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THE RELEVANCE OF CULPABILITY TO THE PUNISHMENT AND PREVENTION OF CRIME

by

R.J. SPJUT*

Some commentators argue that when an aggressor (A) attacks his victim (V) he 'forfeits' his rights, perhaps even his right to life, a forfeiture which grounds V's right of self-defense, which includes in some circumstances a right to kill A.¹ A few writers recently have criticized the forfeiture theory for justifying both too much — it allows the use of force where such is unnecessary² — and justifying too little because it also fails to allow force where needed.³ In particular, an 'innocent aggressor' (IA)⁴, a person whose aggression is not culpable,⁵ does not breach any duty imposed by the criminal law and, it follows, does not 'forfeit' his rights; hence, there is no ground for V's right of self-defense.⁶ John Finnis, who supports the forfeiture theory, has developed the debate over it by arguing that as punishment is justified to "restore an order of fairness which was disrupted by the criminal's act" so self-defense, as a paradigmatic case of prevention,⁷ is justified "to protect the order of justice

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¹LOCKE, *SECOND TREATISE OF GOVERNMENT* § 8 (Macpherson ed. 1980) [hereinafter cited as LOCKE]; Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life*, 7 PHIL. & PUB. AFF. 93, 111 (1978) [hereinafter cited as *Voluntary Euthanasia*]; Murphy, *Killing of the Innocent*, 57 MONIST 527, 546-47 (1973); Ashworth, *Self-defense and the Right to Life*, 34 CAMBRIDGE L.J. 282, 288 (1975); Montague, *Self-Defense and Choosing Between Lives*, 40 PHIL. STUD. 207, 216-18 (1981) [hereinafter cited as Montague]; R. NOZICK, *ANARCHY, STATE AND UTOPIA* 137 (1974) [hereinafter cited as NOZICK].

²Bedau, *The Right to Life*, 52 MONIST 550, 568 (1968); Fletcher, *Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory*, 8 ISR. L. REV. 367, 377 (1973) [hereinafter cited as *Psychotic Aggressor*]; Fletcher, *The Right to Life*, MONIST 135, 144 (1980) [hereinafter cited as *RTL*]; J. THOMSON, *SELF-DEFENSE AND RIGHTS* 5-6 (1976) [hereinafter cited as *SD&R*]; Kadish, *Respect for Life and Regard for Rights in the Criminal Law*, 64 CALIF. L. REV. 871, 884 (1976) [hereinafter cited as Kadish].

³Kadish, *supra* note 2, at 884.

⁴Kadish lists among the "innocent threat" cases an aggressor who acts while under duress, legal insanity, incapacity (below the age of legal capacity to commit a crime) and who does not "act" at all such as sleep walkers or persons whose body is used by another as an instrumentality. Kadish, *supra* note 2, at 876. Nozick also explains a possible "innocent shield of a threat" where an aggressor straps a baby on the front of a tank which he uses to attack V. The latter can halt A's attack only by killing the baby as well. NOZICK, *supra* note 1, at 34-35.

⁵Culpability has wide and narrow meanings. Its narrow meaning confines it to the psychological states which must be shown to have accompanied action in order for it, the act, to be culpable. The MODEL PENAL CODE § 2.02(2) [hereinafter cited as MPC] defines culpability as conduct which a person purposely, knowingly, recklessly or negligently performs. For a detailed analysis of the elements of an offense in respect of which a person must have the required culpability requirements see Robinson & Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681 (1983). H. Gross offers a wider concept of culpability which he calls the culpability principles and defines as follows: "Criminal liability is just only when it is for an intentional act that illegitimately poses a threat of the harm with which the law has concerned itself." H. GROSS, *A THEORY OF CRIMINAL JUSTICE* 139 (1979) [hereinafter cited as TCJ].

⁶*Psychotic Aggressor*, *supra* note 2, at 372, 378.

⁷FINNIS, *FUNDAMENTALS OF ETHICS* 132 (1983) [hereinafter cited as FE].

against present or continuing criminal attack by the person so harmed.”⁸

It follows that if a legal system may fairly punish only a person who culpably violated the law, a preventive restraint like self-defense is also fair only when it is used against a person whose offense or imminent offense is culpable.⁹ Such measures as punishment and prevention are justified because “a person who violates the order of fairness, which can be described as a system of rights, *forfeits* certain of his own rights.”¹⁰ The forfeiture theory implicitly associates A’s loss of rights with his deserts and suggests some analogy with punishment.¹¹ Finnis’ argument both makes explicit the analogy and shifts attention from A, whose aggression operates the forfeiture, to V who stands in the position of a police officer or executioner. If, as is generally accepted, it is unfair to punish innocent persons, why should it be fair to kill an IA in self-defense? The object of this article is to suggest a tentative basis for an attempt to answer this question.

I. THE PUNISHMENT ANALOGY

Finnis confuses two different arguments, one about forfeiture and another about the nature of prevention and punishment. As noted above, the forfeiture theory focuses on A and his conduct; whereas the punishment analogy concentrates on V and his rights. Perhaps, the two claims complement each other. What is important here is that the defects in the forfeiture theory do not affect the punishment analogy because they are distinct claims. As such, the punishment analogy deserves attention quite independent of the forfeiture theory.

The punishment analogy extends to the debate about self-defense the long-standing philosophical controversy over the justification of punishment: Do utilitarian or retributive reasons justify the institution of punishment? For Finnis, the former epitomizes all forms of consequentialism and the latter non-consequentialism.¹² The aim of this section is to explain how the standard arguments are relevant to self-defense; a review of their merits is beyond the present work.

On one hand, utilitarianism regards as moral acts which yield a net good in the form of a desirable result to the community such as satisfaction of a want.¹³ Punishment produces a good by reducing the incidence of crime by the

⁸*Id.* at 130.

⁹*Id.* at 129-30.

¹⁰*Id.* at 129 (*emphasis supplied*).

¹¹Locke and Montague explicitly state that self-defense, like punishment depends upon the aggressor’s deserts. LOCKE, *supra* note 1; Montague, *supra* note 1, at 216-18.

¹²FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 112 (1980) [hereinafter cited as NLNR].

¹³This subject is so widely discussed that it hardly warrants references. A number of writers offer introductory surveys of the issue: T. HONDERICH, *PUNISHMENT: THE SUPPOSED JUSTIFICATION* (1969) [hereinafter cited as HONDERICH]; N. WALKER, *SENTENCING IN A RATIONAL SOCIETY* 15-39 (1971); H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 9-16 (1968) [hereinafter cited as PACKER]; TCJ, *supra* note 2, at 375-99.

offender, who is punished, or by other offenders, or both. His own or other's suffering is offset by the greater overall security which accrues to the rest of the community.¹⁴ On the other hand, retributivism justifies an infliction of suffering where a person "deserves" it because he has, by his crime, gained some unfair advantage over others in the community.¹⁵ Punishment 'annuls' his unfairly gained advantage and restores him and the community to the *status quo ante*.¹⁶ Whereas utilitarianism justifies punishment only to the extent it yields a net benefit, retributivism does so to the extent of the offender's deserts. Put another way, utilitarianism and retributivism acknowledge different theoretical limits on punishment: the former warrants punishment so long as it yields a net good, the latter only to the extent of desert.

Some commentators do not regard the differences between the two positions as "real" because for the most part they produce substantially similar results in practice.¹⁷ Others, especially writers who object to utilitarianism, consider their moral differences important because utilitarianism would also justify the punishment of a person wholly innocent of a crime in circumstances where it would yield some overall net benefit to the community.¹⁸ The point is also pertinent to the prevention of crime where a police officer, in the course of dispersing a riot, might use force against all those present in order to make an example to future, potential rioters. Even though an innocent bystander suffers from the police officer's conduct, the community receives an overall benefit because the likelihood of future riots is diminished: security of personal integrity and property is increased.

A utilitarian rationale of self-defense would justify the use of ostensibly defensive force against a person who does not pose a serious threat to V. Suppose that S, a new sheriff who has just arrived in a lawless town and wants his reputation to be widely known, provokes a fight with A, a known criminal who cannot draw quickly or shoot accurately. In a duel, S waits until A draws first and then shoots and kills him. S's object is to publicize his skills so that others disinclined to obey the law will be deterred from challenging his orders. Proponents of retributivism argue that these results undermine the morality of utilitarianism and are avoidable in a theory which restricts the infliction of suffering on grounds of deserts: an innocent person could never be made to suffer punishment, prevention or self-defense.¹⁹

¹⁴1 BENTHAM, WORKS 367 (Bowring ed., 1962).

¹⁵Finnis, *The Restoration of Retribution*, 32 ANALYSIS 131 (1971-72); NLNR, *supra* note 12, at 263; FE, *supra* note 7, at 130-31. For general discussion of the different arguments which proponents call retributive see Cottingham, *Varieties of Retribution*, 29 PHIL. Q. 238 (1979).

¹⁶NLNR, *supra* note 12, at 263; FE, *supra* note 7, at 130-31.

¹⁷PACKER, *supra* note 13, at 16.

¹⁸The criticism hardly needs citation. See HONDERICH, *supra* note 13, at 64-68; J.J.C. SMART AND B. WILLIAMS, UTILITARIANISM: FOR AND AGAINST 98-118 (1973).

¹⁹FE, *supra* note 7, at 128-32; NLNR, *supra* note 12, at 265-66.

One widely accepted solution²⁰ distinguishes 'logical' and 'moral' retributivism.²¹ The former refers to a definitional proposition that only punishment of the "guilty," a person who is convicted of an offense, is really punishment. Under this theory, suffering which is inflicted upon the innocent is something else, like telishment.²² Moral retributivism is the moral reason for the imposition of suffering, that is, inflicting suffering because the offender 'deserves' it. Philosophers who accept this division argue that they can accept the definitional point, logical retributivism, without committing themselves to moral retributivism.²³ The present writer is not concerned with the merits of this position, but only with its applicability to self-defense.²⁴

The central idea of logical retributivism, that officials should punish only the guilty, contains at least one significant ambiguity: Is the requirement of guilt a mere formal condition which, once satisfied, leaves the official free to pursue whatever aims he desires?²⁵ Or is it a more substantial requirement, that is, the official must consider the offense to the exclusion of other matters? If guilt is a formal condition, a judge could justifiably impose a maximum and severe sentence upon a gangster for a petty crime because, in doing so, he would protect society from the offender's criminal activities for as long as possible. However, the gangster's guilt is immaterial to the reasons for the severe sentence. In effect, the judge satisfies himself of the fact of conviction and then looks to other matters in deciding what sentence he will impose. If, however, the offense serves as a more substantial matter for consideration, the judge must ignore such other matters as the protection of society. Instead, he must concentrate on the offender's guilt. The difference between these two versions of logical retributivism, the weak and the strong, is more than one of degree because the latter shifts the official's focus to "guilt" and, in effect, to desert; it slips into a version of moral retributivism. This ambiguity in logical retributivism is crucial to any attempt to extend the distinction between logical and moral retributivism to prevention and self-defense. Does logical retributivism require that force be used only against culpable aggressors in order to qualify as self-defense? After all, IA's assault upon V is no crime

²⁰Flew, *The Justification of Punishment*, 29 PHIL. 291 (1954); reprinted in THE PHILOSOPHY OF PUNISHMENT (H. Acton ed. 1969); Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955) [hereinafter cited as Rawls]; Benn, *An Approach to the Problems of Punishment*, 33 PHIL. 325 (1958); H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 4-5 (1968) [hereinafter cited as H.L.A. HART].

²¹Quinton, *On Punishment*, 14 ANALYSIS 133, 136 (1954), reprinted in PHILOSOPHY, POLITICS AND SOCIETY (FIRST SERIES) (P. Laslett ed. 1956) [hereinafter cited as Quinton].

²²Rawls, *supra* note 20; Schedler, *On Punishing the Guilty*, 86 ETHICS 256 (1976); G. SCHEDLER, BEHAVIOR MODIFICATION AND "PUNISHMENT" OF THE INNOCENT 20-22 (1977).

²³See authorities cited *supra* note 20.

²⁴For a critical discussion see HONDERICH, *supra* note 13, at 64-66, 151-53.

²⁵A number of writers have identified this ambiguity in the definition of the "standard case" of punishment which requires that suffering which is imposed "be for an offense against legal rules." H.L.A. HART, *supra* note 20, at 5. The words "for an offense" do not make clear what reasons for imposing a sentence are permissible. See Rawls, *supra* note 13, at 22; FLETCHER, RETHINKING CRIMINAL LAW 410-11 (1979) [hereinafter cited as RCL]; Fletcher, *Punishment and Compensation*, 14 CREIGHTON L. REV. 691, 700-01 (1981).

because he is excused.

