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# Does Warrantless Wiretapping Violate Moral Rights?

EVAN TSEN LEE\*

## INTRODUCTION

On August 5, 2007, President Bush signed legislation that put an end to the immediate legal controversy over the National Security Agency's warrantless wiretapping program.<sup>1</sup> The new legislation undoubtedly makes the wiretapping program legal.<sup>2</sup> But the controversy over warrantless wiretapping will undoubtedly flare up again, for the legislation is temporary—it sunsets in February 2008.<sup>3</sup> Congress will eventually have to confront the question whether its temporary legislation is worthy of being made more permanent, even if not until after the 2008 presidential election. In making this decision, Congress should certainly consider, among other things, the morality of warrantless wiretapping. Does warrantless wiretapping ever violate people's moral rights, and, if so, under what circumstances? In this paper, I attempt to answer these questions through the following two-pronged thesis: First, it is not immoral for government to wiretap innocent persons without warrants, provided that the operatives reasonably believe that such surveillance is necessary to

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1. James Risen, *Bush Signs Law to Widen Reach for Wiretapping*, N.Y. TIMES, Aug. 6, 2007, at A1.

2. *See id.* (“‘This more or less legalizes the N.S.A. program,’ said Kate Martin, director of the Center for National Security Studies in Washington, who has studied the new legislation.”).

3. Protect America Act of 2007, Pub. L. No. 110-55, § 6(c), 121 Stat. 552 (2007).

save innocent human life; second, government does not act immorally in wiretapping known terrorists without warrants, so long as operatives reasonably believe the subjects are terrorists, and so long as the surveillance is reasonably related to saving lives.

In defending this thesis, I will make several subsidiary arguments:

1. Wiretapping without adequate justification generally violates moral rights because it denigrates the full personhood of the subject.
2. Wiretapping innocent people is justifiable if necessary to save innocent human life.
3. A reasonable belief in necessity is the moral equivalent of actual necessity.
4. There are lesser moral strictures on wiretapping known terrorists than on wiretapping innocent persons because of a partial forfeiture of moral rights.

## I.

Edward J. Bloustein, a professional philosopher and law professor, is credited with developing the argument that privacy rights are worth defending because they “protect[] against intrusions demeaning to personality and against affronts to human dignity.”<sup>4</sup> In a 1964 article in the *New York University Law Review*, Bloustein criticized William Prosser’s famous taxonomy of four distinct types of torts falling under the general umbrella of the right to privacy.<sup>5</sup> According to Prosser, the four torts were:

1. Intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs[;]
2. Public disclosure of embarrassing private facts about the plaintiff[;]
3. Publicity which places the plaintiff in a false light in the public eye[; and]
4. Appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness.<sup>6</sup>

Prosser thought that these distinct torts protected different interests. In the intrusion cases, the interest being protected was “freedom from mental distress[;] in the public disclosure and ‘false light’ cases, [it was] the interest in reputation[;] and in the appropriation cases, [it was one’s] proprietary interest in name and likeness.”<sup>7</sup>

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4. See Judith DeCew, *Privacy*, in STAN. ENCYCLOPEDIA PHIL. (Edward N. Zalta ed., Fall 2006 ed.), <http://plato.stanford.edu/archives/fall2006/entries/privacy/>.

5. Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 964 (1964).

6. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

7. Bloustein, *supra* note 5, at 965.

The crux of Bloustein's critique was that Prosser's reductionist account of privacy was unfaithful to the view of privacy pioneered by Samuel Warren and Louis Brandeis in their famous article *The Right to Privacy*.<sup>8</sup> Warren and Brandeis argued that privacy was a value independent from all others—it was simply the “right . . . to be let alone.”<sup>9</sup> Although Warren and Brandeis did not attempt an exhaustive description of the interest underlying this right,<sup>10</sup> they did contrast it with the “material” injury done to the victim of defamation.<sup>11</sup> As Bloustein describes it, Warren and Brandeis's notion of the invasion of privacy instead “involve[d] a ‘spiritual’ wrong, an injury to a man's ‘estimate of himself’ and an assault upon ‘his own feelings.’”<sup>12</sup> For Warren and Brandeis, the underlying principle was one of “inviolate personality.”<sup>13</sup>

Bloustein put his own gloss on Warren and Brandeis's formulation: “I take the principle of ‘inviolate personality’ to posit the individual's independence, dignity and integrity; it defines man's essence as a unique and self-determining being.”<sup>14</sup> Then, surveying the intrusion cases—for he was attempting to refute Prosser point by point—Bloustein made the assertion most relevant to our immediate inquiry:

I contend that the gist of the wrong in the intrusion cases is not the intentional infliction of mental distress but rather a blow to human dignity, an assault on human personality. Eavesdropping and wiretapping, unwanted entry into another's home, may be the occasion and cause of distress and embarrassment but that is not what makes these acts of intrusion wrongful. They are wrongful because they are demeaning of individuality, and they are such whether or not they cause emotional trauma.<sup>15</sup>

Whether Bloustein was right that the tort of privacy is a unitary concept, or whether Prosser was right that it was four distinct torts, I believe that Bloustein's characterization of an “assault on human dignity and personality” at the very least captured the essence of the intrusive variety of the invasion of privacy, which includes wiretapping. To treat a person's telephone conversations as open to unannounced government inspection

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8. *See id.* at 971. *See generally* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

9. Warren & Brandeis, *supra* note 8, at 205.

10. Bloustein, *supra* note 5, at 970.

11. Warren & Brandeis, *supra* note 8, at 197.

12. Bloustein, *supra* note 5, at 968.

13. Warren & Brandeis, *supra* note 8, at 205.

14. Bloustein, *supra* note 5, at 971.

15. *Id.* at 974.

is to treat them as a public commodity. Wiretapping in general fails to acknowledge that critical boundary between the individual and society. This is not to say that there is no overlap of interests between individuals and society;<sup>16</sup> it is not even to say that there is no overlap of constitutive identity between individuals and society.<sup>17</sup> It is merely to insist that in critical moral respects individuals do stand apart from the society they comprise, and that those boundaries deserve the utmost respect of democratic government.

