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The Right to Life

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In the theory of rights we repeatedly encounter the problem of reconciling someone's having a right with his properly suffering damage to the interest protected by the right. In the case of right to life, we have to assess numerous cases in which individuals are killed or allowed to die, and we wish nonetheless to affirm their right to life. These cases include killing an aggressor in self-defense, accidental homicide, terminating life-sustaining therapy, and capital punishment.

Two fashionable ways of reconciling acceptable killing with the right to life will no longer do. One approach is to claim that the right to life is merely a *prima facie* right; it is subject to being overridden by competing considerations.[1] Even when stripped of confusing associations with principles of proof, the notion of a *prima facie* right cannot withstand criticism. If someone's right to life prevails over the wishes of those who wish to kill him or her, we hardly would say that the right is merely *prima facie.* And if the victim's right of defense permits the killing of an aggressor, we are hard pressed to say that the aggressor's right to life is somehow overridden and thus "lost" in the collision with a higher value. It seems that the right remains the same, whether overridden or not.[2]

Another fashionable argument builds on a theory of forfeiture.[3] Aggressors and criminals supposedly forfeit their right to life; that they have no right to life explains why murderers are properly subject to the death penalty and why some aggressors are subject to being killed in response to their aggression. This argument has already encountered considerable scepticism,[4] and yet it is so tempting a solution that it continually reasserts itself.[5] One item on our agenda is to develop a more thorough refutation of this theory.

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[1] The doctrine originates in W. ROSS, THE RIGHT AND THE GOOD 55-56 (1930).

[2] *See* A. MELDEN, RIGHTS AND PERSONS 12-15 (1977).

[3] *E.g.*, J. LOCKE, THE SECOND TREATISE OF GOVERNMENT § 23 (1690); 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 133 (1765).

[4] *See* Bedau, *The Right to Life*, 1968 THE MONIST 550.

[5] Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life*, 7 PHIL. & PUB. AFF. 93, 111-12 (1978).

My program in this Article is to provide an account of how it is that those with a right to life may nonetheless be properly subject to an untimely death. Among the advantages of this account, it avoids the shortcomings of theories that stress either the *prima facie* nature of rights or the forfeiture of rights through conduct.

In discussing fundamental human rights, such as the rights to life, liberty, private property and privacy, we often encounter the protagonist who wants to know: What is the definition of the right? What precisely is the right-holder entitled to claim of other people? Yet no straightforward answer emerges from the quest for definition. The reason is that an adequate analysis of the "right to life" requires attention to three distinct questions:

1. Who holds the right? Is it possessed by members of tribes other than our own, by slaves, by fetuses?
2. What are the norms, both positive and negative for protecting life?
3. What are the criteria for justifying a violation of these norms?

Each of these components requires some comment. Distinguishing the first question from the second is critical. For knowing who bears the right to life does not inform us about the scope of the right's protection. We might agree that intentionally killing a person endowed with the right to life would be wrong, but there are more subtle problems in deciding (1) what constitutes a killing, (2) when a killing is intentional, (3) when we may create a risk of death, and (4) when we may permissibly let someone die. Different answers to these four questions generate a range of possible normative systems for protecting life. For this reason, we should address ourselves to the first question independently of the equally difficult task of working out the norms protecting life.

I. The Interest in Life

If the protective norms are reserved for the second stage of analysis, then we would do well to use the expression "interest in life" rather than "right to life." We should add that the interest that one has in life is particularly worthy. Individuals often have unworthy interests, such as the guilty man's interest in avoiding criminal conviction, and the rapist's interest in consummating his unlawful attack.[6]

[6] For a suggestive account of "interests" see H. Gross, A Theory of Criminal Justice 116-17; the difficulty of reducing rights to interests is noted in Benn, *Rights*, 7 The Encyclopedia of Philosophy 195, 196 (1967). Benn concludes that rights are not always to our advantage, but interests are.

Stressing the interest that the living have in life enables us to describe the impact on their lives of dangerous actions by others. Drunk driving and reckless shooting endanger life itself, but not the right to life. We can aptly describe this danger to life itself as endangering the interest in life. Yet the right to life remains intact. Though interests may be affected by physical risks, rights are not so easily abridged. The government might endanger or truncate the right to life, but only by progressively cutting back the class of beings protected under the law. And even a shift in the legal norms has no effect upon the moral right to life.

Interests and rights run on different tracks. Interests are connected with the notion of harm and the risk of harm. When a worthy interest is violated, the interest-bearer suffers harm. But rights are not connected in this way with the occurrence of harm. To lose a right is not necessarily to suffer harm. For example, if fetuses are stripped of their legal right to life, they are not necessarily aborted. Similarly the violation of a right does not always entail harm. I may have a right to your contractual performance, but if the market has shifted and my performance is now worth more than yours, your breach of contract (which releases me from my performance) does not harm me. Indeed your violating my rights under the contract benefits me by enabling me to avoid the more costly counter-performance.

This connection between harm and interests explains why in the law of contracts we are drawn to the idiom of interests in explaining why a breaching obligor must pay damages. In some cases, the damages compensate for harm to the "reliance interest"; in other cases, for harm to the "expectation interest." In no case, so far as I can tell, do we ground the duty to make amends simply on the breach of duty or the failure to honor a right. To speak of harm and amends, we need to think as well of damaging interests.

