7: Killing Which Is Considered Justified

A. An Economic Argument for Nonvoluntary Euthanasia

Not all killings of one human being by another are held by the law to be crimes. In some cases killing is excused. For example, some who kill lack criminal intent: one who kills another by accident and without recklessness, one who kills another while sleepwalking or by a reflex act, and one who kills another while incapable of distinguishing right from wrong—such incapacity is always assumed in the case of very young children. Such excusable killings are neither forbidden nor permitted by law; they simply fall outside the concern of the law. For this reason they will be of no interest in what follows.

But there are cases in which a killing is intentional, yet the law does not hold the act and intent criminal since the killing is considered justified. The most obvious categories of justified killing are those which are authorized by the law itself—for example, capital punishment which executes a legal sentence and acts of war carried out under lawful authority. Under certain conditions modern Anglo-American law also considers killing in self-defense and in the arrest and detention of criminals to be justified. Finally, even when abortion has been considered homicide—the killing of one human being by another—abortion to save the mother's life was permitted as justified either by a statement of exception in the statute or by the common law exception on the ground of necessity.[1]

The question to be examined in this chapter and in chapter eight is whether nonvoluntary euthanasia might not under certain conditions be assimilated to other killing considered justified, and under these conditions legalized to the extent that it would be in the public interest.

In chapter six we considered the argument for voluntary euthanasia, assuming that nonvoluntary and involuntary euthanasia must not be permitted. The argument for voluntary euthanasia has its greatest plausibility when it maintains and stresses the requirement of voluntariness, since the liberty of those who wish to be killed and of those who wish to kill them demands

respect. Our argument was that respect for this liberty ought to prevail neither over respect for justice to those who do not wish to be killed nor over respect for the liberty of those who wish to stand aloof from euthanasia killing. We also argued that voluntary euthanasia will not be legalized without at least some nonvoluntary euthanasia also being legalized—especially the killing of defective infants. And we noted that most proponents of voluntary euthanasia hold principles which would justify nonvoluntary euthanasia if these principles justify voluntary euthanasia.

It might be supposed that if there is a sound jurisprudential argument against voluntary euthanasia, then a fortiori there is a solid argument against the nonvoluntary sort. But this does not follow. Why it does not may be seen by considering the position of Foster Kennedy, a physician and member of Cornell University who was also President of the Euthanasia Society of America prior to World War II. Kennedy recognized that the killing of persons who had been functional could not be legalized without permitting the killing by mistake of many who would have recovered. However, he favored the killing of congenitally defective and nontrainable children, for in these cases he considered a foolproof system of diagnosis and prognosis to be possible.[2]

Kennedy did not propose that infants be killed at or shortly after birth. His idea was that all children should be given a chance to develop and to display their potentiality. But when children reach the age of five, competent medical personnel can tell whether they will be trainable or not. So Kennedy suggests that when persons five years of age or older seem to be hopelessly unfit, then their guardians might apply to a legally authorized medical board. The board would examine the individual at least three times at four-month intervals. If the board decided that there was no hope that the congenitally defective child could be trained, then he or she should be relieved of the burden of living. In making reference to guardians Kennedy does not mean to exclude an application by the parents of a defective child being cared for at home. But he seems to have in mind primarily those cared for in institutions, whom "we hustle out of sight."[3]

It seems clear that if euthanasia were limited to cases of the sort which Kennedy had in mind, procedures could be developed adequate to exclude almost entirely the killing of others by mistake or by malice. Just as we suggested in chapter six that perhaps a safe system of voluntary euthanasia could be set up if there were sufficient public involvement, so Kennedy's proposal could be developed into a system which would eliminate the nontrainable without putting others at grave risk. The medical board could be required to give its testimony before a court, any interested party could be permitted to try to show that the individual proposed for euthanasia might in fact be trainable, the decision for death could be made only when the non-

trainability of the individual was established beyond a reasonable doubt, the individual to be killed would be taken in police custody to a special place where the killing would be done by a public official who would act only in execution of the court's order. If a system along these lines were first developed to dispose of nontrainable children, it later could be extended to cover all persons requiring permanent institutional care at public expense.

Of course, many people would object even more strongly to the involvement of public institutions in such nonvoluntary euthanasia than to the institutionalization of voluntary euthanasia. But an argument can be made that the overriding of liberty to stand aloof from such killing can be justified inasmuch as it could promote a public interest. The interest in question is a financial one. The congenitally defective who are not trainable, the permanently insane, and the senile often are cared for in public institutions for many years at considerable expense.

Walter W. Sackett, testifying before a committee of the United States Senate, put this argument as follows:

> We have training institutions for the less severely retarded who are trainable. I am all for those, but in these two institutions for the severely retarded in Florida, we have 1,500 residents, some with heads as big as buckets, some small as oranges, grotesque and drawn up in contracture. According to present-day cost and the fact that you can keep these individuals alive artificially to between 50 and 60, it's going to cost the State of Florida for 50 years $5 billion.
>
> Translated roughly this means it's going to cost the various States over this same period $100 billion, and when one thinks of what one could do with this money in other fields, the less severely retarded, the mentally ill, our jails, in our homes for delinquents, it is most revealing. . . . It is a question of cost benefit.
>
> Now, where is the benefit in these 1,500 severely retarded, who never had a rational thought. . .?[4]

As we pointed out in chapter one, section D, Sackett's estimated savings are not correct. But, as we also explained, it is true that a considerable amount might be saved if certain groups of individuals who require constant, permanent care were put to death.

Statements as frank as Sackett's are not prevalent, but neither are they rare. Forty years ago, William G. Lennox, who had previously been a medical missionary and was then a professor at Harvard Medical School, argued bluntly in economic terms that funds not be wasted on monsters, congenital idiots, the permanently incurable and institutionalized. To the objection that society would not countenance planned murder, he replied that society countenances war in which the best are killed, while it prolongs the lives of the worst. Lennox was an expert on epilepsy, and he especially deplored the care

given to forty thousand epileptics in public institutions; most of these patients and others who are cared for at home "are physically or mentally incapable of self-support and will be a burden as long as they live."[5]

More recent authors sometimes endorse similar views. Robert H. Williams specifies candidates for euthanasia:

> There are various levels at which one can consider the indications for euthanasia: (a) a group of individuals who will soon be encountering death; (b) a group with such severe mental damage as to be unable to express proper judgments with respect to termination of life, and (c) a group with varying degrees of cognizance, but with disabilities so incapacitating and so common as to produce great hardship on society. At the present time it is important to deal predominantly with the first group.[6]

In another work he suggests that euthanasia might be considered as a method of population control, although a deplorable one.[7]

Similarly, Richard Trubo, reporting with sympathy the views of Fletcher, Sackett, and others, stresses economic considerations. Trubo claims that it cost (1973) $1.5 billion per year just to care for all the children with Down's syndrome.[8]

Glanville Williams protests that the idea of euthanasia for the aged *in present society* would shock him as much as anyone, but he projects a future situation in which people, although not able to function, might be kept alive until they were one thousand years old. Williams argues that under such conditions it would be inappropriate to maintain "hospital-mausolea" for such persons.[9]

Even Marvin Kohl, who is careful to separate himself from some advocates of euthanasia who have written as if economic considerations are paramount, is not willing to deny such considerations a lesser role subordinate to the chief consideration of doing what is kind and loving:

> Indeed, if a society is too niggardly to allow its members to live with dignity, then allowing or helping them die with dignity should strike even the most economically-minded of individuals as being a great bargain.[10]

Although his endorsement is lukewarm, Kohl cannot forbear to state this economic argument.

As we saw in chapter one, section E, the costs of Social Security are mounting so rapidly that it is not at all implausible that society will be prepared to allow and to help the elderly to die "with dignity" long before the horrible fantasy of Williams could ever come to pass.

These economic arguments for nonvoluntary euthanasia present a challenge which is distinct from the challenge presented by typical arguments for voluntary euthanasia, which we examined and answered in chapter six.

