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Volume 38

Issue 1 *Issues 1 and 2: Symposium: Natural  
Law and Legal Reasoning*

Article

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1990

### Justification in the Killing of an Innocent Person

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#### Recommended Citation

John Makdisi, *Justification in the Killing of an Innocent Person*, 38 Clev. St. L. Rev. 85 (1990)  
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# JUSTIFICATION IN THE KILLING OF AN INNOCENT PERSON

JOHN MAKDISI\*

John Finnis advances the notion of side effect to provide a non-consequentialist approach for justifying certain acts that result in the killing of an innocent person.<sup>1</sup> He depends on the reader's own intelligent grasp of the basic forms of good to convince the reader of the merit of his argument, asking the reader as a first premise to acknowledge merely whether he or she thinks particular values are basic human goods.<sup>2</sup> One of these values is life,<sup>3</sup> and Finnis asks, "Life 'is a good, in itself, don't you think?'"<sup>4</sup> To answer this question, Finnis invites his reader to look at the problem from the inside out. An effort of such practical understanding is an effort to grasp and identify the human good of actions in which we participate and from which we derive feelings, spontaneities and behavior.<sup>5</sup> Therefore, if one is to capture the account of human nature that leads one to affirm life as a first basic value, one must not only understand but feel the conflict in the problem of justified killing raised by Finnis. In attempting to reach this state, let me share this scenario with you.

Imagine with me that my two children are playing quietly on the balcony overlooking a twenty-story view of our summer resort town. The birds are singing in a blue sun-filled sky when, suddenly, I see the whole balcony quiver and start to fall away from the building. As my children look up in alarm I speed towards the open sliding door. In that split second they start to scramble back towards the door but the balcony is tearing away from the building too fast. I grab for their hands, arms, clothing—whatever I can reach. As my hands close firmly over the wrist of one and the shirt of the other, the balcony with a grating shriek of metal and concrete rips from the side of the building. I feel the full weight of my children pull me out the sliding door and as my feet catch the edges of the door I find myself suspended in mid-air with both children dangling at the end of my arms.

There is no way I can move to get the children safely back into the apartment. No one else is in the apartment. I call frantically for help and hope that the noise of the balcony falling will attract immediate aid from

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<sup>1</sup> See J. FINNIS, J. BOYLE, JR., & G. GRISEZ, *NUCLEAR DETERRENCE, MORALITY AND REALISM* 309-18 (1987) [hereinafter *Nuclear Deterrence*]; J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* at 118-24 (1980) [hereinafter *NATURAL LAW AND NATURAL RIGHTS*]; Finnis, *Natural Law and Legal Reasoning*, 38 CLEV. ST. L. REV. 1, at 3 (1990) [hereinafter *Natural Law and Legal Reasoning*].

<sup>2</sup> *NATURAL LAW AND NATURAL RIGHTS*, *supra* note 1, at 85-86.

<sup>3</sup> *Id.* at 86-87; *NUCLEAR DETERRENCE*, *supra* note 1, at 304-09; *Natural Law and Legal Reasoning*, *supra* note 1, at 1.

<sup>4</sup> *NATURAL LAW AND NATURAL RIGHTS*, *supra* note 1, at 86.

<sup>5</sup> See *Natural Law and Legal Reasoning*, *supra* note 1, at 1.

next door neighbors. After what seems like an eternity, but must be only moments, my children start slipping from my grasp.

What to do?! With the children slipping away I have to make a decision. Either I can continue to hold both children, in which case I feel that I would lose them both at the same time, or I can let one child go in favor of devoting my full efforts to the somewhat more realistic chance of saving the other. I release the grip of my left hand. Minutes later help arrives and pulls me and my one child into the apartment. But my other child lies dead on the pavement below.

This event did not actually happen. Thank God! But we may dream in dread of such an event happening. I have four children and have puzzled painfully through my feelings in this scenario. Somehow there seems to be no satisfactory answer as to which choice is the better one. In the scenario I had to choose between releasing one child or possibly losing both. I released one, but the fact that the other was saved does not assuage the guilt that arises from participating in an act that leads to the death of the first. I did not have the desire to do that act but I did have the intent. I chose to act in a way that caused the loss of a child's life. Does this guilt suggest that the choice to let one child die in favor of saving the other is wrong and should be punished? I would have felt guilt if I had not let the one child go and both children had fallen from my grasp.