If we begin our analysis with the interest in life rather than the right to life, we avoid confusions that arise from assuming that all rights fall into one of the eight Hohfeldian categories. The Hohfeldian scheme presupposes that the violation of a right correlates with the breach of a duty, the violation of privilege with the breach of a "no-right." Yet an individual can suffer violation of his interest in life without anyone's violating a norm protecting life or otherwise breaching a duty to protect life. Suppose that the Skylab debris had fallen in Delhi and killed an Indian peasant. Or suppose the peasant is merely injured and while recuperating in the hospital, he dies in an unexpected epidemic that sweeps across the country. There is no

doubt that the victim is harmed, but it is not clear that the agents of NASA violated a duty or a norm protecting life. Norms protecting life are directed against acts of killing (either intentionally or negligently) or perhaps against the failure to rescue others in immediate need. For there to be the breach of a duty under one of these norms, there must first of all be an instance of killing or of letting die.[7] The agents of NASA put into motion a sequence of events that issued in the peasant's death, but we are hard pressed to say that they "killed" him. The notion of killing is linked with "causing death." In these versions of Skylab's end, the causal link between orbiting the craft and the death of the man might be too tenuous to constitute a causal tie. If so, we cannot describe the harm to the decedent as a "killing." And without a "killing" there is no violation of duty, no violation of a norm protecting life. In cases like this, though the death falls outside the norms protecting life, the fact of harm remains. Thus we can see that the perception of harm is logically independent of the analysis of the norms protecting life.

It is important to note that not every loss of an interest constitutes the type of harm inflicted by Skylab's falling on an Indian peasant. A natural death obviously reflects loss of the interest in life, but death in the fullness of years does not invite description as a "harm." If a falling object causes death, the victim is "harmed," but as we already noted, not every death caused by an external source — not every harm — constitutes the violation of a norm or of a duty to protect life.

Now we could design a norm that would cover the case of Skylab's falling and killing an innocent observer. It might read like this: Do not do anything that might someday issue in the death of another. The agents of NASA violated this norm, but they might nonetheless escape charges of culpable conduct. They did something that issued in the death of another, but the social value of the Skylab project appeared clearly to outweigh the risks of human life. A balancing of these costs and benefits indicates that the violation of the norm was free from negligence. If our norms protecting life are overly broad, we can take in the slack under the rubrics of negligence and culpability. The end result may be the same — there is neither

[7] I do not address myself in this Article to the problem of failing to avert death, but see G. FLETCHER, RETHINKING CRIMINAL LAW 581-634 (1978) [hereinafter cited as RETHINKING].

moral nor legal liability for the consequences of orbiting Skylab. But it is of some importance whether the issue of accountability is resolved at the threshhold state of construing the norm protecting life or whether we concede the violation of norm and invest our analytic efforts in assessing culpability. If the accent falls on the issue of culpability, we concede that there is some untoward event that requires an explanation. Not every event issuing in death is untoward. But this entire matter is hardly free from doubt. At first blush, the hypothetical death of the Indian peasant would seem to fall beyond the range of the norms protecting life. But suppose we have reason to believe that the NASA designers knew that Skylab would crash over a densely populated area. Suddenly the case takes on different proportions. If the risk is greater than it appeared and the designers knew it, then perhaps we have the culpable violation of norm. This latter example suggests that it is not so easy to distinguish cleanly between applying the norm and the question of culpability.

This introductory discussion, including the latter qualifications, seeks to vindicate our separation of the issue of death as harm from the analysis of norms designed to prevent this harm. This notion of harm, as I have argued, leads us to speak of an interest in life rather than a right to life. Yet if the term "interest" is preferable, why do we gravitate in daily discourse to the notion of a right to life? What does the term "right" offer that "interest" fails to convey? For one, the notion of right makes it clear that the interest is particularly worthy; an unworthy interest, such as the guilty man's interest in avoiding conviction, would never be addressed as a right. Further, the term "right to life" invites us to respect the interest, whether the law does or not. Of course, there are rights that derive solely from legislation; consider the right not to be sued after the prescribed period of limitation. But our asserting a right to a basic interest, such as life, does not always presuppose legal recognition of the right. The language of rights permits us to transcend the supposed gap between the law as it is and the law as it ought to be. The less ambiguous idiom of interests lacks this virtue. The ideal term might be something like "interest-of-right" analogous to the German concept of *Rechtsgut.* A single notion that combined the qualities of interests and the moral stature of rights would serve us well. But rather than encumber the discussion with an artificial language, we shall make do with the term "interest" in life. We should remember, however, that the interest of which we speak has a moral stature akin to that of a right.

II. Intentional Killing and Self-Defense

Let us begin with the norm against intentional killing. If there is any core area of agreement about protecting human life, it is our disapproval of intentional killing, particularly of killing conscious persons capable of independent existence (fetuses, of course, represent a more subtle problem). But even this norm admits of exceptions. It is sometimes right, or at least permissible to kill another intentionally. Some people assert that it is permissible to kill another when necessary to save the lives of a greater number of persons. Others claim that it is permissible to kill whenever the victim desires to end a life of suffering and consents to euthanasia. Anglo-American law rejects both of these possible exceptions. But one exception that we, and indeed all Western legal systems recognize, is killing in self-defense. We shall sift the details of self-defense in an effort to understand the logical structure of justifiably infringing the interest in life.

Consider a relatively noncontroversial case of aggression generating a right of self-defense. A man tries to rape a woman and she resists forcibly; under the circumstances the only way she can ward off the rape is to choke the aggressor and thereby endanger his life. If the woman kills the rapist, most people would regard the killing as justified. Self-defense is occasionally treated as an excuse, and we shall consider this variation of the problem later. For now, we shall assume that the woman has a right to ward off the rapist's attack, even if she kills him. To say that the killing is justified is not merely to recognize the woman's predicament and her need to save herself, but to condone her action as right, or at least permissible under the circumstances.

We need at this point to qualify our initial statement that self-defense represents an exception to the prohibition against intentional killing. If this prohibition is limited to cases where the actor's objective or purpose is to kill the aggressor, then self-defense does not qualify as an exception; for self-defense, as we understand it — either morally or legally — is limited to cases of defensive killing where the defendor's objective is not the death of the aggressor, but merely the warding off of the attack. The death occurs as a side-effect, perhaps an inevitable side-effect of successfully defending against the attack. Thus if the prohibition does not encompass oblique intentions — *i.e.*, knowledge that death is highly likely to result from one's conduct — then acceptable self-defense falls beyond (and fails to violate) the prohibition. But if the norm against intentional killing is interpreted to prohibit obliquely intentional

killing, then knowingly causing death in warding off an unlawful attack nominally violates the norm. The doctrine of self-defense then functions to explain why the nominal violation of the norm is permissible.