The common law suggests a maneuver that evades but does not resolve the problem. Hale, for example, says that a right to self-defense arises because "by the violence of the assault, and the offence committed upon him by the assailant himself, the law of nature, and necessity, hath made him his own protector *cum debito moderamine inculpatae tutelae*."²⁶ Hale telescopes several different grounds, including "the violence of the assault" and "the offence . . . by the assailant," both of which exist in most cases, but not all. If, however, we adopt the older private law approach to the criminal law,²⁷ which divides rules into offenses and defenses, we may say that a person who commits a violent aggression against another commits an offense because his act varies from the rule which prohibits this conduct; his defense is a separate matter. Although the aggressor lacks a legal capacity to commit a crime, the private law conception of guilt treats him as being guilty, or at least presumed guilty, because his defense becomes relevant only at his trial when he asserts it. This remains so even if V knows that A is insane.

The maneuver, however, rests upon an outmoded conception of legal guilt, because modern authorities hold that A's guilt depends upon his culpable violation of the law, that is, the presence of conduct that varies from the prescribed standard of conduct and absence of excuses and justifications.²⁸ It is also an artificial notion of guilt because it ignores considerations of culpability which are most crucial to an adjudication of guilt at a trial. The punishment analogy highlights this artificiality and confusion in the old common law approach to self-defense. If the object of a logically retributive account of punishment is to confine utilitarian considerations to a range of persons, those who were convicted of a crime, then one parallel with self-defense is a definition which restricts, but does not exclude, utilitarian considerations. The use of force is not defensive unless it is used against a person who is part of a threat to V. This, however, appears somewhat trivial because force cannot be 'defensive' unless there is a threat to V. The definition states the obvious and adds nothing to our knowledge about self-defense. Put another way, this minimum way of analogizing punishment and self-defense is uninformative.

However, if we go beyond the essentially definitional account of self-defense and adopt a version of retributivism, which excludes such utilitarian considerations as deterrence, we can identify two versions of self-defense. One, a consequentialist version, allows its use against an aggressor in order to save V's life. The next section explains the moral grounds for this version. The

²⁶1 W. HALE, PLEAS OF CROWN 51 (1678) [hereinafter cited as HALE]. See also FOSTER, CROWN LAW, ch. 3, § 1 (1746) [hereinafter cited as FOSTER]; 1 W. BLACKSTONE, COMMENTARIES 126-27 (1778) [hereinafter cited as BLACKSTONE].

²⁷Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 YALE L.J. 880, 902-10 [hereinafter cited as *Burden-of-Persuasion*]; RCL, *supra* note 25, at § 7.2.2.

²⁸*Burden-of-Persuasion*, *supra* note 27, at 919-23; RCL, *supra* note 25, at § 7.4.

other, a non-consequentialist version, limits the permissible use of force to culpable aggressors. Neither permits deterrence because both require that V give principal consideration to the threat to his life. In other words, V cannot regard the fact that A threatens him as a mere formal condition which once satisfied leaves him free to inflict whatever harm he wishes upon A. When V resorts to force, he must have in mind A's aggression or culpable aggression. While a fact like that of A's aggression against V is never in itself a reason, and is significant only because moral or juridical rules or principles make it so, V implicitly refers to such principles when he confines his considerations to the fact of aggression or culpability. He excludes deterrence from his aim and implicitly adopts other moral reasons for his action.

While the dichotomy is between consequentialist and non-consequentialist reasons for self-defense, this is not the same as between deterrence, on one hand, and retributivism on the others. V's use of force may be grounded upon consequentialist considerations without promoting deterrence; his concern may simply be self-preservation. The punishment analogy may have a trivial meaning, that force is defensive only where there is a threat to V. It may have a stronger meaning, that V must have as his principal consideration a reason other than deterrence. It may have an even stronger meaning, that force is only fairly used when V's principal consideration is A's culpability. Only then is he really in a position similar to judge and executioner. Finnis' thesis implies that the second is incoherent because it excludes some, but not all, consequentialist considerations and, in any event, would have to be a theory of distributive justice.

II. DISTRIBUTIVE JUSTICE IN THE CRIMINAL LAW

A fuller discussion of these two moral criteria, consequentialist and non-consequentialist, is outside the scope of this article. Rather, the present writer's aim is to explain their significance in the context of criminal justice.

A. *Distribution of Benefits and Burdens*

The present writer's thesis is that the criminal law effects a limited, but important form of distributive justice, that is, an increment of security of freedom from interference by others with goods already distributed like life, bodily integrity and property.²⁹

²⁹Finnis, following Aristotle, divides justice into distributive and corrective. NLNR, *supra* note 12, at 164-65. The present writer accepts this division of justice into distributive and corrective, and proposes that we can best understand the criminal law when we understand the way in which its rules further one or the other form of justice. This is especially important in respect of self-defense because, as we shall see, the rules which permit killing to save lives further both forms of justice.

The only evidence that the common law jurists appreciated that the criminal law may have promoted different forms of justice is the division of necessity into public and private. Hale, Hawkins, Foster and Blackstone included under the former killing in the course of execution, apprehension of a felon or to prevent the escape of a felon. HALE, *supra* note 26, at 478; W. HAWKINS, PLEAS OF CROWN, ch. 28, § 4 (hereinafter cited as HAWKINS); FOSTER, *supra* note 26, at 4; W. BLACKSTONE, COMMENTARIES 178, 186 (1778).⁶

1. Benefits and Interests

Liberal political theory presumes or advances the claim that rules like those which define entitlements to property or to the performance of contractual obligations are a separate sphere of law, distinct from the rules which define crime and prescribe punishments. State of nature theories, which assume that rights to property exist anterior to and independent of political society,³⁰ do not conceive the state or its laws to distribute or re-distribute, that is, the state does not allocate goods or shares in them or take from one to give to another. The rules of property and contract, or what is sometimes called private law, define the extent to which a person may make a claim on the production and distribution of goods. By creating entitlements, they prescribe how goods should be distributed.

Exceptionally, the criminal law also defines entitlements and prescribes how goods should be distributed. In such a case, the criminal law leads rather than follows the rules of property law, even though this may not be apparent. Suppose that a parcel of land is 'owned' by A, but those who live nearby enjoy customary rights to hunt, collect wood and graze their cattle on it. A statute that makes it a criminal offense to trespass where the owner posts a "no trespassing" sign extinguishes these 'customary' rights when it is applied to A's land. While the statute facially protects only A's right of possession, it transforms certain collectively enjoyed rights in the land into privately owned and enjoyed rights.³¹

When the legislature enacts a primary rule of obligation into the criminal law it protects (in all probability) an existing entitlement. The law does not create the right to property or confer possession upon the holders of it, nor does the criminal law create a right to life, let alone life itself. Nevertheless, the legislature imposes an additional burden upon citizens to respect such rights as others possess. More specifically, the burden is to respect others' rights by not intentionally, recklessly, or criminally negligently interfering with a rights-holder's freedom to enjoy his right.³² This is no small or insignificant burden. Conversely, a rights-holder acquires a benefit in addition to his right in the form of an incremental security of the enjoyment of his entitlements. A rights-holder knows that not only does the law define the nature and extent of his entitlement, but also imposes an obligation, backed by the force of criminal

Private necessity, however, included killings in self-defense and self-preservation (or what contemporary commentators call necessity). HALE, *supra* note 26, at 478-79, FOSTER, *supra* note 26, at § 1; 4 W. BLACKSTONE, COMMENTARIES 180-82.

³⁰NOZICK, *supra* note 1, at 15-53, 167-74.

³¹See, e.g., E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLOCK ACT (1976).

³²Kadish, *supra* note 2, at 892-94; Michael and Wechsler, *Rationale of the Law of Homicide*, 37 COLUM. L. REV. 701, 742-46 [hereinafter cited as Michael and Wechsler].

punishment, to respect that right.³³

Liberal political theorists have captured this role of criminal law in their distinction between the existence and security of rights. In the state of nature or in the absence of a central state and law, rights are deemed to exist but are insecure because there is little, if any, institutional structures to protect them. The object of the social contract, for classical natural law theorists, is security of rights.³⁴ The benefit, then, is security, that is, freedom from a fear that one's right will be diminished by others' unwarranted and culpable (intentional, reckless or criminally negligent) action. The distinction exaggerates the role of criminal law, because even in the absence of a strong, central state and law, individuals enjoy some measure of security of their rights. Moreover, the institution of a state and a criminal law does not eliminate all possible harm through unwarranted and culpable conduct. Instead, it merely reduces such prospects. What the criminal law confers upon rights-holders is a measure or increment of security.³⁵

This last observation draws attention to another of the distributive aspects of the criminal law — the allocation of risks of crime. The enactment of a rule, backed by the imposition of criminal punishment for its breach, will affect a considerable section of a community, but not all. Some will inadequately calculate either the risks of being apprehended and punished, or the severity of the sanction. On the other hand, if these individuals calculate correctly, they nonetheless break the rules from irrational motives. In either event, a regime of criminal punishment leaves rights-holders at risk of breach by offenders. A legal system can reduce such risks by intervening at a stage prior to breach where it has reason to believe that a person will likely harm a rights-holder. The earlier this intervention takes place, the more the legal system reduces the risk of loss to the rights-holder, and shifts the costs of crime to those whom are suspected of having criminal inclinations.³⁶ This distributive feature, the allocation of risk of harm, derives from the administration of criminal justice and differs from the initial allocation of benefits and burdens, which is the focus of this article.

³³Morris, *Persons and Punishment*, 52 *MONIST* 475 (1968).

³⁴HOBBS, *LEVIATHAN* 199 (Schneider ed. 1958) [hereinafter cited as HOBBS]; LOCKE, *supra* note 1, at §§ 123-24. NOZICK, *supra* note 1, at 140.

³⁵NOZICK, *supra* note 1, at 81 argues that by reducing the risk of boundary crossings a prohibition effectively transfers one person's enjoyment of freedom from fear to another. Nozick argues that the transfer is fair where the person from whom freedom is transferred would be used unproductively; that is, where that person will not secure an advantage independent from the one who desires that the former cease the activity. The present writer accepts Nozick's implicit recognition that a prohibition not only protects, but also distributes, liberty.

³⁶There are two risks which the criminal law allocates: "the risk that an offender may be unnecessarily deprived of his rights and his liberty; and the risk that innocent, unknown persons may suffer harm in the future." J. FLOUD & W. YOUNG, *DANGEROUSNESS AND CRIMINAL JUSTICE* 55 (1981). Nozick explains that risks are also allocated by probability of apprehension and severity of the sanction. NOZICK, *supra* note 1, at 59, 63.

gerates the way in which the law protects interests. It is true that we must examine all the cases of permissible killing, as well as the general prohibition, in order to ascertain the full extent to which the law protects freedom from interference. However, this does not mean that we must simply conjoin all these cases into a single proposition which states in narrowest terms the scope of that freedom.

Instead, we may approach the problem of specification in a way that we specify the meaning of the moral proposition that things that are alike should be treated alike, while things that are unlike should be treated unlike.⁴¹ An explanation of equality does not require that we explain all the possible cases in which persons will be treated alike and all those in which they will be treated unlike. Certainly, we would not list them in a single proposition about equality so as to state them in its narrowest form. Rather, in particular cases where it is alleged that there is a denial of equality, we examine the grounds on which persons have been classed as alike or unlike.⁴² As the interest in equal protection varies with conditions, an account of that interest explains how, in given conditions, persons may be classified as alike or unlike. So with the interest in life, an account will explain how in given conditions a person enjoys a certain measure of freedom from interference.

Whereas the approach to factual specification outlined by Thomson identifies a single, narrow legally protected interest, the approach here adopted specifies different interests in different situations. This is not simply a play on words. In the absence of an attack by A upon V, the law protects both A and V's freedom from interference without classification. If a third person attacks either A or V, he harms the legally protected interest in their life. If A attacks V, the conditions in which both of their interests enjoy equal protection no longer exists: the legally protected interest in A's life is modified in so far as the law prefers V's survival. It is not that A's legally protected interest is "freedom from interferences unless x, y, etc., occur"; the interest are "freedom from interference in normal conditions," "freedom from interference except as necessary to ward off A's attack where he aggresses."

Three objections are made to factual specification. First, we have to identify all the cases in which derogations are permissible, in order to ascertain the full scope of a right or interest.⁴³ How do we know that we have an exhaustive list of permissible derogations? The objection is weak, because in order to determine whether there is a legally protected interest in a particular case we need to know initially how the conditions in this case compare to similar such cases. Next, we need to know the grounds for holding that in such cases killings are warranted or unwarranted. The objection becomes even weaker when

⁴¹ARISTOTLE. ETHICA EUDEMIA VII.9.1241b (W.Ross ed. 1927).

⁴²Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 551-55 (1982).