#### *A. Efficient Result v. Moral Means*

What does a consequentialist argument offer in this case? The choice in this draconian scenario was the almost certain chance of death for both children against the fairer chance of saving one by losing the other. The argument to produce the best end result would applaud the act of losing one child in favor of saving the other. Such an argument seeks to maximize value in society.<sup>6</sup> Since the attempt to save both children would have left both their lives in serious jeopardy and the effort to save only one raised the chances significantly of saving at least one life, the latter effort is the better. In terms of mathematics, the darling of efficiency arguments, if each life were considered equal to the other and the chance of saving both children together was 1% while the chance of saving one child alone was 10%, the expected value of the second situation would be much higher. [ $.10 \times \text{value of one life}$ ] is greater than [ $.01 \times \text{value of two lives}$ ].

But this argument does not make sense when I think back to my balcony scenario. Would I have felt more guilt if I had tried to save both children and lost them both? I don't think I would. Somehow I cannot measure the tragedy of losing one child against the tragedy of losing both. Both of these alternatives are indefinably tragic. Perhaps, in a case such as this, the best end result cannot be measured.

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<sup>6</sup> See R. POSNER, *ECONOMIC ANALYSIS OF LAW* 9 (3d ed. 1986).

The consequentialist argument for efficient result requires that some type of value or ranking be given to each alternative situation in order to determine the greater net good. John Finnis would argue that this cannot be done because the life of each child is incommensurable.<sup>7</sup> One life cannot be measured, valued, or ranked in comparison with another life. Therefore, the "methodological injunction to maximize good is *senseless*" because it attempts to measure the immeasurable.<sup>8</sup>

This perception of incommensurable values reflects Finnis' concept of morally significant choice. Finnis asserts that the pursuit of certain basic values in life should be undertaken as part of a coherent plan of life,<sup>9</sup> but there is no means of identifying and settling the best path in life. If there were a rationally unopposed path in life, its choice would not be morally significant.<sup>10</sup> "For one has a morally significant choice just where one really does have reasons for alternative options; for then the choice can be *free*, no factor but the choosing itself *settling* which alternative is chosen."<sup>11</sup>

On the other hand, there is a principle of right action that requires not "*choosing* (intending) to destroy, damage or impede a basic human good, or imposing on persons, even as a side-effect, harms or burdens which one would not impose on oneself or one's friends and which one imposes for no motive other than differential feelings."<sup>12</sup> Finnis recognizes that "one cannot act at all without accepting some bad side-effects,"<sup>13</sup> but one must never "choose directly against a basic value"<sup>14</sup> nor act unfairly.<sup>15</sup>

Therefore, if I had chosen not to let either child go, even though I most likely would have lost both children, I would have been justified. There would have been no choice against a basic value in that situation. On the other hand, the act of losing one child in favor of saving the other may or may not have been acceptable, depending on whether the release of the one child to save the other was a direct choice against the basic value of the life of the child who was lost or my act was unfair.<sup>16</sup>

<sup>7</sup> NATURAL LAW AND NATURAL RIGHTS, *supra* note 1, at 119.

<sup>8</sup> *Id.* at 113.

<sup>9</sup> *Id.* at 103-05.

<sup>10</sup> *Natural Law and Legal Reasoning*, *supra* note 1, at 9.

<sup>11</sup> *Id.* at 10.

<sup>12</sup> *Id.* at 11.

<sup>13</sup> NUCLEAR DETERRENCE, *supra* note 1, at 292.

<sup>14</sup> NATURAL LAW AND NATURAL RIGHTS, *supra* note 1, at 93, 119-20, 123.

<sup>15</sup> *Id.* at 105-09.