Those who argue for nonvoluntary euthanasia on economic grounds can point out that this practice would not have to be dangerous to the public at large. The criteria for selection could be comparatively clear-cut—for example, residence for a certain length of time in a public institution or in a private one wholly at public expense. People are placed in such institutions on the basis of their objective condition and are hardly likely to be maintained in them for years if their condition does not warrant it.

At the same time the condition of such people which causes them to be institutionalized generates the substantial economic liability of the cost of their long-term care in the institution. The arguments of the various authors we have quoted imply that this economic liability generates a substantial public interest in cutting costs. If the liberty of those who abhor mercy killing to stand aloof from it cannot be overridden by the private interest of those who volunteer to be killed to avoid suffering to themselves, it can be overridden—so the argument for nonvoluntary euthanasia can go—by the public interest in relieving society of the burden of the permanently dependent.

Opponents of euthanasia are likely to object that in some cases the killing of institutionalized persons would constitute not only nonvoluntary but even involuntary euthanasia. Some permanently institutionalized persons are legally competent, and although some such persons might be willing to be killed, others would reject the idea very firmly. Killing them thus would conflict with their own expressed and competent decisions.

Proponents of euthanasia for the dependent would argue that in general killing such persons would be kindly, since their institutional existence generally is wretched and their quality of life miserable. To kill those who would be better off dead is a kindness, not an injury—the argument goes—and so satisfies the concept of euthanasia. Yet even proponents of euthanasia must admit that killing such persons *against* their wills hardly would be "euthanasia."

The law could provide that institutionalized persons would only be killed after a legal process which determined either that they were not competent or that they gave their informed consent to the procedure, and that the other conditions established by law were met. Given such an arrangement, most of the burden of the permanently dependent could be eliminated, since the noncompetent could be killed without their consent and some of the competent with their consent. No one would be killed involuntarily—that is, against an expressed and competent decision.

Proponents of strictly voluntary euthanasia are likely to object that if an argument for overriding the liberty to stand aloof of those who abhor euthanasia killing must be entertained on the ground of the public interest in saving the cost of caring for the permanently dependent, then a fortiori the case for overriding this liberty should have been entertained when we considered voluntary euthanasia, because the legalization of voluntary euthanasia under

strict controls also could save public money—that used to pay for the costs of medical care for competent persons, particularly the elderly. The memorandum of Robert A. Derzon, which we quoted in chapter six, section I, points in this direction, although he explicitly refers to 'Living Wills'' and does not mention active euthanasia.

Our response to this objection is that in chapter six we did not consider an argument for overriding liberty to stand aloof based upon the public interest in cutting costs of care because economic considerations clearly do not support a case for both legalizing euthanasia and restricting it to instances in which it would be strictly voluntary. Rather, the potential savings from purely voluntary euthanasia would be limited and can hardly be expected to be great in comparison with the predictable, substantial savings from nonvoluntary euthanasia of the permanently dependent. Moreover, while a simple hearing could determine fairly easily that a person to be killed was not resistant to the proposal, no simple procedure could establish that a person was competent and genuinely willing to be killed. Hence, if economic considerations are accepted as a basis for legalizing euthanasia, the argument will be irresistible for legalizing nonvoluntary as well as voluntary euthanasia.

The manner in which proponents of euthanasia themselves argue confirms our point, for those who emphasize economic considerations argue for nonvoluntary as well as voluntary euthanasia, while those who make a serious effort to exclude killing which is not purely voluntary carefully avoid trying to justify euthanasia by the potential public interest in saving money.

Furthermore, although there clearly is a public interest in saving public funds, this public interest is of a peculiar sort, as we shall argue in chapter eight. While we are ready to consider for the sake of argument that economic considerations might override the liberty of persons who abhor killing to stand aloof from it, our conclusion will be that a jurisprudence which justly respects liberty would not permit it to be restricted pragmatically for purely budgetary reasons.

Opponents of euthanasia will object to any proposal of nonvoluntary euthanasia primarily on the ground that such killing would be unjust to those killed. The right to life of the permanently institutionalized would be violated, it will be argued, if they were killed in a program of legalized nonvoluntary euthanasia. Such killing cannot be justified, the objection will conclude, even if it is granted for the sake of argument that saving the costs of caring for such persons is in the public interest.

But those who favor such a program of nonvoluntary euthanasia can argue that if the relevant public interest is granted, then killing can be justified. After all, the law does not altogether exclude killing; the right to life never has been held to be an absolute. As we have noticed at the beginning of this chapter the law not only treats certain deadly deeds as excusable but even

considers killing in some circumstances justifiable. The cases of killing in war, in self-defense, as capital punishment, and in the extreme cases in which abortion was permitted even under the most restrictive statutes seem to provide some precedent for killing in a program of nonvoluntary euthanasia. In each case some important public interest seems to have been recognized by Anglo-American law as sufficient to justify killing despite the general presumption of the law against it.

If the instances in which killing traditionally has been considered justifiable do provide precedents for legalizing nonvoluntary euthanasia in the public interest, then those who oppose such killing face a dilemma. Either they accept these precedents or they do not.

If they do not accept them, opponents of euthanasia show themselves even more absolutist in asserting the sanctity of life than the traditional jurisprudence which did allow killing in these cases as justifiable. Such absolutism in asserting the sanctity of life would make clear that opponents of euthanasia adhere to a sectarian morality, and that they wish human life to be treated as a direct and intrinsic component of the common good of political society. In other words, rejection of all killing—even in cases in which the law traditionally has regarded it as justified—would make clear that proponents of euthanasia are correct in claiming that opponents wish to impose their morality upon society at large.

In fact most opponents of euthanasia are prepared to admit that killing in some cases is justified; only total pacifists deny the public the right to defend itself against unjust aggressors and criminals. Moreover, those who held traditional views even agreed that in some cases innocent lives might justifiably be taken, for although there was no agreement about the extent and justification of abortion to save the mother's life, no major group excluded such killing in every single instance.[11] The admission that killing in some cases is justified leads to the other horn of the dilemma: If it is admitted that killing is justified in other cases, then nonvoluntary euthanasia also might be justified if the public interest is served by it.

Of course, this dilemma has force only if cases in which killing has traditionally been considered justified are genuine precedents for the killing in the public interest which is advocated by proponents of nonvoluntary euthanasia. If there are nonsectarian jurisprudential grounds for rejecting as unjustifiable some instances of killing traditionally considered to be justifiable, then killing in these instances at least will provide no precedent for legalizing nonvoluntary euthanasia. Moreover, if there are important jurisprudential differences between instances in which killing has traditionally been considered justifiable and the killing which would be carried out in a program of nonvoluntary euthanasia, then an opponent of the legalization of nonvoluntary euthanasia could admit that killing might be justified in the kinds of cases traditionally

accepted and yet deny without any inconsistency that nonvoluntary euthanasia would be justified, even if it were granted to be in the public interest.

In the remainder of this chapter we shall show that all of the instances in which it is generally agreed that killing can be justified differ from legalized nonvoluntary euthanasia in significant ways, so that proponents of legalization are mistaken in regarding killing in war, as capital punishment, in self-defense, and in abortion to save the mother's life as precedents which show that it would be justifiable to kill the dependent in order to relieve the public of the burden of caring for them. Incidentally, we also shall show that even those who hold that human life must be protected as inviolable by law are not inconsistent in accepting killing as justifiable in the cases in which it traditionally has been accepted.

In chapter eight we shall argue that killing people without their consent is incompatible with the principle of justice upon which Anglo-American jurisprudence is based. To be specific, we shall show that nonvoluntary euthanasia would violate the requirement of equal protection of the law.

B. Killing in War

It is undeniably part of the American consensus that killing in war can be justified. Consent to the constitutional purpose of providing for the common defense implies that some killing is accepted. But beyond this very general proposition there is little consensus either about the conditions under which war can be justified or about the sorts of killing which can be done legitimately even in a war considered to be justified.