Moreover, the constant awareness that government may be tapping one's phone inexorably leads to greater conformity—not only to the law, but to social and political orthodoxies. This may be more of an instrumental argument than a moral one, but it certainly has moral consequences. A government that even indirectly coerces conformity to officially approved norms and ideologies on social and political controversies otherwise open to honest debate is unlikely to be a moral government. When a government comes to regard its citizens' individuality more as an inconvenience to be avoided than as a good to be protected, it has lost its moral direction.<sup>18</sup>

## II.

The previous part speaks only of wiretapping in general, characterizing it as immoral because of its assault on dignity and personhood. This does not take into account the contingency of moral justification—the possibility that in any given instance government has an adequate reason or reasons to engage in wiretapping, even of the warrantless variety. In this part I will argue that wiretapping innocent people, even without a warrant, is justifiable if necessary to save innocent human life, but not otherwise.

As I have just said, wiretapping generally is immoral because it denigrates personhood. But there are many acts that can be said to denigrate personhood, and not all of them have the same gravity. To deliberately look past someone at a cocktail party may denigrate one's personhood, but certainly not to the same extent as does torturing, raping, and murdering. Given my position that wiretapping generally assaults personhood, the viability of my argument that warrantless wiretapping is nonetheless justified if necessary to save innocent human life depends on my ability

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16. Cf. AMITAI ETZIONI, *THE COMMON GOOD* 96 (2004) (stating that individual and public interests in public safety are not mutually exclusive).

17. See generally MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 150 (2d ed. 1998) (suggesting that society is constitutive of individual identity).

18. I do not mean to embroil myself in the debate about whether all societies must regard human individuality as a good. If it helps, I will limit the claim to all Western democracies.

to show that wiretapping is a considerably less grave moral harm than the killing of innocent people.

To make this argument, I propose to borrow analytical apparatus and terminology from Judith Jarvis Thomson's book, *The Realm of Rights*.<sup>19</sup> In the chapter on "Tradeoffs," Thomson discusses the possibility that the disregard of rights may sometimes be morally justified.<sup>20</sup> She operates from the premise that not all rights are absolute, and so do I. As Thomson puts it, puzzling over the famous rights theories of Ronald Dworkin<sup>21</sup> and Robert Nozick:<sup>22</sup> "I cannot believe they think it impermissible to kick a man in the shin to save four lives. . . . But they are alas not very generous with detail."<sup>23</sup> The task, then, is to flesh out an analytical apparatus with sufficient detail to resolve the question of whether and when it is justifiable to engage in warrantless wiretapping. Thomson's refined version of the "Tradeoff Idea" is as follows:

[I]t is . . . permissible for Y to infringe the claim [of X] if and only if Y would thereby produce a sufficiently large and appropriately distributed increment of good, or advantage, the size of the required increment, and the appropriateness of its distribution, turning entirely on the stringency of the claim.<sup>24</sup>

Let us first attend to Thomson's terminology. When she refers to *X*'s *claim*, she means a putative right belonging to *X* and running against *Y*. When she refers to *infringement*, she means an action in contravention of a claimed right that is supported by adequate justification, as opposed to the violation of a right, which is a right-contravening action unsupported by adequate justification. When she refers to an *appropriately distributed* increment of good, she means that the resulting good is not spread out so thinly that it creates only a tiny benefit for a huge number of people, but rather is sufficiently concentrated in at least one person that it makes a morally significant difference to his or her life. When she refers to *advantage*, she means a possibility of good where the target good is not certain to result from the contemplated infringing action, but its chances of occurring are at least enhanced by it. Finally, when she refers to the

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19. JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* (1990).

20. *Id.* at 153.

21. *See generally* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

22. *See generally* ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

23. THOMSON, *supra* note 19, at 153–54 n.2.

24. *Id.* at 175. One commentator refers to this as Thomson's "Revised Tradeoff Idea." *See* Barbara Baum Levenbook, *Defender of the Realm: Thomson on Rights*, 11 *LAW & PHIL.* 449, 449 (1992) (reviewing THOMSON, *supra* note 19).

*stringency* of a claim, she means its weight—that is, the degree to which it resists being overcome by justification.

We can now make a first attempt to plug in the specifics of the wiretapping controversy where variables appear in the Tradeoff Idea: It is permissible for law enforcement to engage in warrantless wiretapping if and only if such wiretapping would produce a sufficiently large and appropriately distributed increment of good or advantage, the size of the required increment, and the appropriateness of its distribution, turning entirely on the stringency of individuals' claims not to be wiretapped.

This formulation obviously begs the question of whether warrantless wiretapping would actually produce enough and appropriate “good” or “advantage” to overcome the claim not to be wiretapped. To be sure, whenever law enforcement engages in wiretapping, there is a chance that it will turn up both past and contemplated crimes. People who think their phone conversations are confidential will often admit to having cheated on their taxes, having exceeded the speed limit on the highway, having partaken of recreational drugs, or having made plans to do these things in the future. I am going to ignore these incidental advantages of wiretapping because no one really believes that law enforcement ought to be routinely monitoring the calls of all Americans to keep them in line with the law. Instead, the Bush Administration, to support its warrantless wiretapping program, has argued that the program saves innocent lives—that it has already prevented terrorist attacks, and that it will continue to do so in the future.<sup>25</sup> So the real question is whether saving innocent lives is a sufficiently large and appropriately distributed good to overcome the claim not to be wiretapped without warrants.