<sup>16</sup> Implicit in the discussion in this paper is the assumption that there is a duty on parents to preserve the lives of their children. This duty extends from their responsibility as parents for the safety of their children. There may be a question whether the duty to safeguard others extends to a non-related onlooker when observing a situation leading to the death of another and preventable by the onlooker. The question of duty to rescue in this latter case is not raised in this paper. We are solely concerned with the justification of one's act in a situation where duty exists and compels the safeguard of the basic value of human life.

### *B. Principle of Right Action*

#### 1. No Direct Choice against a Basic Value

What constitutes a direct choice against a basic value? Finnis asserts that it is not justifiable to kill an innocent person in a case where a blackmailer demands that person be killed as his price for sparing hostages. Finnis says, "the person who complies with the demand, in order to save the lives of the many, cannot deny that he is choosing an act which of itself does nothing but kill [thus damaging the basic value of life]."<sup>17</sup> According to Finnis one cannot morally justify the weighing of one life against that of another or even against those of several others. Human life is a basic good that is incommensurable.

On the other hand, Finnis asserts that some acts may damage a human good as a side effect but are justified by the human good they directly promote. Although he takes a strong stand against killing, including abortion,<sup>18</sup> he declares:

accepting death(s) as a side-effect of one's chosen action is not the same thing as a choice to kill. . . . For example, the tradition of common morality has approved certain interventions ('therapeutic abortions' in a very narrow sense) which bring about the death of the unborn. The approval of certain interventions of this sort is readily explicable by our moral theory: when the protection of either the mother's or the unborn child's life requires that something be done, and the death of the other is only a causal consequence of doing what is necessary, the choice to do it will be justified if it can be made without unfairness to either party.<sup>19</sup>

Does the release of one child to save the other in the balcony scenario compare to the blackmail hostage case or the therapeutic abortion case? The act of killing in either case could be intended to save another human life. Why is it that the killing in the blackmail hostage case is not a side

<sup>17</sup> NATURAL LAW AND NATURAL RIGHTS, *supra* note 1, at 123.

<sup>18</sup> See Finnis, *Natural Law and the Rights of the Unborn*, in ABORTION AND THE CONSTITUTION: REVERSING *Roe v. Wade* THROUGH THE COURTS 115, at 119 (Horan, Grant & Cunningham eds. 1987).

<sup>19</sup> NUCLEAR DETERRENCE, *supra* note 1, at 294, 311. This conclusion is part of the more general proposition that the inherent limitations on our ability to pursue basic goods results in the failure to realize many basic goods. See text at note 13, *supra*. It is also an idea that appears in the "principle of the double effect." This principle justifies the causation of evil under the following four conditions: "(1) The action from which evil results is good or indifferent in itself; it is not morally evil. (2) The intention of the agent is upright—that is, the evil effect is sincerely not intended. (3) The evil effect must be equally immediate causally with the good effect, for otherwise it would be a means to the good effect and would be intended. (4) There must be a proportionately grave reason for allowing the evil to occur." R. McCormick, *HOW BRAVE A NEW WORLD?* 413 (1981).

effect of saving the hostages' lives but in the therapeutic abortion case it is? Finnis does not focus on the consequences of the act, that is, whether the value of losing one life is worth the saving of another. Rather, he focuses on the nature of the act bringing about those consequences, that is, whether the act does something more than damage a basic human good. More specifically, he asks whether the act is a direct and immediate promotion of a basic human good.<sup>20</sup>

Finnis points out that the killing of the victim in the hostage case is a means to the end of saving the hostages and not a side effect because the basic good of saving the hostages is removed from the act of killing the victim. The act of killing the victim is not the direct and immediate promotion of a basic human good because the good of saving the hostages falls within those "expected goods [that] will be realized (if at all) not as aspects of one-and-the-same act, but as aspects or consequences of other acts (by another person, at another time and place, as the upshot of another free decision . . . )."<sup>21</sup> In the abortion case the act that inevitably kills is not an act that uses killing as a means to an end. The act that saves the mother is not done with the desire to kill the baby, nor is the baby's life another's precondition for the saving of the mother. Therefore, the act that saves the mother is the direct and immediate promotion of a basic human good, and killing the baby is a side effect. The killing of the baby is not a means to the end of saving the mother.

