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LECTURE

NATURAL LAW AND POLITICAL CHOICE: THE GENERAL JUSTIFICATION DEFENSE— CRITERIA FOR POLITICAL ACTION AND THE DUTY TO OBEY THE LAW*

Kent Greenawalt **

The privilege of delivering a lecture in this yearly series is heightened by the name that the series honors. Pope John XXIII has always represented for me an embodiment of Christian love and hope, and an openness to the vitality and variety of human life. His papacy provided an impetus to internal Church reform; it also generated a spirit of cooperation and dialogue with non-Catholics that has enriched our common life.

I hope to make a modest contribution to one small area of dialogue: how natural law approaches bear on choices citizens must make concerning the law.

Among the many aspects of the practice and thought of Roman Catholicism that a sympathetic outsider can admire is its rich tradition of natural law. By natural law, I refer here not to the narrow jurisprudential claim that an unjust law is not fully a law, but to the idea that people can discover a great deal about what is morally right conduct through the use of a reason that is shared by human beings. Though natural law approaches to moral choice are not unique to Roman Catholicism, in modern times the Church's hierarchy and theologians have been their dominant spokesmen. Against highly individualistic forms of moral and political philosophy, natural lawyers in the Thomistic tradition have emphasized our social character; against extremes of emphasis on consequences or strict duty, they have struggled to

* This address was delivered on April 15, 1986 at The Catholic University of America as the annual Pope John XXIII Lecture. I am grateful to the faculty and to Dean Frankino for the invitation to deliver this lecture, and for the enriching and enjoyable time I spent on that occasion.

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assign reasonable significance both to the inherent quality of acts and to their consequences; against a comparative neglect of concrete moral choices in most Protestant and secular thought, they have undertaken sustained evaluation of particular moral choices, fruitfully connecting ethical theory to practical decision.

During most of this century, a distinct separation has existed between natural law perspectives and perspectives about the nature of law and about social choices that have dominated American law schools. One could find elaborations of natural law in Catholic law schools and periodicals, but these expressions exercised little influence on the mainstreams of legal thought. In the last two decades, non-Catholics have grown to realize that they have much to learn from natural law approaches, and natural lawyers have tried to enhance their own understandings by references to other perspectives. I am emboldened to proceed by my strong belief in the importance of this interchange, though I know I speak at a time of reexamination and turmoil within the Church over critical premises of Catholic morality, and my own grasp of natural law theory still is far from adequate.

I shall concentrate on three discrete subjects, involving different relationships between moral appraisal and legal norms. My first subject is the general justification defense in criminal law. Here, the main political choice involves the content of a particular legal norm. Natural law, at least in one traditional form, stands as a competitor to a pervasively utilitarian approach regarding the proper scope of such a defense. My second, more general, subject concerns the reasons that citizens and officials in a liberal democracy properly employ when they decide whether to support proposed laws and policies. Here, my inquiry is twofold. How would natural law approaches be treated under proposals that rational, secular morality should govern political choices? May natural law views properly be relied upon even if they have a distinctly religious tinge? My third subject is the citizen's political decision whether to obey the law. Here the issue is whether natural law offers a convincing account of the reasons and extent of a citizen's duty to obey.

The two dominant questions about natural law thinking that underlie these three subjects are how far it provides a convincing alternative to consequentialist evaluations of moral choice and how far it is sustainable independent of particular religious premises.

I. THE GENERAL JUSTIFICATION OR "NECESSITY" DEFENSE

A. *The Defense and Standards of Moral Evaluation*

The general justification, or "necessity," defense exempts an actor from

criminal liability although his behavior violates a specific section of the penal code. The historical roots of the defense owe something to the idea that people should not be punished for understandable human reactions under circumstances of tremendous stress. But I am going to treat the defense, as do modern American penal codes, as one involving a true justification. The defendant is not claiming that he should be excused because he acted under great pressure; rather he asserts that what he did was not wrong.¹ Thus, a person could invoke the defense if he broke the speed limit in order to get someone dangerously ill to a hospital. Whether such a defense should exist at all, and whether, if so, it should receive statutory definition are debated questions; but I shall suppose that a statutorily defined defense is warranted.² What form the statutory elaboration should take is then the critical question.

I believe that this question poses, more starkly than any other question about substantive penal provisions, the merits of competing approaches to moral choice. Most rules of criminal law can be justified on moral theories that emphasize consequences, strict duties, inherent rights, or some mix of the three. Intentionally killing people is generally harmful; it also contravenes notions of moral duty and violates the victims' right to life. Ordinary instances of self-defense may be understood as proper responses to violations of duty, as exercises of rights to resist aggression, or as, on balance, socially desirable. Both those who think the morality of acts can be determined independent of likely consequences and those who think consequences are critical can agree that murder should be a crime and that self-defense should be permitted. One's general approach to morality may bear on how one conceives the best boundaries for specific criminal offenses and defenses; but disagreements among moral theories infrequently yield sharp distinctions in legal formulations. It is in this respect that the general justification defense, which creates an open-ended immunity from specific liability rules, is so unusual.

The present dominant formulations in American criminal codes are consequentialist; traditional natural lawyers are among those likely to think that any formulation so cast is significantly misconceived. The immediate practical importance of this disagreement is highly limited. The defense is infrequently invoked and the actual instances in which a natural lawyer would

1. Ordinarily the defense is available even if the actor made a mistaken appraisal of the facts, at least if his appraisal was reasonable. Though I believe one can still speak of a true justification in such cases, that is a matter of some controversy. See Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897 (1984). In this discussion, I assume that an actor has not misappraised relevant facts.

2. I discuss these questions in K. GREENAWALT, *CONFLICTS OF LAW AND MORALITY*, ch. 13 (forthcoming, Oxford Univ. Press).

dissent from the outcome of a consequentialist test are rarer still. Nonetheless, the formulation matters, because the defense represents a powerful symbolic statement about behavior that society deems acceptable.

Consider the following problem:

The troops of an invading army have circled a town in which the mayor, who has been a staunch opponent of the invaders, is hiding. The captain's plan is to burn the town and kill every one of the inhabitants.

His lieutenant, Leif, who is physically unable to resist the captain, protests: "Killing the mayor is itself a war crime we should not commit; killing all men, women, and children is much worse. I refuse to participate in either effort."

The captain responds: "You are being silly, this is war; but if you feel so strongly, I'll make a deal. If you kill the mayor and bring her body to me within the next hour, I will spare the rest of the town. Otherwise you can drive back to headquarters and I'll proceed without you."

Leif enters the town, finds the mayor, kills her, and brings her body to the captain. The town is spared.

Many years later when Leif is a foreign visitor to the country he is arrested and charged with murder. He raises the general justification defense.

The question whether the defense should embrace Leif strikingly illustrates the problem of an appropriate formulation, and I shall use that question to focus my discussion.

B. Modern Consequentialist Formulations

The two most influential American formulations are those of the Model Penal Code³ and New York Penal Law.⁴ A number of jurisdictions follow one of these two or use a combination of their elements.⁵ The Model Code privileges an otherwise criminal act⁶ when "the harm or evil sought to be avoided by [the actor's] conduct is greater than that sought to be prevented by the law defining the offense charged."⁷ Under the New York provision, "the desirability and urgency of avoiding such injury [must] clearly outweigh the desirability of avoiding the injury sought to be prevented"⁸

3. MODEL PENAL CODE § 3.02 (1985).

4. N.Y. PENAL LAW § 35.05 (McKinney 1975).

5. See generally MODEL PENAL CODE § 3.02 comment (5) (1985).

6. Both standards in their fullness contain other limitations, but they do not bear critically on this discussion.

7. MODEL PENAL CODE § 3.02(1)(a) (1985).

8. N.Y. PENAL LAW § 35.05(2) (McKinney 1975).

Both standards seem thoroughly consequentialist; the criteria do not refer to the central act's intrinsic quality or the means by which it avoids the evil whose avoidance is claimed to render the act justifiable. If the balance of consequences is predictably desirable, the act is justified. Thus, both formulations appear to exonerate defendants who have violated absolute moral norms as conceived by traditional natural lawyers.

I first ask whether the Model Code and New York formulations are really as consequentialist as I have just supposed. I then inquire more precisely as to how far they diverge from natural law approaches. Next, I assess some of the arguments against a consequentialist standard and in favor of absolute norms. I consider what position a natural lawyer reasonably may take about the desirable bounds of the general justification defense. Finally, I offer two concrete suggestions about statutory revision.

Do the Model Code and New York formulations really envision a consequentialist balancing of the two competing harms in specific context? Two possibilities⁹ must be considered here. The major possibility for avoiding a consequentialist reading of the provisions is to understand them as incorporating, or as permitting the judge or jury applying them¹⁰ to incorporate, some deontological limits. The strategy of interpretation would be to say that the inherent wrongness of the actor's conduct counts in the balance of harms, so that the intentional killing of an innocent person might be viewed as a greater harm than the loss of two innocent lives that would occur if the victim was not killed. Interestingly, the original commentary to the Model Code section suggested that a claim of justification might be rejected in a concrete case if the judge or jury deemed that an absolute moral prohibition

9. A third possibility is that if anyone's life is foreseeably forfeited, the evil avoided cannot be greater than the evil the offense seeks to prevent. However, the Model Code commentary reiterates what is plain from the text of its own and the New York sections, that, in addition to the quality of a single loss, the number of people suffering a loss counts.

The likelihood that a loss will occur is also relevant. The speed limit is designed in part to protect life. It does not follow that, because a passenger's death is no greater an evil than the death of someone hit by a speeding automobile, speeding to save the single life of an injured person can never be justified. Though the language chosen in both provisions is imprecise on this point, the notion of the greater harm is to be understood with reference to risks in particular circumstances, not by some wooden reading of every interest a statutory rule is meant to safeguard. The speeding is justified because the risk of causing death by speeding on one occasion is very slight; the chance that speeding will save the passenger is much greater. When these probabilities are taken into account, the harm avoided is greater than the harm sought to be prevented.

10. The critical function is the decision whether, given the actual, believed, or reasonably believed facts, the evil avoided was sufficient to justify the conduct. The New York provision, § 35.05(2), explicitly assigns the determination to the judge; the Model Penal Code makes no allocation.

had been violated,¹¹ but that passage was in severe tension with other passages indicating that lives were to count equally and that a net saving of lives was justified. The language of the section, drafted by Herbert Wechsler, who had previously expounded a consistently utilitarian account of the law of homicide,¹² is certainly inhospitable to any importation of absolute limits. The most straightforward understanding of a comparison of the harm the actor seeks to avoid and the harm the offense seeks to prevent is in terms of damage to the interests of victims, not in terms that include an independent measure of the wrongness of the actor's conduct. The New York statute refers to the desirability of avoiding injuries, language that also focuses on the magnitude of harms to interests. Though neither formulation is wholly beyond a construction that would introduce absolute moral limits or give direct significance to the inherent quality of acts, each can be construed in those ways only with a considerable strain. Taking the standards as exclusively consequentialist involves, at most, a slight oversimplification.¹³

The nature of the consequentialist evaluation is a matter of greater doubt. One argument against justifying the intentional killing of some innocent people to save more innocent people is that recognizing such a moral and legal justification will undermine the value of life. Perhaps Leif's act itself, and its being recognized as justified by others, may have predictably harmful effects in the long run. The Model Code and New York provisions might be understood to permit this kind of administrative assessment before the defense is applied. In that event, the justification could be withheld for some acts that undoubtedly saved lives in the short run. The barrier to such an interpretation is that the language of both provisions focuses on the narrow context of the actor's choice, not on wider harms.¹⁴

C. *Tension with Natural Law Standards*

If the Model Code and New York provisions are consequentialist and focus on the immediate context of choice, how far do they conflict with traditional principles of natural law and with some alternative modern Catholic approaches to moral choice? One of the most basic tenets of traditional Catholic morality is that, in the words of Pope Pius XII, "the deliberate and

11. See MODEL PENAL CODE (Tent. Draft No. 8, at 9, 1958).

12. See Wechsler & Michael, *A Rationale of the Law of Homicide I*, 37 COLUM. L. REV. 701, 738-39 (1937).

13. See J. FINNIS, FUNDAMENTALS OF ETHICS 96-97 (1983).

14. A further problem involves the body that is to weigh the comparative evils. See *supra* note 10. Asking a lay jury to consider either the long-term effects of certain kinds of actions or the long-term effects of its exonerating those kinds of actions would be to ask more than could reasonably be expected.

direct disposing of an innocent human life” is always wrong.¹⁵ That condemnation, by any ordinary construal of the language, plainly covers Leif’s killing of the mayor. Causing her death was Leif’s immediate aim; that evil was the means by which Leif sought to save the other townspeople. His act was unjustifiable if the intentional killing of an innocent person is always wrong.