In order to develop a rationale for the right of self-defense, we need to distinguish among three matters that might be called interests or rights:

1. The interest of the woman in maintaining her sexual integrity (*i.e.*, avoiding involuntary intercourse).
2. The interest of the aggressor in his life.
3. The right of the woman to ward off the attack.

The first two are properly called interests. The third falls squarely within the Hohfeldian taxonomy of rights. Self-defense is a privilege; other persons — the aggressor as well as third parties — are under a "no right" to resist or interfere with the defensive conduct. To corroborate our earlier analysis of rights, interests and the concept of harm, we should note that violating the woman's right of defense does not necessarily harm her. Suppose, for example, that someone restrained the woman and prevented her from responding to the threatened rape. This forcible restraint would violate her right to defend herself, but the violation would harm her only if the rapist proceeded with his aggressive attack. If the rapist repented and abandoned the attack, the woman would remain unharmed.

One further point is important in understanding the difference between the two conflicting interests and the right of defense. The interests at stake are concrete and personal to the woman and the rapist. But the right to repel the aggressive attack lends itself to universalization. If repelling the attack is the right and proper thing to do, then any third person should be able to intervene on behalf of the threatened woman. And indeed, Western legal systems now recognize this right of third-party intervention as a matter of course.[8]

In the present context, the important question is: How do the conflicting interests (in sexual integrity and in life) bear on the privilege of self-defense? They must have some bearing, for the privilege to use force arises to protect one interest at the expense of another. If the protected interest is trivial, we might balk at recog-

[8] For some doubts about the rationale for this universalization, see RETHINKING, *supra* note 7, at 868-69.

nizing a privilege to protect it. And if the privilege permits the defender to kill the aggressor, we might be doubly concerned about the interest the defender seeks to protect.

Two strategies emerge in working with the interests in jeopardy in order to vindicate a right of defensive force. One strategy focuses exclusively on the interest to be protected; it yields an *absolute* privilege of defensive force to protect all interests regarded as personal rights. The alternative strategy looks to both interests — that of the aggressor as well as of the defender — and generates a *relative* right of defensive force geared to the particular interests at stake. It is worth pausing and considering these diverse strategies for justifying defensive force. Upon considering the promise and limits of both strategies, we will return to the investigation of how criteria of justification relate to protecting the rightful interest in life.[9]

The *absolute* theory of self-defense generates the privilege regardless of the cost to the aggressor's interest. Killing an aggressor is permissible if it is the only means available to prevent the invasion of even a minor interest. Shooting an apple thief is rightful and proper if there is no other way to stop her. The rationale of this theory is that those in the right should never yield to wrongdoers.[10] The only question is: who is in the Right and who in the Wrong. The competing interests are irrelevant.

The *relative* theory of self-defense stresses the privileged sacrifice of one interest for the sake of averting harm to another. It may be permissible to kill in some cases, but only to protect particularly worthy interests, such as life, limb and sexual integrity. It is highly debatable whether life — even the life of an aggressor — should be sacrificed for the sake of protecting property. In the absolute theory, the defender may use all the force necessary under the circumstances. In the relative theory, this outer limit of permissible force is qualified by the requirement that the intended harm be reasonable as well as necessary.

Where deadly force is necessary to avert a rape, the absolute and relative theories overlap. Most people regard the woman's interest in sexual integrity as sufficiently important to vindicate a high risk of death to the aggressor. But let us suppose that the sexual aggressor merely wants to massage her breasts and he makes his purpose clear as he commences his assault. If we held to the first rationale

[9] These two approaches to self-defense receive greater clarification in RETHINKING, *supra* note 7, at 857-64.

[10] The German maxim is: *Das Recht braucht dem Unrecht nicht zu weichen.*

of self-defense, the woman could use all the force necessary to repel the sexual assault. If under the circumstances that meant she had to kill him, so be it. But many people would regard this as an injustice, even as to a malicious and perverse aggressor. The woman should surely have the right to hit him, perhaps to wound him, but killing him would seem to be excessive. If she had no effective option short of killing the aggressor, the alternative rationale would require a weighing of the competing interests and presumably would issue in the requirement that she suffer the invasion of her breasts rather than kill the aggressor. If deadly force seems justified even in this context, we could further enlarge the disparity between the conflicting interests. What if the victim had merely to suffer repeated pats on the head or the aggressor's searching through her purse? Should she be permitted to kill to prevent these assaults to her person and privacy? People might judge the competing interests differently, but for most people there would be a breaking point, a point after which the victim's interest seemed so minor that it would be "unreasonable" to kill the aggressor rather than suffer the invasion.

The woman's interest in avoiding rape presumably is strong enough so that she may use whatever force is necessary to thwart the aggression, but there are some puzzles in relying on the relative theory to justify her privilege to use deadly force. As a general matter, the interest in life surely counts for more than the interest in sexual integrity. The weighing of the conflicting interests is obviously skewed against the aggressor. But the problem is how much should the scales be tipped against him? It all depends, I suppose, on how serious an evil we take his aggression to be. His interests are, as it were, discounted by some factor that is a function of his blameworthiness in attacking another.