There is, of course, an important gap between wiretapping and saving human life. Listening in on phone conversations never has the physical effect of stopping bullets or disabling bombs. Our hope is that the information coming out of such surveillance will arm law enforcement with a critical tool to uncover and track down terrorist plots before they are executed, or to at least minimize the number of lives lost. The point is that there is not a one-for-one correspondence between wiretapping and saving life; rather, wiretapping enhances the chances that law enforcement will prevent or minimize the loss of life to terrorist attacks.

In Thomson's terminology, then, the saving of innocent human lives cannot be counted as a “good” but only as an “advantage.” Wiretapping makes the saving of innocent human lives more probable than no

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25. See, e.g., *Bush Says He Authorized Use of Wiretaps Because It Saves Lives*, JAPAN TODAY, Dec. 18, 2005, <http://www.japantoday.com/jp/news/358860>; *Spies, Lies and Wiretaps*, N.Y. TIMES, Jan. 29, 2006, at 15 (“Vice President Dick Cheney claimed it saved thousands of lives by preventing attacks.”).

wiretapping, but it is never absolutely certain to save lives. Now if in a particular case it seems very likely that lives will be saved by warrantless wiretapping, and it turns out that the wiretapping does not actually save any lives, it would be wrongheaded to say that whatever enhancement of the probabilities of saving life were brought about by the wiretapping should not count in the justificatory calculus. As Thomson says: “Suppose that if I kick A, I will thereby very probably save B’s life. So I do kick A. As things turn out, B dies anyway. Was it all the same permissible for me to proceed? I think we want to say yes.”<sup>26</sup> Thus, it will simply not do to say that wiretapping can never be justified on the basis of saving lives because it is never certain that it will save lives. It will have to depend on how much the wiretapping will enhance the probability that life will be saved.

Suppose the FBI has just discovered there is a plot to detonate a “dirty bomb” somewhere in downtown Manhattan within the next six hours. There is no time to evacuate the city. Without wiretapping, the FBI thinks it has about a 20% chance of stopping the terrorists. With wiretapping, the FBI thinks it has about an 80% chance of stopping them. Clearly, the wiretapping sufficiently enhances the probability of saving lives to justify the surveillance.

Of course, this is not the precise question at issue. The precise question is how much dispensing with a warrant enhances the probabilities of saving lives. In other words, what are the probabilities of saving lives if a warrant is sought compared to the probabilities of saving lives if law enforcement proceeds without a warrant? One would think that in most cases dispensing with the warrant requirement would only increase the chances of saving lives marginally, if at all. But suppose in a particular case dispensing with the warrant requirement would increase the chances of saving lives from 20% to 80%. Is this not, in Thomson’s terms, a permissible trade-off?

I think it is, although the analysis is even more complicated than that. This is because in the warrantless wiretapping situation, there is not only one countervailing claim of right, but two—the subject’s right not to be wiretapped and the subject’s right not to be wiretapped without a warrant. The first right, as Bloustein said, protects against the denigration of dignity and personality.<sup>27</sup> The second right also protects against such

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26. THOMSON, *supra* note 19, at 170.

27. See Bloustein, *supra* note 5, at 971.



denigration, but may also preserve a feeling of security and order quite apart from dignity and personhood. Thus, the aggregate stringency of the subject's claims is greater in the warrantless wiretapping situation than in the situation where a warrant is obtained. Still, the aggregate stringency of those claims seems dwarfed by the massive increase (20% to 80%) in the chances of saving lives.

There is still another complication, which I shall refer to as *marginal distortion*. Let us stipulate that an increase in the probability of saving lives from 45% to 50% would not justify warrantless wiretapping. I am not saying that everyone would agree with this statement—some people almost certainly would disagree with it—but many people would agree. Now let us suppose that the increase in probability is from 0% to 5%. I would submit that some people who would not think an increase from 45% to 50% justified would nevertheless find an increase from 0% to 5% justified. The increase remains only 5%, but morally the situation seems quite different. If we permit the warrantless wiretapping, we would then have a fighting chance to save these innocent lives, as it were. Not to permit the warrantless wiretapping would seem like the final act of doom for these innocents, akin perhaps to “throwing the switch” on an innocent person in the electric chair. Thus, the absolute increase in probability—5%—seems to become distorted when we move it to the bottom margin of the probability scale.

An analogous phenomenon occurs at the top margin of the scale. If we posit an increase from 95% to 100%, many who would not find the warrantless wiretapping justified to obtain an increase from 45% to 50% will now find it justified. In the 95% to 100% percent hypo, if we do not permit the warrantless wiretapping and somehow lives are lost, many would feel as if we had “their blood on our hands.” We had an opportunity to guarantee that these innocent people would be spared, but we turned our backs on them. If we refuse warrantless wiretapping that would have increased the chances from 45% to 50%, and lives are lost, there may be more of a tendency to sigh heavily and blame it on the unfairness of the universe. It could easily have turned out well for everyone, after all.

One might object that my marginal distortion phenomenon is an illusion, since in the real world the probability that human lives will be saved is never actually 0% or 100%. In any real world scenario there is always at least a slim chance that lives will be lost or that lives will be saved. But the marginal distortion phenomenon does not require actual certainties to operate. If human minds tend to assimilate a particular probability to “virtual certainty,” the phenomenon will occur just the same. All one has to do is to change the numbers in my hypotheticals such that the posited increase in the first marginal case is from 0.1% to

5.1% and in the second marginal case from 94.9% to 99.9%. The distortion phenomenon might not be quite as strong in these new hypotheticals as in the originals, but it still exists.<sup>28</sup>

All of this goes to the question of what constitutes sufficient enhancement of the probability of saving human life. Note, however, that my thesis does not speak of whether warrantless wiretapping would “sufficiently enhance” the probability of saving human life; it speaks of whether such surveillance would be “necessary” to save life. What is the relationship between these two standards?