The crux of the difference between these two cases is one's participation in the evil intention of another. Although killing is not desired by the person who kills in the hostage case, it is desired by the blackmailer; and to the extent that the blackmailer requires the killing as a precondition of the blackmailer's sparing the hostages, the act of the person who kills under the blackmailer's direction to satisfy his requirement participates in the evil intention of the blackmailer. Participation involves the choice to satisfy the blackmailer's desired purpose in order to induce the blackmailer to act or not act.

If the blackmailer in the hostage case had roughed up a pregnant mother in order to produce the situation that we have noted in the abortion case, would the abortion of the baby not be justified? It is the desired purpose of the blackmailer to induce the taking of the baby's life in order to save the mother, but the saving of the mother still does not depend on the will of the blackmailer. Killing the baby would be part of the process of stopping non-human-willed forces moving towards the death of the mother, even though those forces were set in motion by a human will. Therefore, again, the act that saves the mother is the direct and immediate promotion of a basic human good, and killing the baby is a side effect.

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<sup>20</sup> NATURAL LAW AND NATURAL RIGHTS, *supra* note 1, at 120-23.

<sup>21</sup> *Id.* at 122.

The point that Finnis makes in his discussion of justified choice is that intention counts but not in the way we ordinarily define intention. Intention is ordinarily defined in tort cases to mean:

(1) . . . a *state of mind* (2) about *consequences* of an act (or omission) and not about the act itself, and (3) it extends not only to having in the mind a purpose (or desire) to bring about given consequences but also to having in mind a belief (or knowledge) that given consequences are substantially certain to result from the act.<sup>22</sup>

Therefore, if one aborts the baby to save the mother, the knowledge that the baby will die makes the killing of the baby intentional under the tort law definition of intent. According to Finnis, the definition of intention does not include "having in mind a belief (or knowledge) that given consequences are substantially certain to result from the act." "Having in mind a purpose (or desire) to bring about given consequences" is the focus of concern to Finnis. One does nothing but damage a basic human good if one desires the killing of a life either as an end or as a means to an end, and one desires the killing of a life as a means to an end when one participates in the desire of another to kill life as an end. The killing of life is neither a means nor an end if it is done in the course of an act to promote a basic human good and the act does not depend on the killing of life as such to promote the basic human good.

Finnis is adamant that one need not and should not hold himself out as "a tool for all those willing to threaten sufficiently bad consequences if he does not cooperate with them."<sup>23</sup> The intervention of another human will may turn the choice that results in killing from a justified to an unjustified act. This does not mean, however, that the act in direct and immediate promotion of a basic human good need be void of human intervention. In the abortion case the killing of the baby is part of an act that results in the saving of the mother. It is justified even though the doctor still needs to exercise his will to complete the procedures that will save the mother after the baby has died. Likewise, in the balcony scenario, the act of dropping one child to hold the other is the direct and immediate promotion of saving the life of the other child which depends on someone else coming into the apartment and pulling the child to safety.

## 2. Fairness

The argument thus far is that the killing of a person in order to convince another person not to kill is unjustifiable. The killing of a person as part of an effort not to stop a human will but rather to stop the movement of

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<sup>22</sup> PROSSER AND KEETON, *THE LAW OF TORTS* 34 (5th ed. 1984).

<sup>23</sup> NATURAL LAW AND NATURAL RIGHTS, *supra* note 1, at 121.

forces towards death may be justifiable. Yet, even though an act may be taken in the direct and immediate promotion of a human good, such as, the saving of human life, the resulting side effect of death to another may still be unjustifiable.

