

# Slaughter of the Innocents: Justification, Excuse and the Principle of Double Effect

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## INTRODUCTION

From earliest reflection on human action, theorists have grappled with the question of whether in dire circumstances it is permissible for persons to take the lives of innocent non-aggressors to save themselves or others. Distinct from questions of self-defense, the difficulty arises

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when, from threats of nature or human agency, all possible outcomes entail the death of innocents; but the determination of who will die depends upon human choice—often by the very persons themselves caught up in tragedy.

Traditionally, law and ethics have insisted that in such circumstances it is impermissible to take the lives of innocents. As Lord Coleridge stated succinctly in the renowned lifeboat case *Regina v. Dudley and Stephens*: “To preserve one’s life is generally speaking a duty, but it may be the plainest and highest duty to sacrifice it.”<sup>1</sup> Some modern theorists, however, challenge this traditional view. Most notably, the Model Penal Code (“MPC”) provides that killing innocents in certain circumstances is permissible: “[c]onduct that results in taking life may promote the very value sought to be protected by the law of homicide.”<sup>2</sup> Under the MPC, in cases where killing would result in a net savings of life, conduct may be *justified*,<sup>3</sup> in other circumstances, it may be *excused*.<sup>4</sup> The broad permissibility of conduct sanctioned by the MPC’s consequentialist approach, however, clashes with the traditional, absolute legal prohibition against the taking of innocent life.

Conceding the controversial nature of its claim that it is “ethically preferable to take one innocent life than to have many lives lost,”<sup>5</sup> the MPC commentary observes in passing that many examples of permissible taking of innocent life would also be acceptable under the principle of “double effect.”<sup>6</sup> This principle asserts, in addition to other conditions, that it is sometimes permissible to cause harm unintentionally, i.e., non-purposefully, that would be impermissible to cause intentionally.<sup>7</sup> Unfortunately, apart from such perfunctory references such as that found in the MPC, popular legal theory typically gives scant attention or dismisses outright the principle of double effect.<sup>8</sup>

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<sup>1</sup> R v. Dudley, (1884) 14 Q.B.D. 273 at 287 (Eng.).

<sup>2</sup> MODEL PENAL CODE § 3.02 cmt. 3 (1985).

<sup>3</sup> MODEL PENAL CODE § 3.02 (1962).

<sup>4</sup> MODEL PENAL CODE § 2.09 (1962).

<sup>5</sup> MODEL PENAL CODE § 3.02 cmt. 3.

<sup>6</sup> MODEL PENAL CODE § 3.02 cmt. 3, n.15.

<sup>7</sup> “The [principle of double effect] exploits the distinction between intentional production of evil . . . and foreseen but unintentional production of evil . . .” P.A. Woodward, *Introduction*, THE DOCTRINE OF DOUBLE EFFECT: PHILOSOPHERS DEBATE A CONTROVERSIAL MORAL PRINCIPLE 2 (P.A. Woodward ed., 2001).

<sup>8</sup> See, e.g., JERRY MENIKOFF, LAW AND BIOETHICS: AN INTRODUCTION 343 (2001) (“[Double effect] has had little direct effect on legal analysis . . . . It is a highly technical doctrine, and it is far from clear how useful it is in distinguishing between

This article proposes the principle of double effect as the foundation for a cogent alternative to the MPC's controversial defenses.

Proponents of the principle of double effect recognize that persons may sometimes find themselves burdened with unavoidable choices where all possible outcomes involve harmful and tragic consequences for themselves or others. In such circumstances, its proponents assert that at times it is permissible to cause foreseeable, but unintentional, taking of innocent human life. Double effect thus acknowledges, in a way that traditional legal theory does not, that sometimes the tragic "taking of innocent life" may be justified. At the same time, however, the principle of double effect conforms to the traditional view in asserting that any intentional, i.e., purposeful, taking of innocent life, despite its utilitarian benefit, can never be justified and no law or defense should provide otherwise.

Part I of this article surveys important historical and legal precedents against the killing of innocents; Part II reviews and critiques the MPC's account of justified and excused killings of innocents; and, Part III articulates and defends a limited "double effect" defense to the killing of innocents.

## Part I

### A. Historical Background

In the *Nicomachean Ethics*, Aristotle laid out the basic puzzles concerning human culpability in difficult circumstances and the possible defenses of justification and excuse. He observed that distinctions can be drawn between situations in which goods may justifiably be sacrificed for other goods and those in which, even under threat of death and suffering, no actor should be excused:

[W]ith regard to the things that are done from fear of greater evils or for some noble object (e.g. if a tyrant were to order one to do something base, having one's parents and children in his power, and if one did the action they were to be saved, but

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permissible and impermissible actions.").

In previous articles I have offered descriptions of the generally unrecognized operation of double effect in various substantive areas of the law. See Edward C. Lyons, *In Incognito: The Principle of Double Effect in American Constitutional Law*, 57 FLA. L. REV. 469 (2005); Edward C. Lyons, *Balancing Acts: Intending Good and Foreseeing Harm—The Principle of Double Effect in the Law of Negligence*, 3 GEO. J.L. & PUB. POL'Y 453 (2005). In this article, I argue prescriptively for its application as a defense to certain kinds of criminal homicide.

otherwise would be put to death), it may be debated whether such actions are involuntary or voluntary. Something of the sort happens also with regard to the throwing of goods overboard in a storm; for in the abstract no one throws goods away voluntarily, but on condition of its securing the safety of himself and his crew any sensible man does so. Such actions . . . are more like voluntary actions; for they are worthy of choice at the time when they are done, and the end of an action is relative to the occasion. . . . On some actions praise indeed is not bestowed, but forgiveness is, when one does what he ought not under pressure which overstrains human nature and which no one could withstand. But some acts, perhaps, we cannot be forced to do, but ought rather to face death after the most fearful sufferings . . .<sup>9</sup>

Aristotle here recognized that it is often difficult to assess the proper course of conduct in view of threatened harms and to determine voluntariness in the face of coercive forces.<sup>10</sup> Similar “*aporia*”<sup>11</sup> have continued to surface through the centuries concerning the question of whether taking innocent life might at times be justified or excused.

From a legal perspective, however, scholars generally agree that until the twentieth-century, little support existed for asserting a defense to killing innocents other than in non-negligent, accidents. While common law provided some defenses for causing lesser harm under necessity or duress,<sup>12</sup> in no instance has it provided such defenses for the taking of innocent life, regardless of the balancing of human lives involved or the coercive forces influencing an actor.<sup>13</sup>

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<sup>9</sup> ARISTOTLE, NICOMACHEAN ETHICS bk. III (c. 384 B.C.E.), *reprinted in* 2 THE COMPLETE WORKS OF ARISTOTLE 1752, 1753 (Jonathan Barnes ed., W.D. Ross trans., Princeton Univ. Press 1984).

<sup>10</sup> “It is difficult sometimes to determine what should be chosen at what cost, and what should be endured in return for what gain, and yet more difficult to abide by our decisions . . .” *Id.*

<sup>11</sup> “[A]poria (plural: *aporiai*), Greek term meaning ‘puzzle’, ‘question for discussion’, ‘state of perplexity’. The *aporetic method* – the raising of puzzles without offering solutions – is typical of the *elenchus* in the early Socratic dialogues of Plato.” Roger Crisp, *Aporia*, in THE CAMBRIDGE DICTIONARY OF PHILOSOPHY 29 (Robert Audi ed., 1995).

<sup>12</sup> “Although the point has not been entirely free from controversy, necessity seems clearly to have standing as a common law defense; such issue as there was related to its definition and extent.” MODEL PENAL CODE § 3.02 cmt. 1 (1985).

<sup>13</sup> “Lord Coleridge’s 1884 conflation of justifiable and excusable conduct has been repeated, and his analysis and judgment cited in support of the rule that duress, as well, is not a defense to murder.” Joshua Dressler, *Reflections on Dudley and Stephens and Killing the Innocent: Taking a Wrong Conceptual Path*, in THE SANCTITY OF LIFE AND

While the traditional legal opposition to any defense to taking innocent life continues to prevail in the courts, some modern legal scholars and philosophers advocate for the availability of such defenses.<sup>14</sup> In addition to the MPC's position, which this article explores at length, other examples of continued interest in such defenses include the extensive body of literature generated by Lon Fuller's famous article "The Case of the Speluncean Explorers"<sup>15</sup> and philosopher Philippa Foot's well-known "Trolley Problem,"<sup>16</sup> popularized by Judith Jarvis Thomson and others.<sup>17</sup>

Modern discussions of this topic inevitably refer to two of the most famous cases of American and English criminal law: *United States v. Holmes*<sup>18</sup> and *Regina v. Dudley and Stephens*.<sup>19</sup> Both cases involved tragic circumstances of lifeboats adrift far from land, and in each the defendants took innocent lives to save themselves and others. Similarly, in both cases the court rendered criminal convictions against key actors for these homicides. These cases and their judicial resolution in published opinions provide both the strongest evidence of the absence at common law of any preceding defense to the killing of innocents, as well as providing definitive historical confirmation of that rule for future purposes.

The inherent interest in both cases from historical, ethical and legal perspectives warrants detailed consideration of each:

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THE CRIMINAL LAW: THE LEGACY OF GLANVILLE WILLIAMS 126, 139 (Dennis J. Baker & Jeremy Holder eds., 2013).

<sup>14</sup> See *infra* Part II for a discussion of the MPC defenses § 3.02 and § 2.09.

<sup>15</sup> Lon Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949). In Fuller's hypothetical, five explorers are trapped by a landslide deep in a cavern and survive by killing and eating a member of their party. The survivors are subsequently tried and convicted for murder. The article takes the form of five appellate opinions exploring relevant issues of law and philosophy. The hypothetical case closely tracks *R v. Dudley*, (1884) 14 Q.B.D. 273 at 279 (Eng.), discussed *infra* at Section I.A.2.

<sup>16</sup> Philippa Foot, *The Problem of Abortion and the Doctrine of the Double Effect* (1967), reprinted in VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY (Philippa Foot ed., Blackwell Publishers & Univ. of Cal. Press 1978); see *infra* note 361 and accompanying text.

<sup>17</sup> See, e.g., Judith Jarvis Thomson, *The Trolley Problem*, 94 YALE L.J. 1395 (1985).

<sup>18</sup> *United States v. Holmes*, 26 F. Cas. 360 (C.C.E.D. Pa. 1842) (No. 15,383).

<sup>19</sup> *R v. Dudley*, (1884) 14 Q.B.D. 273 (Eng.).

## B. Legal Precedents

### 1. *United States v. Holmes*<sup>20</sup>

#### a. Facts

The *William Brown*,<sup>21</sup> an American vessel, departed Liverpool for Philadelphia on March 13, 1841 with seventeen (17) crew and sixty-five (65) passengers (Scotch and Irish emigrants).<sup>22</sup> On April 19th, seven weeks and 2000 miles into its voyage, the ship was positioned approximately 250 miles off the coast of Newfoundland.<sup>23</sup> At around 10 p.m., the ship struck ice and was in immediate danger of foundering.<sup>24</sup> Only two smaller boats were available for refuge, a small jollyboat and a longboat, and the full complement of crew and passengers far exceeded their capacity.<sup>25</sup> The captain, second mate, seven (7) crew members, and one passenger loaded the jollyboat;<sup>26</sup> the first mate, eight (8) crew members (one of whom was defendant Holmes), and thirty-three (33) passengers loaded the longboat.<sup>27</sup> Thirty-one (31) passengers were abandoned on the ship.<sup>28</sup> Approximately one-and-a-half hours following

<sup>20</sup> *Holmes*, 26 F. Cas. at 360.

<sup>21</sup> The boat's namesake, William Brown, was born in Ireland in 1777, immigrated to the United States in 1786 and began his naval career in the American and English navies. He moved his family to Buenos Aires in 1812, where he commanded a small fleet for Argentina, breaking the Spanish blockade of Montevideo in March of 1814. He led the Argentinian naval forces until retirement in 1819. Brown was appointed governor of Buenos Aires in 1828 and died in 1857. Edmundo Murray, *Brown, William (1777-1857)*, SOCIETY FOR IRISH LATIN AMERICAN STUDIES, [http://www.irlandeses.org/dilab\\_brownw.htm](http://www.irlandeses.org/dilab_brownw.htm) (last edited May 7, 2009).

<sup>22</sup> *Holmes*, 26 F. Cas. at 360. The passengers were Scotch and Irish emigrants.

<sup>23</sup> *Id.* The ship sank in "iceberg alley" near the site of the Titanic's later tragedy. See TOM KOCH, *THE WRECK OF THE WILLIAM BROWN: A TRUE TALE OF OVERCROWDED LIFEBOATS AND MURDER AT SEA* 42, 183 (2004). Between 1810 and 2001, over 560 recorded incidents occurred involving icebergs in this area, many included significant loss of life. See Brian T. Hill, *Database of Ship Collisions with Icebergs*, INSTITUTE FOR OCEAN TECHNOLOGY, NATIONAL RESEARCH COUNCIL CANADA, [http://researchers.imd.nrc.ca/~hillb/icedb/ice/bergs2\\_01e.html](http://researchers.imd.nrc.ca/~hillb/icedb/ice/bergs2_01e.html) (last updated May 22, 2001) (mapping incidents and listing vessels and known damage and loss of life).

<sup>24</sup> *Holmes*, 26 F. Cas. at 360.

<sup>25</sup> KOCH, *supra* note 23, at 20. The longboat holding 41 persons was 22 ½ feet long, 6 feet wide and 2 ½ to 3 feet deep. A.W. BRIAN SIMPSON, *CANNIBALISM AND THE COMMON LAW: THE STORY OF THE TRAGIC LAST VOYAGE OF THE MIGNONETTE AND THE STRANGE LEGAL PROCEEDINGS TO WHICH IT GAVE RISE* 164 (1984).

<sup>26</sup> *Holmes*, 26 F. Cas. at 360.

<sup>27</sup> SIMPSON, *supra* note 25, at 164.

<sup>28</sup> *Holmes*, 26 F. Cas. at 360. One infant died en route. *Id.* at n.3.

the *William Brown's* contact with the ice, the vessel sank, taking these passengers to their deaths.<sup>29</sup>

Although the longboat was generally seaworthy, it became apparent shortly after launch that it had a substantial leak due to a faulty sea plug.<sup>30</sup> The occupants, however, were able to keep the boat afloat by adjusting the plug and bailing water.<sup>31</sup> In addition to the leak, however, the boat was clearly overcrowded and, according to later depositions of the captain and second mate,<sup>32</sup> was in jeopardy of sinking at any time, the top rail rising only 5 to 12 inches above the water's surface.<sup>33</sup> These depositions reflect the opinion that even with half as many occupants, any significant wind, contact with ice, or irregular stowage of weight could have caused the longboat to sink. Moreover, even if the boat had been lightened, as it later was, no possibility existed of rowing it to shore given its crowded condition and the likelihood of another ship passing by was "ninety-nine to one."<sup>34</sup>

The next morning, Tuesday, April 20th, the captain indicated his intention to separate from the longboat and took a log of its occupants. Prior to parting, the captain urged the longboat's crew to obey the first mate's orders as they would his own.<sup>35</sup> In the course of these exchanges, the first mate, commanding the longboat, told the captain that unless the jollyboat took some passengers off, "it would be necessary to cast lots and throw some overboard."<sup>36</sup> The captain urged him not to speak of it and to "[l]et it be the last resort."<sup>37</sup> After this exchange, the jollyboat departed with the captain, eight (8) crew members and one passenger.<sup>38</sup>

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<sup>29</sup> *Id.* at 360. Four families, with respectively 1, 3, 5, and 10 children aboard, along with 5 other unaccompanied individuals, perished. KOCH, *supra* note 23, at ix.

<sup>30</sup> *Holmes*, 26 F. Cas. at 360 ("The long-boat . . . continued to leak the whole time; but the passengers had buckets, and tins, and, by bailing, were able to reduce the water, so as to make her hold her own. The plug was about an inch and a half in diameter. It came out more than once, and finally, got lost; but its place was supplied by different expedients.").

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 361.

<sup>38</sup> The jollyboat was able to navigate by oar and sail and sought to make for shore or warmer waters to increase the odds of being found. KOCH, *supra* note 23, at 50. Given the precarious situation of the long boat, the captain must also have had some fear of the consequences for his own boat should the long-boat be swamped and founder nearby.

Despite the condition of the longboat, and the heavy rain that began to fall, the boat continued afloat without mishap through the day and into the evening.<sup>39</sup> Around 10 p.m., however, the wind came up and the sea became heavy. Water began to splash over the rails, further filling the boat and wetting its cold, half-naked occupants.<sup>40</sup> At that point, with “the boat having considerable water in it,” and with little if any warning, the first mate called out to the crew: “This work won’t do. Help me, God. Men, go to work.” Holmes and the other crew members did not immediately respond, but the mate urged again, “Men, you must go to work, or we shall all perish.”<sup>41</sup>

With further instructions “not to part man and wife, and not to throw over any women,” the crew proceeded to cast 14 men and 2 women into the water.<sup>42</sup> The court later noted that “[n]o lots were cast, nor had the passengers, at any time, been either informed or consulted as to what was now done.”<sup>43</sup> The opinion describes the casting over of only 5 men by name. Alexander Holmes, the defendant crewman, was charged with the death of one of these:

Next was Francis Askin, for the manslaughter of whom the prisoner was indicted. When laid hold of, he offered Holmes five sovereigns to spare his life till morning, ‘when,’ said he, ‘if God don’t send us some help, we’ll draw lots, and if the lot falls on me, I’ll go over like a man.’ Holmes said, ‘I don’t want your money, Frank,’ and put him overboard. . . . It appeared, also, that when Askin was put out, he had struggled violently, yet the boat had not sunk.<sup>44</sup>

After daybreak the following morning, when danger had passed, the crew discovered two additional men who had concealed themselves in the dark of night. After making the pair assist in bailing the boat, the crew threw them overboard as well.<sup>45</sup> Shortly afterwards, the sky cleared and the crew spotted and signaled the *Crescent*, a vessel passing

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<sup>39</sup> *Holmes*, 26 F. Cas. at 361.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 362.

<sup>44</sup> *Id.* at 361. It is disputed whether Frank Askin’s two sisters “had been thrown over, or whether their sacrifice was an act of self-devotion and affection to their brother.” *Id.* at n.5.

<sup>45</sup> John Nugent and Hugh Keigham were thrown over Wednesday morning, just hours before the lifeboat was rescued by the *Crescent*. KOCH, *supra* note 23, at 66, 68; *see also* THE TRIAL OF ALEXANDER WILLIAM HOLMES: ONE OF THE CREW OF THE SHIP WILLIAM BROWN: FOR MANSLAUGHTER ON THE HIGH SEAS 1, 4 (Philadelphia, 1842).

eastward to the French port of La Havre.<sup>46</sup> All nine (9) crew of the longboat and the seventeen (17) remaining passengers of the original thirty-three (33) survived.

Upon reaching port in France an investigation into the deaths of the sixteen (16) longboat passengers ensued.<sup>47</sup> American and British diplomats detained a number of the crew, deposing them along with some of the surviving passengers.<sup>48</sup> The investigation found no wrongdoing, and the crew members were released.<sup>49</sup> Eventually, many of the crew and surviving passengers made their way to the United States, at least in part through charitable contributions generated by public interest.<sup>50</sup>

The tale continued to circulate among immigrant populations of Philadelphia, culminating in a complaint being filed with the District Attorney.<sup>51</sup> Holmes,<sup>52</sup> a Finnish citizen, was the only crewman found in Philadelphia, and arguably for various political and cultural reasons, he was the only person charged in the case.<sup>53</sup> Although an initial grand jury failed to indict him for murder under Pennsylvania state law,<sup>54</sup> he was subsequently indicted for violation of Section 12 of the federal Crimes Act of 1790, which prohibited “manslaughter upon the high seas.”<sup>55</sup> The

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<sup>46</sup> KOCH, *supra* note 23, at 68.

<sup>47</sup> *Id.* at 82.

<sup>48</sup> *Id.* at 83, 94.

<sup>49</sup> *Id.* at 110.

<sup>50</sup> *Id.* at 121. News reports of the incident became a matter of international interest. *Id.* at 94-98.

<sup>51</sup> *Id.* at 129.

<sup>52</sup> “Alexander William Holmes was a Finn, born in Gothenburg . . .” SIMPSON, *supra* note 25, at 162.

<sup>53</sup> KOCH, *supra* note 23, at 125 (“The United States did not want a diplomatic battle with its principal trading partner. Ruling out both British and American subjects considerably narrowed the field . . . . That left the foreign crewmen [and] Alexander William Holmes, was the obvious choice . . . . Charging Holmes would put the best possible light on the whole sordid affair.”).

<sup>54</sup> *Id.* at 132.

<sup>55</sup> *Id.* 132-33. “[I]f any seaman or other person shall commit manslaughter upon the high seas . . . ; such person or persons so offending, and being thereof convicted, shall be imprisoned not exceeding three years, and fined not exceeding one thousand dollars.” Crimes Act of 1790, ch. 9, § 12, 1 Stat. 115. The Criminal Act of 1790, officially entitled An Act for the Punishment of certain Crimes against the United States, was enacted by the First Congress and was the first federal “comprehensive statute defining an impressive variety of federal crimes.” David P. Currie, *The Constitution in Congress: Substantive Issues in The First Congress, 1789-1791*, 61 U. CHI. L. REV. 775, 828 (1994).

trial took place in mid-April 1842.<sup>56</sup>

*b. Legal Proceedings*

As there was no dispute over Holmes' role in casting Askin overboard, the prosecutor immediately addressed Holmes' necessity defense,<sup>57</sup> explaining two requirements for its successful assertion. First, necessity would only apply when the "the peril be instant, overwhelming, leaving no choice of means, no moment for deliberation."<sup>58</sup> Reviewing the facts, the prosecution argued that the circumstances of the case, though dire, did not warrant the defense.<sup>59</sup> Second, even "[a]dmitting, . . . the fact that death was certain, and that the safety of some persons was to be promoted by an early sacrifice of the others, what law . . . gives a crew, in such a case, to be the arbiters of life and death, settling, for themselves, both the time and the extent of the necessity?"<sup>60</sup> Rather, the prosecution asserted that notice and agreement among the affected persons was required to fix "the principle of sacrifice, and, the mode of selection involving all" to be applied in the moment of extremity.<sup>61</sup> Nothing like this had occurred on the longboat.

Further, the prosecution continued, even if these two conditions had been satisfied, the crew owed a more fundamental duty to passengers:

Thus far, the argument admits that, at sea, sailor and passenger stand upon the same base, and in equal relations. But we take, [a] third, stronger ground. The seaman, we hold, is bound, beyond the passenger, to encounter the perils of the sea. To the last extremity, to death itself, must he protect the passenger. It is his duty. . . . Exposure, risk, hardship, death, are the sailor's vocation,—the seaman's daily bread.<sup>62</sup>

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<sup>56</sup> KOCH, *supra* note 23, at 141.

<sup>57</sup> *Id.* at 162.

<sup>58</sup> United States v. Holmes, 26 F. Cas. 360, 367 (C.C.E.D. Pa. 1842) (No. 15,383).