I intend the relationship between them to be logically circular yet heuristically reinforcing. As I will explain, my definition of when it is necessary to resort to warrantless wiretapping to save lives is whenever such surveillance would sufficiently enhance the probability of saving such lives, and my definition of when such surveillance would sufficiently enhance the chances of saving lives is whenever it is necessary to save lives. Logically, of course, this gets us nowhere. Paradoxically, however, the posited equation of these verbal formulations may help us organize our moral intuitions in a way that moves the ball forward.

A fuller explanation is in order. Under Thomson’s Tradeoff Idea, warrantless wiretapping is justified if it sufficiently enhances the probability of saving human life. Because Thomson does not—and, in my view, cannot—specify precisely how much enhancement is “sufficient,” one can argue that even the slightest enhancement is sufficient. After all, the argument would run, we are talking about the ultimate valuable, human life. Under Bloustein’s analysis, however, this argument is clearly mistaken. The claim of a right not to be wiretapped has considerable stringency, as it is based on the protection of one’s dignity and personhood. A slight enhancement of the chances of saving life cannot justify the disregard of such a claim. So we need to incorporate into the test some reminder of the intense stringency of the claim against wiretapping.

I propose using the term *necessary* because it gives the illusion of a bright line. In everyday life, we commonly speak of things as being necessary to the achievement of other things, and we tend to think of it as a binary proposition. Either *A* is necessary to the achievement of *B*,

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28. I do not wish to be misunderstood as saying that a 0% to 5% or 95% to 100% increase in the probabilities of saving life is always (or ever) sufficient to justify warrantless wiretapping. Reasonable people will disagree. I use these hypotheticals merely to point out the distortion phenomenon.

or *A* is unnecessary to the achievement of *B*. Take the starting of one's car. It would be perfectly normal to say, "I need the key to start my car." Strictly speaking, the statement is not true—one could "hot wire" it in the way that car thieves do. But as a practical matter, we regard the statement as true because there is such a huge leap from starting a car with the key and starting it by identifying the wires to the ignition, baring them, and crossing them in the "correct" way.

Anglo-American criminal law uses the notion of necessity in the same practical sense. When *A* advances on *B* with a gun, the criminal law deems deadly defensive force "necessary" to prevent *B*'s death. Clearly "necessary" in this context means something less than "without which the killing would certainly occur." Any number of events could intervene to prevent the killing. The gun could jam. *A* could suffer a heart attack. *A* could voluntarily desist at the last moment. It is not 100% certain that, without deadly defensive force, *A* will kill *B*. But it is sufficiently close for the criminal law.

As applied to warrantless wiretapping, the necessity requirement will shake out this way. Warrantless wiretapping will always be immoral when used in a preemptive, prophylactic manner. Law enforcement may not use warrantless wiretapping as a routine policy on the theory that it is likely to save innocent lives at some unspecifiable point in the future. It may only be used when it would substantially enhance the chances of preventing an individualized, known threat to innocent human life. Or, to put it differently, the threat must be concrete rather than abstract.

A hypothetical will illustrate this point. Suppose that top law enforcement officials promulgate a secret policy under which all future wiretapping of suspected terrorists or people thought to be associated with suspected terrorists will be done without warrants. Further, suppose the sincerely held belief behind the policy is that over the long run wiretapping suspected terrorists without warrants will significantly enhance the probability of saving innocent lives, compared to a regime in which all wiretaps are executed pursuant to warrants. Is this a permissible trade-off?

I think we want to say no. The enhanced probability of saving lives in this example is too morally attenuated from the infringement of the right not to be wiretapped without warrants. The hypothetical gives rise to no specific scenarios in which law enforcement can visualize lives being saved by the warrantless nature of the surveillance. The best that law enforcement can say is that somewhere, somehow, in some manner, the chances of saving life will be enhanced by not seeking warrants.

Now why should this lack of specificity matter? A life is a life; what difference does it make how much we know about the precise circumstances under which it would be saved? I do not know the answer to this, except

to say that it seems to matter a great deal to our moral intuitions. To see this we need only recur to the criminal law's treatment of justification. The doctrines of necessity, self-defense, and defense of third persons all require that the actor reasonably believe in the "imminence" of the threat. One may not use defensive force against another or otherwise violate the law in order to preempt a temporally remote threat. The strictness of this imminence requirement has been criticized a good deal, largely by those who decry its effect on women who kill their batterers while they sleep.<sup>29</sup> I side with those who would liberalize the strict temporal aspect of this doctrine. But even if the temporal aspect of imminence were liberalized to some degree, it would maintain one important moral quality in the law of justification—epistemological clarity. The threat needs to be relatively concrete. We need to have a pretty good idea about the evil's who, what, when, and where. We are less willing to trade off rights (for example, not to be killed or assaulted, or have one's property meddled with) for the sake of epistemologically abstract benefits. The better we can visualize the circumstances under which the trade-off might save a life, the stronger the moral tug. We feel little, if any, moral sanction for preemptive trade-offs.

In the end, I doubt there is a single algorithm that can capture our considered moral intuitions about what constitutes a "sufficient increase" in the probabilities of saving human life to justify warrantless wiretapping, or about what constitutes a sufficiently "concrete" threat. Wiretapping phones without court approval is not nearly as destructive of dignity and personhood as murder or torture. At the same time, the claim against such surveillance is clearly more stringent than Thomson's favorite example—kicking an innocent person in the shin—or being taxed an extra couple of dollars a year (which might be considered the fiscal equivalent of a kick in the shin). There will be spirited arguments over whether warrantless wiretapping was justifiable in a particular case. I have attempted only to establish a framework for the analysis, not to settle all such arguments ahead of time.

