

Permissibly Encouraging the Impermissible

ALEC WALEN

*Academic Center 201, University of Baltimore, 1420 N. Charles Street, Baltimore
MD21201, USA; e-mail: adwalen@ubalt.edu*

According to some moral theorists, including advocates of the doctrine of double effect, the permissibility of actions can turn on the intentions with which they are performed. Intention-focused theories are susceptible to an objection based on the following three premises. It is morally impermissible to encourage morally impermissible actions; there are certain actions that can permissibly be encouraged; intention-focused theories imply that a subset of such actions are impermissible. The objection rests on the claim that the best way to reconcile these premises is to conclude that intention-focused theories mistakenly deem these actions impermissible. But a better way to reconcile these premises is by rejecting the claim that it is necessarily morally impermissible to encourage morally impermissible acts.

Judith Jarvis Thomson seems to deserve credit for devising this objection to intention-focused theories. Here is how she puts the point in the context of a euthanasia case in which it is clear that a patient's pain is so bad that his request to be put out of his misery is worthy of respect:

If we love [the patient], we too want [the doctor] to inject the [lethal] drug. We can consistently believe it would be morally impermissible for her to act, while nevertheless wanting her to. But morality calls for us to feel ashamed of ourselves if we do. What is morally impermissible is, after all, exactly that: morality requires that the agent not do the thing, the agent must not do it. So if we really do believe it morally impermissible for the doctor to inject the drug, then it is a bad business in us to want her to, wanting this for the sake of the benefit to be got by the patient if she does.¹

Thomson offers this as a *reductio ad absurdum* argument against the claim that it is morally impermissible for the doctor to kill the patient, regardless of the doctor's intent. She is sure that it is morally defensible to want the doctor to kill the patient, regardless of her intent, and she infers that it must therefore be permissible for the doctor to kill the patient, regardless of her intent. Plausible as Thomson's view on euthanasia may be, however, it is irrelevant here. What is relevant here is her inference from it being permissible to encourage an act,

regardless of the intent with which it is performed, to it being permissible to perform the same act, regardless of the intent with which it is performed. That inference is not sound.

Three types of scenarios help to illuminate what is at stake in Thomson's argument. The first encompasses the example she uses, in which we can suppose that a doctor can knowingly choose the intention with which to perform a given act, physically described. In this type of scenario, it is easy to see how it could be permissible to encourage the performance of a desired act, physically described, without encouraging the performance of an act that is impermissible because of the intention with which it is performed.

The second type of scenario involves an agent who does not know what a third party knows, namely that it is possible to perform the act the third party wants him to perform with an acceptable intention. In that type of case, if the third party encourages the agent to perform the act, the agent will think the third party is encouraging him to act impermissibly. It is more difficult, but still possible, to justify encouraging the performance of an impermissible act in this kind of case.

The third type of scenario involves an agent who has full knowledge, as in the first type of scenario, but who will perform the action only if a third party agrees to support his performing it with an illicit intention. This is the type of scenario in which it is most difficult for a third party to justify encouraging an agent to act. Nonetheless, encouragement even here is permissible. While there is something appealing about Thomson's thesis, the truth is better captured by a more qualified claim that there is a strong but defeasible presumption against encouraging the performance of impermissible actions.

1. An Easy Response to Thomson's Argument: Scenario One

When confronted with an agent who is poised to perform an act that would be permissible if performed with one set of intentions, but impermissible if performed with another, a third party may be in a position to encourage the performance of the permissible version of the act. Following up on Thomson's example, suppose that giving a lethal dose of morphine is justifiable as an exercise of palliative care under the circumstances. Suppose, further, at least for the sake of argument, that euthanasia, in this case giving a lethal dose of morphine with the intention to cause death, is not permissible. A third party need not encourage a doctor to engage in euthanasia in order to encourage her to give a lethal dose of morphine. It is up to the doctor to decide whether to act with the intent to kill or merely treat pain; it is her responsibility if she chooses to perform the act in an impermissible way. Looking at permissibility from a legal point of view, if it becomes clear that the doctor administered the morphine with the intent to kill, and if that is illegal, then the punishment that

should ensue is due to her choice, not the choice of the third party. It might be objected that there is no real difference between the intention to kill and the intention to treat pain, not once it is clear that the dose of morphine the doctor would give would be lethal regardless of her intent. But this objection is not sound. There are two aspects of intention: the reasons for action, and the range of possible actions given various contingencies. In both, differences can be found.

