

THE DEFENSE OF NECESSITY CONSIDERED FROM THE LEGAL AND MORAL POINTS OF VIEW

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ABSTRACT

Questions concerning the scope of the defense of necessity frequently arise in a variety of legal and philosophical discussions. Professor Christie grapples with the questions raised by this defense: When can property be taken or destroyed to save human life? Must compensation always be paid? Can one destroy the property of others to save one's own property? Can one kill an innocent person to save the lives of a greater number of people?

Professor Christie submits that much of the discussion of these difficult questions is too abstract and based on too cursory a review of the few legal authorities on the subject. He explores the authorities in depth, and concludes, among other things, that someone who destroys property to save human life is not generally required to pay compensation for the property destroyed, and that private individuals can never use the defense of necessity, even when multiple human lives are threatened, to justify intentionally taking innocent human life.

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INTRODUCTION

There has been, in recent years, an ongoing discussion of the defense of necessity that has focused on two basic sorts of paradigm cases. The first involves the destruction of property to save human life, but, as we shall see, also raises questions as to when one may take or destroy the property of others in order to save one's own property or to further some other important interest one may have. Joel Feinberg, for example, poses the situation in which a backpacker is stranded in a remote area by an unexpected blizzard.¹ He breaks into an unoccupied cabin and waits there for three days until the storm abates and he may safely leave.² During that time, the backpacker consumes the food stocks in the cabin and breaks up his unknown benefactor's furniture, burning it in the fireplace to keep warm.³ Jules Coleman has constructed a simpler version of this first paradigm in which Hal, a diabetic, loses his insulin in an accident.⁴ Before Hal lapses into a coma, he rushes to the house of Carla, another diabetic.⁵ Carla is not at home, but somehow Hal manages to get into her house.⁶ After first assuring himself that he has left Carla enough insulin for her own daily dosage, Hal takes the insulin he needs to survive.⁷

Coleman and Feinberg assert that the backpacker and Hal were justified, both from a legal and a moral point of view, in doing what they did.⁸ Both rely on a supposed distinction between "infringing" a person's rights and "violating" that person's rights.⁹ Coleman and

1. See Joel Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life*, 7 PHIL. & PUB. AFF. 93, 102 (1978).

2. See *id.*

3. See *id.*

4. See JULES L. COLEMAN, RISKS AND WRONGS 282 (1992).

5. See *id.*

6. See *id.*

7. See *id.*

8. See COLEMAN, *supra* note 4, at 300; Feinberg, *supra* note 1, at 102.

9. See COLEMAN, *supra* note 4, at 300; Feinberg, *supra* note 1, at 101. The distinction appears to have been developed by Judith Jarvis Thomson in *Self-Defense and Rights*, The Lindley Lecture, University of Kansas (Apr. 5, 1976), in JUDITH JARVIS THOMSON, RIGHTS, RESTITUTION, AND RISK 33 (William Parent ed., 1986) [hereinafter THOMSON, RIGHTS, RESTITUTION, AND RISK]. She states that person *A* infringes person *B*'s right that *P* (where *P* is a statement about a state of affairs), when *B* has a right that *P* should be true (i.e., that the state of affairs should exist) and *A* causes *P* to be false. See *id.* at 40. *A* does not violate *B*'s right that *P*, however, unless *A* acts *wrongly* or *unjustly* in causing *P* to be false. See *id.* Although *A* is free

Feinberg argue that neither the cabin owner's nor Carla's rights have been violated because the backpacker and Hal have not acted wrongly or unjustly.¹⁰ Their rights have only been infringed.¹¹ Accordingly, since no rights have been violated, the takings in both cases are therefore justified rather than perhaps merely excused.¹² Both the cabin owner and Carla have, however, a right to be compensated for their losses.¹³ If they are not compensated by, respectively, the backpacker and Hal, then their rights would indeed be violated.¹⁴ The conclusions drawn from the backpacker and diabetic examples are then used to support more sweeping conclusions about the conditions under which one may take or destroy property, provided one is prepared to pay compensation for the property destroyed.¹⁵ These conclusions have very little legal support, but they are, as we shall see, consistent with the treatment of these subjects in both the *Restatement of Torts* and *Restatement (Second) of Torts*, which are equally lacking in precedential support.¹⁶

The second type of paradigm case has been discussed in great detail by Judith Jarvis Thomson. It involves not the destruction of property to save life, but the killing of one innocent person to save the lives of a greater number of innocent persons. The core of the paradigm is the situation first presented by Philippa Foot¹⁷ in which, as developed by Thomson, "[a]n out-of-control trolley is hurtling down a track."¹⁸ Ahead of the trolley are five men who will certainly

from blame when he merely *infringes B's* right, *A* has a moral and/or legal obligation to compensate *B* because he did something *B* had a right that he not do. *See id.* at 41.

10. *See* COLEMAN, *supra* note 4, at 300; Feinberg, *supra* note 1, at 102.

11. *See* COLEMAN, *supra* note 4, at 300; Feinberg, *supra* note 1, at 102.

12. *See infra* note 338 for an exploration of the distinction between justification and excuse.

13. *See* COLEMAN, *supra* note 4, at 300-01; Feinberg, *supra* note 1, at 102.

14. *See* COLEMAN, *supra* note 4, at 300-01; Feinberg, *supra* note 1, at 102.

15. *See* COLEMAN, *supra* note 4, at 296-302. As we shall see, these include the supposed obligation to pay compensation when property is destroyed to save human life. Indeed, Feinberg extends these principles, suggesting that if an aggressor's potential victim, threatened with death, unavoidably kills a child the aggressor employs as a shield, the would-be victim should pay compensation for the death of the child. *See* Feinberg, *supra* note 1, at 103.

16. *See infra* Part I.A.2.

17. *See* Philippa Foot, *The Problem of Abortion and the Doctrine of the Double Effect*, 5 OXFORD REV. 5, 8-9 (1967), *reprinted in* PHILLIPA FOOT, *VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY* 19, 23 (1978).

18. JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* 176 (1990) [hereinafter THOMSON, *REALM OF RIGHTS*]. Thomson also devoted considerable attention to the "trolley problem" in her earlier work. *See, e.g.*, Judith Jarvis Thomson, *Killing, Letting Die, and the Trolley Problem*, 59 THE MONIST 204 (1976) [hereinafter THOMSON, *Killing*], *reprinted in* THOMSON, *RIGHTS*,

be killed if the trolley continues on its course. "Bloggs is a passerby, who happens at the moment to be standing by the track next to the switch."¹⁹ If Bloggs throws the switch the trolley will be shunted off to a spur. The five men will be saved, but unfortunately a sixth man, who is immobilized on the spur, is certain to be killed. In short, if Bloggs does nothing, five men will be killed. If he throws the switch, the five will be saved but a sixth man, equally innocent, will be killed. What should Bloggs do? Thomson concludes that Bloggs would be morally justified in throwing the switch, although he would not be morally compelled to do so.²⁰ She spends the better part of two books adding more and more permutations to the paradigm in an effort to explain and justify her conclusions.²¹

I think the conclusions Feinberg and Coleman reach with regard to the first paradigm are seriously flawed and that Thomson's conclusions with regard to the second are just plain wrong. In the discussion that follows, I will attempt to justify these assertions. I will first present a legal analysis of the situations presented by these paradigms, including a discussion of the equally flawed provisions in the two Restatements, and later explore what light this analysis may shed on the moral questions raised by these paradigms. The adoption of such a methodology is justified by the fact that the writers to whom I have referred, as well as many others,²² have used arguments derived from the law to support conclusions about morality and arguments drawn from moral reasoning to support legal conclusions. My complaint is not that this procedure is unjustified. Though often overlooked, it has been well documented that not only is a society's law influenced by its morality, but its morality is also very much influenced by its law.²³

RESTITUTION, AND RISK, *supra* note 9, at 78; Judith Jarvis Thomson, *The Trolley Problem*, 94 YALE L.J. 1395 (1985) [hereinafter THOMSON, *Trolley Problem*], reprinted in THOMSON, RIGHTS, RESTITUTION, AND RISK, *supra* note 9, at 94. There are minor verbal differences in the formulation of the core case as it appears in each of these pieces. For stylistic reasons, I have chosen to use one of the verbal formulations from her later book.

19. THOMSON, REALM OF RIGHTS, *supra* note 18, at 176.

20. *See id.* at 176-77.

21. *See* sources cited *supra* note 18.

22. *See* sources cited *infra* note 206 (listing of a number of these authors).

23. The Swedish legal philosopher Karl Olivecrona has even argued that law probably has a greater influence on morality than morality has on law. *See* KARL OLIVECRONA, LAW AS FACT 150-68 (1939). The position that the mutual influence of law and morality are at least equal has been strongly supported by Lon Fuller. *See* LON FULLER, *A Reply to Critics*, in THE MORALITY OF LAW 204-07 (rev. ed. 1969) [hereinafter FULLER, *A Reply to Critics*]; LON FULLER, THE LAW IN QUEST OF ITSELF 135-37 (1940). The points with which we are concerned are also discussed in Martin P. Golding, *On the Idea of Moral Pathology*, in ECHOES

My objection, rather, is that the legal analysis is too superficial and that erroneous legal conclusions are used to justify unsound moral conclusions.

I will discuss the two paradigms sequentially because they each involve complex questions that can only be resolved by a close analysis of the relevant cases and other legal and philosophical authorities. As we shall see, however, the two paradigms are interrelated because they involve many common issues and the conclusions reached with regard to one paradigm—particularly the first—are sometimes used in discussions of the other. That is why it is fruitful to discuss both paradigms in the same article.

By starting with these paradigms and thoroughly analyzing the implications of the conclusions drawn from them, we shall be able to get a better grasp of the more basic question they raise: When can the defense of necessity be used to justify the destruction or taking of property or the taking of life? In order to help the reader follow the discussion, I set out my ultimate conclusions in advance. Unlike Coleman, Feinberg, and others, I do not think that one has to pay compensation if property is destroyed to save human life. At the same time, again unlike Coleman, Feinberg, and others, I do not think that a private person has a privilege either to destroy someone else's property to save his own property or to use or consume the property of others, for whatever reason, over their objections. Finally, I completely disagree with the conclusion of Foot and Thomson that a person acting in a private capacity can ever intentionally kill an innocent person to save the lives of a greater number of other people.

FROM THE HOLOCAUST: PHILOSOPHICAL REFLECTIONS ON A DARK TIME 128, 133 (Alan Rosenbergs & Gerald E. Myers eds., 1988). Fuller and Golding pointed out that notions like property and marriage, which play an important part in moral discourse, would not make sense without a legal system to give them meaning and content. See FULLER, *A Reply to Critics*, *supra*, at 206; Golding, *supra*, at 132. In my own work I have pointed out a number of other areas where the influence of law on morality is paramount. These include promise-keeping and moral transgressions that are described in terms drawn from the law, such as "murder," "rape," and "invasion of privacy." See George C. Christie, *On the Moral Obligation to Obey the Law*, 1990 DUKE L.J. 1311, 1318-22. It is obvious that any discussion that is framed in terms of "rights," as so much of the philosophical literature on "necessity" is, must inevitably make use of the legal analysis of what rights are.

I. THE DESTRUCTION OF PROPERTY

A. *The Destruction of the Property of Others in Order to Save Life*

1. *The Common Law Background.* Few cases have captured the attention of philosophers who are interested in the law more than *Vincent v. Lake Erie Transportation Co.*,²⁴ decided by the Supreme Court of Minnesota in 1910. Despite the fact that *Vincent* was not a case in which property was destroyed to save life, it has nevertheless become the starting point for practically every discussion, including that in the Restatements of Torts,²⁵ of the justifiability of destroying property in order to save life.²⁶ As we shall see, however, a careful analysis will reveal that *Vincent* cannot support most of the broad conclusions that have been drawn from it. This analysis will also help us to see why these broader conclusions fail to derive adequate legal support from the other sources that bear on this difficult subject.

24. 124 N.W. 221 (Minn. 1910).

25. See RESTATEMENT OF TORTS § 197 cmt. a, illus. 2 & cmt. j, illus. 13 (1934) [hereinafter RESTATEMENT]; RESTATEMENT (SECOND) OF TORTS § 197 cmt. a, illus. 2 & cmt. j, illus. 13 (1965) [hereinafter RESTATEMENT (SECOND)]; RESTATEMENT (SECOND) OF TORTS, APPENDIX, Reporter's notes to § 197 (1966) [hereinafter RESTATEMENT (SECOND) APP.] (stating that illustrations 2 and 13 were each "based on" *Vincent*); see also RESTATEMENT OF TORTS (Tentative Draft No. 11), § 1041 cmt. b, illus. 2 & cmt. i Reporter's notes [hereinafter RESTATEMENT (Tentative Draft No. 11)] (characterizing *Vincent* as a case in which A was held "liable for . . . harm occasioned to B's dock by the pounding of A's boat against it"). Section 1041 of the tentative draft prepared in 1933 became section 197 when the original *Restatement* was completed. These provisions deal with the privilege to enter land in emergency situations and, in describing the scope of the privilege, discuss the permissibility of destroying or damaging the property of others in the course of exercising the privilege. The Restatements' treatment of the questions with which this Article is concerned is discussed *infra* at Part I.A.2 and Part I.B.

26. The *Vincent* case has attracted a great deal of scholarly commentary, but almost all of it is at a fairly theoretical level that treats the case in isolation and does not attempt to determine whether *Vincent* is in fact an accurate presentation of the law on this subject. See, e.g., COLEMAN, *supra* note 4, at 293; RICHARD A. EPSTEIN, A THEORY OF STRICT LIABILITY 11-13 (1980) (using *Vincent* to illustrate that liability may be appropriate even when the defendant's actions were reasonable); GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW § 10.1, at 760-61, § 10.2, at 777-79 (1978) (employing *Vincent* in a comparison of German and American "lesser evil" doctrines); George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 544-47 (1972) (arguing that *Vincent* is an instance of nonreciprocal risk); Howard Klepper, *Torts of Necessity: A Moral Theory of Compensation*, 9 LAW & PHIL. 223-24 (1990) (describing *Vincent* as an instance of unjust enrichment); Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHICAGO-KENT L. REV. 407, 420-22 (1987) (commenting on EPSTEIN, *supra*, and suggesting that Epstein's argument for strict liability is unpersuasive). For citations to narrower legal discussions of these issues, see *infra* Part I.A.2.

In the *Vincent* case, the steamship *Reynolds* was moored to the plaintiff's dock while she was discharging cargo.²⁷ During the unloading process, a storm developed which, by the time the unloading process was completed, was producing winds of fifty miles per hour.²⁸ The storm continued to increase in intensity throughout the night.²⁹ After the *Reynolds* discharged her cargo, she signaled for a tug to tow her from the dock, but no tug could be obtained because of the storm.³⁰ The court accepted that, if the *Reynolds* had cast off her lines, she would have drifted away from the dock.³¹ The *Reynolds* instead kept her lines fast and "as soon as one parted or chafed it was replaced, sometimes with a larger one."³² In the course of keeping fast to the dock, the wind and waves struck the *Reynolds* with such force "that she was constantly being lifted and thrown against the dock, resulting in its damage, as found by the jury, to the amount of \$500."³³ In affirming a judgment for that amount in favor of the dock owner, the court declared that the master of the *Reynolds* was justified in not attempting to leave the dock during the storm.³⁴ Nevertheless, the court continued:

[T]hose in charge of the vessel deliberately and by their direct efforts held her in such a position that the damage to the dock resulted, and, having thus preserved the ship at the expense of the dock, it seems to us that her owners are responsible to the dock owners to the extent of the injury inflicted.³⁵

Two judges dissented. They interpreted the argument of the majority as accepting "that if the ropes, or cables, first attached to the dock had not parted, or if, in the first instance, the master had used the stronger cables, there would be no liability."³⁶ Given that it was accepted that the master could not reasonably have anticipated the severity of the storm and the need to have used stronger cables, they did not believe that liability should attach for the "renewal of cables

27. See *Vincent*, 124 N.W. at 221.

28. See *id.*

29. See *id.*

30. See *id.*

31. See *id.*

32. *Id.*

33. *Id.*

34. See *id.*

35. *Id.* at 222.

36. *Id.* (Lewis, J., joined by Jaggard, J., dissenting).

to keep the boat from being cast adrift at the mercy of the tempest.”³⁷ The damage to the dock was simply storm damage—the consequences of an act of God.³⁸

In his fairly extensive discussion of the case and its support for his legal and moral conclusions about the circumstances under which one may justifiably take or destroy the property of others, Coleman describes *Vincent* simply as a case in which “[t]he court held that even though the ship’s captain acted correctly in firmly tying the boat to the dock, he was required to compensate the dock owner.”³⁹ Coleman fails to note, much less to attach any significance to, the insistence of the dissenters in *Vincent* that it was common ground between themselves and the majority that, if the original lines had not parted, there would have been no liability, a conclusion that I believe

37. *Id.*

38. This certainly would seem to be the correct conclusion if the *Reynolds* had not finished unloading. There is actually a House of Lords decision on point which escaped the notice of the court in *Vincent*. In *River Wear Comm’rs v. Adamson*, 2 App. Cas. 743 (1877) (appeal taken from Eng. C.A.), the ship was trying to enter the plaintiff’s dock to escape a violent storm. The ship went aground and the crew were rescued. After the rescue, when the tide rose, the abandoned ship was driven against the dock causing substantial damages of over £2800. *See id.* at 749. (It should be noted that this amount is much more than the \$500 involved in *Vincent*.) The question before the House of Lords was whether the common law rule that a showing of negligence was required before liability could be imposed had been changed by statute. Their Lordships held that it had not. *See Adamson*, [1877] 2 App. Cas. at 750-52 (construing The Harbours, Docks, and Piers Act, 1847, 10 Vict. c. 27). As Lord Blackburn declared:

[T]he Common Law is, I think, as follows:—Property adjoining to a spot on which the public have a right to carry on traffic is liable to be injured by that traffic. In this respect there is no difference between a shop, the railings or windows of which may be broken by a carriage on the road, and a pier adjoining to a harbour or navigable river or the sea, which is liable to be injured by a ship. In either case the owner of the injured property must bear his own loss, unless he can establish that some other person is in fault, and liable to make it good. And he does not establish this against a person merely by shewing that he is the owner of the carriage or ship which did the mischief, for the owner incurs no liability merely because he is the owner.

Id. at 767. For liability to arise, the damage must have been done “wilfully,” or have arisen as a result of negligence. *Id.*

To give a more modern illustration of the same issue that is more closely patterned on *Vincent*, suppose one visits a friend at the beach and parks his car in the friend’s driveway. If a storm develops and the car is thrown against the side of the friend’s house, should the driver be liable for the damage to the house merely because the house kept the car from being cast into the sea? Should the law require the driver to move his car when the wind whips up so as to avoid such a risk?

39. COLEMAN, *supra* note 4, at 168; *see also* EPSTEIN, *supra* note 26, at 11-12 (using *Vincent* to show that legal liability does not always turn on whether a party acted improperly).

is legally the correct one.⁴⁰ Had the majority addressed themselves to this portion of the dissenting opinion, they might have made less sweeping statements about when compensation must be paid for the destruction of another person's property. That is, accepting as an obvious truism that one may not consciously sacrifice someone else's property to save one's own property does not require one to conclude that, any time property is damaged or destroyed in emergency conditions, any person who benefits from that damage or destruction is under a legal obligation to pay compensation.

Nevertheless, given the actual opinion produced by the majority, Coleman might justify his failure to consider what was a significant factor in the *Vincent* decision—the continual replacing of the ship's moorings as they broke—by pointing to a number of broad dicta in the majority opinion.⁴¹ These dicta seemingly support his conclusion that if one destroys property in order to save one's life—an issue that was clearly not involved in *Vincent*⁴²—one must pay compensation, even if one is in no way at fault in creating the life-threatening situation.⁴³ This conclusion is clearly against the weight of legal authority⁴⁴ and, from a moral perspective, is highly questionable. Moreover, as will be seen, although the law does sometimes permit property to be destroyed to save life, the situations in which that may be done are much more limited than Coleman acknowledges. Coleman is also mistaken in his further conclusion that, so long as one is prepared to pay appropriate compensation, one has a privilege not only to de-

40. My confidence in this conclusion is strengthened by the argument in *Adamson*, 2 App. Cas. 743, discussed *supra* at note 38.

41. See, e.g., *Vincent*, 124 N.W. at 222 (“Theologians hold that a starving man may, without moral guilt, take what is necessary to sustain life; but it could hardly be said that the obligation would not be upon such a person to pay the value of the property so taken when he became able to do so.”).

