴

Perhaps this rationale is adequate when risks are moderate; for it is consistent, given a set value on preserving lives, to intervene more protectively against an action, like an intended killing, which carries an extremely high risk, than against actions not so intended, which pose a much lesser risk.

Yet I doubt that this rationale is sufficient. As for the first distinction—the likelihood of causing death—so long as an action is intended to kill it counts for nothing that the chance of success in the particular case is not great. The chances of my being struck and killed by a poor marksman with bad eyesight and a crude weapon many yards away are not large. Yet that unlikelihood in no way impairs my right to use deadly force if there is no other way to eliminate that risk. Moreover, some unintended killings create risks as high as most intended ones. When elaborate construction projects are planned—like the Golden Gate Bridge, the Boulder Dam, a tunnel under the English

33. There is disagreement over the justification for imposing criminal liability on the basis of negligence. Compare Hall, *Negligent Behavior Should be Excluded from Penal Liability*, 63 COLUM. L. REV. 632 (1963), with H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 152 (1968).

34. Wechsler & Michael, *supra* note 12, at 742.

Channel—it can be predicted with a statistical accuracy approaching certainty that a certain number of deaths will result. Nevertheless, we accept the prospect with equanimity and no qualms. We may know that a variety of safety precautions will reduce the number of deaths and, indeed, we often require them—but not always, not when they will cost so much money or time that the effort is deemed disproportionate.³⁵

These utilitarian considerations raise the other part of Wechsler and Michael's answer—the social desirability of the bridge or the tunnel or the dam justifies the predicted loss of lives. But this answer generally does not suffice to justify intended killings. Although it is true that intended killings rarely serve ends other than those to which the homicide itself is a means, that is not to say that they may not serve socially desirable ends. When we do justify them on utilitarian grounds—for example, the intentional killing of bystanders—we insist on social goods of an order (usually saving lives) far more compelling than we require to justify risking life, even when the risk is statistically near certain.

Another story will illustrate this last point. An underwater tunnel has been started despite an almost certain loss of five to 15 lives. Presumably the expected loss is a calculated cost that society is prepared to pay for having the tunnel. At one point a workman is trapped in a section of the partially laid tunnel. A fitting must be lowered into place. If it is laid it will surely crush the workman to death. If it is not laid within an hour—too short a time to effect a rescue—the whole tunnel will have to be abandoned indefinitely, perhaps permanently, due to changing river conditions. I expect that it would nonetheless be a form of criminal homicide to lower the fitting. Even if it were justified under a lesser-evils formula, which is doubtful, the decision would be a soul-searching one. Yet attaining the very same social good—the construction of the tunnel—readily justified its construction despite the predicted loss of multiple lives.

I do not believe, therefore, that the difference in the law of intended and unintended killing can be accounted for in the differences Wechsler and Michael point to. I suggest, rather, that the explanation is to be found in the fundamentally different perspectives we have toward intended and unintended killings. Generally, the former, as I tried to show, are seen as violative of a basic personal right against the state to be protected against the deadly threats of another person. The

35. For an insightful examination of this aspect of the prevailing response to life-threatening conduct, see Calabresi, *Reflections on Medical Experimentation in Humans*, 98 *DAEDALUS* 387 (1969).

latter, on the other hand, are not so perceived. Accidental risks to life deriving from the actions of others tend to be accepted in the same way as risks to life deriving from natural events—as a natural and inevitable contingency of living. We do not have a right against the state to protection against unintended killings, as we do against intended killings. The fundamental urge which animates the claim of right is security against threats directed by others against us, not security against the perils of living. Intentional killings are moral assaults. Risks to life are a part of nature which, under any contractarian view, the state has no duty to protect against.

We do not, of course, regard these risks indifferently. They are undesirable and to be avoided, and they are often made criminal; but only when it appears on a utilitarian calculus that the risk is not worth bearing—not at all costs. It is not the degree of risk and the degree of social justification of the respective actions that make the difference. It is that there are not the same moral side-constraints on actions that create risk as there are on actions that are seen as aggression. Hence, the principle of optimizing end-results on a utility calculus has the field entirely.