Differences can easily be found in the aspect of intention that concerns reasons for action. The doctor could be trying to ease her patient's pain, foreseeing death would result; or she could be trying to kill the patient, perhaps as a means of ensuring that the patient would not longer suffer pain. What the doctor is trying to do is a reflection of how she frames for herself the relationship between means and ends. The way she frames the relationship between means and ends reflects what she sees as a reason for what. Merely by asking the doctor what she is doing and why, these differences could come to light. Differences can also easily be found in the aspect of intention that concerns the range of possible actions. The intention on which a person acts can be understood as the plan on which she acts.² Plans involve not only adopting means to ends, but also handling contingencies. What if the patient does not die? A doctor who practices euthanasia would not have succeeded, and would have to think about what to do now. By contrast, a doctor who practices palliative care might well have succeeded, and if so would have reason to respond differently to that contingency. Depending on the contingency, they may still act the same way. But it would be a wild coincidence if two doctors, respectively practicing euthanasia and palliative care, would act the same way under all contingencies. Thus we can distinguish the two different intentions with which a doctor could administer a lethal dose of morphine.

It might also be objected that agents cannot choose the intention on which they act. According to this objection, we have certain reasons for action as we have certain beliefs. We can simply choose our intentions no more than we can simply choose our beliefs. But this objection too is unsound. Given that a person is going to perform an action, she may not be able to make herself perform it for a particular reason. But she can choose the plans on which she acts as well as she can choose the actions that fall under her plans. If she does not want to run the risk of prosecution for the practice of euthanasia, she can choose not to adopt the plan to commit euthanasia. If she, instead, decides to adopt the plan to practice palliative care, she might find herself doing just what she would have done, in behavioral terms, had she been practicing euthanasia. But she will now be doing it with a different intent. It seems, therefore, that Thomson's objection can be handled easily enough under scenario one. A third party should feel free to encourage a doctor to give a lethal dose of morphine because a third party can encourage a doctor to give it only as an exercise of palliative care, not as an exercise of euthanasia.

2. A More Problematic Case: Scenario Two

What makes the euthanasia case fairly easy to handle is that a doctor should be able to choose whether to act on the plan to practice euthanasia or to practice palliative care. If a third party told her, "Please, administer the drug," that third party might also want to add, "But please, for your sake, watch how you do so. Please do not do so intending to kill. I do not want to be understood to have encouraged you to do something impermissible."

It is less clear what to say about a case in which an agent does not see that there is a permissible way to perform the act some third party wants him to perform. Suppose, for example, that Ben is about to kill Ana unjustly, and a third person, Charlie is about to kill Ben. Charlie's act of killing Ben is physically identical to an act of justified other-defense. But suppose that Charlie does not see that Ben is about to kill Ana. In that case, Charlie cannot intend to engage in other-defense. Instead, let us suppose that Charlie is simply trying to murder Ben. Because Charlie is trying to murder Ben, his act of shooting Ben seems morally analogous to an attempted murder, and as such should be considered impermissible.

To be strictly accurate, we must acknowledge that Charlie's act of shooting Ben with murderous intent is different from an attempted murder. In an attempted murder, the intended murder victim does not die, whereas in this case we can suppose that Ben does die. But Charlie's act is like attempted murder in a more fundamental way. The essence of the crime of attempt is that the act performed fails to develop into the intended criminal act. In many instances, the act performed is physically identical to one that can justifiably be performed. But the fact that a physically identical act could be performed is, from the point of view of the agent, an accident. The nature of the act as, at best, only accidentally justified is a core feature of attempted crimes. That same feature is present in Charlie's act. Charlie, like someone attempting murder, is guided by the intention to murder. The fact that his act is physically identical to one that can be justified is an accident. As such, he deserves to be treated as if he has performed an impermissible act on a par with attempted murder. Nevertheless, despite Charlie's act being morally on a par with attempted murder, it would be morally permissible to encourage Charlie to shoot Ben. Suppose the example is further developed as follows. Another person, Deborah, is in a position to encourage or discourage Charlie from shooting Ben. Deborah knows that Ben is seconds from killing Ana. She knows, therefore, that she does not have much time to act. Because she has to act quickly, all she can do is yell "Shoot!" or "Do not shoot!" or nothing at all. It seems perfectly plausible that Deborah can encourage Charlie to kill Ben by shouting "Shoot!" on the ground that she merely intends Charlie to perform an act physically identical to justified other-defense. Still, there is a reason to be concerned here. It could be argued that by shouting "Shoot!" Deborah

would be violating either Charlie's or Ben's rights. Charlie can complain that he is being put in moral jeopardy without his consent. Ben can complain that his right not to be attacked with murderous intent is being violated.

Let us start with Charlie's objection, the force of which is fairly easy to feel. If Charlie were going to do something actually harmless, but something which would count as attempted murder, Deborah should not, under most circumstances, encourage him to do so. Unless she were conducting a sting operation, trying to catch people who are predisposed to commit crimes anyway, the respectful thing for her to do upon discovering that he has immoral intentions is to discourage him from acting on them. Encouraging Charlie, however, would not be so disrespectful that it would be impermissible. The claim that it would overlook Charlie's own responsibility for his actions. There are three ways a person in Charlie's epistemic and physical condition could respond to the situation. First, Charlie could be committed to killing Ben, such that Deborah's encouragement or discouragement would make no difference. Second, Charlie could be sitting on the fence, such that Deborah's influence would affect the outcome. Third, given that Charlie does not realize that Ben is a mortal threat to Ana, Charlie could be committed to not killing Ben.

