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In this Article I examine the way in which Michael Moore in *Act and Crime*¹ distinguishes between action and omission, and his reasons for thinking that negative duties are more stringent than positive duties. In Part I, I begin by summarizing points of his argument, including his description of views alternative to his own. I then describe my basic points of agreement and disagreement with Moore in Part II. Finally, in Part III I elaborate on some finer contentious points and on positions we both share. My discussion focuses on the first three chapters of Moore's book since these chapters discuss issues relevant to my concerns.²

I. MOORE ON ACTION/OMISSION AND THE STRINGENCY OF DUTIES

For Moore an act is a willed event, in particular a willed movement. An omission is a willed nonevent, hence a nonact of a particular sort, a nonmovement of a particular sort. In formulating this first thesis, Moore reviews and rejects at least four other ways of formulating the act/omission distinction: (1) a grammatical test; (2) a moral test, that is, if it is not wrong, it is an omission; (3) the Relativized Baseline Thesis, that is, an act is what makes the world worse than some baseline condition, and an omission only keeps or returns the world to this condition, where the baseline for different agents differs; and (4) a view (developed by Leo Katz)³ that a person's *act* is in question when an event would not have occurred if she had not existed, and a person's *omission* is in question if an event would have occurred even if she had not existed.⁴

Moore's second thesis is that negative duties require us not to

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¹ MICHAEL S. MOORE, *ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW* (1993).

² This Article also makes use of my own views published elsewhere. See generally 2 F.M. KAMM, *MORALITY, MORTALITY: RIGHTS, DUTIES, AND VALUES* (forthcoming 1994); F.M. Kamm, *Non-consequentialism, the Person as an End-in-Itself, and the Significance of Status*, 21 PHIL. & PUB. AFF. 354 (1992) [hereinafter Kamm, *Non-consequentialism*]; Frances M. Kamm, *Harming, Not Aiding, and Positive Rights*, 15 PHIL. & PUB. AFF. 3 (1985); Frances M. Kamm, *Killing and Letting Die: Methodological and Substantive Issues*, 64 PAC. PHIL. Q. 297 (1983).

³ See LEO KATZ, *BAD ACTS AND GUILTY MINDS* 143 (1987).

⁴ See MOORE, *supra* note 1, at 24-31.

do acts which cause states of affairs to be worse, and positive duties require us not to omit acts that cause states of affairs to be better.⁵ One can only make the world worse by an act, for it alone can cause harm.⁶ An omission (of an act) which fails to make the world better therefore cannot cause harm.⁷ Moore argues that this thesis depends on an analysis of causation which, he says, is stronger than the necessary condition analysis of causation, for omission of an act (or what is done while omitting to do the act) can be a necessary condition for harm even if it cannot cause the harm.⁸

Moore's third thesis is that negative duties are more stringent than positive duties because not making the world worse is a more stringent duty than making it better.⁹ One piece of Moore's evidence of this difference in stringency can be referred to as a defeasibility test—it takes more to defeat the negative duty than the positive duty. For example, he says, I may leave off saving one baby to save two, but I may not pull away a rope saving one baby in order to save two ("The Dying Baby Cases").¹⁰ Two lives are enough to override saving one life, but not enough to justify killing one life.¹¹ A second piece of evidence is his intuitive sense, in cases originally presented by James Rachels,¹² that it is worse to kill someone maliciously than to maliciously refrain from the slight effort necessary to save a life.¹³

⁵ See *id.* at 25, 29, 54-59.

⁶ See *id.* at 54-59.

⁷ See *id.*

⁸ See *id.* at 30-31.

⁹ See *id.* at 25, 54, 58. Moore presents an adjunctive thesis to this one, which I do not quite understand. It concerns punishment: the liberty lost in interfering to punish omission of a positive duty is usually too great to merit the punishment, but the liberty lost in interfering to punish performance of an act that violates a negative duty is usually so small that punishment is merited. There are exceptions, however: the liberty lost if abortion is illegal is too great to merit punishing the violation of a negative duty (in killing a fetus). I do not understand the view about lesser and greater liberties, and it seems to me that even if the fetus is a person, killing it may well be a permissible form of terminating aid, rather than a violation of negative duty. But I will not pursue this matter here. See generally F.M. KAMM, CREATION AND ABORTION (1992) (considering whether or when abortion would be permissible even if the fetus were a person).

¹⁰ See MOORE, *supra* note 1, at 25.

¹¹ See *id.*

¹² See James Rachels, *Active and Passive Euthanasia*, 292 NEW ENG. J. MED. 78, 78-80 (1975).

¹³ See MOORE, *supra* note 1, at 58-59.