⁴³SD&R, *supra* note 2, at 9; *Voluntary Euthanasia*, *supra* note 1, at 100.

we realize that we are searching not for a single interest, but for propositions about the conditions in which the law protects freedom from interference or does not, and the reasons for a grant or denial of such protection.

Second, "any fully specified statement of [the] . . . right [to life], including the *correct* one . . . would divide us into a hundred quarreling sects during such questions as abortion, capital punishment, and the like."⁴⁴ The appearance of statements about rights as self-evident truths is lost. Whatever the merits of such a statement about rights, it has less force when applied to interests, and legally protected interests at that. Moreover, the value of an account of a legally protected interest should not depend upon its propagandistic appeal or how easily it will command wide and unquestioned acceptance. There may be some value in some statements about rights, but not about legally protected interests. An account of such interests is valid or true if it correctly identifies what the law protects and the reasons which officials give for doing so. Finally, as the brunt of the criticism is directed towards a lengthy statement about a single interest it has less force when applied to the type of factual specification which is proposed by the present writer.

Third, as applied to rights, it is said that factual specification issues "from . . . an incorrect view of rights: [it] would [not] be opted for by anyone who did not take the view that rights are, in a certain sense, *absolute*."⁴⁵ It presumes that every infringement is also a violation of a right. Now, although this criticism is advanced against the applicability of factual specification to rights, it has force, if at all, to an analogous account of interests because every infringement is presumably a violation of an interest. This objection is somewhat obscure: it may mean that an account of interests must include a basis for distinguishing infringements and violations, or it may mean that an account of interests must identify some sense in which they continue to exist, even in conditions in which one person may justifiably deprive another of his life (and his interest in it). The former will be called the weak, and the latter, the strong meaning of this objection.

The weak meaning appears obscure and confused. Thomson illustrates its meaning with the example of a child who suffers a protein deficiency and will die unless he gets some quickly. This can be done only by breaking into Owner's (O) house and freezer where O stores some steak. Now, if we accept Thomson's conclusion that this is a case of justified stealing⁴⁶ and not criminally punishable, do we characterize the taking as an infringement or violation of the right? Thomson says that since compensation is owing there must have

⁴⁴*Voluntary Euthanasia*, *supra* note 1, at 100.

⁴⁵SD&R, *supra* note 2, at 10.

⁴⁶Stealing to avert loss of life would have to be justified under necessity or lesser evils. The common law treatise writers express skepticism about the doctrine. 1 Hale P.C. 54. See also MODEL PENAL CODE § 3.10 (1985).
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been a right which, while not violated because the taking was justified, was infringed.⁴⁷ This abstract analysis glosses over the fact that what O can claim is not that O's meat should not have been taken in the first place, but that O should be paid compensation. It does not help matters to speak of infringement or violation of right (or interest). If Thomson is correct and the law preferred the child's survival to O's enjoyment of his possession of the meat, O's legally protected interest is subordinate to the child's privilege of getting sufficient protein. The redistribution of goods which gives the child preference to O's possession of the meat is accompanied by a further distribution of benefits, so that the owner gets compensated for the meat. What Thomson seems to want in an account of rights (and presumably interests) is something about when one person's conduct, which is associated with another's loss, ought to result in redistribution from the former to the latter. This might be satisfied by adding to an account of an interest that, in such a case, the law no longer protects the meat owner's freedom from interference, at least from the boy, but accords him compensation for what he would have otherwise enjoyed. His interest in such a case is in receiving fair compensation for what he would otherwise have enjoyed, though this is not to say that it's loss or deprivation is an infringement or violation of an interest.

The stronger meaning of the objection suggests that A's rights (or interests) subsist even though V has a right to kill him. The objection implies that factual specification is unacceptable because it holds that when V kills A she does not violate his interests since none exist. The infringe-violate distinction avoids this conclusion by holding that once we accept that there is an interest in A's life, it continues even when A attacks V; V may infringe, but not violate A's interest. If the previous analogy to equality holds, then the stronger meaning would require that we say that once we accept that persons are alike in some respect, then subsequent classification of them as unlike in another respect infringes or violates their equality. If it is a justified classification as unalikes then it infringes, otherwise, it violates equal protection.

Such a view is plainly mistaken, because we do not say that once a person enjoys a benefit in certain conditions he continues to enjoy it in all other conditions. The freedom from interference which the law protects depends upon the conditions in which the person finds himself. Put another way, it distributes benefits according to morally relevant criteria which will not be applicable in all conditions. The crux of the problem is not whether acts infringe or violate interests. Rather, it is what are the morally relevant criteria for the distribution of freedom from interference with life and personal integrity?

B. *Distributive Principles in Criminal Law*

Finnis suggests that the answer to the above question can be reduced to

⁴⁷SD&R, *supra* note 2, at 10-11. See also Thomson, *Some Ruminations on Rights*, 19 ARIZ. L. REV. 45, 47-49 (1977).

two fundamentally different moral criteria; consequentialist and non-consequentialist, and that we must choose one or the other. We cannot compromise between them. In the philosophical and jurisprudential literature, four criteria are advanced to justify self-defense: lesser evils, fairness, autonomy and desert. A closer analysis will reveal that the second and third are reducible to the first and fourth and that ultimately there are two, consequentialist and non-consequentialist, moral reasons for self-defense. That analysis will also show that Finnis is wrong to suppose that a consequentialist criteria is incoherent, though he is correct to suppose that it cannot justify all cases of self-defense. Yet, he is also wrong to suppose that a non-consequentialist criteria can do the job. Both moral grounds, as exclusively criteria for self-defense, lead to results which are manifestly unjust.⁴⁸

1. Lesser Evils

The lesser evils defense is a counterpart to the utilitarian maxim that one should always act to maximize good for society, the "good" being satisfaction of the wants of individuals.⁴⁹ In a situation where one is faced with alternative courses of conduct which will result in evil, the maxim requires that one act to minimize the evil. In the context of the criminal law, one may find that alternative courses of conduct will interfere with what appear to be legally protected interests, in which case a choice must be made. Deliberation about which interest should be sacrificed for another or others is usually described as "balancing" of interests. The metaphor suggests that a person faced with a choice of evils assesses the different interests, and then ascribes and compares their weights.⁵⁰

When the lesser evils theory is applied to self-defense, it highlights the value of both the aggressor's and victim's freedom from interference with their lives. As both are legally protected interests, the loss of one should be avoided wherever possible. If, for example, the victim can protect himself and avoid killing the aggressor, then the lesser evils theory would hold that his killing would not be justified. An example is when the victim may protect himself with less than deadly force or he is able to retreat.⁵¹

However, the "lesser evils" theory is at its weakest when applied to cases

⁴⁸"But if someone really thinks, *in advance*, that it is open to question whether such an action as procuring the judicial execution of the innocent should be quite excluded from consideration — I do not want to argue with him; he shows a corrupt mind." Amscombe, *Modern Moral Philosophy*, 33 PHIL. 1, 17 (1958).

⁴⁹J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLE OF MORALS AND LEGISLATION, ch. 1, §§ 1-3 (Hafner ed. 1948).

⁵⁰MODEL PENAL CODE § 3.02 (1985) provides that the harm avoided must be "greater" than that inflicted.

⁵¹MODEL PENAL CODE § 3.04(2)(b); R. PERKINS & R. BOYCE, CRIMINAL LAW 1133-37 (3d ed. 1982) [hereinafter cited as PERKINS & BOYCE]; W. LAFAVE & A. SCOTT, CRIMINAL LAW 395-96 (1972) [hereinafter cited as LAFAVE & SCOTT]. The conditions in which a person need not retreat before using deadly force are detailed by the text writers. See PERKINS & BOYCE, *supra* at 1117, 1127-33; LAFAVE & SCOTT, *supra* at 395-96, 40 C. J.S. *Homicide* §§ 127-30 (1944).

where there must be a choice between lives. The difficulty is that this choice requires that one compare the value of lives. Therefore, individuals cease to count as persons of equal value. Why does the interest in the aggressor's life weigh less than that of the victim? There is no clear answer. Michael and Wechsler, in their classic article on homicide, dogmatically wrote:

We need not pause to reconsider the universal judgement [sic] that there is no social interest in preserving the lives of the aggressors at the cost of those of their victims. Given the choice that must be made, the only defensible policy is one that will operate as a sanction against unlawful aggression.⁵²

If the aggressor's life is depreciated because of his culpability, then the lesser evils theory turns on desert and obscures its non-consequentialist character. It is only authentically consequentialist if the lesser evils criteria does not depend upon the aggressor's deserts. Its focus must be on the value of the two lives or the effect of that choice on others lives. Once culpability is discounted as relevant to the measure of value of lives, the basis for comparison is obscure.⁵³

One possible basis for comparison is the fact that an aggressor poses a threat or danger to the well-being of others, and therefore he should be valued less than his victim. Dangerousness is not the same as culpability; it refers to the risk that the aggressor will harm others, irrespective of his culpability. One objection is that the aggressor's act may not indicate any dangerousness to others. Whatever prompts him to act may be particular to the occasion. If insane, his insanity may be a transient affair.

A deeper objection is that comparisons refer to the relative value of the individuals to society in terms of expected contribution or presumed worth. Suppose that a brilliant scientist experiences a fit of temporary insanity, and attacks a rogue. The rogue has done nothing on the occasion to provoke the attack, but has often harmed and will likely harm many persons. Arguably the rogue should perish instead of the scientist. Comparison may not only be mistaken and invidious, but may undermine justification of self-defense in particular cases.

2. Fairness

The fairness principle is based on the premise that each person should have an equal opportunity to enjoy the interest in his life. This is not the same as saying that everyone's right to life is equal. Equality of opportunity requires that each person should have a chance no different from that given to others to enjoy his life. If others have no opportunity, then he is not entitled to an oppor-

⁵²Michael and Wechsler, *supra* note 32, at 736.

⁵³*Psychotic Aggressor*, *supra* note 2, at 374. Although NOZICK, *supra* note 1, at 63-3 refers to Fletcher's article he confuses non-consequentialist and consequentialist considerations and misunderstands Fletcher's argument.

tunity to enjoy his interest. In other words, if a person's loss of opportunity to enjoy his life is the same as that of others similarly situated, then the loss is not unfair. The distribution of opportunities is fair if the procedure for allocating them gives everyone an equal chance to secure the benefit or avoid a loss.⁵⁴

When applied to a situation in which there will be a loss of life, the fairness principle requires that a fair procedure be used to determine who will live and die. A classic application of this principle is Circuit Justice Baldwin's remarks in *United States v. Holmes* that "if time have existed to cast lots, and to select the victims, then, as we have said, sortition should be adopted. In no other than this or some like way are those having equal rights put upon an equal footing . . ." ⁵⁵ The drawing of lots randomizes each person's chances of being selected to live or die. No one enjoys any advantage over any other who participates in the process. As each has an equal chance of winning, the drawing of lots offers equal opportunity to all in the boat. The allocation of benefits or losses is fair.

However, difficulties arise when we seek to apply the fairness principle to self-defense situations where V is not in a position to suggest, let alone A and V adopt, a randomizing procedure for deciding who will live and die. Obviously, if A was able and willing to reflect long enough to adopt any such procedure, his aggression would have ceased and the need for choosing between them would also have gone. Where A is an innocent aggressor (IA), and V has not culpably provoked IA's attack, fairness requires that both IA and V have an equal opportunity to decide who will live and die.

In one consequentialist version of fairness, IA and V have an equal chance to be in their respective positions in the given situation. Suppose that IA is insane. The claim is that both IA and V have an equal chance of being sane and misfortune, a random occurrence, has picked IA. Thus, luck has picked V to survive if he kills IA. The argument suggests that the random occurrence of sanity justifies V's killing of IA, although, in fact, V prevails because of his superior strength, not sanity. The account might be modified so that the random occurrence of strength, not sanity, is fair, and so the killing of IA is just. However, if this is so, the converse should also be just, IA's killing of V where nature favors IA with superior strength. The logic goes beyond situations where both are wholly innocent to situations where A is culpable, but nature favors him with superior strength. As nature randomly favors a person to be a male and males are stronger than females, then it follows that a male's use of superior strength to subjugate, rape and harm a woman is fair!⁵⁶

The consequentialist version of fairness is open to objection on the

⁵⁴J. RAWLS, A THEORY OF JUSTICE §§ 18, 52 (1971); Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 185 (1955).

⁵⁵*United States v. Holmes*, 26 F. Cas. 360, 367 (E.D. Pa. 1842) (Case No. 15,383).