42. There is absolutely no indication in either of the opinions in *Vincent* that the storm presented a danger to the lives of the crew of the *Reynolds* and several indications that there was no such danger. For example, the crew was able safely to replace the cables and no one challenged one witness's assertion that the worst that would have happened if the *Reynolds* tried to leave her berth is that she would have gone aground in the mudflats. See *id.* at 221. In rejecting the conclusiveness of that testimony, the court noted that “those in charge of the dock and vessel . . . were not required to use the highest human intelligence, nor were they required to resort to every possible experiment which could be suggested for the preservation of their property.” *Id.* (emphasis added).

43. See COLEMAN, *supra* note 4, at 292-96.

44. See *infra* notes 64-77 and accompanying text.

stroy but also to consume the property of others in order to save his own life.⁴⁵

A second way in which Coleman could attempt to justify his refusal to consider the significance of the constant reattaching of the cables is by pointing to the *Vincent* majority's discussion of the only two cases it cites in support of its decision. The first, *Depue v. Flatau*,⁴⁶ a Minnesota case decided only a few years earlier, involved a cattle and fur buyer who had been invited to stay for dinner by a farmer. The buyer testified that he became ill after the meal and asked the farmer if he could stay for the night.⁴⁷ The farmer refused and assisted the buyer to his buggy, pointing him in the direction of a town some seven miles away.⁴⁸ The buyer was found the next morning by the roadside, nearly frozen to death.⁴⁹ He brought an action against the farmer and his son.⁵⁰ The court held that the plaintiff could recover for the injuries he had suffered as a result of his exposure to the elements if the jury found on remand that the defendants were aware of the plaintiff's "serious condition."⁵¹

In discussing *Depue*, the *Vincent* court asked "[i]f . . . the owner of the premises had furnished the traveler with proper accommodations and medical attendance, would [the traveler] have been able to defeat an action brought against him for their reasonable worth?"⁵² Certainly, if the farmer had paid for medical care and medicines for the buyer, his request for reimbursement for these items would have been legally appropriate on a *quantum meruit* basis.⁵³ The same conclusion would arguably hold for any food given to the buyer after he had ceased to be a guest. That the buyer would have been liable to pay for the privilege of remaining sheltered during a very cold night until he could safely make other arrangements for himself is, how-

45. See COLEMAN, *supra* note 4, at 292-98.

46. 111 N.W. 1 (Minn. 1907).

47. See *id.*

48. See *id.* at 1-2.

49. See *id.* at 2.

50. See *id.*

51. *Id.* at 3.

52. *Vincent*, 124 N.W. at 222.

53. See, e.g., RESTATEMENT (FIRST) OF RESTITUTION § 1 (1937) ("A person who has been unjustly enriched at the expense of another is required to make restitution to the other."); *id.* § 112 ("A person who without mistake, coercion or request has unconditionally conferred a benefit upon another is not entitled to restitution, except where the benefit was conferred under circumstances making such action necessary for the protection of the interests of the other or of third persons.").

ever, a highly questionable conclusion about a question that was not at issue in *Depue*.

The other case discussed in *Vincent* was *Ploof v. Putnam*,⁵⁴ a case decided by the Supreme Court of Vermont only two years before *Vincent*. In *Ploof*, according to the complaint, a husband and wife and their two minor children were sailing on Lake Champlain on a "loaded sloop."⁵⁵ There "then arose a sudden and violent tempest, whereby the sloop and the property and persons therein were placed in great danger of destruction."⁵⁶ Whereupon, "to save these from destruction or injury, the plaintiff was compelled to . . . moor the sloop to defendant's dock,"⁵⁷ the defendant being the owner of an island in the lake. It was then alleged that the defendant's servant unmoored the sloop, which was cast upon the shore with the result that "the sloop and its contents were thereby destroyed, and the plaintiff and his wife and children [were] cast into the lake and upon the shore, receiving injuries."⁵⁸ The complaint charged the defendant alternatively with trespass (i.e., battery) and trespass on the case (i.e., negligence).⁵⁹ The defendant demurred.⁶⁰ The trial court overruled the demurrers and this decision was affirmed on appeal.⁶¹

The *Vincent* majority asserted that "[i]f, in [*Ploof*], the vessel had been permitted to remain, and the dock had suffered an injury, we believe the shipowner would have been held liable for the injury done."⁶² It is this statement in *Vincent* that most supports the assertion made by Coleman and others, that compensation must be paid when property is destroyed to save innocent life.⁶³ This conclusion is not supported by anything in *Ploof*, as can be easily demonstrated.

A case cited and discussed at length in *Ploof* is *Mouse's Case*,⁶⁴ an English case decided in King's Bench in 1609. In *Mouse's Case*,

54. 71 A. 188 (Vt. 1908).

55. *Id.* at 188.

56. *Id.*

57. *Id.*

58. *Id.* at 189.

59. *See id.*

60. *See id.*

61. *See id.* at 188.

62. *Vincent*, 124 N.W. at 222.

63. *See* COLEMAN, *supra* note 4, at 300-01; *see also* Feinberg, *supra* note 1, at 103 (arguing that compensation would be owed to parents of an innocent child used as a "shield" who is killed along with an aggressor to preserve another innocent life).

64. 77 Eng. Rep. 1341 (K.B. 1609), *cited with approval in Ploof*, 71 A. at 189.

personal property belonging to the plaintiff had been thrown overboard by a fellow passenger to lighten a barge that was in danger of foundering while being used as a ferry across the Thames at Gravesend.⁶⁵ The plaintiff subsequently brought an action in trespass against the passenger who had jettisoned his property.⁶⁶ The court non-suited the plaintiff and declared that if the ferryman had overloaded the barge, “for [the] safety of the lives of passengers . . . it is lawful for any passenger to cast the things out of the barge.”⁶⁷ The court added that the owners would have a remedy against the ferryman for overloading the barge; “but if no surcharge was, but the danger accrued only by the act of God, as by tempest, no default being in the ferryman, everyone ought to bear his loss for the safeguard and life of a man.”⁶⁸

This, to me, self-evident proposition of law was unequivocally reaffirmed by the House of Lords more recently in *Esso Petroleum Co. v. Southport Corp.*⁶⁹ That case involved a claim for the “considerable expense” incurred to clean up the plaintiff’s premises after a tanker in difficulty discharged oil to prevent “breaking her back,”⁷⁰ which would have endangered not only the ship and her cargo but also the lives of the crew.⁷¹ The case was brought under the common law headings of trespass, nuisance, and negligence.⁷² Accepting the trial judge’s finding that the tanker’s owner had not been guilty of negligence, the House of Lords affirmed his conclusion that there was no liability on the part of the tanker’s owners.⁷³ The trial judge, Sir Patrick Devlin (later Lord Devlin), had declared that “[t]he safety of human lives belongs to a different scale of values from the safety of property. The two are beyond comparison and the necessity for saving life has at all times been considered a proper ground for inflicting such damage as may be necessary on another’s property.”⁷⁴

65. *See id.* at 1341-42.

66. *See id.*

67. *Id.* at 1342.

68. *Id.* at 1342; *see also Ploof*, 71 A. at 189 (citing *Mouse’s Case*, 77 Eng. Rep. 1341, and quoting this passage).

69. 1956 App. Cas. 218 (appeal taken from Eng. C.A.).

70. *Id.* at 220.

71. *See id.*

72. *See id.* at 219.

73. *See id.*

74. *Southport Corp. v. Esso Petroleum Co.*, 2 All E.R. 1204, 1209-10 (Q.B. 1953).

The principle that property may be destroyed to save human life is recognized in United States admiralty law as well. In modern times, if the circumstances involved in *Mouse's Case* had arisen within the admiralty jurisdiction (i.e., somewhere on the high seas or in navigable waters),⁷⁵ all of the cargo and the vessel itself would have been assessed a general average contribution to pay for the portion of the cargo that was jettisoned, but no contribution would have been assessed against those whose lives were saved.⁷⁶

In summary, the very few cases addressing the issue have all held that property may be destroyed when necessary to save human life. These cases have also held that no compensation is payable for hav-

75. See 28 U.S.C. § 1333 (1994).

76. See GUSTAVUS H. ROBINSON, HANDBOOK OF ADMIRALTY LAW IN THE UNITED STATES 778-79 (1939) (describing the "general average" rule). Both the Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea, Sept. 23, 1910, 37 Stat. 1658, [hereinafter Brussels Convention], and its successor, the International Convention on Salvage, Apr. 28, 1989, Hein's No. KAV 3169 [hereinafter London Convention], provide that "[n]o remuneration is due from the persons whose lives are saved," although both conventions also provide that "nothing in this article shall affect the provisions of the national law on this subject." Brussels Convention, *supra*, art. 9, 37 Stat. at 1671; London Convention, *supra*, art. 16(1), at 10. Both the United Kingdom and the United States are parties to the Brussels Convention, see Brussels Convention, *supra*, 37 Stat. at 1668 (naming the United Kingdom and the United States as signatories), and the London Convention, see M.J. BOWMAN & D.J. HARRIS, MULTILATERAL TREATIES 79-80 (Supp. 1995). To encourage the rescue of human beings, the London Convention grants a "salvor of human life" a share of the payment awarded to the salvor of the vessel or other property or awarded to someone for preventing or minimizing environmental damage. London Convention, *supra*, art. 16(2), at 10; see also Message from the President of the United States Transmitting the International Convention on Salvage, S. TREATY DOC. NO. 102-12, at iii ("[The London] Convention is designed to promote sound environmental practices by commercial salvors and to strengthen the maritime transportation industries by ensuring that salvors receive adequate compensation."); Mark J. Yost, *International Maritime Law & the U.S. Admiralty Lawyer: A Current Assessment*, 7 U.S.F. MAR. L.J. 313, 337-38 (1995) (arguing that the London Convention strikes a balance between preserving life and protecting the environment).

Whether in the modern age *Mouse's Case* would fall within the admiralty jurisdiction in England is not important for present purposes. Indeed, *Vincent* would undoubtedly not fall within the admiralty jurisdiction in the United States. See ROBINSON, *supra*, at 56-57 ("*Suits by land structures, even for injury by vessels, must be at common law. . .* [I]n a collision between a vessel and a structure not within the maritime categories the vessel alone may resort to admiralty.") (citing *Hough v. Western Transp. Co (The Plymouth)*, 70 U.S. (3 Wall.) 20 (1865); *Ex parte Phenix Ins. Co.*, 118 U.S. 610 (1886)). *Cf. id.* at 57 & n.7 ("The curiosity now obtains that while the shore victim may not himself invoke the admiralty law, the floating tort-feasor may invoke it against the shore victim's common law suit.") (citing *Richardson v. Harmon*, 222 U.S. 96, 106-07 (1911) (holding that, under the Limited Liability Act of 1851, a ship owner is entitled to employ admiralty law to limit common law claims "whether the liability be strictly maritime or from a tort non-maritime")). At any rate, both *Mouse's Case* and *Vincent*, as well as *Plouf* and *Southport*, were brought as common law cases.

ing done so, if the person who destroys the property and the person whose life is saved, have not been at fault in creating the life-threatening danger which necessitated the destruction of property.⁷⁷ Nevertheless, as the next section will demonstrate, the siren song of the dicta in *Vincent* has proven irresistible to commentators.

2. *The Restatement Provisions.* As I have noted, there are a number of provisions in the *Restatement of Torts*, which appeared in 1934, and the *Restatement (Second) of Torts*, which appeared in 1965, that would seem to support the conclusions of Coleman and Feinberg. For example, sections 197 of both the original *Restatement* and the *Restatement (Second)* take the position that one is privileged to enter the land of another in order to prevent serious harm to oneself, to one's land, to one's chattels, or to the person, land, or chattels of another.⁷⁸ A person who enters under this privilege, however, must pay compensation for any harm done to the possessor's interest in the land.⁷⁹ A similar provision, section 263, covers what amounts to tres-

77. It is not clear how this situation would be handled under continental legal systems. For example, section 904 of the German Civil Code denies the owner of property the right "to prohibit the interference [with his rights of ownership] if the interference is necessary for the avoidance of a present danger and the damage threatened is disproportionately great compared to the damage caused" to him as the owner of the property destroyed. Section 904 BGB, *translated in THE GERMAN CIVIL CODE* 169 (Simon L. Goren trans., 1994). Section 904 also declares that "[t]he owner [of the property destroyed] may demand compensation for the loss suffered by him." *Id.* That article covers risks to property as well as life. Whether the provisions for compensation are applicable when property is destroyed to save life is quite unclear. It should be noted that Germany is a party to the Brussels Convention, see Brussels Convention, *supra* note 76, 37 Stat. at 1668, which suggests that no compensation would be payable under German admiralty law when property is destroyed to save lives. The scope of the privilege to destroy property to save property under Section 904 is also unclear. See *infra* note 143.

Article 122-7 of the French Penal Code provides that a person who, faced with a present or imminent danger to himself or another or to property, performs an act necessary for the safety of a person or of property is not subject to criminal responsibility unless there is a disproportionality between the means employed and the seriousness of the threat. See CODE PÉNAL [C. PÉN.] art. 122-7 (Fr.) (author's translation). Gaston Stefani and his colleagues, Professors Levasseur and Boulloc, assert that the highest court of ordinary jurisdiction, the Cour de cassation, does not appear to accept the proposition that compensation is due when property is destroyed to save life—thus favoring the position taken by the English and American cases—although the authors observe that commentators continue to debate the issue. See GASTON STEFANI ET AL., *DROIT PÉNAL GÉNÉRAL* 315 (15th ed. 1995).

78. See RESTATEMENT, *supra* note 25, § 197(1); RESTATEMENT (SECOND), *supra* note 25, § 197(1).

79. See RESTATEMENT (SECOND), *supra* note 25, § 197(2). The first *Restatement* required the payment of compensation when a person destroyed property to protect his own interests,

pass to chattels and the conversion of chattels. Section 263 of the *Restatement* limited the privilege to situations in which chattels were destroyed or used to save life or to avoid serious bodily harm⁸⁰ and took no position as to whether one was authorized to take a chattel over the objection of its owner.⁸¹ Section 263 of the *Restatement (Second)* not only extends the privilege to cover the destruction or use of chattels to save property, but also permits the taking of property even if its possessor objects.⁸² The person destroying or using the property is, however, liable for any harm done.⁸³ The reason given by the drafters of both the *Restatement* and the *Restatement (Second)* for recognizing a “privilege” to destroy or use others’ chattels to save one’s property was the same: to take from the possessor of the chattel “the privilege . . . to use reasonable force to defend his exclusive possession.”⁸⁴ The Reporter’s notes to the *Restatement (Second)* are at least candid enough to admit that “[t]here is scarcely any authority to support the principle stated in this Section, and it must rest largely upon the analogy to the corresponding privilege to interfere with the exclusive possession of land, stated in § 197.”⁸⁵ There then follows a “see” citation⁸⁶ to *Mouse’s Case* which, as we have seen,⁸⁷ held that no compensation is due when property is destroyed to save life.⁸⁸

but took no position on whether one who acted to protect the interests of third party was obliged to pay compensation. See RESTATEMENT, *supra* note 25, § 197(2) & § 197 first caveat.

80. See RESTATEMENT, *supra* note 25, § 263(1) (“One is privileged to use or otherwise intentionally intermeddle with a chattel while in the possession of another for the purpose of protecting himself, the other, or a third person from death or serious bodily harm . . .”).

81. See *id.*; see also *infra* note 131 (discussing this point in greater detail). The *Restatement* also declared that the Institute “expresse[d] no opinion” as to whether chattels could be destroyed to save *property*. *Id.* § 263 first caveat.

82. See RESTATEMENT (SECOND), *supra* note 25, § 263 cmt. b (“Since the actor does not become a trespasser when making reasonable use of or otherwise intermeddling with another’s chattel to protect himself or another, such intermeddling cannot be restricted by the possessor of the chattel.”).

83. See *id.* § 263(2) (“Where the act is for the benefit of the actor or a third person, he is subject to liability for any harm caused by the exercise of the privilege.”). The first *Restatement* contained a caveat as to whether an actor was liable for damages to a chattel caused by his intermeddling for the benefit of a third party. See RESTATEMENT, *supra* note 25, § 263 third caveat.

84. RESTATEMENT, *supra* note 25, § 263 cmt. b; RESTATEMENT (SECOND), *supra* note 25, § 263, cmt. b.

85. RESTATEMENT (SECOND) APP., *supra* note 25, Reporter’s notes to § 263.

86. See *id.* The other case cited in the Reporter’s notes to the *Restatement (Second)* is *McKeesport Sawmill Co. v. Pennsylvania Co.*, 122 F. 184 (W.D. Pa. 1903), which involved a runaway barge that became embedded in the defendant’s bridge and which was destroyed in the process of dislodging it. Not surprisingly, the defendant was *not* required to compensate the plaintiff. See *McKeesport*, 122 F. at 187 (stating that “[the defendant] does not have to try and

The Restatements fail to cite any cases in which compensation was actually awarded when property was *destroyed* in order to save life. The Reporter's notes to section 197 do cite a seventeenth-century English case that ostensibly involved the *taking* of property to save life. That case is *Gilbert v. Stone*,⁸⁹ in which the court held that duress was no defense for trespass to the plaintiff's land or for taking the plaintiff's gelding when the defendant claimed he did so because "twelve armed men . . . threatened to kill him" if he did not.⁹⁰ The fact that duress was held to be no justification for the trespass or for taking the horse, however, hardly supports the American Law Institute's contention that compensation must be paid whenever real property or chattels are destroyed in an effort, however justifiable, to save lives. No one who reads the case could reasonably conclude that the court was not only requiring the defendant to pay for the horse he took but also recognizing a privilege on the part of the defendant to take the horse. Yet the drafters of the *Restatement* attempted to dispose of *Gilbert* by suggesting that it is not inconsistent with the recognition of an "incomplete privilege."⁹¹ There is certainly no indication that by citing the case the American Law Institute intended to support the proposition that one is privileged to engage in what would appear to be theft in response to criminal threats. Furthermore, since the court in *Gilbert* held that damages for trespass were appropriate, despite the absence of any indication of damage to land or buildings, the case, if anything, is actually inconsistent with the general privilege that the Restatements espouse.

save the plaintiff's property, but simply not to recklessly or unnecessarily injure or destroy it"). It was clearly a type of self-defense.

87. See *supra* notes 64-68.

88. See *Mouse's Case*, 77 Eng. Rep. 1341, 1342 (K.B. 1609):

[I]n such a time . . . of necessity, it is lawful for any passenger to cast the things out of the barge: and the owners shall have their remedy upon the surcharge against the ferryman, for the fault was in him upon the surcharge; but if no surcharge was, but the danger accrued only the act of God, as by tempest, no default being in the ferryman, everyone ought to bear his loss for the safeguard and life of a man.

89. 82 Eng. Rep. 539 (K.B. 1648), cited in RESTATEMENT (SECOND) APP., *supra* note 25, Reporter's notes to § 197, cmt. j; RESTATEMENT (Tentative Draft No. 11), *supra* note 25, Reporter's notes to § 1041, cmt. i. As already noted, when the original *Restatement* was completed in 1934, it adopted Section 1041 of the tentative draft as Section 197.

90. *Gilbert*, 82 Eng. Rep. at 539.

91. RESTATEMENT (Tentative Draft No. 11), *supra* note 25, Reporter's notes to § 1401, cmt. i. The *Restatement (Second)* simply buries the case without comment in a long string cite. See RESTATEMENT (SECOND) APP., *supra* note 25, Reporter's notes to § 197, cmt. j.

The lack of a precedential basis for the original *Restatement* position was not cured by the more extensive case citation that accompanies the *Restatement (Second)*. One of the additional cases cited in the Reporter's notes to section 197 of the *Restatement (Second)* is *Newcomb v. Tisdale*,⁹² a California case decided in 1881 that involved an action to recover the damage which occurred because the defendants cut a levee. The defendants raised the defense that the levee was cut in order "to save *life* and property."⁹³ The trial judge refused to let the jury consider this defense.⁹⁴ The Supreme Court of California reversed, observing, in a brief opinion, that "such necessity existed" and therefore the case should have been submitted to the jury.⁹⁵ Two justices dissented because they did not believe that the cutting was necessary to save lives and because, in their view, "[n]ecessity, to save their own property, would not have justified defendants in this destruction of plaintiffs' property."⁹⁶ Both the majority and the dissent therefore contradict the Restatements, in denying the landowner compensation because his property was destroyed to save life, and in refusing to recognize any privilege to destroy property to save property.

A case decided subsequent to the publication of the *Restatement (Second)*, however, does offer some support for the position taken by the two Restatements. In *Ruiz v. Forman*,⁹⁷ decided by the Texas Court of Civil Appeals in 1974, a driver swerved to avoid an oncoming vehicle and entered the plaintiff's land, causing \$270 worth of property damage.⁹⁸ The jury found for the defendant but the trial court granted the plaintiff's motion for judgment notwithstanding the verdict.⁹⁹ When the case reached the appellate court, the parties stipulated that the defendant had intentionally entered the plaintiff's land.¹⁰⁰ If that were so, the court declared, the case would clearly come within the ambit of section 197 of the *Restatement (Second)* as a

92. 62 Cal. 575 (1881), *cited in* RESTATEMENT (SECOND) APP., *supra* note 25, Reporter's notes to § 197, cmt. j.