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29. See 2 PAUL H. ROBINSON, *CRIMINAL LAW DEFENSES* § 131(c)(1), at 78 (1984) ("The proper inquiry is not the immediacy of the threat but the immediacy of the response necessary in defense."); see also Lawrence P. Tiffany & Carl A. Anderson, *Legislating the Necessity Defense in Criminal Law*, 52 *DENV. L.J.* 839, 846–47 (1975) ("[T]emporal 'imminence' of the threat may be . . . evidence of a lack of alternatives, but the absence of temporal 'imminence' is not proof of the existence of alternatives.").

Under my general thesis, then, warrantless wiretapping is immoral unless operatives reasonably believe it is necessary to save human lives. I have now defined *necessary* as denoting a situation in which the surveillance will sufficiently enhance the probabilities of saving human life, and where the scenario is sufficiently concrete. I have further acknowledged that there is no bright-line test for identifying “sufficient enhancement of probabilities” or “sufficient concreteness” of a threat scenario.<sup>30</sup> However, I have insisted upon using the word *necessary*, with all its illusion of bright-line quality, to remind us of the stringency of the claim not to be wiretapped without warrants, and to encourage the impression that these trade-offs are morally suspect. Only those trade-offs that have a distinct, if not literal, “last resort” character to them can be assured a clean bill of moral health.

Before proceeding any further, however, I wish to consider two objections, one that I take to be quite serious and one less so. The less serious objection is that my thesis rests on an unrealistic premise, namely, that we must always choose innocent life over anything else. In fact, runs the objection, we choose all sorts of other values over innocent life all the time. For example, we know that the operation of motor vehicles kills thousands of innocent people every year. Yet we continue to sanction their operation because we are not willing to sacrifice the massive economic detriment that would result from the banning of motor vehicles. So why can we not say that our right to privacy outweighs saving innocent lives in much the way that the health of the economy outweighs it?

This objection confuses what is morally required with what is morally permissible. It is certainly true that we as a society have chosen the certainty of thousands of deaths every year from the operation of motor vehicles. I cannot say that this is an immoral choice—I would not say that government is morally required to ban all motor vehicles. But I would unequivocally say that government is morally permitted to do so. If, miraculously, there developed sufficient political support for banning all motor vehicles, it would certainly violate no individual’s moral rights for government to prohibit further vehicle operation provided that it was done in a procedurally fair way. By the same token, I argue merely that, under certain circumstances, it is morally permissible for government to sacrifice the privacy rights of innocent individuals to save innocent lives. I do not argue that government is morally required to do so.

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30. See THOMSON, *supra* note 19, at 165 (“[A] theory of rights cannot be expected to supply a nonvague general formula by means of which it can be decided, quite generally, when it is permissible to infringe a claim.”).

The more serious objection is this: If we may sometimes engage in warrantless wiretapping to save innocent human lives, then what is to stop government from trading a few innocent lives to save a larger number of innocent lives? What is to stop government from killing an innocent person to harvest his organs and thereby save five or six innocent lives?

I do not have a fully satisfactory response to this objection, simply because any such response would require a comprehensive moral theory, and I do not have one. I suppose I could cut the objection short by asserting that there is an absolute side constraint against sacrificing innocent human lives. Indeed, I could even extend the side constraint to the torture or rape of innocent humans. The truth is I do not know if such an absolute side constraint ought to exist or not. I cannot say for sure that I would think it immoral to sacrifice one innocent person to save ten million innocent ones, or that I would be inalterably opposed to torturing one innocent person to spare ten million innocent ones unspeakable suffering. I agree with Thomson that saving five or six innocent lives is clearly not enough to justify sacrificing one innocent one, but as I have already conceded, I do not think it possible to offer an algorithm.<sup>31</sup> I will content myself by turning the tables on those who would make this objection. If we may never engage in warrantless wiretapping to save innocent human lives, then how could it ever be justified for us to kick an innocent person in the shin to save other innocent lives? Or, more to the point, how could it ever be justified for us to engage in what I have described as the fiscal kick-in-the-shin, taxation? Until one is prepared to offer a comprehensive moral theory that explains why a kick in the shin to save innocent lives is justifiable while warrantless wiretapping never is, I do not feel compelled to offer a comprehensive moral theory to explain whether saving a very large number of innocent lives would ever justify sacrificing a very small number, or under what circumstances it might be permissible.<sup>32</sup>

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31. *Id.* at 153 (“Perhaps no increment, however large, would make it permissible for the surgeon to proceed . . . . At all events, *this* increment is not sufficiently large.”).

32. *Cf. id.* at 176–202 (demonstrating the complexity of the explanation for the apparent paradox of the “Trolley Problem”).

### III.

What if it turns out that a particular act of warrantless wiretapping was not, in fact, necessary to saving innocent life? That it did nothing at all to enhance the chances of saving life, and that in fact no lives were saved? Does that mean the surveillance is *per se* immoral? I believe the answer is no.

Again, I would analogize to the justification defenses in criminal law. In virtually all jurisdictions today, the availability of a justification defense pivots not on the reality of a threat, but on the actor's reasonable perception of a threat. So long as a reasonable person in the actor's situation would perceive the type of threat that qualifies one for the privilege of defensive force, it does not matter that the perception turns out to be incorrect. The reason for this rule is, I believe, a moral one: We do not generally ascribe immorality to actors who cause harm without fault.