Professor Rollin Perkins poses the following case:

Consider, hypothetically, a man and a child, total strangers, driven through the countryside in a small horse-drawn vehicle. Suddenly, at a remote spot, they are attacked by ferocious beasts. The driver attempts to elude them, but the horse cannot outdistance the beasts. At the last moment, the man throws the child to the beasts. They stop to devour the child, thus enabling the man and his driver to reach safety. The man insists that had it not been for his foresight in tossing the child to the beasts, he, the child, and the driver would have been destroyed; although the act was unfortunate, it was the best act under the circumstances. . . . [Yet] the man had a different choice: he could have ensured the safety of two by heroically jumping out and facing the animals himself.<sup>24</sup>

This case raises the issue of fairness. The man in the wild beast case preferred himself over the child merely to save himself. He could have thrown himself out of the vehicle to save the other two. The act of throwing out the child was not justified because it was selfish and therefore unfair.

Finnis remarked in the therapeutic abortion case involving mother and child that the choice that results in death is justified only "if it can be made without unfairness to either party."<sup>25</sup> Acting without unfairness involves the absence of selfishness. "The core of the moral norm of fairness is the Golden Rule."<sup>26</sup> The act of saving must not be partial or arbitrary.<sup>27</sup> Thus, if there is no chance to save the child without saving the mother because the child is not yet viable outside the womb, and the mother cannot be saved without killing the child, there is no issue of unfairness and killing the child may be considered a justifiable side effect of an act in the direct and immediate promotion of saving the mother's life.

Perkins offers another example of fairness:

Two men, *B* and *C*, are climbing a mountain, roped together for mutual protection. As they inch along a narrow ledge, *B* suddenly slips off, dragging *C* over with him. *C* manages to get a firm grip as he goes over the ledge, but hangs there, with *B* dangling unconscious at the end of the rope some feet below. *C* can hold on temporarily with one hand but cannot pull up *B* with the other. *C* holds on grimly until he senses that mo-

<sup>24</sup> Perkins, *Impelled Perpetration Restated*, 33 HASTINGS L.J. 403, 406 (1981) [hereinafter Perkins].

<sup>25</sup> NUCLEAR DETERRENCE, *supra* note 1, at 311. See also text accompanying *supra* note 19.

<sup>26</sup> *Natural Law and Legal Reasoning*, *supra* note 1, at 11.

<sup>27</sup> NATURAL LAW AND NATURAL RIGHTS, *supra* note 1, at 106-09.



mentarily his grip will slip and both will plunge to their deaths. At that instant, *C* cuts the rope, letting *B* drop to his death. Without the extra weight of *B*, *C* is then able to pull himself up to safety. In this case, *C* did not choose between himself and *B*: *B* was doomed. *C* could not do anything to save *B*. *C*'s choice was either to save his own life, or to submit to his own and *B*'s deaths.<sup>28</sup>

In this case the act is justified. A person is killed as a result of an effort to stop forces moving towards death and the act of killing is done without partiality, arbitrariness or unfairness, because there is no choice. Only one person, if any, can be saved.

But what if the baby could be saved in the therapeutic abortion case? What if the choice were truly between the mother and the child? Likewise, in the balcony scenario there is a choice between the two children. Which child may one choose to drop? Can that choice be made without partiality or unfairness? Finnis does not appear to have raised this issue, and I am not sure there is a clear answer to this question.

Finnis mentions one case that resembles that of the choice between two innocent lives, and that is the case of a choice between one's own life and that of another:

Those who heroically choose to save another in some desperate situation sometimes foresee their own death as an inevitable consequence. But they do not choose to destroy their own lives. Of itself, their death does nothing to save anyone's life, and so is not included in the precise object of their choices. What they do before they die, not their very death, is what they choose. The precise object of their choices is to do what saves. They [foresee and] accept their own death, only as an unavoidable [unintended] side-effect of doing what is necessary to save the other's life.<sup>29</sup>

Implicit in the approval of such an act is Finnis' judgment that it is fair. In fact it does satisfy the Golden Rule because one has done unto oneself in lieu of doing unto others. Thus, if the blackmailer were to shoot his gun at the hostages one might justifiably throw oneself in front of his gun in order to prevent their deaths even though one foresees one's own death by that act. In such a case the act is designed to stop forces moving towards death without unfairness because one has accepted the burden on oneself.

But what about the case where one can only throw another person in the path of death to save a life? Suppose the blackmailer were to shoot his gun at the hostages and a father, confined to his wheelchair and holding his only son, were to throw his son in front of the blackmailer's

<sup>28</sup> Perkins, *supra* note 24, at 406.