<sup>59</sup> *Id.* at 363.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Among examples the prosecution cites in support of this duty was Francis Bacon's famous illustration: "if a man be commanded to bring ordnance or munition to relieve any of the king's towns that are distressed, then he cannot, for any danger of tempest, justify the throwing of them overboard; for there it holdeth which was spoken by the Roman when he alleged the same necessity of weather to hold him from embarking: '*Necesse est ut eam; non ut vivam.*'" ("It is necessary that I go, not that I survive."). *Id.* at 364 (quoting 13 BASIL MONTAGU, THE WORKS OF FRANCIS BACON 161 (London, 1831)). The saying allegedly derives from Plutarch's description of Pompey ordering

Responding to these arguments, the defense asserted first that it was wrong to second-guess the need for action in the desperate circumstances of the moment.<sup>63</sup> Citing Rutherford's *Institutes of Natural Law* (1754-56), it argued that the "law of nature," i.e., self-preservation, did not require the crewmen to wait until death was so imminent that it was too late to save themselves.<sup>64</sup> Rather, the defense suggested, the court should consider the crew's judgment of imminence in light of the emergency, not in light of the judgment a person might exercise in a calm, unhurried state.<sup>65</sup> Self-defense rested on the reasonable belief of the crew at the time, and not what a court later determined in its serenity.<sup>66</sup> In addition, given that Holmes was an experienced seaman from childhood, and given the absence of any alleged malice in the case, the danger must have been extreme.<sup>67</sup>

Responding to the prosecution's final argument, that as a sailor Holmes owed a duty to protect the passengers superior to his right to preserve his own life,<sup>68</sup> the defense proposed alternative arguments: either Holmes had fulfilled this duty by obeying his superior's command, or all the boat's occupants had returned to a 'state of nature'

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his fleet to depart Africa during a severe storm in order to resupply the Italian mainland with food, often quoted as "*navigare necesse est, vivere non est necesse.*" ("It is necessary to sail, but not to live.") KARL BÜHLER, *THEORY OF LANGUAGE: THE REPRESENTATIONAL FUNCTION OF LANGUAGE* 136 n.10 (Donald Fraser Goodwin & Achim Eschbach trans., 2011).

<sup>63</sup> *Holmes*, 26 F. Cas. at 364 ("Are the United States to come here, now, a year after the events, when it is impossible to estimate the elements which combined to make the risk, or to say to what extent the jeopardy was imminent . . . and because they . . . find that, by their calculation, this unfortunate boat's crew might have had the thousandth part of one poor chance of escape, to condemn this prisoner to chains and a dungeon, for what he did in the terror and darkness of that dark and terrible night. Such a mode of testing men's acts and motives is monstrous.").

<sup>64</sup> *Id.* at 363-64.

<sup>65</sup> *Id.* at 364-65 (citing, *inter alia*, *The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 51 (1825) (holding that in cases of action at sea it is not fair to pass judgment after-the-fact when the seamen had to act instantly and without having time to gather all the facts needed to make a decision).

<sup>66</sup> "We contend, therefore, that what is honestly and reasonably believed to be certain death will justify self-defence to the degree requisite for excuse." *Holmes*, 26 F. Cas. at 364.

<sup>67</sup> "It is not to be supposed that Holmes, who, from infancy, had been a child of the ocean, was causelessly alarmed; and, there being no pretence of animosity, but the contrary, we must infer that the peril was extreme." *Id.*

<sup>68</sup> *Id.* at 363.

and therefore such a duty no longer existed.<sup>69</sup> If, as a sailor whose primary duty was obedience, Holmes had merely been following the first mate's orders, then under those dire circumstances the court should impose upon him no obligation to resolve the complex question of the order's lawfulness.<sup>70</sup> (Whether the *first mate* was guilty of unlawful conduct in issuing the order was not before the court.)<sup>71</sup> On the other hand, if the circumstances of the case had removed all persons from normal sailor-passenger relations, Holmes had an equal right to defend his life against all others:

The sailor was no longer a sailor but a drowning man. Having fairly done his duty to the last extremity, he was not to lose the rights of a human being, because he wore a roundabout instead of a frock coat. We do not seek authorities for such doctrine. The instinct of these men's hearts is our authority, the best authority. Whoever opposes it must be wrong, for he opposes human nature. All the contemplated conditions, all the contemplated possibilities of the voyage, were ended. . . . All became their own lawgivers; for artificial distinctions cease to prevail when men are reduced to the equality of nature. Every man on board had a right to make law with his own right hand, and the law which did prevail on that awful night having been the law of necessity . . . .<sup>72</sup>

*c. Court's Instructions, Verdict, and Sentence*

In charging the jury upon close of these arguments, Judge Baldwin first commented on the "touching character of the case," highlighting the difference between murder and manslaughter.<sup>73</sup> He explained that while murder required proof of malice on the part of the perpetrator toward the victim, manslaughter did not.<sup>74</sup> Instructing the

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<sup>69</sup> *Id.* at 366.

<sup>70</sup> *Id.* at 365 ("It is no part of a sailor's duty to moralize and to speculate, in such a moment as this was, upon the orders of his superior officers.")

<sup>71</sup> "Whether the mate, if on trial here, would be found innocent, is a question which we need not decide. That question is a different one from the guilt or innocence of the prisoner, and one more difficult." *Id.*

<sup>72</sup> *Id.* at 366.

<sup>73</sup> "He said that malice was of the essence of murder, while want of criminal intention was consistent with the nature of manslaughter. He impressed strongly upon the jury that the mere absence of malice did not render the homicide excusable; that the act might be unlawful . . ." *Id.*

<sup>74</sup> "He impressed strongly upon the jury, that the mere absence of malice did not render homicide excusable . . ." *Id.*

jury on the necessity defense, the court observed that it was available only when all ordinary methods of self-preservation had been sought and that the “peril must be instant, overwhelming, leaving no alternative but to lose our own life, or to take the life of another person.”<sup>75</sup> Turning to instances other than self-defense “where the act is indispensably requisite to self-existence,”<sup>76</sup> the court raised for consideration the “plank” case:

For example, suppose that two persons who owe no duty to one another that is not mutual, should, by accident, not attributable to either, be placed in a situation where both cannot survive. Neither is bound to save the other’s life by sacrificing his own, nor would either commit a crime in saving his own life in a struggle for the only means of safety.<sup>77</sup>

After clarifying this example, however, the court noted that the unequal relations between the parties, Holmes and Askin, in the case rendered the plank example inapplicable: “[W]e must look, not only to the jeopardy in which the parties are, but also to the relations in which they stand.”<sup>78</sup> Considering then the issues raised in light of general law applicable to common carriers and duties they owe to their passengers, the court reasoned that no emergency could abolish the basic duty of the captain and crew to protect the passengers entrusted to their care, even in preference to their own lives.<sup>79</sup> “The sailor is bound, as before, to undergo whatever hazard is necessary to preserve the boat and the passengers. Should the emergency become so extreme as to call for the sacrifice of life, there can be no reason why the law does not still remain the same.”<sup>80</sup> While the court recognized that the safety of passengers itself may sometimes demand preservation of the captain and some complement of crew, the passengers’ lives should never be sacrificed for “supernumerary” crew members.<sup>81</sup> To allow a necessity defense in such

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 366-67.

<sup>80</sup> “The captain, indeed, and a sufficient number of seamen to navigate the boat, must be preserved; for, except these abide in the ship, all will perish. But if there be more seamen than are necessary to manage the boat, the supernumerary sailors have no right, for their safety, to sacrifice the passengers.” *Id.* at 367.

<sup>81</sup> *Id.* Emphasizing this point with reference back to the plank case, the court stated: “[W]hile we admit that sailor and sailor may lawfully struggle with each other for the plank which can save but one, we think that, if the passenger is on the plank, even ‘the law of necessity’ justifies not the sailor who takes it from him.” *Id.*

a situation would give free rein to havoc on the sea.<sup>82</sup>

Disposing of a final defense argument, the judge observed that no sailor can justifiably rely on an order that is itself unlawful and turned the case over to the jury.<sup>83</sup> Deliberating 16 hours, it returned a guilty verdict.<sup>84</sup> Defense counsel moved for a new trial reiterating its state of nature argument and a procedural claim.<sup>85</sup> The court rejected this motion.<sup>86</sup> Observing that it could impose up to three years imprisonment and a one thousand dollar fine, Judge Baldwin, noting that Holmes had already been incarcerated for several months, and citing other circumstances of the case, the court sentenced Holmes to only six months imprisonment and a twenty-dollar fine.<sup>87</sup>

## 2. *Regina v. Dudley and Stephens*<sup>88</sup>

### a. *Facts*

On May 19, 1884, forty-three years after the *William Brown* tragedy, the fifty-two-foot English yacht *Mignonette* set out from the port of Southampton. The *Mignonette*, which had been purchased by an Australian attorney, was to be delivered to Sydney by sailing it 15,000 miles around Cape Horn.<sup>89</sup> The yacht was manned by Captain Thomas Dudley, crewmembers Edwin Stephens, Edmund Brooks, and Richard

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<sup>82</sup> “The thousand ships which now traverse the ocean in safety will be consigned to the absolute power of their crews, and, worse than the dangers of the sea, will be added such as come from the violence of men more reckless than any upon earth.” *Id.* at 364.

<sup>83</sup> *Id.* at 368.

<sup>84</sup> *Id.*

<sup>85</sup> The defense asserted that the indictment was defective because the name of the boat on which the offenses took place was not stated. *Id.*

<sup>86</sup> *Id.* The court rejected the procedural point and reiterated its holding: “[W]ithout stopping to speculate upon overnice questions not before us, or to involve ourselves in the labyrinth of ethical subtleties, we may safely say that the sailor’s duty is the protection of the persons intrusted to his care, not their sacrifice,—a duty we must again declare our opinion, that rests on him in every emergency of his calling, and from which it would be senseless, indeed, to absolve him exactly at those times when the obligation is most needed.” *Id.* at 368-69.

<sup>87</sup> *Id.* “[U]nless there was a joint application by prosecution and defence, one accompanied by the blessing of the judge, President Tyler would not consider weakening the legal precedent that officials and diplomats had worked so hard to create.” Therefore, Holmes had no real prospect of a presidential pardon. KOCH, *supra* note 23, at 181.

<sup>88</sup> *R v. Dudley*, (1884) 14 Q.B.D. 273 (Eng.).

<sup>89</sup> SIMPSON, *supra* note 25, at 40.

Parker, a 17 year-old inexperienced cabin boy.<sup>90</sup> The ship made good time, and by July 5th the yacht had advanced 6,000 miles<sup>91</sup> and was positioned 1600 miles northwest of the African Cape of Good Hope.<sup>92</sup> Sailing in a strong gale and hoping to gain some rest, Dudley ordered the crew to heave to.<sup>93</sup> As they completed the maneuver, a large, rogue wave struck the vessel, destroying its bulwark.<sup>94</sup> Realizing the yacht would immediately founder, Dudley gave orders to lower the 13-foot lifeboat and abandon ship.<sup>95</sup> By the time the yacht sank five minutes later,<sup>96</sup> the crew managed to board the lifeboat with a few navigational instruments and two 1-pound tins of turnips, but no water.<sup>97</sup> The lifeboat had only a small makeshift sail and was nearly 700 miles from land.<sup>98</sup>

Recognizing their dangerous situation, Dudley rationed the little food they had, saving the first small turnip tin until the third day adrift, July 7th.<sup>99</sup> On July 9th, the crew captured and consumed a sea turtle. It yielded about three pounds of meat for each man, although they would not drink its blood for fear it had been contaminated with sea water.<sup>100</sup> By July 17th, the twelfth day aboard the craft, the turtle and the second turnip tin were completely gone and, having failed to capture any significant rainwater, the men had in the interim resorted to drinking their own urine.<sup>101</sup>

On July 23rd, after eighteen days adrift, “when they had been

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<sup>90</sup> *Dudley*, 14 Q.B.D. at 273.

<sup>91</sup> *Google Maps Distance Calculator*, DAFT LOGIC, <http://www.daftlogic.com/projects-google-maps-distance-calculator.htm> (last updated Nov. 10, 2013).

<sup>92</sup> *Dudley*, 14 Q.B.D. at 273.

<sup>93</sup> SIMPSON, *supra* note 26, at 46. “Heave To: . . . To hold a vessel or tow heading into the wind and sea at a very slow speed and still maintain control while minimizing the effect during rough weather or during other conditions that may prevent progress on a desired course.” JEFFREY W. MONROE & ROBERT J. STEWART, *DICTIONARY OF MARITIME AND TRANSPORTATION TERMS* 210 (2005).

<sup>94</sup> SIMPSON, *supra* note 26, at 47.

<sup>95</sup> *Dudley*, 14 Q.B.D. 273 (1884); *see also* SIMPSON, *supra* note 26, at 47-48.

<sup>96</sup> SIMPSON, *supra* note 26, at 48.

<sup>97</sup> *Dudley*, 14 Q.B.D. at 273.

<sup>98</sup> *Id.* at 274. While the island of St. Helena was 680 miles north and the islands of the Tristan de Cunha about 680 miles to the south, the only land reachable in a practical sense given the currents and winds was South America, over 2,000 miles west. SIMPSON, *supra* note 25, at 49.

<sup>99</sup> SIMPSON, *supra* note 25, at 57.

<sup>100</sup> *Dudley*, 14 Q.B.D. at 273-74; SIMPSON, *supra* note 26, at 57-58.

<sup>101</sup> SIMPSON, *supra* note 26, at 58.

seven days without food and five without water,”<sup>102</sup> Dudley and Stephens approached Brooks to discuss who among them might be sacrificed to sustain the others.<sup>103</sup> Brooks, however, was opposed.<sup>104</sup> The following day, July 24th, the men again raised the issue of drawing lots and sacrificing someone “but Brooks refused to consent, and it was not put to the boy, and in point of fact there was no drawing of lots.”<sup>105</sup> Richard Parker, the cabin boy, was at this point only semi-conscious as a result of dehydration and probable consumption of seawater.<sup>106</sup> Later that same day, Dudley and Stephens brought up for discussion the fact that they both had families and “it would be better to kill the boy that their lives should be saved.”<sup>107</sup> Dudley stated that if no boat were sighted by the next morning, he was resolved to kill Parker.<sup>108</sup>

The following morning, July 25th, no ship was sighted.<sup>109</sup> The jury in its findings described the events that followed:

Dudley told Brooks that he had better go and have a sleep, and made signs to Stephens and Brooks that the boy had better be killed. The prisoner Stephens agreed to the act, but Brooks dissented from it. That the boy was then lying at the bottom of the boat quite helpless, and extremely weakened by famine and by drinking sea water, and unable to make any resistance, nor did he ever assent to his being killed. The prisoner Dudley offered a prayer asking forgiveness for them all if either of them should be tempted to commit a rash act, and that their souls might be saved. That Dudley, with the assent of Stephens, went to the boy, and telling him that his time was come, put a knife into his throat and killed him then and there[.]<sup>110</sup>

After killing the boy, Dudley collected his blood in a bailing pail and shared it with both Stephens and Brooks.<sup>111</sup> The boy’s heart and

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<sup>102</sup> *Dudley*, 14 Q.B.D. at 273.

<sup>103</sup> *Id.* at 274; see also SIMPSON, *supra* note 26, at 61.

<sup>104</sup> *Dudley*, 14 Q.B.D. at 274.

<sup>105</sup> *Id.* Brooks later testified that, “he did not wish to kill anybody and did not wish anybody to kill him.” *The Mignonette Case*, TIMES (London), Nov. 4, 1884, at 3; see also Michael G. Mallin, Comment, *In Warm Blood: Some Historical and Procedural Aspects of Regina v. Dudley and Stephens*, 34 U. CHI. L. REV. 387, 388 (1967). While there is some inconsistency in the testimony, Brooks’ opposition does not seem to be disputed.

<sup>106</sup> *Dudley*, 14 Q.B.D. at 274.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Mallin, *supra* note 105, at 389.

liver were then eaten and the body dismembered.<sup>112</sup> The jury found that “the men fed upon the body and blood of the boy for four days.”<sup>113</sup>

On the fourth day after killing Parker, the passing German registered *Moctezuma* was sighted and it rescued the men.<sup>114</sup> It returned them along with the lifeboat to Falmouth in Cornwall on September 6, 1884. Both on the *Moctezuma* and upon arrival in England, the men made no secret of what had happened. In fact, during the return voyage Captain Dudley prepared multiple handwritten accounts of the events, evidently to be used for a variety of purposes, including notifying the owner of the ship’s loss.<sup>115</sup>

Despite the men’s belief that no legal consequence would result from the incident, they were arrested after being deposed by customs officials in Cornwall. The authorities confiscated the lifeboat, its contents, and all of Dudley’s written statements.<sup>116</sup> The three were subsequently charged with murder on the high seas.<sup>117</sup> As a sign, however, of the delicacy of the case and the strong public sympathy for the men, all three were granted bail—an occurrence generally unheard of in a capital murder case<sup>118</sup>—to the applause of the courtroom spectators. On the following day, the crown acquitted Brooks of the murder charge, at least in part to secure his testimony against the others.<sup>119</sup> Dudley and Stephens were set over for trial at the Exeter Assize in November before Baron Huddleston.<sup>120</sup>

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<sup>112</sup> SIMPSON, *supra* note 25, at 68 (“In all probability much of the corpse was jettisoned quite soon, and . . . what remained (perhaps strips of flesh) was washed and covered up to protect it from the sun.”).

<sup>113</sup> *Dudley*, 14 Q.B.D. at 274. “Brooks later described the scene as ‘a horrible sight and no mistake’ but added, ‘But I did not think so much of it except just at the moment, though when I am by myself I think of it a good deal and my thoughts then of what I have seen and what we went through are very dreadful.’” SIMPSON, *supra* note 25, at 68.

<sup>114</sup> *Dudley*, 14 Q.B.D. at 274; SIMPSON, *supra* note 25, at 69-70.

<sup>115</sup> SIMPSON, *supra* note 25, at 71-72. Dudley prepared eight separate accounts, many clearly implying that Richard Parker was alive and knew the fate he was to suffer. *Id.* at 67.

<sup>116</sup> *Id.* at 72-74.

<sup>117</sup> *Id.* at 72.

<sup>118</sup> *The Wreck of The Mignonette*, TIMES (London), Sept. 19, 1884, at 5; SIMPSON, *supra* note 25, at 78-79. During this proceeding the defendants shook hands with Richard Parker’s brother. SIMPSON, *supra* note 25, at 80.

<sup>119</sup> Mallin, *supra* note 105, at 391. Under English criminal procedure, a defendant could offer no testimony against a codefendant.

<sup>120</sup> “The title Baron was a judicial title, referring to a ‘Baron of the Exchequer,’ an office abolished by statute soon after Huddleston was invested.” *Id.* at 392.

*b. Legal Proceedings*

Under English criminal procedure of the period it was necessary for a grand jury to indict the men before they could be tried. Although such proceedings were often a mere formality,<sup>121</sup> Huddleston was careful to ensure the successful return of an indictment.<sup>122</sup> On November 3rd, the grand jury assembled and Huddleston, after summarizing the largely undisputed facts, apprised the jury members of the relevant legal precedents.<sup>123</sup>

He first brought to their attention the “St. Christopher” case referenced by Puffendorf in his *Law of Nature and Nations* concerning seven English sailors castaway in the Caribbean islands.<sup>124</sup> The men in this case had resorted after numerous days adrift without food or water, to determine by lots who among them would be killed and eaten.<sup>125</sup> The cursory account of the tragedy included the fact that the survivors were subject to no legal penalty upon eventually making land.<sup>126</sup> Huddleston, however, instructed the grand jury to dismiss this authority, noting that it offered no indication of its jurisdiction.<sup>127</sup> Next, the judge considered *United States v. Holmes*, but also rejected its relevance because it involved a charge only of manslaughter and revolved around a sailor’s breach of duty to passengers, neither of which applied in the present case.<sup>128</sup> Huddleston also cited two other contemporary English sources, the *Report of the Criminal Law Commissioners (1878-79)*<sup>129</sup> and Sir James Fitzjames Stephen’s *History of the Criminal Law*,<sup>130</sup> neither of

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<sup>121</sup> *The Queen v. Dudley and Another – The Mignonette Case*, TIMES (London), Dec. 10, 1884, at 3.

<sup>122</sup> *The Mignonette Case*, *supra* note 106, at 4.

<sup>123</sup> *Id.*

<sup>124</sup> *R v. Dudley*, (1884) 14 Q.B.D. 273, 276 n.5 (Eng.). The “St. Christopher case” is described by Nicholas Tulpius (1593-1674), physician and major of Amsterdam, in his famous *OBERVATIONES MEDICAE* (1641). As the case notes, it is referenced by Puffendorf. Tulpius is memorialized in Rembrandt’s *The Anatomy Lesson of Dr. Nicolaes Tulp*.

<sup>125</sup> See SIMPSON, *supra* note 25, at 122-23.

<sup>126</sup> “[T]hey were accused of homicide by the ‘proctor’ – presumably some sort of constable – and their judge . . . pardoned them, their crime being ‘washed away’ by ‘inevitable necessity.’” *Id.* (“[T]hey were accused of homicide by the ‘proctor’ – presumably some sort of constable – and their judge . . . pardoned them, their crime being ‘washed away’ by ‘inevitable necessity.’”).

<sup>127</sup> *Dudley*, 14 Q.B.D at 278.

<sup>128</sup> SIMPSON, *supra* note 25, at 201.

<sup>129</sup> *Dudley*, 14 Q.B.D. at 286.

<sup>130</sup> JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND

which offered clear support for a necessity defense to a charge of murder.<sup>131</sup>

In closing, Huddleston explained that the only valid defense to a charge of murder was self-defense, and it was “impossible” for the act of Dudley and Stephens to be self-defense because the boy they killed had not posed any threat to them:

Parker, at the bottom of the boat, was not endangering their lives by any act of his: the boat would hold them all, and the motive for killing him was not for the purpose of lightening the boat, but for the purpose of eating him, which they could do when dead, but not while living. What really imperiled their lives was not the presence of Parker, but the absence of food or drink.<sup>132</sup>

As expected, the grand jury returned a true bill indicting the men for murder (undoubtedly being influenced by Huddleston’s representation that if convicted the men would have recourse to the crown for pardon).<sup>133</sup>

Two days later, on November 7, 1884, the initial phase of the case was tried before Huddleston.<sup>134</sup> The prosecution rested after admitting into evidence the men’s deposition testimony and calling Brooks and a few Falmouth witnesses to testify.<sup>135</sup> Having been deprived of a necessity defense by Baron Huddleston, the defense was left with the sole option of raising a few weak procedural objections.<sup>136</sup> In closing, however, despite the court’s instruction on the law to the contrary, defense counsel argued that the jury should acquit based on necessity: “not only might such a necessity as would arise as would justify a body of men in sacrificing the life of one of their number in order to save the remainder, but that in some cases of necessity they might be justified in sacrificing the weakest.”<sup>137</sup>

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(London, MacMillan & Co. 1883).

<sup>131</sup> SIMPSON, *supra* note 25, at 201.

<sup>132</sup> *Id.*

<sup>133</sup> *The Mignonette Case*, *supra* note 106, at 4. “[I]f there is any such doctrine as that suggested the prisoners will have the benefit of it. If there is not, it will enable them, under the peculiar circumstances of this melancholy case, to appeal to the mercy of the Crown, in which, . . . is vested the power of pardoning particular objects of compassion and softening the law in cases of peculiar hardship.” *Id.* It was understood that the Crown rarely rejected pleas for mercy by a jury and judge. Mallin, *supra* note 105, at 396.

<sup>134</sup> *R v. Dudley*, (1884) 14 Q.B.D. 273, 273 (Eng.).

<sup>135</sup> SIMPSON, *supra* note 25, at 206, 210.

<sup>136</sup> *Id.* at 211.

<sup>137</sup> *The Mignonette Case*, *TIMES* (London), Nov. 7, 1884, at 11.