II. WHY NEGATIVE DUTIES ARE MORE STRINGENT THAN POSITIVE DUTIES

Basically, I agree with Moore's characterization of the act/omission distinction: that an act is a willed movement, an omission is a nonact of a particular sort, and that omissions do not cause events.¹⁴ I also agree that negative duties are more stringent than positive duties, at least when all factors besides act/omission are held constant (for example, where motive, intent, and effort are the same in a case involving a duty to avoid an act and in one involving a duty to perform an act). I believe it is even likely that negative duties are more stringent than positive duties when a good motive and noble intention accompany the failure to perform the negative duty and a bad motive and ignoble intention accompany the failure to perform the positive duty. For example, there is a more stringent duty (1) to avoid the act of intentionally rushing to the hospital to save five friends when one foresees that one will run over someone en route than (2) to perform the act of saving a life when one's only reason for not doing so is a desire, propelled by personal gain, to have the person die.

The negative duty to avoid acting is also more stringent than the positive duty to aid, in the sense that more effort could be required to perform the duty and more loss could be imposed for failure to perform. This is consistent with the fact that not performing a positive duty exhibits a worse character and is in some sense morally more objectionable than not performing the negative duty. This consistency implies that a difference in stringency is an indication of some moral difference besides moral objectionableness.

I disagree with Moore's proposed explanation of the moral significance of the negative-positive distinction. He says that negative duties are more stringent than the positive duties, and argues that it is because we have a stronger duty not to make the world worse than we have to make it better.¹⁵ But there are cases

¹⁴ The view that omissions are not causes is also, I believe, held by Warren Quinn, although Moore believes the contrary. See MOORE, *supra* note 1, at 30. Quinn did hold the view that *some* omissions, which are still not causes, have the same moral significance as acts. He grouped together under the category of positive agency acts and omissions accompanied by an intention that an event occur which would only occur if the omission took place. See Warren S. Quinn, *Actions, Intentions, and Consequences: The Doctrine of Doing and Allowing*, 98 PHIL. REV. 287-312 (1989). I have previously discussed Quinn's views and criticized his assimilation of these two categories. See Kamm, *Non-consequentialism*, *supra* note 2, at 367-68.

¹⁵ See MOORE, *supra* note 1, at 25.

in which a negative duty is more stringent than a comparable positive duty, even though failing to perform the negative duty would make the world better. For example, I must not euthanize someone against her will even though death would be in her interest. Philippa Foot supports this view by saying that the duty of justice overrides the duty of charity.¹⁶

The negative duties are, I believe, less concerned with not making things worse than with not interfering with that to which others are entitled, and showing respect for a certain sort of inviolability of the person. In particular, the moral duties not to interfere with what someone else has independently of us is more stringent than the positive duty to provide someone with more than she would have independently of our aid. Note that the duty not to interfere with what the person has independently of you holds even if what she has is retained only via the help of others. This thesis—call it the Entitlement Thesis—emphasizes that relative to a particular person, you are entitled only to what you have independently of the other person, and she is entitled to the efforts which she could make on your behalf.

However, even the Entitlement Thesis seems not to go deep enough for purposes of explaining the distinction between negative and positive duties. Within the class of aiding behaviors which we compare with negative duties not to interfere, there are: (1) acts that we decide we have no duty to perform, (2) acts that we decide we have a duty to perform even without a contractual obligation, and (3) acts that we decide we have a duty to perform due to contractual obligations. The view of the world represented by the Entitlement Thesis may help explain why we decide certain acts fall into class (1): relative to some person, we are entitled to what we have independently of that person, and therefore she cannot claim it for use on her behalf. But the claim that negative duties are stricter than positive duties need not be merely the claim that there are no comparable positive duties. It may also be that the duties in categories (2) and (3) are not as stringent, even though the presence of a duty implies that we are not fully entitled relative to another to what we have independently of her, and may be subject to a claim for efforts on her behalf. Although we are not entitled to keep from her what we have independently of her, it may be that denying

¹⁶ See Philippa Foot, *Euthanasia*, 6 PHIL. & PUB. AFF. 85, 96-98 (1977).

her our efforts is less bad than interfering with what she has independently of us.

III. THE ENTITLEMENT THESIS AND TESTS FOR STRINGENCY OF DUTIES

These are the basic points of agreement and disagreement between Moore and myself. Now I shall proceed to embellish on these positions and explore the finer points of the issues involved.

A. *The Entitlement Thesis*

The Entitlement Thesis that I have proposed as a partial account for the distinction between negative and positive duties can help buttress the moral significance of the Relativized Baseline View which Moore criticizes as a way of drawing an act/omission distinction.¹⁷ I agree that the Relativized Baseline View is not necessary to drawing the act/omission distinction; nonetheless, in conjunction with the Entitlement Thesis, it can help explain (despite Moore's denials) why terminating life support is often more like letting die than it is like killing, even though terminating aid involves an act. The person who has begun aid and terminates it, like the person who refuses to begin it, deprives another only of what she would get via aid, not something she has independently of the person who will assist or terminate aid. But an intruder who terminates aid that someone else has begun kills a person who is independent of her; she deprives that person of more than she would provide. This difference accounts for why the baseline for a person terminating aid she is providing is the condition the person was in before she began aid, but the baseline for the intruder is how she finds a person when that person is already receiving aid. Furthermore, contrary to what Moore argues, the Relativized Baseline View need not imply that we can kill someone we have saved whenever we want. For example, if we cease aiding at t_1 but the person would have continued living until t_2 , then if we kill the person between t_1 and t_2 the person would lose time alive that we had not provided. She would lose more than we had provided and our relationship to her becomes that of any intruder.¹⁸

¹⁷ See *supra* note 4 and accompanying text.