But suppose the aggressor is psychotic or involuntarily intoxicated. We would still be inclined to say that the woman threatened with rape enjoys a full right of defense. Yet if the aggressor is not to blame for the aggression, how can we "discount" his right to life? But if his right to life is not discounted, how can the woman assert that her interests are more compelling? Puzzles of this sort lead one back to the problematic view that the woman's interest itself — without comparison with the competing interests of the aggressor — entails a full right of defense. Yet the absolute theory properly troubles us. Any theory that would justify killing a petty thief requires careful scrutiny. The more one reflects on one of these alternative

rationales for self-defense, the more one is driven to consider the other.[11]

III. FORFEITURE AND JUSTIFICATION

Let us suppose that we can surmount these preliminary problems and justify the right of the woman to defend against rape, even if the objectively minimal defense results in the aggressor's death.[12] Let us fit this datum into the matrix of (1) the interest in life, (2) violation of a protective norm, and (3) criteria of justification. The interest in life is protected by a norm prohibiting intentional killing. We interpret the prohibition to prohibit obliquely as well as directly intentional killings. Self-defense comes into the analysis as an exception to the prohibitory norm. Now let us take a case of killing in legitimate self-defense. The aggressor is killed; his interest in life is sacrificed. But what do we say about his right to life? When the aggressor's life is put into jeopardy, does he not have a right to life? If so, how can he be rightfully killed? And how do we properly describe the justified violation of the norm protecting life? Is the norm violated? Merely infringed? Or is there neither infringement nor violation, but rather an action in conformity with the norm? These are some conceptual points about which we should get clear; and we shall begin by coming to grips with the theory of forfeiture. This is a fashionable mode of reconciling the aggressor's right to life with the defender's right to use deadly force in self-defense.

Joel Feinberg wrote recently: "[A]t the moment a homicidal aggressor puts another's life in jeopardy, his own life is forfeit to his threatened victim."[13] In the context of Feinberg's argument, he clearly means that the aggressor forfeits not only his life, but his right to life. It is not clear why this is so tempting a move in analyzing the right to life. Whatever the reason for its popularity, the argument of forfeiture is an inadequate account of the use of deadly force in self-defense.

The notion of forfeiture is closely connected with the idea of ownership, and ownership has its core application in the law of real and

[11] Note Nozick's interesting proposal for uniting diverse criteria in one formula for permissible defense force. R. NOZICK, ANARCHY, STATE AND UTOPIA 62-63 (1974). The difficulty with his proposal is that he sets no limits to f(H), namely to the component of defensive force that finds its justification solely in the harm threatened.

[12] The problem of mistaken perceptions of necessary force need not detain us. Some misperceptions will excuse the mistaken defender. *See* RETHINKING, *supra* note 7, at 762-69.

[13] Feinberg, *supra* note 5, at 111.

personal property. Sometimes forfeiture requires an administrative proceeding as, for example, when persons forfeit their cars or other vehicles for using them to transport narcotics. In these cases, the forfeiture must be officially declared; but in other cases, the owner's losing his rights is automatic. At common law, the owner lost his rights in goods stolen and then abandoned by the thief; as "waif" these goods were forfeit to the Crown.[14] The idea that the state or the Crown takes the place of the owner seems to run through these cases of forfeiture. But we can readily use the notion more broadly to refer to all cases of involuntarily losing one's rights in land or chattels.

The notion of forfeiture lends itself as well to the loss of rights in incorporeal interests. It used to be the law, for example, that writers forfeited their copyright interests by publishing their works without a copyright notice, or that native-born citizens forfeited their citizenship by fighting in a foreign army or voting in a foreign election. To forfeit one's rights in these cases means simply that one is no longer the owner of the incorporeal interest.

Now it should be possible to think of someone's forfeiting his right to life. Indeed the original conception of the outlaw, as I understand it, was that of a person who had forfeited his right to life. Outlaws live at the mercy of others. There is no wrong — no violation of a norm protecting life — in killing an outlaw. Killing an outlaw is like killing a wolf or a fly. These creatures may have an interest in living, but the interest is not recognized as a matter of right, and therefore there is no wrong, no harm in the moral and legal order, when we kill them.

Is there a plausible analogy between aggressors and outlaws? I should think not. By explicating two features of outlawry, we can bring the disanalogy into proper focus. A person who forfeits particular rights, forfeits them with regard to persons who do not know that he has forfeited them. If I had forfeited my citizenship under the prior law by fighting in a foreign war, I would not have been entitled to be treated as a citizen — even if I still had a passport and even if my fighting in that war were a closely guarded secret. If I had lost my copyright under the prior law by publishing my book without the proper notice, I would not have been entitled to sue someone who published my book in ignorance of my forfeiting my rights. The loss of citizenship or of copyright precludes my asserting

[14] 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 296-97 (1765-69).

a claim that my rights have been violated, and it does not matter whether the putative violator knows of my loss of status. Similarly, an outlaw cannot complain of being hunted down, even if those tracking the outlaw are ignorant of their prey's status as an outlaw. The idea underlying these cases is the same: if you lose your rights — by forfeiture or even by waiver — the intentions of a putative violator are irrelevant.

But not in the case of justified killing. A justified killing is one that nominally violates a norm protecting life. To justify the nominal violation, we need to act with the proper intention, with knowledge of the circumstances that justify our conduct. Suppose that a physician is about to kill a patient by injecting air into his veins; the patient does not know this, but as the physician bends over him, the patient decides to attack the physician to avenge a grudge. He punches the physician, which causes her to fall back and drop the needle. The patient has unwittingly saved his life, but I do not think we can say that the physician's assault justified the patient's response. If he had known of the physician's design, he surely would have had good reason for repelling the aggression. But he did not have this reason. It might have been just for the physician to meet with physical harm, but the patient's conduct is not justified.[15]

This is a critical feature of justified conduct, and one that further elicits the implausibility of the physician's "forfeiting" her right to life by committing an aggressive act. If the physician had forfeited her right to physical integrity, there would be no need to justify the patient's de facto defense by appealing to her reason for acting.

To make the point clear, let us return to the case of the rapist. The legal concept of rape includes cases of intercourse by fraud or intimidation. Let us suppose the rapist holds a knife at the woman's side as she submits and the two engage in intercourse. The woman's covivant comes upon the scene and without seeing the knife, takes the intercourse to be a betrayal. In fury he kills the rapist. Is his conduct justified as a defense of the woman? The right of defense is enjoyed by third parties acting on behalf of the victim as well as by the victim herself. But in this case the third party did not have the right reason for killing the rapist. His conduct is no more justified than is the assault of the patient on the physician. This case demonstrates further why it is thoroughly misleading to speak of the

[15] Feinberg astutely recognizes this point, even though it is inconsistent with his theory of forfeiture in cases of self-defense. *See* J. FEINBERG, DOING AND DESERVING 44-46 (1970).

aggressor's forfeiting his or her right to life. Arguments of forfeiture are directed to the question: Does the aggressive act violate a protected interest. Arguments of justification concede both the violation of the interest, and the nominal violation of a norm protecting that interest and yet seek to explain why the nominal violation is proper. If an outlaw has the same status as a wolf, then killing him requires little, if any, justification. Virtually any reason will do. An aggressor, however, has the same right to life as the rest of us, and therefore, a justified killing requires that the defender have the right reasons for trespassing against the norm protecting human life.