Sometimes proponents of euthanasia point out how much killing has been done in wars considered justified. For example, in World War II, in Korea, and in Vietnam civilians were purposely killed on a large scale in the carrying out of the policy of strategic bombing, and in the last war little effort was made to avoid the killing of helpless civilians.[12]

However, no one considers all wars to be justified and no one who seriously thinks about the matter considers all acts done in any war to be justified. Furthermore, there always has been considerable disagreement about the conditions under which war might be justified and the limits within which it might be justly fought. Certainly there is no agreement on any such general proposition as the following: Soldiers are legally justified in killing whenever this killing would be in the public interest.

First, soldiers are considered legally justified only in killing those who are designated "the enemy," and the enemy includes only persons who are foreigners or rebels acting outside of and against the domestic legal system. Moreover, not even all who are associated with the enemy are considered

justifiable targets of military action. Although the immunity of noncombatants often has been violated, the principle of limiting military action to enemy combatants is part of the traditional law of war.

Second, many people who share in the general public consensus which accepts some killing in war as justified hold that there are very narrow limits of just warfare. According to the views accepted by such people the fact that killing in war is in the public interest is a necessary but by no means a sufficient condition for considering such killing justifiable. The other conditions necessary for a just war would not be met by a program of nonvoluntary euthanasia. Hence, even if it is granted that a program of nonvoluntary euthanasia might be in the public interest, the justification of killing in war would provide no precedent for concluding the justifiability of killing the dependent for the sake of the public interest in saving the cost of caring for them.

To make clear our point that one can provide a jurisprudential justification of war which is consistent with the Anglo-American legal tradition and which involves several conditions in addition to the requirement that the killing be in the public interest, we briefly consider the conditions Thomas Aquinas articulated in his classical statement of just-war theory. We are not concerned here with the moral question with which Aquinas himself was directly concerned, nor are we arguing that his account is in any way authoritative in defining the public consensus concerning the limits of just war. Our only point is that his analysis is a possible rationale for accepting some killing in war as justifiable without admitting any broad principle which would make the justification of killing in war a plausible precedent for the justification of nonvoluntary euthanasia in the public interest.

Aquinas lays down three conditions without which killing in warfare cannot be just. First, war must be conducted under public authority, since individuals always can appeal their private quarrels to such authority. Second, there must be a just cause; the enemy cannot be opposed unless there has really been a wrong done which must be opposed by force. Third, the intention of those fighting must be upright. Aquinas quotes Augustine with approval in condemning "the desire to harm, the cruelty of revenge, a vindictive spirit, the rage of self-defense, the lust of power, and the like."[13] This position absolutely excludes that a war can be fought without one side, at least, being fundamentally and clearly in the wrong. Only defense against injustice begins to justify war, and even then an upright intention would limit violence to that which is absolutely necessary to stop or to mitigate the injustice.[14]

Such a limitation means that if it were possible to oppose the injustice with nondeadly force, then that would be necessary to justify resistance. However, warfare unfolds when at least one party uses deadly force unjustly. The other must either offer no resistance at all or must resist with force adequate to defend so far as possible the lives of those resisting the unjust attack. Thus

in all war there is a threat to life which is generated by the attacker to enforce an unjust demand which otherwise might be thwarted by nondeadly modes of resistance.

Now, although the theory of just war proposed by Aquinas by no means defines the American public consensus concerning the justifiability of killing in war, it is a fact that developing international law during the twentieth century—especially under the auspices of the United Nations Organization in its effort to restrict warfare since World War II—approximates very closely to the conditions Aquinas articulated.[15] And it certainly is well within the bounds of the American consensus to take a position which would permit as legitimate only wars which conform to the most stringent conditions of international law. Thus, the killing in warfare which must be accepted as justifiable by those who stand within the American consensus does not seem to go beyond killing which meets the following conditions:

1) One side is being attacked or about to be attacked by the other; those attacked are unwilling victims and they have done nothing wrongful to provoke the attack.

2) The aggressor cannot be brought to justice by appeal to a higher authority recognized by both sides, nor does the defender have an alternative—such as retreating from the confrontation and seeking a peaceful settlement—which would not permit the aggressor to attain its objectively unjustified objective.

3) Those responsible for the defense cannot succeed using only nondeadly force, since the attackers use or are about to use deadly force.

4) Those killed are actual agents of the attack (not noncombatants or prisoners) who still pose a real threat (not an already defeated enemy) which the killing is likely to help to frustrate (not an already victorious enemy).

Understood in this way, justifiable war must be defensive. To seek by force to overcome an opponent who is not using or about to use deadly force is to act aggressively. The use of terror, torture, and reprisals is not justified. The killing of noncombatants or the indiscriminate killing of noncombatants and the agents of attack alike is unjustified.

The jurisprudential justification of killing in war thus seems to require one to concede only this much: that actual agents of an unprovoked attack may be killed to protect the rights threatened by the attack provided there is not some alternative way of protecting these rights and provided the killing seems really necessary and useful to protect these rights.

In war those whose killing is jurisprudentially justified are either foreigners or revolutionaries, and in either case are individuals whose lives are not under the protection of the law which authorizes their being killed, since they refuse to recognize its authority. The only alternative to war within the stated limits is for the rule of law to yield to the rule of brute force. Pacifists themselves understand the objective which is sought by the defenders in a

jurisprudentially justifiable war, and they do not disapprove of the objective. However, they reject the use of deadly force even to resist evil. Their liberty to stand aloof from the involvement of their societies in defensive war is overridden to the extent necessary—conscientious objection on an individual basis may be permitted—by the public purpose of the war together with the defense of the rights of those who would suffer unjustly and the liberty of others to seek to defend these rights.

The acceptance of the justifiability of killing in war under the conditions we have articulated clearly provides no precedent which would justify a program of nonvoluntary euthanasia. The dependent for whom nonvoluntary euthanasia is proposed are not aggressors; they use no deadly force. They do create a social burden, but there are ways of dealing with this burden short of killing those who constitute it. The dependent are not outlaws; their continued existence poses no threat to the rule of law. Moreover, those who oppose nonvoluntary euthanasia do not approve of the objective which would be sought by such a program.

The theory of just war also makes clear how those who accept it can without inconsistency hold that law must regard human life as inviolable. Killing in warfare which must be accepted as justifiable will be consonant with the purpose of the law insofar as such killing protects the right to life and other rights of those who are subject to the law against the brute power of those who do not respect its authority.

C. Killing in Self-defense

With respect to the right of individual self-defense a standard textbook of criminal law summarizes American law on the matter in the following terms:

> One who is not the aggressor in an encounter is justified in using a reasonable amount of force against his adversary when he reasonably believes (a) that he is in immediate danger of unlawful bodily harm from his adversary and (b) that the use of such force is necessary to avoid this danger.
>
> It may be reasonable to use nondeadly force against the adversary's nondeadly attack (i.e., one threatening only bodily harm), and to use deadly force against his deadly attack (an attack threatening death or serious bodily harm), but it is never reasonable to use deadly force against his nondeadly attack.
>
> There is a dispute as to whether one threatened with a deadly attack must retreat, if he can safely do so, before resorting to deadly force, except that it is agreed that he need not retreat from his home or place of business.[16]

Unlike killing in war, killing in self-defense occurs within an established social context. But like killing in war, and by contrast with the killing which would be involved in a program of nonvoluntary euthanasia, killing in self-defense is considered justifiable only because the usual protection of rights provided by the law is unavailable. If it were available, resort to self-help would be excluded.

Moreover, killing in self-defense is considered justifiable only if the aggressor is doing or about to do something which is not only threatening but also of a type which is unlawful insofar as it is likely to harm the other in a forbidden way. The one who resorts to self-defense thus is justified only insofar as an attack is repulsed or prevented which would violate rights, whether or not the agent of the attack is in a condition of being criminally responsible.

The law's distinction between deadly and nondeadly force is vital but must be understood as a practical rule, not as a theoretical dividing line. In practice one facing a threat cannot distinguish between cases in which the threat is to life and those in which it is only to bodily integrity. For example, someone threatened with a gun does not know what the attacker will do with it: shoot to kill or only to wound. Similarly, one using defensive force cannot distinguish very well between means likely to cause great harm and those likely to cause death. To the extent that the law allows *the intent* to cause the attacker's death, the legal conception of intent must be assumed: one knows the means used is likely to cause death and intends the means to be effective.