¹⁸ Moore argues that if *A* interferes with *B* who was about to save *C*'s life, then *A* kills *C*. See MOORE, *supra* note 1, at 278 n.42. I agree. If *A* is already saving *C*'s life and *B* interferes to take away that defense against death, she also kills *C*.

My suggestion here is that there is a *nonmoral* criterion for determining when a termination of aid is a killing. That is, we do not call the termination of aid a killing merely because we think it violates a moral right. Essentially, removing a defense against a potential cause of death—whether the cause is one which had already threatened the person or is entirely new—is a *killing* if the person who dies was not dependent for the defense on the person who terminates it. If an agent terminates aid and by doing so allows a potential cause of death actually to kill someone, and it is aid that the agent herself was providing, then we have a *letting die*. This will be true even though it is an act rather than an omission that removes the aid. By contrast, when there is an original cause of death, for example, the agent stabs the person she is providing with life support, there is a killing, whether the person is dependent on or independent of the agent who kills.

We can have a letting die even when terminating aid is morally wrong. If an agent who has a duty to save a life starts aid and then stops, she has committed a letting die but is wrong to do so. Furthermore, in a letting die, the agent need not be exactly the same person as the one who began to provide the aid. Suppose one agent of a hospital plugs someone into a life support machine and another agent unplugs her on hospital orders. Further, imagine that the victim was originally threatened by kidney failure and will now die of a *new* infection she picks up once unplugged. (She does not die of the original threat from which the hospital was saving her.) The second agent should be seen as part of the entity (the hospital) that originally plugged the person into the machine. Therefore, the case is a letting die. If, on the other hand, the unplugging itself caused the person's heart to stop, the unplugging would constitute an original cause of death. The case would then be a killing to terminate aid. This killing, however, would have practically the same moral weight as the letting die by actively terminating aid. It should not be analogized to killing someone who is not dependent on the killer for lifesaving aid.

Is an agent who has a *right* to terminate lifesaving aid also a killer if she was in no way connected to the provision of aid? I believe she is, and that we then have a case of morally permissible killing. The agent may unplug the person and thereby allow the eventual cause of death to intercede, but that does not mean that she lets the person die rather than kills her.

Two further points are worth making. First, doing what is permissible certainly does not always turn a killing into a letting die.

Injecting the person I aid with a lethal poison, even when the victim loses only life she would have gotten from my aid may be permissible, but it is, I believe, a clear case of killing someone to end aid. Furthermore, even if in some cases our moral evaluation of an act—as rightful or not—affects our application of the label “killing” or “letting die,” this effect need not follow everywhere. As we have seen in cases presented above, there may still be cases in which a morally neutral criterion for distinguishing killing from letting die is used.

It may be helpful now to summarize. I have drawn attention to the contrast between actions that bring about *original causes* of death (for example, stabbings) and actions that *remove defenses* against death. I have also pointed to the moral relevance of a relation of dependence between victim and agent: a victim may be *dependent* upon the agent for life support or not so dependent (that is, *independent* relative to this agent). The notion of dependence is a causal notion. The view about a killing I am proposing is that the agent’s action is either (1) the original cause of death, whether the victim is dependent or independent of her, or (2) the removal of a defense from someone independent of her. The view I am proposing about letting die is that the agent’s action is (1) not the original cause of death, but may be (2) the removal of a defense from one dependent on her. The claim is that original cause killings of dependents, unlike original cause or removal of defense killings of people independent relative to the agent, have practically the same moral weight as cases of letting die.

We can also use the Entitlement Thesis to argue against Leo Katz’s suggestion that a person’s action is at issue if an event would not have occurred if the person had not lived, and an omission is at issue if an event would have occurred anyway had the person not lived.¹⁹ We may, of course, object to these criteria—for they are criteria for the action/omission restriction, and not really characterizations—on the grounds that some events are overdetermined, and an act could cause an event that would occur even in the absence of the act or the agent who did it. But there is another objection: Suppose *A* is about to save *B*’s life, and I happen on the scene and refuse to aid. Because I am a trendsetter, *A* changes her mind and lets *B* die. If I had not existed *B* would not have died, yet I did not

¹⁹ See *supra* note 3 and accompanying text.

kill her or cause her death since she loses only life she would have had via my aid, not independently of me.