After the crown's brief response, Huddleston instructed the jury that he disagreed with defense counsel's argument as a matter of both morals and law. He clarified that no necessity defense existed under English law, though the case might call for clemency.<sup>138</sup> The judge explained that if he were to call for a directed verdict, they would have no alternative except to return a conviction for willful murder.<sup>139</sup> In a novel procedural maneuver, however, Huddleston instructed the jury members that "they would be spared that painful duty" if they chose, and permit the members instead to reach a "special verdict", i.e., solely to make findings of fact and then refer the legal question of murder to the court.<sup>140</sup> The final decision on murder would then, as Huddleston desired, be made by a higher and more authoritative court.<sup>141</sup>

The jury accepted Huddleston's invitation and adopted as its special verdict the findings which he had drawn up for it.<sup>142</sup> These findings, in addition to capturing the relatively undisputed facts of the tragedy described above,<sup>143</sup> included others relating specifically to the alleged "necessity" of Dudley and Stephens' actions:

That if the men had not fed upon the body of the boy they would probably not have survived to be so picked up and rescued, but would within four days have died of famine. That the boy, being in a much weaker condition, was likely to have died before them. That at the time of the act in question there was no sail in sight, nor any reasonable prospect of relief. That under these

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<sup>138</sup> SIMPSON, *supra* note 25, at 207.

<sup>139</sup> *Id.* at 212-13. "If I was to direct you to give your verdict, I should have to tell you, and you would be bound to obey me, that you must return a verdict of guilty of willful murder." *Id.*

<sup>140</sup> "Now I hope I may deserve from you some consideration for putting you in the position of merely finding the facts, and not finding the verdict of guilty of willful murder . . . and if you will be kind enough now to follow me in the facts that I have prepared and give your consent to each paragraph as I read these to you, then when the whole of these paragraphs or facts are found by you, the matter will be referred to the Court for the purpose of the Court saying what is the law upon the subject and that must be some satisfaction I hope to you." *Id.*

<sup>141</sup> The Times reported the following communication to the jury: "It struck him [Huddleston], however, that they might be as anxious as he was that the subject should receive the highest interpretation it could receive in this country and he would ask them therefore to find the facts in a special verdict." *The Mignonette Case*, *supra* note 106, at 11.

<sup>142</sup> SIMPSON, *supra* note 25, at 213.

<sup>143</sup> *Dudley*, 14 Q.B.D. at 273-75. The facts found by the jury correspond in all essential respects to the account offered above, which however has been amplified by reference to other sources.

circumstances there appeared to the prisoners every probability that unless they then fed or very soon fed upon the boy or one of themselves they would die of starvation. That there was no appreciable chance of saving life except by killing someone for the others to eat. That assuming any necessity to kill anybody, there was no greater necessity for killing the boy than any of the other three men.<sup>144</sup>

Beyond these findings, the jury left it to the court to determine whether the conduct of the men constituted an act of murder: “But whether upon the whole matter by the jurors found the killing of Richard Parker by Dudley and Stephens be felony and murder the jurors are ignorant, and pray the advice of the Court . . . .”<sup>145</sup> Upon the court’s acceptance of these findings, the trial concluded; Dudley and Stephens were again released on bail and general satisfaction was voiced in the press with the proceedings to that point.<sup>146</sup>

The final stage of the case came on for decision December 4th, 1884, before five judges of the Queen’s Bench Division of the High Court of Justice, including Lord Chief Justice Coleridge, Judges Grove and Denman, and Barons Pollock and Huddleston.<sup>147</sup> The entire record and the special verdict findings from the jury trial were first read to the court. Following this, the prosecution began its case-in-chief by asserting its position that the only defense to intentional killing was a lawful execution or self-defense, and that no precedent supported a necessity defense to murder.<sup>148</sup> The court immediately interrupted the crown’s case-in-chief indicating its agreement and called upon defense counsel Collins, “to see if he can remove the very strong impression at

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<sup>144</sup> *Id.* at 275.

<sup>145</sup> *Id.* In the formal findings one last sentence was added by Huddleston: “If . . . the Court shall be of opinion that the killing of Richard Parker be felony and murder, then the jurors say that Dudley and Stephens were each guilty of felony and murder as alleged in the indictment.” Objection was subsequently made to this insertion before the high court but rejected on the grounds that it was implicit in the other findings of the special verdict. *Id.*

<sup>146</sup> *The Mignonette Case*, *supra* note 106, at 11. “The English law as laid down by Baron Huddleston is averse from entertaining the notion that peril from starvation is an excuse for homicide. It would be dangerous to affirm the contrary, and tell seafaring men that they may freely eat others in extreme circumstances, and that the cabin boy may be consumed if provisions run out.” SIMPSON, *supra* note 25, at 216 (quoting TIMES (London), December 8, 1844).

<sup>147</sup> *The Queen v. Dudley and Another – The Mignonette Case*, TIMES (London), Dec. 5, 1884, at 3. The question of precisely which English court had jurisdiction to resolve the special verdict turned out to be a complex issue. See SIMPSON, *supra* note 26, at 219-23.

<sup>148</sup> *The Queen v. Dudley and Another – The Mignonette Case*, *supra* note 122, at 3.

present upon our minds.”<sup>149</sup>

After raising some preliminary jurisdictional points,<sup>150</sup> the defense turned to its substantive arguments. Based on multiple legal sources and authorities to be considered in detail below,<sup>151</sup> the defense asserted that the men should be acquitted: “The facts found on the special verdict shew that the prisoners were not guilty of murder, at the time when they killed Parker, they killed him under the pressure of necessity. Necessity will excuse an act which would otherwise be a crime.”<sup>152</sup> Following these arguments the court again indicated that no response was needed from the prosecution: “We need not trouble you, Mr. Attorney-General, to reply, as we are all of opinion that the prisoners must be convicted.”<sup>153</sup> Following this determination, the Court stated that it would provide its reasoned decision and sentence the men four days later, on the 9th of December.<sup>154</sup>

In the court’s subsequent judgment,<sup>155</sup> Lord Coleridge immediately set the tone of the decision. Acknowledging the terrible suffering and condition of the men aboard the lifeboat, he nevertheless observed that they “put to death a weak and unoffending boy upon the chance of preserving their own lives . . . with the certainty of depriving *him* of any possible chance of survival,”<sup>156</sup> noting in addition that if they had been spotted the next day or never been spotted at all, “the killing of the boy would have been an unnecessary and profitless act.”<sup>157</sup> Turning to the main issue Coleridge observed that the court’s obligation was to determine whether, in the circumstances as found by the jury, the killing was murder or not, and noting that the “contention that it could be anything else was, to the minds of us all, both new and strange . . .”<sup>158</sup>

Addressing the specific legal authorities advanced by the defense, Coleridge first considered the contention that various English jurists supported, indirectly if not directly, “the doctrine, that in order to

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<sup>149</sup> *Id.*

<sup>150</sup> SIMPSON, *supra* note 26, at 229.

<sup>151</sup> *R v. Dudley*, (1884) 14 Q.B.D. 273 at 280-81 (Eng.). Analysis of the authorities offered to the court by the defense will be considered below in discussion of Lord Coleridge’s written decision. *See infra* at notes 157-184 and accompanying text.

<sup>152</sup> *Dudley*, 14 Q.B.D. at 277.

<sup>153</sup> *R v. Dudley*, (1884) 52 L.T. 107 (Q.B.) at 110 (Eng.).

<sup>154</sup> *Dudley*, 14 Q.B.D. at 288.

<sup>155</sup> *Id.* at 279 (Coleridge, J.).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 281.

save your own life you may lawfully take away the life of another, when that other is neither attempting nor threatening yours, nor is guilty of any illegal act whatever towards you or anyone else.”<sup>159</sup> Considering, without citing in detail, references that had been made to Lord Bracton,<sup>160</sup> Lord Hale,<sup>161</sup> Sir Michael Foster,<sup>162</sup> Sir Edward East’s Pleas of the Crown,<sup>163</sup> Serjeant-at-Law Hawkins,<sup>164</sup> Sir William Staunford,<sup>165</sup> Dalton<sup>166</sup> and Russel,<sup>167</sup> Lord Coleridge found that in reality whenever these men spoke broadly of a killing being permitted by necessity, the context, with the exception of two references to the ambiguous “plank

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 281-82. Henry de Bracton (1210-1268) studied law at Oxford and is believed to have been a justice of the King’s Bench. EDWARD FOSS, BIOGRAPHIA JURIDICA: A BIOGRAPHICAL DICTIONARY OF THE JUDGES OF ENGLAND FROM THE CONQUEST TO THE PRESENT TIME 1066-1870, at 112 (London, John Murray, Albemarle Street 1870).

<sup>161</sup> *Dudley*, 14 Q.B.D. at 278, 282-83. Matthew Hale (1609-1676) was the head of a parliamentary law reform commission in 1652, a judge of the Court of Common Pleas from 1653 to 1657, Chief Baron of the Exchequer under Charles II, and then Chief Justice of the King’s Bench until his death in 1676. Hale’s most notable work was the *History of the Common Law*, the first comprehensive book on the evolution of English law. See Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651, 1702, 1704, 1707 (1994).

<sup>162</sup> *Dudley*, 14 Q.B.D. at 283. Sir Michael Foster (1689-1763) was a Justice of the King’s Bench. LORD CAMPBELL, LIVES OF THE LORD CHANCELLORS AND CHIEF JUSTICES OF ENGLAND 123 (New York, James Cockcroft & Co. 1876). See FOSS, *supra* note 160, at 4.

<sup>163</sup> *Dudley*, 14 Q.B.D. at 278, 283-84. Sir Edward Hyde East (1764-1847) was a member of the British Parliament and very active in the defense of West India. He became an Indian judge in 1813 and remained in India until 1823, when he returned to England as a member of Parliament. Phillip Salmon & Howard Spencer, *East, Sir Edward Hyde*, in 7 THE HISTORY OF PARLIAMENT: THE HOUSE OF COMMONS 1820-1832 (D. R. Fisher ed., Cambridge Univ. Press 2009), available at <http://www.historyofparliamentonline.org/volume/1820-1832/member/east-sir-edward-1764-1847>.

<sup>164</sup> *Dudley*, 14 Q.B.D. at 284. William Hawkins (1673-1746) was the King’s Serjeant and author of the “Treatise of the Pleas of the Crown.” HUMPHRY WILLIAM WOOLRYCH, LIVES OF EMINENT SERJEANTS-AT-LAW OF THE ENGLISH BAR 512 (1869); 25 DICTIONARY OF NATIONAL BIOGRAPHY 230-31 (Leslie Stephen ed., London, Smith, Elder & Co. 1891).

<sup>165</sup> *Dudley*, 14 Q.B.D. at 284. Sir William Staunford was born in Islington on August 22, 1509. Staunford had a prominent legal career in England; was appointed to the Bench of Common pleas in the 1550s and authored several famous legal works, including a “Pleas of the Crown.” King Philip knighted Staunford on January 27, 1554/5. PETER STAINFORTH, NOT FOUND WANTING: A HISTORY OF THE STAINFORTHS, AN ANGLO-SAXON FAMILY 90-92 (2003).

<sup>166</sup> *Dudley*, 14 Q.B.D. at 278, 284.

<sup>167</sup> *Id.* at 284.

case,”<sup>168</sup> was always in the end that of typical self-defense and not the killing of the innocent. As Lord Coleridge noted by way of example, “But in the very passage as to necessity, on which reliance has been placed, it is clear that Bracton is speaking of necessity in the ordinary sense – the repelling by violence, violence justified so far as it was necessary for . . . [repelling] any illegal violence used towards oneself.”<sup>169</sup>

To make the matter even clearer, Coleridge cited to Hale, who explicitly distinguishes between killing out of necessity and in self-defense.

If a man be desperately assaulted and in peril of death, and cannot otherwise escape unless, to satisfy his assailant’s fury, he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the fact, for he ought rather to die himself than kill an innocent; but if he cannot otherwise save his own life the law permits him in his own defence to kill the assailant, for by the violence of the assault, and the offence committed upon him by the assailant himself, the law of nature, and necessity, hath made him his own protector *cum debito moderamine inculpate tutelae*.<sup>170</sup>

Having disposed of these authorities, Coleridge turned to the St. Christopher and *Holmes* cases, following Huddleston in concluding that they are inappropriate authorities for any consideration by an English court.<sup>171</sup> He then addressed Bacon’s well-known account of necessity: *Necessitas inducit privilegium quoad iura private*’:<sup>172</sup>

Necessity is of three sorts - necessity of conservation of life, necessity of obedience and necessity of the act of God or of a

<sup>168</sup> *Id.* at 285.

<sup>169</sup> *Id.* at 282.

<sup>170</sup> *Id.* at 283. The addition of the limitation “with appropriate moderation of blameless defense” (“*cum debito moderamine inculpate tutelae*”) to the traditional Roman legal principle of “*vim vi repellere licet*” or “it is permitted to repel violence by violence” was a formal addition to the doctrine of self-defense apparently first codified by Pope Innocent III in his Decretals. See X 5.12.18, in 2 CORPUS JURIS CANONICI 800-01 (Aemilius Friedberg ed., 1959) (1879); Harold J. Berman, *The Origins of Western Legal Science*, 90 HARV. L. REV. 894, 943 n.65 (1977).

<sup>171</sup> *Dudley*, 14 Q.B.D. at 284-85.

<sup>172</sup> The court freely translates this as “Necessity carrieth a privilege in itself.” *R v. Dudley*, (1884) 33 WKLY. REP. 347 (Q.B.) at 352 (Eng.). A more accurate translation is “[N]ecessity introduces a privilege with respect to private rights.” FRANCIS BACON, *THE ELEMENTS OF THE COMMON LAWS OF ENGLAND* 29 (Legal Classics Library ed., 1997) (1630) (author’s trans.).

stranger. First of conservation of life; if a man steal viands to satisfy his present hunger, this is no felony nor larceny. So if divers<sup>173</sup> be in danger of drowning by the casting away of some boat or barge, and one of them get to some plank or on the boat's side to keep himself above water, and another to save his life thrust him from it, whereby he is drowned, this is neither *se defendendo* nor by misadventure, but justifiable.<sup>174</sup>

Coleridge first observed that Bacon's assertion that hunger justifies theft had been explicitly contradicted by English legal authorities.<sup>175</sup> As for the plank case, Coleridge appeared somewhat ambivalent. Although had Bacon provided no authority for his position, Coleridge acknowledged "there [were] many conceivable states of things in which it might possibly be true."<sup>176</sup> He concluded, however, that in no event would it apply to the case before him: "[I]f Lord Bacon meant to lay down the broad proposition that a man may save his life by killing, if necessary, an innocent and unoffending neighbour, it certainly is not law at the present day."<sup>177</sup>

Turning next to the authority of Sir James Fitzjames Stephen, a fellow sitting English judge and influential jurist,<sup>178</sup> Coleridge observed that while Stephen's broad definition of necessity appeared "perhaps wide enough to cover this case," he found as a matter of fact that it did not. In support of this finding, Coleridge obliquely indicated that he had in fact confirmed this with Stephen himself.<sup>179</sup> Finally, Coleridge ended his analysis of the English legal authorities by quoting from the commission that had drafted the then current Criminal Code:

<sup>173</sup> "Divers" is used here in the antiquated English sense of "some men." See, e.g., *Acts* 19:9 (King James) ("But when divers were hardened, and believed not . . . he departed from them, and separated the disciples, disputing daily in the school of one Tyrannus.").

<sup>174</sup> *Dudley*, 14 Q.B.D. at 285 (quoting BACON, *supra* note 172).

<sup>175</sup> Coleridge again quotes Hale: "I take it that . . . that rule, at least by the laws of England, is false; . . . if a person, being under necessity for want of victuals or clothes, shall upon that account . . . steal another man's goods, it is a felony and . . . punishable with death." *Dudley*, 14 Q.B.D. at 288.

<sup>176</sup> *Dudley*, 14 Q.B.D. at 286; see BACON, *supra* note 172.

<sup>177</sup> *Dudley*, 14 Q.B.D. at 286.

<sup>178</sup> Sir James Fitzjames Stephen was the author of both the influential *A DIGEST OF THE LAW OF EVIDENCE* (1876) and *2 A HISTORY OF THE CRIMINAL LAW OF ENGLAND* (1883).

<sup>179</sup> *Dudley*, 14 Q.B.D. at 286. Coleridge remarks: "And we have the best authority for saying that it was not meant to cover it." *Id.* The London Times of December 10, 1884, referring to reliance made by the defense on Stephen's position notes: "[B]ut he [Stephen], it was stated yesterday, repudiated the construction put upon his remarks." *The Queen v. Dudley and Another – The Mignonette Case*, *supra* note 122.

We are certainly not prepared to suggest that necessity should in every case be a justification. We are equally unprepared to suggest that necessity should in no case be a defence; we judge it better to leave such questions to be dealt with when, if ever, they arise in practice by applying the principles of law to the circumstances of the particular case.<sup>180</sup>

Having slogged through these authorities, Coleridge, as instructed by the commission, concluded his analysis by applying then existing “principles of law” to the case. Observing first that the case involved a “case of private homicide,”<sup>181</sup> he found that it implicated no principles relevant to permissible killing in war or legitimate executions. Rather, as defendants themselves had conceded, the case involved an admitted “deliberate killing of [an] unoffending and unresisting boy,” and, as was also conceded, constituted a crime of murder unless an affirmative defense of necessity justified the conduct.<sup>182</sup>

Coleridge continued by observing, as the preceding considerations had made clear, that under English law, the defense necessity had never applied to conduct such as that committed by the defendants.<sup>183</sup> Noting that law and morality, while not identical, could never be completely separated, Coleridge ironically proposed that allowing a necessity defense in case of temptation to murder would be of “fatal consequence.”<sup>184</sup> While preservation of life is generally a duty incumbent upon all, situations inevitably arise in which “it may be the plainest and highest duty to sacrifice it.”<sup>185</sup> Citing the examples of wartime duty to country, soldiers to women and children, and maritime duties of a captain to crew and crew to passengers, he reflected that the exigencies of life sometimes “impose on men the moral duty not of the preservation of, but of the sacrifice of their lives for others.”<sup>186</sup>

Drawing out his critique, Coleridge noted that application of a necessity defense would inevitably be fraught with irresolvable complexity. It would, for example, be uncertain by whom and by what standard a “necessity” decision would be made: “Who is to be the judge

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<sup>180</sup> *Dudley*, 14 Q.B.D. at 286 (quoting the Commission on the Criminal Code).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 286-87.

<sup>183</sup> *Id.* at 287.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> In support of a duty to die Coleridge refers generically to examples found in classical “pagan” literature (Horace, Juvenal, Cicero, and Euripides) as well as the “Great Example” of Christian England. *Id.*

of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what?”<sup>187</sup> He suggests that the defense would in reality be a mere “legal cloak” for passion and crime, “leav[ing] to him who is to profit by it to determine the necessity which will justify him in deliberately taking another’s life to save his own.”<sup>188</sup> Referring to the very case before him, Coleridge recalls, as the jury found, that there was no more “necessity” to take the boy Richard Parker’s life than any of the other shipmates, yet the one chosen to die was precisely “the weakest, the youngest, the most unresisting[.]”<sup>189</sup>

Not meaning to trivialize the temptations and sufferings of the men, Coleridge closed his opinion by remarking that the law often lays down standards and rules that individuals may at times be incapable of satisfying: “A man has no right to declare temptation to be an excuse, though he might himself have yielded to it, nor allow compassion for the criminal to change or weaken in any manner the legal definition of the crime.”<sup>190</sup> In such cases where “the law appears to be too severe on individuals,” Coleridge stressed the proper course for a judge would be to leave mercy to the sovereign.<sup>191</sup> Concluding his analysis, Coleridge issued the unanimous judgment of the court finding the men guilty of willful murder and imposing the sentence of death by hanging.<sup>192</sup> Following judgment, Dudley and Stephens were remanded to prison; their death sentences, as anticipated, were eventually commuted to six months imprisonment.<sup>193</sup>

### 3. *Legacy of Holmes and Dudley and Stephens*

The lifeboat decisions of *Holmes* and *Dudley and Stephens* resolved – at least until the mid-twentieth century – any flirtation by American or English law with a necessity defense to homicide.<sup>194</sup> Both

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<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 288.

<sup>191</sup> *Id.*

<sup>192</sup> “It is therefore our duty to declare that the prisoners’ act in this case was wilful murder, that the facts as stated in the verdict are no legal justification of the homicide; and to say that in our unanimous opinion the prisoners are upon this special verdict guilty of murder.” *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> “Unlike other leading cases, *Dudley and Stephens* is more important in itself than for its progeny. . . . [I]t amounts to a negative precedent, restraining rather than

decisions definitively rejected a necessity defense as applied to the killing of innocents despite its possibility being suggested by broad language used by some jurists in discussions of necessity in the context of self-defense<sup>195</sup> and by virtue of scattered historical references to the “plank” case, not all of which were entirely negative.<sup>196</sup> Judge Baldwin in *Holmes*, for example, made it clear that whatever merit there might be in overnice questions arising from the plank hypothetical, necessity had no place in the case before him. Similarly, Coleridge, while not rejecting the plank case outright, accurately observed that English law had expressly rejected any necessity defense in cases where a person steals out of hunger. If, however, extreme hunger could not justify even theft, it would certainly fail to justify homicide. It was no great leap to conclude that homicide by general necessity was unlawful under any circumstances.

At the same time, however, some would argue that the reasoning of the decisions carry the seeds of their own destruction.<sup>197</sup> This is so because their logic entails a variety of ambiguities and assumptions that are inadequate, or at least incomplete, as judged by modern standards of analysis. While one obviously cannot lay fault for such deficiencies, it is inevitable that time and further reflection would lead to calls for reevaluation of these holdings.

One fundamental deficiency of these cases is a failure to draw any clear analytical distinction between necessity, understood as a defense that rationally *justifies* a course of conduct as distinct, from one that *excuses* an actor’s conduct. At times, the defense in each case appears to argue that the men should be exonerated because their actions

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expanding legal doctrine. It gives an absolute answer, in thunder, to a very difficult question.” Allen Boyer, *Crime, Cannibalism and Joseph Conrad: The Influence of Regina v. Dudley and Stephens on Lord Jim*, 20 LOY. L.A. L. REV. 9, 9-10 (1986).

<sup>195</sup> Stephen had observed that there was no definitive rule and there was a lack of case law on this point altogether. He thought, however, under the right circumstances an actor would escape punishment, especially if the actor was forced to act by external circumstances. See Michael H. Hoffheimer, *Codifying Necessity: Legislative Resistance to Enacting Choice-of-Evils Defenses to Criminal Liability*, 82 TUL. L. REV. 191, 204-05 (2007).

<sup>196</sup> See, e.g., Bacon’s openness to the defense in certain circumstances including homicide, larceny and prison break and his discussion of the plank case. See *supra* notes 173-76 and accompanying text.

<sup>197</sup> Glanville Williams, for example, discussing Coleridge’s opinion in *Dudley and Stephens* stated succinctly: “Much of the judgment is unconvincing.” Glanville Williams, *A Commentary on R. v. Dudley and Stephens*, 8 CAMBRIAN L. REV. 94, 94 (1977).

were entirely reasonable in view of the dire circumstances; at other times, the defense appears to argue that they should be acquitted because of their terrible suffering and temptations. These ambiguities are further amplified by the fact that the courts often collapse these considerations.<sup>198</sup> Thus, in the end, it is not entirely clear which specific defense is asserted and which is denied in the cases. Modern distinctions between justification and excuse thus call for clarification of the precise issues that are at play in these decisions.

A second potential defect in the judgments relates to their assertions that the sanction of a necessity defense would simply give free reign to self-serving, subjective standards of action permitting those finding themselves in such dire circumstances to use necessity as a mere lawless pretext for saving their own lives at the cost of others'. As in other legal contexts, however, e.g., negligence law, courts themselves are able to provide guidance, if only general, as to the proper criteria for resolving such questions. Over time, judicially crafted norms could be provided for evaluating such circumstances. These might delineate legal duties with specificity, and remedy the courts' concerns. For example, in response to Coleridge's question about whether the standard for deciding "the comparative value of lives" would be "strength, or intellect, or what?"<sup>199</sup> the court itself could itself have provided an answer to this question. While the articulation of such norms would inevitably be controversial, there is little doubt that, rather than just throwing their hands up, the courts could themselves offer more detailed standards for applying the defense.