A merely sincere belief that there is a necessity to use deadly force in self-defense is insufficient to justify the legal use of such force. The belief also must be reasonable: one a reasonable person would hold in the circumstances. Yet the belief can be false without undermining the justification. The attack must be immediate or imminent, for otherwise there is an alternative to self-defense: resort to public authority. Ordinarily the aggressor has no right to self-defense, but there are exceptions. An attacker who uses obviously nondeadly force can defend against an excessive response; likewise, an aggressor who has withdrawn can defend against a retaliatory attack.

Retreat is not required where nondeadly force is all that is involved. Many jurisdictions do not require one who is attacked to retreat rather than use deadly force, but some do, and so no more than this needs to be explained for a reasonably adequate jurisprudential justification of that killing which is done in self-defense. However, one who is attacked in his or her own home or place of business is not held to retreat even if this could be done safely before using deadly force to repel deadly force. The concept here seems to be that one's home is one's safest retreat; probably also the law assumes that an aggressor who also is a trespasser normally does not attack with deadly force and permit the one attacked to retreat safely unless the purpose of the attack is to infringe seriously upon property or other rights of the one attacked.

The principles of law with respect to the defense of another person are very similar to those with respect to self-defense. In some jurisdictions private defense of strangers has been excluded; where it is considered justified—which would seem reasonable enough—there have been some difficulties in dealing with cases which arise from errors made about who deserved protection from whom.[17]

The principles of law with respect to defense of property vary somewhat from jurisdiction to jurisdiction. The narrower view excludes the use of deadly force to protect property unless the circumstances are those in which deadly force also is justified in self-defense, or unless an intruder into an occupied home behaves in a way which is reasonably interpreted to show the intent to commit a felony, and the intruder ignores an order to desist.[18]

A police officer or one assisting an officer can use force to bring about an arrest. If the arrest is for a misdemeanor, only nondeadly force may be used. If the arrest is for a felony, then deadly force may be used, but only if necessary to bring about the arrest or to prevent escape from custody.

A person, not necessarily a police officer, may use deadly force to prevent or terminate the commission of a felony, but only if such force is necessary and only if the felony is dangerous, such as murder, arson, robbery, burglary of a dwelling, kidnapping, or forcible rape. The underlying principle is that dangerous felonies may cause death or serious bodily harm, and so deadly force is reasonable to prevent them.[19]

There have been suggestions that the justification of the use of force in arresting and detaining prisoners be limited even more, so that in effect deadly force could be used only where there was some likelihood that the person not arrested or not detained through nonuse of force would seriously violate someone's rights.[20]

The legal conditions for justifiable killing in self-defense and in law enforcement thus are quite narrow. They are very similar to the conditions outlined above in which at a minimum killing must be justified in warfare by a nonpacifist. Agents of nonprovoked attacks may be killed to protect the rights threatened by attack, but only if there is not some alternative which would adequately protect these rights. The aggressor can always obtain immunity by withdrawing from the attack. Law enforcement claims precedence over the right of innocent persons to resist; their protection is in legal processes. Yet the lawful use of force in law enforcement is narrower than usually thought, and there is a tendency to restrict it even more. In any case, compliance with the orders of arresting and detaining officers protects one from the use of deadly force except insofar as one may be subjected to capital punishment.

The acceptance of the justifiability of killing in self-defense and in the process of criminal law enforcement clearly provides no precedent which would justify a program of nonvoluntary euthanasia. Killing considered justi-

fied in these instances certainly is held to be in the public interest. But the public interest which is at stake is the protection of basic rights and the carrying out of public duties required to protect these rights. As in the case of warfare, moreover, there is no inconsistency in considering killing justified in these instances yet in holding that the law must regard human life as inviolable; for, at least in jurisdictions where it is more limited, killing is justified in self-defense and in law enforcement only when the alternative would be to allow the rule of law to be overcome by the rule of force, and the lives of those who respect the law to be at the mercy of those who refuse to submit to its authority.

D. Killing as Penalty

Since killing traditionally has been considered justifiable as punishment for serious crimes, especially for murder, it seems to offer a stronger precedent for considering a program of nonvoluntary euthanasia justifiable. Unlike killing in war, in self-defense, and in the course of law enforcement activities, capital punishment is not essential to protect rights and to defend the rule of law against the brute force of those who will not submit to it.

Of course, criminals do attack innocent victims, and it is reasonable to suppose they will continue to do so unless hindered. Mutual protection against criminal acts certainly is one of the purposes of political society, and no government can set this function aside. But by the time capital punishment becomes possible, the criminal has been identified and is in close custody. Defense of the rule of law in this case seems quite possible without the use of deadly means, particularly today when the state can hold criminals in maximum security prisons. Thus it would appear that capital punishment can be justified only by the public interest in terminating the careers of criminals without going to the inconvenience and expense of maintaining them in prisons for life. A justification along these lines is not so far removed from an argument for a program of nonvoluntary euthanasia on economic grounds.

However, we do not think that the practice of capital punishment provides the precedent for euthanasia which it at first appears to provide. In the first place there is no longer a consensus in Britain or America that capital punishment is justifiable. Hence, without violating the principles which are accepted in common, those who oppose euthanasia can reject an argument in justification of it based on analogy with capital punishment simply by taking their stand with those who deny the justifiability of this type of killing.

It is true some of the opposition to capital punishment is based upon the assumption that human life as such is sacred. A pamphlet published by the American Civil Liberties Union states, "Executions in prisons gave the un-

mistakable message to all society that life ceases to be sacred when it is thought useful to take it.. . ."[21] Clearly, arguments along these lines cannot be accepted by a jurisprudence appropriate to a pluralistic society in which there no longer is a consensus upon the sanctity of life. To exclude capital punishment on this basis would be to impose a sectarian morality which depends upon assumptions which lie outside the commonly accepted principles of liberty and justice.

Nevertheless, as we already suggested in chapter six, section F, a more acceptable argument against the death penalty is possible. In American society today there is widespread abhorrence of this practice. The public good which is served by it is not clear, for it is not established that the threat of death deters criminals.[22] The involvement of society in this sort of killing therefore seems to violate the liberty to stand aloof of those who object to it on conscientious grounds.

With public attitudes toward the death penalty in the state they are, opponents of euthanasia can simply deny the justifiability of capital punishment and thus undercut its use as a precedent for euthanasia without putting themselves outside the American consensus. However, even if the justifiability of capital punishment were universally accepted, there are some important disanalogies between this practice and the killing which would be involved in a program of nonvoluntary euthanasia. Capital punishment can be defended on a narrow rationale—indeed, it is most plausibly defended on a narrow rationale—which stops far short of justifying killing whenever it happens to be in the public interest.

The chief disanalogy between capital punishment and euthanasia is that the former is limited to persons who have been convicted of serious crimes. Criminals are not merely a burden to society; they have defied the rule of law and inflicted grave harm upon other members of society who respect the law and look to it not only for the protection of their rights but also for the vindication of their fair claims to retribution. Hence, one can argue for capital punishment on a basis which is quite independent of any assumption that it is an effective deterrent or an efficient way of disposing of criminals. The argument is that some crimes, especially cold-blooded murder, warrant death as a penalty and are not justly punished if this penalty is not inflicted.

A rationale for capital punishment along these lines clearly provides no precedent for a program of nonvoluntary euthanasia. Permanently dependent persons who would be the primary candidates for nonvoluntary euthanasia have not defied the law and have not harmed others unless indirectly and with no malicious intent. Thus, there is no public interest in exacting death to vindicate a demand for just retribution against the dependent. The burden they impose upon the public is purely one of caring for them. The public interest in killing the dependent would be strictly economic.