B. *Tests for Inequivalence of Negative and Positive Duties*

The evidence that Moore presents for the thesis that negative duties are more stringent than positive duties is not as strong as it might be. First, while I have no objection to defeasibility tests in general, the particular case (of dying babies) that he uses may be problematic because cases in which we save two instead of one have a structure of *redirection* of efforts which save from a lesser to a greater number. If we want to test for the moral difference between act and omission, we should do so in cases that are held constant for all other factors. A case in which we kill one by pulling on her rope to save two is not a *redirection* type of case. Redirection cases involving negative duties occur when we take a threat which is facing two people and redirect it to one, and in such cases killing is in fact permissible. Therefore a redirection case will not show that negative duties are harder to defeat than positive duties. Furthermore, when we save two babies instead of one we are not defeating a positive duty to aid one; we are fulfilling the positive duty of aiding as many as we can, so it is not clear that the aiding case represents a defeasibility test case at all.

We can make Moore's point more clearly by arguing that the duty to not kill may require us to drive down a very dangerous road rather than over an easy one where we will run over someone, but the duty to aid a dying person may be defeated if we would have to go down a very dangerous road to rescue.

The second problem with defeasibility tests is one of insensitivity. They may pick up a difference between the moral significance of act and omission in general, but miss it in particular cases. For example, as Moore notes, some (like Quinn)²⁰ who think negative duties are more stringent than positive duties per se may think that in particular cases, negative and positive duties can be equally wrong (even if for different reasons).²¹

I believe that to see how these cases differ it is useful to develop other tests for inequivalence. Consider the following cases:

²⁰ See *supra* note 14.

²¹ Moore classifies me with this group. See MOORE, *supra* note 1, at 58-59. On the basis of my work that is already in print, this is not an unreasonable conclusion to draw. In fact, I agree with Moore that even Rachels's cases differ in wrongness. See *supra* note 12 and accompanying text.

Case B1 (Killing): I push a child underwater in a tub, thereby killing her, in order to collect her inheritance.

Case B2 (Letting die): A child slips in the bathtub. I could easily lift her out but do not, because I want to collect her inheritance.

Let us assume that these are properly equalized cases for all factors besides killing and letting die (for example, motive, effort, and intention). One way to deny that they support the thesis of the equivalence of killing and letting die is to argue that we evaluate them as equally bad, even though killing and letting die differ per se, because bad intention swamps differences in other factors. This is to argue that this one case represents a specific context that hides the true difference between killing and letting die per se. Let us put this argument to one side and consider whether we really do think these cases are equally objectionable. Rather than rely on our direct intuitions about *B1* and *B2*, consider a further test. Consider how much of a loss we would think ourselves justified in imposing on someone, or how great an effort we could require of her, if her suffering the loss at t_2 would help save the life of the child she tried to kill at t_1 in *B1* or failed to aid at t_1 in *B2*.

This test requires that the act not yet have succeeded in causing death and that the omission not yet have made further aid impossible. We also assume that if the loss is not imposed at t_2 , the child will die.²² I call this the Post-Efforts Test since what is involved is deciding on efforts to be made (or loss imposed) after someone has done something that is considered wrong (for example, attempting to let die or kill).

What answer shall we give to the question posed by the Post-Efforts Test? It would be right to require an agent (for example, in *B1*) who tried to kill to suffer a loss to save her victim equivalent to (or greater than) the loss she threatened to impose on her victim.

²² In response to my proposing this test, Raziel Abelson has commented in conversation on the problem of individuating omissions. Would we say that someone had done something wrong if she fails to aid at t_1 , but does aid at t_2 ? It is hard to tell whether the wrong omission for which someone must make up has occurred, or whether aid has just been put off. This difficulty can be overcome in at least two ways: (1) assume for purposes of argument that we know that the agent's delay was due to the intention never to aid, or (2) accept behavioral criteria for demonstrating no intention to aid, constructing the case so that someone went away from where she could be of assistance and must be brought back.

We could run the same test in a purely hypothetical fashion by assuming that the child had died. We then ask how much of an effort could permissibly be demanded of the killer and the nonsaver if only this would resurrect the child.

I believe it would not be right to require such high post-efforts of a person who let die (for example, in *B2*). So even cases like *B1* and *B2* which seem equally objectionable at first do not seem to merit equal post-efforts. One explanation for the difference in post-efforts is that killing and letting die differ in some morally relevant way. That is, if the killing and letting die in such cases are just as morally bad, should it not be permissible to prevent the consequences of one behavior by the same means it is permissible to prevent the consequences of the other, if the cases are properly equalized? I believe it is permissible (if necessary) to kill the person who pushes the baby into the water to achieve the good consequences of the baby's not drowning (even if not by preventing her act, for example, I shoot her, she topples into the water, and the baby pops out). But I do not think it is permissible for me to force the person in *B2*, who I am certain has omitted to aid and who would not otherwise aid, to aid the baby by shooting off her arm so that she reaches out with the other arm. Nor may I kill her so that she topples into the water and the baby pops out. Therefore, perhaps even in these cases, there is a morally relevant difference between the killing and letting die.