The absolute rule against the intentional killing of innocent people might be understood as a specific instance of a more general principle, that one should not do wrong to achieve good results. One modern formulation of such a principle is that of Germain Grisez, who says that we must never act “in a way directly destructive of a realization of any of the basic goods,”¹⁶ a sentiment echoed by the claim of John Finnis that an intermediate principle of morality is, “[d]o not choose directly against any basic human good.”¹⁷ Others have suggested that absolute prohibitions traditionally asserted by the Church as part of natural law can be understood more narrowly. On this view, not every choice to accomplish some good by causing a “pre-moral” evil¹⁸ is necessarily wrong. But a choice to promote good by evil means is wrong if it “frustrates the finality of a natural (God-given) faculty,” or if it is performed without the required authorization.¹⁹ Illicit sexual acts and lying are considered acts that are contrary to the natural purposes of human faculties;²⁰ intentional killing contravenes the basic principle that it is up to God to give and take life.²¹

The status of absolute moral norms has been the subject of intense theological controversy in the years since the Second Vatican Council. Practical

15. McCormick, *Ambiguity in Moral Choice*, in *DOING EVIL TO ACHIEVE GOOD* 7, 8 (R. McCormick & P. Ramsey eds. 1978) [hereinafter *DOING EVIL TO ACHIEVE GOOD*] (quoting Pope Pius XII, *ACTA APOSTOLICAE SEDIS* 43, 838-39 (1951)). See *DOING EVIL TO ACHIEVE GOOD*, *supra* at 4; Frankena, *McCormick and the Traditional Distinction*, in *DOING EVIL TO ACHIEVE GOOD*, *supra* at 147-49; C. CURRAN, *TRANSITION AND TRADITION IN MORAL THEOLOGY* 191 (1979).

16. G. GRISEZ, *ABORTION: THE MYTHS, THE REALITIES, AND THE ARGUMENTS* 319 (1970).

17. J. FINNIS, *supra* note 13, at 109; see J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 118 (1980).

18. A pre-moral evil is a harm like physical injury or death which need not involve any moral wrong. It is generally assumed by Catholic thinkers that intentionally causing a moral evil, that is successfully attempting to get someone else to do something that is morally wrong, is always wrong. I do not address that subject.

19. See Schuller, *The Double Effect in Catholic Thought: A Reevaluation*, in *DOING EVIL TO ACHIEVE GOOD*, *supra* note 15, at 169. In this passage, Schuller is reporting his analysis of traditional Catholic theology, not expressing his own position. See also McCormick, *A Commentary on the Commentaries*, in *DOING EVIL TO ACHIEVE GOOD*, *supra* note 15, at 198.

20. C. CURRAN, *supra* note 15, at 193-97.

21. Whether, so understood, the principle truly can be said to rest entirely on natural law rather than at least partly on revelation seems highly doubtful to me. See *id.* at 191.

concern has been directed largely at the Church's standard positions that masturbation, homosexual acts, artificial contraception, artificial insemination, sterilization, and direct abortion are invariably immoral; but some of the broader theories, which have underlain attacks on these norms, have implications for Leif's situation.

Before turning to some of these theories, I want to engage in a brief exercise in classification that should help to clarify various possibilities. Roughly, we can think of moral theories as including both ultimate justifying principles and practical rules or guides to conduct.²² In classic utilitarianism, both justifying principles and practical standards are consequentialist; morally best alternatives are conceived as those that produce the best outcomes, and individuals are supposed to make moral choices with such considerations in mind. At the level of justifying principles, ideas that some acts are wrong because inherently unnatural or unauthorized offer themselves as competitors to a consequentialist appraisal. If such justifying principles are sound, one may be able to condemn certain kinds of acts as wrongful without investigating the immediate or long-term consequences of subcategories of those acts.

Among practical standards for conduct, norms that are absolute and do not characterize acts in terms of their consequences are the extreme alternative to consequentialism. Such norms might be thought to cover the entire domain of morality or to leave some kinds of moral choices dependent on likely consequences. Between absolute norms and consequentialist approaches to norms lie various intermediate possibilities. Among these are the positions that: (1) nearly absolute norms may be overridden when compliance would have disastrous consequences; and (2) in a large range of cases both the inherent quality of acts and likely consequences matter, so that sometimes the overall best choice will be to avoid acts that are inherently bad or wrong despite predictable harmful consequences, but at other times considerations of consequence will override considerations of inherent quality.

As I have already suggested, practical standards about inherent wrongness, or absolute inherent wrongness, may be thought to be based on non-consequential justifications; but nonconsequential practical standards may be defended also in terms of long-term consequences. Thus, it might be argued that because of human weakness, human life and society will best be promoted if everyone assumes that there is an absolute rule against intentionally killing innocent people. Were this argument sound, we would have

22. Any comprehensive moral theory will also include other elements, such as an account of the use of moral language.

a consequentialist grounding of an absolute nonconsequential practical rule of behavior.

This quick survey is hardly complete or adequately qualified, but it should serve to indicate how resistant many theories are to simple categorization.

Modern Catholic critics of the traditional natural law standards, relied upon in much authoritative Church teaching and employed in older moral manuals, have challenged those standards as paying inadequate attention to the whole context of a situation and to the likely consequences of acts. The challenges have been raised both at the level of justifying principles and at the level of practical moral standards.

Some proposed revisions have been quite modest. Germain Grisez has suggested a change in the older notion that when a desired second effect follows physically from an undesired initial effect, the initial effect must be viewed as directly willed. Under that notion, direct abortion was not thought justified to save a mother's life, even when without the abortion both mother and fetus would die. According to Grisez, if one initiates an indivisible process, all that is involved in that process should be viewed as equally immediate for purposes of moral judgment.²³ This alteration in traditional understandings would permit the abortion when both mother and fetus would die without it, but it would leave absolute standards largely intact.

Other moral theologians have raised much more radical objections to the traditional standards. According to Peter Knauer, one does not directly intend a physical evil if one has a "commensurate ground" for its causation.²⁴ Joseph Fuchs has expressed skepticism that "intrinsic evils" can be understood in the deontological manner of the older standards.²⁵ Cornelius J. Van Der Poel rejects a methodology that draws a sharp distinction between direct and indirect killing, and denies that an intermediate stage can be the final moral determinant of a total action.²⁶ Bruno Schuller has argued that, from a teleological perspective, means regarded as morally evil by "deontologists" should not be ruled out.²⁷ Daniel Callahan has spoken of "a growing awareness that rigid, formalistic ethical codes too often break down in practice, proving themselves inadequate to moral complexity."²⁸ Charles Curran has contended that the "physicalism" of the traditional approach is mistaken and has urged a "relational model" under which "the moral self is

23. G. GRISEZ, *supra* note 16, at 333.

24. Knauer, *The Hermeneutic Function of the Principle of Double Effect*, 12 NAT'L L. F. 132, 137 (1967).

25. See J. FUCHS, CHRISTIAN ETHICS IN A SECULAR ARENA 77, 83 (1984).

26. Van der Poel, *The Principle of Double Effect*, in C. CURRAN, ABSOLUTES IN MORAL THEOLOGY? 186, 206-07 (1968).

27. See B. SCHULLER, WHOLLY HUMAN 163, 165 (1986).

28. D. CALLAHAN, ABORTION: LAW, CHOICE AND MORALITY 312 (1970).

seen in terms of the multiple relationships with God, neighbor, self, the structures of society and the world."²⁹

Many of these barely sketched approaches might appear to give Leif a foothold in claiming that his act was morally justified; but in my limited reading of Catholic writers, only Charles Curran has explicitly acknowledged that an exception to the usual rule against killing innocent people may be warranted in such extreme situations.³⁰ An outsider perceives a considerable hesitancy to accept the idea that the intentional killing of mature human beings can ever be morally right. Because I believe that hesitancy is powerfully displayed in Richard McCormick's views, I shall devote more concentrated attention to them.

In a widely read lecture on Ambiguity in Moral Choice,³¹ McCormick addresses the Church's position that direct abortion is not justified to save the mother's life, even when without the abortion both mother and fetus will die. Responding to Grisez's suggestion that abortion is then justified since its foreseeable natural effects make saving the mother an aspect of the original action,³² McCormick claims that the real justification for the abortion is that, because it salvages one life rather than allowing both to be lost, it is less destructive than the alternative.³³ Accepting the idea of a love ethic, McCormick says that such an ethic focuses on "the *overall* implications and repercussions of human conduct."³⁴ He argues that it would be myopic simply to regard the immediate foreseeable consequences of an act, because "implications and repercussions are affected very much at times by whether a certain evil is visited by an intending or merely permitting will."³⁵ Because of the long-term dangers of certain kinds of intended acts, and of their moral acceptance, some moral rules, such as the prohibition on intentionally killing noncombatants in war, may be treated as practical absolutes.³⁶ It is not entirely clear whether McCormick is recommending that actors themselves make moral choices in terms of the long run implications of their acts; but his approach at the level of principles of justification certainly depends on that perspective. What should be regarded as practical absolutes depends on long run dangers.

29. C. CURRAN, *supra* note 15, at 22, 31.

30. C. CURRAN, *Themes in Fundamental Moral Theology* 125 (1977) (discussing a well known hypothetical dilemma put by Bernard Williams in Williams, *A Critique of Utilitarianism* in J. SMART & B. WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* 98 (1973)).

31. *DOING EVIL TO ACHIEVE GOOD*, *supra* note 15, at 7.

32. *See generally* G. GRISEZ, *supra* note 16.

33. *DOING EVIL TO ACHIEVE GOOD*, *supra* note 15, at 27-28.

34. *Id.* at 32 (emphasis in original).

35. *Id.*

36. *Id.* at 42-43.

McCormick explicitly discusses the problem of whether a judge should frame one innocent man and execute him to avoid a mob's killing five other men unjustly. His answer is that such an act is unjustified, because it "would represent a capitulation to and encouragement of a type of injustice which in the long run would render many lives more vulnerable."³⁷ But Lief's situation differs from the judge's in three important respects. First, the judge's framing of an innocent man, which may some day be discovered, threatens the integrity of the legal system. Lief is a relatively unimportant figure in the invading army and, if he does not act, a worse evil will be done, not by a mob, but by a higher authority that has already committed numerous war crimes. Second, the mayor's life will be lost whatever Lief does. Given what would have happened if Lief had not acted, he has a pretty good argument that the total repercussions of his acting were preferable to the alternatives available to him.³⁸ Third, the number of lives saved is much greater. Thus, if one focuses on Lief's act by itself and asks if it was morally justified, McCormick's original essay leaves us uncertain about his answer.

In a subsequent essay, McCormick rules out the possible appropriateness of Lief's act.³⁹ Talking about using the atom bomb against civilians, he writes:

It is the Christian's faith that another's ceasing from his wrongdoing is *never* dependent on my doing nonmoral evil. . . .

. . . .

. . . There is no *necessary connection* between our doing harm to noncombatants . . . and that nation's ceasing unjust aggression. To say that there is would be to insult the humanity of the aggressor by denying this liberty.⁴⁰

In this language, the captain's decision not to destroy the town and its inhabitants is not dependent on Lief's act, and that act denies the captain's liberty. McCormick goes on to say that an act may be condemned by proportionate reason because of bad consequences or because "its very descrip-

37. *Id.* at 33.