Justifications of the killing done in war, in self-defense, and in law enforcement are based upon the necessity for such killings if the rule of law is to be protected against brute force. A plausible justification for the death penalty also must appeal to the demands of justice in fair punishment. In all of these cases those who are to be killed select themselves by their own unlawful acts. In none of these cases is the quality of life of the persons to be killed a relevant consideration. Hence, opponents of euthanasia can without inconsistency accept killing in all of these cases without admitting any principle which would justify a program of euthanasia, even if it is granted for the sake of argument that nonvoluntary euthanasia of dependent persons would be in the public interest.

E. Abortion as Legally Justifiable Killing

In recent years many nations in the common law tradition have legalized abortion in a more or less extensive set of instances beyond the traditionally accepted cases in which it is necessary to save the mother's life. Most extreme was the decision of the United States Supreme Court in 1973 in the *Abortion Cases,* since this decision in practice permits abortion at any stage of pregnancy whenever the pregnant woman and the physician agree to it. In the earlier stages of pregnancy no question of motive can be raised; even in the latter stages the mother's health—defined to include all aspects of her well-being—is deemed sufficient to justify the killing of the unborn.[23]

Since the interests which are accepted as justifying abortion can be merely private ones, the legalization of abortion seems to provide a very strong precedent for the legalization of nonvoluntary euthanasia, which would be carried on not for mere private interests but for the public interest (granted for the sake of argument) in saving the costs of caring for permanently dependent persons. However, the legalization of abortion does not provide the precedent which it might appear to do for legalizing euthanasia.

In the first place abortion has been legalized on the basis of the exclusion of the unborn from the status of legal personhood. This exclusion is explicit in the U. S. Supreme Court decision and is implicit in the statutes passed in the United Kingdom and other countries. Although the justice of this exclusion is arguable, it has a certain foundation in the common law, since the unborn never have been protected by the same law of homicide which protects everyone else. The legalization of nonvoluntary euthanasia would differ from the legalization of abortion, for a public program of nonvoluntary euthanasia would be aimed at individuals whose lives at present are protected by the law of homicide—individuals whose past and present status as legal persons is beyond doubt in any nation within the common law tradition.

Furthermore, there is no consensus in America or in any other English-speaking country upon the justifiability of abortion except in cases in which it is necessary to save the life of the mother. Those who oppose nonvoluntary euthanasia very often also oppose abortion and consider abortion which is not strictly necessary to save the mother's life to be nothing else than nonvoluntary euthanasia of the unborn. Whether the opposition to abortion is considered correct or not, proponents of nonvoluntary euthanasia beg the question if they appeal to abortion as a precedent, when the justifiability of the latter practice is just as much in question as that of the former.

Hence, if the legal justification for that killing which is done in cases of abortion is to serve as a precedent for legalizing nonvoluntary euthanasia, the argument must proceed from the narrow class of cases in which abortion was generally agreed to be justifiable prior to recent changes in the law. At the very least, cases which are not granted by at least some who oppose nonvoluntary euthanasia cannot be taken as a precedent for legalizing other killing. But if abortion is considered justified only in some very narrow classes of cases, it provides little plausible ground for legalizing nonvoluntary euthanasia.

However, any concession that abortion is justified—even if only when it is strictly necessary to save the mother's life—does raise questions which are not raised by the acceptance of killing as legally justified in war and in the other kinds of cases considered thus far. For this reason it will be informative to examine the grounds on which abortion to save the mother's life might be justified. This examination will show that one can consistently accept such abortion as justified and reject the use of this type of killing as a precedent for legalizing nonvoluntary euthanasia.

The justification of killing in war and the other cases considered previously depends upon the fact that those killed stand outside the law, and killing them is necessary to protect rights and to vindicate justice. Abortion to save the mother's life cannot be justified jurisprudentially as a necessary means to protect rights against attack and preserve the very order of law itself. The situation of the unborn in such cases of abortion does present a threat to the mother's life; she is unwilling to die and did nothing wrongful to bring about the threat; and there is no alternative to killing the unborn if the mother's life is to be saved. But the unborn individual is not the agent of a wrongful act; what the unborn poses as a threat is, not a type of behavior which has been declared unlawful precisely as threatening to another, but an accidental and inevitable consequence of its merely living and developing naturally.[24]

It follows that if opponents of the legalization of euthanasia concede the justifiability of abortion even in this narrowest class of cases, they must concede something more than is conceded as justified in accepting killing in war and the other cases already considered. They must concede that killing can be justified not only by the compelling public interest in protecting rights

and the rule of law itself but also by what appears to be an essentially private interest in the protection of another's life.

To see just how much must be conceded if abortion to save the mother's life is to be given a plausible jurisprudential justification, we begin with the most restricted case: abortion which may save the mother's life in circumstances in which the alternative to abortion is that both the mother and the child will die. In this case there is a threat or grave danger to the life of the mother, she is unwilling to suffer the threatened harm, she did nothing wrongful to bring the situation about, and killing is necessary if life is to be saved. In these respects the case is similar to justifiable self-defense. The difference is that here there is no aggressor; the threat does not arise from a type of behavior which is unlawful. But in place of this the condition of an especially repugnant alternative to killing is given: Not to do the act of killing will turn out (by hypothesis) with no survivor at all.

In abortion in such a case life is certainly taken without the justification that the rights of the one threatened are protected against attack. But is the *right* to life of the unborn violated in this case? Those who regard this right as unalienable might say so. However, if the right to life is based, not upon the status of life as a substantive component of the common good, but rather upon fairness in protecting each person's real interest in his or her own life, then it seems reasonable to say that the right to life is infringed if and only if an act of killing unfairly reduces one's share in the protected good of life. But on the assumption that the unborn will die whether or not an abortion is done, killing of the unborn to save the mother's life does not reduce the child's share in this protected good. Therefore, whatever one may think from a moral point of view of such killing, jurisprudence can allow the killing of the unborn in this kind of case without either conditioning the right to life upon quality-of-life considerations or admitting that the right to life of the unborn can be weighed against and outweighed by the interests of the mother.

Of course, the laws which permitted abortion to save the life of the mother were not restricted to cases in which the alternative in view was the death of both mother and child. What justification can be given for abortion which is necessary to save the mother's life when the alternative is that the child could survive if the mother were permitted to die?

There probably are concrete cases which would be described abstractly in the preceding language—due to prejudice in favor of the mother—where an objective statement of the situation would be that while the abortion might improve the mother's physical health, there is reasonable probability that both mother and child would be saved if the killing of the child were postponed, good care were given, and the pregnancy were brought to term. Those who grant no more than the justifiability of abortion to save the mother's life do not have to justify killing in cases such as this; they can recognize that it

will occur if the law permits any abortion at all, but regard killing in all such cases not as justified but as an unjustified abuse of the legal exception.

If there is not a reasonable probability that care can save both the pregnant woman and her child, then it usually is reasonably certain that prompt action will more probably save one or the other—either the child or the mother. This is usually the situation when a craniotomy is performed. If nothing is done, then there is a real and increasing probability that both the mother and the child will die. But if action is taken quickly, it is easier and more certain to save one life if the child is killed. Conceivably the mother might be cut apart to release the child, but this would take time during which the child's condition might deteriorate to the point that both would be lost.

In a case like this the mother's right to refuse treatment on her own behalf becomes an important consideration. If she does refuse treatment, then the baby cannot be killed for her benefit. Indeed, if she approves, the effort to save the baby can be made even if this increases the probability of her own death to practical certainty. The abortion will destroy the child, however, and so her agreement to accept this treatment is not sufficient in itself to justify it. The principle relevant to the child would seem to forbid harming it as a violation of its right to life.

However, this situation is odd. The probability of survival is (by hypothesis) less on the side where the right *as so far defined* lies. But the principle that no one may be attacked in a way which would violate his or her share in the protected good of life envisages a more common situation: one in which preference for one or another individual's life would depend upon discrimination on some principle other than equal protection of life itself. While this general principle of protecting all lives equally is likely to be adopted as just when no further circumstances are specified, still if it is clear that everyone would accept some restriction of the principle in special circumstances, then such a specification can be accepted by a sound jurisprudence. To see what is just, then, one must consider the problem in terms such that it can be examined behind a veil of ignorance, to ensure that temptations to discriminate on irrelevant criteria are excluded.