⁵⁶C. FRIED, AN ANATOMY OF VALUES: PROBLEMS OF PERSONAL AND SOCIAL CHOICE 201-03 (1970).
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grounds that there is no reason to suppose that one random event has moral significance, and certainly no reason to accord it greater significance than any other. Why should fairness turn on strength or sanity any more than race or height? There are infinite differences between any two persons and no apparent reason for singling out one in order to judge V's killing of IA as fair. Strength and sanity are facts, but then so are these other differences. The fact of an event or the existence of a biological, psychological or social characteristic is simply a fact. Its moral significance depends upon reasons. Its randomness alone is an insufficient reason because there are many such differences between individuals, and thus many of the infinite differences may be treated as random. The selection of one over another also depends upon a reason. This reason is an evaluative judgment that one trait or event is somehow more significant than all the others and it assumes a normative proposition about how events should be judged. If strength is all important, it is because there is an implicit judgment that a person ought always to be permitted to use whatever strength or prowess he possesses to further his interests. Paradoxically, the result undermines the very notion of a fair procedure (illustrated by the drawing of lots) since there would be nothing unfair in the strong throwing the weak overboard.⁵⁷

A second version of fairness recognizes that V and IA lack opportunity to adopt a randomizing procedure, and that such facts as survival are morally irrelevant. This version holds that as V lacked such an opportunity, he did not act unfairly. Cases like *United States v. Holmes*⁵⁸ differ from self-defense in that there is an opportunity to adopt a randomizing procedure in the former but not in the latter. By choosing between lives without adopting such a procedure in the former, there is unfairness. In the self-defense situation, that opportunity does not exist; choosing without first resorting to such a procedure is not unfair.⁵⁹

While failure to adopt a randomizing procedure may not be unfair, what remains to be explained is why V's choice that she survive instead of IA is fair. These are two separate decisions. We cannot fall back on morally irrelevant facts such as strength or intelligence. Nor can we refer to culpability because neither IA or V is culpable. In any event, this would reduce the theory of fairness to one of deserts. We might supplement fairness with a claim that in the absence of time to adopt a randomizing procedure, a person is allowed to choose himself.⁶⁰

⁵⁷Levine, *The Moral Permissibility of Killing a "Material Aggressor" in Self-Defense*, 45 PHIL. STUD. 69, 70-71 (1984) [hereinafter cited as Levine].

⁵⁸*Holmes*, 26 F. Cas at 360.

⁵⁹Levine, *supra* note 57, at 72.

⁶⁰*Id.* at 73-74. The argument is similar to that found in HOLMES, THE COMMON LAW 40 (Howe ed. 1963) [hereinafter cited as HOLMES]. In Holmes' analysis, however, self-preference appears to excuse, rather than justify, killing because "a threat of death at some future time can never be a sufficiently powerful motive to

This additional criteria is reducible to a consequentialist criteria, like that of the lesser evils theory of necessity and self-defense. As V kills to save herself, she implicitly judges that her preservation (and life) is worth more than IA's in the absence of IA's culpability. Perhaps V makes comparisons on some such basis as dangerousness, social status or potential contribution to society. More likely, V assumes without giving the matter much thought that her own life is worth more than that of anyone else. Although this sentiment is common, it hardly justifies her judgment. Moreover, it must be explained why lesser evils is supplementary to fairness and not *vice versa*. The two criteria are logically incompatible in situations where there is time for the adoption of a randomizing procedure. Why should the parties apply the fairness theory in preference to lesser evils, if the latter is also a moral reason for the distribution of freedom from interference with life? The conclusion, then, is that a non-consequentialist version of fairness fails to supply a reason why it is permissible for V to kill IA. Additionally, fairness requires assistance from a consequentialist criteria, like lesser evils.

3. Autonomy

The principle of autonomy is epitomized by the Kantian categorical imperative, "act externally in such a way that the free use of your will is compatible with the freedom of everyone according to municipal law."⁶¹ This principle is associated with the retributive justification of punishment, particularly that of inflicting suffering according to deserts.⁶² According to retributivism, when an official imposes a punishment, he respects that person as a person because he, the official, treats the offender as a person who is wholly autonomous and responsible for his conduct.⁶³ If, however, an official takes into account considerations such as deterrence, he uses a person as a means to further a social policy or goal.⁶⁴

When applied to situations in which there must be a sacrifice of one to save another's life, the autonomy principle does not supply as clear a guide as is commonly supposed. Commentators generally argue that respect for persons means that a person's freedom from interference with his life is inviolable, unless he himself threatens another's interest. Put another way, the scope of the legally protected interest is freedom from interference by other persons, not "the perils of living."⁶⁵ By killing one to save another's life, we treat the

make a man choose death now in order to avoid the threat." *Id.* For further discussion of the distinction between excuse and justification in respect of self-preservation see *Psychotic Aggressor*, *supra* note 2, at 373-76; RCL, *supra* note 25, at § 10.5.

⁶¹I. KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 35 (J. Ladd trans. 1965) [hereinafter cited as KANT].

⁶²HONDERICH, *supra* note 13, at 26-34.

⁶³Morris, *supra* note 33.

⁶⁴KANT, *supra* note 61, at 100-01; HEGEL, *PHILOSOPHY OF RIGHT*, 99-100, 246-47 (T.M. Knox trans. 1967) [hereinafter cited as HEGEL].

⁶⁵Kadish, *supra* note 2, at 886.

former as a means to another person's end, survival. This is called the strong version of autonomy, and it denies a privilege to kill in order to save lives where the person who will be killed does not create or is not part of the threat to those who will be saved.

However, the autonomy principle permits a person to take his own life or to have another put him out of his misery (mercy killing) because he does not treat himself as a means nor is he treated as a means by another.⁶⁶ The analogy to punishment is that a person who commits a crime has put himself in a position where another has a right to inflict suffering upon him. He explicitly consents in the instances of suicide and mercy killing, and implicitly consents in the case of (even capital) punishment. This logic extends to cases where the parties adopt a randomizing procedure to decide who will live or die because a choice must be made. Each person respects the autonomy of others as no decision is taken or selection made without that person's agreement. Non-consequentialist fairness and autonomy are not synonymous since the former depends upon and is reducible to the latter. In any event, this is the moderate version of autonomy, and it allows killing to save lives where the victims have consented to be sacrificed or have consented to the procedure by which those who are to be sacrificed are selected.

Only the strong version of the autonomy principle applies to self-defense, if it applies at all. The weak version requires that there be an opportunity for IA to consent to being killed or to consent to a procedure which selects him to be killed. As already observed, time for such a procedure simply does not exist. Nor does IA imply consent to being killed by V. It may be the case that when A culpably attacks V, he willingly submits himself to a response by V, including being killed if necessary. This consent is analogous to that which justifies punishment, that is, an offender is deemed to submit to punishment when he breaks the law. As IA lacks responsibility for his part in the aggression against V, he cannot be deemed to have consented.

The strong version of the autonomy principle allows V to kill A (and IA), because in threatening V, A uses V as a means to an end. The law protects V's interest in freedom from such interference by another who uses his, V's life, as a means to that other's end. V, by defending himself against aggression, protects that interest and his autonomy.⁶⁷

This theory of self-defense is not without its difficulties. First, when A interferes with even trivial interests of V, he uses V as a means. If V must kill A to protect his trivial interests the autonomy principle permits it. Proportionality and autonomy are incompatible.⁶⁸ If the proportionality principle is admit-

⁶⁶J. GLOVER, CAUSING DEATHS AND SAVING LIVES 185 (1977) [hereinafter cited as GLOVER].

⁶⁷Kadish, *supra* note 2, at 884-86.

⁶⁸Psychotic Aggressor, *supra* note 2, at 381-82; RTL, *supra* note 2, at 140-41.

ted as a qualification so that the degree of permissible force is restricted, and therefore the harm which V inflicts upon A is not greater than the harm threatened by A, then autonomy is subordinate to proportionality where the two conflict. The lesser evils theory, not autonomy, delimits the scope of the interest in freedom from interference with life.

Second, the basis for allowing V to kill IA is obscure. As already observed, a culpable aggressor is deemed to have consented to punishment and self-defense if necessary, because he responsibly chooses to break the law. IA, however, makes no such choice. If IA is sleep walking or insane, he does not choose to threaten V. If the autonomy principle focuses on IA and asks, "Has IA treated V as a means?" then the answer is clearly "no." IA lacks action in the sense which it is ordinarily assessed in morals and criminal jurisprudence. If we focus on V, we may say that he is 'threatened' by IA. That is not the same thing as V "being used as a means to an end" because "using" connotes a purposeful act, one in which the actor has conscious aims.

Commentators who explain how the autonomy principle justifies V's killing of IA in self-defense fail to address this problem. Rather, they assume that IA violates V's autonomy, and thereby becomes an enemy of the legal order.⁶⁹ The assumption may be derived from the private law notion of guilt which, as already observed, regards IA as guilty by virtue of his attempted transgression of the norm which prohibits taking another's life. In other words, if we assume that IA is guilty (and culpable) his position is the same as a culpable aggressor. This artificial conception of guilt, however, reveals that the autonomy principle is reducible to another — that of desert — because the moral permissibility of V's killing of IA depends upon the latter's presumed responsible violation of the law.

4. Desert

Distribution according to desert allocates goods as rewards for good conduct, and revokes or deprives a person of goods as punishments. Conduct, not states of affairs, is evaluated. Desert depends upon the praiseworthiness or blameworthiness of conduct. In particular, the latter depends upon culpability of conduct, which is usually judged by the actor's purposes, intentions; or if conduct is unintentional, its recklessness or negligence.⁷⁰

Desert is closely associated with the forfeiture theory of self-defense, which as already observed has recently come under severe criticism.⁷¹ Nearly all commentary on the forfeiture theory concentrates on what the present writer calls the strong version of that theory. When these different versions are disentangled, we shall find that desert may play a limited role in self-defense.

⁶⁹ *Psychotic Aggressor*, *supra* note 2, at 379-80.

⁷⁰ See authorities cited *supra* note 5.

⁷¹ See authorities cited *supra* note 2.

The strong version holds that when A culpably attacks V he "forfeits" all rights and, in effect, becomes an outlaw whom others may kill at will.⁷² The essence of this version is that the interest in freedom from interference with life exists so long as it is not lost by culpable aggression. Put another way, V's interest exists because he does nothing to forfeit it, but then neither does IA. A, however, irrevocably forfeits his interest and may be immediately or later killed by V or, for that matter, any one.

The underlying principle that a person by virtue of his transgression of a norm loses all protection of the law has wider applicability. What appears to be crucial is that, having once broken a rule, A is forever tainted and to be deprived of the benefits of life in a community. Put another way, he no longer enjoys equal status with others in the community when its benefits are allocated. If, for example, A and X both need the use of a machine where it will serve only one of them, the doctors may or ought to take into account the fact that A is tainted and allow X to live.⁷³ Or, if A and X struggle for a plank which will support only one, X may kill A, but not *vice versa*, because A, not X, has forfeited all rights on a previous occasion. The strong version leaves A wholly at the mercy and beneficence of the community because of his transgression on a single occasion.

The standard objections to this version of forfeiture theory are that it fails to connect the use of force against A with his transgression in a doubly significant sense. First, the forfeiture theory does not restrict the deprivation of A's benefits to the situation in which he transgresses a norm. It lacks an immediacy requirement. V or another may kill A after the threat to V has ceased. As A's taint continues he may be deprived of the use of the machine or the plank even though his culpability is not immediately connected with the need to choose.⁷⁴ Second, the forfeiture theory does not limit the use of force to that which is required to obviate the threat to V's life. A's loss of all protection afforded by law leaves him open to any harm which V or others wish to inflict.⁷⁵

A moderate version attempts to overcome these objections by connecting A's loss of benefits to his desert.⁷⁶ An attack which threatens only a minor harm to V is less serious than one which threatens a grave harm; A deserves less punishment and should lose less benefits. His loss is assessed according to his deserts.

Although the moderate version more closely associates A's loss with his deserts it does not sufficiently connect them to overcome the defects of the strong version. The lack of immediacy still remains: A's deserts need not be in-

⁷²LOCKE, *supra* note 1, § 8.

⁷³GLOVER, *supra* note 66, at 224-26.

⁷⁴Kadish, *supra* note 2, at 884; SDR *supra* note 2, at 5-6.

⁷⁵Psychotic Aggressor, *supra* note 2, at 377; RTL, *supra* note 2, at 144.

⁷⁶Montague, *supra* note 1, at 216-17; NOZICK, *supra* note 1, at 62-63.

flicted during the time which his aggression threatens V. Nor need the harm inflicted upon A be limited to that necessary to obviate the threat. His deserts may warrant a harm graver than what is needed to prevent him from harming V.