93. *Newcomb*, 62 Cal. at 576 (emphasis added).

94. *See id.* (discussing the jury instruction that if the levee was lawfully constructed, "then the defendants had no right to cut [it] without the consent of the owners").

95. *Id.*

96. *Id.* at 579 (Myrick, J., dissenting).

97. 514 S.W.2d 817 (Tex. Civ. App. 1974).

98. *See id.*

99. *See id.*

100. *See id.* at 818.

privileged entry onto the property of another.¹⁰¹ The “culpable or moral fault, *if any*, is said to be attributed to the actor’s refusal to pay for the damage done in the course of serving his own interests rather than in what he did,” while “[t]he legal fault centers around the notion that there was an intentional invasion of a legally protected interest.”¹⁰² These considerations “would afford a basis for a simple affirmation of the case.”¹⁰³ The court went on to note, however, that the defendant testified at trial that he “‘consciously and intentionally turned his wheels to the right to avoid hitting the truck.’”¹⁰⁴ Based on this item in the trial record, the defendant-appellant argued that notwithstanding his stipulation, his entry upon the plaintiff’s land was in point of fact not a trespass because the entry upon the plaintiff’s land was neither intentional nor the result of negligence.¹⁰⁵ The court concluded that the defendant would be liable under Texas law, even if he did not intend to invade anyone’s land, because it was sufficient that he intended the act (namely, turning the wheels) that eventually caused the trespass.¹⁰⁶ While the court noted that “[p]ossibly some comfort can be afforded the Appellant by Professor Prosser, who anticipates that Texas will abandon its present position,”¹⁰⁷ it concluded that “[t]his is for the Texas Supreme Court to decide.”¹⁰⁸ Texas was one of a minority of states that still imposed liability upon a person who accidentally trespassed on real property by stumbling or by losing control of a vehicle. Most states would not impose liability in such circumstances in the absence of a showing that the defendant’s stumbling or loss of control of his vehicle was a result of his own negligence.¹⁰⁹ It is perhaps amusing that the only case that clearly echoes

101. *See id.*

102. *Id.* (emphasis added). The court cited an article that briefly addresses the elements of trespass to land but has no analysis at all of the problem with which we are concerned. *See id.* (citing W. Page Keeton & Lee Jones, Jr., *Tort Liability and the Oil and Gas Industry II*, 39 TEX. L. REV. 253 (1961)).

103. *Id.*

104. *Id.*

105. *See id.*

106. *See id.* at 819.

107. *Id.* (citing WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 13, at 64-65 (4th ed. 1971) (predicting that decisions in Texas limiting liability “to cases in which the defendant has done some affirmative volitional act which immediately causes the invasion of the land . . . foreshadow ultimate abandonment [of the rule]”).

108. *Id.*

the *Restatement (Second)*, is one that cites the *Restatement (Second)* as its sole authority.

What conclusion is to be drawn from this review of the case law? There are few cases in England or the United States directly on point but the weight of such cases as there are, particularly in England, is clearly contrary to the position taken by sections 197 and 263 of the Restatements, and by Coleman and Feinberg.¹¹⁰ These cases and the doctrines of admiralty law support my contention that when neither the actor nor those whose lives are saved are legally at fault for placing themselves in the perilous position from which they can only be saved by destroying the property of another, they bear no legal liability for destroying that property.

Most of the legal scholarship tracks and relies on the Restatements' position,¹¹¹ but some is in accord with the position taken by the courts in *Mouse's Case* and *Southport* and with the admiralty rule. Francis Bohlen asserted that where others' lives, but not one's own, are at stake, property may be destroyed without any corresponding obligation to pay compensation.¹¹² Robert Keeton generally supports the position taken by the Restatements but is skeptical about whether a person who destroys property to save the lives of others has any obligation to pay for the property.¹¹³ Neither Prosser¹¹⁴ nor Page Keeton¹¹⁵ really discusses the situation where property is destroyed to save life; they merely note the Restatements' position. There is a somewhat more extensive discussion in the Harper, James, and Gray treatise,¹¹⁶ but this largely tracks the Restatements' position. Common sense and a moment's reflection, I submit, clearly show that the position actually taken by the few cases on the subject is the most rational and sensible one.

109. See PROSSER, *supra* note 107, § 13, at 64-65 ("[The] prevailing position is that of the Restatement of Torts, which finds liability for trespass only in the case of intentional intrusion, or negligence, or some 'abnormally dangerous activity' on the part of the defendant.").

110. See *supra* notes 1-15 and accompanying text.

111. See *supra* note 26 for references to the more general theoretical literature prompted by the *Vincent* case.

112. See Francis H. Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality*, 39 HARV. L. REV. 307, 317-18 (1926).

113. See Robert E. Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401, 415-18, 427-30 (1959).

114. See PROSSER, *supra* note 107, § 24, at 126-27.

115. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 24, at 145-48 (5th ed. 1984).

116. FOWLER V. HARPER, ET AL., 1 THE LAW OF TORTS § 1.22, at 1:84-89, § 2.43, at 2:140-42 (3d. ed. 1996).

Consider the following situation. In many states—including, for example, California,¹¹⁷ New York,¹¹⁸ and Washington¹¹⁹—the owners and operators of aircraft are not strictly liable for ground damage that is not occasioned by their fault. In these states, requiring someone to pay for property destroyed to save lives would encourage an airline pilot who is obliged by an act of God to make a forced landing to place his life and those of his passengers in greater jeopardy because the safest alternative landing place has very valuable flower beds on it, while nearby less valuable vacant land is rockier and less flat. Surely the possible value of the property that might be destroyed should not enter into the pilot's consideration at all. The situation becomes even more ludicrous when the actor is in no danger himself but destroys property to save the life of a third party. The *Restatement (Second)* clearly makes the actor liable for the property he has destroyed.¹²⁰ One would be hard put to create a doctrine more calculated to discourage people from coming to the aid of imperiled human beings.¹²¹

One should finally note that the public authorities also have a privilege to destroy property in order to save life or to deal with public emergencies, and are under no common law duty to pay compensation to the owner of the property when they exercise the privilege.¹²² Of course, in many jurisdictions, statutory schemes provide for

117. See *Southern Cal. Edison Co. v. Coleman*, 310 P.2d 504, 505 (Cal. App. Dep't Super. Ct. 1957) (declaring that "[t]here is no California case which holds that a pilot is liable for collision damage independent of negligence"); *Boyd v. White*, 276 P.2d 92, 98 (Cal. Dist. Ct. App. 1954) (identifying as the general rule in California that "the owner (or operator) of an airship is only liable for injury inflicted upon another when such damage is caused by a defect in the plane or its negligent operation").

118. See *Wood v. United Air Lines, Inc.*, 32 Misc.2d 955, 958 (N.Y. Sup. Ct. 1961) (rejecting strict liability in the context of operating an airplane, and applying the rule that "to constitute an actionable trespass there must be an intent to do the very act which results in the immediate damage").

119. See *Crosby v. Cox Aircraft Co.*, 746 P.2d 1198, 1202 (Wash. 1987) (holding that "owners and operators of flying aircraft are liable for ground damage caused by such aircraft only upon a showing of negligence").

120. See RESTATEMENT (SECOND), *supra* note 25, § 263(2).

121. Professor Weinrib, who seems to accept that the Talmud requires a person who saves his own life by destroying the property of innocent third parties to pay compensation, asserts that the Talmud specifically declares that rescuers are under no such liability, although this is not in accordance with strict law (*min hadin*). See Ernest Weinrib, *Rescue and Restitution*, 1 S'VARA, 59, 62-64 (1990).

122. See, e.g., *National Bd. of YMCA v. United States*, 395 U.S. 85, 92 (1969) (stating that where the government takes action to protect a private party, the public need not bear the cost of losses that might result from that action); *United States v. Caltex, Inc.*, 344 U.S. 149, 154

compensation in some situations when property is destroyed on grounds of public necessity.¹²³ But that is another matter.

The difficult legal problems raised when property is destroyed to save lives concern not the question of compensation, but rather the question of whether force may be used against the protesting owner

(1952) (noting that "in times of imminent peril . . . the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved"). The *YMCA* case involved property destroyed when U.S. troops took refuge in private buildings to escape raging mobs in the Panama Canal Zone. See *YMCA*, 395 U.S. at 87-88. *Caltex* involved the destruction of property in the Philippines during World War II to keep it from falling into the hands of the invading Japanese. See *Caltex*, 344 U.S. at 151. In *Burmah Oil Co. v. Lord Advocate*, 1965 App. Cas. 75 (appeal taken from Scot.), the House of Lords rejected the traditional approach taken in *Caltex* which distinguished between property taken for consumption, for which compensation was due, and property destroyed to prevent its falling into the hands of the enemy, for which no compensation was due. But Parliament disagreed and promptly reinstated the traditional doctrine, directing dismissal of the claim in *Burmah Oil* itself while that case was on remand for an assessment of the plaintiff's claim. See War Damage Act, 1965, ch. 18 (Eng.). For cases discussing municipal government liability in peacetime contexts, see *Surocco v. Geary*, 3 Cal. 70 (1853) (holding that the government was not liable for the costs of destroying buildings to prevent the spread of a fire); *Seavey v. Preble*, 64 Me. 120 (1874) (holding that the government was not liable for the costs of destroying wallpaper in the homes of smallpox victims); *Putnam v. Payne*, 13 N.Y. 311 (1816) (holding that the government was not liable for the costs of destroying mad dogs). Governmental destruction of property also does not give rise to any constitutional claim for compensation against state governments under the Fourteenth Amendment. See *Miller v. Schoene*, 276 U.S. 272, 280 (1928) (holding that Virginia did not have to compensate owners of cedar trees destroyed to save apple trees because "preferment of [the public] interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of police power which affects property"). The *Restatement (Second)* tries to capture, in a simplified way, the essence of these cases. See *RESTATEMENT (SECOND)*, *supra* note 25, § 262 ("One is privileged to commit an act which would otherwise be a trespass to a chattel or a conversion if the act is or is reasonably believed to be necessary for the purpose of avoiding a public disaster."). For a discussion of the importance of the distinction in the domestic context between the public destruction of property in situations of necessity and the consuming or using of such property whatever the justification, see Jed Rubenfeld, *Usings*, 102 *YALE L.J.* 1077, 1118-30 (1993).

123. For example, municipal ordinances providing compensation to owners of urban real property whose buildings are destroyed to prevent the spread of fire are of long standing. See, e.g., *Mayor of New York v. Lord*, 17 N.Y. 285 (1837) (discussing a municipal ordinance in New York passed in 1806 which directed the mayor to compensate property owners whose property was destroyed at the mayor's direction to prevent the spread of fire). There is a federal statute providing partial compensation to the owners of cattle that are legally required to be destroyed because they suffer from foot-and-mouth disease. See 21 U.S.C. §§ 114a, 134a (1994). The latter scheme not only recognizes that the public should bear a large part of the loss, since the benefits of destroying the cattle to prevent the spread of the disease redound to the public good, but also recognizes the more pragmatic consideration that the cattle owners, whose cooperation is essential, are more likely to cooperate with the public authorities if they receive at least some compensation.

of the property that needs to be destroyed.¹²⁴ In the cases of private necessity that have thus far been litigated, this has not been a major issue. The typical case concerns a trivial trespass on someone's land or the destruction of property in an emergency situation in which the possibility of serious strife did not arise.¹²⁵ But that does not mean that situations might not arise in which the possessor seriously objects to the invasion of his interests, such as when a desperate person attempts to break into his home. We will discuss this question at length when we come to consider Coleman and Feinberg's principal contention that, in order to save one's life, one may take and consume another person's property,¹²⁶ since the problem presented by a resisting owner is more likely to arise in that context.

3. *The Moral Obligations That Arise from the Destruction of Property to Save Lives.* Assuming that the destruction of property is morally as well as legally permissible when necessary in order to save human lives, is there nevertheless a moral obligation to pay for the harm done? I maintain that Coleman is wrong when he assumes that, from the *legal* perspective, if one destroys property in order to save life, although one has not violated the property owner's rights, one has nevertheless infringed the property owner's rights and is therefore required to compensate the owner for his loss.¹²⁷ How does that

124. Recall that it was this concern which served as the American Law Institute's rationale for recognizing the privilege to destroy or use another's chattels to save one's own property in section 263 of the *Restatement* and the *Restatement (Second)*. See *supra* note 84 and accompanying text.

125. The cases involving trespass to land are in many ways just extensions of the generally recognized common law privilege that travelers on a road can enter private property to avoid an obstruction on the road. See, e.g., RESTATEMENT (SECOND), *supra* note 25, § 195(1) ("A traveler on a public highway who reasonably believes that such highway is impassable, is privileged . . . to enter . . . upon neighboring land in possession of another . . ."). Of course, since the entry normally does not involve a situation in which entry is necessary to save human life, the actor is under a legal obligation to pay for any harm his entry might cause. In areas where there are no sidewalks, and such areas are quite common in the United States, everyone at one time or another has walked across the edge of someone's lawn to avoid puddles or on-coming vehicles. It is an odd person who would object to these invasions of his property interests. *Ploof v. Putnam*, 71 A. 188 (Vt. 1908), the case in which the defendant's employee unmoored the plaintiff's sloop during a storm, seems bizarre and the implication of that case that the plaintiff might have been legally justified in using force to prevent his boat from being unmoored, see *id.* at 190 (describing the employee's action to unmoor the plaintiff's vessel from his employer's dock as wrongful), does not raise disturbing implications.

126. See *infra* Part I.C.

127. See *infra* notes 162-64 and accompanying text.

affect Coleman's implicit additional claim¹²⁸—which Feinberg makes explicitly¹²⁹—that, in these kinds of situations, one has a *moral* obligation to pay compensation (other than to prevent us from using the fact that one has a legal obligation to pay compensation to support the claim that one also has a similar moral obligation)? After all, it is not necessary that one should have a legal obligation to do something in order for it to be true that one has a moral obligation to do that something.

A moral universe in which the options are between no compensation at all or compensation for full replacement value strikes me as an overly legalistic universe and not a moral universe. Morality, for most people, requires subtler distinctions.¹³⁰ What if the person who saves his life by destroying someone else's property is practically penniless? Is such a person morally obliged to spend his last nickel in an attempt to compensate, at least partially, the person whose property he has destroyed? What if the person who has destroyed the property of another to save his life or that of a third person could, without completely impoverishing himself, afford to compensate the property owner but the property owner is a far wealthier person? To many it would be insulting even to be offered compensation in such circumstances. To others, perhaps even payment of full replacement value might not be enough in some circumstances. I accept that some moral obligations arise when one destroys property in order to save life, but what these obligations are will vary with the culture and the particular circumstances. They may be as great as payment of even more than full replacement value, or as little as just an expression of gratitude. The set of moral obligations could, of course, also include an obligation to be similarly forbearing and generous when others need to destroy his property in order to save themselves.

128. See COLEMAN, *supra* note 4, at 297-98.

129. See Feinberg, *supra* note 1, at 101-03 (proposing that when you invade another's home to escape the elements in an emergency "almost everyone would agree that you owe *compensation* to the homeowner for the depletion of his larder, the breaking of his window, and the destruction of his furniture").

130. David Hume, for example, argues that justice is an artificial virtue because it makes sharp distinctions whereas the natural virtues and vices "run insensibly into each other." DAVID HUME, A TREATISE OF HUMAN NATURE 529 (L.A. Selby-Bigge ed., London, Oxford Univ. Press 1888) (1739).

B. The Destruction of Others' Property to Save One's Own Property

The fact that the privilege recognized by *Restatement* section 263 has been extended by the *Restatement (Second)* to cover the *destruction* of someone's chattels to save someone else's property¹³¹ shows how poorly considered the provision is, and how much has been read into the cursory opinion of the majority in *Vincent*. That the *Restatement (Second)* also authorizes the use and *consumption* of other people's property, even over their objections, to save one's own property¹³² only reinforces that conclusion. For the moment, however, let us extend the focus of our discussion of the privilege to destroy property to include only the additional situation in which someone destroys the property of others to save his own property or that of others. I will discuss the so-called privilege to use or consume the property of others later. What is particularly aggravating about the Restatements is their attempt to formulate simple general rules to cover exceedingly complex and diverse situations. Indeed, though the Restatements fail to recognize it, there are even some situations in which property may be destroyed to save other property and no compensation is required, as for example, when an out of control ship or vehicle is about to collide with one's own property.¹³³

131. Compare RESTATEMENT, *supra* note 25, § 263(1) ("One is privileged to use or otherwise intentionally intermeddle with a chattel while in the possession of another for the purpose of protecting himself, the other, or a third person from death or serious bodily harm . . .") (emphasis added), and *id.* second caveat ("The Institute expresses no opinion as to whether . . . Subsection (1) is applicable to one who dispossesses another of a chattel for the purpose of protecting himself, the other or a third person from death or serious bodily harm."), with RESTATEMENT (SECOND), *supra* note 25, § 263(1) ("One is privileged to commit an act which would otherwise be a trespass to the chattel of another or a conversion of it, if it is . . . reasonable and necessary to protect the person or property of the actor, the other or a third person from serious harm . . .") (emphasis added).

132. See RESTATEMENT (SECOND), *supra* note 25, § 263(1), the relevant portions of which are quoted in the preceding note, see *supra* note 131. By using the shorthand "trespass" in addition to the word "conversion" in section 263(1), the *Restatement (Second)* is of course including use of another's property over his objection. See *id.* § 217 ("A trespass to a chattel may be committed by intentionally (a) dispossessing another of the chattel, or (b) using or intermeddling with a chattel in the possession of another.") (emphasis added).

133. See *McKeesport Sawmill Co. v. Pennsylvania Co.*, 122 F. 184, 187 (W.D. Pa. 1903) (holding that where a "defendant could not pass [plaintiff's coal boat, which was obstructing navigation] without seriously endangering the safety of his own property, he had the right to remove such obstruction"); *Commercial Union Assurance Co. v. Pacific Gas & Elec. Co.*, 31 P.2d 793 (Cal. 1934) (holding that there was no liability for negligence where the defendant broke partitions in a burning warehouse to save its copper and the plaintiffs claimed this enabled the fire to spread and destroy their goods); cf. *Owen v. Cook*, 81 N.W. 285 (N.D. 1899) (holding that the defendant, who started a back fire which burned the plaintiff's property in

As I have already noted, the *Restatement (Second)* is candid enough to admit that there is “scarcely any authority” to support its conclusions.¹³⁴ And for good reason. No one, not even those who think it is sometimes permissible to kill an innocent person to save the lives of a greater number of other innocent persons, believes that there is a general privilege to kill an innocent person to save one’s own life or the life of a third party.¹³⁵ Why, then, should there be a general privilege to destroy someone else’s property to save one’s own? The fact that compensation must be paid and that such compensation often seems an acceptable social accommodation because much property is either fungible or readily translatable into a monetary equivalent does not mean that one has a broad privilege to destroy someone else’s property to save one’s own. How can private individuals so cavalierly be granted the power of eminent domain?

The *Restatement (Second)* declares that the act must not only be necessary but also reasonable,¹³⁶ so that one “whose chattel of small value is threatened with serious harm or even with complete destruction *may not* be privileged to destroy a far more valuable chattel of another in order to protect it.”¹³⁷ By its use of the word “may,” the *Restatement (Second)* seems to recognize that it is not a matter of mere economic calculation. That money is not everything is a proposition with which I would agree, but, in the context of the *Restatement (Second)*’s recognition of a privilege to destroy someone else’s property to save one’s own property or that of another, can one destroy a Van Gogh painting to preserve a family Bible that has been handed down in the same family for 350 years? And what about destroying the 350-year-old family Bible or other irreplaceable heirloom to save the Van Gogh painting?¹³⁸

order to protect his own property from a prairie fire, was not liable for negligence; it was conceded that the main fire would eventually have reached the plaintiff’s property). *Corpus Juris Secundum* also states that “[o]ne who acts with reasonable prudence, and with respect for the rights of others, in endeavoring to rescue or protect his property in an emergency is not liable for resulting injury to the property of another.” 65 C.J.S. *Negligence* § 17(c) (1966).

134. See *supra* text accompanying note 85 (quoting RESTATEMENT (SECOND) APP., *supra* note 25, Reporter’s note to § 263).

135. For example, Foot and Thomson, who are both strongly supportive of the notion that it is sometimes permissible to kill an innocent person to save the lives of a greater number of innocent lives, suggest absolutely nothing of the kind with respect to taking a single individual’s life to preserve one’s own life.