In the first and third cases, Deborah's yelling "Shoot!" will be merely an expression of her desire to influence Charlie; it will have no effect on Charlie's behavior or his culpability. If Deborah has no effect on Charlie or his culpability, then she does not harm him. In both cases, he may wonder why she encourages him to shoot. But if she were to explain, after the fact, that she was trying to get him to save Ana by shooting Ben, then he should understand. We can imagine that in the third case Charlie might be indignant that Deborah tried to encourage him to murder, given that it would be, from his uninformed perspective, a wrongful killing. But if he is not wronged in the second case, which we turn to next, then he really should not be indignant.

In the second case, Deborah does have an effect on Charlie. There are two ways to model this effect. On the one hand, Charlie might take Deborah to be an authority to whom he should defer unless he has solid evidence that she is misguided. For an analogy, consider a police officer who normally accepts orders if barked in a certain tone by his partner. He might reasonably act on the assumption that if his partner barks an order in a certain urgent tone, his partner must appreciate something that he does not, and he should not question the order for fear of dire consequences. If Deborah had a similar understanding with Charlie, then Charlie's listening to her would be unproblematic. Charlie would have a justification for killing Ben based on Deborah's authority and the good reason he has to accept her authority. If she should turn out not to have good reason to shout "Shoot!" the fault would lie with her, not with Charlie. Charlie might regret having listened to her. He could accept a certain, non-criminal, responsibility for playing a part in a wrongful killing. But he could

not justifiably blame himself for having acted wrongly. These worries would be moot in this case, however, because Deborah does have good reason to shout "Shoot." On the other hand, Charlie could simply be wavering about whether to kill Ben with murderous intent, and could be susceptible to encouragement even though he does not take it to mean that there is a legitimate reason to kill Ben. In that case, Charlie's agency does not vanish from view simply because Deborah has an effect on him. Charlie still bears full responsibility for choosing to shoot Ben given nothing more in the way of an external influence than Deborah's yelling encouragement.

Deborah might also seem to be responsible for Charlie's wrongful killing of Ben, since she encouraged him to shoot. If Ben had a right not to be shot at all, then Deborah certainly would share in the guilt, and would deserve punishment for abetting the crime. But from Deborah's perspective, she can see that there is good reason to shoot Ben. Her intention is merely to have Charlie do what there is objectively good reason for someone in his physical position to do. If her concern were simply with Charlie's welfare, she should wish that he not shoot Ben. His shooting Ben with murderous intent should get him in trouble, and as a general matter, she should want him to stay out of trouble, all things equal. But all things are not equal, and she could reasonably prefer to protect Ana from murder than to keep Charlie out of trouble.

What should we say of the risk that Charlie will not merely shoot Ben in an objectively justifiable way, but will go beyond that? Suppose, for example, that Charlie shoots Ben once, injures him and thereby saves Ana, and then shoots him again, after it is clear that Ana is out of danger, and kills him. Is Deborah not now liable for Charlie's unjust killing of Ben, having encouraged Charlie to act knowing that he would do so with an impermissible intention? Does she not at least take a risk of moral liability that seems inconsistent with the permissibility of her own action? The answer is that she does not. Charlie is a somewhat dangerous tool to use. But the fact that Deborah uses a dangerous tool need not make her action impermissible. If a police officer releases tear gas in a crowd to stop a riot, there is a risk that the tear gas will cause more harm than the riot would have caused. But if the use of tear gas is likely to minimize overall harm, and to be substantially better than the alternatives, then its use is permissible. The same could be said for the possibility of Charlie performing an act that is actually unjustifiable. That possibility, as long as there is no less dangerous alternative and the risk of unjustifiable harm to Ben is sufficiently low, does not by itself make encouraging Charlie impermissible.

It might be objected that Deborah is, in a literal sense, using Charlie as a means of saving Ana by influencing him to do something without connecting her influence to his rational will. It would be one thing if she yelled, "Shoot Ben because he is trying to murder Ana." That would give Charlie a reason to do as she says. But yelling "Shoot!" is a way of influencing Charlie without reasoning with him. If there is no prior understanding between the two of

them regarding barked orders, then Deborah's barking an order is more akin to pushing him forward into action than presenting him with a reason to act. A Kantian absolutist might say that her influencing him in this way is wrong. But that view is implausibly rigoristic. Sometimes, it is morally acceptable to treat someone simply as a means. Imagine a case in which Elizabeth has to push Fred, using his body weight to throw a switch to save a life. If the only harm that comes to Fred is that he is jostled and bruised, Elizabeth's action would be acceptable. His harm is sufficiently outweighed by the benefit. Indeed, we can imagine that he would even have a positive duty to subject himself to that kind of harm were he aware of the need.