A weak version restricts the relevance of desert to cases where it is closely connected with the need to deprive A of his benefits.⁷⁷ The loss of benefits continues only so long as the situation exists in which there is a need to choose between lives, assuming that this situation was culpably created by A. For example, if the struggle for a plank arises because A culpably capsized the boat then the need to choose between A and X derives from A's culpability. Similarly, if A initially commits an aggression against V the law holds that A 'forfeits' his right of self-defense.⁷⁸ The rule extends to cases where although A has not actually attacked V he provokes V's attack by his own culpable conduct.⁷⁹

This forfeiture of self-defense, however, must not extend beyond the situation which is created by A's culpable conduct. If by retreat⁸⁰ A temporizes the affray he effectively terminates the need to choose between A and V and therefore his loss of self-defense ceases.⁸¹ This weak version overcomes the objections to the strong and moderate versions of forfeiture theory but does not (nor does it purport to) supply a moral criteria for choosing between lives in all cases of necessity and self-defense.

5. Conclusion

In this section the writer has argued that the criminal law distributes an increment of freedom from interference with, among other things, life. Liberal political theorists since Hobbes have regarded this freedom as indispensable to the enjoyment of basic goods. Further, by distinguishing the object of conduct from that of protection by a penal law we may find in the latter the freedom which is distributed by the criminal law.

⁷⁷GLOVER, *supra* note 66, at 225-26.

⁷⁸MODEL PENAL CODE § 3.02(2) (1985). See also PERKINS & BOYCE, *supra* note 51, at 1128-29; LAFAYE & SCOTT, *supra* note 51, at 394-95. MODEL PENAL CODE § 3.04(2)(b)(i) applies forfeiture to cases where the killer provokes the aggression for the purpose of killing in self-defense. *Swan v. State*, 13 Okla. Crim. 546, 165 P. 627 (1917) (Although defendant may have provoked aggression by victim he does not lose self-defense unless he had intent to kill the victim.); 40 C.J.S. *Homicide* §§ 117-19 (1944).

⁷⁹The principle stated in the text does not limit loss of self-defense to a person who initiates aggressive combat but includes one who provokes aggression. *State v. Morgan*, 100 Ohio St. 66, 125 N.E. 109 (1919) (Defendant by refusing to come out of toilet compartment on train instigated effort by conductor to gain entry and was not entitled to use deadly force against the conductor); *State v. Morgan*, 296 N.W.2d 397 (Minn. 1980) (Defendant, for the purpose of committing a robbery, posed as a homosexual, replied to advertisement by a homosexual for a male housekeeper and when the latter made sexual advances was not entitled to defend himself by use of deadly force because he invited the advances); 40 C.J.S. *Homicide* § 117 (1944).

⁸⁰Beale, *Retreat from Murderous Assault*, 16 HARV. L. REV. 567, 575 (1903). The rule referred to in the text is what Beale calls "flee to the wall." PERKINS & BOYCE, *supra* note 51, at 1129-30, call it "withdrawal."

⁸¹LAFAYE & SCOTT, *supra* note 51, at 395; 40 C.J.S. *Homicide* § 121 (1944); *Cribb v. State*, 71 Ga. App. 539, 31 S.E. 2d 248 (1944); *Eby v. State*, 165 Ind. 112, 74 N.E. 890 (1905); *Banks v. Commonwealth*, 196 Ky. 639, 245 S.W. 296 (1922); *State v. Reid*, 3 Ohio App. 2d 215, 210 N.E.2d 142 (1965); *Townley v. State*, 355 P.2d 420, 439 (Okla. Crim. App. 1960).

The nature of this distribution may be ascertained by the factual specification method which explains that in given conditions the freedom from interference is qualified by a principle. While this method logically permits a distribution of benefits and burdens, and does so on consequentialist grounds, there does not appear to be a single moral ground for all cases of permissible killing. Put another way, no single moral principle, consequentialist or non-consequentialist, delimits the scope of freedom from interference with life in all cases. Finnis' claim that there are only two basic choices is correct, but that does not warrant his further claim that we must choose between them. A compromise between them may be necessary, but compromise, especially on an *ad hoc* or eclectic basis, is not widely preferred by commentators.⁸²

III. CORRECTIVE JUSTICE IN CRIMINAL LAW

Legally protected interests are often, though not always, rights, or more particularly claim-rights.⁸³ These rights enable a rights-holder to make demands upon others, particularly that they respect the rights-holder's interests. A duty correlative to a right is owed a rights-holder.⁸⁴ What Finnis calls a 'system of rights' is a scheme of complex relations among individuals who individually possess claim-rights, and may make certain demands of others, including that they fulfill their corresponding duties. The enforcement of these obligations falls within the sphere of corrective justice.⁸⁵

A. *Definitions of Crime and Criminal Law*

Perhaps the individualistic character of rights, the special legal meaning of words when used in a legal system,⁸⁶ or both, have contributed to widespread confusion over the nature of criminal law. A focus on rights has prompted many writers to attempt a division of wrongs into private, which are peculiarly individual, and public which are otherwise.⁸⁷ A focus on the legal meaning of nomenclature used in a legal system has led other writers to insist that whatever the law calls crime is crime.⁸⁸ Whatever the source of confusion the debate over the nature of criminal law has continued within the confines of these two approaches both of which perpetuate misunderstanding.⁸⁹

⁸²See, e.g., NOZICK, *supra* note 1 at 160-64.

⁸³NLNR, *supra* note 12, at 303-04.

⁸⁴W. HOFELD, *FUNDAMENTAL LEGAL CONCEPTS* 38-39 (W. Cook ed. 1928).

⁸⁵NLNR, *supra* note 12, at 178.

⁸⁶H.L.A. Hart, *Definition and Theory in Jurisprudence*, 70 *LAW Q. REV.* 37 (1954); Ross, *Tu-Tu*, 70 *HARV. L. REV.* 812 (1957).

⁸⁷Allen, *The Nature of a Crime*, 13 *J. COMP. LEGIS.* 1 (1931) [hereinafter cited as Allen]; Drane and Neal, *On Moral Justifications for the Tort/Crime Distinction*, 68 *CAL. L. REV.* 398 (1980); NOZICK, *supra* note 1, at 67.

⁸⁸J. MICHAEL AND M. ADLER, *CRIME, LAW AND SOCIAL SCIENCE* 1-5 (1933) [hereinafter cited as MICHAEL AND ALDER]; Williams, *The Definition of Crime*, 8 *CURRENT LEGIS. PROB.* 107 (1955) [hereinafter cited as Williams].

⁸⁹Kramer, *The Debate over the Definition of Crime: Paradigms, Value Judgments, and Criminological Work in Ethics, Public Policy and Criminal Justice* (1982).

1. Purely Legal Definition of Crime

The "purely legal" definition of crime⁹⁰ defines it as "an act capable of being followed by criminal proceedings having a criminal outcome, and a proceeding or its outcome is criminal if it has certain characteristics which mark it as criminal."⁹¹ So stated the definition is open to criticism as empty since it defines crime by reference to 'criminal' proceedings and the 'criminal' nature of proceedings by further reference to the 'criminal' character of the outcome: It fails to supply a criteria by which we separate the criminal from non-criminal proceeding.⁹²

Apart from its defects the purely legal definition is valid, if at all, for a particular legal system. Its leading proponent explains that "if we can frame a definition of crime that will state the legal use of the word, we shall have succeeded in our principal purpose."⁹³ 'Legal use' may narrowly refer to what a word means in a particular legal system such as the English legal system or the U.S. federal legal system. As such there is no single 'legal definition' of crime, but many legal definitions of crime. There may be similarities, or the definitions may even be identical. Similarities do not identify any logical or moral features of definitions because a statement about a definition is a description of its use in a particular legal system. This is not to say that a purely legal definition lacks validity or utility. The validity of such a definition rests upon how accurately it describes the use of the word in the legal system under examination. Its utility depends upon the legal questions in which the meaning of the word 'crime' is important. These too will vary from legal system to legal system, and therefore it is meaningless to speak of a legal definition of crime having a uniform content for all legal systems, or solving a set of legal issues common to all or even a range of legal systems.

While historians, sociologists and philosophers may examine many of the problems which arise in the administration of criminal law, they have no need to resort to the terminology used by lawyers and judges. For them the problem is not how a particular legal system uses a word like crime but the nature of political and legal institutions which seek to influence how individuals conduct their affairs. Historians of criminal law, for example, must compare legal systems and identify certain institutional arrangements as specifically appertaining to the criminal law; they cannot confine themselves to the legal meaning of words.⁹⁴ Sociologists must also compare social control arrangements in

⁹⁰MICHAEL AND ADLER, *supra* note 88, at 5; Tappan, *Who is the Criminal?*, 12 AM. SOC. REV. 96 (1947) [hereinafter cited as Tappan].

⁹¹Williams, *supra* note 88, at 130.

⁹²Hughes, *The Concept of Crime: An American View*, 1959 CRIM. L. REV. 239, 241. Hughes observes that whatever merits the definition may have in England it is only the beginning in the United States. See also Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404 (1958) [hereinafter cited as Hart].

⁹³Williams, *supra* note 88, at 109.

⁹⁴H. MAINE, *ANCIENT LAW* 369-374 (1864); R. CHERRY, *LECTURES ON THE GROWTH OF CRIMINAL LAW IN*

different societies in order to explain how specific techniques influence behavior.⁹⁵ Philosophers and jurists must also compare criminal law systems for common features in order to identify the institutional arrangements which they evaluate.⁹⁶ Proponents of the purely legal definition who claim that it is the only definition for these other enterprises wrongly exaggerate its validity and misunderstand the nature of these other tasks.⁹⁷

2. Crime as Harm

Critics of the purely legal definition nearly always adopt a moral notion of harm as their criteria for crime. By implication, the criminal law consists of those moral standards the breach of which is harmful. Stated simply, crime is a certain type of immoral conduct or morally blameworthy conduct.⁹⁸

Three different versions of the "crime as moral harm" thesis concentrate on the standards of conduct which are enforced by law. The first account holds that criminal conduct is grave or seriously immoral conduct, such as murder, rape and grievous bodily harm.⁹⁹ It refers to those acts which are regarded as immoral irrespective of whether or not they are prohibited by law, and thus they are *mala in se*.¹⁰⁰ The implication is that the other standards of conduct which are included in the criminal law are not "crime" even if immoral.¹⁰¹ A second account holds that while the minimum or "core" content of the criminal law is the prohibition of seriously immoral conduct, the rest of the standards enforced by the law are also crime because the taint of immorality which attaches to the grave offenses spills over to these less serious crimes.¹⁰² A third version holds that when society adopts a standard of conduct because it had to choose between alternative courses of conduct there is a moral obligation to accept and comply with society's choice; a breach of the standard is immoral and crime.¹⁰³ Presumably, where a society does not have to choose between alternative courses of conduct a rule is not a moral standard, and therefore its breach is not crime.¹⁰⁴

The standard objections to the crime as harm thesis are, firstly, that the

ANCIENT COMMUNITIES 1-16; G. CALHOUN, *THE GROWTH OF CRIMINAL LAW IN ANCIENT GREECE* 1-14 (1927); J. STRACHAN-DAVIDSON, *PROBLEMS OF THE ROMAN CRIMINAL LAW* 36-45 (1912).

⁹⁵E. DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 70-79, 424-31 (Simpson trans. 1936).

⁹⁶Casinelli, *Criminal Law: The Rules of the Polity*, 75 *ETHICS* 240 (1965).

⁹⁷MICHAEL AND ADLER, *supra* note 88, at 5.

⁹⁸TCJ, *supra* note 2, at 13-33 provides an excellent review of these positions.

⁹⁹4 W. BLACKSTONE, *COMMENTARIES* 5 (1778); Allen, *supra* note 86, at 18-19.

¹⁰⁰4 W. BLACKSTONE, *COMMENTARIES* 5 (1778).

¹⁰¹Allen, *supra* note 87, at 18.

¹⁰²Hart, *supra* note 92, at 413; Wasserstom, *H.L.A. Hart and the Doctrine of Mens Rea and Criminal Responsibility*, 35 *U. CHI. L. REV.* 92, 97 (1967).

¹⁰³Fitzgerald, *Real Crimes and Quasi-Crimes*, 10 *NAT'L LAW F.* 21 (1965) [hereinafter cited as Fitzgerald]; J. RAZ, *THE AUTHORITY OF LAW* 229 (1979) [hereinafter cited as RAZ].

¹⁰⁴Fitzgerald, *supra* note 103, at 51.

concept of harm lacks objectivity because it depends upon the morals of the person who offers the definition. What is harm in one community may not be in another. And what is harm at a given time in a community may not be at another time in it. The thesis introduces subjectivity into the definition of crime.¹⁰⁵ In any event, nearly all writers who advance a harm concept of crime concede that only some immorality is crime, and they must distinguish immoral conduct which is crime from that which is not. In doing so they must introduce a further moral criterion which adds yet another subjective feature to the definition.

Second, the focus on morality to the exclusion of the legal and political institutional arrangements that create and enforce law implies that crime is crime even in the absence of these arrangements. The crime as harm thesis offers an account of immorality and perhaps even a view of a class of immoral conduct which the law ought to prohibit. However, as a description of the institution of criminal law which is the object of study for historians, sociologists and philosophers, it is wholly misleading and inaccurate for obvious reasons. Nor is the defect remedied by adding to the account that crime is legally prohibited moral harm because while there is some reference to law the account does not explain the 'legal' — institutional — nature of criminal law.