Philippa Foot has argued that letting die is contrary to charity but not to justice—that is, letting die is not a matter of violating rights.²³ By contrast, killing is a matter of violating rights (at least in cases like *B1*). This could account for the difference in what we are required to do by the Post-Efforts Test, if violating rights were morally subject to a different level of compensatory behavior than wrong acts that do not violate rights. Alternatively, suppose there were a positive *right* to aid in *B2*. Post-efforts for letting die might still be different from post-efforts for attempting to kill because violating positive rights counts for less than violating negative ones in equalized cases. This, in turn, would be true when killing, but not letting die, takes from someone a life she would have had independently of the agent.

Note again, however, that the moral difference may have nothing to do with what makes us feel outraged at the behavior; not all morally significant differences show up in this way. Consider another example: We may be more horrified at what is done in *B2* than at what is done when someone rushes five people to a hospital foreseeing that she will run over one person who is in the way. Yet

²³ See Foot, *supra* note 16, at 107-08.

we might permissibly impose greater post-efforts on someone in the second case than in the first if this would prevent permanent bad consequences.²⁴

It is useful to consider an interesting derivative of the Post-Efforts test. Suppose we know that John maliciously let Mary die, and that Jim maliciously killed Jane (in equalized cases). Knowing this, we then find out that Jim also maliciously let his victim die. For example, we originally thought that Jim fainted right after shooting Jane, but then find out we were wrong; he stood by and did not aid for malicious reasons.

Would we increase the post-efforts required of Jim or losses we imposed on him to make up for or prevent the consequence of what he did, once we find out he also let die? I think not. The efforts would be at their highest point already due to his act of killing. Indeed, if someone had a change of heart and tried to help the person he had endangered (that is, he did not intend to let die), I believe he would still have to make the maximum efforts to make things up to his victim (although we would think better of him than of the "unrepentant" person).

But suppose we found out that John, who we already knew had maliciously let Mary die, also maliciously caused Mary's death. Would not the post-efforts demandable of John go up? I believe they would. If so, it would be because the efforts morally demandable were not already at their maximum. A possible explanation of this contrast with the previous case is that negative duties are more stringent than positive duties.

After these additions to our knowledge, the cases involving Jim and John both present us with cases of someone who killed and let die. Yet, I believe, the order of discovery changes our decision about post-efforts. That is, letting die added to a known killing brings no change in post-efforts because killing already, by itself, calls forth maximum efforts. Killing added to a known letting die, however, increases the post-efforts, because letting die by itself does not call forth maximum post-efforts.

²⁴ We might also do more to prevent the driver's act—what I call a pre-effort—than to stop the other person from maliciously not aiding. This may be because the negative duties are more stringent than positive duties.

C. *Equalizing with Approximate Definitional Properties*

We have considered the use of the Post-Efforts Test for certain equalized killing and letting die cases in order to see if we could strengthen Moore's defense of the moral inequivalence of negative and positive duties. We can take this discussion in a new direction by applying the Post-Efforts Test to killing and letting die cases that have been equalized in a different way. We can equalize cases in a somewhat different way by exporting properties which approximate the definitional properties of killing into letting die cases. An example is an approximation to causation that does not turn the letting die case into one that also has a killing in it. For example, I tell someone to jump into the water when she would not otherwise have done so, foreseeing that she will drown. Then I do not aid her when she needs my help. Furthermore, we can add what is perhaps missing in standard letting die cases, namely, a clear right of the victim to receive aid. Such a case might involve my not aiding someone after I prompt her to go into the water by promising I will aid her, when I am a bodyguard specifically paid to aid. I believe the Post-Efforts Test says that efforts demandable are greater here than in standard letting die cases. This suggests that as cases gather more properties like those present in standard killings, letting die gets worse. Do they get worse than killings? I believe not.

At this point it is appropriate to introduce a transitivity argument against the claim that standard equalized cases involve a killing and a letting die that are morally equivalent. Suppose the Post-Efforts Test shows that a letting die case to which we add both an approximation to causation (or its cousin) and an explicit right to aid becomes morally worse than a standard letting die case. It does not, however, become worse than a standard equalized killing case. Does this not suggest that a standard case of letting die is not morally as bad as a standard case of killing? That is, if *A* is worse than *B*, and *A* is no worse than *C*, is it not a good bet that *C* will be worse than *B*?

In criticizing the Post-Efforts Test, some might claim that unequal post-efforts are not explained by the fact that letting die differs morally *per se* from killing. Rather, unequal post-efforts are explained by the fact that in all standard letting die cases the person who lets die necessarily has an accomplice. That is, when the person who lets die did not also perform the act which endangers the other person, someone or something (nature) must have caused the danger. When there are two "sources" of a person's death, it

might be claimed, post-efforts should be divided. Therefore, it is no wonder that the person who only lets die has lower efforts demandable of her post-omission. When the person who let die is also the one who killed, the post-efforts should increase. This is not because killing and letting die differ, but only because there is now one factor (one person) instead of two factors morally responsible for the death. In the standard killing case, either one person both causes death and lets die, or one person causes death and no one else lets die. There is then no one or thing with whom to share responsibility.