38. I have assumed that any attempt by him to kill the captain or to report to the captain's superiors would have been unavailing to stop this massacre or to prevent future similar actions by the captain.

39. McCormick, *A Commentary on the Commentaries*, in *DOING EVIL TO ACHIEVE GOOD*, *supra* note 15, at 193. My reading of this essay is quite different from that of John Finnis. See J. FINNIS, *supra* note 13, at 101-04. Finnis thinks that McCormick continues to rely on overall harmful effects involving a particular value, such as life; on that reading any assumption by McCormick that Lief's act was wrong would depend on debatable factual premises. Though I do not think the text clearly resolves the difference of interpretation between Finnis and myself, I understand McCormick to be attempting to ground the wrongness of conduct like Lief's on some premise that does not depend on long-term consequences.

40. *DOING EVIL TO ACHIEVE GOOD*, *supra* note 15, at 236-37.

tion, when carefully made . . . entails an attack on the value it seeks to serve."⁴¹ Having begun with an approach that emphasizes long-term effects on the value that is involved, McCormick finally veers away from the possibility that the wrongful motives of others could ever make the intentional taking of innocent life justified.

Thus, we see that some critics of a traditional natural law approach unite with its defenders in rejecting the claim that Leif's act could be regarded as morally justified. In the following sections, where I consider the extent of the practical divergence between absolutists and consequentialists and evaluate certain absolutist arguments against consequentialism, I concentrate mainly on the absolute norm about innocent life as traditionally formulated, not pausing to assess how the analysis would change if one tried to defend a variation of that norm derived from one of the modern methodologies.

D. The Degree of Divergence and the Principle of Double Effect

Just how great is the divergence between what traditional natural law standards allow and the Model Code and New York general justification defenses allow? Brief reflection tells us that the disagreement is not over whether a moral justification can ever be present for an act that the law treats as a criminal homicide, or even for an act that the law treats as murder. A critical corollary of the position that the intentional killing of innocents is always wrong has been the principle of "double effect." Under that principle, acts that *predictably* cause the loss of innocent life may be morally justified. An act causing death as a virtually certain, but unintended, consequence is not necessarily wrong; it may be warranted if the actor's intention is good and if there are proportionately grave reasons for allowing the evil to occur.⁴² When a mountaineer cuts the rope that attaches him to a companion who has fallen over a precipice and whom it is impossible to save, or an engineer diverts a flood to save a town knowing that the inhabitants of a farm will be inundated, loss of life is an unwanted and unintended, although almost inevitable, consequence. These acts are allowed under the principle of "double effect," as are operations on pregnant women that will indirectly destroy fetuses, and the bombing of military targets that will kill some civilians.

Understanding what divides an absolute norm against intentional killing from a consequentialist approach to justification shows why excluding the defense for all instances of homicide or murder would not be an appropriate

41. *Id.* at 261.

42. For formulations of the principle, see D. CALLAHAN, *supra* note 28, at 423; DOING EVIL TO ACHIEVE GOOD, *supra* note 15, at 7.

way to implement the absolute norm. A person commits murder if he acts in a way that is virtually certain to cause the death of another, even if he hopes that death will not occur. Absent a justification, both the mountaineer and the engineer would be murderers. Thus, nonapplication of the defense to murder would leave unjustified people who would be morally innocent even under an absolute norm.

E. Challenges to Consequentialism and Defenses of the Absolute Norm

I now consider arguments that constitute challenges to consequentialism and defenses of absolute norms, such as the traditional standard that intentionally killing innocent persons is always wrong. Given the intermediate possibilities, we must recognize that an effective argument against consequentialism is not necessarily an effective argument for absolute norms, nor is an effective challenge to absolute norms necessarily an effective support of consequentialism.

1. Consequentialism is Unfaithful to Our Moral Experience

One argument against consequentialism is that it is unfaithful to our ordinary moral experience. We sense that it matters whether we take lives or allow lives to be taken by others and that it may also matter, if we are the cause of the deaths of innocents, whether we intend those deaths or not. Suppose that a doctor thinks that by killing one healthy person and using his body parts, she could save five others desperately in need of organ transplants. Few believe that such conduct is morally permissible. Though a committed consequentialist might talk about long-term insecurities, for many people this example illustrates the untenability of a purely consequentialist approach and shows the moral difference between intentionally causing death and failing to intervene to prevent death from natural causes.

A related aspect of our moral experience is that it is morally better to suffer wrong than to be the instrument of wrong. In the *Crito*, Socrates refuses to wrong the state by escaping despite the injustice of his own condemnation and impending execution. In the *Apology*, he recalls his earlier refusal to participate in the unjust liquidation of Leon of Salamis, a refusal that endangered his own life at the hands of the Thirty Commissioners, who had ordered him to fetch Leon.⁴³ The incident of Socrates and the Thirty Commissioners goes beyond a simple conclusion that when an injury must be suffered by oneself or another, one should suffer a wrong rather than inflict one; because, as Finnis points out, Socrates had every expectancy that Leon would be killed whatever he did. Although Socrates did not, like Leif, sup-

43. See J. FINNIS, *supra* note 13, at 112-13.

pose that his failure to participate in a wrong would harm others besides himself, his refusal to participate did add another likely harm, his own death, to those that would occur in any event.⁴⁴

These appeals to common moral sense are sufficient to create serious doubt about any exclusively consequentialist approach to moral judgment. They strongly suggest that the morally right act is not always the one that will have the best short run consequences. They also help to indicate why, if Leif had refused to kill the mayor and walked away from the situation, we would hesitate to condemn him. But one can reject consequences as the exclusive touchstone of particular moral judgments without treating them as irrelevant. One might well think that if consequences are *bad enough*, they somehow outweigh or supersede the nonconsequentialist norm that would otherwise apply. Many people would have just this reaction to Leif's situation; as bad as intentionally killing the mayor may be, declining the opportunity to save all the other townspeople might be even worse. In a book defending the "absoluteness" of deontological norms, Charles Fried acknowledges that when consequences would be catastrophic, the situation is removed from the governance of ordinary moral norms.⁴⁵ His "absolute" norms then, unlike those of the traditional natural lawyer,⁴⁶ do not apply to every choice that fits within their language.⁴⁷ Though reference to most people's intuitive moral sense may pose a serious challenge to consequentialism, it falls short of establishing the plausibility of absolute nonconsequentialist moral norms.

2. Long Run Consequences

One may defend absolute norms in terms of their long run consequences.⁴⁸ Of course, most immoral acts are judged to be harmful in some way, but the point here would be to use the long-term balance of consequences to condemn acts whose immediate predictable effect is to do lesser harm than might otherwise occur. Such is the import of McCormick's proposal that not intentionally killing noncombatants in wartime may be treated as a

44. See *id.* at 120.

45. See C. FRIED, *RIGHT AND WRONG* 12 (1978).

46. Compare Finnis' belief that it is better for "the whole people to perish" than that one innocent may be put to death. J. FINNIS, *supra* note 13, at 95, 109-11.

47. I assume that the language of the norm does not include the implied exception for catastrophic consequences. If it does, the absolute norm as formulated would always apply to the situations it covers, but it would be formulated in partially consequentialist terms.

48. See generally C. CURRAN, *TRANSITION AND TRADITION IN MORAL THEOLOGY* 42 (1979); S. SCHEFFLER, *THE REJECTION OF CONSEQUENTIALISM* 110-11 (1982); Perry, *Some Notes on Absolutism, Consequentialism, and Incommensurability*, 79 NW. U.L. REV. 967, 975 (1985).

“practical absolute,” because of the inevitable dangers if such killing is treated as sometimes justified.⁴⁹

This possibility requires us to consider distinctions that have lain submerged in the analysis thus far. If one is talking about the long run, the overall effect of an act itself may not necessarily be of the same import as the overall effects of formal legal justification or even of informal judgments that the act is morally justified. This conceivable divergence is brought home sharply by the circumstances facing Leif. Let us suppose that the consequences of legal or moral approval of Leif’s act would be bad, encouraging a less than ideal respect of the sanctity of innocent life. It does not follow that the long term consequences of Leif’s act alone will be bad. The realistic immediate alternative to that act was an even more horrible crime committed by his superior. Because Leif was a relatively unknown member of a largely brutal invading force, the long-term beneficial effect of a choice to leave the scene and not participate was highly dubious. The force of his example was probably very limited. It is conceivable that the best overall consequences would be produced if Leif kills the mayor, thus saving many lives, but others condemn his action, thus largely forestalling dangerous ripples from his example. The theoretical point here is that moral and legal appraisals are themselves social practices with effects, effects that may be evaluated separately from the effects of the acts to which they apply. We must face the possible paradox that Leif’s act may have been right, in some sense, though it should not be recognized as being right.

This paradox may be avoided for moral evaluation if it is postulated that the actual morality of an act must coincide with its proper moral evaluation. One way to do that is to say that moral standards must be standards that are, or can be, publicly announced and applied. On this view, Lief’s act cannot be morally right unless it is one that can be defended in terms of publicly announced standards.⁵⁰ These standards might be rule-utilitarian, in which event both Leif and his evaluators would need to ask whether a rule that would justify killing the mayor would, if publicly taught and accepted,

49. DOING EVIL TO ACHIEVE GOOD, *supra* note 15, at 42-43.

50. I have said that the possible paradox of both Leif’s act and its condemnation being morally right is avoided if moral standards of action must be publicly announced and applied, but that is true only in a sense. Suppose that Leif realizes that the best consequences will be produced if an exceptionless rule forbidding killing of innocents is generally accepted. He then understands that killing the mayor would be immoral. But if he further realizes that the best overall outcome will occur if he acts “immorally” and is then condemned, why should he actually do what is “morally right” rather than what will produce the best consequences? That troubling question is not really answered by insistence that moral standards must be public.

have long-term desirable consequences.⁵¹ Alternatively, the standards might be cast in nonconsequentialist language. Perhaps things will work best if standards require actors to think in terms of consequences or are at least presented to actors as justified in relation to long term consequences; but that need not be so. It is logically possible that the best consequences will be produced if standards are nonconsequentialist and, further, are recommended to actors as having a validity that does not depend on a balance of consequences. One who speaks of "practical absolutes" *might* think their force would be undesirably eroded were it publicly admitted that the bases for the "practical absolutes" were long-term, desirable consequences.

Whether or not the relevant standards were to involve the actors themselves thinking in consequential terms, questions of desirable generality would be crucial for evaluation of Leif's conduct. Is an appropriate standard cast in terms of all intentional killing of innocents, or should exceptions be introduced for situations in which such killing avoids catastrophic consequences, or achieves a net saving of lives? If the ultimate principle of evaluation is long-term consequences, and there is an agreed assessment of what long-term consequences are desirable, then the choice of appropriate generality ultimately resolves into a factual question, albeit an extremely complex and hypothetical one. The issue turns on which among the possible alternative standards would produce the best consequences. Conceivably such an approach would yield a nonconsequential standard which would condemn Leif's act, but the argument for that position would have to be made against claims that a more modulated standard with exceptions would have better consequences.

3. *Do Not Choose Against a Basic Good*

Many defenders of the kind of absolute norms found in traditional natural law do not want finally to rest their case on factual appraisals of overall consequences. They believe that the intentional killing of innocent people is always wrong and that its wrongness does not depend on any human assessment of an immediate or long-term balance of consequences. This idea is forcefully captured by the claim of Grisez and Finnis that an intermediate principle of practical reason is that one should never act against a basic good.⁵² The two authors disagree somewhat in the way they formulate the basic goods, but for our purposes, Finnis' simpler list of life, knowledge, play, aesthetic experience, sociability (friendship), practical reasonableness,

51. I have greatly oversimplified possible variations of rule-utilitarianism.

52. See G. GRISEZ, *supra* note 16, at 319; J. FINNIS, *supra* note 13, at 109; J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS*, 118-19 (1980).

and religion will suffice.⁵³ To some degree, the idea that one should not choose against a basic good is consonant with the intuitive sense that intentionally causing a harm is qualitatively different from failing to prevent a harm or knowingly causing a harm as an indirect, unintended consequence. As Grisez indicates, the idea also reflects the notion that people should not be used as mere means to achieve ends.⁵⁴ In the thought of Grisez and Finnis, the related claim that the basic goods are not commensurable partly underlies their challenge to consequentialism. I address that claim and its implications in the next subsection; here, I concentrate on other considerations.