On Feinberg's behalf, we might try to salvage the theory of forfeiture by rendering its presuppositions equivalent to those of justified killing. An aggressor "forfeits" his life only in the sense that someone who kills him must have the right reasons for doing so. This would work, but at the price of disassociating this special case of forfeiture from all the instances in the law in which we speak of forfeiting rights to tangible things and incorporeal interests. In these standard cases, the victim no longer has a protectible interest. He cannot complain against those who seek to injure him in ignorance of the forfeiture. In the case of defensive killing, however, the victim still has a right to life. The retention of this basic right is reflected in the practice of analyzing self-defense as justified killing, rather than as a case akin to killing an outlaw.[16]

IV. COLLAPSING THE CRITERIA OF JUSTIFICATION IN THE NORM AGAINST KILLING

Let us turn to one recurrent objection to breaking down the analysis of wrongful killing into (1) the interest in life, (2) the prohibitory norm and (3) the criteria of justification. The objection holds that the distinction between prohibition and justification is purely formal. Nothing of substance is gained by adding this third category rather than treating the criteria of justification as negative elements of a prohibitory norm. If the two dimensions of analysis were collapsed, the norm might read: "It is wrong to kill another intentionally unless X, Y or Z," where X, Y and Z stand for the particular

[16] There is something slightly dogmatic about the argument of the text. I do not mean to exclude the *logical* possibility that the doctrine of forfeiture could account for self-defense, but forfeiture does conflict with the premise that we must have the right reasons in cases of self-defense. If Robinson were right in analysis of justificatory claims, *see* Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 U.C.L.A. L. REV. 266 (1975), the theory of forfeiture would be more plausible.

circumstances that justify killing another. This is the move that Judith Thomson calls "factual specification."[17] One fills out the norm to cover the possible exceptions. Thomson has doubts about this strategy, but for weak reasons. She objects that the justificatory circumstances do not lend themsleves to a limited and manageable factual catalogue. Even in the field of self-defense there is an endless set of subtly different circumstances that would justify a killing. This is true, but the point holds as well against the clarification of the norm against killing. As we have seen, one does not violate the norm against killing unless one's conduct causes the death of the victim. If Skylab had hit and killed an Indian, the employees of NASA would not have "killed" him. The problems implicit in finding a "killing" are surely just as great as those that confound the analysis of self-defense. The reason we use norms and moral categories, I take it, is that we can never fully specify the range of factual variation that we are concerned about.

The more compelling objection to stating the criteria of justification as negative elements of the prohibitory norm is that doing so obscures the logic of justification. Let the norm read: "It is wrong intentionally to kill another unless X, Y or Z." As to the element of "intentionally killing another," it is sufficient to preclude a claim of violating the norm that in fact the actor does not kill another. His designing Skylab may ultimately issue in the death of another, but the act of designing-cum-death is presumably not an act of killing. If the creature killed does not have a right to life, that also is sufficient to preclude a violation of the norm.

The important point is that objective circumstances alone are sufficient to find that the actor does not violate the norm; his reasons and his intentions are irrelevant. Suppose that the actor shoots a tree stump in the mistaken belief that he is shooting at his boss. He hits the stump and he acts with an intent to kill, but by no stretch of fancy does he violate the norm against intentionally killing another. That it is a stump and not a human being is sufficient.[18]

But as we noted earlier, the objective circumstances are not enough to support a claim of justification; the actor must act with

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[17] J. THOMSON, SELF-DEFENSE AND RIGHTS 7-9 (1976).

[18] These problems are explored in greater detail in RETHINKING, *supra* note 7, at 552-69, and Fletcher, *The Right Deed for the Wrong Reason: A Reply to Mr. Robinson*, 23 U.C.L.A. L. REV. 293 (1975).

the right reasons. That we require good reasons follows from his act's being a violation of the norm. This critical point is obscured if we lump the criteria of justification together with the criteria for violating the norm.

It would be possible to gerrymander the norm to read: "It is wrong intentionally to kill another unless one acts with the right reasons in cases X, Y, Z," where X, Y, Z stand for categories of justified killing. Even this version would be unsatisfactory, for it would obscure an important point about a protectible interest in life. A justified killing in self-defense would fall outside this omnibus-norm in the same way that killing a fly would fall outside it. Both claims would simply be denials that the act violated the norm. But it is important to see that the justification does not eliminate the harm to the aggressor. His interest in life is invaded, even if the invasion is justified. Admittedly, as we noted earlier, the notion of harm does not presuppose a killing incompatible with a norm protecting life. Nonetheless we might wish to avoid the implication that a justified harm is the same as one that falls outside the norm protecting life.

Thomson captures the concept of justified harm by distinguishing between infringing the right to life and violating it.[19] A justified killing merely infringes the right; an unjustified killing violates it. Difficulties arise, however, in cases of killing in justifiable self-defense. Thomson develops the distinction between infringement and violation in order to explain why compensation is due to someone whose property is justifiably damaged in a situation of lesser evils; the actor takes the property of one person in order to save the life of another; compensation is appropriately due to the person who suffers the loss.[20] Cases of strict liability in tort lend themselves to the same analysis. The blasting company acts justifiably in dynamiting a tunnel for the new subway, but the rocks unavoidably fall on people in the vicinity. Compensation is due to the injured parties, and the best explanation is that their right to be free from harm is infringed. If they had no right not to be injured, it would be difficult to explain why compensation is due; but if their rights were violated, it would be difficult to explain why they could not exercise self-help or secure an injunction against the blasting. They must tolerate the blasting, but if injured, they may recover for their loss. Distinguishing between infringement and violation captures this complex legal and moral position of the victim.