This moral principle appears most clearly in the law of homicide, where the penal stakes are the highest. If *A* kills *B* in the absence of any culpability—that is to say, not in any way that *A* could be faulted—then the criminal law authorizes no punishment whatsoever for the killing. If a small child darts out from in front of a parked car and a driver, having observed all traffic laws and having done everything he could to avoid the child, hits and kills him, the homicide is noncriminal and the driver may not be punished. The criminal law foregoes punishment here for the simple reason that it seems unjust to punish under the circumstances. Although the concept of justice is not coterminous with morality, they are certainly related, and I think it not too much of a stretch to say that the average citizen does not feel that the driver has done anything immoral in this situation. Of course, the criminal law foregoes punishment for numerous other reasons as well—the absence of deterrent effect, the absence of violent propensities in offenders, difficulties in detection and apprehension, concerns about horizontal equity, and so on. Whatever else might be said about not punishing the driver in the dart-out case, however, I feel confident in saying that the principal reason is that the driver does not seem morally responsible for the child's death.<sup>33</sup>

So it is with the use of defensive force, including deadly force. When *A* approaches *B* with a gun aimed directly at *B*'s chest, *B* is justified in shooting *A* first. Even if it turns out that *A*'s gun was a toy, or unloaded,

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33. In theory, the felony murder rule punishes a killing on the basis of strict liability. From a moral standpoint, however, the actor is at fault for committing the underlying intentional felony. That, one imagines, is why the rule continues to be popular.

*B* has a full defense. It is not that *B* has not done any harm; he has killed someone who in reality was no threat to him whatsoever. But he has done nothing immoral. The same would be true if, instead of advancing on *B* (an armed person), *A* advanced on *C* (an unarmed person). If *B* were to kill *A* in this situation, *B* would be justified in killing *A* even if it turned out that *A*'s gun was quite incapable of shooting. *B* had a reasonable perception that there was no other way to protect *C*'s life from an unlawful and deadly attack by *A*.

I think it follows that when law enforcement reasonably perceives that warrantless wiretapping is necessary to save innocent lives in a concrete situation, the wiretapping is not immoral, even if it turns out that there was never any threat to the lives in the first place. I fully acknowledge that the reasonable belief of government operatives does not in any way erase the harm done to the privacy interests of wiretapped individuals. There are, however, three things to bear in mind. First, the mere fact that an act causes harm cannot by itself make the act immoral, as with the child dart-out example. Second, it is not immoral to do an act that one knows will cause harm if one has a sufficient moral justification. Third, even if the threat turns out to be real, and the warrantless wiretapping actually saves innocent lives, the persons who were wiretapped have suffered some harm to their privacy interests, and the fact that lives were saved does not erase those harms, but the harms are simply outweighed by the lives saved. If the saving of innocent lives outweighs the harms done to privacy interests, then a reasonable perception in the need to engage in warrantless wiretapping to save innocent lives also outweighs the harms done to privacy interests. To hold otherwise would be to elevate luck to a position of moral primacy.

There is a different argument against my assertion that reasonable belief in the necessity of warrantless wiretapping should be treated the same as actual necessity. This argument focuses on the fact that the wiretapping is warrantless. When government breaks the law, it could be argued, it has no moral standing to claim that it was not at fault. When government has gone through proper judicial process, it preserves the ability later to argue that it reasonably perceived a threat to human life that required immediate action. If it chooses to forego that process, it has deliberately bypassed a second, disinterested pair of eyes that could have detected the absence of any true threat. The government must now accept the consequences of its choice.



The problem with this argument is that the warrantless nature of the wiretapping has already been taken into account when deciding whether the risk is morally justified. That is, in order for the conduct to be morally justifiable under my thesis, the agents must have reasonably believed that, under these circumstances, the warrantless nature of the surveillance is essential to the prospect of saving lives. To hold the agents responsible for getting it wrong on the ground that they did not seek a warrant is to forget what made the risk worth taking in the first place.

#### IV.

We have reached the last portion of my thesis: Even if the operatives do not reasonably believe that the warrantless wiretapping is necessary to save innocent lives, the surveillance is not immoral so long as operatives hold a reasonable belief that the subjects are guilty and so long as the surveillance is reasonably related to an effort to save lives. This portion of my thesis effectively recognizes a lower justificatory threshold when the subject of the wiretapping is himself guilty. This position is built on a theory of graded moral forfeiture, and I imagine that it will provoke disagreement from some advocates of security and from some civil libertarians.

In *The Realm of Rights*, Judith Jarvis Thomson argued that one does not forfeit rights as against other individuals merely by acting culpably.<sup>34</sup> She attempted to demonstrate this point with two hypotheticals. In the first, *A* and *B* are in an elevator when *A* villainously attacks *B* with intent to kill. *B* clearly is privileged to employ force in self-defense, including deadly force if necessary. Our impulse—mistaken, Thomson says—is to attribute the loss of *A*'s moral right not to be killed to the fact that *A* has engaged in morally culpable behavior toward *B* and therefore has forfeited that moral right. In Thomson's second hypothetical, *C* suffers a spontaneous episode of insanity, causing him to attack *D* with deadly force. We would all agree that *D* is privileged to defend himself by killing *C*. In this situation, *C* has lost his moral right not to be killed by *D*. Yet *C* is not at fault—he is a morally irresponsible agent. It must be some other factor that causes *C* to lose his right not to be killed. From this, Thomson concludes that *A*'s loss of the right not to be killed by *B* must be attributable to something other than *A*'s fault for attacking *B* in the first place.