The idea that one should never use one person as a mere means to the good of another is appealing, but its precise dimensions are obscure; and, if it is understood in the manner that fits with the thesis of Grisez and Finnis, it has strongly counterintuitive implications.

A crazy woman is angry that others have been admitted to a small museum from which she has been excluded for making too much noise. She puts a gun to the head of the museum guard and says she will shoot him unless Ada, the attendant, sets off an alarm that will empty the museum of its ten visitors. It is close to the time when one out-of-town visitor must catch an airplane, and the attendant is aware that this person will not have another chance soon to see the museum.

If Ada sets off the alarm she will be interfering with the aesthetic experience of the visitors. That is precisely the objective of the crazy woman, and Ada is trying to achieve it to save lives.⁵⁵ When people must choose between a minor impairment for some people or a grave loss for others, and the impairment is the necessary and regretted means for avoiding the loss, it seems

53. J. FINNIS, *Natural Law and Natural Rights*, summarized in FUNDAMENTALS OF ETHICS, *supra* note 13, at 50-51. For Grisez's list of basic goods, see G. GRISEZ, *supra* note 16, at 312-13.

54. See G. GRISEZ, *supra* note 16, at 319: "To act directly against a good is to subordinate that good to whatever leads us to choose such a course of action. We treat an end as if it were a mere means; we treat an aspect of the person as if it were an object of measurable and calculable worth."

55. One might make a "double effect" argument that Ada only wants to clear the building, not to prevent aesthetic experience; that the crazy woman's hostile motive does not reach Ada's intention. Given its full scope, this argument might reach all sorts of interferences with various kinds of valuable experiences. The principle that one should not act against a basic good would then be sharply circumscribed. What then of Leif's act? It might be said that he would be delighted if the mayor only appeared dead to the captain and then was resuscitated; but shooting the mayor was the only way Leif knew to make her appear dead. Leif's intention could then be understood as acting so the mayor would appear dead; her actual death would be a foreseen unintended consequence. There comes a point at which such torturings of intention vitiate the principle of double effect.

odd to speak of the people as being used as “mere means.” If such language is aptly applied to circumstances like this, using people as “mere means” sometimes seems appropriate.

Further doubt is cast on the absoluteness of any rule not to choose against basic goods by the difficult borderlines of the rule, borderlines of intention, action, and innocence. I have already spoken about the critical distinction between intended and foreseen results in the principle of double effect. Consider the following case:

Gerald's body is lodged in the entrance to a fast flooding cave, in which twenty people are trapped. Unless he is dislodged, they will die. He can be dislodged only if explosives are used that will blow his body into pieces.

Would the use of the explosives involve an intentional killing of Gerald, because the freeing of the entrance is physically linked with Gerald's death, or only an unintended killing, because all would be delighted if somehow the explosives blasted Gerald free and also allowed him to survive?

The second borderline of the rule about not acting against a basic good concerns action and inaction. Though Finnis talks about never choosing against a basic good,⁵⁶ that seems imprecise, at least as far as life is concerned. In a situation in which someone is suffering a painful and debilitating terminal illness, it has traditionally been supposed that the patient or family members may choose to forego extraordinary measures of care for motives that could not permissibly underlie positive steps to take life. I assume that an intentional *action* motivated to bring death more quickly would be an impermissible action against the good of life; but a choice similarly motivated not to use extraordinary means to preserve life would be permissible.⁵⁷ This shows that not only one's grounds for choice, but also whether one acts or omits to act, can be critical. In this light, consider the following case:

The mayor of the town is seated in an electric chair. If she is electrocuted the townspeople will be saved. Leif is able, by flicking or not flicking a switch, to determine whether she will die. In version (1), Leif must move the switch for the execution to occur. In version (2), an electric current will automatically execute the mayor unless Leif moves the switch.

The third borderline concerns innocence. If killing in self-defense is warranted, may a person kill a small child advancing toward him when killing

56. See J. FINNIS, *supra* note 13, at 109.

57. See Schuller, *supra* note 19, at 175-76. For an emphasis on the importance of action and inaction, see P. FOOT, VIRTUES AND VICES 20-30 (1978). The intricacies of relevant judgments are explored in Thompson, *The Trolley Problem* 94 YALE L.J. 1395 (1985).

the child is the only way of preventing a bomb the child is carrying from killing himself and others?

Once we grasp the delicacy of the borderlines of intention, action, and innocence, we have further reason to doubt whether they can bear the weight of absolute moral norms that condemn without qualification every instance of conduct that falls on the "wrong side" of the borders.

4. *Incommensurability of Basic Values*

Grisez and Finnis strongly suggest that the incommensurability of basic values requires a rejection of consequentialism. Attempting to engage in computations when basic values are in conflict is not only impossible, they claim, but senseless.⁵⁸ This claim, as made, has little direct bearing on Leif's case, is unpersuasive in its full scope, and has doubtful import for the acceptability of a consequentialist legal formulation.

The strongest version of a claim of incommensurability would preclude comparisons even when the value involved in a choice is the same value, for example, life. The claim would be that one could not make a moral judgment about whether it was preferable to save a thousand lives or one life if a choice had to be made where to direct a single rescue craft. Though it has been suggested recently that numbers do not count,⁵⁹ virtually everyone, including Grisez⁶⁰ and presumably Finnis, agrees that in such a situation, barring any special countervailing considerations, one morally ought to save the thousand. In any event, even were the incommensurability of basic values carried so far, it would not touch Leif's case. The mayor is to die in any event, and probably will die as quickly if Leif retires from the scene instead of entering the village. Leif's conduct sacrifices no lives which would otherwise be saved, and saves many lives which would otherwise be taken.

For many other situations touched by a general justification defense, the supposed incommensurability of values may matter more, because often justifications will take the form of defending a sacrifice of one value to serve some other value. I turn now to situations in which various goods or values are in conflict.

To attack a thoroughgoing moral consequentialism, it may be enough to claim that basic values are only partially commensurable, to say that in some instances of conflict there is no uniquely correct ordering. But Grisez and Finnis seem to go beyond this to argue that different values are wholly incommensurable. At first blush, this is a truly astonishing claim.

58. See Grisez, *Against Consequentialism*, 23 AM. J. JURIS. 21, 29 (1978); J. FINNIS, *supra* note 13, at 87-92.

59. Taurek, *Should the Numbers Count?*, 6 PHIL. & PUB. AFFS. 293-316 (1977).

60. See Grisez, *supra* note 58, at 51.

Imagine a different choice by Ada as to whether to set off the museum alarm. A basement gas leak endangers one person's life; the only feasible alarm will disturb the aesthetic enjoyment of ten others who are not threatened. It would be a rare person who would not suppose that Ada is morally required to set off the alarm if that will help save one life; the slight sacrifice in aesthetic experience seems plainly warranted. Even if, as in the original example of Ada and the crazy woman, the disturbance of aesthetic experience is the means by which the life is saved, Ada should act.

Grisez and Finnis do acknowledge that individuals and cultures undertake commitments that reflect choices among basic values.⁶¹ Each also accepts that these commitments must be guided by standards of consistency and reasonableness,⁶² giving, as Finnis puts it, "some place to each of the basic aspects of human well-being."⁶³ But what they apparently do not accept is that assigning a high priority to any one value at the expense of others is intrinsically immoral. If this extreme skepticism is really their position, it is not widely accepted. In choices between death and some modest impairment of other basic values, I have suggested that most people consider the choice in favor of life to be morally required.

Traditional Catholic morality itself seems to suppose not only that numbers of lives matter but also that some commensurability exists among values generally. The most obvious situations are ones in which a person is not choosing against a basic value, but harm to a value is a risk of one's action. A war may be just or not depending upon the likely loss of civilian life; a firefighter can be expected to risk his life to save ordinary people but not to save ordinary paintings or manuscripts.⁶⁴ The absence of any verbal formula or precise nonverbal formula for comparing different values does not mean either that humans are incapable of resolving some conflicts or that these resolutions are outside the domain of morality.

Perhaps Grisez and Finnis would say that other criteria of decision would yield results in the cases in which one choice between values seems morally required. If this is their position, then they may have an intellectual quarrel with notions of computation, but they do not deny that basic principles of morality settle many clashes of conflicting values.

However sweeping their thesis about the incommensurability of values, it has doubtful implications for a general justification defense. Both writers assume that societies develop standards for resolving conflicts among the

61. *See id.* at 39, 59; J. FINNIS, *supra* note 13, at 90-92.

62. *See* G. GRISEZ, *supra* note 16, at 318; J. FINNIS, *supra* note 13, at 91.

63. *See* J. FINNIS, *supra* note 13, at 91; G. GRISEZ, *supra* note 16, at 318.

64. I pick these objects because their loss may mean an inevitable deprivation of aesthetic experience or knowledge.

realizations of possible values, standards that are not themselves immoral. Within a society it would be presumably appropriate for legal principles to embody those standards.⁶⁵ For the general justification defense, that might be done implicitly with consequentialist language. Indeed, Grisez explicitly says that people often use consequentialist language to express what he believes are intuitive moral, noncomputive, judgments.⁶⁶ Employing such language in a criminal defense might be viewed as a rough but acceptable way to call forth such intuitive judgments. So, individuals and cultures permissibly compare values, and standards for such comparison are properly found in the law.

What remains for both Grisez and Finnis is a strong objection to any action that is directly against a basic good, but this objection is now revealed as not following from any principle about the incommensurability of values.⁶⁷

5. *One Should Not Yield to Extortion*

Another argument in favor of an absolute norm for situations in which one's commission of a wrong does good through the choice of another actor is that one's commission of the wrong is yielding to extortion, is perhaps even a kind of extortion itself, and that it denies the freedom of action of the other.⁶⁸ The captain should not burn the village and kill the inhabitants. His offer not to do so is a kind of extortion against Leif. Leif's killing the mayor is an attempt to "buy" from the captain restraint that the captain should engage in anyway. Leif's act compromises the captain's freedom to refrain for the right reasons. As cast, this argument, made by McCormick, is puzzling. One can certainly understand the position that yielding to extortion encourages more wrongful extortion, and worry about this possibility can underlie a long-term consequences argument against justifying submission to extortion. Were that the force of the argument, it would have only glancing relevance to Leif's situation. The captain is not really trying to manipulate Leif. He would be perfectly content to burn the village, but is willing to make a concession to a favored lieutenant.

If the argument about extortion and freedom is meant not as a consequential claim but as showing the inherent wrongness of what Leif does, it is not very powerful. If Leif brings back the mayor's body, the captain may be less free than he would otherwise be to change his mind for reasons of conscience. But much worry about the captain's freedom seems a little precious here. He is already a wrongdoer in making his plans and using them as the

65. See Grisez, *supra* note 58, at 59.

66. *Id.* at 56.

67. My analysis here owes a good deal to Perry, *supra* note 48, at 979-82.

68. See McCormick, *supra* note 39, at 237-38, 260.

basis for putting Leif to the choice.⁶⁹ The captain has voluntarily surrendered this piece of freedom. Moreover, if Leif leaves for the town just at the time the captain would otherwise have given the order to destroy the village, the captain was already poised to forego his possible choice to save the village. Perhaps most important, if Leif witnessed or heard about numerous firings of towns by this very captain and heard the captain's firm plan, can he not assume that almost certainly the captain will not exercise his freedom to save the village? No doubt, giving in to extortion is not generally a good thing to do, but that aspect of the situation seems to pale in comparison with the almost certain loss of two hundred lives.