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[19] *See* J. THOMSON, *supra* note 17.

[20] Thomson, *Some Ruminations on Rights*, 19 ARIZ. L. REV. 45 (1977).

The obligation to compensate accounts for cases of infringement where the justification is a variation of the principle of lesser evils, *i.e.*, where the lesser interest is intentionally sacrificed for the greater. But the criterion of compensation is of no avail in cases of justifiable self-defense. So far as I know, no legal system in the Western world accords compensation to the aggressor who is injured by another's reasonable effort to ward off the aggressive attack. This consensus presumably exposes a deeply felt moral judgment that aggressors do not deserve compensation. Yet it nonetheless seems appropriate to distinguish between infringements and violation of the aggressor's rights.

One might argue that the distinction between infringement and violation accounts for the appropriate sense of regret we feel in some cases of injuring and disabling an aggressor. Regret might be appropriate in some cases — if, for example, the aggressor is insane or otherwise acts without personal fault. But in the standard case of disabling a rapist, why should one feel regret, remorse or any related sentiment? There are indeed cases in which people do bring harm on themselves, and if that is the way we feel about culpable aggressors I see no cause for regret.[21]

The distinction between infringements and violation makes little sense in cases of self-defense, unless we have a clearly worked out distinction between violating a norm and justifying the violation. The specific case of self-defense does not lend itself to this anlaysis unless we see that in many cases of justified conduct (but not self-defense) compensation is due to the victim and a sense of regret is appropriate. And in all cases of justifiable conduct, including self-defense, the actor must act for the right reason. The distinction between infringement and violation of the victim's interests is illuminating, but only if we link the distinction to the general theory of norms and their justifiable violation.

To summarize the discussion to this point, let us classify the types of issues that arise in analyzing whether someone wrongfully kills another.

1. *No infringement of the right to life.* This case arises in several variations:

[21] Note that we would also feel no regret in the case of the physician who is unwittingly repulsed by the patient. Though her suffering the injury is not justified, it is just. It is worth noting that the physician would be able to recover in tort. In contrast, we might feel regret about injuring a psychotic aggressor, but the defense would be justified and therefore there would be no liability in tort.

A. No being with a worthy interest in life is affected, *e.g.*, the cases of killing a wolf, a fly, and arguably an embryo.

B. The being once had a right to life, but has since forfeited the right, *e.g.*, the special case of the outlaw.

C. A being with such an interest is affected, but the defendant's act does not constitute killing the victim, *e.g.*, the skylab case.

2. *Infringing the right to life.* This is the standard case of justifiable killing.

3. *Violating the right to life.* This is the case of wrongfully (unjustifiably and intentionally) killing another.

Two other categories of killing bear mentioning. First, there are many instances of excusably violating the right to life. These cases are exemplified by killings under duress, killings by the insane, killings where the actor is unavoidably and excusably mistaken about whether the victim is aggressing against him.[22] We should also include some intentional killings that are, in my opinion, excusable on grounds of personal necessity. In *Regina v. Dudley & Stephens*[23] the shipwrecked sailors violated the right to life of the weakened cabin boy; they were convicted and their sentences later commuted to a short term. In my view, their killing should have been excused on grounds of personal necessity.[24] They did the wrong thing, but they responded as most people would to the situation of starvation and despair. Thomson poses a case of self-defense that seems more appropriately classified as a case of personal necessity excusing wrongful conduct. Suppose, she writes, that an aggressor "is driving his tank at you. He has taken care to arrange that a baby is strapped to the front of the tank, so that if you use your anti-tank gun, you not only kill [this] aggressor, you will kill the baby."[25]

Thomson concludes that you "can presumably go ahead and use the gun, even though this involves killing the baby. . . ."[26] Well, I suppose you can, but this conclusion fails to specify whether killing the baby is justified or excused. Is there a right to kill the baby or is it merely inappropriate to blame someone who kills to save her own life? The way to elicit our intuitions is to look at the case from

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[22] *See generally* RETHINKING, *supra* note 7, at 817-55.

[23] 14 Q.B.D. 273 (1884).

[24] RETHINKING, *supra* note 7, at 818-29.

[25] J. THOMSON, *supra* note 17, at 8.

[26] *Id.* Nozick similarly fails to distinguish between the justifiable and excusable variations of self-defense. He treats the killing of innocent shields as "not prohibited." R. Nozick, *supra* note 11, at 34.

the perspective of a third-party stranger who comes on the scene and sees exactly what is going on. The stranger has a right to defend you against the tank, but does he have a right to kill the innocent baby? The case is admittedly a close one, but I find it difficult to justify favoring one innocent party over another. The baby's rights are not, as it were, swept away by his being used as an "innocent shield." The threatened victim's killing an innocent nonaggressor may well be excusable, as should have been the case in *Dudley & Stephens,* but it does not follow that a third party has the right to intervene and choose the person who will survive the unfortunate conflict.

The second problem we should underscore before moving on to another set of cases is that the (moral or legal) duty to pay compensation does not map neatly onto this set of distinctions. As I have argued elsewhere, the actor does not owe compensation for unjustified but excused violations, for in these cases, the actor is not personally accountable for the harm.[27] Yet there are some cases of excused conduct where the actor does choose (in a limited sense) to violate the rights of another, *e.g.,* the threatened victim's choice to kill the baby strapped to a tank in order to save himself. This choice arguably would support a duty to render compensation.