An alternative to the harm thesis holds that crime is a species of morally blameworthy conduct.¹⁰⁶ The focus is on the "hinges of criminal liability"¹⁰⁷ or rules that govern a determination that a person is liable for conduct which varies from the literal meaning of the standard. The moral character of a rule, if any, is irrelevant to this approach.¹⁰⁸ Criminal conduct differs from other transgressions in that the former are culpable according to certain moral criteria by which we attach blame. However, not all moral distinctions are pertinent to the characterization of conduct as criminal. For example, an intention to kill is immoral, but is not criminal, though it incurs blame.

The blame thesis suffers both of the defects in the harm thesis. First, what qualifies as morally blameworthy conduct is hardly a matter of objective definition. Moreover, the criteria for treating some moral distinctions as relevant and others as irrelevant to the concept of crime has not been, and cannot

¹⁰⁵Tappan, *supra* note 90, at 97; Williams, *supra* note 88, at 120-21; Cohen, *Moral Aspects of the Criminal Law*, 49 YALE L.J. 987, 994, 996-97 (1940) [hereinafter cited as Cohen].

¹⁰⁶Cohen, *supra* note 105, at 999; J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 25 (2d ed. 1960); Hall, *Interrelations of Criminal Law and Torts: II*, 43 COLUM. L. REV. 753, 967-74 (1943); BRETT, AN INQUIRY INTO CRIMINAL GUILT 35-37 (1963); Allen, *Criminal Law and Modern Consciousness: Observations on Blameworthiness*, 44 TENN. L. REV. 735, 743-45 (1977); Hart, *supra* note 92, at 417-18.

¹⁰⁷TCJ, *supra* note 2, at 21.

¹⁰⁸None of the writers goes so far as to explicitly adopt this position because it would mean that blameworthiness depends solely upon the principles of criminal liability and not the moral character of the standard of conduct which is enforced by the law. Burgh points out that the logic of this position in respect of the morality of punishment implies that punishment is fair not only where the moral quality of a rule is neutral but even immoral. Burgh, *Do the Guilty Deserve Punishment?*, 79 J. PHIL. 193, 200-02 (1982).

be, elaborated by proponents of the blame thesis because it is a further moral or policy ground which will also depend upon the views of its proponent. Second, like the harm thesis, the blame thesis does not refer to the political and legal institutional features of a criminal law system. Instead, it refers only to the moral reasons for judging conduct as blameworthy. Like the blame thesis it may provide a basis for an argument about what ought to fall within the sphere of corrective justice in criminal law, but it tells us nothing about that sphere itself.

B. *Political Obligation in Criminal Law*

However, we must break with the orthodox dichotomy by focusing on the formal institutional arrangements which a community uses to enforce its members obligations. Rights and obligations possess not only their individualistic character but also specificity and generality. A specific obligation prescribes a particular course of conduct in certain conditions: a person's conduct either complies with or varies from that standard. A general obligation, however, is a duty to comply with whatever is required by the law. It does not prescribe particular acts, rather obedience to what specific obligations are imposed by law. It is the connection between these two obligations that constitutes the special form of corrective justice which we find in the criminal law.

1. Crime as Disobedience

A few commentators have, like Hobbes, tentatively suggested that crime is disobedience or "contempt of the legislator," but they have not further developed their analysis.¹⁰⁹ This may be partly due to assumptions about the obligation to obey law generally (general obligation). On a crude view of this obligation, an infraction of any primary rule of obligation which is enacted by lawmakers is disobedience and a rejection of a general obligation. Hobbes held such a view and did not distinguish between the rules of private law relations like contract or tort on one hand and criminal law on the other.¹¹⁰ If the crude view were correct then a breach of a contract is a rejection of a general obligation. No doubt, a breach of contract is a rejection of a duty to keep promises, which is a species of a general obligation. However, this is, at least intuitively, different from what we commonly regard as disobedience.¹¹¹

A second view of general obligation holds that there is a presumptive or *prima facie*¹¹² obligation to obey law. As a moral claim it suggests that the fact

¹⁰⁹HOBBS, *supra* note 34, at 229. See McGinley, *An Inquiry into the Nature of the State and Its Relation to the Criminal Law*, 19 OSGOOD HALL L.J. 267 (1981).

¹¹⁰Spjut, *Hobbes' Definition of Crime*, 13 ANGLO-AM. L. REV. 1 (1984).

¹¹¹RAZ, *supra* note 103, at 234-36.

¹¹²For critical analysis of the concept of *prima facie* obligations see Searle, *Prima Facie Obligations*, in *PRACTICAL REASONING* (J. Raz, ed. 1978).

that a liberal democratic regime enacts a rule as law is as a rule a sufficient reason to comply with it, the law. An examination of this moral claim is beyond the scope of this article. What is important is that this view of rules as reasons for action does not attempt to describe how a legal system actually insists upon compliance with its rules. It throws no light upon the present inquiry.

A third, sociological, conception of obligation examines how the breach of one rule sets an example for others who are likely to consider transgression of that or other rules on other occasions. Perhaps the breach of some rules will generate greater disrespect for law or generate it more quickly than other rules. In effect the generality of a legal obligation varies with the extent to which compliance with it leads to respect for law generally or the extent to which violation leads to disrespect for law generally. This approach, however, does not tell us about how lawmakers view the connection between specific and general obligations, and like the crude and moral conceptions is irrelevant to our present inquiry.

What will be called an institutional approach focuses on how lawmakers, enforcers and adjudicators conceive the importance of a specific obligation and its connection with a general obligation. Obviously the importance of an obligation will be partly evident in the sanctions which are prescribed for violation. The more severe the sanction the more important the obligation. The link between general and specific obligations is, however, more than a matter of degree of importance of the latter obligation; it is a difference of kind of obligation. Where lawmakers (or adjudicators where left to them) designate a specific obligation as one which also indicates that its compliance signifies acceptance and transgression a rejection of a general obligation they create a specific obligation of a kind which is significantly different from other specific obligations. While still a specific obligation, it is one which by virtue of its institutional designation as linked with a general obligation serves as a test for how subjects in a community accept their basic political obligation.

The institutional link should not be confused with the offender's own views of his transgression. He may intend to break only this one rule on this one occasion and not regard his violation as a rejection of a general obligation. He may regard this particular rule as immoral and his breach as excused or justified, but not a challenge to the lawmaker's authority to enact just laws. He may believe that while he injures a particular person he has not affected respect for law generally.¹¹³ While the transgressor's beliefs about his conduct and the conditions in which he acts are not wholly immaterial they do not designate or undermine the institutional designation of a specific as a general obligation.

¹¹³For an excellent study of how delinquents so rationalize their infractions which the delinquents do not regard as culpable, let alone a rejection of a general obligation, see D. MATZA, *DELINQUENCY AND DRIFT* (1964).
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A designation of a specific as also a general obligation does not impose two obligations, to do what is prescribed by the former and to accept the latter. When a law imposes a duty to drive carefully it does not oblige a driver to fulfill two duties, to drive and to take care, nor does it require two acts, to drive and to take care; it requires of those who drive that they do so carefully. It requires a particular kind of driving. We may say of designated specific obligations that what the law requires is compliance with the standard of conduct which is prescribed, and no more or less. However, as the standard is also a designated one, it demands special attention and compliance.

In the absence of a specific obligation, its designation, or both, a link with a general obligation no more exists than one has a duty to drive carefully while not driving at all; the former are conditions for the latter. In the crude sense there is always, even in the absence of designation, a general obligation and transgression of a specific is also a rejection of a general obligation. However, only where lawmakers have actually stipulated that playing by a particular rule is also regarded as playing by the rules generally do they connect the two and treat a violation as also a rejection of a general obligation.

As already observed, institutional designation of an obligation does not impose additional requirements although it does require special attention. Its designation suggests to all concerned that compliance with this rule will be treated as playing by the rules; one who fails will be symbolically rejecting the rules of life in the community.

Lawmakers might adopt a view that the fact of violation itself signifies a rejection or they might restrict the class of cases in which a violation qualifies as a rejection of a general obligation. This supposed dichotomy, "fact of violation itself," and restricted cases of violation, may be misleading because it suggests that violations exist *in abstracto*. It may be understood to suggest that the offense of careless driving is divisible into the fact of driving and carelessness. What is meant is that a person may drive in a way that creates a risk of harm or danger to others on the road or highway; lawmakers may make this course of conduct itself a violation and stipulate that it will be regarded as a rejection of a general obligation.

Lawmakers may, however, restrict liability by a further requirement that the risks be obvious to a reasonable person. This additional requirement, negligence, is not peculiar to this particular statute, though its application to this law will have a particular meaning. In other words, lawmakers may specify a range of conditions which are common to all specific obligations designated as linked, so that a breach signifies rejection only where one of these exists. It is not that there are breaches and those which also signify rejection; there are only breaches which signify rejection.

2. General Obligation and Distributive Justice in the Criminal Law

The criminal law serves a double function: firstly, it creates an incremental measure of freedom from interference for, among other things, life, personal integrity and property; secondly, it designates that respect for these interests will be regarded as playing by the basic rules of life in the political community, and, conversely, violation will be treated as a rejection of the rules. The latter affords a special form of corrective justice and protection for the former, distributive justice in the criminal law. In specific cases, however, there is potential for tension between the two functions.

A central theme in liberal political theory is that freedom from interference is insecure without an incremental measure of protection by the political and legal institutions. That protection, firstly, requires the existence of a central lawmaking and enforcing body. Secondly, the state must insist that the members of the political community accept their general obligation. Third, it connects the incremental freedom distributed by primary rules of obligation with the general legal obligation so that that freedom is secured by the state as fundamental to participation in the life of political and legal institutions.

In most cases of alleged infraction, law enforcers and adjudicators are concerned principally with whether the alleged conduct occurred; if it did, does it transgress the norm; and, if so, was the transgression culpable? There is no tension between the distributive and corrective justice features of the criminal law. In cases, however, where there is no disturbance in the order of distributive justice which is effected by the criminal law the tension becomes manifest. One example is a case where from the outset a person who seeks to commit a crime cannot succeed, and therefore cannot interfere with a protected interest.¹¹⁴ If we concentrate on the distributive functions of the criminal law and assume that an offender must at least pose a realistic threat to legally protected interests, we will be likely to find no attempt has occurred.¹¹⁵ On the other hand, if we focus on how the course of conduct is a manifestation of the offender's unwillingness to play by the rules we will likely find an attempt has occurred.¹¹⁶

¹¹⁴Such a case usually involves both factual and legal impossibility. MODEL PENAL CODE § 5.01 (1985) draws no distinction between the two.

¹¹⁵For commentators who favor the "objective" approach see TCJ, *supra* note 2, at 206, 215, 224-32; Beale, *Criminal Attempts*, 16 HARV. L. REV. 491, 493 (1902); Elkind, *Impossibility in Criminal Attempts: A Theorist's Headache*, 54 VA. L. REV. 20, 26, 30-31 (1968); Hall, *Criminal Attempt — A Study of Foundations of Criminal Liability*, 49 YALE L.J. 789, 836-37 (1940); Hughes, *One Further Footnote on Attempting the Impossible*, 42 N.Y.U. L. REV. 1005 (1967); Ryu, *supra* note 37, at 1170; Sayre, *Criminal Attempts*, 41 HARV. L. REV. 821, 850-51 (1928); Smith, *Two Problems in Criminal Attempts*, 70 HARV. L. REV. 422, 447 (1956) [hereinafter cited as Smith]; Strahorn, *The Effect of Impossibility on Criminal Attempts*, 78 U. PA. L. REV. 962, 970, 987-88 (1930).

¹¹⁶RCL, *supra* note 25, at 161-66, 181-84; Perkins, *Criminal Attempt and Related Problems*, 2 UCLA L. REV. 319, 331-32 (1955); Turner, *Attempts to Commit Crimes*, 5 CAMBRIDGE L.J. 230, 246-47 (1934); Ullmann, *The Reasons for Punishing Attempted Crimes*, 51 JUR. REV. 353, 363-64 (1939); Wechsler, Jones and Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 64 COLUMBIA L. REV. 571, 578-79 (1961); RCL, *supra* note 25, at 161-66, 181-84.