Furthermore, one might say, the person who lets die must do so *after* the operation of the cause which will kill. It is not that she does anything intrinsically different, only that she does it after, and that makes what she does count for less.

This two-part objection can be answered. Take the last part first: the fact that the nonaider's role comes after does not show that it is less bad *per se*. If killing and letting die were morally equivalent, then the same argument should apply to killing. That is, if two people were jointly involved in killing (so that each one's act is necessary but not sufficient to result in death), then the one who sticks her dagger in last should be less morally responsible for the death than the one who sticks her dagger in first. But this seems incorrect. In fact, one might argue in this killing case that the person last in line, the one who ensures the death, is morally more responsible for it.

If the person last in line were morally more responsible, and it was correct to treat letting die as equivalent to killing, then the person who lets die should have greater moral responsibility for the death than the person who caused the danger, because the person who lets die is last. So, in a sense, if letting die were morally equivalent to killing, it would be worse than killing.

In response, some might argue that because it comes later, letting die did not create the need for aid. This, however, seems like an argument *for* a moral difference between standard killing and letting die, since endangering creates a need for aid. However, the person who endangered someone might complain that if not for the person who lets die, or nature's failure to "come to the rescue," her own act would have been innocuous. The probability that an act will cause a death could be determined by taking into consideration whether other people will help protect a victim from the consequences of the act. If no one will help, an act is dangerous;

otherwise it is not. The person who is needed to save would be responsible for the probability that any act is dangerous.

So, unless letting die were morally different from killing, there are reasons to think that the "after" factor (which is conceptually true of letting die) would make it morally worse than doing the act which introduces the cause of death, rather than merely equivalent to it. On the other hand, suppose that coming *after* did make conduct less bad, and coming *after* was *conceptually true* of letting die. This would support the argument, other things being equal, for letting die being less bad than killing per se. That is, the "after" factor, because it is conceptually true of letting die, would help constitute on the moral status of letting die per se. One could not simply say that letting die and killing were morally equivalent per se, but the "after" factor made letting die less bad. This is because the factor that made letting die less bad would be one that was conceptually true of it.

Now we can turn to the first part of the objection to the Post-Efforts Test. This is the claim that letting die accrues lower post-efforts because there is an accomplice. If killing and letting die were morally equivalent per se, and the intuitive judgment supporting a difference in post-efforts held, then what is said of letting die should also be true of killing. Suppose that two killers are jointly responsible for a death, but only one is available to make efforts to prevent the ultimate bad consequences for the victim. Thus the effort demandable of the one should be, at most, one half of what could be demanded of the two together. In addition, suppose we found out that someone had let die the victim of a known killer (who had fainted after her act). Since the killer had a letting die accomplice, the killer's post-effort requirement should go down. Indeed, as noted above, it might be said that killers also have unhelpful nature as a later accomplice, just as those who let someone die from natural causes.

Both these results seem incorrect. The efforts may be shared if two killers are available. But each one is morally responsible for the death, and this gives her responsibility for making the maximum post-effort demandable if the other killer is not present with whom to share it.²⁵ So if killing and letting die were morally equivalent,

²⁵ However, suppose there were an *agreement* for me to endanger and for another person to *rescue* rather than to let die, and I would not have endangered without believing the other would rescue. If the other does not rescue, required post-efforts should decrease for me since the nonaider failed in what is here agreed to be her

in the absence of a person who was an "accomplice," the person who lets die should also have to make the maximum effort demandable.

D. *Justice, Charity, and Stringency*

Let us return to cases *B1* and *B2* and the question, which Moore discusses, of whether or not they are equally objectionable. Philippa Foot claims that not aiding is not necessarily less objectionable than killing. For example, in cases *B1* and *B2*, she says "[i]t is not that [the] killing is worse than [the] allowing to die."²⁶ However, according to Foot, when not aiding in this case is wrong, it is contrary to the virtue of charity, whereas when killing is wrong it is contrary to the virtue of justice.²⁷ That is, one has a right not to be killed, but no right to be aided in this case, since justice is a matter of rights. When we refuse to give our medicine to someone in whose interest it is to die but who does not want to die, we act for the sake of charity and we violate no right to aid. When we kill someone in whose interest it is to die but who does not want to die, we also act for the sake of charity, but we violate a right not to be killed against one's wishes ("The Euthanasia Cases"). Presumably, Foot thinks that not violating this right takes precedence over acting charitably, and therefore it is wrong to kill in this case. Notice that if one respects rights and does not kill, one need not aim against the best interests of a person. That is, one is not aiming to be uncharitable if one does not kill. One only foresees that one will not be able to promote her interests because rights stand in the way.