6. *God's Providence*

Finnis has suggested that a consequentialist approach necessarily implies a lack of confidence in God's providence, because a Christian has faith that God will bring good out of bad events and believes that, therefore, no human act will actually compromise God's long-term purposes.⁷⁰ I have manifold problems with this argument, which I will just sketch. First, I do not think all Christians subscribe to Finnis' view of providence; some, at least, do believe that human freedom involves the capability to do harms that God does not rectify. Second, a consequentialist might say that human moral responsibility concerns consequences apparent to us as human beings, whereas God's providence includes many aspects of existence that are fundamentally unknowable. To try to promote a maximization of goods we understand would not be to arrogate ourselves to God's position. Third, even if we thought God inevitably bailed us out when we made mistakes, we might think our moral purpose should be to aim to contribute to the overall good as though we could not rely on God's providential intervention. Much more might be said about these complex theological questions, but suffice it to say no simple reference to God's providence is sufficient to undermine consequentialism, as is evidenced by the number of Christian thinkers who subscribe to some form of consequentialist ethic, often cast in terms of maximizing love. Further, the argument about God's providence, even if valid, hardly establishes that likely consequences in particular instances do not count at all for moral judgment; so the argument does not establish the correctness of absolute norms.

69. According to legal principles, those who extort others can be arrested well before the point of "no return."

70. J. FINNIS, *supra* note 13, at 110-12.

7. *Unauthorized Acts*

Finally, there is an argument that certain kinds of acts are simply unauthorized. Although one can conceive of such an argument that one should never act against a basic good, the example in which Ada is told she can save a life by interfering with aesthetic experience suggests that few religious persons would take that uncompromising position. A good many people, however, do think that God alone may intentionally take innocent human life; that the purposeful destruction of such human life is something human beings are never authorized to do. Without trying to work through all the possible arguments, I shall assert simply that by considering dilemmas like that which Leif faced, we could not reach this absolute norm about human life on the basis of rational reflection about human life alone or about that life in relation to an omnipotent and benevolent God. We could reach this norm only on the basis of some revelation of God's relation to human beings and purposes for them, or upon some nonrational judgment of value that one should never take an innocent person's life. If I am right about this, the absolute norm based on a lack of authority is not contrary to reason, but its acceptance depends on some particular religious revelation, or some other step beyond reason. It is not a conclusion one should expect to be drawn generally by those who do not accept some revelation with this implication.

My conclusion about arguments against consequentialism and in favor of an absolute norm against intentional killing is that some of these arguments do cast serious doubt on the adequacy of a wholly consequentialist evaluation focused on immediate context; but as potential supports for an absolute norm, the arguments are either unpersuasive or inconclusive, or rest on particular religious premises. I am now ready to return to the practical problem of a general justification defense.

F. *Formulating the Defense*

1. *Implications of the Absolute Norm*

I first want to ask what language would best capture a plausible version of the absolute position. I have stressed that an absolute norm against intentional killing would not preclude use of the general justification defense in all cases of homicide or murder. I have also suggested that a moral rule that one should never act against a basic good or that one should never do evil to promote good is not plausible if it precludes the modest impairment of aesthetic experience to save lives. A principle cast in terms of never choosing against a basic good or never doing evil might, of course, be construed in some way to avoid unacceptable implications, but then the language of the principle would itself provide limited guidance. Language of this sort would

not appropriately be included in a justification provision in a criminal code. A formulation that the justification would never extend to the intentional taking of innocent human life would provide much clearer guidance and would represent the moral view of substantial numbers of people. I shall take such a formulation as embodying the absolute norm.

A general justification defense might include the absolute norm against intentional killing; it might implicitly reject it, as I have suggested that the Model Penal Code and New York provisions do; or it might contain language allowing the court or jury applying the defense to reject the defense if it thought an absolute norm was transgressed. A believer in the absolute norm might consider its actual inclusion in the penal law as ideal, treating as a fallback position the open-ended language that would leave possible reliance on the norm to the judge or jury.

At least one argument might be presented to the absolutist against seeking inclusion of the absolute norm. The general justification defense provides an exemption from criminal liability. Ordinarily, acts that most people regard as morally acceptable should not be treated as crimes. If most people do not accept the absolute norm, and if the believer in such a norm acknowledges that the best argument for its validity depends on a view of particular religious revelation that is not generally accepted, then he might acknowledge that people like Leif should not be treated as criminals for performing acts that most people do not think are wrong. It is important here that extending the justification defense to Leif does not actually put him in a position *superior* to the individual who sticks to the absolute principle. The person who refuses to kill the mayor though he knows the captain will take 200 lives has committed no crime. Giving Leif the defense does not represent a statement that he acted better than if he had retired from the scene; it puts his behavior within the range of what is minimally acceptable.

There is a special wrinkle here concerning duress and a possible counter-argument about legal justification that warrant brief examination. With some oversimplification, duress is regarded as an excuse, and its operation overlaps to a substantial extent with the Model Penal Code and New York provisions on general justification. If someone threatens to kill someone unless I steal a painting, I can claim that my act was justified; I can also claim that, because I was coerced to act by a threat of force that a reasonable person could not resist, I have the defense of duress.⁷¹ This overlap could provide some support for an absolutist's argument that the general justification defense should include no act that violates the absolute norm. He might say that the issue is not whether the actor will suffer criminal punishment;

71. See MODEL PENAL CODE § 2.09 (1985).

the person who does what most people would do will be excused on grounds of duress. Therefore, the actor does not need the implicit approval of the justification defense and the defense should not approve behavior that is morally wrong.

Taken on its own terms, this argument has some power, but it is not fully persuasive. The person who has done what most people regard as morally right or morally acceptable should be able to claim that he did no wrong in the law's eyes, not only that his wrong was excused because of great pressure. Further, and more important, the duress defense as presently constituted does not cover all relevant circumstances. Only by an extreme stretch could it be said that Leif was *coerced*. The captain did not threaten him; he made a kind of "concession" to forestall Leif's resentment. If Leif does not have available the general justification defense, he probably has no defense at all.

The counterargument that the absolutist could present to nonabsolutists might go something like this. The situations in which anyone thinks the intentional killing of innocent people is morally acceptable are extremely rare. If such situations exist, legal institutions will have a very difficult time sorting them out, and should not attempt to do so. The law should adopt a straightforward principle that will coincide with what is morally right in the vast majority of instances, sending a strong message that the intentional killing of innocents is wrong.⁷² Appropriate leniency can be introduced at the sentencing stage or by executive clemency.

This argument is not without force; sometimes the law does have to adopt comparatively simple principles that end up condemning as legally wrong some behavior that is morally justified. But it is harsh to think that someone could be convicted of murder who has acted in a way most people think is morally appropriate.

If the argument for actual inclusion of the absolute norm fails, what is an appropriate alternative? The discussion thus far has indicated that disquiet over justification standards that focus on relatively immediate consequences should not be limited to the believer in absolute norms. Some acts whose immediate consequences are beneficial may have overall harmful long-term consequences, so a justification standard should reasonably invite attention to long-term as well as short-term consequences. Those should include the consequences of affording a legal justification as well as of the act itself. Moreover, many people believe that some acts are wrong though they produce overall desirable consequences. Perhaps most people's intuitive sense

72. Lord Coleridge's opinion in *The Queen v. Dudley & Stephens*, 14 Q.B.D. 273 (1884), contains language to this effect.

lies somewhere between the absolutist and the straightforward consequentialist positions, assigning a wrongful quality to intentional killing that counts heavily against it, but allowing that in extreme enough cases intentional killing may be the morally better choice. Neither the present language of the Model Code and New York provisions nor the absolutist principle adequately captures their view. Though that view is harder to express and defend than either of the extreme alternatives, it can give sensible answers to the examples that embarrass the extremes, and may well express a sounder moral position.

The natural law challenge to consequentialism is disturbing enough to conclude that a thoroughgoing consequentialist approach that focuses exclusively on the comparative harms in the immediate situation is too limited a focus. The quality of acts can matter, as can longer term effects, and those who pass on the justification defense in particular cases should be able to consider their relevance. Appropriate language can be variously formulated, but an independent requirement that any act that is claimed to be privileged "justly respect the interests of everyone involved" is attractive. Such language would focus the attention of the judge or jury on whether a gain for some has been wrought in an unacceptable manner at the expense of others who are innocent. In addition to the problems already discussed, such language would also permit the justification to be refused when those on whom a harm falls are unfairly selected. Whatever an absolutist judge should do if he understands that he is in a minority, an absolutist juror, in a jurisdiction where jurors decide if the established facts are sufficient to make out the defense, could urge his fellow jurors that no killing of the innocent could justly respect the interests of the victim.

A second desirable independent requirement would be that the defense not be afforded when its recognition "would tend to undermine principles of justice." This language would focus attention on the long-term effects of recognizing the defense in particular kinds of cases.

No doubt these formulations could be improved upon. No doubt also, present formulations *could* be interpreted along these lines. Given the rarity with which the defense is raised and the great latitude a judge or jury already has in applying the defense, statutory emendation of existing language is not a high priority. But the general justification defense is an important symbol of society's moral views. Its language should not misrepresent enlightened and widespread moral understandings. I believe these changes would bring existing provisions closer to those understandings than either the present language or an absolutist formulation.

II. NATURAL LAW AND SECULAR POLITICAL MORALITY

I now want to explore more generally a subject that the previous discussion has already raised. Broadly put, the subject is the extent to which substantive moral principles potentially relevant to political choice rest on particular religious premises, and whether, if they do, they are appropriately relied upon by good liberal citizens.⁷³ The suggestion often has been made that in a liberal democracy the bases for political judgments should be publicly accessible.⁷⁴ Because rational public reasons are commonly thought to be incapable of settling matters of religious truth, the practical import of the suggestion that bases for judgments should be publicly accessible is that reasons deriving from particularist claims of religious truth are inappropriate bases for political decisions.⁷⁵ On this view, neither officials nor citizens should rely on such bases to impose laws and policies on fellow citizens who cannot be expected to understand and accept these bases. To take an obvious example, it would be wrong in a liberal society to prohibit the eating of pork on the ground that a dietary law in the Old Testament forbids it. Similarly, if an absolute norm against taking innocent life could be supported only on the basis of particular revelation, that norm should not be written into the law.

Proponents of exclusive reliance on rational secular grounds do not assert that citizens with religious views will in fact be able to disregard totally these views as they make political choices; the idea is that citizens should try. They should try to make the decisions and arguments they would make if they could, for the moment, block out whatever religious premises they ac-

73. I explore this general subject in a series of lectures entitled Greenawalt, *Religious Convictions and Lawmaking*, 84 MICH. L. REV. 352 (1985). A more comprehensive treatment is undertaken in K. GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* (forthcoming Oxford Univ. Press). Particular aspects are explored in greater depth in Greenawalt, *Religiously Based Convictions and Restrictions of Liberty*, B.Y.U. L. REV. (forthcoming); and Greenawalt, *The Limits of Rationality and the Place of Religious Convictions: Protecting Animals and the Environment*, WM. & MARY L. REV. (forthcoming).

74. Some of the social philosophers who assert this position are discussed in the pieces cited in the previous footnote. A similar concern affects some Christian thinkers who believe that "the Christian no longer lives in a Christian society but that he should be able to dialogue in moral matters with all people of goodwill and be largely able to agree with them in matters of public policy." V. MACNAMARA, *FAITH AND ETHICS* 38-39 (1985).

75. In some accounts, the argument that religious premises should not figure in political decisions is connected to an argument that these decisions should be made on the basis of principles of justice, without reference to any controversial conception of the good. Natural law thinkers have traditionally claimed that human goods are rationally determinable and that judgments about these goods underlie thought about moral and political subjects. The thesis that theories of the good should not be relied upon is in much more obvious conflict with traditional natural law thought than the thesis that religious premises should not be relied upon.

cept. Under this view, the good liberal citizen would *not* have to ask what he would believe if he had never been religious. If, in fact, he came to recognize human selfishness from reading the Bible, he would not have to figure out what he would think about human nature if he had had no exposure to the Bible. But the good citizen would have to depend only on views that he now believes can be supported without reference to religious premises.