Let the specification of circumstances be as follows: An equal number of lives is at stake whether action (killing) is taken or not, but there is a greater probability of saving life by action (the killing of some) than by nonaction (the letting die of others). If the inviolability of life is not introduced here to bar killing and to approve letting die, then anyone putting himself or herself in the various roles would prefer that the course be taken which offers the greater probability of survival on the average. Thus fairness seems to demand that killing be permitted when it is necessary to provide the greater average protection of each person's share of life in case not all lives can be saved.

On this specified principle abortion to save the mother's life is permissible

not only when otherwise both lives would be lost but also when otherwise the probability of saving at least one life would be lessened. In this case the infant killed loses its chance (which is a lower probability than the mother's chance) of life. But the loss of this share of the good of life is not a violation of the right to life of the child, since the right is only to a fair share, and fairness demands that preference be given to that life which more probably can be saved.

Of course, if the general principle which justifies abortion when the killing of the unborn is more likely to save one life is accepted, the same principle will justify the killing of the mother, even against her will, in case the child has a better chance of surviving if the mother is killed than the mother has if the child is killed or allowed to die. In case the mother must be killed to maximize the chances of one surviving, she loses some share in the good of life but her right to life is not violated, for the specified rule demands as the standard of fairness preference for the life which more probably can be saved.

What is to be done if the probabilities of survival are equal whether action (killing) is taken or not? In this case it might seem that killing must be excluded, for it will not offer any greater protection of the good of life and to permit killing would prefer the claim of one not in possession of a good to the claim of one in possession. Here, it seems, the law ought to prefer inaction. It is to be noticed that although theoretically a perfect balance between the probabilities of survival might be unlikely, in practice the uncertainty of such difficult situations is sure to make the probabilities indistinguishable in some cases.

We think that the answer to this question is that the law should not make rules which can never be enforced. The facts of a situation which is at all close will not be such as to establish that the probabilities were precisely equal. Of course, if a physician were to announce that he considered the probabilities equal and yet that he had killed the child out of preference for the life of the mother, the principles thus far stated would condemn his act as a violation of the infant's right to life.

Thus it seems that the exception which permits abortion to save the life of the mother can be justified jurisprudentially if it is taken to mean that abortion is permitted when probably otherwise both mother and child will die and when otherwise the child will more likely die than the mother. However, if the exception were formulated in these terms, it would in practice permit abortion whenever it was not clear that otherwise the child would more likely survive than the mother.

F. Abortion for Health and in Cases of Rape

What we have said thus far raises the question: What other classes of killings will be justified if abortion can be justified in the way explained? If

the preceding analysis is right, then killing will be justified in other sorts of cases only if there is some further nondiscriminatory modification of the general rule that equal protection of life means that no one ought to be killed. A nondiscriminatory modification would be one which every reasonable person, considering the matter while excluding from consideration nonrelevant descriptions of the individuals involved, would be ready to accept and to apply to his or her own case.

Of course, in considering any proposed modification one ought to formulate the rule (as has been done here) in a fashion which could cut both ways. Otherwise, the intuitions of a majority, perhaps a very great majority, based upon their own distinctive interests will prevail over the interests of a minority—interests of a sort which the majority could not share in fact and may not be able to identify with imaginatively. Considerable care is needed to avoid developing rules of law which are in reality discriminatory although they seem fair enough to most people.

If abortion can be justified to save the mother's life, could it also be justified to protect her health?

Before answering this question, one ought to bear in mind that the distinction between protecting life and protecting health will not fall at the same point in a jurisprudential as it would in an ethical consideration. Ethics is concerned primarily with helping individuals arrive at sound moral judgments for themselves. Thus the question of health comes into play as soon as the danger to life is not imminent if the matter is considered from an ethical point of view.

But on a jurisprudential view the question of protecting health only arises when it is *clear* that the danger to the mother's health is not and will not become a danger to her life. If the danger to health is not one a reasonable person could and would distinguish from a threat to life itself, then abortion to save the mother's life already includes a certain margin of abortion to protect health. Thus the question which is raised in a legal context when it is asked whether abortion ought to be allowed to protect the mother's health is the question whether killing ought to be permitted to prevent harm to another when the harm will clearly be short of death.

If the matter is considered in general terms, the question is whether an individual who is the agent of no wrongful act may be attacked with deadly force in order to prevent harm to another individual—harm clearly short of death. The answer surely is obvious. No one is going to admit a rule in these terms if it is assumed that the rule would apply generally, so that anybody might be in the position of being killed to prevent harm to another.

Of course, many people would be willing to accept the principle if it were specified in qualitative terms, making clear that the individual to be killed would always be unborn. But such a qualitative specification, which makes clear that those considering the matter will not be in the role of victim, clearly

is a discriminatory appeal to interest rather than an appeal to impartial intuitions about fair play. Hence, the acceptance of abortion as justified to save the mother's life along the lines sketched out above cannot be extended to abortion for reasons of health.

What about abortion in the case of rape? The state of affairs in which a woman is pregnant as a result of rape is a continuing violation of her liberty, but it is not as such a threat to her life. The situation is caused by a wrongful and unlawful act, but not by any act of the unborn individual who would be killed by the abortion. The continuation of the pregnancy does not as such violate the mother's rights or harm her except insofar as it is a continuation of an infringement upon her liberty.

There also is to some extent an alternative way of compensating the woman for her loss of liberty rather than permitting the killing of the unborn to end the infringement upon it. Society could pay for the service of continuing pregnancy in such cases in order to protect the right to life of the unborn. Such compensation would seem reasonable, especially since the law has failed to protect the woman who has been raped and so should mitigate consequential damages to her.

No principle accepted thus far would justify killing the unborn conceived by rape. A candidate for a general rule which would permit abortion in such a case might be the following: It is permissible to kill one person when there is no other way to terminate a continuing infringement upon the liberty of another, although the one killed has done nothing wrongful and although the loss of liberty might be partially compensated in some other way. Even with the last phrase excluded, we hardly think anyone would accept a general rule along these lines. Certainly, no one who opposes euthanasia must or would accept it.

Judith Jarvis Thomson proposes an imaginary situation which she uses especially to argue for the justifiability of abortion in cases of rape, even on the assumption that the unborn is a person with a right to life. One wakes up to find oneself hooked up in bed with a famous violinist, so that his blood circulates through one's own veins and is purified by one's kidneys. This has been done by a Music Lover's Society to protect the violinist's life until he recovers in nine months from a kidney ailment which will be fatal to him otherwise. One has been chosen because no other way is possible for saving the violinist's life; no one else has exactly the right blood type. The hospital director sympathizes with one's plight but claims it would be wrong to unplug the violinist, now that the situation exists, since this would kill him. However, it will only last nine months.

Thomson says it would be nice if one were to accede to the situation but denies there is any obligation to do so. Much less, she adds, would there be an obligation if the situation were to go on for nine years or for the rest of one's life rather than for nine months. Her conclusion is that while everyone

has some sort of right to life, this right is not unlimited and unproblematical. One has no claim upon others for everything which one would need to stay alive. Nor, she asserts, has one any absolute inviolability, for the act of unhooking oneself from the violinist would kill him, yet this act seems clearly to be justifiable.[25]

The disanalogy between abortion in the case of rape and in Thomson's imaginary case can be pointed out. The violinist will die from a cause from which death would otherwise be inevitable had the person used to save his life not been imposed upon. The infant dies from a battery which would have been impossible had its mother not been attacked by a third party who violates both her liberty and her right to bodily intangibility. Legally, to unhook oneself from the violinst is not to kill him, for one has no legal duty to be hooked to him and unhooking oneself is not the legal cause of death. Aborting the unborn is the legal cause of its death. Thus, one's unhooking cannot possibly be a violation of the violinist's right not to be killed. But aborting could be a violation of the unborn child's right not to be killed, unless it is assumed that unlike others, the unborn child has no such right, especially because in the case of rape it came to be as a result of an unlawful act—but one in which it was in no way involved.