Yet, how can this explanation apply where it is known to a statistical certainty that accidental deaths will result from a course of action, like building a bridge or a tunnel? I have not, after all, argued a distinction between intended and known killings for purposes of defining the extent of the right against acts of aggression. Indeed, I took pains to reject the distinction in discussing the double-effect doctrine. Hence, how can it be that the victims of an unintended killing do not have a right against the state to protection from this present risk of certain death to some of them? One possible answer is that the statistically certain risk created by the construction project is to the workmen who, by agreeing to work on it in return for wages, have consented to the risk. The point has force; yet, it seems insufficient. First, while consent to the risk of death may negate the criminality of a subsequent homicide, it may not do so in cases of intentional killings. Why, then, given our rejection of the distinction between intended and known killings, should consent negate the criminality of homicide in the cases of known killings in these examples? Some further explanation is needed. Second, the absence of consent does not appear determinative in these cases. The statistically certain risk of death produced by the widespread use of the automobile and attendant services, for example, is not confined to those who choose to drive.

The further necessary explanation, I suggest, lies in the nature of statistical knowledge. It is known that some people will be killed; it is not known who they will be. If statistical analysis demonstrates that

10 out of a thousand will die, no individual person can claim that his death is a known consequence of the action. His own risk, indeed, is relatively modest—in this case one percent. So it is that in these cases the known deaths need only be regarded as a regrettable cost and not as the perpetration of an injustice.

4. Omissions

I turn finally to the omission cases, the last piece in the puzzle. Though failing to act while knowing that a death will thereby result might be justified or not as affirmative actions are, the law treats omissions differently. Affirmative actions which cause or tend to cause the death of a person are culpable or not depending on an inquiry into their justification (putting aside excuse). With omissions to act, no such inquiry arises until a duty to act is first established. Hence, a person is at liberty knowingly to permit another to die, without regard to any consideration of whether his omission is justified, unless the law otherwise imposes a duty to act—as it may, for example, because of a status, contractual or equitable relationship between the parties. On what theory can the law be explained?

One view is that the criminal law is unable to formulate a rule commanding when a person must act without being so indefinite as to render its administration uncertain and unjust. For how could one formulate a rule that would say just how far a person need alter his life or burden himself and those dependent upon him in order to save the life of a person in need? And how could the rule distinguish those who must do so out of the many who could, at varying costs, do so as well? This emphasis on indefiniteness is the classic justification for requiring action only when the law otherwise imposes a duty to act.³⁶

Certainly this explanation has some merit. In addition to its intrinsic plausibility, it tends to be borne out by occasional general statutes that require the non-dangerous rescue of a person in distress and those that require action in a variety of particular situations (like registering for the draft and filing income tax returns), for in these instances a sufficiently definite rule is practicable. Yet one may doubt that it represents the whole story. To be sure, any general formulation of a requirement to act—for example, one based on an appeal to common decency—would be indefinite; but, as has been persuasively argued,³⁷ it would be no more indefinite than the standard of criminal liability for reckless or negligent killings, which also turns on an assessment of

36. See MACAULAY, A PENAL CODE PREPARED BY THE INDIAN LAW COMMISSIONERS, Note M, 53-56 (1837).

37. Wechsler & Michael, *supra* note 12, at 751 n.175.

such imponderables as necessity of means, desirability of ends, probability of death, and the like.³⁸

An additional possible explanation is the undesirability of people sacrificing their own interests, no matter how slight, to aid another person, even where that person otherwise will die. We need not pause over this view. It obviously contradicts the elemental humanitarianism that permeates our culture. A lesser version of this view is that while it is desirable for people to act to keep another alive, it is not desirable for the criminal law to seek to make them do so. But one wonders why not. One possible reason is that a general affirmative duty to act would necessitate unacceptably indefinite standards of conduct. I have already said why I think this consequence would not necessarily follow. Another possible reason is that such an affirmative duty could not affect people's conduct. But surely deterring inaction is not intrinsically more difficult than deterring acts, even acknowledging the greater difficulty of proving the mens rea—the state of mind—that accompanies an omission.³⁹ Another reason might be the general undesirability of using the criminal law to coerce virtuousness.⁴⁰ But compelling actions to save life is hardly using punishment to exact private conformity to virtue or to standards of good conduct that are at all controversial.