The problem of compensation in cases of justified killing is equally unruly. There is no duty to compensate in cases of justifiable self-defense; but there might be a duty to compensate if we permitted people to sacrifice nonaggressing individuals for the sake of the greater good. For example, if we admitted a justification of lesser evils in cases such as *Dudley & Stephens,*[28] the duty to compensate for the deprivation of life might be sound. This duty is recognized where one person's property is sacrificed for the sake of another.[29] If the same theory of justification applied in homicide cases, compensation to the victim's heirs and legatees might well be appropriate. The problem is that whether the killing is justified or excused carries no necessary implications about liability in tort.

V. JUSTIFYING UNINTENTIONAL KILLINGS

Killings in self-defense raise difficult questions about the right to life, but we could resolve those issues, by and large, by analyzing them as bearing on the interest in life, the norm against intentional

[27] Fletcher, *Fairness and Utility in Tort Theory,* 85 HARV. L. REV. 537, 551-56 (1972).

[28] The Model Penal Code § 3.02 proposes to solve the problem of *Dudley & Stephens* by extending the justification of lesser evils. *See* RETHINKING, *supra* note 7, at 827.

[29] Vincent v. Lake Erie Transp. Co., 109 Minn. 456, 124 N.W. 221 (1910).

killing, and the criteria of justification. Accidental killings expose other knots in the complex grain of respecting life as a particularly worthy interest. By an accidental killing, I mean to include the full range of nonintentional killings. Some of these are negligent or reckless and others occur without fault on the part of the actor.

Let us start with a case of negligent killing and try to assess whether, in Thomson's terms, the right to life is infringed or violated. Suppose a driver fails to turn on his headlights and thereby causes an accident, killing another driver. The conduct is negligent, for he should have noticed that his lights were off. He had no excuse for not noticing and thus he was at fault for causing death. He would be liable in tort, and in most legal systems he would be criminally liable for negligent homicide. It seems fairly clear as well that the negligent killing violates the victim's right to life. But let us focus on the moment that the driver is cruising down the street happily indifferent to the danger he poses to others. The victim is now 100 feet away. What do we wish to say at this moment about the victim's right to life? Surely, it is neither violated nor infringed, but the driver is negligently creating a risk of the victim's death. We are drawn toward saying that the victim's life is negligently endangered, but note that it is his interest, not his right to life, that is endangered.

Now consider a case in which someone faultlessly endangers the life of another. A few years after nitroglycerine is introduced into commerce, Wells-Fargo receives a crate oozing a substance resembling sweet oil. The agents open the crate with a hammer and chisel, thus detonating the nitroglycerine and instantly killing everyone nearby. In view of the commercial world's inexperience with nitroglycerine, we could not have expected the Wells-Fargo agents to realize how dangerous it was to open the crate with a hammer and chisel. Their creating a risk of explosion and death was excusable under the circumstances. Let us conclude that they were not at fault, not negligent, in causing the victims' deaths.[30] There would be no basis for criminal or civil liability. What do we say now about the victims' right to life? Was it violated as in the case of the negligent driver, merely infringed as in the case of justifiable self-defense, or, perhaps, because there would be no liability, the right to life stands unaffected. Is it possible for someone to be killed

[30] This was the conclusion of the Court in Parrott v. Wells Fargo & Co., 82 U.S. (15 Wall.) 524 (1872).

without his right to life being affected? I confess that my linguistic intuitions are not up to the test. I am not sure whether to say the right is "violated," "infringed," or "unaffected."

One could argue by analogy to the case of excusable, intentional killing that if the right to life is violated by a psychotic assailant, it is violated as well by the excusable behavior of the Wells-Fargo agents. But excusable risk-taking may well be different from excusable, intentional homicide. And, frankly, one wonders why we need to find the right word to describe what happens to the right to life as the explosion takes its victims. Once we realize that the critical problems lie in working out the norms against killing and the criteria for justifiable killing, we need not fret so much about describing the impact on the right to life. We can obviously talk about persons having a protectable interest in life, about their being killed justifiably or excusably, about their untimely deaths as a harm — these are the concepts that we should invoke in evaluating unfortunate accidents like the explosion at the Wells-Fargo freight office.

The contemporary legal approach to dangerous conduct focuses on the risk of harm apart from the materialization of the harm. Thus lawyers would say that risk in the nitroglycerine case was objectively "unreasonable" but nonetheless not the fault of the unwitting Wells-Fargo agents. A risk might be thought unreasonable on different grounds: because its costs exceed its benefits, because it is simply excessive under the circumstances or, as I have argued elsewhere, because it poses a nonreciprocal threat to people nearby.[31] The idea that risks lend themselves to abstraction from what in fact happens in the concrete case leads to a variety of possible cases:

1. The risk might be objectively unreasonable, and the risk materializes into harm. There are two further possibilities:
   A. The risk-taking might be excused on grounds of unavoidable ignorance, *e.g.*, the nitroglycerine case.
   B. The risk-taking might be unexcused, *e.g.*, the case of driving with one's lights off.
2. The risk might be objectively unreasonable, and no harm occurs. Suppose, for example, that there were no persons nearby and the agent threw the crate onto a concrete platform. The separation of risk from outcome suggests that the risk can be objectively unreasonable, even if under the concrete circumstances no one is injured.
3. The risk might be objectively reasonable if, for example,

[31] *See* Fletcher, *supra* note 27.

its benefits outweigh its costs. Again, there are two possibilities:

A. No harm occurs.

B. Harm does occur.

Of all of these cases posed by abstracting risks from results, the most troubling is 3-B: The risk is deemed reasonable, and yet it issues in the death of an innocent person. Would we say that the unintended death is justified? Let us think about this problem in the context of the following troubling case. A police officer comes on the scene of a robbery and shoots, as he may under the law, at the robber seeking to escape. There are few people nearby, but nonetheless one of the bullets misses its target and fatally strikes an innocent bystander. What do we wish to say about the unintended death of the innocent bystander? In a famous felony-murder case, the Pennsylvania Supreme Court said that in this situation the policeman's killing the robber would have been justified, but his killing the innocent bystander was merely excused.[32] Yet our analysis of permissible risk-taking suggests that killing the bystander might have been justified.