In the course of my struggles to understand and evaluate the thesis that rational secular morality should control political decisions in a liberal democracy, one interesting question I have faced is how typical reliance on natural law conclusions fits with that thesis. It is that slice of the general topic I mainly treat here.

In preparing for this lecture, I have learned that the question whether a substantial naturalistic ethics can stand independent of faith is now highly controversial among Roman Catholic moral theologians. My understanding of that controversy is as follows. Catholic thinkers more or less agree that Christian revelation is important for understanding humankind's final good;⁷⁶ that revelation confirms and clarifies moral norms or guides⁷⁷ which are also accessible to nonbelievers; that revelation exhorts moral behavior;⁷⁸ that in establishing our relationship to God, revelation provides an important motivation for acting morally and can help infuse people with a loving and generous spirit; that revelation enriches our understanding of moral failure. What is not agreed upon is the extent to which Christian revelation informs believers about substantive moral principles that are not accessible to nonbelievers.⁷⁹ Those who adopt the traditional approach to natural law claim that natural reason is a basic source for moral understanding and that the nonbeliever has access to bases for important moral judgments.⁸⁰ Some modern critics of the deontological emphasis and rigidity of the traditional moral positions agree with the traditional view that moral understanding is accessible to all.⁸¹ Indeed, in rejecting the idea that scripture and church

76. See V. MACNAMARA, *supra* note 74, at 10 (reporting on the traditional natural law view reflected in moral manuals).

77. C. CURRAN, *supra* note 15, at 188, says that "given human weakness and sinfulness, human beings need the help of divine revelation and of the teaching office of the church in order to have a clear and adequate knowledge of the natural law." See also J. FINNIS, *supra* note 13, at 110. It is assumed that revelation, correctly understood, cannot contradict reason. See C. CURRAN, *supra* note 15, at 13.

78. See B. SCHULLER, *supra* note 27, at 16-18; J. FUCHS, *supra* note 25, at 16.

79. My sense of the dimensions of the disagreement has been largely informed by MacNamara. See V. MACNAMARA, *supra* note 74.

80. See, e.g., J. FINNIS, *supra* note 13, at 67-76.

81. See, e.g., G. HUGHES, *AUTHORITY IN MORALS* (1978); B. SCHULLER, *supra* note 27. Schuller has some interesting passages claiming that his position about autonomous morality has been long accepted by the hierarchy and conservative theologians. *Id.* at 2-3, 25.

teaching give clear and correct answers to modern moral problems, these thinkers go further in asserting the "autonomy" of morals and natural reason.⁸² The contrary view, now associated especially with a faith-ethic, or Glaubensethik, approach, is that at least much of the substantive moral understanding of a believer will be inseparable from his religious faith.⁸³

What matters for our purposes is how far the substantive morality that bears potentially on political decisions depends on faith. Suppose that naturalist reasoning could determine all the basic norms of behavior that are properly enforced by law, but that Christian faith led one to believe that a much greater measure of personal self-sacrifice was called for than could be established by natural thought. In that event, Christian revelation would affect one's substantive moral views, but not in a manner that mattered, at least directly, for appropriate laws.⁸⁴

If the claim of natural law is that there is a basic stratum of moral judgments, accessible to all, and that all, or virtually all,⁸⁵ political decisions can be made on the basis of this stratum, then natural law theories may appear consonant with the thesis that secular rational grounds should determine political decisions. However, if one addresses natural law in its traditional Roman Catholic context, it is plain that particular faith figures in ways that are not in accord with exclusive reliance on secular rational grounds.

Natural lawyers have supposed that virtually all people can understand basic moral truths, but they have not supposed that natural reason allows everyone to reach correct conclusions about all issues relevant to public law and policy. There are limits to ordinary human capacities. Many ethical questions, though they yield to reasoned resolution, are quite complex. Perhaps most ordinary people are *incapable* of resolving these questions on rational grounds. As John Finnis says, some derivations from first principles to moral norms require "wisdom, i.e., a reasonableness not found in everyone or even in most people. There is the movement from goods and principles (of natural law) recognized by everyone to moral precepts (still of natural law) whose truth is accessible only to a wisdom not shared by all."⁸⁶ Perhaps even among people who are capable of resolving an issue on grounds of reason, some will lack the time or inclination to make the effort. People who are incapable of reasoning fully about the complex questions or

82. See G. HUGHES, *supra* note 81.

83. See V. MACNAMARA, *supra* note 74, at 56-63.

84. MacNamara suggests generally that the Christian's different vision may "relate to the more personal, rather than to the more public, aspects of morality." *Id.* at 143.

85. One might suppose that on certain questions relevant to political decisions, such as the rightness of monogamous marriage, or indissoluble, monogamous marriage, revelation was essential. See G. HUGHES, *supra* note 81, at 10.

86. J. FINNIS, *supra* note 13, at 69-70.

who have not devoted the necessary effort may believe that religious bases, the teaching of church authorities or scripture, give them answers.⁸⁷ If these people also believe in natural law, they may well conclude that the positions they accept on the basis of religious authority are also correct on rational secular grounds, but they will not understand on secular rational grounds why that is so, nor will they yet be able to defend their positions on such grounds against major competitors. They have adopted the positions they now hold on religious grounds and they may not know what positions they would accept if they abandoned the religious grounds. We see, therefore, that even if the conclusions of natural law are in fact accessible to nonbelievers, for many believers, religious conviction, informed by scripture and by authoritative church statements, may often play a critical role in the formation of political views.

Let me pause to consider a possible response to the claim that reliance on the church's teaching is a reliance on religious conviction. It might be said that deference to authority is often rational. In matters of fact and even in some matters of evaluation, we all defer on occasion to the judgments of those who understand more than we do. Deference to church teachings may be claimed to involve acceptance of the authority of the morally wise.

I begin by acknowledging that any sensible view of political choice must include reliance on factual authorities as part of a citizen's exercise of his political responsibilities. On many issues, we must assume that experts know roughly what they are talking about. It is rational to accept the judgments of people who are established as experts by criteria of training, experience, and peer recognition, and to accept the judgments of those who have proven right in the past. It is less apparent that such acceptance is appropriate for evaluative judgments, but it cannot be ruled out. Suppose that on five previous occasions I have tentatively reached a judgment opposed to that of Socrates; on each occasion I have failed to be persuaded by his arguments at the time; but further experience and long reflection have persuaded me, and most other people, that Socrates definitely had the better of the arguments and that I was wrong. The sixth occasion arises and the issue is whether capital punishment is morally acceptable. My assessment of the arguments is that it is not, but Socrates concludes that it is. I am asked whether I believe, overall, that capital punishment is acceptable. On the basis of previous experience I might rationally say: "Because at this point I have more confidence in Socrates' judgment than my own, I think it is probably accept-

87. It is here that modern proponents of autonomous morality are much more skeptical than traditional natural lawyers. At issue are such questions as whether scripture contains permanently binding norms, how earlier authoritative statements are to be construed, and what is the comparative competence of church hierarchy and moral theologians.

able." On this basis, I might rationally support capital punishment though not presently understanding why the arguments for it are stronger than the arguments against it. No sensible model of how citizens and officials should make political decisions should wholly exclude this possibility of reliance on "moral authority."

I am inclined to think that something like this account might be part of the explanation why religious believers accord weight to the positions derivable from scripture and church teachings; these sources have, for the individual, established reliability in judgments about moral matters on other occasions. But I do not think such an account is most of the explanation for most religious believers. The authority of the religious sources derives mainly from independent beliefs about the ways in which these sources reflect God's will. It is, for example, often said that the Church's teachings are guided by the Holy Spirit. Confidence derives not so much from successful resolution of previous moral issues as from religious convictions that establish authoritativeness. If I am right about this, the reliance of Roman Catholics on the teachings of the Church typically involves a distinctive reliance on religious convictions; and that reliance is not an appropriate basis for political judgments if those judgments are supposed to rest on rational, secular grounds.

A more complex role for religious sources concerns the inquiries and conclusions of those who are most competent to resolve issues on rational grounds and who make the effort to do so. Rational solutions to some problems may be hard to grasp for even the best thinkers. It is a familiar process for legal scholars to shift from thinking that one answer to a problem is right to thinking that the choice is a "toss-up" for which there is no right answer, to thinking that a contrary answer is correct. Even scholars committed to the view that every legal problem has a rationally correct answer will often be uncertain as to what answer it is. Now, if he thought the same were true about some ethical problems, a committed natural lawyer, who believed that religious sources confirm what reason may discover, might attain a much higher degree of certainty about an answer which seems consonant with religious sources than if he relied on reason alone. And he might, like the ordinary person, even accept, on the basis of religious sources, a position that conflicted with a present highly uncertain judgment about the comparative strength of rational arguments.⁸⁸

88. See G. HUGHES, *supra* note 81, at 92-93. This cite to Hughes is particularly notable because among English speaking Catholic theologians, he is one of those who places greatest emphasis on rational approaches to moral questions and who challenges most strongly the possibility of certainty derived from scripture or historic church teachings. Grisez has written, "Those who really believe that there exists on this earth a community whose leaders are ap-

In some instances of decision about laws and policies the degree of certainty of moral judgment itself will be important. As compared with the person who has no doubts, someone who is highly uncertain about the correctness of his own position may be much less willing to impose it on others and much more willing to accept some sort of compromise. A full blooded principle foreclosing reliance on religious convictions would also foreclose any increments in degree of certainty that these convictions provide.

We now reach deeper problems, about which I must speak with less confidence. One great question is whether a person can believe in a traditional natural law approach and its particular normative structure without accepting notions of religious truth. Are underlying premises that traditional natural lawyers have asserted about ascertainable human purposes or self-evident goods, about human reason, about the ultimate compatibility of individual and social good, about order and harmony establishable independent of belief in a benevolent deity? Despite the insights of Hegel, Marx, and Freud and their many followers, distinguished natural lawyers still claim that the truths of a full bodied natural law can be grasped without prior acceptance of religious premises. I shall simply report my own skepticism that anything more than a fairly modest natural law can be established on the basis of reason uninstructed by faith.

What I want to analyze here is a somewhat narrower issue: whether the moral conclusions of a traditional natural law position would look quite the same if one had no starting premises about transcendent reality. I have already expressed my view that the *absolute* norm against killing innocent people can probably not be established without the benefit of particular religious sources. Here, I shall concentrate on another issue, the status of the fetus, which is critical for the proper legal treatment of induced abortion. Resolution of the moral permissibility of abortion rests on some assessment of the moral respect owed the fetus, against whatever interests, claims, or rights the pregnant woman has to rid her body of the fetus.

As far as the moral consideration owed the fetus is concerned, one can distinguish a "sharp break" approach from a gradualist one. A "sharp break" approach posits one or more particular points in time at which the moral status of the fetus changes drastically; there could be one point in time, often cast rhetorically as the time at which one becomes a human being or a person, at which the change is from no moral consideration to the full consideration owed ordinary people, or two or more points at which the

pointed and continuously assisted by God to guide those who accept their authority safely through time to eternity would be foolish to divert their lives by some frail fabrication of reason instead of conforming to a guidance system designed and maintained by divine wisdom." G. GRISEZ, *supra* note 16, at 345-46.

amount of consideration owed increases dramatically. A gradualist approach would conceive the moral status of the fetus as increasing slowly and steadily over time until it reached that of the newborn infant. In each successive period the balance of contrary interests necessary to override those of the fetus would increase.