What, then, is the further explanation of the law's traditional reluctance to criminalize omissions? I believe an approach through a rights analysis casts light on the question. On the one hand, the moral right to resist aggression hardly provides the basis for a claim on others to their help;⁴¹ the failure to assist another in need is not the type of aggressive threat to personality that gives rise to a claim against the state for protection. Hence one finds the pervasive distinction, in the law as elsewhere, between killing a person, which does violate his right, and letting him die, which does not.⁴² On the other hand, the right

38. *See id.*:

Whereas the issue [in liability for negligent acts] is . . . whether or not the act is a sufficiently necessary means to sufficiently desirable ends to compensate for the risk of death or injury which it creates, the issue [in liability for omissions] is whether or not freedom to remain inactive serves ends that are sufficiently desirable to compensate for the evil that inaction permits to befall. The extent of the burden imposed by the act is obviously a relevant factor in making such an evaluation. If the burden is negligible or very light, the case for liability is strong, and the difficulty of formulating a general rule no more insuperable an obstacle than in the case of acts.

39. *See id.*

40. *See Skolnick, Coercion to Virtue*, 41 S. CAL. L. REV. 588 (1968).

41. *See Murphy, The Killing of the Innocent*, 57 MONIST 527, 546 (1973): "When a man has a right, he has a claim against interference. Simply to refuse to be beneficent to him is not an invasion of his rights because it is not to interfere with him at all."

42. *See Foot, supra* note 16, at 11:

Most of us allow people to die of starvation in India and Africa, and there

to resist aggression rests to some extent, as we saw above when dealing with deadly defensive force against non-deadly threats, upon the notion of autonomy, which posits a person's right not to be used coercively in the service of another. Requiring actions of bystanders to save others tends to collide with the autonomy principle. For to accord to a stranger a claim upon me that does not flow in any sense from my own actions conscripts the uses of my life to his.⁴³ This explanation, it may be observed, is consistent with the exceptional cases in which the common law does traditionally compel action—cases of status, contractual or equitable relationship between the parties. In these cases the putative helper, by his actions, has implicated himself in the predicament of the person in need, and he cannot make the same claim of autonomy.⁴⁴

Of course, this autonomy principle does not have the field to itself. We saw earlier how the principle of proportionality contends with it in cases of resistance to non-deadly threats to the person. The proportionality principle does so also in cases of omissions where, in a variety of situations, usually statutory (for example, the statutes requiring the giving of aid to one in distress where there is practically no risk to the aider), the demands of the principle of autonomy are compromised on a judgment of gross disproportion between what is demanded of the aider and what is at stake for the person in need.

C. Summary

So much, then, is the map of the criminal law and what I suggest to be some of the moral sentiments and the perceptions of actions and

is surely something wrong with us that we do; it would be nonsense, however, to pretend that it is only in law that we make a distinction between allowing people in the underdeveloped countries to die of starvation and sending them poisoned food. There is worked into our moral system a distinction between what we owe people in the form of aid and what we owe them in the way of non-interference.

It is worth noting in passing that this theory is not applicable to governments which, unlike the persons subject to them, are precisely instruments to be used by such persons. For example, the Universal Declaration of Human Rights, in Articles 22, 24, 25, 26, asserts a person's rights against his government to be provided with a variety of social services. G.A. Res. 217, U.N. Doc. A/810 at 71, 75, 76 (1948). The Theory is quite applicable, however, to the relation between governments and persons belonging to other governments. On this view, the issue of the wealthier countries of the world feeding the starving ones is an issue of beneficence, not rights.