136. See RESTATEMENT (SECOND), *supra* note 25, § 263(1).

137. *Id.* § 263 cmt. d (emphasis added).

138. It is the fact that property is destroyed that would otherwise not be destroyed that distinguishes this case from the “general average” situation in Admiralty, see *supra* note 76 and

Not only is there no authority to support the *Restatement (Second)*'s position, other than an excessively broad interpretation of *Vincent*, but several of the other cases cited in general support of *Restatement (Second)* section 197, the provision upon which *Restatement (Second)* section 263 is expressly based,¹³⁹ flatly hold that there is no privilege to destroy an innocent person's property to preserve one's own property.¹⁴⁰ One of these cases expressly declares that a rule permitting such conduct by he "whose property is the more valuable, would lead to great injustice."¹⁴¹ If such comparisons were to be

accompanying text. In the general average situation, it is assumed that the ship and all the cargo, including the cargo sacrificed, would be lost if some cargo were not jettisoned. See ROBINSON, *supra* note 76, at 764. That is why the person whose cargo is jettisoned is compensated by the owners of the ship and of the cargo that is saved. The owner of the jettisoned cargo must, of course, absorb his own proportionate share of the loss as well. See *id.*

139. See RESTATEMENT, *supra* note 25, § 263 cmt. b ("The statement in this Subsection is analogous in part to the privilege to enter land in the possession of another for the protection of person or property as stated in § 197."); RESTATEMENT (SECOND), *supra* note 25, § 263 cmt. b (same); RESTATEMENT (SECOND) APP., *supra* note 25, Reporter's notes to § 263 ("[T]he principle stated in this Section . . . must rest largely upon the analogy to the corresponding privilege to interfere with the exclusive possession of land, stated in § 197."). Note, however, that unlike trespass to land, there is no liability for trespass to chattels when no damage is done. See RESTATEMENT, *supra* note 25, § 263 cmt. b ("Since one is not liable in any event for a harmless intermeddling with chattels in the possession of another . . . the principle of the incomplete privilege to enter land stated in § 197 is of no significance with respect to the actor's liability to the possessor of chattels."); RESTATEMENT (SECOND), *supra* note 25, § 263 cmt. b (same).

140. See RESTATEMENT (SECOND) APP., *supra* note 25, Reporter's notes to § 197 (citing *Latta v. New Orleans & N.W. Ry.*, 59 So. 250 (La. 1912); *Whalley v. Lancashire & Yorkshire Ry. Co.*, 13 Q.B.D. 131 (C.A. 1884)). In *Latta*, the court held the defendant liable for damages when its agents moved a burning freight car to protect its depot, thus allowing the burning car to set fire to the plaintiff's staves. See *Latta*, 59 So. at 255. In *Whalley*, the plaintiff's land was flooded when the railroad cut gaps in an embankment to protect its property from the accumulation of water after an unprecedented rainfall. The court held that "in order to get rid of the misfortune which had happened to [the defendants] . . . which . . . would not have hurt the plaintiff, they did something which brought an injury upon the plaintiff [and] [u]nder [these] circumstances . . . the defendants are liable." *Whalley*, 13 Q.B.D. at 138. In his discussion of a similar case in *Whalley*, Sir William Brett, the Master of the Rolls, opined that injunctive relief would even be appropriate if the defendant continued to act so as to subject the plaintiff's land to damage. See *id.* at 136 (discussing *Menzies v. Earl of Breadalbane*, 3 Bli. (N.S.) 414 (1828)); see also *Swan-Finch Oil Corp. v. Warner-Quinlin Co.*, 167 A. 211, 212 (N.J. 1933) (imposing liability when a burning oil barge moored to the defendant's dock was cut loose in order to save the dock and the barge drifted against the plaintiff's property), *aff'd on other grounds*, 171 A. 800 (N.J. 1934); cf. *Currie v. Silvernale*, 171 N.W. 782, 784 (Minn. 1919) (holding that repeated entry onto the plaintiff's land to preserve the water flow to the defendant's mill dam was trespass, although the court was prepared to concede that the first entry "may" have been justified upon the unexpected appearance of a new channel, because such entry would not only have saved the defendant's water flow, but also would have averted the erosion to the plaintiff's land).

141. *Latta*, 59 So. at 254.

made, the Louisiana Supreme Court continued, "it would be proper to consider . . . the question of the comparative ability of the sufferers to sustain the loss."¹⁴² The *Restatement (Second)* nevertheless ignores the thrust of these cases, and contains a privilege to destroy the property of innocent people that poses no threat to one's own property.¹⁴³ By recognizing such a privilege, is the *Restatement (Second)* seriously suggesting that if two people are interested in saving their own property the so-called privilege accrues to the one who lays hold of his neighbor's property first? I ask this since we can conceive of instances where the guidance provided by the *Restatement (Second)* might justify both actors in taking the other's property (such as the example given above of the family Bible and the Van Gogh painting). This is an important matter because, as we shall soon discuss in greater detail, there remains the question of whether the owner of the property about to be taken and destroyed can take reasonable steps to protect his property. Despite the *Restatement (Second)*, most people would surely believe that he could.

As we have already noted, the *Restatement (Second)* relies on *Vincent* as support for its view of the privilege to destroy property.¹⁴⁴ If the key element in *Vincent* was the reattaching of the lines so that the case did not involve a variant of storm damage, which seems to be the how the majority viewed it,¹⁴⁵ I would submit that the case is not an instance of the exercise of a privilege at all. It is simply a case of intentionally damaging the property of another in the civil sense of "intention," that is, of engaging in conduct that one knows, with substantial certainty, will lead to that result.¹⁴⁶ At the very least, it would

142. *Id.*

143. See RESTATEMENT (SECOND), *supra* note 25, § 263(1). Section 904 of the German Civil Code states that, provided one pays compensation for the harm done, property may be destroyed if "the interference is necessary for the avoidance of a present danger and the damage threatened is disproportionately great compared to the damage caused to the owner" of the property destroyed. BGB, *supra* note 77, § 904. How this provision would be applied in a concrete situation is hard to ascertain. George Fletcher, for example, cites a commentator on section 904 who rejects out of hand the idea that it could be used to justify the actions of someone who seizes another's raincoat in order to save his own suede coat from destruction in an unexpected rainstorm. See FLETCHER, *supra* note 26, at 777 n.13 (citing H.H. JESCHECK, LEHRBUCH DES STRAFRECHTS: ALLGEMEINER TEIL (2d ed. 1972)).

144. See *supra* note 25 and accompanying text.

145. See *supra* note 36 and accompanying text.

146. See RESTATEMENT (SECOND), *supra* note 25, § 8A ("The word 'intent' is used throughout the Restatement of this Subject to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.").

amount to negligent or reckless behavior. That compensation should be paid in such circumstances is not at all surprising or controversial. It is the attempt to read more into the *Vincent* case than the actual facts of the case would uncontroversially permit that has encouraged some to conclude that, if one must pay compensation for property destroyed in order to save other property, then one must also pay compensation whenever property is destroyed to save human life.

C. Entry by Force into the Dwellings of Others and the Taking and Use of the Property of Others in Emergency Situations

1. *Entry into Dwellings.* Although it is often difficult, if not impossible, to separate the two situations, the main thrust of the first paradigm is not the simple *destruction* of property but the *taking and consumption* of property. Feinberg's backpacker, for example, enters an unoccupied vacation cabin.¹⁴⁷ According to *Restatement (Second)* section 197, he is legally privileged to do so when necessary to avert serious harm to himself.¹⁴⁸ That the cabin is unoccupied avoids some of the more difficult problems. For example, what if the cabin reasonably appears to be unoccupied but in fact is actually occupied? Should this circumstance, which could not reasonably be known by the backpacker, make a difference with regard to his legal or moral rights? What about the more extreme case in which the cabin is the principal residence of a family and is *known* to be occupied?

In the comments to section 197, the *Restatement (Second)* states that, when necessary to prevent serious harm, a person is privileged "to break and enter or to destroy a fence or other enclosure and indeed a building, including a dwelling."¹⁴⁹ However, "more may be required to justify [entering a dwelling] than . . . entry upon other premises"¹⁵⁰ and this is "a fact to be taken into account in determining the reasonableness of the defendant's action[s]."¹⁵¹ This was a departure from the first *Restatement* in which the privilege was described as

147. See Feinberg, *supra* note 1, at 102.

148. See RESTATEMENT (SECOND), *supra* note 25, § 197(1)(a) ("One is privileged to enter or remain on land in the possession of another if it is or reasonably appears to be necessary to prevent serious harm to (a) the actor . . .").

149. *Id.* § 197 cmt. g; *cf. id.* cmt. h ("[I]t may be reasonable for the actor to break through a fence in order to rescue his dog who is drowning in the plaintiff's pond, where it would not be reasonable for him to break into the plaintiff's dwelling in order to release the same dog from temporary confinement.").

150. *Id.* cmt. h.

151. *Id.*

extending to buildings "other than a dwelling."¹⁵² Furthermore, according to the same comment in the *Restatement (Second)*, "the privilege . . . carries with it the subsidiary privilege to use reasonable force to the person of the possessor or any third person."¹⁵³ The Reporter's notes recognized that "[d]irect authority is lacking as to the subsidiary privilege to use force against the person, or to break or enter an enclosure or a building,"¹⁵⁴ but argued that "[t]o render the privilege of entry effective the subsidiary privilege is obviously necessary."¹⁵⁵ I am skeptical that the *Restatement (Second)* accurately states the law on this subject. It is hard for me to conceive that courts would sanction the use of force against an objecting homeowner by a private person who, in order to protect his own life, seeks to enter the homeowner's dwelling.

The Reporter's notes recognize that *Ploof v. Putnam*¹⁵⁶ only held that the possessor could not use force to prevent the plaintiff and his wife and children from entering on his land.¹⁵⁷ The only case remotely involving a breaking and entry cited by the *Restatement (Second)* is *People v. Roberts*,¹⁵⁸ in which a conviction was upheld when critical evidence was obtained as a result of the police getting the manager to let them into an apartment when no one answered their knock and after the police heard "several moans or groans that sounded as if a person in the apartment were in distress."¹⁵⁹ The trial court found that the officers reasonably believed that someone inside the apartment was in distress and in need of help and that the police had entered for the purpose of rendering assistance.¹⁶⁰ It is a long way from this situation to one in which there is an entry against the wishes of the possessor and even further to a case in which the intruder meets resistance from the possessor and resorts to force to gain entry.

152. RESTATEMENT, *supra* note 25, § 197(1).

153. RESTATEMENT (SECOND), *supra* note 25, § 197 cmt. g.

154. RESTATEMENT (SECOND) APP., *supra* note 25, Reporter's notes to § 197 cmt. g.

155. *Id.*

156. 71 A. 188 (Vt. 1908).

157. *See id.* at 189, *discussed in* RESTATEMENT (SECOND) APP., *supra* note 25, Reporter's notes to § 197 cmt. g.

158. 303 P.2d 721 (Cal. 1956), *cited in* RESTATEMENT (SECOND) APP., *supra* note 25, Reporter's notes to § 197 cmt. h.

159. *Roberts*, 303 P.2d at 722.

160. *See id.* at 724.

2. *The Taking and Consumption of Others' Property.* The more important aspects of the paradigm we have been discussing involve not just unauthorized entry and the simple destruction of property but also, and more importantly, the taking and consumption of someone else's property. In Feinberg's example, the desperate backpacker eats his unknown host's food and burns his host's furniture in order to keep warm.¹⁶¹ In Coleman's less complex example, Hal injects (or possibly ingests) Carla's insulin into his body to prevent himself from lapsing into a coma.¹⁶²

To focus for the moment on the latter example, Coleman concludes that Hal is justified in taking and using the insulin since he needs it to preserve his life, but that Carla is entitled to compensation since her rights have been infringed (although not violated).¹⁶³ Legal support for this doctrine and its application in the situation posed is supposedly derived from *Vincent v. Lake Erie Transportation Co.*¹⁶⁴ But, as we have seen, the *Vincent* case has nothing to say about this situation. At the time *Vincent* was decided in 1910, Hal's taking of Carla's insulin would almost certainly have been considered theft, and the entry into her house or apartment in order to obtain the insulin (we are not told how Hal gained entry) probably amounted to an additional crime (either breaking and entering or some form of common law or statutory burglary).¹⁶⁵

Admittedly, since 1910, and more specifically in the last thirty years, a number of states have incorporated "lesser evil" defenses

161. See Feinberg, *supra* note 1, at 102. I am prepared to accept that it is possible that there might be some local custom that might bear on these sorts of situations. For example, John McPhee writes of a custom in the most sparsely populated regions of Alaska to leave remote cabins unlocked and stocked with food for the use of people in need, such as the survivors of a plane crash. See JOHN MCPHEE, *COMING INTO THE COUNTRY* 248-57 (1976). Notice, however, that the cabins are *unlocked*. I have no idea whether this custom still persists. The actual example that McPhee gives took place in 1943.

162. See COLEMAN, *supra* note 4, at 282.

163. See *id.* at 282-83.

164. 124 N.W. 221 (Minn. 1910), cited in COLEMAN, *supra* note 4, at 293.

165. In *The Queen v. Dudley & Stephens*, 14 Q.B.D. 273, 286 (1884), the court accepted Sir Matthew Hale's declaration that it was not the law of England that a starving man could steal bread. This statement was accepted as stating the law in several American textbooks. See, e.g., WILLIAM L. CLARK, JR., *HAND-BOOK OF CRIMINAL LAW* 96-97 (Francis B. Tiffany ed., 2d ed. 1902); JUSTIN MILLER, *HANDBOOK OF CRIMINAL LAW* 169 (1934). Modern law seems to be the same. See, e.g., *State v. Moe*, 24 P.2d 638, 640 (Wash. 1933) (rejecting poverty as a defense to theft of groceries); WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *HANDBOOK ON CRIMINAL LAW* § 5.4, at 444 (2d ed. 1986) (stating that "'economic necessity' is no defense to crime").

into their criminal codes.¹⁶⁶ I will discuss these developments at some length in Part II of this Article. Admittedly also, as we have already seen, both the *Restatement* and the *Restatement (Second)* grant a privilege not only to *destroy* the chattels of another in cases of necessity but also the privilege to *use* the chattels of another, if necessary, always subject to an obligation to pay compensation for any harm that might be caused by the exercise of the privilege.¹⁶⁷ This is, of course, the position espoused by Coleman and Feinberg. But, as we have noted, the Reporter's notes to the *Restatement (Second)* candidly admit that "[t]here is scarcely any authority to support the principle stated in this Section."¹⁶⁸

That the so-called privilege not only to destroy but also to use the chattels of another, first recognized in 1934 by *Restatement* section 263, was never adequately thought out is shown by the second of the two examples offered as illustrations: "A is seriously hurt in an automobile accident. He requires B, against his will, to drive him in B's automobile to a hospital. A is liable to B for harm to the upholstery of the automobile caused by the blood dripping from his wounds."¹⁶⁹ Provided that A were prepared to pay some sort of compensation, the *Restatement* would thus allow the injured A to kidnap B and force B to drive him to the hospital.¹⁷⁰ If B were to resist, A could then, to make his privilege effective, force B at gunpoint to serve as an unwilling chauffeur and, if necessary, presumably shoot B and commandeer B's car. Fortunately, the *Restatement (Second)* omits this ridiculous illustration. It presents instead a new illustration in which "A is seriously hurt in an automobile accident. While waiting for an ambulance, he uses B's scarf, over B's objection, as a tourniquet. A is privileged to use the scarf, but is subject to liability to B for the harm caused to it by the blood."¹⁷¹ Those unlucky enough to

166. See *infra* note 273 and accompanying text.

167. See RESTATEMENT, *supra* note 25, § 263(2); RESTATEMENT (SECOND), *supra* note 25, § 263(2).

168. RESTATEMENT (SECOND) APP., *supra* note 25, Reporter's notes to § 263. It is ironic given the paucity of authority for section 197, which discusses the privilege to enter the land of others in emergency situations, that the *Model Penal Code* refers to the general acceptance of the principle of necessity in tort law as one of the bases for recognizing a "lesser evil" defense in the criminal law. See *infra* notes 297-98 and accompanying text.

169. RESTATEMENT, *supra* note 25, § 263 cmt. f., illus. 2.

170. See RESTATEMENT (SECOND), *supra* note 25, § 263 cmt. e ("[T]he actor . . . is not entitled to commandeer the use of the other's goods for his own protection, or that of a third person, without making good any loss thus caused.").

171. *Id.* § 263 cmt. e, illus. 1.

be standing near the scene of an accident are thereby subject to having their clothing forcibly removed to make bandages for the injured. Their consolation is that they will be compensated for the damage to their clothing. How about the loss of their time if they have to return home to put on fresh clothes to look presentable at a business meeting? I am not suggesting that one might not wish to volunteer his clothing in these circumstances, but that it may lawfully be taken away from him by force strains credulity.

The other two illustrations in the *Restatement (Second)* involve the taking of medicine from a pharmacist who refuses to sell it—first by a patient attempting to save his own life and second by the patient's doctor.¹⁷² Again, although there is no discussion of the issue, one may presume that the medicine may be taken from the pharmacist by force if necessary to make the privilege effective.¹⁷³ As might be expected, I have been unable to find a case in which the defense of necessity has been raised, much less upheld, in a prosecution for theft.¹⁷⁴ This is not surprising since the law has, if anything, always taken a dimmer view of the taking and consumption of property than it has of its mere destruction.¹⁷⁵

3. *The Right to Resist a Taking.* In his attempt to describe the appropriate legal regime to govern this subject, Coleman, like the drafters of the *Restatement*, does not consider what would happen if Carla were to suddenly appear and refuse to allow Hal to use any of her insulin. She may not believe that Hal has accurately assessed how much insulin to leave her, or she may be apprehensive about her ability to replace the insulin taken, or doubtful about how soon Hal will be able to pay her, or perhaps just outraged that Hal wants to take *her* insulin. Despite Hal's promise to pay her—even on the spot—for the insulin, may she legally tell him to leave her insulin alone? With due respect to Coleman and the drafters of the Restatements, I believe

172. See *id.* § 263 cmt. e, illus. 2-3.

173. The fact that a superficially appealing general principle can have bizarre consequences when we try to give concrete examples shows the inherent limitations of trying to decide concrete cases by resort to principle.

174. See sources listed *supra* note 165 (confirming the general rule that economic necessity is no defense to a criminal charge).

175. For example, even though the doctrine of public necessity allows governments to destroy private property in emergency situations without having to pay compensation to the owner, it does not permit them to take and consume private property without compensating its owners. See *supra* note 122.

she may. May she legally defend, with physical force, her insulin? Again, I believe she may. Admittedly, she may not use deadly force to defend her insulin—unless she reasonably thought Hal might take all of it—but if she interposed her body between Hal and the insulin and he tried to push her aside, she could use all force reasonably necessary to protect her person.¹⁷⁶

If all of this is hornbook law, how is it possible to maintain that Hal is legally justified in taking the insulin? Admittedly, if Hal succeeds in taking the insulin, he will be under an obligation to compensate Carla for the taking—in legal parlance, for converting it—but that does not show that his taking of her insulin by force was legally justified. Sometimes all the law can do is to impose a monetary remedy, which is why, from a realist's perspective, it is difficult to distinguish between a fine and a tax. Indeed, for a person sufficiently rich so that parking fines are meaningless expenses, the public streets are one big parking lot—at least in the absence of towing or booting. But, in the situation we have been discussing, I would submit that Hal is subject to criminal prosecution for criminal assault and theft,¹⁷⁷ even if the prosecutor might be reluctant to charge him; and Carla, in most jurisdictions, is in theory entitled to punitive damages,¹⁷⁸ even if juries

176. For a discussion of the privilege to defend one's person when one is physically attacked while protecting one's property, see KEETON ET AL., *supra* note 115, at 132-4. It might be said, of course, that since Hal's taking of the insulin is privileged, Carla has no privilege to act in defense of her property and, subsequently, of her person when Hal tries to overcome her efforts. See *id.* at 131-32; see also RESTATEMENT (SECOND), *supra* note 25, § 197(2) ("Where [a privileged] entry is for the benefit of the actor . . . he is subject to liability for any harm done in the exercise of the privilege . . . except where the threat of harm . . . is caused by the tortious conduct . . . of the possessor.") (emphasis added). The only two cases cited by Professor Keeton and his colleagues—*Arlowski v. Foglio*, 135 A. 397 (Conn. 1926), and *Stuyvesant v. Wilcox*, 52 N.W. 465 (Mich. 1892)—are not helpful. See KEETON ET AL., *supra* note 115, at 132, n.5 (citing *Arlowski* and *Stuyvesant* in support of the proposition that "an erroneous belief, however reasonable, that the intruder did not have a privilege will not justify the use of force against the intruder"). The plaintiff in one case entered the defendant's property to recover *his own* personal property, see *Stuyvesant*, 52 N.W. at 465, and in the other the plaintiff sought to recover *his own* livestock, see *Arlowski*, 135 A. at 398. It takes greater imagination than I possess to believe that these cases, which involve the attempt to reclaim unlawfully detained property, are authority for denying Carla the right to defend what everyone agrees is *her own* property.