The decisions have also been criticized for denying a necessity defense even when compliance with existing legal obligations is beyond the power of ordinary persons.<sup>200</sup> This critique asserts that the law

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<sup>198</sup> Consider the confusion of terms in the following passage: "Now it is admitted that the deliberate killing of this unoffending and unresisting boy was clearly murder, unless the killing can be *justified* by some well recognized *excuse* admitted by the law. It is further admitted that there was in this case no such *excuse*, unless the killing was *justified* by what has been called '*necessity*.' But *the temptation to the act* which existed here was not what the law has ever called necessity." R v. Dudley, (1884) 14 Q.B.D. 273 at 286-87 (Eng.) (emphasis added).

<sup>199</sup> *Id.* at 287.

<sup>200</sup> See, e.g., Dressler, *supra* note 13, at 128-29 ("Moreover, the influence of *D & S* does not end here. It is often seen in the United Kingdom as suggesting or requiring a similar rule when a defendant asserts the defense of duress, and the United States has largely followed the UK's lead in this regard. Put simply, this case has had significant impact on the development of necessity and duress law in the homicide context.").

generally, especially criminal law, is founded on the supposition that persons should only be punished for conduct for which they are responsible. Coleridge himself acknowledged that the men “were subject to terrible temptation, to sufferings which might break down the bodily power of the strongest man, and try the conscience of the best.”<sup>201</sup> Yet, he refused any defense to the murder charge, noting that the law is “often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy.”<sup>202</sup> Critics maintain that the juxtaposition of these two ideas is incoherent; by denying a defense in cases where an ordinary person could not act otherwise, the purpose and function of the law is thwarted because it unfairly punishes those deserving of no blame.

Finally, and perhaps most fundamentally, it is claimed that the decisions are improperly rooted in a controversial deontological ethical position (alleged by Glanville Williams to be rooted in Christian ethics)<sup>203</sup> which erroneously asserts that an innocent person’s right to life is absolute.<sup>204</sup> Proponents of utilitarian schools of philosophy and law openly disavow this premise<sup>205</sup> and maintain instead that, in certain circumstances, it is entirely appropriate for innocent lives to be sacrificed whenever that course of action would result in a greater savings of human life. Williams, for example, proposed his commentary on *Dudley and Stevens*:

But whatever the position may be in Christian ethics, there is another ethical system to be considered, which is frequently thought to have a direct bearing on problems of the criminal law, namely utilitarianism. For the utilitarian, the prime consideration

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<sup>201</sup> *Dudley*, 14 Q.B.D. at 279.

<sup>202</sup> *Id.* at 288.

<sup>203</sup> “Lord Coleridge assumed that the killing was contrary to Christian principles, saying that ‘it is enough in a Christian country to remind ourselves of the Great Example whom we profess to follow.’” Williams, *supra* note 197, at 97. It is somewhat disingenuous, however, for Williams to assert that Coleridge was relying solely on religious convictions. Before mentioning “The Great Example,” Coleridge clearly referred to numerous pre-Christian philosophers recognizing the duty to die. See *Dudley*, 14 Q.B.D. at 287.

<sup>204</sup> Others have argued that an absolute prohibition against taking innocent human life is also traceable to Kant’s Categorical Imperative: “Dudley and Stephens surely violated the Kantian principle that a person should never be used as a means to an end. One can hardly imagine a more obvious example of violation of this principle than killing a person to eat his remains in order to survive.” Dressler, *supra* note 13, at 142.

<sup>205</sup> For discussion of distinct perspectives that might be taken by act and rule utilitarianism, see *id.* at 141-42.

in a situation like that in *Dudley* would be the promotion of human welfare . . . . [T]he situation of the defendants in *Dudley* was . . . one of insecurity for all concerned. What they did was intended to lessen this insecurity and result in a net saving of lives.<sup>206</sup>

Proponents of this view note the obvious inapplicability of Coleridge's appeal to the fact that duty sometimes requires persons to sacrifice themselves for others, referring to times of war and the Great Example.<sup>207</sup> At least in *Dudley and Stephens*, however, this notion is alleged to be a non-sequitur in this context. As Williams observes: "[I]f the defendants before the court had allowed themselves to die of starvation, they would not have died for others; so the argument is irrelevant."<sup>208</sup> In fact, Williams asserts, Coleridge's point might suggest exactly the opposite, namely, that the boy, as the weakest and most likely to die first, had the duty "to bare his breast to the knife in order to provide food for the others . . ."<sup>209</sup>

In short, the lifeboat decisions, despite firmly establishing the rule denying a necessity defense to homicide which has persisted for nearly two hundred years, have not gone unchallenged. The following section explores in more detail the position of the MPC, perhaps the strongest legal authority favoring legal defenses for the killing of innocents. As will become clear in the course of this analysis, many of the above critiques factor into the MPC's development and effort to legitimize these controversial defenses.

## Part II

### A. *Justification and Excuse*

While debate concerning the precise distinction between justification and excuse still arises in internecine criminal theory disputes,<sup>210</sup> there appears to be general agreement on certain basic distinctions. As one scholar notes, "the distinction between justification

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<sup>206</sup> Williams, *supra* note 197, at 97.

<sup>207</sup> *Dudley*, 14 Q.B.D. at 287.

<sup>208</sup> Williams, *supra* note 197, at 95.

<sup>209</sup> *Id.*

<sup>210</sup> The MPC is cautious in attempting to pin down the precise distinction between justification and excuse in all cases. *See, e.g.*, MODEL PENAL CODE art. 3, intro. at 2-3 (1962) ("The Model Code does not . . . attempt to draw a fine line between all those situations in which a defense might more precisely be labelled a justification and all those situation in which a defense might more precisely be labelled an excuse.").

and excuse has become one of the rare subjects on which scholars have reached wide agreement.”<sup>211</sup> The MPC captures the distinction in the following manner:

To say that someone’s conduct is “justified” ordinarily connotes that the conduct is thought to be right, or at least not undesirable; to say that someone’s conduct is “excused” ordinarily connotes that the conduct is thought to be undesirable but that for some reason the actor is not to be blamed for it.<sup>212</sup>

A justification defense, then, exculpates by entirely excepting from criminalization a particular subset of conduct. An excuse defense, on the other hand, while maintaining the objective wrongfulness of some specific conduct, concludes that imposition of punishment is inappropriate due to the particular state of mind or volitional considerations of the actor at the time. Broadly stated, in justification the actor’s conduct is not deserving of punishment because on the facts the conduct is no longer regarded as criminal; in excuse, although the conduct in itself is still considered objectionable, the actor is not regarded as deserving of punishment.

This description of course itself raises significant questions. It is, for example, appropriate to question precisely what principle determines whether conduct will be rendered non-criminal under justification and in what relevant sense an actor ceases to be responsible for his conduct and free from legal liability under excuse.

*B. The Model Penal Code’s “Necessity” Defenses:  
Justification and Duress*

While “necessity” is at times understood to encompass both justification and duress,<sup>213</sup> under the MPC each defense is circumscribed by the distinct requirements laid out in § 3.02 and § 2.09. The concept of necessity is specifically reserved for § 3.02 Justification.

*1. Necessity and Justification: Model Penal Code*

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<sup>211</sup> “[T]he distinction between justification and excuse has become one of the rare subjects on which scholars have reached wide agreement.” Mitchell N. Berman, *Justification and Excuse, Law and Morality*, 53 DUKE L.J. 1, 3 (2003).

<sup>212</sup> MODEL PENAL CODE art. 3, intro. at 3.

<sup>213</sup> “[M]odern courts frequently blur the distinction between duress and necessity or treat the dichotomy as ‘narrow and unreal.’” Joshua Dressler, *Exegesis Of The Law Of Duress: Justifying The Excuse And Searching For Its Proper Limits*, 62 S. CAL. L. REV. 1331, 1347-1348 (1989).

§ 3.02 *Choice of Evils*<sup>214</sup>

While acknowledging at the outset that the necessity defense has a controversial history in common law,<sup>215</sup> MPC § 3.02 “Justification Generally: Choice of Evils” provides:

- (1) Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:
  - (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
  - (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
  - (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

Restated, the “principle of necessity”<sup>216</sup> applies, unless clearly proscribed by statute or legislative intent, when an actor believes that violating the law will prevent a harm, and the harm prevented is greater than the harm that would have resulted if the law had been complied with. Availability of such a defense is asserted by the MPC to be necessary because, “it . . . like the general requirements of culpability, is essential to the rationality and justice of the criminal law . . . .”<sup>217</sup>

*a. Intrinsic Limitations*

Commentary to § 3.02 clarifies that determination of what constitutes the “greater harm or evil” in this context entails application of a balancing of values. And it is the resolution of this balancing that constitutes the rationale for “justification” under the defense. By means of justification, the law recognizes “an interpretation of the law of the offense”<sup>218</sup> and more specifically that “the special situation calls for an exception to the criminal prohibition that the legislature could not reasonably have intended to exclude, given the competing values to be

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<sup>214</sup> Although § 3.02 is not designated an affirmative defense as is § 2.09 Duress, commentators clearly believe it functions as one. *See, e.g.*, Tammy A. Tierney, Comment, *Civil Disobedience as the Lesser Evil*, 59 U. COLO. L. REV. 961, 964 (1988).

<sup>215</sup> “Although the point has not been entirely free from controversy, necessity seems clearly to have standing as a common law defense, such issue as there was related to its definition and extent.” MODEL PENAL CODE § 3.02 cmt. 1 (1985).

<sup>216</sup> *See id.* (“[A] principle of necessity, properly conceived, affords a general justification for conduct that would otherwise constitute an offense.”).

<sup>217</sup> *Id.*

<sup>218</sup> MODEL PENAL CODE § 3.02 cmt. 2.

weighed.”<sup>219</sup>

Neither the MPC provisions nor its commentary, however, define the meaning of “value” or how precisely it is to be balanced. The drafters do, however, offer some illustrations of their intent (e.g., peace officer violating speed limit in order to capture suspect; ambulance violating traffic signal; lost mountain climbers appropriating housing and provisions etc.).<sup>220</sup> The obvious implication in each example is that an actor permissibly violates some legal prohibition in order to protect a value more important than the value sought to be protected by the law violated.

Having stated the defense in these very general terms and without more precise definition, the MPC drafters in turn introduce a series of further limitations in an effort to clarify its parameters. Most relevant for present purposes are the following:

First, the defense applies only if an actor subjectively believes that the conduct is necessary to prevent an evil. If an actor violates a law without intent to avoid some harm, though in fact his conduct does so, the actor is entitled to no defense (e.g., no application of the defense to a pharmacist who dispenses drugs without a prescription unaware that the drug is in fact necessary to save the patient’s life).<sup>221</sup> In addition, the actor must not only believe that violation of the law is “conducive” to averting harm, but that it is *necessary* for doing so: “It is not enough that the actor believes that his behavior possibly may be conducive to ameliorating certain evils; he must believe it is ‘necessary’ to avoid the evils.”<sup>222</sup>

Second, the actor must seek to avert a harm which is “greater” than that “sought to be avoided by the law . . . .”<sup>223</sup> An intent to avoid an “equal or lesser harm will not suffice.”<sup>224</sup> A sea captain, for example, may enter a closed port to save a crewmember’s life; but a life may not be taken in order to avoid financial ruin.<sup>225</sup> When the harm to be avoided is equal to the harm prohibited by the law, the defense is unavailable.<sup>226</sup>

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<sup>219</sup> *Id.*

<sup>220</sup> MODEL PENAL CODE § 3.02 cmt. 1. Other examples include: cargo jettisoned or embargos violated to preserve a ship; alien violating curfew to reach bomb shelter; druggist dispensing medicine without prescription in a health emergency.

<sup>221</sup> MODEL PENAL CODE § 3.02 cmt. 2.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> See MODEL PENAL CODE § 3.02 cmt. 3.

The third and final internal limitation is that the balancing of evils is ultimately allotted not to the subjective evaluation of individuals involved but to a jury or court.<sup>227</sup> While the principle of necessity defense, § 3.02(1), requires that the actor *believe* he is acting to avoid a greater harm, subsection (a) adds the requirement that the conduct must in fact do so, not simply “that the defendant believe it to be so.”<sup>228</sup> (E.g., conduct motivated by the actor’s genuine belief that the life of another person is less valuable than his own financial benefit is not entitled to the defense.)<sup>229</sup>

*b. Extrinsic Limitations*

Following the delineation of these internal qualifications, the MPC commentary considers whether the defense should be unavailable for commission of certain types of conduct, for example homicide or rape. Answering the question in the negative, “[t]he Model Penal Code rejects any limitations on necessity cast in terms of particular evils to be avoided or particular evils to be justified . . .”<sup>230</sup> Instead, the commentary proposes that the defense should be generally available, as it is alleged to be in torts,<sup>231</sup> in all applicable circumstances. While the MPC acknowledges that it may be difficult to foresee circumstances in which a crime of rape, for example, might be justified as avoiding a greater evil, “this is a matter that is safely left to the determination and elaboration of the courts.”<sup>232</sup>

Focusing next upon homicide, the drafters note that it would be “particularly unfortunate” to exclude it from the justification defense.<sup>233</sup> “For, recognizing that the sanctity of life has a supreme place in the hierarchy of values, it is nonetheless true that conduct that results in

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<sup>227</sup> MODEL PENAL CODE § 3.02 cmt. 2. The MPC explicitly leaves unresolved whether this balancing is a question for the court or should be left to a jury.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* Commenting on this condition, Glanville Williams states: “The selection of values cannot be left to the citizen—for, as Bacon observed, ‘extreme self-lovers will set a man’s house on fire, though it were but to roast their eggs.’” See CRIMINAL LAW: THE GENERAL PART § 239 (1961).

<sup>230</sup> MODEL PENAL CODE § 3.02 cmt. 3.

<sup>231</sup> “It is widely accepted in the law of torts and there is even greater need for its acceptance in the law of crime.” *Id.* While the privilege of necessity in tort law has been elaborated in more detail than in criminal law, the MPC provides no authority supporting the implication that it applies to wrongful death or cases of rape.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

taking life may promote the very value sought to be protected by the law of homicide.”<sup>234</sup> In illustration, the commentary proposes the example of a dike being intentionally breached in order to avoid the flooding of a town though causing the deaths of the inhabitants of an inundated farm.<sup>235</sup> A second example involves “a mountaineer, roped to a companion who has fallen over a precipice, who holds on as long as possible but eventually cuts the rope . . . .”<sup>236</sup> The MPC commentary envisions the defense applying here because by cutting the rope the actor avoids the inevitable death of two persons and only accelerates “one death slightly.”<sup>237</sup> In both cases, it is contended that the defense should apply because the purpose of the law of homicide is the preservation of life and such conduct achieves a net savings of life.

The life of every individual must be taken in such a case to be equal value and the numerical preponderance in the lives saved compared to those sacrificed surely should establish legal justification for the act. [. . .] Although the view is not universally held that it is ethically preferable to take one innocent life than to have many lives lost, most persons probably think a net savings of lives is ethically warranted if the choice among lives to be saved is not unfair. Certainly the law should permit such a choice.<sup>238</sup>

### *c. Generality*

Explicitly addressing the objection that the principle of necessity so described lacks any substantive clarification of the relevant values which are to inform its application, the commentary suggests that this omission is in reality a positive aspect of the MPC codification.

First, the definition of a defense need not be as specific as that for offenses; it is better to offer a “defense of uncertain ambit than none at all.”<sup>239</sup> As the defense is applied in a variety of cases, its parameters will become more defined.<sup>240</sup> Second, the absence of greater clarity about the nature of the values at play is desirable precisely in order to avoid inappropriate restriction. Pointing out that the defense entails a

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<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* Subsequent MPC commentary clarifies that the § 3.02 justification would apply whether the choice of evils is caused by “natural physical force” or “human threats of harm.” See MODEL PENAL CODE § 3.02 cmts. 3-4.

<sup>239</sup> MODEL PENAL CODE § 3.02 cmt. 4.

<sup>240</sup> *Id.*

balancing of values and uncertainty not dissimilar to that found in negligence law, the drafters conclude that “submitting such issues to adjudication, as they arise in concrete cases, therefore has much strategic value.”<sup>241</sup> Finally, the drafters assert that even if greater clarity about the applicable values might in the abstract be desirable from a legislative point of view, it would be impossible to reach any consensus in view of disagreement about the nature of values: “Deep disagreements are bound to exist over some moral issues, such as the extent to which values are absolute or relative and how far desirable ends may justify otherwise offensive means. Thus, even when a specific legislative resolution is theoretically possible, it may be quite unattainable in practice.”<sup>242</sup>

*2. Necessity and Excuse: Model Penal Code §  
2.09 Duress*

MPC § 2.09(1) provides in relevant part:

It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist.<sup>243</sup>

*a. Intrinsic Limitations*

The explanatory note to this section observes, similar to discussion of the § 3.02 choice of evils defense, that it also has both a subjective and an objective character. In order to be entitled to the duress defense the actor must, from a subjective point of view, be coerced. Not just any form of coercion, however, suffices. Rather, the actor must be coerced by an unlawful force or threat as judged from the objective perspective of an ordinary person, i.e., it must be a force or threat that a person “of reasonable firmness . . . would have been unable to resist.”<sup>244</sup>

Elaborating the limits of the duress defense, the commentary introduces important qualifications on its operation. In situations involving involuntary conduct due to direct physical compulsion (e.g., where the defendant’s body is moved against his will to cause harm) § 2.09 will always excuse. Where, however, the “involuntary” nature of

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<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> MODEL PENAL CODE § 2.09(1) (1962).

<sup>244</sup> *Id.*

the coercion is psychological, the analysis is more complex.

The commentary rejects outright the notion that *all* acts committed under psychological coercion should be excused even though it acknowledges that any limits placed on the availability of the defense may in reality be ineffectual in deterring those non-excused forms of coerced action, and the actor may in fact be subjectively blameless. To explain this limitation, the commentary notes that, just as in other legal contexts where the law sets down norms that persons may be unable to satisfy due to their idiosyncratic temperament or intelligence (i.e., apart from any “disability that is both gross and verifiable”),<sup>245</sup> making exceptions for all instances of duress or lack of fortitude would be “impracticable” and “impolitic” (though the specific circumstances may be taken into account in sentencing).<sup>246</sup>

In further defense of this limitation, the commentary observes that the denial of the defense in situations where the “reasonable firmness” requirement is not met may actually increase the defense’s effectiveness. If it is known that exculpation is foreclosed, actors facing potentially coercive forces may be more efficaciously motivated to overcome their peculiar deficiencies. On the other hand, if exculpation is a known possibility, actors may not be quite as determined in their resistance.<sup>247</sup> Further, the code recognizes the educational and formative function of the law: “No less important, norms and sanctions operate not only at the moment of climactic choice, but also in the fashioning of values and character.”<sup>248</sup> Being raised in a milieu where conformity of conduct to the rule of law is inculcated and demanded with strict enforcement presumably encourages formation of stronger powers of resistance in face of temptations to violate the law. The same would not be true of a lax legal system fraught with excuses for weakness.

Continuing on this line of argument, however, the drafters caution that the same arguments do not apply if the situation involves coercive forces that would overpower most persons’ powers of resistance: “A different situation is presented if the claimed excuse is based upon the incapacity of men in general to resist the coercive

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<sup>245</sup> MODEL PENAL CODE § 2.09 cmt. 2 (1985).

<sup>246</sup> *Id.*

<sup>247</sup> “It cannot be known what choices might be different if the actor thought he had a chance of exculpation on the ground of his particular disabilities instead of knowing he does not.” *Id.*

<sup>248</sup> *Id.*

pressures to which the individual succumbed.”<sup>249</sup> Denial of a duress defense in this situation would, according to the commentary, violate the conception of law as a set of minimal prescriptive requirements needed for the preservation of ordered society and which therefore presumes the ability of most members to abide by them.<sup>250</sup> To deny a defense in that situation is “divorced from any moral base and is unjust.”<sup>251</sup>

*b. Extrinsic Limitations and Relation to §  
3.02 Choice of Evils Defense*

In discussing other issues connected with the defense,<sup>252</sup> the commentary eventually turns to consideration of whether duress may excuse acts of homicide. The drafters note that the vast majority of jurisdictions expressly exclude homicide from any duress defense,<sup>253</sup> and that duress has in fact never provided a defense to homicide: “[N]o case had been found in which the defendant was held entitled to a duress charge in a murder case.”<sup>254</sup> The commentary also observes that debate about whether duress should provide a defense to homicide has historically met with strong opposition.<sup>255</sup>

Despite this unresolved controversy, the commentary notes that it has in part resolved the theoretical dispute by adoption of the § 3.02 choice of evils defense, including its extension to homicide. In keeping with the broad applicability of § 3.02, a defense would be generally available whenever the choice of evils question is faced in situations involving threats from of nature or “human threats of harm.”<sup>256</sup> Thus, in

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<sup>249</sup> *Id.*

<sup>250</sup> *Id.* (citing Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 414 (1958) (“Obligations of conduct fixed by a fair appraisal of the minimum requirements for the maintenance and fostering of community life will, by hypothesis, be obligations which normal members of the community will be able to comply with, given the necessary awareness of the circumstances of fact calling for compliance.”)).

<sup>251</sup> MODEL PENAL CODE § 2.09 cmt. 2.

<sup>252</sup> The commentary considers issues of nature of the threatened injury required, the immediacy of harm required, and whether reasonable belief is sufficient. MODEL PENAL CODE § 2.09 cmt. 1.

<sup>253</sup> MODEL PENAL CODE § 2.09 cmt. 3.

<sup>254</sup> *Id.* at n.24.

<sup>255</sup> In opposition, commentary cites Stephen’s comment: “Surely it is at the moment when the temptation to crime is strongest that the law should speak most clearly and emphatically to the contrary.” MODEL PENAL CODE § 2.09 cmt. 2 (citing STEPHEN, *supra* note 131, at 108).

<sup>256</sup> See *supra* note 238.

circumstances under which an actor is coerced either by natural conditions or human force and the “choice of evils” analysis is satisfied,<sup>257</sup> a defense to homicide will be available.<sup>258</sup>

Given this extension of § 3.02 to certain instances of duress, the drafters recognize that applicability of § 2.09 standing alone will be restricted to situations where a person is coerced by a force (that no person of reasonable firmness could resist) only when the actor’s conduct is aimed at preventing an evil that is *less than or equal to* that harm which the violated law seeks to avert.<sup>259</sup> Such actions could of course not be exculpated under § 3.02 because that section requires the conduct be directed at averting evil *greater than* that which the law of the offense seeks to prevent.

Further limiting § 2.09, the drafters clarify that it only applies to coercive forces brought to bear by human agency and not natural causes. While a defense in cases of duress arising from natural causes would be available under § 3.02, no defense would be available under § 2.09.<sup>260</sup> Commenting on the seeming incongruity of the distinction, the drafters first suggest that it would be a rare case in which a person of reasonable firmness would be coerced by natural causes but where the choice would not at the same time be a lesser evil.<sup>261</sup> In addition, the commentary notes a difference between cases of duress caused by human agency, in which the law may pursue the “agent of unlawful force,”<sup>262</sup> and cases of

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<sup>257</sup> As explained above, this requires that “actor believed his conduct necessary to avoid an evil to himself or to another and the evil sought to be avoided is greater than that sought to be prevented by the law defining the offense charged.” MODEL PENAL CODE § 2.09 (1962).

<sup>258</sup> “Where the actor is presented with a choice of evils and the other criteria of Section 3.02 are met, that section will thus give him a defense whether the choice is the result of physical forces or the coercion of another person.” MODEL PENAL CODE § 2.09 cmt. 2. Accordingly, MODEL PENAL CODE § 2.09(4) provides: “When the conduct of the actor would otherwise be justifiable under Section 3.02, this Section does not preclude such defense.”