43. In suggesting that one may have a right to decline to do an act that we should criticize him for not doing, there is no inconsistency. As Professor R. Dworkin suggests, when we say a person has a right to do something (or not to do it), we imply that it would be wrong to require him to do it. But it is consistent to say that that which he has a right to do (or not to do) in this sense is still not the right thing for him to do. Dworkin, *Taking Rights Seriously*, in *IS LAW DEAD?* 168, 174 (E. Rostow ed. 1975).

44. See S. KADISH & M. PAULSEN, *CRIMINAL LAW AND ITS PROCESSES* 85 (3d ed. 1975).

events that explain its contours. The sacredness of human life is an important ingredient of the humanistic ideal. Insofar as it asserts the equality-of-lives principle, it constitutes a significant influence on the law. In any other sense, it does not. We have to look elsewhere to comprehend the determinative influences on the shape of the law.

One predominant and persistent theme is the conception of the rightness of actions—rightness measured not by what most effectively preserves lives or by what best serves the social interest of all, but by what a person may claim as his due equally with all other persons. The right, in this sense, to resist aggression, embracing the liberty to use defensive force and the right to the law's protection against aggression, from which the liberty derives, plays a central role in explaining the shape of the law. When the victim must take the life of one threatening his own in order to survive, his action is justifiable, whether the persons he must kill are one or many, guilty or innocent, so long as they are part of the threat. But other principles of right manifest themselves in other situations where life is at stake. Where interests other than the victim's life (or interests closely identified with it) are threatened, two competing principles affect his right to kill: the principle of autonomy, which would extend the right to resist aggression to all threats to the personality of the victim, and the principle of proportionality, which would draw the line at preservation of life and closely identified interests. Neither principle governs entirely in the law. Further, in cases of omissions to act to avoid the death of another, there is a similar tension between these principles operating in the law.

But explanations in terms of rights and principles fail to account for the whole shape of the law. Another force is at work, manifesting a very different notion of right: rightness in the sense of the desirable consequence of an action—whether it will produce a net loss or saving of lives, whether it will serve or disserve prevailing estimates of social goods other than saving lives. This competing standard, turning solely on evaluation of consequences, is manifested in the lesser-evil doctrine. When taking the life of an innocent, non-threatening bystander will result in a net saving of lives, the law justifies an actor in doing so, notwithstanding the invasion of the bystander's own right to the law's protection against aggression. As we saw, the doctrine, when carried to its logical conclusion, is controversial, further reflecting the tensions in the impulses that shape our law.

This consequentialist standard is most firmly in evidence when unintended killing is involved, for here no individual rights are perceived which must be subordinated or qualified. It is in these cases that the value we place on life as against other goods and interests may be most clearly seen, since no competing principle of right exists to complicate

its assessment. It is revealing that the judgments in this area that appeal most immediately to our common sense permit life to be yielded when the costs of saving it, in terms of the comforts, conveniences and satisfactions of many, seem too high.⁴⁵ The nature of the action that takes life commands our concern far more than loss of life itself.⁴⁶

These, then, appear to be the underlying principles and controlling patterns of thought that govern the law's judgments of life-taking actions. The principles and patterns I have identified do not all fit into a harmonious pattern; inconsistencies and tensions, reflecting a variety of impulses and perceptions, appear to me a major feature of our experience. Whether, to that extent, what I have concluded is defective as a theory of the criminal law depends on what constitute the governing criteria of a proper theory of this kind. Although I could not properly address that issue here, I would venture two brief comments. First, I recognize that it may well be possible to discern a rationale underlying our criminal law tradition that achieves a more logically consistent explanation of the whole than what I have produced. I offer only my best effort. Second, I am dubious that any single, self-consistent theory is likely ever to comprehend the whole of our experience. I venture the intuition that the essential stuff of our moral judgments and perceptions in complex matters like the taking of life is tension and contradiction that may be identified but never dissolved.