177. *Cf.*, e.g., LAFAVE & SCOTT, *supra* note 165, § 5.4, at 444 ("[E]conomic necessity' is no defense to crime . . .").

178. In most jurisdictions, the availability of punitive damages would depend on the degree to which the defendant's acts could be demonstrated to be "outrageous" or the product of "reckless indifference." See RESTATEMENT (SECOND), *supra* note 25, § 908(2):

Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing

might be reluctant to impose them. This hardly seems the stuff that legal justification is made of. We shall return to this basic problem again in Part II of this Article when we shall consider the ramifications of the modern “lesser evil” defense.¹⁷⁹

4. *The Moral Implications of a Supposed Privilege to Take and Use the Property of Others.* We may accept, without hesitation, that both the owner of the vacation cabin in Feinberg’s example and Carla, the owner of the insulin in Coleman’s example, have some moral obligation to help the backpacker and Hal, respectively. Do the property owners’ moral obligations give either the backpacker or Hal the moral right to take the property? If they did, what would be the nature of the moral obligations that the backpacker and Hal would assume by exercising their supposed rights? Whatever moral obligation they might have assumed by exercising the supposed right to take and consume property, it cannot be the simplistic and legalistic obligation to pay for the goods taken and consumed.¹⁸⁰ Surely morality does not insist that, assuming Hal is justified in taking and consuming Carla’s insulin, Hal thereby becomes unequivocally morally obliged to pay Carla its fair market value. What if Hal is penniless? What if Carla is a billionaire? Morality is more subtle than that.

Coleman nevertheless argues that Hal is only justified in taking Carla’s insulin if he is prepared to compensate her. He characterizes the taking of the insulin as an “ex post contract” in which compensation is a condition of its “justifiability.”¹⁸¹ From a moral perspective, I am not so sure that compensation makes a great deal of difference, particularly if Carla is well off. I do, of course, accept that if Hal were rich and the value of the property taken were great, this might give rise to a new moral obligation to compensate or better still to help Carla if she has fallen on hard times.

I am not sure, however, that either the backpacker or Hal has a moral right to take and consume the goods in question. Suppose Carla suddenly appears and refuses—let us presume wrongfully from a moral perspective—to let Hal have some insulin. We have just suggested that Hal would not be *legally* justified in taking the insulin

punitive damages, the trier of fact can properly consider the character of the defendant’s act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

179. See *infra* Part II.C.2.

180. See *supra* Part I.B.3.

181. COLEMAN, *supra* note 4, at 295.

from Carla by force. Is Hal nevertheless *morally* justified in taking the insulin from her by force? The backpacker and the insulin examples excite our sympathy because they are unlikely to occur—certainly they are outside the experience of most of us—and therefore the example they set is unlikely to have major repercussions. In almost every urban area, however, there are people who are on the brink of starvation, often through no fault of their own, and there are certainly many homeless people desperately in need of shelter. I do not think that society could tolerate their taking and consuming the food or goods of others.¹⁸² In cases of general public disorder, the authorities never tolerate looting—which is the same situation on a larger scale—if they can help it.

The problem of squatters is perhaps more troublesome, but certainly there is no general public recognition of the moral legitimacy of squatting, that is, the entry of homeless and needy persons into vacant dwellings. In short, although our society recognizes a moral obligation on the part of those who have to help those who have not, it is not at all clear to me that the way our morality enforces this obligation is by giving the destitute the right to take and consume.¹⁸³ It seems to me significant that, in our literature and our folklore, the refusal of people to discharge their moral obligations is met by curses or a spate of bad luck, not by outright aggression by those in need of assistance.¹⁸⁴ This seems to me to be an implicit, but nevertheless clear, recognition of the point I have been making.

182. For example, during the Great Depression, the convictions of several members of a crowd of rioters who were convicted of stealing groceries were affirmed over their objection that they were denied the right to present the defense of economic necessity. See *State v. Moe*, 24 P.2d 638, 639-40 (Wash. 1933).

183. St. Thomas Aquinas, in *Summa Theologiae*, opined that the natural law requires whatever material things a person possesses in superabundance be used to help the poor, and further stated that such goods may be taken by a needy person in a time of imminent danger. See ST. THOMAS AQUINAS, ON LAW, MORALITY, AND POLITICS, q. 66, a. 7, at 186 (William P. Baumgarth & Richard J. Regan eds., Hackett Publishing Co. 1988) (1274). John Locke similarly declared that, in the state of nature, the needy have a right to the “[s]urplusage” of their fellows. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 170 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690). “Charity gives every Man a Title to so much out of another’s Plenty, as will keep him from extream want, where he has no means to subsist otherwise” *Id.* Whether this right carried over to civil society is another matter.

184. A classic illustration is the fairy tale *The Golden Goose*, in which two brothers who refuse to share their food and drink with a hungry and thirsty old man are met with bad luck and the third brother, who does share his food and drink with the old man, is blessed with extraordinary good fortune. See THE COMPLETE BROTHERS GRIMM FAIRY TALES 274-77 (Lily Owens ed., 1981); see also *Matthew* 25:31-40 (New King James):

II. THE TROLLEY PROBLEM: THE INTENTIONAL TAKING OF
INNOCENT HUMAN LIFE IN ORDER TO SAVE A LARGER NUMBER OF
INNOCENT HUMAN LIVES

A. *The Construction of the Paradigm*

Thomson's trolley hypotheticals, it will be recalled, concern one Bloggs, a bystander who witnesses a trolley bearing down upon five helpless men who will certainly be killed if the trolley continues on its course.¹⁸⁵ Bloggs can avert the catastrophe only by throwing a switch that will shunt the trolley off to a spur where it will certainly kill a different helpless man.¹⁸⁶ Thomson draws on a hypothetical posed by Philippa Foot in which the "driver of a runaway tram,"¹⁸⁷ which is bearing down upon five helpless workmen, realizes that he can only avoid running into them by steering the tram he is driving down a different track and killing the single workman who is on this other track.¹⁸⁸ Foot assumes that "we should say, without hesitation, that the driver should steer for the less occupied track."¹⁸⁹ Doing so will certainly save the five, and the driver cannot be absolutely sure in advance that the single workman might not somehow manage to get out of the way or at least escape serious injury.¹⁹⁰ It is undoubtedly to avoid this possibility, which Foot merely mentions but does not stress,¹⁹¹ that Thomson, in her formulation of the trolley problem, ex-

When the son of man comes in His glory . . . then He will sit on the throne of His glory. All the nations will be gathered before Him, and He will separate them one from another, as a shepherd divides *his* sheep from the goats. And He will set the sheep on His right hand, but the goats on the left. Then the King will say to those on His right hand, "Come, you blessed of My Father, inherit the kingdom prepared for you from the foundation of the world: for I was hungry and you gave Me food; I was thirsty and you gave Me drink; I was a stranger and you took Me in; I was naked and you clothed Me; I was sick and you visited Me; I was in prison and you came to Me." Then the righteous will answer Him, saying, "Lord, when did we see You hungry and feed You, or thirsty and give You drink? When did we see You a stranger and take You in, or naked and clothe You? Or when did we see You sick, or in prison, and come to You?" And the King will answer and say to them, "Assuredly, I say to you, inasmuch as you did *it* to one of the least of these My brethren, you did *it* to Me."

185. See THOMSON, REALM OF RIGHTS, *supra* note 18, at 176.

186. See *id.*

187. FOOT, *supra* note 17, at 23.

188. See *id.*

189. *Id.*

190. See *id.*

191. See *id.*

plicitly provides that all the men are helpless without the slightest possibility of escape.¹⁹²

Having concluded that we would agree that the driver is justified in endangering the life of the single workman, Foot explores why we would nevertheless be horrified if it were suggested that we should comply with the demand of “some tyrant [who] should threaten to torture five men if we ourselves would not torture one.”¹⁹³ Foot justifies our different reactions to her tram situation and the tyrant situation by resorting to the distinction between what we do and what we allow to happen, which, at a more abstract level, corresponds to the difference between our negative duty *not* to harm someone and our positive duty to aid others.¹⁹⁴ Foot argues that, all other things being equal, it is more important that we not harm someone than that we help someone.¹⁹⁵

Perhaps an even better example of the latter type of situation would be the demand of a terrorist who threatens to kill five innocent hostages unless some particular person, *X*, is handed over to him for execution. According to Foot’s reasoning, we must not harm *X*, even if by so doing we fail to help the five innocents whom the tyrant has threatened to torture or the terrorist has threatened to kill. For those who find this reason for distinguishing these cases from Foot’s tram case not completely convincing, another argument is that people cannot be allowed to change the legal and moral responsibilities of others by making threats and forcing them to choose the lesser of two evils. Even if we might sometimes be prepared to excuse some acts performed out of duress to oneself, there are obvious and compelling pragmatic reasons not to encourage capitulation to illegal threats.

192. See THOMSON, RIGHTS, RESTITUTION, AND RISK, *supra* note 9, at 94.

193. FOOT, *supra* note 17, at 25. This torture question is similar to a hypothetical situation posed by Bernard Williams in which a man named Jim finds himself in the square of a remote South American town where government troops, in reprisal for recent protests against the government, are about to execute 20 randomly chosen Indians. See Bernard Williams, *A Critique of Utilitarianism*, in J.J.C. SMART & BERNARD WILLIAMS, UTILITARIANISM: FOR AND AGAINST 75, 98 (1973). As a mark of courtesy to Jim, a visitor from a foreign land, the commander of the reprisal force tells Jim that, if he kills one of the hostages, the others will be set free; if Jim refuses to accept the offer, all 20 will be executed. See *id.* Williams never tells us how he thinks Jim should respond. If all 20 hostages begged Jim to accept the offer, the moral situation of course changes because each of the hostages can be said to have agreed to be the one killed if he should be chosen in some random or otherwise objective way.

194. See FOOT, *supra* note 17, at 25-30.

195. See *id.* at 28.

Although, as we shall see, Thomson ultimately provides a different rationale for concluding that her Bloggs should throw the switch,¹⁹⁶ she agrees with Foot that there is a difference between acting to bring about a result and allowing something to happen.¹⁹⁷ Since I, too, am prepared to accept this distinction in the present context, I will only advert briefly to some of the arguments that can be made in support of the distinction. In the case of acting to bring about a result, one's active participation in the chain of events leading up to that result is causally essential. If one had chosen not to do anything, that result would not have occurred. When one simply allows something to happen, the result is the same as that which would have ensued if one had not existed. Merely allowing something to happen, furthermore, is not as morally salient as acting: if it were, one would be morally responsible for every unfortunate result one could have acted to prevent.

In accepting the distinction between acting to bring about a result and allowing something to happen, both Foot and Thomson are relying on, and trying to capture, the essence of the intuition that is behind the common law's distinction between misfeasance and non-feasance.¹⁹⁸ Thomson is prepared to recognize a moral duty to act

196. See *infra* text accompanying notes 208-11.

197. Throughout her work, Thomson assumes that, all things being equal, doing something is morally more serious than merely allowing something to happen. See, e.g., THOMSON, REALM OF RIGHTS, *supra* note 18, at 241-42 (observing that a "nondoer" may regret the harm they failed to prevent, but yet remain free of moral fault for having failed to act); THOMSON, *The Trolley Problem*, *supra* note 18, at 94-102 (arguing that a bystander at the trolley switch is not morally responsible for the death of five workmen stranded on the track if he fails to throw the switch preventing their death). For a recent discussion of the distinction between doing something and allowing something to happen, see Matthew Hanser, *Why Are Killing and Letting Die Wrong?*, 24 PHIL. & PUB. AFF. 175, 200-01 (1995) (arguing that killing a person is wrong for different reasons than is letting a person die).

198. See, e.g., *Yania v. Bigan*, 155 A.2d 343, 346 (Pa. 1959) ("The mere fact that Bigan saw Yania in a position of peril . . . imposed on him no legal, although a moral, obligation or duty to go to his rescue unless Bigan was legally responsible, in whole or in part, for placing Yania in the perilous position."); see also RESTATEMENT (SECOND), *supra* note 25, § 314 ("The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action."); *id.* cmt. c:

The origin of the rule lay in the early common law distinction between action and inaction, or "misfeasance" and "non-feasance." In the early law one who injured another by a positive affirmative act was held liable without any great regard even for his fault. . . . [L]iability for non-feasance was slow to receive any recognition in the law. It appeared first in, and is still largely confined to, situations in which there was some special relation between the parties, on the basis of which the defendant was found to have a duty to take action for the aid or protection of the plaintiff.

only in those situations in which one is under a preexisting duty to act for the benefit of others.¹⁹⁹ In an example she gives, a railroad switchman “cause[s]” an accident by failing “to throw the switch at 4:00 so that the four-fifteen goes to the right rather than the left,”²⁰⁰ whereas a bystander who does not throw the switch is not the cause of the accident. Thomson thus tracks the legal doctrine that the duty to act in aid of someone is only as strong as the duty to avoid causing harm by one’s actions in those situations in which the law has previously imposed upon a person an affirmative duty to come to the aid of others. Examples of such duties are those imposed by the status of being a common carrier of passengers for hire,²⁰¹ or a caretaker of young children,²⁰² or a switchman charged with throwing the switch.²⁰³

The problem with Foot’s conclusion in her version of the trolley problem is not the distinction between acting to bring about a result and allowing something to happen—which, for all its limitations, has some defensible uses—but Foot’s assertion that the driver of the tram is faced with the choice of either breaching his negative duty not to kill five men or breaching his negative duty not kill a single man.²⁰⁴ I would submit that this is not the correct description of the driver’s predicament. At the time that the driver is faced with his difficult choice, the tram is out of control. If the tram driver does not steer the tram to the other track because he does not want to kill the single workman on the other track, it would not, from the legal point of view, be correct to say that he has killed the five workmen. He has not done anything; he has merely allowed something to happen. If he

199. See THOMSON, REALM OF RIGHTS, *supra* note 18, at 237-39.

200. *Id.* at 237.

201. See RESTATEMENT (SECOND), *supra* note 25, § 314A(1) (“A common carrier is under a duty to its passengers to take reasonable action . . . (b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.”). That duty ends, of course, when the passenger leaves the care of the carrier. See *id.* § 314A cmt. c (“A carrier is under no duty to one who has left the vehicle and ceased to be a passenger, nor is an innkeeper under a duty to a guest who is injured or endangered while he is away from the premises.”).

202. See *id.* § 314A illus. 7.

203. *Cf. id.* § 314 cmt. d, illus. 3:

A, a trespasser in the freight yard of the B Railroad Company, falls in the path of a slowly moving train. The conductor of the train sees A, and by signalling the engineer could readily stop the train in time to prevent its running over A, but does not do so. While a bystander would not be liable to A for refusing to give such a signal, the B Railroad is subject to liability for permitting the train to continue in motion with knowledge of A’s peril.

204. See FOOT, *supra* note 17, at 27.

steers the tram to the other track and kills the lone workman, however, he has obviously done something: he has killed the lone workman. Assuming that the tram driver was not responsible for his loss of control over the tram, if he allows the tram to continue on its way, nothing he did caused the death of the five workmen. From the legal perspective, the situation is much more like the terrorist-and-hostages situation I have described than Foot might realize. I would submit that this is the better way of viewing the situation from the moral perspective as well.

Of course, if the driver were responsible for placing the five men in jeopardy—say he was speeding or even that he *wanted* to kill the five men—he would be breaching a negative duty not to kill the men if he were to allow the tram to run over them. But would the situation then become one in which, if the driver allows the tram to continue on its way, he will breach his negative duty not to kill five men, while if he “steers” for the other track, he will only breach his negative duty not to kill a single man? In other words—to take the extreme case—having decided to kill five men and having put the tram on its path to achieve that result, is it morally preferable for the driver to change the direction of the tram so as to kill a single but different man? A full discussion of this point would raise some interesting questions.²⁰⁵ Let us, however, stick with the situation in which the driver is in no way legally or morally responsible for the tram being out of control, and with Thomson’s analogous situation in which a bystander can, by throwing a switch, shunt the trolley away from the five helpless men onto a spur where it will kill a different helpless man.

The trolley problem has given rise to an extensive literature on the permissibility of killing one person in order to save one or more persons. As far as I can tell, there seems to be general agreement that, in the basic situation presented by Foot and Thomson, it is permissible to turn the trolley away from the five workmen even if that means the single workman will be killed.²⁰⁶

205. In these situations, unlike those posited by Foot and Thomson, the driver is both legally and morally responsible for the resulting death or deaths regardless of what he does. The question then becomes: is it preferable to choose, between immoral acts, the one that leads to the fewest deaths?

206. See, e.g., Larry Alexander, *Self-Defense, Justification and Excuse*, 22 PHIL. & PUB. AFF. 53, 60 (1993) (“I believe Thomson is correct in her judgment that [one] may switch the trolley and kill the bystander to save five.”); Michael J. Costa, *Another Trip on the Trolley*, 25 S. J. PHIL. 461, 461 (1987) (defending Thomson’s argument in *Killing, Letting Die, and the Trolley Problem*); Michael J. Costa, *The Trolley Problem Revisited*, 24 S. J. PHIL. 437, 437

B. Thomson's Attempted Justification

Of the many variants of the basic situation which she presents, the one as to which Thomson feels most comfortable in concluding that it is morally permissible for the bystander, Bloggs, to throw the switch is the one in which the helpless men are all workmen and part of the same crew whose tasks, on any given day, are randomly assigned.²⁰⁷ Unlike the tram driver in Foot's example,²⁰⁸ Thomson's bystander, Bloggs, has had no connection whatsoever—legally, morally, or in any other way—with the creation of the situation. More to the point, from the legal and moral perspectives, Thomson plausibly envisages that, when men join the work crew, it is explained to them that their occupation is a dangerous one in which death or serious injury is a distinct possibility²⁰⁹ and that should the situation arise in which the certainty of the death of a larger number of men can be averted by shunting a runaway trolley onto a spur and killing a lesser number of men, then the trolley will be shunted.²¹⁰ Thomson assumes that reasonable workmen would agree, *ex ante*, to this arrange-

(1986) ("I am roughly in agreement with Thomson's treatment . . ."); Bernard Gert, *Transplants and Trolleys*, 53 PHIL. & PHENOMENOLOGICAL RES. 173, 174 (1993) ("I think that most of the general substantive moral views that Thomson puts forth are sensible . . ."); Robert Hallborg, Jr., *Comparing Harms: The Lesser-Evil Defense and the Trolley Problem*, 3 LEGAL THEORY 291, 295 (1997) ("My intuitive judgment is that it would be permissible [to throw the switch and divert the trolley]."); F.M. Kamm, *Harming Some to Save Others*, 57 PHIL. STUD. 227, 231 (1989) ("Despite the questions I have raised about Thomson's proposal, I believe its underlying idea is sound . . ."); Michael Otsuka, *Killing the Innocent in Self-Defense*, 23 PHIL. & PUB. AFF. 74, 75 (1994) ("[M]y case against the killing of an innocent does not extend to cases in which such killing is necessary to save a large number of lives . . ."); Eric Rakowski, *Taking and Saving Lives*, 93 COLUM. L. REV. 1063, 1065 (1993) ("[P]eople may, I argue, be killed to save a larger number of others if several conditions are met [including hypothetical or actual consent by] a majority of those affected . . ."). Otsuka's article is an example of how legal analysis permeates philosophical discussion of this topic. Otsuka concludes, unlike Thomson, that you may not kill someone who is innocently hurtling towards you—either a villain or a force of nature having set him in motion—and is, unless you destroy him, about to kill you, because that person has not violated any right of yours. *See* Otsuka, *supra*, at 76-90. It is true that such an innocent threat may not have violated any of your rights and therefore may not be subject to either civil or criminal liability if he should kill you. However, as any law student knows, the right to act in self-defense does not require that the person against whom one is acting is about to violate your rights. For a more complete discussion of the interplay between legal and moral argument, see *supra* note 23.

207. *See* THOMSON, REALM OF RIGHTS, *supra* note 18, at 181-87; *see also* Rakowski, *supra* note 206, at 1145 (taking the even stronger position that an agent has "a moral imperative, not merely a permission" to divert the trolley).

208. *See* FOOT, *supra* note 17, at 23.

209. *See* THOMSON, REALM OF RIGHTS, *supra* note 18, at 181.