Thomson's analogy would be closer if one could not unhook oneself from the violinist except by dismembering him. Cutting the violinist to pieces would be the legal cause of death, and the one who did it would have committed homicide. Moreover, because the violinist was passive in the process, one could not defend one's homicidal act by claiming it to be an instance of self-defense, especially since the violence to oneself was both nondeadly and already completed. In a case like this sympathetic prosecutors probably would not prosecute, the grand jury probably would not indict, and so on. Still, one who cut the nonoffending violinist to pieces in order to unhook oneself from him would be technically guilty of murder.

This conclusion would be rendered more acceptable—and the plausibility of legally justifying abortion in the case of a pregnancy resulting from rape less so—if the analogy between the violinist and the unborn conceived in consequence of rape was made closer in several respects than Thomson makes it.

First, we should assume that the Society of Music Lovers did not purposely hook one to the violinist in order to save his life. Rather, the Society attacked one, and the violinist happened to become hooked to one as a result of their attack, although he had no part in it.

Second, we should assume that the violinist was not in such a condition that he would have otherwise died, but rather that his condition of temporary dependence rose from the attack itself, so that he is as much a victim of the attack as the person to whom he is hooked.

Third, we should assume that the burden of being hooked to the violinist is not greater than that of pregnancy; one can very likely go about one's normal activities, not be compelled to stay in a hospital bed for nine months, much less for nine years or the rest of one's life. (Thomson here perhaps alludes to the fact that a parent has a long-term responsibility for children, but this long-term responsibility is not analogous to being hooked to the violinist and need not be accepted by the woman who conceives as a result of rape.)

Fourth, we should assume that one's condition of being hooked to the violinist was not a unique state of affairs, but an instance of a common type—that people regularly become hooked to others in this way, but usually only as a result of an act to which they consented—except that one is hooked to the violinist without the usual prior consent on one's own part.

With all of these modifications in Thomson's analogy, would it seem reasonable that one be regarded as legally justified in cutting the violinist to pieces in order to unhook from him? We do not think so. Moreover, such a justification could not be established by any principle of traditional Anglo-American jurisprudence. Rather, the proper outcome of a trial for murder would be guilty, but with considerable mitigation of punishment due to the extenuating circumstance that one was trying to free oneself from a condition into which one had been put by a most grave violation of one's liberty and bodily intangibility.

Our conclusion thus is that apart from cases of killing in war, self-defense, and law enforcement, individuals can be regarded as having an equal right not to be killed which protects their fair share in the good of life. Abortion to save the mother's life can be legally permitted on principles which are both reasonable and so narrow that they do not even extend to the justification of abortion in other very difficult cases. The rationale for abortion to save the mother's life need only be that this action carries with it the *greater probability* of saving at least one life—that of the mother. If abortion does not do this, it is not really "to save the life of the mother," and laws forbidding abortion except to save the life of the mother—such as existed in the United States until 1973—strictly construed would not have permitted it. As long as no discriminatory principle is introduced, the old statutes provide no precedent for killing which is not required to maximize the chances of survival of some involved in a difficult situation. Thus they provide no precedent for nonvoluntary euthanasia, and so the abortion permitted by the old statute can be consistently admitted as just by those who oppose the legalization of nonvoluntary euthanasia.

G. Justifiable Killing in Cases of Necessity

The conclusion reached in the previous section might be challenged by proponents of euthanasia. In addition to cases of abortion to save the life of the mother there can be other cases in which the killing of someone who has

done nothing to offend the law might be necessary to save the lives of others. Like cases ought to be treated alike, and so the killing of some members of a group ought to be considered justifiable whenever such homicide carries with it a greater probability of saving life. Might not a legal rule adequate to justify such killing also justify nonvoluntary euthanasia?

A consideration of some examples and the formulation of a rule adequate to cover such cases will show that the justification of killing in such cases need provide no general justification for killing in the public interest. Considerations of fairness alone will provide sufficient rationale for a legal rule permitting as justified that killing which might be required in cases of necessity, at least to the extent that Anglo-American law has even approached admitting the justifiability of such killing.

There are few real cases which might be covered by such a rule of law. But there are some plausible, imaginary cases which also can be considered to show the adequacy and limits of the rule we shall formulate. We consider the actual cases first.

In 1841 a sailor, acting under orders of the mate, threw passengers overboard to lighten a floundering lifeboat in the icy North Atlantic. The survivors were subsequently picked up and brought to Philadelphia. The mate and other crew members quickly dispersed, to leave this one sailor, Holmes, to be arrested and tried.

The grand jury refused to indict for murder, so Holmes was tried for manslaughter. The judge told the jury that in a case of this sort seamen must give way to passengers except for those sailors needed to operate the boat. Then, if there were time to do so, the persons to be thrown overboard should be chosen by lot. This had not been done. The jury found Holmes guilty but recommended mercy, which he surely deserved because he had acted responsibly throughout the ordeal. He was sentenced to six months at hard labor in addition to the time he had already spent in jail waiting trial.[26]

About forty years later four sailors were adrift in the Atlantic. After about three weeks, when their food and water had run out, two of the men, Dudley and Stephens, killed the cabin boy, who was the youngest and weakest of the four. The three consumed the body and survived for several more days, when they were finally rescued. The survivors were taken to England, and the two tried for murder.

The jury found as to the facts by a special verdict that the men probably would not have survived had they not killed the boy, that the boy probably would have been the first to die, that at the time of the killing there was no reasonable prospect of relief, that the accused killed the boy because they thought all would starve unless someone were killed—thus that the killing was necessary and was done out of necessity to save life, but that there was no greater necessity to kill the boy than any of the other three men.

This verdict was referred to the Queen's Bench Division for a judicial decision as to the relevant law. The judges found that the law does not justify killing even when necessary to save life and judged the accused guilty of murder. They were subsequently reprieved, and their sentence commuted to six months imprisonment without hard labor.[27]

The defense of necessity which is admitted at common law permits a finding of not guilty in respect to an act done in violation of criminal law under the following conditions: (1) the act is done in an emergency situation under the pressure of physical circumstances, not human pressure; (2) compliance with the criminal law in the circumstances would have resulted in greater harm than was reasonably expected from the violation; (3) the situation was not brought about by the fault of the one who did the act in question. The reason for permitting this defense is not that the actor lacks criminal intent, nor was it traditionally that the law would not be effective in such circumstances in deterring the forbidden behavior. Rather, this defense was allowed because the purpose of the law is to protect and promote the human goods of society at large and of its members; if in an unusual case conformity to the law would defeat its very purpose, then the letter of the law must be set aside in order to fulfill its purpose.[28]

A classic example of necessity which is found throughout the philosophical tradition is the case in which the law forbids the opening of a city's gates between sunset and sunrise, but the city's militia is pursued by a more powerful enemy force and seeks admission during the night. The gates are to be opened to save the militia who can better defend the city from inside its walls than from outside them. As in this case, the defense of necessity can be invoked only when the peril is immediate and there is no alternative. Also, the defendant's belief that the act is necessary is not controlling; the court will judge the belief reasonable or not and the harm avoided sufficient or not. Moreover, if the law already specifies what is to be done in the circumstances, then one cannot defend violating its specification by pleading necessity.

This was the defense which the British court rejected in the case of Dudley and Stephens. That the defense might apply to other kinds of cases was admitted, but to the taking of life only in the case of self-defense. And the court denied that the pressure on Dudley and Stephens was what the law ever had called necessity. Self-preservation may not be regarded as a higher and prior law. No one can judge the comparative value of lives. In this case the youngest, the weakest, and the most unresisting was chosen to be killed. There definitely was no more necessity to kill him than one of the grown men.[29]

An imaginary case is that of the cave explorers. A group of explorers is trapped in a cave in immediate peril of drowning from rising waters. There is one way out, but an extraordinarily fat man pushes into it, becomes stuck,

and so blocks the exit of all the rest. The group has sufficient explosive to blast the fat man out of the exit while every other effort to dislodge him fails. One may assume either that the fat man is headed out of the cave and will survive although his larger number of companions will perish if he is not blasted out, or that he is headed inward so that all will perish if nothing is done. Here the life to be sacrificed is clearly specified by the circumstances. Can killing the fat man be justified in either case?