A problem with Foot's account is that there are cases in which it is permissible to interfere with negative rights (not to be interfered with) for the sake of doing a charitable act. For example, we stop suicides when we believe death is not in the person's interest. Charitable motivation which is in favor of life, at least sometimes, seems to override a negative right. Yet charitable motivation which leads us to be against life does not override the negative right. This is explicable if we say that killing someone takes away something significant that she has independently of us (her life), and not doing this takes precedence over charity. But interfering with a suicide

duty to aid. This assumes that my reliance on her was permitted.

²⁶ Foot, *supra* note 16, at 101 (emphasis omitted).

²⁷ See *id.* at 96-97.

only takes away liberty temporarily, and the achievement of significant benefit for the person can override this interference.

There is a second possible problem with Foot's analysis. If the root difference between killing and letting die rests on the existence of a right, it would be just as wrong for someone to refuse to give lifesaving aid she had contracted to give as to kill a person. But it could be argued that even if the person dies as a consequence, being denied aid to which she has a right is not to suffer as great (or perhaps a significantly different) wrong as being deprived of life she could have had independently of an attack. When such aid is denied, our links to other people are in jeopardy. (Consequentially, of course, we die.) When deprivation occurs, our independence from others is in jeopardy. The latter may be more important (or at least the sort of offense we have a right to more protection against), because the boundaries of our independence are more crucial to the idea of a separate person. We must (logically) first think of separate entities before we can think of them as linked. When having been promised aid is what prompts us to put ourselves in jeopardy, the failure to aid comes closer to being as great a wrong as killing. This is because someone else comes close to having caused us to lose what we would have had independently of her.

A third problem is whether Foot's account of the euthanasia cases is consistent with her view that killing is not worse than letting die in *B1* and *B2*. If not violating a right takes precedence over acting charitably in euthanasia, why is not violating a right in *B1* a more serious offense than simply being uncharitable in *B2*? That is, if it is more important to respect the right than to render charity when there is a conflict between the two, why is not violating the right a more serious offense than offending charity when they appear in separate cases like *B1* and *B2*?

One possible answer to the last query, an answer we have already considered, is that we may have a more stringent duty not to kill than to save life, but this only means that one behavior is more easily defeated than the other. For example, if this were so, the need to make efforts would defeat the duty to aid more easily than the duty not to kill. If the duty not to kill some particular person is more stringent than the duty to aid some particular person in the sense that it is less defeasible, this, it may be claimed, does not imply that a violation of one duty when it is present is more grave than a violation of another. There may be more occasions in which the duty to aid is permissibly defeated. In

particular, the duty to aid may be defeated by the duty to not kill. That does not mean, however, that when we let die impermissibly we have done anything less serious than when we kill impermissibly.

The Post-Efforts Test was intended to suggest that this view is not correct. When the less stringent (under the defeasibility standard) duty is violated, it is still a less serious matter than when the more serious duty is violated, and therefore *B1* is morally different from *B2*.

Another response to our objection to Foot's account is that independently we could judge two behaviors as morally equal, given that there was no excuse of having to do one in order to avoid doing the other. (An example is murder and torture; we could judge them as equally wrong.) Yet if they are in conflict, one (for example, murder) is preferable to the other (for example, torture). So violating a right and having an uncharitable intention could be as seriously wrong when judged independently, but given a choice we should not violate a right. The problem with this response is that while murder and torture independently may elicit equally as great pre- and post-efforts, this does not mean that independently they are equally morally objectionable. Indeed, preferring to do one rather than the other suggests they are not equal. The less bad act may just be so bad that it elicits the highest efforts we are (morally) able to impose.

Another possible explanation of why we may hold that violating justice is equivalent to offending charity in *B1* and *B2*, yet deny that we may violate justice for the sake of charity, focuses on the fact that in *B1* and *B2* we contrast violating a right with intending that something bad happen to someone. By contrast, in euthanasia cases if we do not kill, we will not be intending that something bad happen to someone. We only will *foreseeably not promote* someone's own good. We do not aim at what is bad for her. So if killing is worse than this foreseen failure to promote someone's welfare, this need not mean that it is worse than intending someone harm.

What of cases in which someone respects a right because she aims at the person's harm? For example, someone might be glad there is a strong antipaternalistic theory of negative rights because she knows that most people, left to their own devices, will do harm to themselves. If they harm themselves, this reduces the number of people who can successfully compete with her. We still cannot permit violations of someone's significant negative right merely to prevent her being the victim of an agent's aiming against her good.

Protecting the negative right takes precedence over preventing action on a bad intention.

Foot herself may have come to think that her view that *B2* is as bad or in other respects morally as significant as *B1* was inconsistent with the position that rights dominate charity.²⁸ This is because she suggests that *B2* may seem as bad as *B1* because it is assumed that there is a strict right to minimal aid in *B2*.²⁹ This position, however, raises problems for letting die in euthanasia cases. If someone has a positive right from even a stranger (that is, independent of contract) to a small amount of lifesaving aid, why should we be able to refuse it for a charitable motive?