Thomson goes on to say that what causes both *B* and *D* to gain the privilege of killing *A* and *C* is need. But this will not do. Suppose *E* attacks *F* in the elevator with intent to kill. *F* somehow gains the upper

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34. THOMSON, *supra* note 19, at 366–71.

hand and is about to kill *E*, which he reasonably believes is necessary to save his own life. At this point *E* “needs” to kill *F*, for there is no other way to stop *F* from killing him. No one thinks that in this situation *E* is privileged to kill *F*. *F* has not lost his moral right not to be killed. Need, at least by itself, cannot be the decisive factor in who loses his right not to be killed, and, correlatively, who gains a right to kill. But if need is not doing all the work, what is doing the rest of it?

I believe fault is doing some of the work here, diminishing the stringency of *A*'s and *C*'s moral right not to be killed by *B* and *D*, respectively. It is easy to see why *A*'s aggression diminishes the stringency of his right not to be killed by *B*. The ultimate question is the degree of the diminution, a matter to which I shall return momentarily. It is much more difficult to see why *C*'s aggression diminishes the stringency of his right not to be killed by *D*, because *C*'s aggression is the product of insanity rather than “free will.” Yet it is my contention that our response to this hypothetical—namely, that *D* must be privileged to kill *C* in that situation—results in part from perceiving some fault on *C*'s part. The average person simply does not see insanity as rendering a person wholly irresponsible from a moral perspective. Because an insane adult has the same basic outward physical appearance of a sane adult, we are hardwired to attribute to that person some minimal ability to see the world as we see it and to control his behavior as we can control ours. Expert testimony may convince us that an insane killer is delusional, but it does not convince us that the person is entirely morally without fault. Even putting aside those cynics who believe that all insane killers are “faking it,” there is always an epistemological gap with insanity. How can we know for sure that this person, delusions and all, could not have made better choices in this situation? After all, he does not go around killing everyone he sees; he must have some residual capacity to reason and exercise some self-discipline. When John Hinckley shot President Reagan and was acquitted on grounds of insanity, there was a massive popular backlash, leading Congress and many state legislatures to return to the restrictive *M'Naghten* standard of insanity.<sup>35</sup> If people really perceived insanity as robbing a person of all moral agency, this backlash would be inexplicable.

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35. See STEPHEN A. SALTZBURG ET AL., CRIMINAL LAW 853 (2d ed. 2000) (“[T]wo-thirds of the states took steps to limit the insanity defense in the three years following the Hinckley verdict. . . . As a result, . . . *M'Naghten* [became] the prevailing standard in the majority of states.”).

As I have demonstrated, need is not doing all the work in all the cases. But there are a few cases in which need truly does do all the work. *E*, a three-year-old child, and *F*, an unrelated adult, are in an elevator. *E* has gotten ahold of a loaded gun and is aiming it menacingly at *F*. *F* also has a loaded gun and could shoot *E* dead. Is *F* privileged to kill *E*?

I think the answer to this for most people will be yes, but not right away. Most people would fight this hypothetical much more doggedly than they would fight the insanity hypothetical. How do we know that *E* really intends to pull the trigger? Could we not expect a three-year-old child to be a pretty bad shot? Could *F* not reach over and grab the gun? Or at least shoot the gun harmlessly out of *E*'s little hands? Of course, we can add to the facts to preserve the essential moral dilemma: *E* has already fired one shot, just barely missing *F* and provoking a giggle from the child shooter; it is a large elevator and *F* is nine feet away from *E*, well out of reach, and so on. At this point I imagine most people would weaken and acknowledge that *F* is privileged to shoot *E*, although a few might continue to insist that *F* does not have any such privilege, but rather that the hypothetical simply presents a tragic situation where *F* must allow himself to be killed.

Even if we ultimately would recognize a privilege in *F* to kill *E*, my point is that we would want to see the most compelling evidence that the killing was absolutely indispensable to saving *F*'s life, because a three-year-old is clearly not a responsible moral agent. In the insanity hypothetical, we are far less demanding of proof that the killing of *C* is indispensable to saving *D*'s life. Suppose *D* shot *C* after *C* lustily announced his intention to kill *D* on account of *D* being the devil incarnate, but before actually raising the gun. Or suppose *D* shot *C* despite some evidence that he was within reach of *C* and might have been able to knock the gun from *C*'s hand. I doubt that many people would consider that *D* had disqualified himself from the privilege of shooting *C* on the ground that it was not truly necessary under the circumstances. I believe this is because most people do not consider *C* completely innocent. The less innocent the threat, the less drastic precautions are required before eradicating it forcefully.

This brings us back to the first hypothetical. To what degree is *A*'s moral right not to be killed by *B* diminished on account of *A*'s guilt as a terrorism conspirator? The forfeiture is clearly not total. Surely *B* would not be justified in killing *A* after he had laid down his gun, put his hands on his head, and surrendered. But by the same token the forfeiture is not zero. Few would think that *B* had lost his privilege to kill *A* simply because he did not wait for *A* to cock the hammer, or because *B* made no attempt to knock the gun out of *A*'s hands first, or because *B* did not explore the possibility of escaping through a trap door. If we do

not feel that *D* was required to exhaust every last alternative before killing *C*, we feel even less strongly that *B* was required to do so before killing *A*. So long as *B* did not forego any obvious means of saving his life short of killing *A*, he retains his privilege.

Because the precise degree of moral forfeiture in this hypothetical is elusive, we would be best to couch it in terms of reasonableness. So long as *B* did not forego any alternative means of defending himself that a reasonable person in that situation would have employed, it is not immoral for him to kill *A*. *B* is not required to undertake any heroic or extraordinary measures to safeguard *A*'s life in the course of warding off *A*'s attack. *A*'s culpable aggression against *B* has considerably diminished the stringency of *A*'s moral claim not to be killed by *B*.