If someone thought that the way to work out a proper morality regarding abortion was to first work out an appropriate natural morality and then to add relevant transcendental significance to that morality, any religious convictions might seem redundant to resolution of moral and political issues. At first glance, the manner in which the Catholic hierarchy defends the traditional position on abortion seems to approximate such an approach, at least if we put aside the extent to which that position is defended on the basis of earlier authoritative statements. The Church does not claim that the moral status of the early zygote is settled by scripture. It begins with natural law ideas, claimed to be rationally persuasive independent of particular religious belief. These preclude artificial impediments to procreation and protect innocent life. Absent a determination when human life relevantly begins, those principles alone do not explain why abortion is a worse moral wrong than the use of contraceptives; but the determination about the beginning of life also depends on naturalistic moral reasoning. One looks to see what is the most natural point at which to fix the beginning of human life, and one *then* concludes that in all likelihood it is the same point at which God ensouls the fetus. That the Church's position has been so formed is evidenced by its shift since the Middle Ages, in response to altered scientific understanding, over when human life begins and God ensouls the fetus.⁸⁹ On this so far simplified view, when God ensouls the fetus may have special religious significance, but the determination when this occurs is effectively dependent on a prior determination when the fetus warrants moral consideration and, thus, the religious perspective is not critical for resolution of the moral and legal problem.

On closer examination, however, one doubts that the religious perspective is wholly passive and dependent in this inquiry. The very notion that at a specific time God gives each human a soul may influence someone to look for a critical either-or point, a point at which a shift takes place from virtually no moral status to moral status equivalent to that of a full human being. The ensoulment notion itself is relatively inhospitable to a gradualist or multistage approach to the moral status of the fetus.

Relatedly, when considered with an absolute proscription on the taking of

89. See generally Noonan, *Abortion and the Catholic Church: A Summary History*, 12 NAT'L L. F. 85 (1967).

human life, any ensoulment idea is unfavorable to the claim that the pregnant woman's interests could override those of the fetus. Not only does that idea make it harder to say that the fetus with *some* worth has *less* inherent worth than that of a human being after birth, it tends to undercut the attractiveness of the argument that the woman may extinguish the fetus in "defense" of her own body. Not impairing innocent life is one of the most stringent duties in a morality that emphasizes duties. That the traditional, neo-Thomist version of natural law places more emphasis on duty than its Aristotelian forebearer may itself be partly the product of the specifically religious notion that we have duties to God.⁹⁰ In any event, no one doubts that the fetus is without moral guilt. Finding "innocent aggression" in the natural process of fetal growth is difficult if one has decided that ensoulment takes place at a very early point in that process. Thus, even if the point of ensoulment is decided on the basis of purely naturalistic reasoning, the whole perspective that surrounds the notion of ensoulment will subtly influence how the moral status of the fetus and the permissibility of abortion are regarded.

Can the rigorous position, that from the moment of conception the zygote is (or may be) innocent human life⁹¹ that morally cannot be intentionally terminated, be defended exclusively on rational secular grounds? I have certainly not demonstrated the impossibility of such a defense; but I have said enough to suggest that religious bases and naturalistic reasoning may be woven together in a more complex manner than is usually acknowledged.

My general conclusion is that natural law grounds, as commonly advocated in our society, are really not free from the "taint" of religious convictions. If the thesis that citizens and officials should rely exclusively on rational, secular grounds is sound, then Roman Catholics, like Jews and Protestants, must worry about purging from their processes of political decision whatever influence religious convictions have.

To understand this program as it applies to a believer in natural law is to see one reason why the very claim that citizens should rely exclusively on rational secular grounds is not sound. Asking people to rely exclusively on secular grounds might be sensible if religious convictions and secular arguments were separable and all that were involved were an attempt to try to assess the latter on their own merits. In reality, religious conviction often pervades the way in which one regards a problem. The idea of ensoulment helps lead many Catholics to look for a critical single stage of transition, and respect for innocent life and a duty-based, partly religious, morality form the

90. See D. CALLAHAN, *supra* note 28, at 319.

91. *Id.* at 419.

background from which they assess a woman's claim to control her body. To ask them to pluck out their religious convictions is to ask them to decide how they would think about a fundamental moral problem if they started from scratch, disregarding what they presently take as basic premises of moral thought. Asking that people perform this exercise is not only unrealistic in the sense of being impossible, it is positively objectionable in demanding that people try to compartmentalize beliefs that constitute some kind of unity in their approach to life. These concerns about the unity and integrity of religious believers, and the unrealism of expecting them to discount the influence of their religious perspectives on their moral judgments, cast grave doubt on the wisdom of any recommendation that citizens should rely solely on rational secular grounds.

For me, there is yet a more fundamental objection, which I shall only sketch here. I believe there are many fundamental questions of morality that are critical for the appropriate boundaries of legal protection for which rational secular morality cannot provide any single persuasive answer.⁹² I believe this is true about the moral status of the fetus. I believe that every citizen must resolve the status on the basis of some nonrational judgment, a judgment that is not irrational or against reason, but which goes beyond what rationality can establish.

If all citizens must make critical nonrational judgments, I can perceive no convincing reason for preferring nonrational, nonreligious judgments to religious convictions as bases for decision. A liberal society would have to be riven by religious strife or actually hostile to religion to support such a distinction, and it may be doubtful if a society actively hostile to religion could even be regarded as liberal.

Though I believe that behavior should not be restricted just because some people think it is wrong from a religious point of view, when religious judgments are used to determine the moral status of various entities, to help resolve conflicts of value, and to assess extremely complex matters of fact, I believe they are properly brought to bear by liberal citizens on political decisions. Roughly, people should not try to prohibit behavior just because they think it is offensive to God, if it causes no harm to entities in this world deserving protection. Standing alone, a belief that homosexual acts are sinful is not a proper basis in a liberal state for a prohibition. On the other hand, if everyone must decide on a nonrational basis whether an entity, such as a fetus, warrants protection, or how a conflict of values, say between welfare of the poor and general welfare, must be resolved, the believer may rely on his religiously informed convictions and act on their political

92. See *V. MACNAMARA*, *supra* note 74, at 204-06.

implications.⁹³

If this dichotomy is generally sound, a religious belief that taking life is wrong even when lives will be saved by the act is a troubling intermediate case.⁹⁴ On the one hand, there is the innocent victim, who may be said to have a right not to have his life taken in these circumstances. On the other hand, the victim's right in context depends on the wrongness of the act; the victim might not have the right if the actor's intention were different (that is, if his death were only an unintended consequence) or he might even be, as the mayor in my initial example, about to lose his life anyway. Because the critical judgment operating here is about the wrongness of action rather than a right to protection, I think believers who perceive that the root of their position is particular revelation should be more hesitant to impose its implications on others than when the critical inquiry is who deserves protection. But, because the judgment is an important part of an other-regarding morality, and does *eventuate* in a notion of the rights of innocents not to be intentionally killed, I think that believers may justifiably rely on that judgment if it is shared by most of the population or if an absolute principle of nonkilling is supported by a good many people on different grounds.⁹⁵

In any event, however the precise dimensions of permissible and impermissible reliance may be drawn, my main point is that the premises of liberal democracy do not entail any wholesale exclusion of religious bases of political judgment.

III. THE DUTY TO OBEY THE LAW

My third topic is the natural law account of the duty to obey the law.⁹⁶ My thesis here is that without some controversial assumptions, naturalist reasoning does not support a duty to obey all just laws on all occasions of their application. This problem raises, as does the general justification defense, the critical question of the place of consequences in moral evaluation.

Natural law has provided a theory for why citizens should obey the law that differs importantly from social contract approaches and from utilitari-

93. The arguments for these positions are developed in the pieces cited *supra* note 73.

94. This is a point I have not addressed in previous writings.

95. To be a little more specific, if 90% of society thought on religious grounds that intentional killing was always wrong, they could properly impose that rule by law; if 40% of society thought on nonreligious grounds that intentional killing was always wrong and 30% reached a similar conclusion on religious grounds, then the 30% could properly join the 40% to impose that rule by law.

96. This section is largely excerpted from a longer treatment that appears in Greenawalt, *The Natural Duty to Obey the Law*, 84 MICH. L. REV. 1 (1985), and that will appear as chapter 8 in K. GREENAWALT, *CONFLICTS OF LAW AND MORALITY* (forthcoming Oxford Univ. Press).

anism. Unlike social contract, natural law does not ground the duty in some voluntary undertaking. Unlike simple utilitarianism, it posits a true general duty to obey, one that does not depend on the consequences of disobedience in particular instances. The reasons natural law assigns for obedience resemble more closely those prominent in the duty of fair play, but natural law differs from fair play also, in not making critical the citizen's attitudes toward the benefits he receives.

In explicating the natural law duty to obey I shall concentrate heavily on the account given by John Finnis in his *Natural Law and Natural Rights*,⁹⁷ a comprehensive and sensitive modern exposition of the traditional view. This concentration no doubt obscures important divisions among natural law theorists, but since what unites them is, for my purposes, more important than what divides them, this limited focus is warranted.

According to natural law theory, laws are rules for the common good, the common good embracing the good of individual members of the community. Human beings need authority and rules to coordinate activities of any complexity, to guide those who are ignorant, and to curb antisocial selfish inclinations. Political authority and the law of the state are necessary to promote human flourishing, and are natural institutions to promote the common good. Since individuals have a duty to promote the common good, they have a duty to support those who exercise political authority and to obey valid laws. As Finnis puts it, one aspect of action for the sake of the common good is being a "law-abiding citizen" and to be a law-abiding citizen requires obeying the law even when one does not see an independent reason to do what the law requires.⁹⁸ Though the moral obligation to obey each law is "variable in force," the reasons that justify creating laws which are "relatively impervious to discretionary assessments" are "reasons that also justify us in asserting that the moral obligation to conform to legal obligations is relatively weighty."⁹⁹

Implicit in the idea of the common good is a notion of reciprocity. The promotion of the community's common good involves the promotion of the good of each member. Thus, in being a law-abiding citizen, someone is contributing towards the effectiveness of an institution that is necessary for his own welfare. His duty to obey the law is related to the benefits the existence of law confers on him. These involve both the intrinsic good of social relations and goods that he can pursue on his own if given respect and support.

Two distinctive features of traditional natural law theory are its "realism"

97. J. FINNIS, *supra* note 52. I do not have an informed view about the faithfulness of Finnis' account to the spirit of Aquinas on points as to which that is disputed.

98. *Id.* at 314-17.

99. *Id.* at 318-19.

about the origins and survival of actual political authorities and its stringency about what counts as a law carrying a moral obligation to obey. Recognizing that many governments originate in force and treating effectiveness as the most critical ingredient of authority, natural lawyers have claimed that the obligation to obey can arise under all sorts of governments. Particular laws, however, that are not addressed to the common good, or suffer other defects that make them unjust, do not generate the moral obligation that follows from just laws.

I shall skirt the question whether natural law's assumption about self-evident human goods or the teleology of human beings is maintainable. I assume that the receipt of benefits as a member of a community can generate reasons to contribute to the good of the community by obeying its rules. Whether the reasons to contribute to the common good by obedience amount to a duty, and whether the duty applies if obedience on a particular occasion will not contribute to that good, are the problems I want to address.

Natural law theory does not claim that obedience to law is self-evidently good or an obvious aspect of human nature; rather, obedience is needed if humans are to accomplish their true purposes or achieve the goods that are self-evident. Thus, the good consequences of widespread obedience largely underlie the duty to obey. Yet the claimed duty is more stringent than whatever moral reasons ordinarily exist to promote good consequences; it is assumed to require obedience at least sometimes when the foreseeable balance of consequences would favor disobedience; and it is thought to come into play even when, predictably, disobedience will cause no harm and obedience will achieve no actual contribution to the common good. Can these steps, from consequential reasons to a duty of some stringency and from consequential reasons to a nonconsequential duty, be justified without reference to special revelation?

The first two thresholds that the natural law theory of duty must surmount is why the reasons it presents should be viewed as giving rise to moral "oughts," rather than regarded simply as relevant to morally preferred (supererogatory) acts, and why these oughts should be viewed as having a capacity to weigh against the predictable balance of consequences. Often the promotion of desirable consequences is praiseworthy, but the failure to promote them is usually not a subject of blame. What answer, if any, may be given to the person faced with a choice whether to obey who asks: "No doubt, my obeying will promote the common good, but if I need not devote most of my resources to charity, why ought I to obey?" What answer may be given to the person who thinks that whatever duty he may have to obey reduces to a balance of favorable consequences?