If we stipulate that a quantifiable risk of injury crystallizes between the shooting and the unintended hit, then we might well be able to justify the risk on the basis, say, of cost-benefit analysis. Over the long run — although surely not in this case — it might be preferable for the police to shoot at escaping felons even if a stray bullet might injure bystanders. Though this mode of thinking has become commonplace, a number of conceptual oddities attend the claim that unintended killings of innocent people are justifiable.

First, when we speak of justifying a risk, we do not employ the concept of justification as we do in justifying the infringement of norms against intentional wrongdoing. Recall that the justified infringement of norms requires that one have the right reason for acting. The same requirement does not so clearly hold in the case of justified risk-taking. If the benefits of operating the DC-10 outweigh the dangers to the public, then operating the DC-10 is a justified, reasonable risk. Yet those who do so need not have a clear conception of the benefits and burdens, and surely they need not act on the belief that it is in the public interest to operate the DC-10.

[32] Commonwealth v. Redline, 391 Pa. 486, 137 A.2d 472 (1958). The point of the distinction in this context is that, according to the principles of complicity, a co-felon in the robbery could be held accountable for a wrongful but excused killing by the policeman, but the co-felon could not be held liable for a lawful, justified killing. *See* RETHINKING, *supra* note 7, at 668.

The assumption seems to be that if the risk is reasonable, then it represents no social harm; and if there is no harm there is no need to have the right reasons in creating the risk.[33]

A second related point is that a justified risk of death does not constitute even the infringement of a norm protecting life. The norm presumably reads: do not create an unreasonable risk of death. A reasonable risk is one that conforms to the norm. We need good reasons for infringing norms, not for conforming to them. Thus we can explain why one does not need good reasons for creating a reasonable risk of death.

If it be true that a reasonable risk of death constitutes a social benefit rather than a social harm, then we confront a serious paradox. Is a bystander not harmed by the policeman's stray bullet? Of course he is; but if the risk of shooting is not harmful, how does a death issuing from the shooting become a harm? The problem here strikes me as more serious than our noting earlier that some deaths count as harms even though there is no killing incompatible with a protective norm. The shift from the result to the risk softens our focus in perceiving the harms that occur in individual cases. Across a range of cases, the risk appears desirable; the actual materialization of the risk in particular cases becomes almost incidental.

We might try to avoid this absorption of harms into one abstract beneficial risk by redefining the relevant norm protecting life. Instead of focusing on the reasonableness of the risk, the norm should read: do not expose others to a high risk of death. Shooting at a fleeing felon with bystanders present would be a clear violation of the norm. The appeal to social utility would enter to justify the violation. The justification would resemble lesser evils. If intentionally harming another is justified by the greater good, then intentionally exposing to a high risk of death can also be justified by the expected utility of the risk. The problem with this argument is that the premise does not hold. We accept the principle of lesser evils in cases of harm to property, but not in cases of intentional killing.[34] If Kantian principles persuade us that a killing cannot be justified solely to serve our own ends, we would be hard-pressed to justify exposing another person to the risk of death solely for our own ends.

Whether we think of reasonableness as a factor in the prohibition

[33] This is the argument that led Robinson to deny the requirement of right reasons in all cases of justification. *See* Robinson, *supra* note 16, at 284-91.

[34] It is true that Model Penal Code § 3.02 appears to permit killing to save a greater number of lives. So far as I know, no court has ever recognized this principle in a homicide case.

("do not create an unreasonable risk of death") or a justification for infringing a broader norm ("do not expose others to a high risk of death"), we encounter great difficulties in justifying unintended deaths. Perhaps we should take the suggestion of the Pennsylvania Supreme Court seriously: the killing of the bystander is wrongful, but nonetheless excused. The argument would be that, even if unintentional, the killing of an innocent, nonaggressing person is categorically wrong. But a wrongful killing might be excused, as it was historically, on the ground of unavoidable ignorance.[35] The police officer could not be expected to know that his shooting would kill a bystander and therefore the killing is excused.

This theory of excusable killing sounds plausible, but is it possible to ignore the factor of risk in assessing the excusability of the killing? How can we decide whether the officer can be excused for killing the bystander without inquiring into (1) the danger of shooting under the specific circumstances and (2) whether an ordinary police officer should be able to appreciate this degree of danger? Danger bespeaks risk, and thus we are invariably drawn back into an inquiry about the gravity of the risk.

There is an important difference, however, between assessing the risk in the abstract and assessing the risk as it bears on what the actor should be able to expect under the circumstances. The former view is the perspective of justification, and the latter, of excuse. In order to justify a dangerous, risk-taking act, we have to isolate the risk as the first step in adjudging it socially beneficial. In order to excuse unintended harm, we need only focus on the actor and the difficulties of gauging the incidental dangers implicit in shooting at an escaping felon. The perspective of justification is *ex ante* in the sense that it attaches to a risk that crystallizes prior to the harm. The perspective of excuse is *ex post* in the sense that it attaches to the specific concrete harm and inquires, retrospectively, whether the actor is at fault for not having appreciated the risk.

The question remains whether unintended killings can ever be justified. It seems clear that any theory of justified unintended killings would turn on a thesis about justified risk-taking, and we have shown that antinomies arise from a range of efforts to justify individual harms by justifying risks.

In analyzing the right to life, difficult issues inhere at all three stages of the analysis. We encounter problems in determining who

[35] *See* RETHINKING, *supra* note 7, at 235-41.

has an interest in life that we ought to acknowledge and protect. We face new difficulties in deciding which norms should serve to protect the interest in life. And finally, we confront the subtle problems of justifying both intended and unintended killings.

That we perceive new difficulties in analyzing the right to life indicates that we have advanced the inquiry. We can now relate some problems to theory of interests enjoyed as a matter of right; some problems, to the framing of norms to protect life; and others, to the theory of justification. If we have refuted the theory of forfeiture, if we see the full complexity of the issues, then we might be on the way to a more adequate explanation of how we can all enjoy a right to life and yet accept a world in which permissible killing and permissibly risking death pervade our lives.