<sup>29</sup> NUCLEAR DETERRENCE, *supra* note 1, at 311.

gun in order to prevent the deaths of the hostages. It is not clear that Finnis would condone such an act. Again, the answer to this question is not clear.

It should be noted, of course, that one aspect of fairness in the justifiable killing of an innocent person is that it be a choice of last resort. If there is another alternative, such as waiting for a neighbor in the balcony scenario, that alternative must be exercised. It is only when the side effect of death is the only possible consequence of saving the life of another that that choice can be fair and justifiable.

### *C. Evidence of Finnis' Theory in Two Common Law Cases*

Finnis' argument to distinguish justifiable from unjustifiable acts that include the consequence of death emphasizes the inability of reason to settle on what is the better choice in the balcony scenario. There is no one right answer because the values involved are incommensurable. There are standards by which one can judge what is not justifiable. If the act of killing is not a side effect or is a choice made unfairly, the killing is wrong. The blackmail hostage case and the wild beast case are examples. However, if an act is performed in the direct and immediate promotion of preserving life, Finnis refuses to judge the act by its consequences in terms of how many lives are saved so long as the act is done fairly to all concerned. The therapeutic abortion, heroic self-sacrifice and mountain climber cases are examples. In the balcony scenario, it is justifiable to hold on to both children even though it means almost certain death to both. It may also be justifiable to release one child to hold the other, although the question of which child to release raises an issue of fairness that is not fully resolved. With this theory in mind, let us turn to two noted cases in the common law that involved killing in the act of saving others. Both cases are particularly reflective of the approach adopted by Finnis.

In 1842 the Circuit Court for the Eastern District of Pennsylvania in *U.S. v. Holmes*<sup>30</sup> found that a sailor's duty to protect passengers even in cases of extreme peril was violated when passengers were thrown overboard. A leaky longboat held several people who had escaped a shipwreck. It was in grave danger of sinking when the crew threw fourteen male passengers overboard. No lots were cast nor were the passengers informed or consulted. Despite the fact that the defendant sailor had been heroic initially in his efforts to save the passengers from the ship when it was sinking, he was charged and convicted of unlawful homicide for his subsequent act of throwing passengers overboard to save the longboat from sinking. His defense that the homicide was necessary for self-preservation was rejected.

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<sup>30</sup> 26 F. Cas. 360 (C.C.E.D. Pa. 1842) (No. 15,383).

*Holmes* did not reject the defense of necessity. It merely stated that the doctrine of necessity did not apply in this particular case. The prosecutor suggested and the court agreed that there was an argument for justifiable homicide if, among people in equal relations,<sup>31</sup> there had been notice, consultation and a casting of lots in a sacrifice that was absolutely indispensable to save the remaining lives.<sup>32</sup> This justification for an act that results in killing is precisely the point that Finnis seeks to elaborate. It is justifiable to preserve life even though a side effect may be the death of another. In *Holmes* the court indicated that throwing people overboard would be permissible if absolutely necessary to preserve life so long as the selection of the victim was made fairly, as by lot. The death of the people thrown overboard was not a means to the end of saving the others. Throwing the people overboard was a means of saving the longboat from sinking by lightening the load; death was only a side effect.

The only reason that a verdict of guilty was rendered in *Holmes* was that the means used were unfair in the choice of victims and perhaps without sufficient regard to minimizing the damaging side effects (too many people thrown overboard). This reason of unfairness is the second prong of Finnis' principle of right action. Without fairness the act is unjustified even though killing is a side effect.