Another example will illustrate this analytical tension in practice: A has a contractual right to B's performance, but due to a change in circumstances A's own performance is now more costly than what he will receive from B. Although B's breach violates A's right, it does not harm A's interest because A is better off having been relieved of his own obligation.¹¹⁷ As corrective justice in contract law depends upon distributive justice and B's breach does not impair that order, A has no claim for damages even though B breached his obligation. In the criminal law, the specific form of corrective justice and the general importance of political obligation in liberal political theory obscures the precise character of the link between specific and general obligations. It is conceptually possible to treat the fact of transgression, without risk of harm to the distributive order, as itself sufficient to amount a breach of the criminal law. Alternatively, the concept of breach can be more closely connected with the distributive justice function in the criminal law so that there is no breach in the absence of harm or danger of such. An elaborate discussion of this problem is beyond the scope of the present article, though an understanding of it is relevant to a discussion of self-defense and prevention of crime.

C. *Culpability*

The relevance of culpability to corrective justice in the criminal law is implicit in the above account of how a breach may signify a rejection of a general obligation. The logical features of the criminal law are a specific obligation, a general obligation and a link between them; that is, a stipulation by the legal system that it regards compliance with the former as acceptance of the latter. Conversely, a "breach" of the former will be regarded as rejection of the latter, but a legal system may also stipulate that conduct will be regarded as a breach only when it is culpable. In such event, culpability, or more precisely the general principles of criminal law by which culpability is determined, connects specific and general obligations. Culpability is an indicator or index of the extent to which a transgression also signifies a rejection of a general obligation: the graver the culpability, the stronger the rejection:

The present writer's logical claim, that the special character of corrective justice in the criminal law is the connection between specific and general obligation, should not be confused with other writers' moral claim that blameworthiness is an essential feature of criminal law.¹¹⁸ The logical claim is that a legal system may designate rules as so important that their breach is regarded as failure to play by the basic rules of the community. It may go further, and specify that certain rules of liability for all alleged transgressions of these specially designated rules. Where it does so, those are the rules by which the sense in which a breach will be treated as a rejection of a general obligation

¹¹⁷RTL, *supra* note 2, at 136-37.

¹¹⁸See authorities cited *supra* note 106.

is ascertained. In modern western legal systems these rules are the general principles of criminal liability.

These rules are believed by most jurists to be so important that a criminal law system without them would be so repugnant to our beliefs about the nature of criminal justice that it would be virtually unrecognizable. But repugnance is moral, and therefore such a system is so offensive that we can hardly conceive giving it serious consideration as a candidate for description as criminal justice. That might well be. The important point, however, is that these beliefs, like the claims advanced by some commentators about the essential role of blameworthiness in criminal law, are moral claims, albeit strongly held beliefs. The logical claim is that there must be a designation of rules as indicators of a general obligation; the moral claim is that this cannot be done morally, even in some minimal sense, unless certain general principles condition liability for grave offenses upon the requirements of culpability.

D. *Excuse and Justification in Self-Defense*

Although culpability is relevant to both the distributive and corrective justice functions of the criminal law, its relevance differs for each. In the sphere of corrective justice it serves as an indicator of the sense in which an alleged breach is a rejection of a general obligation. In the sphere of distributive justice it provides a criteria by which to allocate protection of interests where a choice between them must be made.

This difference is usually expressed as one between excuse and justification. Thus, where a person's conduct is excused he proves lack of responsibility or 'voluntariness.'¹¹⁹ Where conduct is justified it is assumed to have been "voluntarily" performed, but warranted by the interests it protects.¹²⁰ While not directly calling into question this distinction between excuse and justification, the present writer has argued that it may be more clearly understood in the context of the distributive and corrective justice functions of the criminal law. By seeking to excuse conduct we deny both its culpability and the fact that a person by engaging in such conduct signified a rejection of his general obligation. By seeking to justify conduct we only indirectly deny culpability, because we claim that it protected the order of distributive justice; the assumption is that there is no disturbance in the order of corrective justice unless there is a disturbance in that of distributive justice.

Self-defense is both a privilege to protect the order of distributive justice

¹¹⁹H.L.A. HART, *supra* note 20, at 31-35, 217-22; RCL, *supra* note 25, at § 7.6.3; TCJ, *supra* note 5, at 137 calls this the "responsibility principle"; Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 221-29 (1982) [hereinafter cited as Robinson]; Fletcher, *The Individualization of Excusing Conditions*, 48 S. CAL. L. REV. 1269, 1269-71 (1974).

¹²⁰RCL, *supra* note 25, at § 7.6.3.; Robinson, *supra* note 119, at 213-20; Note, *Justification: The Impact of the Model Penal Code on Statutory Reform*, 75 COLUM. L. REV. 914, 915-17 (1975); TCJ, *supra* note 5, at 139.

and a justification to an alleged criminal offense. Thus, the legal rules which permit its use against an aggressor and to avoid criminal liability serve a double function. In one sense the two functions are interdependent: so long as a person upholds the order of distributive justice he does not disturb the order of commutative justice.¹²¹

In another sense, however, the concerns of corrective justice are quite separate and distinct. It does not matter that a person does not actually protect the order of distributive justice when acting in self-defense so long as he believes on reasonable grounds that there was a need to defend himself and to do so with the force which he used.¹²² A defender's belief that he was entitled to use disproportionate force, such as a trap or spring gun to defend his property, is however a species of mistake of law and is always culpable.¹²³ The 'alter ego' rule, which holds that a person who intervenes to prevent a crime against a third person has only the rights of that person,¹²⁴ focuses on the distributive justice function and ignores the corrective justice features of the defense. The intervening party's liability depends upon whether his conduct disturbs the order of distributive justice, and that depends upon whether the person whom the intervenor protects had a right of self-defense. The separate culpability requirement is omitted.¹²⁵

The logic of separability of functions, if taken to its extreme, dissolves interdependence for the independent role of corrective justice and, hence, culpability. As already observed, a person may not be aware of circumstances

¹²¹ . . . [W]e should not be led erroneously to conclude that the wrong of the crime consists only in the violation of the king's or state's commands, i.e. the law. Rather, it should always be understood that the formal breach of the law has its material substance in the impairment of the interests the law is designed to protect.

Eser, *supra* note 37, at 351.

While generally acceptable in this general form the thesis becomes controversial when applied to a case where had the defendant known all the facts he would have had reasonable grounds to have used such force as he did when he assaulted or killed his victim. A number of writers support application of the objective criminality theory: A. WILLIAMS, *CRIMINAL LAW, THE GENERAL PART* 25-26 (2d ed. 1961); Smith, *supra* note 114, at 447; Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 *UCLA L. Rev.* 266, 288-91 (1975). However, MODEL PENAL CODE §§ 3.02(1) (1985), 3.04(1) require that the actor believe in the need for the use of force. *State v Berry*, 35 N.C. 128, 240 S.E. 2d 633 (1978) (Although defendant knew that victim was approaching him, he did not know that the victim had a knife in his hand and had no basis for a belief that the victim would do him serious bodily harm).

¹²² MODEL PENAL CODE §§ 3.02(1) (1985), 3.02(1) require only a belief, not reasonable belief. *State v Lionetti*, 93 N.J. L. 24, 107 A. 47 (1919).

¹²³ For example, *People v Ceballos*, 12 Cal. 3d 470, 526 P.2d 241, 116 Cal. Rptr. 233 (1974). (There was no dispute over the threat to defendant's property; the question was whether he was justified using a spring gun to prevent entry.) The courts do not treat these as mistake of law cases. The only question is whether the defendant was entitled to use such force as he did. The assumption is that if he was wrong, his belief however honest, does not excuse his conduct. Clearly, such a belief is inexcusable under the MODEL PENAL CODE § 2.04(3) (1985).

¹²⁴ For review of authorities see *State v Chiarello*, 69 N.J. Super. 479, 174 A.2d 506 (App. Div. 1961); *Taylor v. United States*, 380 A.2d 989 (D.C. Ct. App. 1977); *People v. Williams*, 75 Cal. App. 3d 731, 142 Cal. Rptr. 704 (Ct. App. 1977).

¹²⁵ *State v. Chiarello*, 69 N.J. Super. 479, 486-90, 174 A.2d 506, 510-12, (App. Div. 1961); MODEL PENAL CODE § 3.05(1)(b) (1985).

which would warrant his taking measures in self-defense, but nonetheless initiates what he believes is aggressive or excessive defensive action. Arguably, the distributive order is undisturbed, though that does not mean that his conduct is not culpable; he is regarded as violating his obligation and disturbing the order of corrective justice.¹²⁶

In any event, culpability is relevant to both the distributive and corrective justice functions of criminal law in relation to self-defense. The difference between these two functions is not always fully understood. On one hand, where a person's culpable conduct forces a choice between his and another's life, his killing in order to preserve himself does not promote the distributive justice function even if it does not impair it. Whether it impairs that order depends upon the culpability of the person whom is killed. Where that victim is also culpable, as in a mutual combat, then both parties by their culpability jointly create the necessity for a choice; there is no reason to prefer one life over another.

On the other hand, a person who initiates or provokes aggression by another person with the intent of killing in self-defense does not merely force a choice between lives but through his culpable conduct will be regarded as indicating his unwillingness to play by the rules. His culpability goes directly to the way in which a breach of an obligation is a rejection of a general obligation because it disturbs the order of corrective justice. The two rules are complementary, fault which impairs the distributive justice order, and fault which impairs the corrective justice function, though some writers and jurisdictions treat them as competing positions.¹²⁷

IV. PUNISHMENT

Although the preceding discussion alludes to the connection between distributive justice and self-defense and explains the nature of corrective justice in the criminal law, no mention is made of punishment or prevention. The object of this section is to discuss the nature and corrective justice function of punishment. The next section examines the nature and role of preventive measures of which self-defense is, according to Finnis, a paradigm.

¹²⁶See *supra* note 121.

¹²⁷Hawkins, Foster and Blackstone classified killings in self-defense during chance medley as excusable, not justified. Hawkins also included a killing by an officer of a person who resists arrests or by a private person of another who feloniously assaults upon a highway. HAWKINS, *supra* note 29, ch. 29, §§ 13-17; FOSTER, *supra* note 26, ch. 3, § 2; 4 W. BLACKSTONE, COMMENTARIES 178. Blackstone treats as excusable, and Hawkins justifiable, killing by a person whose boat is capsized and whose survival depends upon throwing another person off a plank that will support only one. HAWKINS, *supra* note 29, ch. 29, § 15; 4 W. BLACKSTONE, COMMENTARIES 178. An excusable homicide is one where a killing in self-defense does not impair nor promote the order of distributive justice in the criminal law. The legally protected interest in V's life is equal to that of A because V initiated or provoked the aggression. Like a person who struggles for a plank to avoid drowning his sole ground for killing another is self-preservation. See HOLMES, *supra* note 60. Where, however, a person's culpability is regarded as showing an unwillingness to play by society's basic rules the killing disturbs the order of corrective justice even if not that of distributive justice. This is arguably the case where V provokes or initiates aggression in order get to get A to attack and kill A. See authorities cited *supra* notes 78, 79.

Many contemporary commentators follow Henry M. Hart's characterization of punishment as "condemnation" of the offender for his offense.¹²⁸ In its early period of development, punishment by the political and legal institutions was literally condemnation because the chief or communal assembly ostracized the offender from the community, leaving him to be hunted and killed by those wishing to avenge his initial offense.¹²⁹ Today, punishments are still forms of banishment because the authorities actually remove an offender from the community by carceral confinement. They are also, however, metaphorical or symbolic since the authorities taint or stigmatize an offender by the fact of his conviction as a person who was unwilling to accept his basic political and legal obligation. Thus, the offender is tainted as a person who does not live within the rules of the political and legal institutions. Even when the authorities impose a non-incarceral sentence upon an offender, such as probation, a suspended sentence of imprisonment, or a fine, it may, though not always,¹³⁰ designate the offender as a symbolic outsider. This outsider's entry into participation on the terms which are ordinarily enjoyed by members of the community in the life of the political and legal institutions is conditioned by the payment of a price or, in Hegel's terms, the annulment of his crime.¹³¹

Criminal law and punishment mutually depend upon, or presuppose, each other. Tainting is possible for infractions of specific obligations, but as symbolic ostracism is a coherent practice only where the political and legal institutions have marked certain specific obligations as so important that they are an index of the sense in which a person plays by the rules of community life. Punishment, as literal or metaphorical banishment, presupposes that the sphere of corrective justice in the criminal law is already established. The designation of rules as those the compliance or transgression of which signify acceptance or rejection respectively of a general obligation supposes that there is a regime of enforcement and sanctions which will mark the transgressor apart from the rest of society. The criminal law presupposes the existence of punishment. The logical interdependence of criminal law and punishment suggests that, in practice, one cannot exist without the other. As a community develops or terminates its system of criminal law it must also develop or terminate its institution of legal punishment and *vice versa*.

The definitional proposition that punishment is "for" an offense¹³² has a minimal content because an "offense" refers to rules the breach of which will be regarded as an indicator of a rejection of a general obligation; punishment taints the convicted person for a manifestation of an unwillingness to accept this obligation. It implies that punishment is for a disturbance in the order of

¹²⁸Hart, *supra* note 92, at 404; Robinson, *supra* note 119 at 243.