<sup>259</sup> “The problem of Section 2.09, then, reduces to the question of whether there are cases where the actor cannot justify his conduct under Section 3.02, as when his choice involves an equal or greater evil than that threatened, but where he nonetheless should be excused because he was subjected to coercion.” MODEL PENAL CODE § 2.09 cmt. 2.

<sup>260</sup> For examples, see MODEL PENAL CODE § 2.09 cmt. 3 (1985).

<sup>261</sup> *Id.*

<sup>262</sup> The MPC notes that the “typical situation in which the section will be invoked is one in which the actor is told that unless he performs a particular criminal act a threatened harm will occur and he yields to the pressure of the treat, performing the forbidden act.” *Id.*

duress caused by natural necessity, in which, other than the coerced actor, “no one is subject to the law’s application.”<sup>263</sup>

### 3. *The Model Penal Code and the Lifeboat Cases*

Having summarized the § 3.02 justification and § 2.09 duress defenses and highlighted their applicability to the killing of innocents, it is appropriate to consider these defenses in light of the criticisms raised against the lifeboat decisions.<sup>264</sup> In view of those critiques, and in particular that of *Dudley and Stephens* offered by Glanville Williams, a main drafter of the MPC,<sup>265</sup> one might have assumed that hypothetically applying the MPC defenses to those cases would result in acquittals of the protagonists. In fact, good reasons suggest otherwise.

#### *a. Distinction and Applicability of Necessity as Justification and Duress*

Responding to the criticism that both *Holmes* and *Dudley and Stephens* blurred the conceptions of justification and excuse, reexamination of these cases in light of MPC § 3.02 and § 2.09 allows consideration of their distinct impact. While both defenses may sometimes overlap in concrete cases, a distinction between the two is relevant to properly evaluating the choice of evils defense to homicide and for resolving the objection that the defenses were confused in the lifeboat cases. While the MPC suggests that in some instances homicide might be both justified and excused, the conditions for each will sometimes differ.

#### *i) Holmes*

In *Holmes*, a § 3.02 choice of evils analysis first demands consideration of whether the crew believed that their actions were necessary in order to avoid harm to themselves, and whether, objectively considered, the harm they intended to avoid was in fact greater than the harm prohibited by the federal manslaughter statute. Beginning with the second condition first, from an objective, numerical point of view, the action appears to satisfy the avoidance of a greater evil condition: sixteen (16) persons were cast overboard and died in order to save twenty-six (26) others and avoid the death of all forty-two (42)

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<sup>263</sup> *Id.*

<sup>264</sup> See *supra* notes 197-209 and accompanying text.

<sup>265</sup> “The Model Penal Code’s necessity defense displayed the unmistakable influence—if not personal authorship—of Glanville Williams.” Hoffheimer, *supra* note 195, at 222.

passengers.

Upon closer scrutiny, however, flaws arise in this analysis. It is clear, for example, that no evidence in the record suggests that the sacrifice of *all* unaccompanied male passengers was necessary to sufficiently lighten the boat.<sup>266</sup> Rather, that selection criterion appears to have been selected as a pragmatic, albeit overbroad principle. While it may have had the benefit of offering some sense of equity under the circumstances both to the offenders and the victims, i.e., no single male passenger was spared (even those found the next morning when danger had passed), it was patently ill-tailored to the necessity of achieving the lesser evil.<sup>267</sup> The terms of § 3.09(1)(a), however, provide a defense only for the causing of a prohibited evil that is necessary to avoid the greater evil. To the extent, then, that any persons were unnecessarily jettisoned in order to achieve the salvation of the remaining passengers, no justification defense should apply.

This conclusion in turn influences resolution of the first condition of § 3.02 requiring that the actors *believe* their conduct was *necessary* to avoid harm to themselves or others. If from an objective perspective the criterion for ejection was patently overbroad and not appropriately tailored to avoiding the lesser evil, a strong presumption would again arise that the crew could not have subjectively believed their actions were necessary in an appropriate sense.

On this interpretation of the facts of the case, neither the first subjective nor second objective conditions of § 3.02 would be satisfied. Given the evidence that the ejection criterion selected was not necessary to achieve the goal of sufficient lightening of the boat, it is doubtful that the crew believed that ejection of all unaccompanied men was necessary. Accordingly, it would not appear that Holmes should be able to satisfy his burden to show that throwing Askin overboard was justified.

With respect to the availability of a duress defense under § 2.09, little needs to be said. MPC §2.09 is unambiguous that it does not apply in situations where force is brought about by natural causes. Since the force at issue in *Holmes* originates from conditions of the sea, the crew would only have a defense if, contrary to the preceding considerations, the conditions of § 3.02 were satisfied.

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<sup>266</sup> All male passengers travelling alone, whether married or not, were ejected.

<sup>267</sup> The fact that two additional men were thrown over the following morning after all danger was passed confirms that the principle guiding ejection was not necessity.

*ii. Dudley and Stephens*

The § 3.02 choice of evils defense requires first that Dudley and Stephens believed that killing Richard Parker was necessary to avoid harm, and second, that the evil avoided by their conduct was objectively greater than the harm sought to be averted by the English law of murder. Again, applicability of § 3.02 appears uncomplicated. By killing Richard Parker, the death of all four men was avoided and three survived. Saving three lives at the cost of one appears to satisfy the lesser evil requirement.

This facile analysis of the situation, however, arises from an obscuring of the proper issues due to the post-facto awareness that the three men were eventually saved. In reality, however, while a “greater evil” as envisioned by § 3.02 was averted by their conduct, the causal connection between killing and eating Richard and the avoidance of that greater evil was in large part a mere fortuity. This point becomes clear by focusing attention on just what it was the men believed they might achieve by killing Richard. In other words, what effect could they understand themselves to bring about by that conduct?

Clearly the men could not have entertained the belief that killing Richard and eating his flesh would result necessarily in their salvation. As Lord Coleridge pointed out, the men’s actions did not guarantee whatsoever that they would survive. If the men had been picked up later that day or, perhaps more likely, had never been picked up at all, “the killing of the boy would have been an unnecessary and profitless act.”<sup>268</sup> Instead, the men could only have acted under the belief that by killing and eating the boy, their survival chance would *increase*, but not guarantee, their chance of survival. If they did not kill Richard and eat him, they would very likely die; but if they did kill and eat him, they still had at least an uncertain but potential hope of survival.

Good reasons exist, however, for questioning whether this sort of practical belief can satisfy the MPC requirements.<sup>269</sup> Given that §

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<sup>268</sup> R v. Dudley, (1884) 14 Q.B.D. 273 at 279 (Eng.).

<sup>269</sup> Glanville Williams argues in favor of a “wait and see” interpretation of § 3.02. Because the killing of the boy turned out as a factual matter to be necessary to their salvation, “it should not on principle have affected them that they had no reasonable ground at the time for supposing the act to be necessary, or even that they did not suppose it to be necessary.” See WILLIAMS, *supra* note 229, § 237. Given the commentary’s discussion of the belief requirements of § 3.02 and the policy reasons that militate against allowing a “wait and see” approach to the defense, Williams’ argument should be rejected as entirely implausible.

3.02, at least as applied to homicide, represents a self-confessed radical break with the common law tradition, it is reasonable to expect its provisions to be construed narrowly rather than broadly. Thus, when § 3.02(1) requires that an actor believe some contemplated conduct is *necessary* in order to avoid harm, it appears appropriate to understand this as requiring that the actor believe his conduct will, by a likelihood greater than mere possibility, be causally effective in avoiding that harm under the foreseeable circumstances.

Likewise, when § 3.02(1)(a) objectively requires that the evil avoided by violating the law be less than the evil obtained by conforming to the law, one expects a clear causal relation between the violation and the bringing about of the lesser evil; one constituted by mere fortuity is insufficient. Stated succinctly, it is presumed that § 3.02 anticipates a stronger connection than mere luck between the harm he causes in violation of the law and the harm he seeks to avoid. Given § 3.02's break with tradition, § 3.02 cannot be understood to apply where the causal connection between the two is as remote or speculative as in *Dudley and Stephens*.

Turning to the possibility of a duress defense under MPC § 2.09, a result similar to that in *Holmes* results rendering the duress defense inapplicable. Because the force that threatened the men arose from natural causes and not human means, no duress defense would be available under § 2.09.

Instead, the crux of any defense in the lifeboat cases under the MPC hinges on whether the conduct can be justified under § 3.02. Examples provided in the MPC commentary, however, all involve situations where engaging in otherwise unlawful conduct will, with relative certainty, causally eliminate the threatened harms to actors.<sup>270</sup> Given these examples, it is reasonable to assert that § 3.02 requires a strong causal connection between the avoidance of threatened harm and commission of otherwise unlawful conduct. In fact, in most circumstances it is the existence of a close objective causal nexus that would warrant subjective beliefs of the actors about the necessity of their conduct. This conclusion is also supported by the MPC's requirements that the actor must actually intend to avoid a greater evil by conduct rather than that result being fortuitous or merely "conducive" to some end.<sup>271</sup> An attenuated causal relation between conduct violating

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<sup>270</sup> For examples, see *supra* note 220 and accompanying text.

<sup>271</sup> See *supra* notes 221-222 and accompanying text.

the law (here homicide) and a merely potential avoidance of a greater harm is hardly a plausible interpretation of § 3.02.

As described above, in both *Holmes* and *Dudley and Stephens*, no clear evidence establishes a strong causal connection between the perceived threat facing the defendants and the avoidance of evil purportedly necessitating their conduct. Rather, in both lifeboat cases the causal connection is seriously in doubt, and it is at least probable that the men's conduct could not be justified under the MPC.

*b. Duress and Culpability*

The preceding considerations also connect to the historical criticism that by denying a duress defense to the men, American and English courts had unfairly imposed legal burdens with which no ordinary person could comply. This consequence was asserted to be inconsistent with fundamental notions of legal culpability and ultimately to undermine the legitimacy of the criminal law.<sup>272</sup> In response, the MPC provides a limited remedy for this perceived legal injustice in cases of duress under § 2.09. As the considerations above illustrated, § 2.09 would not apply to either lifeboat case because the threats faced in each arose from nature and not human force; thus all sympathetic references to the weakness and inability of the men to resist temptation to homicide in face of their dire circumstances becomes utterly irrelevant under the MPC analysis. Perhaps somewhat surprisingly, then, the MPC would categorically deny a duress excuse defense to the men based on their suffering and trials.

As noted above, MPC § 2.09 defends this distinction between coercion due to human forces versus coercion arising from natural forces because exculpation of the defendant under § 2.09 in the case of human force would only leave another protagonist to answer for the wrong. This resolution of the issue, however, fails to address the specific concern that the MPC highlights in its commentary. There the concern related not to potential societal remedies for wrongful conduct, but rather simply to the wrongfulness of criminally punishing persons of

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<sup>272</sup> Presumably responding to Coleridge's claim that sometime the law lays down burdens that even judges cannot fulfill, the MPC drafters note: "This is to say that the law is ineffective in the deepest sense, indeed that it is hypocritical, if it imposes on the actor who has the misfortune to confront a dilemmatic choice, a standard that his judges are not prepared to affirm that they should and could comply with if their turn to face the problem should arise. . . . [I]t would be . . . debilitating to demand that heroism be the standard of legality." MODEL PENAL CODE § 2.09 cmt. 2 (1985).

reasonable firmness for actions that they could not resist. In the context of the MPC's main argument, it is a non sequitur to deny a duress defense occasioned by natural threats based simply on the absence of a person who can be prosecuted. Noting that the MPC is inconsistent in its demands for legal recourse further corroborates this objection. As described above, § 3.02 justification applies without distinction whether threatened harm arises from nature or human agency.<sup>273</sup> Yet, the commentary provides no insights as to the rationale for this divergence; there is no account for why MPC § 2.09 duress is only available in situations involving human coercion but § 3.02 justification is not limited in this way.

*c. Objectivity and Self-Interest*

In *Holmes and Dudley and Stephens*, the courts were clearly concerned that permitting any defense (under the admittedly blurred notions of justification and duress) would inevitably lead to chaotic results. Defendants would be left to their own subjective interests and abilities to determine when homicide would be justified and when it would be excused by sufficient levels of duress. The MPC addresses both concerns by attempting to introduce objective constraints into both defenses:

Section 2.09 duress incorporates this objective factor by limiting the defense to situations where an individual's inability to resist unlawful conduct conforms to that of "a person of reasonable firmness" rather than some lesser level of fortitude. Although the MPC concedes that such a rule may be unable to deter actors with lesser degrees of fortitude from engaging in unlawful conduct, it proposes that providing such individuals of deficient character with a defense would prove unworkable. In this area of the law, as in others, actors are required to raise the level of their conduct to a minimum level of competence and reasonability, even if from subjective points of view they may be incapable of achieving such results.<sup>274</sup>

Section 3.02 choice of evils analysis requires that the ultimate

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<sup>273</sup> This is true despite the fact that historically justification had also been limited and only applied to *natural* threats: "[u]nder the early common law the harm to be avoided had to be of a natural origin (storm, earthquake, flood) as opposed to a human origin." DAVID C. BRODY ET AL., CRIMINAL LAW 276 (1st ed. 2007).

<sup>274</sup> "The crucial reason is the same as that which elsewhere leads to an unwillingness to vary legal norms with the individual's capacity to meet the standards they prescribe, absent a disability that is both gross and verifiable." MODEL PENAL CODE § 2.09 cmt. 2.

determination of whether the evil avoided justifies the evil caused be left, not to subjective individual evaluation, but to community standards captured in the judicial process by the judge or jury. Thus, a justification defense will be dependent upon correspondence between the subjective balancing of values adopted by the actor and the objective judgment of the legal system.

In elaborating on the “objective” character of each defense, commentaries to both § 2.09<sup>275</sup> and § 3.02<sup>276</sup> suggest that a background analogy can be found in reference to negligence analysis. A determination of reasonability of conduct under the negligence standard, e.g., Restatement (Second) of Torts § 291<sup>277</sup> requires balancing interests of the utility of conduct (favoring permissibility) against the risk of harm created by conduct (favoring impermissibility). In addition, the content of the values or interests informing this balancing (i.e., what in particular constitutes utility and harm) is not determined by subjective individual evaluation, but must be tethered to considerations which would be undertaken by a “reasonable man.”<sup>278</sup>

*i) § 2.09 Duress and Reasonable Firmness*

Elaborating on this negligence-like limitation on § 2.09 duress, the commentary asserts that the denial of a defense to those who lack the required “reasonable” firmness may be useful both because of its potential impact on practical deliberation at the moment of choice as well as its pedagogical or “virtue theory” function over time:

. . . [T]he legal standard may gain in its effectiveness by being unconditional in this respect. It cannot be known what choices might be different if the actor thought he had a chance of exculpation on the ground of his peculiar disabilities instead of knowing that he does not. No less important, legal norms and sanctions operate not only at the moment of climactic choice, but also in the fashioning of values and of character.<sup>279</sup>

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<sup>275</sup> MODEL PENAL CODE § 2.09 cmts. 2-3 (1985).

<sup>276</sup> MODEL PENAL CODE § 3.02 cmt. 4 (1985).

<sup>277</sup> “Where an act is one which a *reasonable* man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.” RESTATEMENT (SECOND) OF TORTS § 291 (1965)

<sup>278</sup> *Id.*

<sup>279</sup> MODEL PENAL CODE § 2.09 cmt. 2.

The MPC commentary thus recognizes a psychological complexity in human choice. At the moment of decision, coercion may be subjectively facilitated by an agent's belief that the conduct to be coerced from him may be exculpated under the law; by the same token, coercion may at times presumably be inhibited when the actor is aware that punishment may be imposed. In addition, the MPC recognizes that training in fortitude, i.e., habituation to resist the things a reasonable person should, is a process of character formation, influenced by community norms, beliefs, and practices.

The MPC, however, goes on to suggest that such arguments do not apply when the claim for duress "is based upon the incapacity of men in general to resist the coercive pressures to which the individual succumbed."<sup>280</sup> In particular, this argument is advanced to support the conclusion that a duress defense is appropriate in circumstances when threat of death or other harm is brought to bear upon a person: "The typical situation in which the section will be invoked is one in which the actor is told that unless he performs a particular criminal act a threatened harm will occur and he yields to the pressure of the threat, performing the forbidden act."<sup>281</sup>

The defect in the MPC's argument on this point, however, is that it simply begs the question by assuming that persons of reasonable firmness are not capable of making such a sacrifice in appropriate circumstances.<sup>282</sup> This assumption is illustrated by Glanville Williams' dismissal of Coleridge's reference in *Dudley and Stephens* to the common duty of self-sacrifice in time of war etc.,<sup>283</sup> asserting that it is inapplicable because "if the defendants . . . had allowed themselves to die of starvation, they would not have died for others; so the argument is irrelevant."<sup>284</sup> Here, however, Williams seems to miss the more general point intended by Coleridge, at least with respect to the duress defense. The examples are brought forward not only to address the existence of an ethical obligation to die *for others*, but more generally as examples of a human capacity to voluntarily lay down one's life for moral commitments and legal obligations, even if others are not saved by such action.

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<sup>280</sup> *Id.*

<sup>281</sup> MODEL PENAL CODE § 2.09 cmt. 3.

<sup>282</sup> "The law serves certain practical purposes, and it is pointless to use it in an attempt to enforce rules that are admitted to be unenforceable." Williams, *supra* note 197, at 98.

<sup>283</sup> See *supra* notes 207-209 and accompanying text.

<sup>284</sup> Williams, *supra* note 197, at 95.

Williams in fact elsewhere openly recognizes the ability of human persons to die rather than kill others in such situations:

One may . . . assert that there are some things so repulsive that a man may say: "Come what may, I will not do it." Although we commonly account death the greatest misfortune, this is not the philosophy on which human beings act in a crisis. Shipwrecked mariners rarely kill and eat their comrades to avert death by starvation, not because of fear of the law but because such an idea is more abhorrent than death itself.<sup>285</sup>

These examples illustrate that sometimes human beings of presumably ordinary, i.e., reasonable and not necessarily heroic, firmness are confronted with circumstances in which the duty and ability to accept death appears to be a shared human experience. Sometimes that duty is experienced in the context of accepting death in order to save others and sometimes as accepting death rather than intentionally killing another innocent person. In such circumstances, rare though they may be, it is at least debatable whether the duty exceeds the ability of a person of reasonable firmness. As the MPC concedes, the question of what persons are able to resist, including persons of reasonable firmness, is influenced both by the availability of an exculpatory defense as well as generally accepted and expected norms of human behavior.

*ii) § 3.02 Choice of Evils and  
Objective Standards*

The suggestion that negligence analysis provides an analogy for operation of the § 3.02 justification defense is likewise understandable. Similar to the negligence reasoning articulated in the Restatement of Torts (Second),<sup>286</sup> MPC § 3.02 requires a balancing of the evil that would be avoided by the conduct violating the law as compared to the otherwise unlawful harm which is caused. The analogy also supports the MPC's position that the balancing test of the necessity defense should be available for all charged crimes in appropriate circumstances with no ex ante exclusions for certain types of conduct. As in negligence, the balance of utility to harm is to be determined on a case-by-case basis, ultimately placing that balancing of values in an organic fact-based judicial process.<sup>287</sup>

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<sup>285</sup> *Id.*

<sup>286</sup> *See supra* note 277.

<sup>287</sup> "The adjudication of negligence requires the same kind of value-judgment as is involved in the doctrine of necessity." *See WILLIAMS, supra* note 229, § 235.

There is, however, at least one decisive respect in which the analogy between choice of evils analysis and negligence balancing is inapt, and which ultimately undermines the MPC position. While it is true in negligence analysis that reasonableness of conduct is generally left to the discretion of a jury applying a type of reasonability balancing test, that test is simply inapplicable in situations where the harm is brought about either purposefully or with substantial certainty, that is, where the harm is “intentional” under the RESTATEMENT’S definition of that term.<sup>288</sup> The MPC, however, clearly envisions that in many, if not most, situations the otherwise legally prohibited harms sought to be justified by the defense would be brought about intentionally.<sup>289</sup> In short, the negligence model of reasoning proposed as the analog for understanding the § 3.02 balancing analysis is itself generally understood to be inapplicable to the entire class of intended harms to which such reasoning by hypothesis would be applied under § 3.02.

It might of course be suggested in response that the differing contexts of the negligence and justification analyses resolve this difficulty. It is clear, for example, that a significant difference exists between the purpose of the negligence analysis to resolve questions of *civil liability*, and that of § 3.02 justification to resolve issues of *criminal defense*. Further, while referring to negligence analysis as a model for the § 3.02 analysis, the MPC nowhere suggests that the two are synonymous. Rather, the MPC commentary proposes only an *analogy* between the two. Thus, substantial differences between the two should not be surprising.

The shortcoming of this response, however, is that while negligence and justification analyses may be distinct in their perspective and context, the way in which they *are* analogous is precisely the sense in which the objections are relevant. Both are proposed as models of reasoning for assessing culpability by means of balancing the utility of conduct against its harm. In view of this similarity, it is not unreasonable to assume that whatever grounds underlie the law’s general refusal to apply a balancing test when evaluating the permissibility of intentionally caused harm in tort law, similar grounds would undermine the assertion that a balancing test should apply to assess permissibility of intentionally caused criminal harms. This is especially true in view of

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<sup>288</sup> See RESTATEMENT (SECOND) OF TORTS § 8A (1965).

<sup>289</sup> See, e.g., *infra* note 290 involving the intentional killing of a mayor to protect townspeople.

the fact that criminal harms are generally considered to be of greater magnitude and concern than tort harms. The MPC, however, offers no account justifying the application of such balancing analysis to intentionally caused criminal harm.

Rather, without argument, § 3.02 collapses into one distinct culpability analyses traditionally applied for differentiating liability for intentional versus unintentional harm. This failure undermines the efforts of the MPC to introduce a workable principle of objectivity into the § 3.02 defense. As considered in the following section, the distinct legal analyses applicable for assessing liability for intentional versus unintentional harms, as reflected in the RESTATEMENT OF TORTS (SECOND), are based on important normative distinctions between these types of harm-causing conduct captured in the law.

*d. Inviolability of Human Life and the  
MPC*

In the lifeboat cases, the courts deny a necessity defense to homicide based on the belief that such a defense would give free reign to acts of intentional homicide motivated by subjective self-interest. The MPC purports to remedy this defect by introducing an “objective” standard for the defense that guards against such idiosyncratic justifications. The balancing of utility versus harm is not to be left to individual determination, but rather to community standards of value brought to bear by judge or jury. This resolution, however, fails to resolve the concern raised by the courts. Under the amorphous notion of value adopted by the MPC, innocent persons would still possess no definitive protection, as is offered by traditional legal theory, against intentional harms to life and bodily integrity.