In a similar case in 1884 the Queen's Bench Division in *Regina v. Dudley & Stevens*<sup>33</sup> found that two men cast adrift on the sea were not justified in killing a boy and eating him to save their lives. The defendants had consumed all food by the twelfth day and did not perform the killing until the twentieth day. It was found that if the men had not fed on the boy they would probably not have survived, and the boy would probably have been the first to die. The court decided that the necessity to preserve one's life was not a justifiable excuse for taking the life of an innocent person. The boy who was killed was never consulted nor were lots drawn, but the court did not find merely that fairness did not exist in this case; it found that necessity itself was not a defense for the killing.<sup>34</sup>

*Dudley & Stevens* adopts an absolutist approach. Under no circumstances is the taking of life allowed in such a case. Finnis would probably agree. Cannibalism involves the distinct act of killing a person as a means

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<sup>31</sup> There was an argument that a sailor was not in equal relations with a passenger and had a duty to sacrifice himself before the passenger as long as he was not necessary for the running of the boat. *Id.* at 367.

<sup>32</sup> It is interesting that in dictum the court in *Holmes* found no difference between cannibalism and throwing overboard. The court stated:

When the ship is in no danger of sinking, but all sustenance is exhausted, and a sacrifice of one person is necessary to appease the hunger of others, the selection is by lot. This mode is resorted to as the fairest mode, and, in some sort, as an appeal to God, for selection of the victim.

*U.S. v. Holmes*, 26 F. Cas. at 367. As we shall note, this dictum contradicts the decision in *Regina v. Dudley & Stevens*, 14 Q.B.D. 273 (1884), and contradicts Finnis' theory, but it does not change the consistency of the holding in *Holmes* with Finnis' theory.

<sup>33</sup> 14 Q.B.D. 273 (1884).

<sup>34</sup> *Id.* at 287-88.

of being able to eat that person. If the person is not dead, the cannibal cannot eat. If it were possible for the cannibal to start eating a live person who dies in the process, death may be viewed as a side effect. In *Dudley & Stevens*, however, death was an intended means to the end of saving lives from starvation. Therefore, it was not a side effect, and Finnis would condemn such an act as adamantly as the court.

While *Holmes* and *Dudley & Stevens* accord with Finnis' concept of justified killing, it should be noted that necessity is raised in the two cases as a defense to a wrongful act. In *Holmes* this defense was approved (and would have succeeded except for the issue of unfairness). The act of throwing people overboard, if done fairly, was considered wrong but necessity would have justified it. Finnis, on the other hand, would argue that the act of throwing people overboard, if done fairly, was not wrong and needed no defense. When killing is not an end nor a means to an end, Finnis asserts that the actor does not "intend" the killing; the actor intends the saving, and the killing is an unintended effect — thus, a side effect. Finnis would agree that the killing in *Holmes* could have been foreseen as an inevitable effect of the act of lightening the boat, but this foreseeability need not have affected intention. The common law concept of intent differs from that of Finnis. It includes the state of mind in which the effect of an act is foreseen. Thus, in *Holmes* the act of throwing overboard was considered an intentional act of killing those thrown overboard because their deaths were foreseen by the actor. Once defined as wrongful, the act needed a defense in order to be justified. Nevertheless, the philosophy in *Holmes* still accords with that of Finnis despite the technical difference in approach.

#### *D. The Reality of Finnis' Approach*

It is appropriate to call Finnis' approach to life as an incommensurable basic human good a natural law approach. It suggests that there is more to life than just an accumulation of wealth, happiness, value, etc. There is something about life that we cannot value, that we cannot measure, that we cannot fathom, that is mysterious. While contract and even some tort law are readily adaptable to arguments of economic efficiency (and I am a very strong proponent of Law and Economics in this regard), there are areas where such arguments do not belong. Specifically, where the end result cannot be measured because the values at stake are incommensurable, there may be no best answer in a conflictive situation with differing alternatives. There can only be a best means to possibly several different end results.

In the case of the balcony scenario, the act of releasing one child is as permissible as holding on to both children with the almost inevitable effect of losing both, as long as the means follow the principle of right action. The death of one or both children must be a side effect of the act seeking to save life, and, if a choice is made that results in the death of one, it must be made fairly. This approach makes sense when viewed

from within the experience of the act itself. It is also the view adopted in *Holmes* and *Dudley & Stevens* in two of the very rare instances such cases have come before the courts. These cases affirm that lives should not be ascribed values that can be added or subtracted for a best end result. It is the means and not the end that determines the justification for human action.