III

CONCLUDING OBSERVATIONS

I should like to conclude by saying a few words on how this pattern of principles and perceptions bears on some of the controversial issues of the day I mentioned at the outset. Since my focus throughout has been on the law, I will confine myself to those issues that pose a problem for the criminal law and ask no more than how the principles

45. Compare J. HOSPERS, HUMAN CONDUCT 399-400 (1963):

Some philosophers, such as Kant, have said that an individual human life is a thing not only of great value but of *infinite* value—that to preserve one human life it would be worthwhile not indeed to risk the collapse of civilization (for that would involve the loss of many lives), but to sacrifice for all mankind some convenience or source of happiness that would *not* involve the loss of life.

46. See Calabresi, *supra* note 35, at 388:

Accident law indicates that our commitment to human life is not, in fact, so great as we say it is; that our commitment to life-destroying material progress and comfort is greater. But this fact merely accentuates our need to make a bow in the direction of our commitment to the sanctity of human life (whenever we can do so at a reasonable total cost). It also accentuates our need to reject any societal decisions that too blatantly contradict this commitment. Like 'free will,' it may be less important that this commitment be total than that we believe it to be there.

and perceptions that I have argued underlie the shape of our criminal law bear on those issues.

Human medical experimentation seems to me, as it has to others,⁴⁷ not readily distinguishable from other cases where life may be legally risked to achieve some greater social good. Indeed, if a bridge justifies the predicted loss of life its construction entails, surely the saving of countless lives through medical discoveries does so as well. Since loss of life is risked, not intended, no right is invaded in either case. And since the subject consents to a risk of death rather than to being killed, there is no ground for denying the efficacy of the consent. The key problem for the law is not intrinsic but administrative—how to assure that risks are minimized, that consent is freely given, that the competence of the experimenter and the promise of the experiment justify the risk, and that abuses are avoided.

The criminalization of abortion is a different matter. Whether a fetus must be regarded as a person and at what stage is a threshold question little illumined by the themes we have found dominant in shaping the law. But once that threshold is passed and personhood recognized in a fetus at some stage, the abortion debate turns quite centrally on a number of those themes. How cogently may the dependent fetus be analogized to a person requiring affirmative aid from another to survive—aid to which it has no claim of right? Even if so analogized, has the mother's participation invested her with a duty not to let it die? How far may the answer turn on whether she at first sought the child, whether she was just careless, or whether she had been raped? Is the whole analogy to letting die by failing to aid misconceived because abortion entails affirmative action to stop life-sustaining aid already flowing? In other words, is it more like turning off a machine that is keeping a person alive than failing to attach the person to it in the first place? Even if so, how much does it weigh that it is *her* person—her "machine"—over which she has autonomy? Where the pregnancy is endangering her very existence, may the fetus be regarded as an innocent threat against which she may defend herself with whatever means are necessary? Where the fetus poses a threat "only" to her psychological well-being, does the principle of proportionality argue against taking the fetus' life, or should her interests of personality be defined broadly, so that the principle of autonomy would control? Finally, whatever the claims of justice in recognizing rights, how far do consequentialist considerations of achieving some optimal set of socially desirable results require their subordination? I am not so foolhardy as to venture answers at this point. My purpose is only

47. See Calabresi, *supra* note 35, at 391.

to point out what is apparent in much of the abortion literature⁴⁸—that the underlying themes we found at work in doctrines of the criminal law bear centrally on the current controversy over the criminalization of abortion.