210. *See id.* at 195.

ment.²¹¹ Perhaps they would. It is another matter whether anyone would actually want to work on a crew with fewer men than another crew that was likely to be put in danger in proximity to his own crew, if this arrangement were known and thoroughly understood. It would probably depend on how likely the men thought the occurrence of this situation to be. If they thought it not very likely to arise at all, they would dismiss it as the ramblings of lawyers who are as afraid of liability as they are of their own shadows. If they thought there was a reasonable likelihood of the situation arising, however, one would think that they would demand a pay premium for working on the smaller crew. At higher and higher estimated likelihoods, one would expect more and more people to be reluctant to enter into any such agreement regardless of the greater pay.

It is one thing to accept that some occupations are hazardous and that serious injury or death is a distinct possibility; it is another to accept that because of the hazardousness of one's occupation one will be subject to the additional risk of being intentionally killed to save a larger group of co-workers, even if the tradeoff is that one's own life may be saved by the intentional killing of someone else if one is a member of the larger group.

In the real world, so far as I am aware, with two possible exceptions, no one enters into these kinds of arrangements, just as no one engages in the making of a Rawlsian contract with his fellow citizens,²¹² but, as with Rawls's argument, it is the plausibility of the claim that a contractual arrangement would be accepted that buttresses Thomson's conclusion that Bloggs may throw the switch. I am aware of only two groups of workers that might be considered to have entered into arrangements arguably analogous to the arrangement Thomson is suggesting: seamen and underground miners. Ship captains undoubtedly have the authority to flood a ship's engine room to save their ships, even if this means certain death for the seamen manning the engine room.²¹³ Mine superintendents probably

211. See *id.* at 186-87.

212. John Rawls explores how a hypothetical group of persons, each ignorant of his or her actual condition and situation in life, would structure a society in which all must live. See JOHN RAWLS, A THEORY OF JUSTICE 152-57 (1971). Rawls concludes that, in exploring possible arrangements, they would choose the one that maximizes the return for the person or persons who receive the minimum payout from that arrangement. See *id.* at 153-54.

213. On May 23, 1939, in peacetime, while the United States submarine *Squalus* was practicing a crash dive, the main induction valves failed to close and water poured into the engine rooms. The submarine sank to the ocean floor more than 200 feet below the surface. The two

have an analogous authority to seal off coal pits to keep fires from spreading throughout mines.²¹⁴ These cases, however, are not truly analogous to the trolley situation. They are not situations in which a decision is made to save some by sacrificing others who would otherwise have lived, but rather situations in which all will die if nothing is done.²¹⁵ They are also situations in which the person making the decision is a quasi-public authority, like the captain of a ship or the superintendent of a mine, the significance of which will be explored and explained as the discussion progresses.

In the hypothetical situation in which a surgeon has the opportunity to save five people needing various kinds of organ transplants by taking them from a single healthy person and thus killing that person, Thomson has no hesitation in concluding that doing so would be immoral.²¹⁶ Unlike the trolley situation, it seems quite implausible to think of a group of people agreeing *ex ante* to this kind of arrangement. But perhaps the possibility of such an arrangement is not completely implausible even in the transplant situation. For example, one writer has considered the possibility that it might be morally right to kill the one innocent healthy person in order to save five ill people needing organ transplants if the innocent healthy person were randomly chosen from a list of all persons.²¹⁷ Perhaps a person who takes this position would find the possibility of such an *ex ante* hypothetical agreement not so implausible after all.

It is a mark of Thomson's diffidence that even in the trolley situation, which she believes presents the most plausible case for

engine rooms were closed off as well as the after torpedo room, entombing 26 men. The remaining 33 were eventually rescued. See CARL LAVO, *BACK FROM THE DEEP* 32-61 (1994). The *Squalus's* travails are covered in more detail in NAT A. BARROWS, *BLOW ALL BALLAST!* (1941). The man who actually closed the bulkhead door was reported as saying, when rescued, "I wish to make it clear that I acted according to the requirements of my duty in closing the bulkhead door. I have the utmost sorrow for my shipmates who died, but I would not hesitate to do the same thing if similar circumstances required . . ." *Id.* at 172.

214. Cf. Paul H. Rakes, *Casualties on the Homefront: Scotts Run Mining Disasters During World War II*, 53 W. VA. HIST. 95, 111 (1994) ("After the failure of a two-day attempt to put out the fire with rock dust and chemicals, officials abandoned the search for Frank Robinette and sealed off the affected area.").

215. See, e.g., *infra* notes 294-96 and accompanying text (discussing the "mountain climber" hypothetical).

216. See THOMSON, *REALM OF RIGHTS*, *supra* note 18, at 135-43; see also THOMSON, *Killing*, *supra* note 18, at 80-82, 90-93; THOMSON, *The Trolley Problem*, *supra* note 18, at 95-96.

217. See John Harris, *The Survival Lottery*, 50 PHILOSOPHY 81, 81-87 (1975), reprinted in *KILLING AND LETTING DIE* 257, 259-65 (Bonnie Steinbock & Alastair Norcross eds., 2d ed. 1994).

killing one to avoid the death of five,²¹⁸ she stresses that her conclusion is only that it is morally *permissible* for Bloggs to throw the switch.²¹⁹ She shrinks from the stronger conclusion that Bloggs is morally *required* to throw the switch.²²⁰ If Bloggs is not morally required to throw the switch, however, how does he decide what to do? Thomson leaves that decision up to him. Would it be morally relevant that Bloggs's son was one of the five helpless workmen? That Bloggs's son was the single helpless workman? As I have noted, Thomson discusses many other situations in which one might be faced with the choice of killing one innocent person to save a larger number of innocent persons, some of which are variants of the trolley problem and some of which are not.²²¹ But, since the trolley and the workmen is the scenario in which she thinks the strongest arguments can be made for the moral permissibility of killing an innocent person in order to save a greater number of other innocent persons, I will concentrate on it. For, as I have already indicated, I do not agree that from a legal or even a moral point of view it is permissible to kill an innocent person in the situations posited by Thomson and Foot.

C. *Anglo-American Law*

1. *The Common Law Background.* At least in the English-speaking world, any serious discussion of the legality of taking the life of an innocent person to save the life of a greater number of other persons must begin with a detailed description and discussion of *The Queen v. Dudley and Stephens*,²²² decided in 1884 by a panel of five judges in the Queen's Bench.

Dudley and Stephens were among four crew members of a yacht who "were cast away in a storm on the high seas 1600 miles from the Cape of Good Hope, and were compelled to put into an open boat

218. See *supra* note 207 and accompanying text.

219. See THOMSON, REALM OF RIGHTS, *supra* note 18, at 177 ("On some views it is not merely permissible for Bloggs to turn the trolley, it is morally required of Bloggs that he do so. That is not my view, and we will come back to it below. Meanwhile, however, it surely is at least permissible for him to proceed.").

220. See *id.*; see also *id.* at 196 ("There is nothing in the proposal I make that issues in the conclusion [that Bloggs] ought to.").

221. Those which are not variants of the trolley situation include medical transplants and innocent and villainous aggressors. See *id.* at 135-43, 366-71.

222. 14 Q.B.D. 273 (1884). The customs of sailors in these difficult circumstances is discussed in A.W. BRIAN SIMPSON, CANNIBALISM AND THE COMMON LAW 95-160 (1994).

belonging to the said yacht.”²²³ The men had only two eleven-pound tins of turnips with them and were only able to supplement this meager store with a small turtle caught on the fourth day.²²⁴ Their only source of fresh water was rainwater that they caught in their oilskin capes.²²⁵ On the eighteenth day, when the men had been without food for seven days and without water for five and when their boat was probably still 1,000 miles from land, the two defendants spoke to a third man, Brooks, about the possibility of killing and eating the weakest of the survivors, a seventeen-year-old boy.²²⁶ Brooks “dissented.”²²⁷ On the next day Dudley suggested to Stephens and Brooks the drawing of lots to determine who should be killed to save the rest but Brooks again refused to consent.²²⁸ Later in the day Dudley proposed that, if a ship did not appear the next morning, the boy should be killed.²²⁹ When no ship appeared on the next day, which was the twentieth day since they were cast adrift, Dudley, after offering a prayer for forgiveness, killed the boy with Stephens’ consent.²³⁰ At the time of his death the boy was helpless, “extremely weakened by famine and by drinking sea water.”²³¹ Dudley, Stephens and Brooks fed upon the body and blood of the boy for four days.²³² On the fourth day their “boat was picked up by a passing vessel, and the prisoners were rescued, still alive, but in the lowest state of prostration.”²³³

In addition to the facts mentioned above, the jury specifically found that, if the men had not fed upon the body of the boy, they would probably not have survived to be rescued and that the boy, “being in a much weaker condition, was likely to have died before them.”²³⁴ The jury also found that “there was no appreciable chance of saving life except by killing some one for the others to eat.”²³⁵ The jurors professed ignorance as to whether the killing of the boy was

223. *Dudley & Stephens*, 14 Q.B.D. at 273.

224. *See id.* at 273-74.

225. *See id.* at 274.

226. *See id.*

227. *Id.*

228. *See id.*

229. *See id.*

230. *See id.*

231. *Id.*

232. *See id.*

233. *Id.*

234. *Id.* at 275.

235. *Id.*

“felony and murder” and requested the opinion of the court, but concluded that, if in the opinion of the court the killing of the boy was “felony and murder,” then “the jurors say that Dudley and Stephens were each guilty of felony and murder.”²³⁶ The court concluded that the “conviction must be affirmed,”²³⁷ and Dudley and Stephens were sentenced to death, a sentence that was afterwards commuted by the Crown to six months’ imprisonment.²³⁸

The judgment of the unanimous court was delivered by Lord Chief Justice Coleridge. After disposing of a number of procedural questions, Lord Coleridge turned to what he called “the real question in the case—whether killing under the circumstances set forth in the verdict be or be not murder.”²³⁹ The contention that it was not appeared to the court “both new and strange” and the court “stopped the Attorney General in his negative argument in order that we might hear what could be said in support of a proposition which appeared to us to be at once dangerous, immoral, and opposed to all legal principle and analogy.”²⁴⁰ The court found the discussions of the defense of necessity in Bracton and Hale²⁴¹ unhelpful because they involved the situation in which a man was obliged to kill another in the defense of his own life.²⁴² However, the court noted that Hale had concluded that the proposition “theft is no theft, or at least is not punishable as theft”²⁴³ in case of extreme necessity of food or clothing was false as a matter of English law despite what Grotius and Pufendorf²⁴⁴ may have said on the subject.²⁴⁵ If extreme hunger did not justify larceny, Lord Coleridge asked what Hale would have said to the argument that it justified murder. In his review of the authorities, Lord Coleridge found several references to “the case of two ship-

236. *Id.*

237. *Id.* at 278.

238. *See id.* at 288 n.2.

239. *Id.* at 281.

240. *Id.*

241. These are, of course, Henry de Bracton (died 1268), the leading medieval English jurist and author of *De Legibus et Consuetudinibus Angliae* (c. 1250), and Sir Mathew Hale (1609-76), Lord Chief Justice of England, whose *History of the Pleas of the Crown* was first published in 1736.

242. *See Dudley & Stephens*, 14 Q.B.D. at 281-83.

243. *Id.* at 283 (quoting Hale).

244. These are, of course, the Dutch jurist Hugo Grotius (1583-1645) whose great work, *De Jure Belli ac Pacis*, was first published in 1625, and the German jurist Samuel von Pufendorf (1632-94), whose greatest work, *De Jure Naturae et Gentium*, was published in 1672.

245. *See Dudley & Stephens*, 14 Q.B.D. at 283.

wrecked men and the single plank” presented by Lord Bacon,²⁴⁶ but noted that English legal writers like East²⁴⁷ and Hawkins²⁴⁸ either left their own opinions unclear or merely noted that “[i]t is said to be justifiable.”²⁴⁹ Focusing on what Bacon himself said, the court noted that he cited no authority for the proposition that “a man may save his life by killing, if necessary, an innocent and unoffending neighbour, [and] it is certainly not the law at the present day.”²⁵⁰

Turning from the text writers to the cases, the court found only two on point. One was a case referred to by a commentator on Grotius and Pufendorf which was discovered by a member of the bar and conveyed to one of the judges.²⁵¹ It involved seven English sailors cast adrift; it was decided by a single judge on the island of St. Kitts in 1641 and was mentioned in a medical treatise published in Amsterdam, which the *Dudley & Stephens* court concluded “is altogether, as authority in an English court, as unsatisfactory as possible.”²⁵² The other was an American case, *United States v. Holmes*,²⁵³ in which the defendant, a seaman and a member of the ship’s company, was convicted of manslaughter for throwing passengers out of an overcrowded lifeboat. Lord Coleridge agreed that Holmes was properly convicted, but dismissed the case as having been decided “on the somewhat strange ground that the proper mode of determining who was to be sacrificed was to vote upon the subject by ballot.”²⁵⁴

246. *Id.* at 284. Lord Coleridge was referring to an illustration of *Regula V* in SIR FRANCIS BACON, *MAXIMS OF THE LAW*, reprinted in GEORGE C. CHRISTIE, *JURISPRUDENCE* 884, 894 (1st ed. 1973). Bacon’s fifth rule stated that “[n]ecessity gives a privilege with reference to private rights,” or as Bacon rendered it, “[n]ecessitas inducit privilegium quoad jura privata.” *Id.* & n.184. Among the examples illustrating *Regula V*, Bacon wrote:

So if divers be in danger of drowning by the casting away of some boat or bark, and one of them get to some plank, or on the boat side to keep himself above water, and another to save his life thrust him from it, whereby he is drowned; this is neither *se defendendo* nor by misadventure, but justifiable.

Id. at 894. In the same rule, Bacon stated that stealing bread to satisfy *present* hunger “is no felony.” *Id.*

247. Sir Edward Hyde East (1764-1847) was an English lawyer famous for his reports of the decisions of the King’s Bench and author of *Pleas of the Crown* (1803).

248. William Hawkins (1673-1746) was the author of *A Treatise of the Pleas of the Crown* (1721).

249. *Dudley & Stephens*, 14 Q.B.D. at 284 (quoting Hawkins).

250. *Id.* at 286.

251. *See id.* at 284-85.

252. *Id.* at 285.

253. 26 F. Cas. 360 (E.D. Pa. 1842) (No. 15,383).

254. *Dudley & Stephens*, 14 Q.B.D. at 285.

In his summary treatment of *Holmes*, Lord Coleridge was somewhat unfair to Justice Baldwin, who, sitting as Circuit Justice, presided at the trial and delivered the charge to the jury in which the major discussion of the legal issues was presented.²⁵⁵ The facts in *Holmes* were that, in 1841, an American ship carrying a heavy cargo, a crew of seventeen, and sixty-five passengers struck an iceberg en route from Liverpool to Philadelphia.²⁵⁶ The captain, seven members of the crew, and a passenger got into the jolly boat, and the first mate, eight members of the crew and thirty-two passengers got into the longboat.²⁵⁷ The remaining passengers were left on the ship, which eventually sank.²⁵⁸ The captain refused to accept more people into the jolly boat from the longboat, which started leaking almost immediately, but did order some more experienced seamen to exchange into the longboat to improve its navigational capacity.²⁵⁹ After the two boats separated, the morning after the loss of the ship, the “sea grew heavier” and the longboat began to fill with icy water.²⁶⁰ That night, in response to the order of the first mate, defendant Holmes and the other seamen began to throw overboard a total of fourteen male passengers who were not accompanied by their wives.²⁶¹ Two young women were also lost, but it is unclear whether they were thrown out or jumped out after their young brother, who was thrown overboard by Holmes.²⁶² It was for the death of this youth that Holmes was tried on an indictment for manslaughter.²⁶³ The next day the survivors were rescued by a passing ship.²⁶⁴

Holmes’s prosecution was particularly poignant because it was accepted that he was the bravest of the seaman, that he had rescued one of the passengers from the sinking ship, that he had eventually taken over the direction of the lifeboat as the first mate became in-

255. Lord Coleridge mischaracterized Justice Baldwin’s treatment of the issue. Baldwin did not say the passengers should have voted on a victim. Rather, he said that in such extreme circumstances, selection should be by lot, as “[t]his mode is . . . the fairest mode, and, in some sort, . . . an appeal to God, for selection of the victim.” *Holmes*, 26 F. Cas. at 367.

256. *See id.* at 360.

257. *See id.*

258. *See id.*

259. *See id.* & n.2.

260. *See id.* at 361.

261. *See id.*

262. *See id.* & n.5.

263. *See id.*

264. *See id.* at 362.

creasingly unable to act decisively, and that he was probably the cause of the survivors' being observed by the passing ship.²⁶⁵ It was perhaps for this reason, as well as the fact that he had spent several months in pretrial confinement, that Holmes was sentenced to six months imprisonment and a fine of twenty dollars when the statute authorized a penalty of imprisonment for as much as three years and a fine of \$1,000.²⁶⁶

In his charge to the jury, Justice Baldwin made it clear that, since Holmes was a seaman, there were no circumstances in which a passenger could be compelled to give up his life to save Holmes.²⁶⁷ The only circumstance in which a passenger could be compelled to sacrifice his life before a seaman was when it was necessary to maintain a minimum number of seamen to man and navigate the lifeboat, in which case the other passengers would be saved as well.²⁶⁸ Furthermore, although Justice Baldwin recognized that Holmes was acting in obedience to the commands of his superior, the first mate, he told the jury that obedience to an *unlawful* order was no defense.²⁶⁹ It was only after declaring that a passenger could never be sacrificed to save a member of the crew—"while we admit that sailor and sailor may lawfully struggle with each other for the plank which can save but one, we think that, if the passenger is on the plank, even 'the law of necessity' justifies not the sailor who takes it from him"²⁷⁰—that Justice Baldwin considered the case of people "in *equal relations*."²⁷¹ It was in this connection that he first opined that, if shipwrecked people are starving, the person who should be sacrificed should be drawn by

265. *See id.* & nn.7-8.

266. *See id.* at 369. Because the court was apparently not prepared to add its voice to the outpouring of public sympathy on Holmes's behalf, President Tyler refused to pardon Holmes, but nonetheless the "penalty was subsequently remitted." *Id.* The report does not indicate whether anyone else was sitting with Justice Baldwin to compose the court. If there was indeed another judge in the case, that would have been Archibald Randall, who was appointed district judge for the Eastern District of Pennsylvania by President Tyler on March 3, 1842. *See* BICENTENNIAL COMMITTEE, JUDICIAL CONFERENCE OF THE UNITED STATES, JUDGES OF THE UNITED STATES 327 (1978). Holmes's trial began on April 13, 1842. *See Holmes*, 28 F. Cas. at 363.

267. *See Holmes*, 28 F. Cas. at 367.

268. *See id.*

269. *See id.* at 368.

270. *Id.* at 367.

271. *Id.* (emphasis added).

lot and then that, if someone must be jettisoned to lighten the boat, selection should again be by lot.²⁷²

Both these ruminations in Justice Baldwin's charge to the jury were of course unnecessary for the decision of the case. Whether choice by lot is a valid legal or moral reason to kill one person to save one or more other persons depends, in the last analysis, on whether a person can consent to be put to death. That question raises a host of issues, including the legal and moral permissibility of assisted suicide and religious sacrifices, that are beyond the scope of this Article and whose resolution is unnecessary for resolving the question with which this paper is concerned, namely whether it is either legally or morally permissible to kill a person who has not expressly consented to be killed, and indeed does not want to be killed. On the issues with which we are concerned, the traditional common law clearly denies Bloggs any legal privilege to shunt the trolley on to the other track.

2. *The Modern Law and the Model Penal Code. The Queen v. Dudley & Stephens* and *United States v. Holmes* are the classic cases. What does the modern law tell us? Since 1950, over twenty states have now adopted some form of what I prefer to call the "lesser evil defense."²⁷³ One of the key impetuses to this development was the project that culminated in the *Model Penal Code*, which uses the term "[c]hoice of [e]vils" defense.²⁷⁴ Work on the *Code* occupied much of the 1950s. The *Proposed Official Draft* was approved in 1962 and re-issued with a revised official commentary in 1985.²⁷⁵ We shall be concerned with sections 3.01 and 3.02 of the *Code*, which were first presented to the American Law Institute in 1958 in *Tentative Draft No. 8* and then again in 1962 when the *Proposed Official Draft* was approved by the Institute in May of that year. The pertinent part of section 3.02 provides that:

- (1) Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:

272. See *id.*

273. See MODEL PENAL CODE AND COMMENTARIES § 3.02 cmt. 5 (Official Draft and Revised Comments 1985) [hereinafter OFFICIAL MODEL CODE] (listing state statutes for "general choice of evils defense").

274. MODEL PENAL CODE § 3.02 (Proposed Official Draft 1962) [hereinafter PROPOSED MODEL CODE].

275. The history of the project is described in the foreword to all of the volumes of the OFFICIAL MODEL CODE, *supra* note 273.