This point is aptly illustrated by the MPC commentary’s approval of a town’s mayor being justifiably killed by its citizens in order to prevent an enemy invader from killing all the town’s inhabitants.<sup>290</sup> While the provisions of § 3.02 may preclude an innocent person’s life from being weighed against another *individual’s* opposing self-interest, its explicitly does not protect an innocent person’s rights from being weighed against *community* self-interest. H.L.A Hart

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<sup>290</sup> “Suppose . . . the citizens of a town receive a credible threat, say from a foreign invader, that everyone in the town will be killed unless the townspeople themselves kill their mayor, who is hiding. If the townspeople accede, they would have a substantial argument against criminal liability under this section . . . .” MODEL PENAL CODE § 3.02 cmt. 3, n.15 (1985).

describes the problem posed by consequentialist theory:

In the perspective of classical maximising utilitarianism separate individuals are of no intrinsic importance but only important as the points at which fragments of what *is* important, *i.e.* the total aggregate of pleasure or happiness, are located. Individual persons for it are therefore merely the channels or locations where what is of value is to be found. . . . [O]ne individual's happiness or pleasure, however innocent he may be, may be sacrificed to procure a greater happiness or pleasure located in other persons, and such replacements of one person by another are not only allowed but required by unqualified utilitarianism when unrestrained by distinct distributive principles.<sup>291</sup>

Under the MPC analysis, no person, not even an entirely innocent one, has the absolute right, at least in the sense that "rights" have traditionally been conceived, to be free from intentional invasions of bodily integrity and life. Rather, as James Boyle describes the idea, "All that [he has] instead is an entitlement to have some court go through a cost-benefit calculation to determine whether the activity [he is] engaging in is . . . worthy of protection."<sup>292</sup>

These implications of course would not be troublesome or objectionable to the drafters of the MPC, but rather entirely in keeping with the spirit of its provisions. For, in view of the irresolvable disputes that the MPC purports to exist with respect to the values that might inform its balancing test, it explicitly refuses to define these values: "There is room for disagreement on what constitutes an evil, and which of two evils is greater. . . . Deep disagreements are bound to exist over some moral issues, such as the extent to which values are absolute or relative and how far desirable ends may justify otherwise offensive means."<sup>293</sup> Extending this malleable conception of value to the point of justifying the killing of innocents, the MPC specifically states, ". . . [R]ecognizing that the sanctity of life has a supreme place in the hierarchy of values, it is nonetheless true that conduct that results in taking life may promote the very value sought to be protected by the law of homicide."<sup>294</sup>

By permitting the intentional harming and killing of an innocent person under such a balancing test, the MPC does more than simply propose a novel and previously unrecognized legal defense. Instead, it

<sup>291</sup> H.L.A. Hart, *Between Utility and Rights*, 79 COLUM. L. REV. 828, 829-30 (1979).

<sup>292</sup> James Boyle, *The Anatomy of a Torts Class*, 34 AM. U. L. REV. 1003, 1043 (1985).

<sup>293</sup> MODEL PENAL CODE § 3.02 cmt. 4.

<sup>294</sup> *Id.* cmt. 3.

dispenses entirely with traditional structural distinctions for assessing culpability, which distinctions, however, are themselves rooted in fundamental philosophical and ethical assumptions about human action and culpability.

When actors engage in conduct intended to bring about harm to another person, personal responsibility and identification with the causing of that harm absent from situations when harm is merely unintended even if foreseeable is presumed. This observation is corroborated by the fact that such conduct is described precisely in this way, e.g., an act of murder or assault. Such acts are intrinsically intentional. Acts causing harm negligently or accidentally, however, generally occur in the context of conduct intentionally aimed at some other end and the evil is caused as an incidental, if foreseeable, side-effect. In actions intentionally aimed at some harm, it is appropriate to assert that the harm is precisely what the agent was “trying to do;” in cases of alleged negligence, the actor unintentionally causes harm while “trying to do” something else.

Based on such distinctions, when action involves intentional harm to innocent persons, the law is generally unconcerned with the actor’s motivations or the utility of his conduct. In such cases the non-culpable individual’s right to bodily integrity or inviolability is strictly protected from intentional interference whatever the countervailing considerations. Alternatively, causing similar harm unintentionally is not categorically prohibited but requires a separate, more complex analysis. In context of these unintended harms, the “balancing” requires analysis of what the actor was intentionally trying to do and the reasons for it. It also requires consideration, in light of the importance of the actor’s intended purpose, of the foreseeability of that harm and whether alternative means of achieving the actor’s end were available.

MPC § 3.02 is therefore objectionable because, by expressly sanctioning intentional infliction of harm on innocent persons in order to achieve benefits unrelated to the interests of those persons, it is blatantly in conflict with the law’s traditional structural approach to culpability for causing harm. No inherent limitation of the defense exists to restrict the scope of intentional harms to which the defense will apply.

*e. Widespread Rejection of the MPC  
Justification and Duress Defenses*

The preceding critique is corroborated by the virtually universal rejection of the MPC’s § 2.09 duress and § 3.02 choice of evils defenses

in the United States and England. While a few jurisdictions have adopted the MPC's general version of these specific defenses,<sup>295</sup> it appears that *none* have adopted its radical utilitarian justification of homicide under § 3.02 choice of evils<sup>296</sup> or excuse of homicide under § 2.09 duress.<sup>297</sup> Thus, whether one agrees with the hypothetical analyses presented above, suggesting the inapplicability of the MPC defenses to the factual circumstances in *Holmes* and *Dudley and Stephens*, in fact no jurisdiction has permitted a defense to homicide under either duress or necessity, whether under the MPC or general common law principles.<sup>298</sup>

In keeping with the critiques of the reasoning found in the prominent American and English lifeboat cases, the MPC and its proponents have argued that it is unreasonable to demand persons to forfeit their lives when killing would permit a net savings of life or under duress even when there was no net savings of life.<sup>299</sup> Efforts to

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<sup>295</sup> “Almost as unpopular as the MPC’s elimination of felony murder was its modification of the necessity defense. . . . The MPC . . . allowed the defense to apply to a broad, relatively undefined number of ‘harm[s] or evil[s],’ opening the door to myriad scenarios that most courts and legislatures would ultimately reject. . . . [O]nly two of the total thirty-four MPC states adopted its version.” Anders Walker, *The New Common Law: Courts, Culture, and the Localization of the Model Penal Code*, 62 HASTINGS L.J. 1633, 1653 (2011).

<sup>296</sup> “[T]he view (expressed in the commentaries) extending these defenses to prosecution for murder is followed, in the case of necessity, by none of the states.” Vera Bergelson, *Victims and Perpetrators: An Argument for Comparative Liability in Criminal Law*, 8 BUFF. CRIM. L. REV. 385, 418 (2005).

<sup>297</sup> “Few jurisdictions have followed the MPC: duress generally is limited to situations in which an innocent party is coerced into committing a crime against a third party, rather than striking back against the coercer, and the defense cannot be invoked for homicides.” Joan H. Krause, *Distorted Reflections of Battered Women Who Kill: A Response to Professor Dressler*, 4 OHIO ST. J. CRIM. L. 555, 568 (2007).

<sup>298</sup> The law appears to be unwavering in its denial of exculpation for the *intentional* killing of an innocent person, even in order to save one’s own life, regardless of whether the killer seeks to be justified under the defense of necessity or excused under duress. *See, e.g.*, *United States v. LaFleur*, 971 F.2d 200, 206 (9th Cir. 1991) (“We are persuaded that duress is not a valid defense to . . . first degree murder. We believe that, consistent with the common law rule, a defendant should not be excused from taking the life of an innocent third person because of the threat of harm to himself.”); *State v. Tate*, 477 A.2d 462, 465 (N.J. Super. Ct. Law Div. 1984) (“[W]hen deliberate homicide was involved . . . common law courts did not allow necessity as a justification for the criminal act.”).

<sup>299</sup> “Although the view is not universally held that it is ethically preferable to take one innocent life than to have many lives lost, most persons probably think a net savings of lives is ethically warranted if the choice among lives to be saved is not unfair. Certainly the law should permit such a choice.” MODEL PENAL CODE § 3.02 cmt. 3 at 15 (1985).

propose viable defenses to homicide in keeping with that view, however, have been wholly unsuccessful.

### Part III

At the same time, it can be asked whether these MPC defenses fail because of their particular resolution of the issue or because the taking of innocent life is, by general consensus, always and under any circumstances considered wrong. As noted in the introduction to this article, in the context of defending its thesis regarding general agreement about the permissibility of killing innocents when a net savings of life would occur, the MPC directs passing reference to the “principle of double effect.” The MPC first points out that this principle, primarily but not exclusively, asserted in Catholic ethical deliberations, adheres to the absolute prohibition against the taking of innocent human life.<sup>300</sup> Yet, at the same time, the commentary also acknowledges that “[m]any acts [of homicide] justifiable under [§ 3.02], would also be justifiable under the principle of double effect.”<sup>301</sup>

In view of these seemingly inconsistent positions attributed to double effect by the MPC, the commentary leaves unresolved whether double effect ultimately stands in opposition to or agreement with the MPC’s general thesis regarding the taking of life. The concluding section of this article explores this issue in more detail and argues that, despite the MPC’s apparent dismissal, or at best ambivalence, concerning the principle of double effect, the principle constitutes a viable resolution to the dilemma between the common law position rejecting the permissibility in any situation of taking innocent life and the extreme utilitarian position of the MPC position which has been universally rejected.

#### *A. Killing and Taking: the Inviolability of Life*

Glanville Williams, commenting upon *Dudley and Stephens*, observed that the case is a “dramatic illustration of the difference between utilitarian and deontological ethics.”<sup>302</sup> As considered above, the utilitarian MPC analysis justifies killing in violation of law whenever the evil avoided by such conduct is greater than the harm the law seeks to prevent. Opponents of utilitarianism, however, assert that

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<sup>300</sup> MODEL PENAL CODE § 3.02 cmt 3, n.15.

<sup>301</sup> MODEL PENAL CODE § 3.02 cmt 3.

<sup>302</sup> Williams, *supra* note 198, at 94.

such conduct violates perhaps the most basic tenet of morality. As Williams states the objection:

We intuitively know, it is said, that some things are wrong in all circumstances, and one of these is the taking of life. This principle is directly given to us by our moral consciousness. We do not have to consult the statute book or to weigh up the consequences of killing. It is always wrong to kill, period.<sup>303</sup>

In response, however, Williams points out that human life is not in fact generally accorded so absolute a right. In cases of war, self-defense, and capital punishment, society approves the killing of human persons.<sup>304</sup> While utilitarian ethics can easily justify these actions by appeal to their beneficial consequences for the general interests of the community, Williams suggests that, “[i]t is much harder for the deontologist to explain them.”<sup>305</sup>

The deontologist, however, may assert that the absolute moral prohibition relates only to the killing of innocent persons and not those who, as Williams’ describes it, are “wicked.” On such a view, for deontologists, “[t]he limitation is contained in the moral rule, and it does not involve weighing up the consequences of killing.”<sup>306</sup> Responding again, however, Williams points out that society’s approach to warfare is not so neat but often entails killing of children and other innocent persons:

The difficulty with this explanation is that warfare has always involved risk to the innocent; and modern warfare in particular, with its bombing of cities, clearly involves the destruction of innocent children. It may perhaps be justified on a consequentialist view, but certainly cannot be brought under a rule about killing innocent people. To keep to an absolute deontological position on the right to life you have to be an absolute pacifist.<sup>307</sup>

To the extent a deontologist concedes that warfare is permissible, at least in its modern form, Williams believes that the permissibility of killing innocent persons must be conceded on utilitarian grounds, and thus the deontologist’s absolute commitment against taking innocent life is undermined.

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<sup>303</sup> *Id.* at 98.

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

*B. The Principle of Double Effect*<sup>308</sup>

In elaborating possible responses to his position, Williams states: “The deontologists have a reply” adding, “Let the Roman Catholic Church speak for them.”<sup>309</sup> Here Williams explicitly associates principles of Catholic ethics with the deontological views shared by others concerning the value of human life. This identification of Catholic ethical principles with deontological constraints against killing innocents is useful for present purposes because it directly ties Williams’ critique of the “sanctity of life” principle with a coordinate principle of Catholic ethics, i.e., the ‘principle of double effect.’

Double effect proposes that under certain circumstances, it is permissible to unintentionally bring about harmful effects by one’s conduct that would be impermissible if intentionally caused. Double effect is generally applied in situations where the actor intends a particular end or good, but, due to unavoidable circumstances, a concomitant foreseeable harm also results.

The necessary circumstances for application of the principle are typically summarized by four conditions:

1. The conduct causing the intended good effect of action must otherwise be unobjectionable (i.e., prior to assessment under [double effect]).
2. The intended good cannot be caused by the unintended evil effect.
3. The intended good effect must reasonably justify the causing of the unintended evil effect, and
4. The evil effect must not *in fact* be intended by the agent as a means or an end by the agent.<sup>310</sup>

Each of these conditions is designed to ensure that any intended good sought by the actor’s conduct does not occur instrumentally as a result of an evil effect (considered either from the objective chain of physical causality or from the perspective of the subjective volitional psychology of the actor). Simply stated, the good effect cannot be caused by the evil effect and the actor cannot intend the evil effect as a

<sup>308</sup> The following section draws heavily upon two prior articles of the author dealing with the principle of double effect and its operation in law. See Lyons, *supra* note 8.

<sup>309</sup> Williams, *supra* note 198, at 98.

<sup>310</sup> See generally Joseph T. Mangan, *An Historical Analysis of the Principle of Double Effect*, 10 THEOLOGICAL STUD. 41, 42-43 (1949) (citing numerous formulations of double effect).

means to the good effect.

A standard illustration of the principle of double effect contrasts strategic or tactical bombing with terror bombing:

Munitions factories are often located in or near civilian populations. An act of bombing a munitions factory, then, often has two effects, the destruction of the munitions factory and the destruction of innocent human life. In the case of the strategic bomber (SB), the bomber undertakes the destruction of a munitions factory even though it is clear that innocent civilians will be killed in the process. In the case of terror bombing (TB), the bomber *seeks* to kill civilians so as to bring war to an early end. Both SB and TB know that they will kill civilians, and both undertake this mission in order to bring war to a speedy end. However, SB is said solely to foresee the deaths of the civilians, while TB intends the deaths of the civilians.<sup>311</sup>

From a “physical” analysis of the different acts there is little if any difference; the killing of innocent civilians may occur in precisely the same causal manner in both instances. Analogous to the impossibility at times of distinguishing cases of self-defense from murder solely by analysis of a physical description of the act of killing itself, the distinction must be found based on a consideration of the agent’s intentions and the circumstances of the actions. Here, the difference between the two is found in the distinct manner in which the agents involved are cognitively and volitionally disposed toward the death of “innocent civilians” in each instance, i.e., the function that the killing of innocents plays in their practical plans and motivations of action.

Under double effect reasoning,<sup>312</sup> strategic or tactical bombing may at times be ethically permissible while terror bombing cannot ever be permissible. Various means may exist by which actors may seek to prevail in a military conflict. In terror bombing, those involved choose killing civilians as the specific means of achieving victory. For them, killing civilians is thus an intended goal, even if an intermediate one, of their conduct; “it is an integral—not incidental—part of the agent’s volitional plan to attain his end. The terror bomber *tries* to kill civilians in order to achieve victory and thus in a real, positive sense *wants* that

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<sup>311</sup> Christopher Kaczor, *Distinguishing Intention from Foresight: What Is Included in a Means to an End?*, 41 INT’L PHIL. Q. 77, 78-79 (2001).

<sup>312</sup> See, e.g., Thomas A. Cavanaugh, *Aquinas’s Account of Double Effect*, 61 THOMIST 107, 107 (1997).

effect to come about.”<sup>313</sup> If by some fortuity civilians were not killed, the bombing mission would be judged a failure and presumably need to be repeated. In tactical bombing, however, the actor’s intent is, by hypothesis, solely to destroy the munitions facility, and the foreseeable consequence of the killing of innocent civilians plays no integral role but is only incidental to his intentions. “The deaths of civilians are perceived as a tragic but unavoidable side effect of the means chosen to achieve victory.”<sup>314</sup> If by happenstance the civilian harm does not occur, the mission would be successful, and the actor relieved at the reduction in unintended collateral damage.

A second example of operation of the principle of double effect, in a legal context, is found in *Vacco v. Quill*, the U.S. Supreme Court’s physician-assisted suicide (“PAS”) case.<sup>315</sup> In *Quill*, terminally ill patients and their physicians brought an action against New York State arguing that state law criminalizing assisted suicide, as applied to these patients and their doctors, constituted a federal Equal Protection violation. The plaintiff-patients alleged that they were being treated differently from other terminally ill, and thus similarly situated, persons in New York. With the help of their physicians, these other terminally ill patients could obtain medical treatment causing death as a foreseeable consequence, to wit, voluntary removal from life support and provision of palliative care. Contending that PAS was “essentially the same thing” as those permissible medical treatments, plaintiffs claimed that the differing treatment was irrational and violated their federal constitutional rights.<sup>316</sup>

The Supreme Court, however, rejected this contention. The Court observed that the difference between the approved medical treatments and PAS and was simply an application of a familiar legal distinction:

The distinction comports with fundamental legal principles of causation and intent . . . .

. . .

The law has long used actors’ intent or purpose to distinguish between two acts that may have the same result. . . . Put differently, the law distinguishes actions taken “because of” a

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<sup>313</sup> See Lyons, *In Incognito*, *supra* note 8, at 484.

<sup>314</sup> *Id.*

<sup>315</sup> *Vacco v. Quill*, 521 U.S. 793 (1997).

<sup>316</sup> See *id.* at 796-98.

given end from actions taken “in spite of” their unintended but foreseen consequences.<sup>317</sup>

The Court explained that a choice of PAS is made precisely *because of* its effect of bringing about the patient’s death: “A doctor who assists a suicide . . . ‘must, necessarily and indubitably, intend primarily that the patient be made dead.’”<sup>318</sup> The permissible medical treatments, however, entail no similar intent but may be chosen for other purposes *in spite of* their foreseen effect of causing the patient’s death: “[P]atients who refuse life sustaining treatment ‘may not harbor a specific intent to die and may instead ‘fervently wish to live, but to do so free of unwanted medical technology, surgery, or drugs’”<sup>319</sup> and “[j]ust as a State may . . . permit . . . patients to refuse unwanted lifesaving treatment, it may permit palliative care related to that refusal, which may have *the foreseen but unintended ‘double effect’* of hastening the patient’s death.”<sup>320</sup> Based on this distinction between the intentions of the agents in the two cases, the Supreme Court found that a rational basis supported the distinction under New York law between PAS and the permissible medical treatments. Accordingly, it held that the different treatment of terminally ill patients did not constitute an equal protection violation.

In *Quill*, as widely acknowledged by commentators,<sup>321</sup> the Supreme Court explicitly applied the principle of double effect to justify New York State’s prohibition of PAS, in contrast to permissible medical procedures which do not necessarily entail an intention to kill even though sometimes death is a foreseen side effect.<sup>322</sup>

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<sup>317</sup> *Id.* at 801-03 (citations omitted) (quoting *Pers. Adm’r v. Feeney*, 442 U.S. 256, 279 (1979)). Note the similarity of this language with the operation of double effect: “[T]he foreseen consequences of one’s bringing about an intended state of affairs are often considered in deliberating, but not as reasons *for* the action—rather, they are sometimes conditions *in spite of which* one acts. It is not for the sake of such conditions that one selects an option; it is not these effects to which one is committed in acting.” Joseph M. Boyle, Jr., *Toward Understanding the Principle of Double Effect*, in *THE DOCTRINE OF DOUBLE EFFECT: PHILOSOPHERS DEBATE A CONTROVERSIAL MORAL PRINCIPLE* 7, 15 (P. A. Woodward ed., 2001).

<sup>318</sup> *Quill*, 521 U.S. at 802 (quoting *Assisted Suicide in the United States*, *Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong. 367 (1996) (prepared statement of Dr. Leon R. Kass, M.D., Addie Clark Harding Professor, The College and Committee on Social Thought, University of Chicago)).

<sup>319</sup> *Id.* (quoting with approval *In re Conroy*, 486 A.2d 1209, 1224 (N.J. 1985)).

<sup>320</sup> *Id.* at 807 n.11 (emphasis added).

<sup>321</sup> See Lyons, *In Incognito*, *supra* note 8, at 476 n.30.

<sup>322</sup> For a more detailed treatment of principle of double effect see T.A. CAVANAUGH,

### C. Criticisms of the Double Effect

The doctrine of double effect is certainly not immune from debate and controversy; for purposes of the present argument two challenges are particularly relevant.

#### 1. Intention and Foreseeability

One objection to double effect arises mainly in legal contexts and asserts that the distinction it makes between an 'intention' versus a 'foreseen effect' is simply untenable. In the law, the objection runs, intending a result and foreseeing it with substantial certainty are the same thing; thus, any attempt to distinguish between them is misguided and fails to appreciate the nature of intentions.

An example of such criticism is raised, again by Glanville Williams, precisely in response to earlier arguments in England which distinguished between PAS and medical treatments that knowingly bring about death. Williams asserted there is no difference between intending a result and knowing that that result will follow one's conduct even if it is undesirable:

What is true of morals is true of the law. There is no legal difference between desiring or intending a consequence as following from your conduct, and persisting in your conduct with a knowledge that the consequence will inevitably follow from it, though not desiring that consequence. When a result is foreseen as certain, it is the same as if it were desired or intended.<sup>323</sup>

While a full critique of this contention is beyond the scope of this present article,<sup>324</sup> it is clear that the Supreme Court in *Quill* patently rejected Williams' identification of intent and knowledge, going so far as to assert that the "distinction comports with fundamental legal principles of causation and intent."<sup>325</sup> In truth, while there clearly are legal contexts in which the law does treat intent the same as knowledge or substantial certainty,<sup>326</sup> there are numerous legal contexts, such as in

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DOING GOOD AND AVOIDING EVIL (2006).

<sup>323</sup> GLANVILLE WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* 286 (1958).

<sup>324</sup> See Lyons, *In Incognito*, *supra* note 9, at 508-515.

<sup>325</sup> *Quill*, 521 U.S. at 801-803.

<sup>326</sup> See, e.g., RESTATEMENT (SECOND) OF TORTS § 8A (1965): "The word 'intent' is used . . . to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it."

Careful reading of the Restatement (Second) commentary, however, openly admits that

*Quill* itself, in which the distinction between intent and knowledge is not only made, but also required as a matter of law.<sup>327</sup>

## 2. *Permissible Causing of Means and Ends*

A second objection to double effect is philosophical in nature. This objection begins by conceding that evil should never be the end of any actor's conduct. As with most deontological positions, however, the doctrine of double effect carries with it the additional prohibition against causing evil as a *means* to permissible ends. As seen in the examples above, it is the precisely the suggestion that evil is being chosen *as a means* that is at the crux of each controversy. In both terror bombing and PAS, the intentional causing of death as a means to achieving otherwise permissible ends (i.e., respectively, victory in war and relief from suffering) constitutes the objectionable aspect of the conduct.

Skeptics of double effect, however, challenge the assumption that because willing an evil end is wrong, then willing evil as a means should also always be regarded as wrong. In defense of this argument, proponents contend that when evil is caused as a means for the sake of some good end, then the agent's attitude with respect to the harm caused may in fact be indistinguishable from the regret experienced by an adherent of double effect who is willing to accept the same harm but only as a side effect.<sup>328</sup> Thus, this suggests that willing evil as a means is

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this definition is a fiction: "If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law *as if* he had in fact desired to produce the result. § 8A cmt. B (emphasis added). While good practical reasons (of evidentiary and pragmatic nature) sometimes exist for treating effects that follow conduct with substantial certainty as establishing intent, the Restatement (Second) clearly recognizes that such effects are not in reality intended. *See also* Lyons, *In Incognito*, *supra* note 8, at 514 and following.

<sup>327</sup> In *Quill*, the Court discusses *Personnel Administrator v. Feeney*, 442 U.S. 256, 279 (1979), in support of a distinction between knowledge and intent. In *Feeney*, proof of constitutional discrimination required a showing of intent as purpose, and a showing of a "knowing" discriminatory effect was insufficient. *See infra* at notes 369 and 372 for the distinct MPC definitions of "purposely" and "knowingly" both encompassed by the tort definition of intent. *See also* Lyons, *In Incognito*, *supra* note 8, at 528-542 (discussion of other legal examples of the distinction).

<sup>328</sup> "To intend harm only as a means to some good end is compatible with feelings of regret, reluctance, and, in short, a range of attitudes that would also be present in cases in which harmful side effects are present. Opponents of [double effect] typically argue that a properly regretful agent with a clear-sighted grasp of just why she was causing a particular harm as a means to a good end would be able to acquit herself of the particular moral charge of manifesting a bad attitude or, more precisely, a worse attitude than what would be manifested if the harm were brought about as a side effect and so

morally distinct from willing it as an end, and double effect thus errs by assuming that causing harm as a means is always wrong.<sup>329</sup> The objection concludes that, given a good reason for acting, and given the agent's proper regret over the harm caused as a means to the good effect, such action should be considered just as permissible as causing the evil as an incidental side effect under double effect.