Other imaginary examples are a case in which the only way to stop an electrician from mistakenly throwing a switch which will bring about a disaster is to kill the electrician, thus to save countless others; a case in which drowning persons struggle for a plank, perhaps with one already in possession; and a case in which one mountaineer must be cut loose to prevent a whole party or a greater number from falling to their deaths.

Various rules of law might be proposed to guide action in cases such as these. Statutes have formulated the common law defense of necessity to some extent but do not clearly indicate a rational principle for applying the theory to cases involving the taking of life, although they do not absolutely preclude the possibility of justifying homicide by necessity.[30] What we wish to propose here is not necessarily the widest justifiable rule which would permit the taking of life, but a rule wide enough to cover the relevant cases and general enough to exclude discrimination. Such a formulation will make clear what must be admitted by opponents of euthanasia who regard abortion to save the mother's life and the killing in analogous cases of necessity as justified, and thus will show whether or not the rule which is necessary to permit these killings also will permit euthanasia.

We propose the following as an apparently adequate rule. An act which otherwise would be considered homicide shall be judged justified if (1) two or more persons are involved in a single state of affairs; (2) this state of affairs was not caused by any wrongful act or omission of any person; (3) the act which caused death was believed to be necessary and would have been regarded by a reasonable person in the circumstances to be necessary to alter the state of affairs in a manner which would prevent the deaths of everyone involved, or of a larger number of those involved, or of an equal number whose chances of survival were greater than the chances of survival of those who were killed; (4) the intent of the person or persons acting was to maximize the average probability of survival of all involved; (5) the principle by which the person or persons killed were selected was settled either by the necessities of the state of affairs, or by the antecedent duty of those killed to lay down their lives if necessary for the protection of the others, or by lot, or by some principle accepted by all who were killed, or by some combination of these factors; and (6) either (a) a hearing was held by a suitable court of law in which due process was accorded to those to be killed and a judgment reached that the preceding

conditions were met, or (b) a trial of those doing the killing is conducted afterward on a charge of murder or a lesser charge and the defense establishes by preponderance of evidence that the preceding conditions were met.

The statement of the first condition avoids any qualitative discrimination among the persons involved. Nothing is said about whether they are old or young, good or bad, beautiful or ugly, strong or weak.

The second condition might be thought to be included to exclude abortion in the case of rape. But this is not the point. We are narrowing the rule to avoid admitting cases in which emergency circumstances might be engineered in order to allow as justifiable killings which otherwise would be murder.

The third condition embodies the reason underlying the justification of killing in these conditions. Most people desire to protect their own share of the good of life, and fairness demands that there be no discrimination of some in favor of others. But in case all lives cannot be saved, rational persons would desire to secure the best chance of protecting their own lives and the lives of others. Thus the best chance becomes the fair share which the law must protect. The rule proposed accomplishes this and so appears to be just.

The fourth condition merely specifies that the mental element of the act must be in accord with the justification, for if it were not, then the killing would have been done with murderous intent and ought not legally to be justified. In practice, excluding murderous intent directs attention to the principle which justifies killing out of necessity and thus limits the killing to that which the rule accepts as justifiable.

The fifth condition specifies all the ways of selecting those to be killed which appear to be fair. In some cases the circumstances indicate who must be killed; this is so in abortion to save the mother's life. In other cases antecedent duty is the determining factor; the court in *Holmes* indicated that the unnecessary sailors should have been sacrificed before the passengers. In other cases selection might be by lot, as the court also suggested in *Holmes*. Or, finally, those involved might all agree upon some principle of selection—for example, that the first person in the lifeboat to stop bailing would be the first to be thrown overboard and so on.

The sixth condition of our proposed rule envisages cases in which, as in most abortions, there would be time to carry out a hearing before the act was done, and other cases in which there would be no time to adjudicate the issue until after the fact. A trial of each case of killing justified by necessity does not seem an unreasonably burdensome requirement, for such cases must be discriminated carefully from those not justified. The burden of proving the deed otherwise criminal would remain with the prosecution; the defense would bear the burden of showing necessity, but only the burden of proving it reasonably credible, not the heavier burden of establishing it beyond a reasonable doubt, since innocence is to be presumed unless guilt is proven.

The rule we have formulated covers the verdict in the case of Holmes. Sailors not required to operate the boat should have been sacrificed before the passengers, and then the passengers only to the extent necessary to save the rest and by a fair principle of selection. One could argue that the heaviest passengers should have been thrown overboard first, since fewer persons would thus be killed to lighten the boat sufficiently. The verdict in the case of Dudley and Stephens also is covered if it is assumed that there really was no more necessity to kill the cabinboy than one of the adults.

In this case, too, an argument could be made for killing the biggest individual, since the rations would be thus increased to the greatest extent possible with only a single death. However, if one assumes that the average probability of survival really was greater by the killing of the cabinboy—the supposition would be that he was so far gone that he probably would not have survived in any case—then the rule would justify killing the boy. The court obviously did not believe the latter supposition, and on the evidence its judgment seems correct.

The case of the cave explorers presents fewer problems than the real cases. The fat man is designated by the circumstances, and the case always is sketched in such a way that more will survive by blowing the fat man out of the way than by refraining from the act. Even if the fat man is assumed to be headed out of the cave so that he would otherwise survive, the average probability of survival is increased if he is blasted out.

In the struggle for the plank the drowning persons if in possession have no problem of justifying the repulsing of attempts to take the plank away—this is simply self-defense. In many such examples, too, the fact that maintaining possession of the means of survival does not itself kill the one repulsed must be taken into account. Presumably someone repulsed might be able to find other flotation.

The mountaineer cases present no problem when the situation designates who is to be allowed to fall, whose line must be cut. In some such cases there may be accepted responsibilities which will determine what may and may not be done in case of accident. These rules would be binding.

The rule which we have outlined is sufficiently broad to cover abortion to save the life of the mother, but not other cases of abortion. It also would cover the actual and imaginary cases in which killing might be permitted upon a plausible justification based on necessity. But this rule clearly does not cover nonvoluntary euthanasia.

The killing which would be permitted by the rule would be limited to that done when people find themselves in tragic circumstances in which not all can survive. In these circumstances killing would be permitted only to the extent that it could be justified by a rationale based on protecting the good of life fairly to the maximum possible extent. By contrast, the alleged justifica-

tion for nonvoluntary euthanasia is that it would be in the public interest in cutting the cost of caring for the dependent. This interest, if allowed to prevail, would sacrifice the lives of those killed to the economic interests of the public at large.

From our consideration of this problem and the other cases of justifiable killing in previous sections we conclude that none of the cases in which the law has permitted killing provides a plausible precedent for nonvoluntary euthanasia. All of these cases do have a regard for the public interest, but each limits killing by other necessary conditions which would not be fulfilled if the dependent were killed to cut the burden of caring for them.

Moreover, opponents of euthanasia are by no means inconsistent if they admit as jurisprudentially justified killing in war, in self-defense, as capital punishment, and in abortion (and analogous cases of necessity) where killing maximizes the average chances of survival. Even if some such killings are regarded as immoral, they can be accepted by a system of law without unfairness to those who are killed.

Of course, our argument in this chapter has not shown that nonvoluntary euthanasia necessarily is unjust. All we have shown thus far is that the *argument* for nonvoluntary euthanasia fails to the extent that it is based upon claiming other types of legally accepted killing as precedents to justify this type of killing. A position supported by a bad argument might still be true. In chapter eight we directly confront the question: Can the killing of certain persons who pose no threat to the rights of others and the rule of law be justified, on the ground that they would be better off dead and that the public interest would be served by killing them? Our conclusion will be that such killing cannot be justified.