The correct answer to these queries lies in the notions of reciprocation on which the natural law theory more or less explicitly relies. What is crucial is that the demand to obey is being placed on us under a necessary scheme in which we are fairly involved, whose aim in part is to benefit us, and whose success depends on our complying with the rules. That is sufficient to create a genuine duty when obedience makes a substantial difference. By a genuine duty, I mean both that an "ought" is present and that it has some capacity to trump considerations of consequence.

Should the duty also be conceived as not depending on whether there will be any harmful consequences in particular cases? One aspect of conceiving the duty to obey in this way is that a potential actor is barred from considering the likely compliance of others. Such a preclusion has been often understood to rest on a moral principle of generalization: "If the circumstances of the case are such that the consequences of everyone's acting in that way in those circumstances would be undesirable, then the act is wrong, and it is irrelevant that the consequences of one person's acting in that way in those circumstances would not be undesirable."¹⁰⁰

In many situations, the principle of generalization will not be the only argument against disobedience, but when plausible arguments about the particular act's harm are wholly lacking or require bolstering, reliance on the principle may be decisive. The principle of generalization is grounded on fairness and on the impracticality of moral principles that make duties turn on the harm of one's own act in light of the compliance of others. The idea of fairness lying behind the principle of generalization is that it is unfair for me to get an advantage that people just like me from the moral point of view are foregoing. As to impracticality, I need only mention that grave dangers of self-serving evaluations would almost certainly infect moral standards that permitted one person's indulgence on the assumption that that indulgence would do no harm because others are restraining themselves.

Establishment of the generalization principle alone does not settle that a duty to obey the law should be conceived in nonconsequentialist terms. In various circumstances, a person contemplating disobedience may claim that if everyone similarly situated disobeyed, no harm or tendency toward injustice would occur. Such a claim most clearly arises when laws are highly unjust, but I put those situations aside here. Other laws are exceedingly trivial without being unjust in the usual sense, and people may conclude that widespread disobedience will have no negative effect on the common good. I shall focus on what is perhaps the more common case of a law that has many

100. M. SINGER, *GENERALIZATION IN ETHICS* 137 (1961). Singer actually calls this a generalized principle of consequences, which he distinguishes from a broader principle of generalization. The distinction is not important here.

applications, some of which are important and some of which are not. Imagine that Diana is a sober driver who is considering at 4:00 a.m. whether to exceed a 30 m.p.h. speed limit that she thinks may safely be exceeded by any other sober driver at that time; or that she is wondering whether to walk on someone's posted land in the woods, believing that similar unseen violations by others would do no harm. Diana can define her situation in a way that makes no reference to whether others in like circumstances actually do comply and she can contend that regardless of the degree of compliance by others, her disobedient act and others like it will do no harm to the common good. Diana can also claim that she is not taking advantage of the compliance of others.

If Diana can make those judgments, what reason is there for her to think she has a duty to observe the law on occasions like these? Put more abstractly, her question is: How can a moral reason that derives from the desirable consequences of most acts in a certain class turn into a nonconsequentialist duty to perform every act in the class?

Two possibilities for understanding the duty in a nonconsequentialist way are that the duty derives from some more extensive nonconsequentialist duty or that it fits closely with a number of related nonconsequential duties. The natural law account of the duty to obey does not rest on a claim that it can be derived simply from some uncontroversial more general duty; but an argument might be made that a nonconsequentialist duty to obey fits best with the understanding of related natural law duties. One way to resist this sort of "fit" argument would be to concede the crucial linkage between obedience to law and other duties, but urge that all of them would better be understood in consequential terms. A different response would be to detach the duty to obey the law from any duties to which it is claimed to be closely related. One might, for example, concede that given the close personal relationships and trust that exist in families, duties there should be conceived as not resting on predictable consequences, but claim that in the much more impersonal relation of citizen to state, a consequential assessment of one's need to obey the law might suffice.

Perhaps the most important argument that the duty to obey is nonconsequential is that, considered by itself, that conception of the duty is superior to a consequential one. A person might, of course, urge that revelation shows that God has instructed us to conceive our relation to the law in a nonconsequential way; but any conclusion based on such premises would plainly rest on particularist religious convictions, not on naturalist reasoning. Instead, it may be claimed that the duty to obey will be most effective in promoting human good if it is understood in nonconsequentialist terms.

The argument that a nonconsequentialist understanding will be preferable

to a consequentialist one could be made in various ways. The clearest argument is one that shows that a consequentialist understanding would be obviously self-defeating in some significant respect. Finnis offers such an argument about promise-keeping.¹⁰¹ Imagine that people decided to keep promises only if doing so would be beneficial, or at least would satisfy the psychological expectations of the person to whom the promise was given and of other concerned persons. Such an attitude might lead people to break promises with relative freedom when only the promisor and promisee knew of the promise and the promisee has died or will be unaware of the breach. But if people know that promises are freely broken in these settings they will know that promises made to them that must be carried out in such contexts will not be very reliable. The practice resulting from these attitudes will deprive them of confident expectations and will, therefore, substantially undermine the benefits that promises afford to those who wish to control future events indirectly. A consequential attitude toward the keeping of promises will, thus, seriously erode the social benefits of the institution of promises.

A consequentialist understanding of a duty might fall short of this sort of logical difficulty and still be self-defeating in a practical sense. Something along these lines might be said in defense of the generalization principle. Given people's uncertainty about how others similarly situated will act and about when dangerous thresholds are reached, and, given their propensity to underestimate the harms of their own individual actions, a broad principle that people should consider the likely compliance of others might consistently lead to inadequate levels of compliance exactly when widespread compliance is needed.

The force of these arguments about the self-defeating character of a consequentialist understanding does not depend much on the particular features of a society or its stage of history; but we reach much more difficult terrain in deciding what conception of the duty will best promote human good when we address circumstances in which everyone similarly situated could disobey the law with no ill effect. Here, resolution most plainly turns on how many of these circumstances there are, how clearly they can be identified, and how great the damage is from misidentification. If these circumstances are few and difficult to identify and if people have a strong propensity to think that acts they would like to perform fall into this category, then a nonconsequential understanding will work better. On the other hand, if legal regulation of life is so pervasive that many instances of violation have no harmful tendency (i.e., would not do harm even if engaged in by all similarly situated) and if people can identify these instances with a high degree of accuracy, a

101. J. FINNIS, *supra* note 97, at 298-305.

consequentialist understanding will be most sound. An overall judgment about a preferred understanding will rest on the extent of legal rules and the degree of disinterestedness and acuity of the population. For purposes of comparison, one thinks of norms urged on children; parents will be much more likely to build consequential elements into norms urged on older children, "Do this only if . . . ," than into norms urged on younger children, "Never do this." A population with a good understanding of various aspects of law and its benefits might appropriately be able to rely on a standard that was more consequential than a less well-informed population.¹⁰²

What I have suggested thus far is enough to indicate my view that no overwhelming conceptual or rational argument supports the notion that a duty to promote the common good yields a nonconsequential duty to obey the law. The argument in favor of such a duty must be fact dependent, and the relevant facts may vary among societies and stages of history. I now reach the practical question of whether a nonconsequential duty to obey just laws in all their applications states the best understanding for our society.

An initial difficulty with such a view is that in most modern legal systems, many legal norms are substantially broader than the reach of the behavior they are really supposed to discourage. Ease of drafting and simplicity of administration lead officials to adopt rules that neither the drafters nor enforcers expect to be enforced in their full scope. In respect to the outer coverage of such rules, it is unrealistic to say that the law *seriously demands* the behavior that it formally prescribes and that it would properly be taken to prescribe by courts interpreting the rules. For some other rules that are enforced across their full range, such as certain parking violations, officials may be indifferent as to whether the rule is initially observed or the penalty paid for violation. Similarly, prompt compensation for breach may sometimes be regarded as adequate satisfaction of a civil law duty. If, in all these instances, concerned persons, officials and citizens alike, neither expect nor insist upon adherence to the law's terms, the idea of a moral duty to comply with those terms is implausible.

Even if one focuses on legal rules that are enforced and as to which payment of damages is not regarded as equivalent to initial compliance, the notion of a general duty to obey faces difficulties. Given all the occasions in modern societies with highly complex and technical legal norms when disobedience of law will not inflict harm on others or detract from the common good, and given other moral bases for duties to obey, a general duty to obey is probably not needed to sustain adequate compliance.

102. If one were trying to evaluate what type of standard would work best in a society, one would also have to consider linkages with related duties and present attitudes about the duty to obey, but I shall omit these complications here.

Lest too much turn on individual calculation, one might understand the duty as an obligation to comply with laws of the state directed toward what are the state's proper ends—including security, liberty, justice, and welfare¹⁰³—when one's compliance, and that of one's fellows, may reasonably be thought necessary to success. Such a duty, incorporating the generalization principle, would not reach evidently foolish laws or applications of laws when general noncompliance plainly will not interfere with the state's legitimate ends.

I have been assuming in the previous discussion that the duty to obey is conceived of as being of at least moderate strength. That is the assumption of traditional natural law theories, including that of Finnis. This assumption obscures yet another complexity: the relation between the coverage of a duty to obey and the strength of the duty. Suppose, on the one hand, that someone said that all he meant by a general duty to obey was a moral duty of however slight strength in favor of obedience, one that might give way in many cases to very slight reasons, including selfish reasons, to disobey. Violation of such a "duty" would warrant only slight blame, and even that would be appropriate only when competing reasons did not override the duty. If the natural law duty to obey resolved itself to such a minimal "ought," one might very well concede a general duty to obey all laws, the concession amounting to little more than that basic ideas of reciprocation provide some rather slight responsibility to obey. If, on the other hand, a general duty to obey is put forward as a moderately strong moral "ought," one that can be overridden only by substantial reasons in favor of disobedience, then there is good reason to resist the assumption that such a duty is implicated on every occasion on which we must choose whether to obey law. Thus, I find the basic arguments underlying a natural law duty to obey the law as being of considerable force; but I am doubtful that they yield a duty as absolute and as nonconsequential as is commonly supposed by natural lawyers.

IV. CONCLUSIONS

What general conclusions may be drawn from my three separate inquiries? At points in each of them, I have wondered whether normative positions associated with natural law views are convincingly supportable on the basis of naturalistic reasons or are partially dependent on particular religious insights, and that query has been a dominant theme of my middle inquiry. There, I concluded that natural law positions do not stand condemned as

103. See Pennock, *The Obligation to Obey the Law and the Ends of the State*, in *LAW AND PHILOSOPHY* (S. Hook, ed. 1964).

improper starting points for political determinations even if, as I believe, religious and rational considerations are intertwined in them, because any model of liberal democracy that claims exclusivity for rational secular grounds of decision is misguided. The inquiries into the general justification defense and the duty to obey the law both concentrated on the gulf between consequential and nonconsequential conceptions of duty. In each instance, I suggested that natural law's rejection of undiluted consequentialism was warranted, that proper conceptions of what we owe our fellow citizens are not wholly reducible to evaluations of harmful consequences. But I also concluded that naturalistic reasoning does not provide firm support for claims of absolute or general duty posited by traditional natural law. In the context of general justification, the crucial concern was whether considerations of consequence could sometimes offset the proscription against inherently wrong acts. I concluded that they could, particularly if the issue is the imposition of criminal punishment on the person who commits an otherwise wrongful act to avoid dire consequences. In respect to obedience of law, I did not address when a duty to obey can be outweighed; but I did consider whether that duty comes into play with respect to every application of every just law. I concluded that for circumstances when disobedience, even if replicated, will do no harm to the common good, naturalistic reasoning does not establish a duty to obey for citizens of modern societies.

I have covered some profound topics in a regrettably cursory manner. These are topics that are highly significant in three important dialogues; the internal dialogue among Roman Catholics about their moral theology; the dialogue between Catholics and Protestants about the nature of Christian ethics; and the dialogue between religious believers and secular moral philosophers about shared moral understandings and the appropriate place of religious ethics in a pluralist liberal society. I hope these views from outside the Catholic tradition can make a small contribution to the quality of these dialogues.