An adequate response to this objection requires consideration of a number of principles that underlie double effect. As operative within a deontological framework, double effect is premised on the view that certain types of human action are always wrong, apart from their circumstances or consequences. More specifically, this is often tied to a distinction between two distinct classes of goods that can specify human acts.<sup>330</sup> The first class of goods includes basic objects such as life and physical or psychological integrity.<sup>331</sup> Deontologists argue that humans inherently consider these basic goods as desirable and fulfilling. The second class of goods, however, is seen as desirable only insofar as they are instrumental to obtaining these more basic goods.<sup>332</sup>

In typical cases of human action, people choose in ways that relate either to these basic human goods or needs, or choose objects that instrumentally promote or protect the possession of basic goods. The execution of such choices is usually unproblematic and poses no special psychic conflict or dilemma for an agent. Given the contingent and complex state of the world, however, intentional pursuit of basic human goods is not always so unproblematic. At times, pursuit of basic goods risks, with differing degrees of foreseeability, causing harm to instrumental goods or even, at times, to other instances of basic goods themselves. The lifeboat cases considered in this article represent clear examples of the serious challenges to moral psychology and human choice that such circumstances can present.

In view of the relation between basic and instrumental goods and the role they play in choice, however, various normative orderings of

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merely foreseen." Alison McIntyre, *Doing Away with Double Effect*, 111 *ETHICS* 219, 227 (2001).

<sup>329</sup> "If proponents of double effect assert that 'instrumental intending [i.e., intending an evil as a means] shares all of the objectionable characteristics of aiming at harm as an end, then skeptics about DE may well accuse [its proponents] of simply begging the question.'" *Id.*

<sup>330</sup> For further discussion of basic goods versus instrumental goods see Lyons, *Balancing Acts*, *supra* note 8, at 485-86.

<sup>331</sup> *Id.*

<sup>332</sup> *Id.*

choice are suggested. When choosing goods that are only instrumental for attaining basic goods, it is unreasonable to engage in conduct that foreseeably risks significant harm to intrinsic basic goods. "Because instrumental goods are by their very character directed at human existence in its various basic requirements as an end, it is reasonable . . . that pursuit of such goods be constrained by the purpose for which they are sought."<sup>333</sup> This restriction on the pursuit of instrumental goods preserves the appropriate relation between instrumental and basic goods. Similarly, by inverse reasoning, insofar as instrumental goods are subordinated to basic goods as their end, their intentional or unintentional sacrifice is unproblematic if the conduct is intended to protect or procure a threatened basic good.

The same is not true, however, when action directed at protecting a basic good (in oneself or another) would involve destruction or harm to other instances of basic good (in oneself or another). In such cases, the basic good threatened, from the perspective of practical reason, cannot be logically subordinated to the intended basic good in the same straightforward way as an instrumental good can be.<sup>334</sup> In such situations psychological dilemmas arise for agents precisely because they are able to appreciate the incommensurability of the basic goods at stake. In such circumstances, to treat an instance of a basic good as if it were merely instrumental violates the very cognitive/affective structure of practical reason, and as such, is experienced as unreasonable, i.e., wrong or culpable, by the agent.<sup>335</sup>

It is precisely in this context that the principle of double effect comes into play. While the intentional choice to destroy one instance of

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<sup>333</sup> *Id.* at 486.

<sup>334</sup> "When . . . a strategic bomber destroys a military installation with foreseeable risk of injury or death to civilians, the value of the lives protected by the bomber at home is not ethically superior to the value of those non-combatant lives in the enemy country. Rather both the good intended (preservation of lives of family and friends at home) and the foreseeable harm (death of non-combatants) are instances of goods that are ultimately irreducible to one another on a utilitarian scale. Each life functions as an end in itself, and resolution of a conflict of values in such a situation cannot be achieved by application of a mathematical formula. . . . Each life, as an intrinsic good, functions as an irreducible, incommensurable object and thus, in that very irreducibility, is 'proportionate' to any other instance of fundamental human value." *Id.* at 487.

<sup>335</sup> As John Finnis remarks, "[t]o choose an act which in itself simply . . . damages a basic good is thereby to engage oneself . . . in an act of opposition to an incommensurable value . . . which one treats as if it were an object of measurable worth that could be outweighed by commensurable objects of greater (or cumulatively greater) worth." JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 120 (1980).

a basic good to preserve another directly violates these characteristic norms of practical reason, the same is not true of choices that indirectly or incidentally harm basic goods. Rather than prohibiting the causing of any harm whatsoever to basic goods in such circumstances, which may in fact be impossible, double effect proposes that an intentional choice to preserve one instance of a basic good can sometimes justify unintentional, i.e., non-purposeful, causing of harm to other instances of basic goods in oneself or others.<sup>336</sup> In no circumstances, however, can a basic good be intentionally destroyed as a means to protect or elicit another instance of a basic good.

The rationale for this distinction is further grounded in differing implications of responsibility that accrue to intentional acts versus actions bringing about effects unintentionally. Agents are held responsible in the fullest sense only for purposeful, deliberate conduct, i.e., intentional conduct in the strict sense:

[W]hen acting intentionally . . . a person causes possible states of affairs to come about *because*—and this is the crucial factor—the actor affirmatively wants and chooses those specific, cognitively grasped states to be made real. In choosing to engage in certain types of conduct or produce particular effects because of one’s beliefs and desires—an intention—an actor is psychologically connected in a unique causal mode with the very realities he or she “creates.” By such conduct, the actor identifies and participates in the very value of the objects intended. In short, attribution of personal responsibility is nothing more than recognition of the actor’s causal identification with the objects of intention—the awareness that, by intentionally causing effects, agents *reflexively* express and establish their own ethical character.<sup>337</sup>

The reflexive function played in choice by effects that are not intended (i.e., not positively desired as the object of the agent’s ‘trying’) but merely foreseen or foreseeable is entirely different:

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<sup>336</sup> Assuming satisfaction of double effect’s other conditions as well.

<sup>337</sup> Lyons, *In Incognito*, *supra* note 8, at 497; *see, e.g.*, CARLOS J. MOYA, *THE PHILOSOPHY OF ACTION* 168-69 (1990) (“Our account of human intentional action includes the subjective point of view of a reflective agent. The ability to commit oneself to act goes hand in hand with the ability to make one’s own desires and other sorts of reasons objects of reflection and evaluation. This reflective capacity allows human agents to place their own desires and urges at a distance and to judge them worth pursuing or not . . . . This is one sense in which agents can be said to be the source of their own actions, independently of the past history of the world.”).

The term “foreseen” denotes precisely the limited role that such awareness plays in the consciousness of the actor. “To foresee” bespeaks a purely cognitive grasp of some possible state of affairs without any corresponding appetitive inclination. “Foreseen effects” are identified as such precisely because they provide no focal point for an actor’s volitions or desires. . . . Whether one chooses to call foreseen consequences mere “side effects,” “unintended effects,” or, as some do, “obliquely inten[ded]” or “indirectly inten[ded]” makes no distinction in reality. Their import is the same: a fundamental distinction exists between choosing objects of practical reason and desire in their own right and bringing about effects that are not desired by the actor in their own right but are merely foreseen to result from the pursuit of intended objects.<sup>338</sup>

In situations where choice is necessary in order to protect a basic good but where it also involves unavoidable risks to other instances of basic goods, the imposition of *unintended* harms on basic goods can sometimes be considered permissible, i.e., not unfair or unreasonable, based on the view that causing unintended harm does not carry the same culpability implications of intentionally causing harm.

Of course, it is still quite true that that an actor does not elude all responsibility for consequences of action merely because those effects may be unintended. As John Finnis observes, “One may well be culpable in accepting [such foreseen effects]. But the ground of culpability will not be that one intended them, but that one wrongly—unfairly—accepted them as incidents of what one did intend.”<sup>339</sup> In order to capture this condition, double effect recognizes that permissible choices that cause harm to basic goods are subject to additional restrictions beyond the necessary but not sufficient condition that the harm be unintended: “The importance of the intended good effect must reasonably justify the causing of the unintended evil effect.”<sup>340</sup>

The difficulty, of course, with this condition is that it threatens to surreptitiously introduce a utilitarian analysis into the principle of double effect and thus undermine its deontological claim. Considering the importance of this issue, some attention must be given to articulating

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<sup>338</sup> Lyons, *In Incognito*, *supra* note 8, at 497-98 (citing Michael E. Bratman, *Intention*, in THE CAMBRIDGE DICTIONARY OF PHILOSOPHY, *supra* note 12, at 381); cf. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 86 (J.H. Burns & H.L.A. Hart eds., Clarendon Press 1970) (1789).

<sup>339</sup> John Finnis, *Intention in Tort Law*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 229, 244 (David G. Owen ed., 1995).

<sup>340</sup> See *supra* Part III.B.

the sense of the balancing envisioned by double effect.

One obvious implication of this condition is that it requires that any harm caused as a side effect in pursuit of an intended good be reasonably restrained in light of that good. Similar to some legal defenses, double effect would not be satisfied if the actor's conduct included excessive or unnecessary harm in pursuit of legitimate intended ends. Similarly, the principle of double effect would arguably be inapplicable when the actor himself wrongly created the very situation calling for its application.

More complex limitations implied by this condition are suggested by further consideration of the strategic terror bombing scenarios. It is obvious, for example, that not every instance of strategic bombing with concomitant killing of civilians can be justified. The specific importance of any military objective would have to be carefully scrutinized in order to determine whether the importance of the mission was reasonable in light of the unintended injury to civilians that would still foreseeably occur even after all reasonable remedial efforts to reduce collateral harm were implemented. The analysis called for here, however, does not admit of any formulaic utilitarian resolution.

This point is perhaps best understood in light of the critique offered above of the MPC's analogy between § 3.02 and traditional negligence analysis. As argued above, that analogy is untenable because the MPC balancing test includes within its scope intentional harming, even homicide, of innocent individuals.<sup>341</sup> As noted, however, negligence analysis applies to assess the reasonability of actions only when the harm is unintentional.

In relation to the principle of double effect, however, the analogy to negligence analysis is entirely appropriate.<sup>342</sup> The balancing suggested by double effect requires consideration of the burden imposed upon an actor to avoid some unintended harm (i.e. the loss of the intended good) as well as the harm that would be caused unintentionally

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<sup>341</sup> The Restatement (Second) of Torts itself expressly rejects the subjection of certain interests to the balancing test. RESTATEMENT (SECOND) OF TORTS § 1 cmt. b (1965) (“‘Interest’ as distinguished from ‘right’. In so far as an ‘interest,’ as defined in this Section, is protected against any form of invasion, the interest becomes the subject matter of a ‘right’ that either all the world or certain persons or classes of its inhabitants shall refrain from the conduct against which the interest is protected, or shall do such things as are required for its protection.”).

<sup>342</sup> For more detailed argument rejecting the economic interpretation of the Hand formula and addressing the analogy of it to double effect see Lyons, *Balancing Acts*, *supra* note 8, at 474-89, 498-500.

if the agent does not avoid it. The resolution of this balancing test, assuming one rejects utilitarian deconstructions of negligence law,<sup>343</sup> need not be understood as predominantly consequentialist in nature.<sup>344</sup> As Judge Learned Hand himself explained, his negligence “formula”  $B < PL$  was not to be understood as an actual utilitarian calculus but rather as a convenient rubric encapsulating the inevitable process of balancing incommensurables under prudential standards of reasonability.<sup>345</sup>

In *Conway v. O’Brien*, Hand observed:

The degree of care demanded of a person by an occasion is the resultant of three factors: the likelihood that his conduct will injure others, taken with the seriousness of the injury if it happens, and balanced against the interest which he must sacrifice to avoid the risk. All these are practically not susceptible of any quantitative estimate, and the second two are generally not so, even theoretically. For this reason a solution always involves some preference, or choice between incommensurables . . . .<sup>346</sup>

Along a similar line of reasoning, whatever the nature of balancing called for by double effect reasoning, there is no need to interpret it as utilitarian. As one scholar comments, “ordinary usage also permits a more general sense of the words ‘weigh’ and ‘balance’ to mean simply that rational actors may take account of numerous factors in their practical reasoning with regard to a particular issue. . . . There is nothing intrinsically utilitarian or consequentialist in practical

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<sup>343</sup> For example, see the critique of Posner’s law and economics theory by Finnis, *supra* note 339, at 233-35.

<sup>344</sup> “[A] thoroughgoing economic interpretation of negligence repudiates fundamental premises and nuances of fault-based legal systems by destroying the distinct import of differing relations between mental states and consequences of conduct. . . . By collapsing these distinctions, economic theory dispenses with rudimentary notions of culpability. Further, such a view unjustifiably dismisses other human values protected by the law (not to mention common sense) and implausibly reduces culpability determinations to questions of mere pecuniary value. It is difficult to understand how any theory that undermines such basic presuppositions of the law could plausibly make the claim to capture its ‘pattern.’” Lyons, *Balancing Acts*, *supra* note 8, at 474.

<sup>345</sup> Hand later reiterates his view: “[T]he kernel of the matter . . . is this choice between what will be gained and what will be lost. The difficulty here does not come from ignorance, but from the absence of any standard, for values are incommensurable.” Learned Hand, *The Contribution of an Independent Judiciary to Civilization* (Nov. 21, 1942), in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 161 (Irving Dillard ed., 3d ed. 1960).

<sup>346</sup> *Conway v. O’Brien*, 111 F.2d 611, 612 (2d Cir. 1940).

reasoning.”<sup>347</sup>

In sum, double effect’s response to the contention that it begs the question and improperly confuses willing evil as a means with willing evil as an end is threefold:

First, intending objects either as ends or means implies distinct psychic commitments of the agent to bring those states of affairs into reality. While an agent causing evil as a means may regret the harm caused, it is not true that such an agent stands on a similar footing as the person unwilling to cause such a result as a means, but merely as a side effect. While the agent choosing evil as a means may act *regretfully*, that evil must still be positively willed and brought about as an intended instrumental means in itself, i.e., as an intermediate goal of the agent, and thus shares to some extent the nature of an end.<sup>348</sup> The agent at some level chooses, however reluctantly, precisely to make that evil an affirmative, if only instrumental, part of his integral plan of practical reason. In the case of terror bombing, for example, “[t]he necessity of engaging in specific means deliberation concerning the killing of innocent civilians patently illustrates that, in such a case, the actor must indeed become fixed in both thought and desire on killing civilians in a way that the strategic bomber does not.”<sup>349</sup> Whatever his emotional stance may be, the terror bomber is volitionally interested in the deaths of innocents, and would experience the absence of their deaths as a failure and frustration of his practical goals. Nothing similar can be said of the tactical bomber causing harm merely as an undesired side-effect.

Second, while willing evil as a means may indeed be less culpable than willing similar harm as an ultimate end, the argument proves too much. Most evil is eventually traceable to final ends of agents that are presumably at some level of universality unobjectionable, e.g., if nothing else, for happiness in general. To excuse a chosen evil

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<sup>347</sup> Steven Hetcher, *Non-Utilitarian Negligence Norms and the Reasonable Person Standard*, 54 VAND. L. REV. 863, 882 (2001).

<sup>348</sup> As Aquinas observed, “Intention refers to an end as a terminus of the motion of the will. In motions, however, ‘terminus’ can be understood in two ways: in one way, as the ultimate terminus, in which the will is satisfied, the end of its entire motion; in another way, terminus can be understood as a midpoint, which constitutes the beginning of one part of the motion, and the end or terminus of another. Just as in that motion by which one moves from A to C by means of B, C is a final terminus, but B also is a terminus, but not a final one. And therefore there can be an intention of either.” THOMAS AQUINAS, *SUMMA THEOLOGIAE I-II*, question 12, art. 2 (Benzinger Bros. 1948) (author’s translation).

<sup>349</sup> Lyons, *In Incognito*, *supra* note 8, at 502.

means simply because it is in some way conducive to other good ends and not willed as an ultimate object of choice would implausibly legitimize countless forms of egregious harm.

Third, asserting that a fundamental distinction exists between causing evil as a side effect and causing it as a means does not imply that all unintended causing of harm is justified. Contingent circumstances require evaluation of all the circumstances, interests, duties, and alternatives facing the agent. Similar to the balancing test of negligence, the resolution of conflicts of value arising under double effect requires prudent considerations comparing the good of the intended objects of action against all foreseeable (and foreseen) harm.

The principle of double effect therefore is not free standing. It's plausibility is constituted by the interrelation between two presuppositions about human action: first, that a substantive difference exists between possible objects of human will including both basic goods (which human persons experience as inherently desirable) and secondary goods (which are instrumental to basic goods); and second, that differing culpability implications arise out of the distinct modes in which those objects can be willed, i.e., either intentionally or as mere side effects of choice.

Emerging from the interplay between these distinctions, double effect applies in situations where, due to the complexity of human affairs, preservation of some instantiations of basic goods are possible only at the cost of unavoidable harm to other instantiations of basic goods. While double effect affirms the fundamental orientation of the will to basic good, and thus absolutely prohibits purposeful or intentional destruction of such goods, it permits unintentional harming of instances of basic good in circumscribed circumstances.

#### *D. The Absolute Moral Norm against Taking Innocent Human Life*

Having completed this review of the principle of double effect, it is possible to respond to Glanville Williams' assertion that "[t]o keep an absolute deontological position on the right to life you have to be an absolute pacifist."<sup>350</sup> In fact, taking Williams' argument at its face, one must go even further and affirm that to avoid violating the absolute norm, as he envisions it, one would have to be not only an absolute pacifist, but an absolute shut-in. As is all too familiar from experience,

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<sup>350</sup> See Williams, *supra* note 198, at 98.

human events do not infrequently result in the tragic death and killing of innocent persons under a variety of unavoidable circumstances.

While the law, contrary to the position advocated by the MPC, has never sanctioned intentional killing of innocents, other killings of innocents regularly escape legal punishment. Such “permissible” killings arise, for example, from pure or non-negligent accidents and in situations involving unintentional injury to third parties in the reasonable exercise of self-defense. Analogous to these cases, double effect defines in other contexts the boundaries of permissibility and fault with respect to unintentional killings of innocents.

Williams’ arguments notwithstanding, the deontological norm is usually understood not to prohibit all killing of innocents (which is a moral and practical impossibility), but rather to prohibit absolutely only the *intentional* killing of innocents. Both the examples just cited and the principle of double effect recognize that in both law and ethics innocent persons do not possess an absolute right not to be killed or harmed. Rather, innocent persons only have an absolute right not to be killed or seriously injured *intentionally*, and only a relative right not to be killed or seriously injured unintentionally. Responding directly to Williams’ reference to cases of modern warfare, the principle of double effect proposes that in certain circumstances the unintentional killing of innocents, though tragic, does not violate in all cases the absolute prohibition against killing the innocent.

#### *E. Double Effect and the Model Penal Code*

In support of the § 3.02 choice-of-evils defense, the MPC asserts that “[a]lthough the view is not universally held that it is ethically preferable to take one innocent life than to have many lives lost, most persons probably think a net savings of lives is ethically warranted if the choice among lives to be saved is not unfair. Certainly the law should permit such a choice.”<sup>351</sup> As noted above, it is in this very context that the MPC cites to the principle of double effect as a prime example of a position which rejects the utilitarian preference for taking a life for a net savings of life. At the same time, however, the commentary somewhat enigmatically observes that “[m]any acts [of homicide] justifiable under [§ 3.02], would also be justifiable under the principle of ‘double effect.’”<sup>352</sup>

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<sup>351</sup> MODEL PENAL CODE § 3.02 cmt. 3 (1985).

<sup>352</sup> *Id.*

The seeming confusion of the MPC commentary with respect to the principle of double effect is clarified by the discussions in the preceding section. Double effect indeed rejects the permissibility of any intentional taking of innocent life in order to achieve a net savings of life or for any other reason. In that respect, it directly conflicts with MPC § 3.02. At the same time, however, double effect does not prohibit all “taking” of human life broadly understood. Although the MPC acknowledges that the principle of double effect justifies some of the very same examples the MPC employs to support of its choice of evils defense, it fails to follow up on the implications of that concession. By means of this omission, the MPC may be misunderstood to suggest that only utilitarian theories can account for the alleged moral intuition of “most persons” that taking innocent life is permissible, if the “choice among lives to be saved is not unfair.”

In fact, double effect is quite consistent with that moral intuition. Under double effect a general ethical preference exists for the protection of life even if at times this results in the unintentional taking of others’ lives, but only if there is no other viable alternative. When dire circumstances present themselves and one choice would entail the incidental killing of a larger number of innocent persons than another choice, and no other relevant duties or considerations come into play, it would be reasonable intentionally to choose to save the greater number of lives, thus minimizing the unintentional loss of life. In such examples, double effect is just as consistent as § 3.02 with the proposition that respect for human life may sometimes require the taking of life: “[R]ecognizing that the sanctity of life has a supreme place in the hierarchy of values, it is nonetheless true that conduct that results in taking life may promote the very value sought to be protected by the law of homicide.”<sup>353</sup>

The harmonization of the principle of double effect with such statements, however, requires clarification of the ambiguous play on the notions of ‘*taking* of innocent life’ and ‘*killing* of innocent persons’ which have plagued much of the discussions up to this point. Without further specification, these terms can be understood to refer to both intentional and unintentional causing of death. Because of this ambiguous usage, there exists the potential for obfuscation. The MPC, for example, speaks of it being “ethically preferable to take one innocent life than to have many lives lost” and that “taking life may promote the

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<sup>353</sup> *Id.*

very value sought to be protected by the law of homicide.”<sup>354</sup> It is arguable that these assertions are to some extent made more palatable precisely by use of the equivocal concept of “taking life” as opposed to highlighting the more precise sense implied by § 3.02, i.e., to “purposely kill.”

#### *F. Defense Under the Principle of Double Effect*

In view of the practical failure of the MPC to present a homicide defense acceptable in any jurisdiction, the principle of double effect suggests an alternative. While a double effect defense would be both narrower and in certain situations broader than the MPC defense, it would be more consistent with traditional notions of legal causation. By categorically distinguishing between intentional and unintentional harm, it closely tracks traditional interests in protecting innocent persons from intentional invasions of life and bodily integrity, while in certain circumstances allowing for the unintentional, yet foreseeable taking of human life, as is also recognized in negligence law.

##### *1. Intentional or Purposeful Homicide*

Based on these discussions, it is clear that no defense to homicide would exist under the principle of double effect for cases in which a person intentionally, in the specific sense of ‘purposely,’ kills an innocent person. Thus, no defense would be available in a *Dudley and Stephens* scenario, where actors intentionally cause the death of another person in order to survive.<sup>355</sup> As Baron Huddleston aptly observed during the proceedings, “Parker, at the bottom of the boat, was not endangering their lives by any act of his; the boat could hold them all, and the motive for killing him was . . . for the purpose of eating him which they could do when dead, but not while living.”<sup>356</sup> Similarly, the MPC’s example involving the intentional killing of the mayor by the townsfolk to protect themselves from a foreign invader would also be unacceptable,<sup>357</sup> as would be the case of the speluncean explorers.<sup>358</sup>

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<sup>354</sup> *Id.*

<sup>355</sup> See, e.g., Dressler, *supra* note 13, at 142 (“The dike example fits the double-effect principle. One might draw this limiting line in the law – although the MPC does not! – but this leaves *Dudley and Stephens* without justificatory redress: the youth Parker’s demise was not collateral damage; his death was desired outcome.”).

<sup>356</sup> Baron Huddleston, *Baron Huddleston on Justifying Homicide*, 20 CAN. L.J. 400, 401 (1884) (discussing Parker’s intentional cause of death).

<sup>357</sup> See MODEL PENAL CODE § 3.02, cmt. 3, n.15 (1985).