(a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and

...

(c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.²⁷⁶

This privilege, section 3.01 tells us, “does not abolish or impair any remedy for such conduct that is available in any civil action,”²⁷⁷ which of course would mean that, if Bloggs threw the switch, he would be liable in tort for substantial damages in a wrongful death action brought by the workman’s next of kin. This would certainly cause Bloggs to think twice before exercising the discretion Thomson is prepared to grant him.²⁷⁸

The black letter of section 3.02 is silent as to whether the defense is available in cases of homicide, and this is true of most of the statutes and judicial decisions recognizing the defense. Kentucky²⁷⁹ and Missouri²⁸⁰ have in their statutes, however, expressly excluded the defense in situations involving intentional homicide, and in Wisconsin, the defense is limited to reducing the charge to “2nd-degree intentional homicide.”²⁸¹ Furthermore, although prompted by the *Model Penal Code*, the New York statute, which has been followed in several other jurisdictions,²⁸² mandates that the injury sought to be avoided by what would otherwise be a criminal act must be such that it would “clearly outweigh” the injury that will be inflicted by the choice of the lesser evil.²⁸³ In the practice commentary to the New

276. OFFICIAL MODEL CODE, *supra* note 273, § 3.02(1).

277. *Id.* at § 3.01(2).

278. See THOMSON, REALM OF RIGHTS, *supra* note 18, at 177.

279. See KY. REV. STAT. ANN. § 503.030 (Banks-Baldwin 1997) (“[N]o justification can exist under this section for an intentional homicide.”).

280. See MO. ANN. STAT. § 563.026 (West 1979) (excusing certain conduct “other than a class A felony or murder” as justifiable).

281. WIS. STAT. ANN. § 939.47 (West 1996). Necessity is one of four “mitigating circumstances” listed as affirmative defenses to first-degree intentional homicide. *Id.* § 940.01(2). Once the accused presents evidence to support such a defense, the charge is reduced to second-degree intentional homicide unless the state can prove beyond a reasonable doubt that the facts constituting the defense did not exist. See *id.* §§ 940.01(3), 940.05(1)(a).

282. See OFFICIAL MODEL CODE, *supra* note 273, § 3.02 cmt. 5 n.23 (listing the six states that follow the New York model).

283. N.Y. PENAL LAW § 35.05 (McKinney 1998).

York statute, it is said that the statute “is addressed to an area or kind of technically criminal behavior which virtually no one would consider improper.”²⁸⁴ As one of the few courts to construe the provision declared, it “is to be narrowly construed.”²⁸⁵ This would hardly seem to allow the defense to be raised in a case of intentional homicide.

The official commentary nevertheless makes it clear that section 3.02 of the *Model Penal Code* was not meant to preclude the raising of the lesser evil defense in a case of intentional homicide.²⁸⁶ Still, the examples given as illustrations do not cover Thomson’s Bloggs. The first example given is of a person who, to save a town, cuts a dike, which results in the inundation of a nearby farm.²⁸⁷ The illustration is inapplicable to our situation for two very important reasons. First, at the time of acting, the actor does not know with certainty that the occupants of the farm will be drowned—he is not deciding that one person should be killed rather than another. Second, the hypothetical presents a case of public necessity, a defense that, as we will soon see, has, in some limited circumstances, been successfully claimed by private individuals. Public authorities are constantly deciding which areas should be patrolled by the police, where scarce fire equipment should be sent in cases of natural disaster, and whether attempting to quell a riot to protect persons or property is prudent in particular situations.

The distinction between public and private necessity is neither merely verbal nor historic, but rather rests upon a very fundamental feature. Public officials are charged with promoting the common good. They not only exercise the authority to decide that some people should be sacrificed to save a larger number of others, but also

284. N.Y. PENAL LAW § 35.05 practice commentary (McKinney 1975); N.Y. PENAL LAW § 35.05 practice commentary (McKinney 1967). Later versions of the Practice Commentary contain similar discussions of the subject we are examining. See N.Y. PENAL LAW § 35 practice commentary at 90-91 (McKinney 1987); N.Y. PENAL LAW § 35 practice commentary at 130 (McKinney 1998).

285. *People v. Brown*, 333 N.Y.S.2d 342, 349 (Sup. Ct. 1972) (citing and discussing the Practice Commentary of section 35.05).

286. See MODEL PENAL CODE § 3.02 cmt. 3 (Tentative Draft No. 8, 1958) [hereinafter TENTATIVE CODE] (finding no “reason for excluding cases where the actor’s conduct portends a particular evil, such as homicide”); OFFICIAL MODEL CODE, *supra* note 273, § 3.02 cmt. 3 (“It would be particularly unfortunate to exclude homicidal conduct from the scope of the defense.”).

287. See TENTATIVE CODE, *supra* note 286, § 3.02 cmt. 3; OFFICIAL MODEL CODE, *supra* note 273, § 3.02 cmt. 3.

exercise a vastly more important authority, namely the authority to decide that some lives are more important than others. If the war effort requires the survival of technically trained people, then these will be withdrawn from the Philippines before the Japanese Army completes its conquest, when scarce transportation resources required others to be left behind.²⁸⁸ Indeed, in order to provide greater safety for B-29 bomber crews, nearly 6,000 Marines and about 900 sailors lost their lives to capture Iwo Jima.²⁸⁹

But the power to decide that one person's life is socially more important than another's is forbidden to private individuals. None of the writers who think Bloggs should throw the switch seems prepared to countenance even the suggestion that private persons can decide that one person's life is more valuable than another's.²⁹⁰ Admittedly there is at least one nineteenth-century decision, *Harrison v. Wisdom*,²⁹¹ allowing private persons to claim the defense of public necessity, but that was a case in which government had collapsed. After the withdrawal of Confederate forces and on the eve of the arrival of the Union Army in Clarksville, Tennessee, private citizens destroyed merchants' stocks of whiskey and other liquors.²⁹² The court reasoned that the advance of a hostile army is "among the exigencies when such a necessity might exist to justify the destruction of private property."²⁹³ Bloggs, however, has no basis for a claim of public necessity.

288. See W.L. WHITE, *THEY WERE EXPENDABLE* 203-04 (1942).

289. See NATHAN MILLER, *WAR AT SEA* 507-16 (1995). There were in addition about 25,000 wounded. See GERHARD L. WEINBERG, *A WORLD AT ARMS* 868 (1994). About 2400 bombers made emergency landings on Iwo Jima which means, if each bomber had a crew of 10, that perhaps as many as 24,000 bomber crewmen benefited from the availability of Iwo Jima. See *id.* at 869; MILLER, *supra*, at 516. A realistic estimate of the tradeoff in casualties is not that simple since, if Iwo Jima were not available, some of the planes undoubtedly might have made it back to their bases in the Marianas. Many more would have taken advantage of the elaborate air-sea rescue schemes that had been established, see WEINBERG, *supra*, at 869, including the stationing of submarines at fixed points known to the air crews. There is even some legal authority expressly recognizing the extensive authority of governmental officials to decide who shall live and who shall die. In *Chandler v. Director of Pub. Prosecutions*, 1964 App. Cas. 763 (1962), the court refused to allow nuclear disarmament demonstrators, who had been prosecuted for attempting to enter a Royal Air Force air station that was being used by nuclear-armed United States aircraft, to argue that Great Britain (and the world) would be safer if such aircraft were prevented from taking off. See *id.* at 774-76.

290. But cf. Alexander, *supra* note 206, at 62 (arguing that certain factors, such as the "relative ages of the parties," if generalizable on an ex ante basis, might be relevant).

291. 54 Tenn. (7 Heisk.) 99 (1872).

292. See *id.* at 100. The citizens feared that a large supply of liquor "would imperil the lives and property of the inhabitants if it should fall into the hands of the Federal soldiery." *Id.*

293. *Id.* at 116.

The second example given in the official commentary to the *Code* involves a mountain climber who falls over a precipice and who will drag his companion, to whom he is roped, with him.²⁹⁴ According to the commentary, the companion “who holds on as long as possible but eventually cuts the rope, must certainly be granted the defense that he accelerated one death slightly but avoided the only alternative, the certain death of both.”²⁹⁵ This hypothetical is also vastly different from the trolley problem. It is more like a case of self-defense. Indeed, it is one of the few situations where one can imagine people agreeing in advance: “If I slip and am about to drag you with me to certain death, cut the rope to keep me from killing you.” This is certainly not a case in which a person, who would otherwise not be killed, is killed in order to save others. If nothing is done, both climbers will be killed, including the climber who could have been cut loose.²⁹⁶

The commentary to the *Model Penal Code* claims that a broad reading of the defense is justified because “the principle of necessity is one of general validity . . . [and] is widely accepted in the law of torts.”²⁹⁷ In support of this proposition, the 1985 revised commentary to the *Code* cites two provisions from the *Restatement (Second)*, sections 197 and 262.²⁹⁸ The first deals with the privilege to enter the land

294. See TENTATIVE CODE, *supra* note 286, § 3.02 cmt. 3; OFFICIAL MODEL CODE, *supra* note 273, § 3.02 cmt. 3.

295. TENTATIVE CODE, *supra* note 286, § 3.02 cmt. 3; OFFICIAL MODEL CODE, *supra* note 273, § 3.02 cmt. 3.

296. In a sense, one might say that it is the situation rather than a human agency that has chosen the victim. But would it be too great an extension of this principle to reach the choice-by-lot case on the ground that it is the outcome of a lottery, i.e., the impersonal operation of chance, that has chosen the person to be sacrificed? If the principle can be extended to cover choice by lot, would it be too great a further extension to argue that it is chance circumstance that has chosen the victim in the trolley case? As I suggested in the text, I prefer to treat the mountain climber case as one of self-defense. One certainly has a right to keep another from pulling one over a cliff.

297. OFFICIAL MODEL CODE, *supra* note 273, § 3.02 cmt. 3.

298. See OFFICIAL MODEL CODE, *supra* note 273, § 3.02 cmt. 3 n.11 (citing RESTATEMENT (SECOND), *supra* note 25, §§ 197, 262). Curiously, the privilege to destroy chattels in cases of private necessity, see RESTATEMENT (SECOND), *supra* note 25, § 263, which was discussed at length in the first part of this Article, is not cited in the *Official Model Code*. The *Tentative Code* cites several additional sections of the *Restatement*, including section 263. See TENTATIVE CODE, *supra* note 286, § 3.02 cmt. 3. Other than sections 197, 262 and 263, the *Restatement* provisions cited in the *Tentative Code* were dropped from the *Restatement (Second)* and their substance was folded into sections 262, 263, and several other provisions not germane to the issues we are now discussing.

of another,²⁹⁹ which we have discussed at length throughout Part I, and the second deals with trespass to chattels in cases of public necessity.³⁰⁰ Neither section has any relevance whatsoever to cases of intentional homicide. Similar questions also arise in cases of duress; namely, whether the defense of duress is available to those accused of intentional killing or rape. The *Model Penal Code* is at least consistent in allowing for the possibility that it is.³⁰¹ The vast majority of states, however, follows the common law and categorically rejects the availability of the defense of duress for those crimes.³⁰²

Only a few legal scholars have commented on the provisions of the *Model Penal Code* that we have been discussing. LaFave and Scott, in their 1972 treatise on criminal law, seem somewhat ambiguously to support the *Model Penal Code*.³⁰³ Their second edition, published in 1986, has a more extended discussion and is more unambiguous in its support for the position espoused by the *Model Penal Code*.³⁰⁴ Sanford Kadish also supports the *Model Penal Code's* approach, somewhat tepidly, but does not go into the matter at any great length.³⁰⁵ None of these commentaries considers the difficult moral and practical problems that would arise were these provisions seriously applied. It is my contention that, if they had, they might have been less certain of their conclusions. We shall consider these

299. See RESTATEMENT (SECOND), *supra* note 25, § 197.

300. See *id.* § 262; see also *supra* note 122 (discussing section 262 and cases involving public necessity).

301. See OFFICIAL MODEL CODE, *supra* note 273, § 2.09. Indeed, section 2.09(4) specifically declares that the defense of necessity and the defense of duress may both be available in some cases. See *id.* ("When the conduct of the actor would otherwise be justifiable under Section 3.02, this Section does not preclude such defense.").

302. See LAFAVE & SCOTT, *supra* note 165, § 5.3, at 434-35 ("[T]he case law . . . has generally held that . . . duress cannot justify the intentional killing of (or attempt to kill) an innocent third person.").

303. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW § 50, at 383-84 (1st ed. 1972) (listing situations where the defense of necessity applies, but also discussing reasons for rejecting the defense). For interesting discussions of the criminal law on the subjects with which we are concerned, with less emphasis on the *Model Penal Code*, see ROLLIN M. PERKINS & RONALD M. BOYCE, CRIMINAL LAW 1054-74 (3d ed. 1982); 1 WHARTON'S CRIMINAL LAW § 90, at 614-28 (Charles E. Torcia, ed., 15th ed. 1993).

304. See LAFAVE & SCOTT, *supra* note 165, § 5.4, at 442 & n.6 ("[M]ost but not all of the modern recodifications (following the *Model Penal Code* in this respect) contain a broader choice-of-evils defense . . . This is as it should be.") (footnote omitted).

305. See SANFORD H. KADISH, BLAME AND PUNISHMENT, 93-95, 238 (1987). Glanville Williams, who wrote before the final version of the *Model Penal Code* was adopted, also supports its position. See GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART, § 237, at 737-45 (2d ed. 1961) (discussing cases in which necessity might be a defense to homicide).

problems in due course. Before doing so, however, we shall explore what insights might be obtained from international law, a source that neither the drafters of the *Model Penal Code* nor the commentators to whom reference has just been made saw fit to consider.

D. Insights from International Law Sources

The question has been raised whether it is permissible to torture a known terrorist in order to obtain the location of a bomb that will kill a large number of innocent people.³⁰⁶ This case is unlike the hostage situation discussed earlier because we can easily imagine that the person being tortured to obtain the information that will save scores of innocent people is indeed a guilty party; possibly even the originator of the terrorist plot. Indeed, let us assume that he has admitted planting the bomb and is even taunting his captors. He is certainly not innocent, as is the person whom a tyrant or terrorist insists we kill or torture in return for the release of hostages in the types of scenario considered by Foot and Thomson. Yet there is an international convention, to which the United Kingdom and the United States are parties, that absolutely prohibits the use of torture and which specifically states that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”³⁰⁷ The convention further obliges signatory states to insure that

306. The Israeli security service has apparently sought to use torture in these circumstances and indeed has, in the past, actually been accused of using some forms of what many would consider torture. See Barton Gellman, *Israeli First: Word ‘Torture’ Is Spoken; Attorney General Condemns Shaking of Arab Prisoners in Interrogation*, WASH. POST, Oct. 21, 1995, at A17. The question was subsequently considered by the Israeli Supreme Court. Accepting for the moment a civil rights lawyer’s allegation that what the security services were engaged in was torture, that court is reported as having refused to uphold an injunction that had been issued by a lower court. See *id.* One of the judges described as “immoral” the position that a person could not be tortured when the lives of a thousand people could thereby be saved. See Serge Schmemmann, *Israel Allows Use of Physical Force in Arab’s Interrogation*, N.Y. TIMES, Nov. 16, 1996, § 1, at 8.

307. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. GAOR, 39th Sess., Supp. No. 51, art. 2(2), at 197, U.N. Doc. A/RES/39/46 (1984) [hereinafter *Torture Convention*]. Torture is defined therein in Article 1 and includes inflicting severe pain or suffering, whether physical or mental, for purposes of obtaining information or of punishment, other than the pain or suffering incidental to lawful sanctions. See *id.*, art. 1; see also *Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict: Protocols I and II Additional to the Geneva Conventions*, June 8, 1977, 16 I.L.M. 1391 [hereinafter *Protocol I and Protocol II*]. Protocol I, which relates to the treatment of civilians and combatants in time of war, categorically forbids,

“all acts of torture” and all attempts to commit torture shall be made criminal offenses.³⁰⁸ The convention dates from 1984 but no one pretends that the convention made “new law.” Indeed, the 1984 convention repeats in greater detail the general proscriptions of Article 7 of the 1966 International Covenant on Civil and Political Rights,³⁰⁹ to which the United Kingdom is a party and the United States is a signatory.³¹⁰ Are we to conclude then that the life and physical integrity of a terrorist receives greater protection under the law, even if the result is that scores of innocents will die, than the life of an innocent workman whose life may be sacrificed to save a greater number of other innocents?

The relevance of international law is not confined to the torture situation. Article 6 of the Covenant declares that “[e]very human being has the inherent right to life [which] shall be protected by law,” and further provides that “[n]o one shall be arbitrarily deprived of his life.”³¹¹ It then provides for certain limitations on the imposition of the death penalty in those states that have not already abolished it.³¹² Finally, the Covenant expressly declares that no “public emergency which threatens the life of the nation” can justify a “derogation” from Article 6.³¹³ It is hard to maintain that these provisions leave open the possibility that the killing of an innocent person to save a larger number of innocent lives may be legally authorized. Certainly, the parties to the 1950 European Convention for Protection of Hu-

inter alia, any “physical mutilations” of civilians or combatants. Protocol I, *supra*, art. 11, 16 I.L.M. at 1400. Protocol II, which applies to all armed conflicts not covered either by the Geneva Conventions of 1949 or Protocol I, states categorically that it is impermissible to do violence to the “life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment” to all persons who either do not take a direct part or “who have ceased to take part in hostilities.” Protocol II, *supra*, art. 4, 16 I.L.M. at 1444. The United States and the United Kingdom are both signatories to these protocols, *see* BOWMAN & HARRIS, *supra* note 76, at 419, and while the United States has never formally ratified the protocols, *see* Letter from President Ronald Reagan to the United States Senate (Jan. 29, 1987), *reprinted in* 81 AM. J. INT’L L. 910 (1987), Executive Branch officials have recognized Protocol I as an authoritative codification of customary practices between nations, *see United States Department of Defense Report to Congress on the Conduct of the Persian Gulf War—Appendix on the Role of the Law of War*, 31 I.L.M. 612, 617, 624-25, 631-32 (1992).

308. *See* Torture Convention, *supra* note 307, at art. 4 (1).

309. International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 7, 6 I.L.M. 368, 370 [hereinafter ICCPR].

310. *See* BOWMAN & HARRIS, *supra* note 76, at 304.

311. ICCPR, *supra* note 309, art. 6(1), 6 I.L.M. at 370.

312. *See id.*, art. 6(2), 6 I.L.M. at 370.

313. *Id.*, art. 4, 6 I.L.M. at 369-70.

man Rights and Fundamental Freedoms,³¹⁴ to which the United Kingdom is a party,³¹⁵ did not think so. Article 2 of that convention declares: "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."³¹⁶ The only exceptions are deprivations of life resulting "from the use of force which is no more than is absolutely necessary" in defense of a person threatened with unlawful violence, or to effect a lawful arrest to prevent the escape of persons lawfully detained, or for actions lawfully taken to quell a riot or insurrection.³¹⁷ The existence of war or other public emergency is expressly declared to permit "[n]o derogation" from the right to life "except in respect of deaths resulting from lawful acts of war."³¹⁸ In the face of these provisions of international law, it would be hard to maintain, particularly in a nation that is a member of the European Community, that generally-worded national provisions on the lesser evil defense in fact authorize the killing of innocents to save the lives of a greater number of innocents.³¹⁹

314. European Convention for Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 5 Europ. T.S. 3 [hereinafter Human Rights Convention].

315. See BOWMAN & HARRIS, *supra* note 76, at 163.

316. Human Rights Convention, *supra* note 314, art. 2(1), 5 Europ. T.S. at 6.

317. *Id.*, art. 2(2), 5 Europ. T.S. at 6 & 8.

318. *Id.*, art. 15(2), at 14.