Perhaps someone has a right to lifesaving aid only when it is in her interest to get it, as in *B2*. Then we would not have to aid rather than perform passive euthanasia (where there is no contract for aid), though we would have to aid in *B2* on grounds of a right. However, if killing and letting die were morally equivalent, it should then also be true that someone has a right not to be killed only when it is in her interest not to be killed. This means it would be permissible to kill someone against her will in euthanasia, contrary to what Foot claims.

Foot, however, need not be worried by this since she is not arguing for the moral equivalence of killing and letting die. She could claim that there is a right to aid only when it is in someone's interest but none when it is against someone's interest, unless there is a contractual obligation to give aid (such as an explicit agreement for aid "no matter what"). Foot can still claim that there is a serious right not to be killed, even when being killed is in one's interests, unless one has waived (or forfeited) the right. Notice that the addition of a contract could strengthen a right to aid, so that we would have to give aid even when it is against someone's interests. By contrast, there is no need for such a special contract in the case of the right not to be killed. This should worry a proponent of the equivalence of killing and letting die, but not Foot. Again, note that the reliance on a positive right in *B2* to account for the supposed equivalence of *B1* and *B2* is stymied if violating a positive right, even of the clearest sort, for example, contractual, is morally not equivalent to violating a negative right.

²⁸ See Philippa Foot, *Killing and Letting Die*, in *ABORTION: MORAL AND LEGAL PERSPECTIVES* 176, 182 (Jay L. Garfield & Patricia Hennessy eds., 1984).

²⁹ See *id.*

The independence in fact of a person (which gives rise to negative rights) seems to have a force not totally dependent on the complete moral independence of persons (that is, where no positive rights relate them). For example, suppose a bodyguard has a duty to aid a drowning employer at effort *X* and fails to do so. Her reason is that effort *X* is too great. Is this as bad as someone's failure to make effort *X* to avoid an act that she foresees will drown a stranger? The claim here is that it is not as bad.

The suggestion is that the strength of the right which protects the life a person has independently of another is even greater than the strength of a person's strict right to get lifesaving aid from another. Above it was suggested that this is because negative rights play a more fundamental role than positive rights in constituting the idea of the person itself, given that the person is conceived as a separate unit, however capable it is of relating to others or however much its development into a separate unit depends on relationships.³⁰

Separateness and independence are not the same (as I use the terms). A person is still a separate person even though she is dependent for lifesaving aid on someone else. Identifying the failure to recognize separateness with what is known as a "boundary crossing"³¹ also does not capture the distinction in which we are interested. If someone who is already receiving lifesaving aid is killed by (or at the directive of) the person aiding her, there is a boundary crossing, a move into a separate person. Yet it has been argued that a great deal, though not all, of the negative moral significance of this crossing is eliminated if the aid need not be given, is sufficiently large, and if, in being killed, the person loses only what she would get from the aid. Alternatively, even if there is negative moral value, it is not much greater than inappropriately

³⁰ Suppose negative rights play a more fundamental role in constituting the idea of the person itself. Then requiring those who are better off to aid the worse off, when the worse off are not required to aid, will give them more positive duties and may also thereby leave the better off with fewer protected negative rights than the worse off. This may be contingent on the positive duties being enforceable by coercive means. If they were enforceable in this way, the better off would have a weaker sense of themselves as separate persons. Those who benefit from positive rights do not thereby lose the sense of themselves as separate units merely because additions are made to their welfare. Taking away (even permissibly) destroys the unit in a way that giving to it does not, presumably because one can refuse what is given to one, but one cannot as legitimately fail a duty to give or resist permissible enforcement of it.

³¹ See ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 57-59 (1974).

not aiding initially. Suppose the bodyguard in our previous cases was already providing her employer with lifesaving aid she owes her. This is aid that prevents the employer from falling back into the water. The guard's doing something that causes the employer to fall back into the water and drown has close to the same moral significance as her initial failure to aid the employer, rather than close to the same significance as killing her when she survives independently of the guard.

The idea of the person who is separate relative to another that is crucial for the negative right not to be killed is the idea of the person who is independent of life support relative to that other person. It is not merely the person surrounded by an identifiable physical boundary. It may be that causing the death of a different person (that is, where there is an identifiable physical boundary) has its own moral weight, but it is not the great weight attached to the transgression of a negative right. Of course, relative to those who do not provide the life support, the person receiving life support retains her negative rights.

CONCLUSION

I have tried to argue for the view that Michael Moore supports, namely that negative duties are more stringent than positive duties. I have done this by applying a Post-Efforts Test, rather than a defeasibility test, to cases *B1* and *B2*. I have also considered Philippa Foot's proposals on killing and letting die and argued that, contrary to what she claims, they are inconsistent with the view that *B1* and *B2* have equal moral status. I have tried to account for the difference between killing and letting die even in these cases, by emphasizing the importance of someone's taking away what another person has independently of her, and contrasted this with the importance of meeting the positive rights to aid that others have.