Double effect would reject the permissibility of all these actions because they aim precisely at killing an innocent person as the specific means chosen for survival.

## 2. Unintentional or “Knowledge” Homicide

A different result is suggested under double effect in cases where causing the death of an innocent person is not the purpose of the actor’s conduct, but occurs as an unwanted, unintended side effect. In such circumstances, the death must play no role in the actor’s intention or purpose in acting, nor provide a causal role in obtaining the desired end; it must result solely as a regrettable, if foreseeable, consequence of action.

The tactical bombing scenario already considered provides a straightforward example.<sup>359</sup> The MPC itself provides a further example of double effect reasoning: “Many acts justifiable under this section would also be justifiable under the principle of ‘double effect.’ Diverting a flood to destroy a farmhouse instead of a town would be acceptable since the destruction of the farmhouse is not intended and is not a means of saving the town.”<sup>360</sup> Here, the death of the farm inhabitants is a purely incidental though foreseen consequence of the actor’s conduct. The death of these individuals plays no causal role in bringing about the salvation of the town and, if perchance avoided, would be received with relief.

Philippa Foot’s original Trolley Car Problem presents another example:

Edward is the driver of a trolley, whose brakes have failed. On the track ahead of him are five people; they will not be able to get off the track in time. The track has a spur leading off to the right, and Edward can turn the trolley onto it. Unfortunately there is one person on the right-hand track. Edward can turn the trolley, killing the one; or he can refrain from turning the trolley, killing the five.<sup>361</sup>

Presumably, absent any other relevant considerations or duties, the driver could permissibly divert the trolley away from the track with the five and onto the track with the one, not intending the death of that person but foreseeing it, even with substantial certainty.

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<sup>358</sup> See Fuller, *supra* note 15.

<sup>359</sup> See Kaczor, *supra* note 311.

<sup>360</sup> MODEL PENAL CODE § 3.02 cmt. 3, n.15.

<sup>361</sup> Foot, *supra* note 17.

In addition, one might consider a modified *Holmes* situation. For purposes of this hypothetical, let it be assumed that the longboat is in imminent danger of capsizing due to the leak and overcrowding. Upon realizing the impending disaster, the first mate quickly calls for three volunteers among the crew to abandon the lifeboat for the sake of the passengers. The mate estimates that three will be sufficient to appropriately lighten the craft. Not receiving any volunteers, the first mate orders more essential sailors (e.g., navigators and the best rowers) to cast three crew members overboard until the boat is sufficiently lightened to preserve the lives of the passengers.

In this example, the intent or purpose of the first mate in giving his order is not purposefully to cause the death of the crewmen, but rather to lighten the boat to save the passengers. Here the deaths of the sailors, no matter how foreseeable, play no causal or instrumental role in the intentions of the first mate; nor does their death function as a necessary or sufficient condition for the salvation of the lifeboat's occupants. If, due to some fortuity, the offloaded crew members manage to find other means of flotation, the first mate will presumably be relieved. In such a case, the good reason that justifies the casting of crew members over, even foreseeing their death, is precisely the duty owed by those very crew members to the passengers, as well as the duty of the first mate to ensure the safety of the passengers<sup>362</sup>

The actual facts of *Holmes*, as opposed to the hypothetical just considered, provide a good example of situations where death may indeed be unintended, but where the conduct would not be permissible under double effect. Given the preexisting duty of the crew to the passengers, the foreseeable, but unintended harm (death to the passengers) would not be justified under the reasonability prong because it fails when balanced against other applicable norms. On the other hand, if crew members are cast overboard in order to save the passengers' lives, no independent norm appears to be violated, but rather the appropriate norm is in fact fulfilled.

In some examples, such as those considered above, a justification under double effect may include reference to the fact that a

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<sup>362</sup> This analysis appears consistent with Judge Balwin's view in *Holmes*: "The captain, indeed, and a sufficient number of seamen to navigate the boat, must be preserved; for, except these abide in the ship, all will perish. But if there be more seamen than are necessary to manage the boat, the supernumerary sailors have no right, for their safety, to sacrifice the passengers." *United States v. Holmes*, 26 F. Cas. 360, 367 (C.C.E.D. Pa. 1842) (No. 15,383).

net savings of life has occurred. This will sometimes be relevant to the third condition of double effect in terms of offering good reason favoring the causing of the intended good relative to the foreseeable harm. While this does not reduce double effect reasoning to utilitarian analysis, it should be conceded that considerations quantifying harm, everything else being equal, may sometimes play a role in double effect analysis. In such circumstances, there could be potential overlap in the end results with applications of MPC § 3.02.<sup>363</sup>

At the same time, however, a double effect defense to homicide would not need to be restricted by the utilitarian condition requiring a “net” savings of life. This point is clarified by consideration of a hypothetical presented in the MPC:

X is unwillingly driving a car along a narrow and precipitous mountain road, falling off sharply on both sides, under the command of Y, an armed escaping felon. The headlights pick out two persons, apparently and actually drunk, lying across the road in such a position as to make passage impossible without running them over. X is prevented from stopping by the threat of Y to shoot him dead if he declines to drive straight on. If X does drive on and kills the drunks in order to save himself . . . he would not be justified under the lesser principle of § 3.02.<sup>364</sup>

MPC § 3.02 would not provide a defense for X because the conduct would not result in a net savings of life. While driving over the drunks would save X’s life, it would come at the cost of two other lives.<sup>365</sup> Section 3.02 is therefore not satisfied because the harm that would be averted by violation of the law, X’s death, is not a greater evil than that sought to be avoided by the law against homicide, i.e., the death of the two drunks.

Applying double effect to this scenario, however, might arguably yield a different result. Here, X need have no intent or purpose to kill the men lying on the street, but rather intend only to continue moving the vehicle forward as commanded in order to save his own life, although knowing that he will very likely, or even certainly, kill the two men by running them over. Here, however, the death of these men does not function in X’s intentions as a means to save his life nor is their death necessary, other than in a purely incidental sense, to his survival.

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<sup>363</sup> § 3.02 does not apply on its terms only to cases involving purposeful homicides.

<sup>364</sup> MODEL PENAL CODE § 2.09 cmt. 3.

<sup>365</sup> Even if the assailant’s life counted in the analysis, § 3.02 would still not apply because the number of lives that would be saved (two) by violation of the statute would only be equal the lives lost (two).

Further, it does not appear from the facts that there is anything else legally or ethically wrong with X's conduct in driving down the road, except for the fact that it will foreseeably cause the deaths of these men.

The additional question to be considered under double effect is whether good reason exists for X's causing the deaths of the two men as a foreseeable side effect of saving his own life. Here, an affirmative answer can be proposed. X's need to continue driving and not stop the vehicle arises through no fault of his own, but from the circumstances in which he innocently stands: first, his life has been unlawfully put into danger by an aggressor; second, the deaths of the men in the road are in large part attributable to their being improperly positioned in the middle of the road, thus exposing themselves to the risk of death; and third, X is in no way responsible for the men's choice to position themselves in harm's way. Thus, under the principle of double effect, no net savings of life would be required for application of the principle. Although X may only be able to preserve his own life at the cost of two others, the normative basis of double effect would not preclude this result.

A second possible example of the broader applicability of double effect is suggested in *Dudley and Stephens* itself. In colloquy between the English judges and defense counsel, the following exchange is reported:

[Lord Coleridge, C.J. — Do you go so far as to say that any act, however base or cruel, which a jury may find to have been necessary to preserve life, is to be held lawful?] Yes; if it be forced upon a man by necessity. . . . [Pollock, B. — I remember trying a painful case where a man, to save his own life, diverted hot water, and caused serious injury to another person — injury which he must have known would follow, as the jury found. Can it be said that, in such a case it was to be left to a jury to decide whether there was a necessity to commit the act?]<sup>366</sup>

There is no indication in the report if the case was civil or criminal in nature, nor what its result was. The example, however, suggests other types of cases in which the principle of double effect may exculpate conduct having the foreseeable effect of injuring or killing an innocent person. In this example, assuming the other person was severely burned or died, whatever harm the actor sought to avert falling upon himself would presumably be equal to the harm that any law (e.g., assault, battery, murder, manslaughter) would have sought to prevent from being inflicted upon the other. Thus, MPC § 3.02 would not apply.

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<sup>366</sup> R v. Dudley, (1884) 33 Weekly Rptr. 347 (Q.B.) at 350 (Eng.).

Assuming that the escape of hot water was entirely accidental and in no way due to the fault of the defendant, it is presumable that the defendant's intent was not to harm the other person, but rather solely to direct the scalding water away from himself in order to avoid serious injury or death. Assuming also that the defendant owed no duty to the other person and that the water could only be redirected toward a position in which the other person stood, it is certainly arguable that intention and right to protect oneself may constitute a good reason for unintentionally causing harm to another and thus be permissible under double effect.<sup>367</sup>

Given the utilitarian underpinnings of § 3.02, however, the MPC theory is unable to address situations like this where the balancing of goods does not result in one outweighing the other. As the MPC explicitly states: “[I]f the values are equal, the case for a justification has not been made out.”<sup>368</sup> The examples considered here clarify that this same restriction would not always apply in double effect analysis. While quantity of harm foreseeably but unintentionally caused may legitimately play a role in some situations, others demand a balancing of incommensurable norms and duties that may result in justifications favoring actions that do not result in a net savings of life. While double effect therefore might be inapplicable in a number of situations permissible under § 3.02 of the MPC, double effect might also permit assertion of a defense in a variety of circumstances barred by the MPC's utilitarian calculus.

In sum, various practical implications follow from these considerations. First, a double effect defense would be unavailable in any case where the specific homicide charged is defined by reference to the culpability requirement found in MPC § 2.02(2)(a),<sup>369</sup> i.e.,

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<sup>367</sup> By the same token, foreseeing that a redirection of water would harm another, the actor would have been equally justified in allowing himself to be burned by the water without any allegation that he intentionally harmed himself, or intended to kill himself. At times, double effect offers justification for optional courses of action, either of which can be understood to legitimately protect a basic good in oneself or another, even though unintentionally causing harm is a foreseen side effect.

<sup>368</sup> MODEL PENAL CODE § 3.02 cmt. 3.

<sup>369</sup> MPC § 2.02(2) states: “Kinds of Culpability Defined provides: (a) Purposely. A person acts purposely with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result . . . .” MODEL PENAL CODE § 2.02(2) (1962).

“purposely.”<sup>370</sup> In such cases, the culpability necessary to convict, i.e., that the defendant intentionally (in the strict sense of purposely) killed, would directly violate double effect’s prohibition against intentional killing. If, however, the case involved charges of a level of homicide defined by reference to the lesser culpability requirement of “knowledge”<sup>371</sup> following MPC §2.02(2)(b),<sup>372</sup> a double effect defense might be available in appropriate factual circumstances.<sup>373</sup>

If the homicide charged permitted conviction under a variety of state of mind culpability levels, application of a double effect defense would depend upon the particular allegations of the case. If conviction might be found under culpability levels of “intentionally,” “willfully,” or with “malice aforethought” (each of which in some jurisdictions can be understood to require only knowledge)<sup>374</sup> or under a statute specifically allowing conviction under “purpose” or “knowledge” stated separately,<sup>375</sup> a judicial determination would need to be made as to

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<sup>370</sup> Such statutes include NEB. REV. STAT. § 28-303 (2008) (“A person commits murder in the first degree if he or she kills another person (1) purposely and with deliberate and premeditated malice . . .”) and ARK. CODE ANN. § 5-10-102 (West 2012): “(a) A person commits murder in the first degree if: . . . 2) With a purpose of causing the death of another person, the person causes the death of another person . . . “ (but also allowing conviction of first degree murder if “person knowingly causes the death of a person fourteen (14) years of age or younger at the time the murder was committed”).

<sup>371</sup> “In certain narrow classes of crimes . . . heightened culpability has been thought to merit special attention. Thus, the statutory and common law of homicide often distinguishes, either in setting the ‘degree’ of the crime or in imposing punishment, between a person who knows that another person will be killed as the result of his conduct and a person who acts with the specific purpose of taking another’s life.” *United States v. Bailey*, 444 U.S. 394, 405 (1980) (quoting WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *HANDBOOK ON CRIMINAL LAW* 196-97 (1972)).

<sup>372</sup> MPC § 2.02(2)(b) provides: “Knowingly. A person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.” MODEL PENAL CODE § 2.02(2).

<sup>373</sup> See, e.g., COLO. REV. STAT. ANN. § 18-3-103 (West 2013) (“A person commits the crime of murder in the second degree if the person knowingly causes the death of a person.”).

<sup>374</sup> In *Bailey*, the Court spoke of the “the ambiguous and elastic term ‘intent.’” *Bailey*, 444 U.S. at 404-05 (citing LAFAVE & SCOTT, *supra* note 372, at 201-202) (“In a general sense, ‘purpose’ corresponds loosely with the common-law concept of specific intent, while ‘knowledge’ corresponds loosely with the concept of general intent.”).

<sup>375</sup> See, e.g., ARIZ. REV. STAT. § 13-1104 (2013) (“A person commits second degree murder if without premeditation: 1. The person intentionally

whether the jury's instruction on a double effect defense was warranted by the facts and appropriately explained.

Based on these considerations, a proposed version of a "double effect defense" might take something of the following form:

Double Effect Defense to Homicide or Aggravated Assault and Battery

(1) Apart from situations involving self-defense or other privileges, if an actor purposely engages in conduct believing it necessary for his own or others' protection from imminent serious bodily injury or death, the conduct shall be justified even though it results in foreseeable or foreseen bodily injury or death to one or more third persons provided that:

(a) the conduct is necessary to protect himself or other(s) from imminent serious bodily harm or death;

(b) the actor does not purposely cause bodily harm or death to any third person as a means of protecting himself or others;

(c) the actor's conduct is otherwise lawful, or if unlawful, otherwise justified in view of the threat of harm to the actor or others;

(e) the protection of his own or others' bodily integrity or life is reasonable in light of the unintended harm caused to third parties.

(f) the situation calling for the application of the defense was not proximately caused by any unlawful conduct of the actor or others sought to be protected under the defense; and

(g) no law defining the offense provides exceptions or defenses dealing with the specific situation involved and no legislative intent to exclude the defense plainly appears.

In contrast to situations involving some legal privileges, here no defense would lie for a reasonable but mistaken belief in the need for action. In view of the potential harm to innocent persons sanctioned by the defense, it seems appropriate to restrict its availability to situations where the belief in the need for conduct corresponds to the true nature of the circumstances. In addition, it would be expected that application of the defense in concrete cases might yield further elaboration of its terms and possible categorical limitations of its application.

With respect to the critical reasonability or proportion clause in subsection (e), double effect as elaborated in prior considerations rejects

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causes the death of another person . . . or 2. Knowing that the person's conduct will cause death or serious physical injury, the person causes the death of another person . . .").

a utilitarian analysis. Instead, the jury's function in a double effect defense case would be to determine, similar to a non-utility based interpretation of negligence analysis, whether the actor's intentional protection of his own or others' life or bodily inviolability was reasonable under all the circumstances. Reasonability should be understood to encompass whatever relevant human considerations a jury may believe appropriate in determining whether the actor's conduct was fair in light of the harm threatened and the harm caused.<sup>376</sup>

Finally, it bears noting that simply because double effect may permit an agent to act in order to protect himself or others, it is not suggested that availing oneself of the defense would always be the best or ideal course of action from an ethical perspective. As George Fletcher observes, "[c]laims of justification concern the rightness, or at least the legal permissibility, of an act that nominally violates, the law."<sup>377</sup> Similarly, Glanville Williams himself notes with respect to his version of the necessity defense: "This is not to argue that killing in these circumstances is a moral *duty*. . . . Although we commonly account death the greatest misfortune, this is not the philosophy on which human beings act in a crisis."<sup>378</sup> To assert that conduct would be justified under the double effect defense is then only to suggest that it is permissible, not that there is any duty or requirement to act according to its provisions.

#### *G. Duress, Excuse, and the Inviolability of the Innocent*

The preceding considerations have proposed a possible justification defense under double effect that arguably comports better than MPC § 3.02 with traditional culpability distinctions made in the law. The preceding discussions, however, have not resolved the issue of whether a duress defense should be available to the homicide of

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<sup>376</sup> "In general, consistent with Hand's observations, the *Restatement*, its commentary, and the common negligence jury instruction, no a priori limitation exists on the values that may inform that balancing analysis. Determinations of negligence require consideration of *whatever* values a reasonable jury (as a sampling of persons whose views and judgments embody community standards) believes is appropriate, given the circumstances of a particular case, for legal protection. Upon consideration of these values, the jury is called upon to make its best judgment concerning whether the unintended harm was reasonably justified in light of the good intended." Lyons, *Balancing Acts*, *supra* note 8, at 481-82

<sup>377</sup> George P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 954 (1985).

<sup>378</sup> Williams, *supra* note 198, at 98.

innocents.

As just noted, no duty would exist under a double effect defense to act in protection of oneself or others. This, however, presupposes the existence of some freedom of choice on the actor's part. Situations of duress on the other hand, involve coercive conditions in which free choice is not an option for the actor. This is not, however, to be understood in the sense that such actions would be involuntary in the sense that an actor's mental and volitional capacities are entirely overwhelmed. Coercion often operates precisely by taking advantage of those powers by *not* eliminating their operation.

Agents who act under duress possess capacities for rational judgment, because it is precisely those capacities that aggressors successfully exploit in them. "What the coercer does is to appeal to the deliberative faculties of the defendant; the coercer provides the defendant with particularly strong reasons for acting, and when the defendant complies, he acts *for those reasons*."<sup>379</sup>

Thus, similar to the relation between § 3.02 and § 2.09 in the MPC,<sup>380</sup> a duress defense would be available even if the agent had no freedom of choice on the condition that the actor's subjective state of mind and the objective circumstances satisfied the elements necessary for a double effect defense as described above. Applying this limitation, when an actor coerced either by a force of nature or human agency purposely seeks to protect his own life or the life of others by causing unintentional harm, a defense would sometimes be available.

On the other hand, in keeping with its commitment to the inviolability of innocent human life as requiring an absolute prohibition against the intentional taking of such life, no defense would be available for the purposeful taking of life, even under duress. While this is consistent with the MPC's § 2.09 denial of a duress defense in cases of coercion by natural forces, it would not be consistent with the MPC's allowance of a duress defense in response to human threat.

Reiterating the critique of MPC § 2.09 offered above,<sup>381</sup> the assertion that human persons of reasonable firmness are incapable of resisting intentionally killing innocent persons when coercive human

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<sup>379</sup> Peter Westen & James Mangiafico, *The Criminal Defense of Duress: A Justification, Not an Excuse—And Why It Matters*, 6 BUFF. CRIM. L. REV. 833, 903 (2003) (emphasis added) (citing Claire Finkelstein, *Duress: A Philosophical Account of the Defense in Law*, 37 ARIZ. L. REV. 251, 272 (1995)).

<sup>380</sup> See discussion *supra* at note 256 and accompanying text.

<sup>381</sup> See *supra* Part II.A.3.c.i.

forces are applied to them begs the question about general human capacities and reasonable firmness. The ability to engage in self-sacrifice in war and other circumstances, and the ethical and legal expectation that persons do so, belies the point in contention. Similar to the MPC's willingness to deny a duress defense in cases of coercion by natural force, traditional objections to the intentional taking of innocent human life would apply under double effect in all circumstances of coercion.

Further, as conceded in principle by the MPC, a clear, categorical denial of a legal duress defense to homicide inevitably influences formation of a community's general powers of resistance against coercion. "It cannot be known what choices might be different if the actor thought he had a chance of exculpation . . . instead of knowing that he does not."<sup>382</sup> A contrary policy, such as that advocated by the MPC § 2.09, could only have the opposite effect.

#### CONCLUSION

Traditionally, no defense was allowed for persons who, in dire circumstances, take the lives of innocents in order to preserve their own life or that of others. As illustrated in the seminal nineteenth-century cases *United States v. Holmes* and *Regina v. Dudley and Stephens*, claims to such necessity killings were held, though perhaps for somewhat muddled reasoning, to be neither justified nor excused. The rationale for the absolute prohibition against killing of innocents and its implied corollary duty, at times, to die, was asserted to lie in the common law's commitment to the inviolability of innocent human life.

Critics, however, suggest that the law's devotion to the sanctity of innocent life is misplaced. The MPC, for example, suggests that if one adopts a utilitarian approach to law, the taking of life is sometimes consistent with an overall respect for life. In keeping with this view, the MPC provides both a necessity and a duress defense to homicide: killing of the innocent can be justified whenever the evil avoided by doing so exceeds the evil that would result by not killing; and even when this is not the case, killing of the innocent under duress due to human threat can be excused whenever a person of reasonable firmness would have been unable to resist.

In defending the controversial nature of its position, the MPC

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<sup>382</sup> MODEL PENAL CODE § 2.09 cmt. 2 (1985) (omitting reference to the actor's "particular disabilities").

asserts that “most persons probably think a net saving of lives is ethically warranted if the choice among lives to be saved is not unfair.”<sup>383</sup> Despite the MPC’s popularity in other areas of criminal law,<sup>384</sup> however, and despite its representations about what “most persons probably” think, both the MPC justification and duress defenses to homicide have been universally rejected. At the same time, in context of the defense of this position, the MPC commentary notes, but without significant elaboration, that “[m]any acts justifiable under [the MPC] would also be justifiable under the principle of ‘double effect.’”<sup>385</sup>

This article proposes that the principle of double effect provides a viable alternative to the rejected MPC position. As opposed to the radical break with tradition represented by the utilitarian based MPC, double effect respects the common law’s commitment to the inviolability of innocent human life while at the same time recognizing some truth in the MPC’s assertion that the taking of innocent life may sometimes be “ethically warranted if the choice among lives saved is not unfair.” The resolution to this dilemma is found in double effect’s understanding that the absolute prohibition against killing is properly understood to apply only to intentional, i.e., purposeful, taking of innocent life. In fact, other instances of killing innocents, from purely accidental to unintentional but non-negligent and non-reckless killings, are clearly permissible under the law and required as a matter of practicality and morals.

In contrast to utilitarian theories which generally reject the import of state of mind considerations,<sup>386</sup> double effect is founded on the view that intentionally causing harm carries with it a kind of culpability not present when the same kinds of harm are brought about unintentionally as mere side-effects of action. While it is true that good reasons may exist for concluding that causing incidental harms may also

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<sup>383</sup> MODEL PENAL CODE § 3.02 cmt. 3.

<sup>384</sup> “Though the Model Penal Code was reformative in many of its efforts to rationalize the criminal law, most of its crucial provisions have been followed in enough jurisdictions so that they now represent major themes in the law of the United States.” Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897, 1897 n.2 (1984).

<sup>385</sup> MODEL PENAL CODE § 3.02 cmt. 3.

<sup>386</sup> Consider Judge Posner’s remark that “intentionality is neither here nor there.” Richard A. Posner, *Killing or Wounding to Protect a Property Interest*, 14 J.L. & ECON. 201, 206 (1971) (contrasting risk of deaths by automobile accidents to deaths caused from intentionally set spring-guns and arguing that the question of permissibility is properly a function of economic analysis without reference to actors’ states of mind).

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be objectionable, that analysis admits of more complexity, and culpability would not include reference to the fact that the actor *meant* to cause it.

Justification and duress defenses to homicide under the principle of double effect would acknowledge that, when threatened with death or serious bodily harm, a person may at times permissibly engage in conduct necessary to preserve life, which though not intended to cause death or serious harm to others, may have that unintended, if foreseeable effect. The right to preserve one's own or others' innocent life, however, would not permit such killing of the innocent under all circumstances. The permissibility of such killing would vary according to the situation, and be limited, not by a utilitarian calculus, but by prudential determinations of reasonability and fairness. In no case, however, would a double effect defense allow the purposeful killing of another innocent human person as a means to salvation.