We are now able to return to the question posed at the beginning of this part: To what degree have terrorists forfeited their moral right not to be wiretapped without warrants? Again, the degree of the forfeit is not total. Government may not, for example, wiretap terrorists simply to satisfy the voyeuristic urges of surveillance agents. On the other hand, the degree of forfeit is more than zero. From a *purely moral* standpoint, government is not required to obtain warrants to wiretap known terrorists when a reasonable person would think that the process of requesting a warrant would unreasonably endanger the effort to prevent grave harm. A terrorist has no standing to complain that his moral rights have been violated because government did not obtain a warrant before wiretapping his phone, unless it would have been obvious to a reasonable person that obtaining a warrant would not seriously prejudice the surveillance mission. Government is not morally required to make large sacrifices of goods or advantage to protect the rights of known terrorists not to have their phones tapped without warrants.

Having said this, a couple of important reminders are in order. One is that this only applies to *known* terrorists, by which I mean that government has a reasonable belief in the terrorist status of the intended wiretapping subject. If operatives lack that reasonable belief at the time they initiate the wiretapping and only later stumble onto evidence that the subject is a co-conspirator, the wiretapping is immoral. If *A* shoots *B* intending to kill for the purpose of collecting insurance proceeds, and it only turns out later—to *A*'s complete surprise—that *B* was about to kill *A*, *A* deserves punishment for murder. That the killing would have been justified had *A* known of the basis for the justification is irrelevant to the morality of *A*'s action.

Second, I have said only that government is not *morally* required to do more than act reasonably when it wiretaps known terrorists without a warrant. Although the moral status of government action is surely an important factor in deciding whether to legalize such action, it is not the only factor. A rational legislature—and, secondarily, rational courts—must consider whether warrantless wiretapping of even known terrorists is so corrosive to rule of law values that there ought to be a blanket rule against it. Alas, the subject of the symposium for which this paper was written is moral, not legal, rights, and consideration of the latter would take twice or three times the space already taken. Suffice to say that I believe there is a more than plausible policy argument in favor of such prophylaxis.

## V.

It has been my thesis that it is not immoral for government to wiretap innocent persons without warrants, provided that the operatives reasonably believe that such surveillance is necessary to save innocent human life; and, furthermore, that government does not act immorally in wiretapping known terrorists without warrants, so long as operatives reasonably believe the subjects are terrorists, and so long as the surveillance is reasonably related to saving lives. To civil libertarians, this may seem to leave entirely too much room for warrantless wiretapping, particularly in the hands of the present administration. Nonetheless, as I have just said, there may well be winning arguments from political philosophy or policy in favor of banning warrantless wiretapping altogether. I have merely concluded that such a complete ban is not morally required.

What does my thesis have to say about the temporary legislation enacted in August 2007?<sup>36</sup> The legislation's principal feature is that it eliminates any warrant requirement for the wiretapping of subjects "reasonably believed to be located outside of the United States."<sup>37</sup> Reportedly this provision was a response to the National Security Agency (NSA) having difficulty monitoring communications between terrorists outside the United States.<sup>38</sup> Because such communications were routed through the United States, the NSA was required to obtain court approval before wiretapping. Congress clearly believed that warrants should not be required before wiretapping calls between terrorists who

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36. 50 U.S.C.A. §§ 1801, 1803, 1805a, 1805b, 1805c (2007).

37. "Nothing in the definition of electronic surveillance under section 101(f) shall be construed to encompass electronic surveillance directed at a person reasonably believed to be outside of the United States." 50 U.S.C.A. § 1805a (2007).

38. James Risen, *Warrantless Wiretaps Not Used*, *Official Says*, N.Y. TIMES, Sept. 19, 2007, at A14.

are both outside the United States. On its face, however, the legislation authorizes warrantless wiretapping of persons outside the United States no matter what their status. One of the parties could be an American—indeed, both could be Americans. It is even more troubling that neither one of them need be a suspected terrorist. Under the provision in question, so long as the subjects of the wiretapping are outside the United States, the wiretapping simply does not count as “electronic surveillance.”

Clearly this legislation is inconsistent with my thesis. What makes warrantless wiretapping morally acceptable is the imminent necessity of saving lives, or the reasonable belief that the subject is a terrorist—not the reasonable belief that the subject is outside the United States. Civil libertarians are surely troubled by the prospect that the NSA will be engaging in the warrantless wiretapping of Americans overseas, and I share that concern. But my concern goes beyond that. I highly doubt that Americans are the only ones who have moral rights as against the United States government not to be wiretapped without warrants. The basic moral problem with warrantless wiretapping is its denigration of personhood. Surely warrantless surveillance denigrates the personhood of innocent non-American citizens every bit as much as it denigrates the personhood of innocent American citizens. There may be some kind of argument from political philosophy that governments’ fiduciary duties are limited to their own citizens, but we are not here talking about some kind of fiduciary duty, such as a duty to spend tax revenues on matters generally benefiting the nation. We are talking about a basic moral duty not to do harm to others unjustifiably. I suppose one could argue that the justificatory calculus of the United States government should include only benefits that would be enjoyed by Americans, and that it should exclude burdens that would be suffered only by non-Americans—thus making warrantless wiretapping of non-Americans justifiable if any advantage, no matter how slight, might inure to Americans—but the prospect is too horrible to contemplate. It would presumably extend to the justification of colonizations, enslavements, and even genocides. And it would be well for us to remember that American actions leading to the demonization of the United States throughout the rest of the world entail a burden of considerable dimension.

Congress, then, should not renew the temporary legislation in its present form. In my view, the government is not morally required to engage in any warrantless wiretapping whatsoever. It is morally permissible for it to engage in such surveillance, but only if imminently necessary to save

human lives, or if it reasonably believes the subjects to be terrorists and the surveillance is not abusive. Whatever legislation takes the place of the present law should, at a minimum, observe these basic moral injunctions.