319. The text of the relevant provisions of French and German law are not particularly helpful. Article 122-7 of the French *nouveau code pénal* provides that a person who, in the face of a danger to himself or another, performs an act necessary to safeguard the personal safety of himself or of another is not subject to criminal punishment unless there is a disproportion between the means employed and the gravity of the threatened danger. See C. PÉN. art. 122-7 (Fr.) (author's translation). The comments to the code in the Dalloz edition of 1997-98 indicate that the interest sacrificed must be of inferior value to the interest that is saved. See C. PÉN. art. 122-7 (95th ed. Petits Codes Dalloz 1997-98) (Fr.). The only discussion that is at all germane to the possibility of having to sacrifice the safety of one individual to save another concerns the abortion of a fetus to safeguard the life or health of a pregnant woman. See *id.* It would hardly seem plausible to interpret this provision to authorize one to kill an innocent person who poses no threat to oneself in order to save one's own life. To use this provision to justify the killing of one innocent in order to save the lives of a greater number of innocent persons would require a finding that the lives of five innocent people are of greater value than the life of one innocent person. This presumably is what Foot and Thomson believe, at least in the trolley situation, although not in the tyrant or organ transplant situations. I am skeptical as to whether the French *nouveau code pénal* would be so construed. Section 34 of the Penal Code of the Federal Republic of Germany declares that someone who commits an act to avoid "an imminent and otherwise unavoidable danger" to himself or another does not act unlawfully if, taking into account all the conflicting interests, the interest protected "significantly outweighs the interest which he harms." Section 34 StGB, *translated in* THE PENAL CODE OF THE FEDERAL

E. The Legal and Moral Implications of Recognizing a Privilege to Intentionally Kill One to Save Many

We are, of course, concerned not only with the legality of killing an innocent human being in order to save the lives of a greater number of other human beings, but also with the morality of doing so. We have seen that there is almost no support, even in the modern cases, for the proposition that the intentional killing of an innocent person in such circumstances is legally justifiable; if anything, they seem to reaffirm the contrary position.³²⁰ It is thus hard to argue that the moral appropriateness of such conduct is supported by actual legal practice. Indeed, the relevant provisions of international law, which are clearly premised on the drafters' understanding of moral principles, strongly suggest the moral inappropriateness of such conduct.

1. *The Legal Implications of the Supposed Privilege.* Let us, however, review the problem from another direction. How could the purported legal recognition of a privilege to take the life of an innocent person be integrated within the body of the law? I would submit that, by focusing on the complexity of the factual and legal issues that necessarily would arise were we to recognize such a privilege, we shall be better able to ascertain whether we really are prepared to accept Thomson and Foot's suggestion that, whatever the legality of such conduct might be, it is nevertheless morally preferable, or at the very least morally permissible,³²¹ for a person in Bloggs's situation to throw the switch.

To see why the trolley problem is not so simple, let us assume, with Thomson, that all the workmen are helpless.³²² Let us just make one change which certainly does not change the moral dimensions of the problem. The single workman, although incapable of getting off the track and therefore inevitably subject to being killed if the trolley is shunted off in his direction, nevertheless has a free hand in which

REPUBLIC OF GERMANY 59 (Joseph J. Darby trans., 1987). This general statement merely begs the question at the core of our discussion: Does the interest in saving five innocent lives outweigh the interest in preserving an innocent person from the deliberate taking of his life? In discussing this question, Fletcher maintains that German law would not permit the taking of innocent life to save the lives of a greater number of innocents. See FLETCHER, *supra* note 26, §§ 10.2-10.2.2, at 774-88.

320. See *supra* Part II.C.1.

321. See *supra* note 219 and accompanying text. Recall, however, that Thomson does not believe that Bloggs is required to throw the switch. See *supra* note 220 and accompanying text.

322. See THOMSON, RIGHTS, RESTITUTION, AND RISK, *supra* note 9, at 190, 317.

he grasps a revolver. May he shoot Bloggs if Bloggs attempts to throw the switch? It would certainly seem that legally he may, although the *Model Penal Code* fails to consider anything resembling this possible scenario in its discussion of the defense of necessity. As the *Model Penal Code* and the *Restatement (Second)* both recognize, every person not in the process of committing a tort or a crime is entitled to use deadly force if that person reasonably believes it necessary to do so to protect himself from imminent danger of death or serious bodily injury.³²³ And, under modern law, as these sources recognize, not only may an innocent person do so to protect himself from death or bodily injury, but so may a bystander who reasonably believes that it is necessary to do so to save another from death or serious bodily injury.³²⁴

323. See OFFICIAL MODEL CODE, *supra* note 273, § 3.04(2)(b) (“The use of deadly force is not justifiable . . . unless the actor believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat”); PROPOSED MODEL CODE, *supra* note 274, § 3.04(2)(b) (same); RESTATEMENT (SECOND), *supra* note 25, § 65(1):

[A]n actor is privileged to defend himself against another by force intended or likely to cause death or serious bodily harm, when he reasonably believes that (a) the other is about to inflict upon him an intentional contact or other bodily harm, and that (b) he is thereby put in peril of death or serious bodily harm or ravishment, which can safely be prevented only by the immediate use of such force.

See also RESTATEMENT, *supra* note 25, § 65(1):

[I]ntentional infliction upon another of a harmful or offensive contact or other bodily harm by a means which is intended or likely to cause death or serious bodily harm is privileged only when,

(a) the other so acts as to lead the actor reasonably to believe that he intends to inflict upon the actor a bodily contact or other bodily harm, and

(b) the actor reasonably believes that he is thereby put in peril of death or serious bodily harm or ravishment which can be safely prevented only by immediate use of such self-defensive means.

324. See OFFICIAL MODEL CODE, *supra* note 273, § 3.05; PROPOSED MODEL CODE, *supra* note 274, § 3.05; RESTATEMENT (SECOND), *supra* note 25, § 76:

The actor is privileged to defend a third person from a harmful or offensive contact or other invasion of his interests of personality under the same conditions and by the same means as those under and by which he is privileged to defend himself if the actor correctly or reasonably believes that

(a) the circumstances are such as to give the third person a privilege of self-defense, and

(b) his intervention is necessary for the protection of the third person.

Unlike the *Restatement (Second)*,³²⁵ and the *New York Penal Law*,³²⁶ however, the *Model Penal Code* explicitly states that the privilege to use force in self-defense only arises when one reasonably believes he is defending himself or another "against the use of unlawful force."³²⁷ This suggests that the workman whom Bloggs is about to kill by throwing the switch cannot defend himself because Bloggs is not acting unlawfully. Indeed, Glanville Williams, who seems to be one of the very few people to advert to this possible situation, actually states that a person chosen by lot to be thrown out of a lifeboat is "under a duty not to resist," but concludes that "this question is too theoretical to be worth discussing."³²⁸ Presumably Williams would reach the same conclusion if the workmen had entered into Thomson's pre-employment agreement.³²⁹ But if the choice of the lesser evil is a defense to a charge of intentional homicide, why should a prior agreement be necessary? The *Model Penal Code*, perhaps unwittingly, spares itself from the ludicrous conclusion that the workman cannot lawfully prevent Bloggs from killing him by stressing that it is not necessary that the actor actually be threatened by unlawful force. It is enough that he "believe that the circumstances create the necessity for using some protective force."³³⁰ This certainly would cover the lone workman.

In any event, it is not clear that Bloggs's conduct may be said to be lawful under the *Code*. He may be entitled to a defense of justification only in a criminal prosecution. As already noted, the *Model Penal Code* expressly declares that the invocation of the defense of necessity in a criminal prosecution does not insulate Bloggs from tort liability.³³¹ Is this a grotesque illustration of the argument of Thomson and others that a person's rights (e.g., the right to life of the innocent person who has been killed) may be infringed although that person's rights have not been violated?

As we have seen, under modern law, one can use force, even deadly force, not only to defend oneself, but also to defend others when one reasonably believes them to be threatened with death or

325. See RESTATEMENT (SECOND), *supra* note 25, § 65.

326. See N.Y. PENAL LAW §§ 35.10, 35.15 (McKinney 1998).

327. OFFICIAL MODEL CODE, *supra* note 273, § 3.04(1); PROPOSED MODEL CODE, *supra* note 274, § 3.04(1).

328. WILLIAMS, *supra* note 305, § 238, at 745.

329. See THOMSON, REALM OF RIGHTS, *supra* note 18, at 181-87.

330. OFFICIAL MODEL CODE, *supra* note 273, § 3.04 cmt. 2.

331. See *id.* § 3.01(2); PROPOSED MODEL CODE, *supra* note 274, § 3.01(2).

serious bodily injury by unlawful force.³³² So, to leave the example exactly as Thomson has presented it,³³³ if the single workman is completely immobile but his wife sees Bloggs about to throw the switch, can she shoot Bloggs to keep him from killing her husband? From the legal point of view, it would seem that she can, and indeed, since the person at risk is her husband, it is more than arguable that she is legally *obligated* to try to stop Bloggs from harming her husband if she can do so without serious risk to herself.³³⁴ Could Bloggs, now in self-defense, shoot the workman's wife? That hardly seems plausible from the legal point of view, nor could the workmen on the other track or their wives shoot to prevent the single workman or his wife from disabling Bloggs from throwing the switch. If they could, they or their wives should be able to threaten to shoot and kill Bloggs if he did not throw the switch, a conclusion from which I am certain Foot and Thomson and possibly even Williams would shrink.

Admittedly there is at least one possible scenario in modern law in which each of two people might be justified in killing the other because each believes that it is necessary to resort to deadly force when in point of fact there is no such necessity. In one well-known hypothetical, an armed policeman encounters two actors rehearsing an armed robbery scene³³⁵ or, to make the situation more compelling, an assassination scene. The officer believes he must shoot to prevent a serious crime. At least in the situation in which the actors could not have reasonably anticipated the sudden appearance of a third party,³³⁶ since they are being threatened with death or serious bodily injury, they in turn could use deadly force to defend themselves. This scenario, however, is very different from ours. In the situation just presented, the policeman and the actors each reasonably believe in a different state of affairs, though one of the parties is mistaken. In all the

332. See *supra* notes 323-24 and accompanying text.

333. See THOMSON, REALM OF RIGHTS, *supra* note 18, at 176.

334. See RESTATEMENT (SECOND), *supra* note 25, § 314A cmt. b (noting that such a duty between spouses is recognized in the criminal law, although there had not as yet been any civil cases on the subject in those states that had abolished inter-spousal immunity).

335. See, e.g., RESTATEMENT (SECOND), *supra* note 25, § 76, cmt. d, illus. 3; George P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 971-76 (1985) [hereinafter Fletcher, *The Right*]; Kent Greenawalt, *The Perplexing Borders Between Justification and Excuse*, 84 COLUM. L. REV. 1897, 1918-27 (1984).

336. See RESTATEMENT (SECOND), *supra* note 25, § 72 ("The actor is not privileged to defend himself against any force or confinement which the other is privileged for any purpose to inflict upon the actor except where the other's privilege is based upon a reasonable mistake of fact not caused by the fault of the actor.").

variants of the trolley situation that we have been considering, all the parties have the same view of the facts and their view is the correct one.³³⁷

But have I not failed to appreciate the force of the distinction between justification and excuse?³³⁸ For someone who accepted the relevance of this distinction, Bloggs would be *justified* in throwing the switch and shunting the train off onto the other track where it will kill the lone workman, and because Bloggs would be justified, he could use force to prevent others from interfering with his exercise of his privilege to throw the switch. The lone workman (and presumably also his wife) would not be justified in shooting Bloggs to prevent him from throwing the switch, but might be acquitted because his or her conduct would be *excused*.³³⁹

Assuming arguendo that both should be acquitted—I of course do not believe that Bloggs should be acquitted—I would nevertheless ask in response, what is the legal difference here between justifica-

337. I earlier raised the possibility that an advocate for the *Model Penal Code's* position might try to square the workman's privilege to defend himself against Bloggs's exercise of the privilege granted him under section 3.02 of the *Model Penal Code* by making an argument that analogizes Bloggs's situation to that of the policeman and the actors. See *supra* text following note 323. I do not think that is the best way to characterize the trolley situation, even under the *Model Penal Code*.

338. The significance of the distinction between justification and excuse is an enormously difficult subject, a full discussion of which is beyond the scope of this Article. For those who wish to pursue the matter at greater length, compare Fletcher, *The Right*, *supra* note 335, with Greenawalt, *supra* note 335. Fletcher contends that, although both the policeman and the actors in the hypothetical case presented in the text at note 335, *supra*, would escape liability for shooting the other, only the actors would actually be justified. See Fletcher, *The Right*, *supra* note 335, at 971-76. The third party, since he acts under a mistaken although reasonable belief, would only be excused. See *id.* I agree with Greenawalt that there is no reason why both parties might not be justified and that the law's recognition of this is not irrational. See Greenawalt, *supra* note 335, at 1918-27. Fletcher's point is to some extent based on the logical feature that conduct is only morally justified if it is morally right and since (he assumes) there is only one morally right conclusion in the circumstances presented, there is only one justified action. I fail to follow this argument. One could either accept Fletcher's premise, but assert that the right thing to do is situation-dependent, in which case the situation of the two sets of parties is not the same, or reject Fletcher's equation of justification and right as contrary to common usage. We all understand the concept of a justified belief and we all accept that justified beliefs are not necessarily true. Why then must a justified action be more than action that a rational person would consider the appropriate thing to do given the facts reasonably believed by him to be true? Fletcher's work is also criticized in Ernest J. Weinrib, *Law as a Kantian Idea of Reason*, 87 COLUM. L. REV. 472, 475 n.10 (1987). On the general subject, see also FLETCHER, *supra* note 26.

339. None of the examples given by the authors cited *supra* note 338, consider the possibility of a mistaken belief that it is actually necessary to kill one person in order to save a greater number of persons.

tion and excuse? One might assert that, since Bloggs would have been justified in doing what he did, he or his survivors could bring a tort action against the lone workman or his estate whereas the lone workman whose conduct would be merely excused could not bring such an action against Bloggs or Bloggs's estate. But the *Model Penal Code* expressly declares that someone who destroys life or property to avoid a greater evil secures immunity only from criminal prosecution, not from civil liability.³⁴⁰ For the justification/excuse distinction to have any legal application in this situation, one would have to assert that a private person who kills another person to save the life of a greater number of people has no liability in tort. I have never heard of a case so holding, and such a conclusion should be an anathema to Coleman and Feinberg, who maintain that one must always compensate for intentional destruction of property even if lives are thereby saved. If any of the parties would be free from tort liability, it would be the lone workman. I cannot conceive of any American court holding an innocent person liable in tort for shooting another person to prevent that other person from killing him.³⁴¹

For the distinction between excuses and justifications to be at all helpful in the situations we are discussing, one must be prepared to assert that, if he were prosecuted, Bloggs should be acquitted because he was *justified*, but, if the lone workman were prosecuted, he should be convicted of a lesser offense since his conduct was merely *excused*. To the best of my knowledge, however, no one has asserted that the lone workman, in the situation which we have been discussing, would be subject to criminal prosecution of any kind for attempting to defend himself.

2. *The Moral Implications of the Supposed Privilege.* If the chaotic situation that would arise from granting Bloggs a legal privilege

340. See OFFICIAL MODEL CODE, *supra* note 273, § 3.01(2); PROPOSED MODEL CODE, *supra* note 274, § 3.01(2).

341. Were someone to attempt to argue the proposition that the workman was liable in tort, one could imagine a judge responding as did Lord Justice Scrutton to the argument that it was not defamatory to assert falsely that a member of the former Russian royal family had been raped by Rasputin:

That argument was solemnly presented to the jury, and I only wish the jury could have expressed, and that we could know, what they thought of it, because it seems to me to be one of the most legal arguments that were ever addressed to, I will not say a business body, but a sensible body. . . . I really have no language to express my opinion of that argument

Youssouppoff v. Metro-Goldwyn-Mayer Pictures, Ltd., 50 T.L.R. 581, 584 (C.A. 1934).

to throw the switch makes one understand why there is almost no legal authority supporting such a privilege, what conclusions ought we draw as to the morality of Bloggs's throwing the switch? Thomson, it will be recalled, concludes that Bloggs's throwing the switch is morally permissible, but not morally required.³⁴² Would Thomson be prepared to assert that the single workman on the spur is morally obliged to let Bloggs kill him or that the workman's wife is morally obliged not to come to her husband's rescue?³⁴³ Or, by saying that Bloggs's throwing the switch is morally permissible, is she merely saying that in this situation morality boils down to the survival of the strongest or the luckiest or the least sentimental?

But surely if enough lives are at stake does it not makes sense to sacrifice one or a few to save a larger number of lives? Consider a school bus driver carrying forty children, faced with failing brakes and the choice between going over a cliff or of turning into two old people chatting by the side of the road at the edge of a field into which the driver is attempting to guide the bus. Of course, in real life, the driver is unlikely to have time to think and would most likely turn the wheel instinctively, so that even if the two old people are killed it would be incorrect to say that they were *intentionally* killed to save the larger number of school children on the bus. But, since it is certainly possible that such a bus driver would have time to reflect—it is indeed probably more plausible than many of the scenarios involving Bloggs and the trolley—let us consider it. Assuming that the bus driver is legally and morally privileged to kill the two old people by the side of the road, would one feel the same way if in fact the people on the bus were convicted rapists and child abusers being transported to a high security prison and the two people by the side of road were children playing? The *Model Penal Code* is categorical in declaring that all lives are equal,³⁴⁴ and of course one of the reasons that we cannot kill a derelict in order to provide organs for transplantation

342. See THOMSON, REALM OF RIGHTS, *supra* note 18, at 196; see also *supra* note 220 and accompanying text (discussing Thomson's position).

343. If she did shoot Bloggs, would the supposed legal distinction between justification and excuse operate on the moral level so that we should say that, while she was not morally justified in shooting Bloggs, she was nonetheless morally excused? If "excused," as used here, means that she was blameless rather than not as blameworthy as she otherwise might be, the distinction between justification and excuse is even less helpful on the moral level than it is on the legal level.

344. See OFFICIAL MODEL CODE, *supra* note 273, § 3.02 cmt. 3 ("The life of every individual must be taken . . . to be of equal value . . ."). Neither Foot nor Thomson have given any indication that they dissent from this proposition.

into a gaggle of Nobel prize winners is that all lives are equal from a moral point of view as well. Indeed, if the greater number of lives to be saved were the determining factor, what difference would it make if the people whose lives are to be saved are responsible for their predicament, say forty teenagers who are joyriding in a school bus? Yet, in all the illustrative examples given by Thomson, who thinks that it may sometimes be morally permissible to take the life of an innocent person to save the lives of a greater number of other persons, it is assumed that the people whose lives are to be saved are themselves in no way responsible for their predicament.³⁴⁵

CONCLUSION

Whatever legal or moral privilege public authorities may have to decide who shall live and who shall die when they respond to natural disasters or in prosecuting a war, one is reluctant to grant this power to private citizens. The common law does sometimes permit private parties to assert the defense of public necessity; as for instance, to justify the destruction of private stores of liquor before an invading army enters a city or,³⁴⁶ presumably, in the example presented in the comments to the *Model Penal Code*,³⁴⁷ the destruction of a dike to save a city, although its destruction might lead to the inundation of a farm. None of the trolley examples we have been discussing, however, involve any kind of public necessity calling for a political decision in any generally accepted meaning of that term. Moreover, none of the litigated public necessity cases involves the intentional killing of specific, innocent people who were otherwise in no danger themselves.

In reaching my conclusions, I have accepted the assumption of people like Thomson and Foot that a person making a decision whether to kill one innocent person in order to save the lives of a greater number of other people is correct in his belief that it is necessary to kill the one to save the others. In the real world, however, people do make mistakes. From the perspective of law and practical morality, the privilege to kill innocent people to save a greater number of lives would have to include the privilege to kill innocent peo-

345. See, e.g., THOMSON, REALM OF RIGHTS, *supra* note 18, at 137, 180.

346. See *Harrison v. Wisdom*, 54 Tenn. 99, 116 (1872); see also *supra* note 291 (discussing *Harrison*).

347. See OFFICIAL MODEL CODE, *supra* note 273, § 3.02 cmt. 3.

ple on the reasonable but unfortunately mistaken belief that such action was absolutely necessary in order to save a greater number of lives.³⁴⁸ The fact that this makes us feel uncomfortable is another reason why I would submit that it is not permissible to intentionally kill an innocent person in order to save a larger number of other people.

Assuming, therefore, that there is a morally significant difference between action and inaction, and I agree with Thomson and Foot that there is, the proposition that it is permissible intentionally to kill an innocent person in order to save a larger number of other people is highly suspect. I have tried to show that such a proposition is without legal foundation and I have also tried to show why the proposition also lacks an adequate moral foundation. The proposition certainly seems to violate Kant's injunction that one must treat people as ends in themselves and never as means.³⁴⁹

348. The *Model Penal Code* makes what it calls the "[c]hoice of [e]vils" defense applicable to conduct "the actor *believes* to be necessary" to avoid a greater harm. OFFICIAL MODEL CODE, *supra* note 273, § 3.02(1); PROPOSED MODEL CODE, *supra* note 274, § 3.02(1) (emphasis added).

349. See IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 54 (Lewis White Beck trans., Bobbs-Merrill 1969) (1785) ("The practical imperative, therefore, is the following: Act so that you treat humanity, whether in your own person or in that of another, as an end and never as a means only."). In a later work, Kant discusses the classic case of two drowning men struggling for possession of a plank and concludes that even if legal sanctions are pointless in that situation, "there still cannot be any necessity that will make what is unjust legal." IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 42 (John Ladd trans., Bobbs-Merrill 1965) (1797).