The human transplant problem also raises several of these themes. In a suitable case, may the organs of a unique donor be removed against his will to save the lives of several? Probably, as I suggested earlier, the rights principle would be strong enough to resist legalizing such an action, but the lesser-evil principle, in its broadest reach, would point the other way. Where the donor consents at some risk to his life, the legal problems again, as in the case of medical experimentation, would be administrative. Where removing his organ would kill him, one faces the engrained reluctance to sanction taking one's own life or permitting another to do so. Where the donor is moribund, two main problems emerge. The first is whether one with virtually no life left may be treated as dead, as no longer a person, for purposes of the criminal law. An affirmative answer would entail a serious breach of the equality-of-lives principle. The second problem is determining when a person is dead, just as the abortion issue raises the problem of when a person begins to live. Here again legal experience offers little guidance, since the beginning and ending of life were generally regarded in the law as unproblematic events. Only recent scientific sophistication has fully revealed the gradualness of the process both of man's coming into being and his ceasing to be, and therefore has exposed the troubling choices that the law cannot eventually escape making.⁴⁹

Euthanasia also involves the equality-of-life principle: May life be treated differently when it becomes unwanted and unbearable by the person; or must life, as life, always be treated equally, so that a judgment of its worth, even by the person himself, may never enter into a justification for taking it? May the lesser-evil rationale justify some qualification of the equality-of-life principle when death is certain and imminent in any event, and killing would save the person from the evil of a few moments of agonizing pain and terror?⁵⁰

48. *E.g.*, Brody, *Abortion and the Sanctity of Life*, 10 AMER. PHIL. Q. 133 (1973); Finnis, *The Rights and Wrongs of Abortion: A Reply to Judith Thomson*, 2 PHIL. & PUB. AFFAIRS 117 (1973); Foot, *supra* note 16; Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFFAIRS 47 (1971).

49. In saying that the problem is revealed by scientific discoveries, I do not want it taken as agreeing with those who seem to suggest that the problem is answerable by such discoveries. *See, e.g.*, P. STEIN & J. SHAND, LEGAL VALUES IN WESTERN SOCIETY 171 n.36 (1974). *Roe v. Wade*, 410 U.S. 113, 220 (1973) (Douglas, J., concurring). Who is to be regarded as no longer a person for purposes of legal and moral judgment is hardly a scientific question. *See generally* Wertheimer, *Understanding the Abortion Argument*, 1 PHIL. & PUB. AFFAIRS 67 (1971).

50. *See* WORKING PARTY, BOARD FOR SOCIAL RESPONSIBILITY, CHURCH OF

A FINAL COMMENT

Using the rules of the criminal law as a guide, I have tried in this essay to identify some of the underlying principles and controlling patterns of thought that govern our judgments of life-taking actions and to suggest their relevance to a number of controversial problems involving the taking of life. I took my task to be descriptive and analytical, not judgmental; to state, that is, what the controlling principles and patterns are in fact, not whether they are sound (whatever sound might mean) or whether some are sounder than others. But, of course, these judgmental issues are the ultimate ones. Should the sanctity-of-life ideal prevail over rights and a calculus of other utilities, or does it represent a religious commitment that may not be given primacy in a secular, or at least pluralistic society? Should rights always prevail because they express a commitment to justice, or is the notion of justice they express a product of man's primordial fears, conditioning and genetic structuring over time, which a rational order should seek to overcome?⁵¹ Is a consequentialist principle to be preferred because it non-dogmatically opens the assessment to embrace the widest range of social utilities at any time and place, or is the final commitment to socially desirable consequences itself a dogma that should be rejected insofar as it denies the primacy of life and the claims of justice? I have not ventured to say, mainly because I do not know. These questions are, after all, at the core of the great controversies in moral philosophy. I have to be content with having shown how it is that even a criminal lawyer reaches them at the end.

ENGLAND, ON DYING WELL—AN ANGLICAN CONTRIBUTION TO THE DEBATE ON EUTHANASIA 58 (1975) (published by the Church Information Office). There the example is given of shooting a man trapped in a burning gun-turret. The Report comments: "Life is thereby shortened by only a matter of moments, and great agony of short duration is avoided or terminated. Can it be successfully argued that the evil asserted (great agony) is greater than the evil inflicted (death)?"

51. See generally Scarf, *The Anatomy of Fear*, N.Y. Times, June 16, 1974, at 10 (Magazine).