¹²⁹See authorities cited *supra* note 94.

¹³⁰This is discussed in Spjut, *Criminal Law, Punishment and Penalties*, 5 OX. J. LEGAL STUD. 33 (1985).

¹³¹HEGEL, *supra* note 64, at § 97.

¹³²See authorities cited *supra* note 20.

corrective justice, a special form of corrective justice in which specific obligations are linked with general obligations. It further implies that culpability is relevant to punishment, not logically, but in a significantly important moral sense, because culpability serves as one of the most important indicies of the sense in which a person rejects his general obligation. His "desert" depends upon culpability because that measures how or the extent to which a transgression will be taken as unwillingness to play by the rules. A person is not punished for his moral blameworthiness, but because the offender disregards his political obligation and blameworthiness serves as a measure of this disregard.

V. PREVENTION OF CRIME AND SELF-DEFENSE

The analysis of self-defense in this article associates it with the sphere of distributive justice in the criminal law. If it is a paradigm case of prevention, then the various forms of prevention, including prevention of "crime" should also further the distributive justice function. Prevention, however, includes killing to apprehend or prevent the escape of a felon. These killings do not appear to avert a disturbance to the order of distributive justice. If these killings do not do so then self-defense is not a paradigm case as Finnis claims because prevention is more complex than he allows for, or self-defense does not promote distributive justice as the present writer has proposed.

A. *Prevention of Disturbances to the Order of Distributive Justice*

A preventive measure is one taken to avert the occurrence of an event or course of conduct. Such measures are usually classified as "civil" because they are not punishments in the ordinary sense in which the word is used in relation to the punishment of crimes.¹³³ The present article is not concerned with the differences between civil and criminal proceedings,¹³⁴ but the relation of preventive measures to distributive and corrective justice. Commentators usually illustrate their definition of prevention with such examples as detention of immigrants pending determination of their status, quarantine of persons afflicted with infectious diseases, detention of the mentally ill, internment of alien enemies during wartime or of suspected terrorists during an emergency.¹³⁵ We may add to this list the detention of 'dangerous' persons and sterilization of sexual offenders.¹³⁶ Finally, mention should be made of killing of a person in the course of arrest and prevention of escape by an offender.

With the exception of the last two examples (killing to apprehend or pre-

¹³³For a discussion of the differences between punishment and prevention see TCJ, *supra* note 5, at 460; SCHEDLER, BEHAVIOR MODIFICATION AND "PUNISHMENT" OF THE INNOCENT (1977); T. SEN. FROM PUNISHMENT TO PREVENTION 61-64 (1932); Frankel, *Preventive Restraints and Just Compensation: Toward a Sanction Law of the Future*, 78 YALE L.J. 229, 236 (1968) [hereinafter cited as Frankel].

¹³⁴Frankel, *supra* note 133.

¹³⁵TCJ, *supra* note 5, at 460.

¹³⁶NOZICK, *supra* note 1, at 142-46.
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vent escape), all the above listed measures are exercised to avert the occurrence of a particular injury usually, but not always, to a legally protected interest. Sterilization is supposed to diminish the risk that a sexual offender will repeat a sex crime. Detention is supposed to restrict an offender's ability to repeat a certain type of crime, namely grave offenses against the person. Internment restricts the ability of an alien enemy or suspected terrorist, so that they cannot help the enemy or perpetrate terrorist crimes. Detention of a mentally ill person restricts his ability to inflict injury on himself or another person. Quarantine prevents the spread of infectious diseases to others and protects their well-being. While we cannot precisely identify the victim and the harm which is supposed likely to occur, we can delineate a range of possible victims and harms to them, and accordingly specify the class of legally protected interests which the law by prevention seeks to protect.

As the object of each of these preventive measures is to avert harm to a legally protected interest, each protects the order of distributive justice. It should be noted that these measures doubly differ from the criminal law. The latter partly distributes an incremental freedom from interference by prescribing a standard of conduct. A preventive measure effects a similar freedom from interference without standards of conduct. It permits, for example, detention of a mentally ill person even though he has broken no rule. The class of persons whom might have been harmed by such a person is accorded protection none the less. Second, the earlier the intervention to prevent a risk of harm the less certain the judgement that the person against whom the restraint is exercised is correct; that is, a predictive judgement that a person will interfere with another's freedom is weaker in relation to the remoteness of the event or harm which is supposed to be predicted. In effect, preventive measures shift the risk of harm partly to the class of suspected harm-doers. Neither of these differences alter the distributive justice function of these preventive measures.

B. *Prevention of Disturbances to the Order of Corrective Justice*

However, the use of force to apprehend or to prevent the escape of an offender does not protect a person's freedom from interference with his life, bodily integrity or property. A person, individual or law enforcement officer, who uses force does not do so on the basis of a predictive judgement that unless he apprehends the suspect or prevents his escape the suspect will at a later date be likely to harm a particular interest. It may be that the officer believes that the suspect will endanger legally protected interests if he is allowed to remain at large, but this is immaterial. He is empowered to use force to apprehend or to prevent an escape even where he firmly believes that the suspect will not repeat the alleged offense. The ground for the exercise of these powers is to take the suspect into custody or to prevent his escape from such. In the former, the object is to enable the law enforcement and adjudicating process to run its

course; in the latter the aim is to prevent the frustration of that process. If there is an interest at stake it is not a good — freedom from interference — which is distributed by the criminal law.

Where the offense has already been committed, the object of prevention cannot be to stop the offender from disturbing the orders of distributive or corrective justice. Here Finnis' remark that prevention conserves or preserves the order of rights is obscure to say the least.¹³⁷ Once a crime is perpetrated, what is at stake is what Finnis calls the 'restoration' of the order of justice.¹³⁸ This too is obscure. Perhaps there should be a redistribution to rectify the loss suffered by the victim, but this is not the concern of the criminal law.¹³⁹ The principal object of law enforcement is to bring the offender to trial so that the sphere of corrective justice is enforced. Put another way, escape by a suspect or an offender frustrates the corrective justice function of criminal justice by leaving the crime without punishment. This is not to say, as did Kant, that all crimes must be punished.¹⁴⁰ Rather, the decision of whether or not an offender should be punished belongs to those who administer criminal justice not the offender, and an offender's escape aggravates or leaves without rectification the disturbance to the order of corrective justice inflicted by the original crime.

There are two other cases in which prevention is directed against disturbances of the order of corrective justice, not distributive justice. First, where intervention is directed towards obviating a person's rejection of his general obligation rather than his breach of a particular obligation, its aim is preservation of the sphere of corrective justice. This possibility is an obscure one since the very idea of crime and criminal law depends upon there being a specific obligation and its link with a general obligation. Nevertheless, a legal system may concern itself with the prospect that a person will fail to accept his general obligation without necessarily being concerned with infractions of any particular rules or the risk of harms to particular interests. Its concern is obedience as such. More particularly, its focus is a person's sense or legal and political obligation. This "sense" is moral character or conscience. In other words, a legal system that seeks to prevent a rejection of a general obligation will direct its effort towards the moral development of its subjects and seek to prevent the decline of moral conscience or the development of those aberrant features which are regarded as associated with a rejection of a general obligation.

Second, where a course of conduct which the perpetrator hopes he will consummate and result in a crime has no realistic possibility of doing so because it is impossible, legally or factually, his conduct may pose only a remote or trivial threat to legally protected interests.¹⁴¹ A person (A) who

¹³⁷FE, *supra* note 7, at 129.

¹³⁸*Id.* at 130.

¹³⁹Compensation for loss or injury falls under the province of tort law. HOLMES, *supra* note 60, at 45.

¹⁴⁰KANT, *supra* note 61, at 102.

¹⁴¹See authorities cited *supra* note 115.¹⁹⁸⁶

shoots at a stump but believes it to be his enemy (V) does not seriously endanger his enemy's legally protected interests, nor those of others if no one else is in the vicinity. An officer who knows all these facts and intervenes immediately before A shoots does not protect any interest since A endangers none. Arguably, if his intervention is warranted it is to prevent A from an attempted breach of a specific duty whereby he signifies his rejection of his general obligation. In short, the officer is protecting the order of corrective justice from A's disturbance.

C. *Self-Defense and Prevention*

Now, as preventive measures preserve not only the order of distributive justice but also the order of corrective justice in the criminal law, self-defense is not a paradigm as Finnis suggests. It is perhaps a paradigm of one of these types, either distributive or preventive justice, but which one?

The previous discussion of self-defense connects the privilege with the existence of a threat to V or at least one perceived on reasonable grounds. What must be at stake, or at least appear on reasonable grounds to be at stake, is V's freedom from interference with life or bodily integrity, his legally protected interest. In the absence of such a threat or grounds for believing there was a threat, V cannot claim self-defense. Suppose that in the above example V is in the room adjacent to A, knows that A wants to shoot him, that A believes the stump is V and obviously does not know that V is in the room next to him and A has only one bullet. V cannot intervene by killing A because, although he may claim that he prevents A from an attempt to kill him, he does not believe that A threatens nor are there grounds for believing that A threatens his life.

This result is compatible with the first three of the distributive principles which were previously discussed. Since A does not threaten V's life, the lesser evils doctrine will not allow V to kill A because the evil inflicted is far greater than anything prevented. As V is not at risk, A's action does not create a situation in which V lacks the opportunity to adopt a randomizing procedure. He may not want to approach A to suggest any procedure at all for choosing between the two of them, but the point is that he is not forced to choose at all. Nor does the autonomy principle permit V to kill A because A has not actually used or posed a real threat that he will use V as a means to his own ends. Only the strong version of culpability will permit V to kill A when he is ready to fire but, as already observed, it will also permit V to kill A afterwards as well.

The absence of a moral reason for allowing V to kill A and the rules which connect the privilege to kill in self-defense with a threat to V's life point to the distributive justice function of the privilege. It does not permit a person or official to kill simply because a person manifests by a breach or attempted breach of even a grave criminal offense a willingness to reject his general obligation. It allows individuals to avert threatened harm to legally protected interests.

D. *Culpability and Prevention*

The discussion of culpability has so far assumed that it serves as a measure for desert, either in distributive or corrective justice. In the former, and in particular relation to self-defense, culpability undermines V's claim to the privilege where as a result of culpable conduct he initiates aggression or provokes A's attack. In the latter, it both signifies and measures the sense in which a person's breach is a rejection of his general obligation.

The various facets of human action, such as intention, recklessness and negligence, which will be assessed in a judgment about the culpability of conduct are relevant to prevention of specific harms and to rejection of a general obligation. They are facts, items of evidence, symptoms or indicators of, for example, a person's dangerousness. An official who seeks to predict whether a person will be likely to commit a grave crime will consider the offender's past crimes of which his culpability will be material. Here the official is concerned with prediction of behavior in the future, not with desert. Culpability is one of the items of evidence which is relevant to that determination. Similarly, an official who seeks to predict whether an offender will likely reject his general obligation which is effectively about the offender's moral character will look to such facts as intentionality of action as a relevant consideration.¹⁴² Again, the official is not concerned with desert, but prediction of a development of the offender's moral character.

VI. CONCLUSION

This article has argued at length that the punishment analogy is defective because the privilege of self-defense preserves the order of distributive justice, and punishment that of corrective justice. This does not, however, establish that desert is irrelevant to self-defense, or, for that matter, that desert ought not to control the permissibility of self-defense as Finnis claims. What is demonstrated is that if desert determines whom should be punished it does not automatically determine whom may be killed in self-defense.

Moreover, as previous commentators have argued, desert cannot alone ground self-defense because that would not only restrict the privilege so that innocent aggressors would fall outside its scope but also expand it far beyond what is generally regarded as acceptable. Recognition that self-defense promotes distributive justice in the criminal law is a first step in delimiting its proper scope. A further and more important development would be an exposition of a consequentialist theory which supplies a reason for preserving a legally protected interest while preserving the legitimate interests of innocent per-

¹⁴²W. HEALY, *THE INDIVIDUAL DELINQUENT: A TEST-BOOK OF DIAGNOSIS AND PROGNOSIS FOR ALL CONCERNED IN UNDERSTANDING OFFENDERS* § 120 (1915); B. WOOTTON, *CRIME AND THE CRIMINAL LAW: REFLECTIONS OF A MAGISTRATE AND SOCIAL SCIENTIST* 52-57 (1963); Leviitt, *Extent and Function of the Doctrine of Mens Rea*, 19 *TUL. L. REV.* 378, 390-93 (1922).

sons. Whether such a theory is possible remains to be seen. Otherwise, we must rest content with a theory which compromises, albeit on uncertain moral grounds, between consequentialism and non-consequentialism, that is, between lesser evils and desert.