Admittedly, the harm to Charlie if prosecuted for a crime akin to attempted murder is no trivial harm. But the blame for suffering that harm falls squarely on Charlie's shoulders. It is still his choice to kill without good reason; Deborah's influence does not negate his responsibility. She contributes to his suffering a serious harm, but her contribution does not visit a harm upon him that he does not deserve.

It might nonetheless be objected that this view commits Deborah to a bizarre form of regret in the third case. It might seem that she has reason to regret that Charlie is the kind of person who would not intend a murderous act. But there are two ways Charlie could have been brought to kill Ben. One is by realizing that Ben could justifiably be killed to save Ana. The other is by being moved to disregard the moral imperative not to kill without good reason. Given that the second possibility is so bad for Charlie, there is no reason to suppose Deborah is committed to wishing for that. Her commitments are more conditional than that. She is committed only to wishing either that Charlie somehow realize that Ben can justifiably be killed to save Ana, or if Charlie is already inclined to be a murderer, that he act on his murderous intent, kill Ben, and save Ana. In sum, there is no reason to think that concern with Charlie can justify the claim that Deborah may not encourage him to kill Ben. Even though Charlie acts impermissibly by killing Ben with murderous intent, Deborah can justifiably encourage him to perform that act.

Let us turn to Ben's claim that he has a right not to be killed with murderous intent. If Ben were not trying to kill Ana, then Deborah clearly would violate Ben's rights were she to encourage Charlie to kill Ben. But Ben is trying to kill Ana, and if Deborah can save Ana only by causing Ben's death, then Deborah would not violate Ben's rights by trying to kill him. At first blush, it seems that Ben's claims against Deborah cannot plausibly be any stronger simply because Deborah would not kill him herself, but instead would encourage Charlie to kill Ben. Yet it might be objected that Charlie violates Ben's rights because Charlie is trying to murder Ben, and that Deborah indirectly violates Ben's rights because she encourages a violation of his rights. There is something to this objection. Rights do have a limited transitive power. But it turns out that the power is not strong enough in this case.

As an illustration of the limits of the transitive power of rights, let us suppose that a terrorist threatens to kill five people if Grant does not kill someone else. Grant should not feel torn by the thought that, by not killing someone else, he in some way violates the rights of the five not to be murdered. Their claims not to be murdered are directed against the terrorist, not against Grant. It is only the one other person who presses a claim against Grant that he not murder. The claims of the five are claims for his help, and they are trumped by the other person's right not to be killed.

There is a sense, however, in which the claims of the five against the terrorist are transitive: they block Grant from recognizing a set of reasons to encourage, or even to allow, the terrorist to kill the five. But this kind of transitivity works only to block reasons that would justify an action by way of the terrorist violating their rights. The rights of the five do not block other justifications for the same action. To see this, let us suppose that to save an even larger number of people, Grant would have to perform an act that the terrorist would foreseeably, but mistakenly, interpret as encouragement to kill the five. The justification for this action is that it would save a greater number of people; the fact that the terrorist would take it as encouragement to kill the five plays no role in justifying the action. In such a case, Grant should be permitted to foreseeably, but unintentionally, encourage the terrorist.

Taking the point back to Deborah's situation, Ben has a right against Charlie that he not be murdered. The right is transitive against Deborah only in the sense that it grounds a claim against her that she cannot justify encouraging Charlie to kill him for the good that may come specifically from the wrongfulness of his intention. To respect Ben's right, the aspect of Charlie's intention that makes his act morally on a par with attempted murder is something that Deborah cannot look to in order to justify her action. The first question, then, is whether she must look to his intention in order to justify her action.

On the one hand, it could be argued that there is no reason for Deborah to take as her aim that Charlie kill Ben with murderous intent. Deborah's aim is simply to use Charlie as a means of killing Ben, regardless of Charlie's intent. Ben can have no complaint against her for this. On the other hand, it could be argued that Deborah cannot get Charlie to kill Ben without trading on the fact that Charlie would be acting on a murderous intent. Ben could have a complaint against her for this. The second of these two positions is the more sound. Ben does have a complaint against Deborah because she can rely on Charlie to do what she wants him to do only by relying on the fact that Charlie will act on his murderous intent. The wrongfulness of his intent is no mere side effect of her plan to save Ana. It is part of the means of saving Ana. The fact that Deborah relies on Charlie acting impermissibly means that Deborah cannot put all of the responsibility for acting wrongfully on Charlie. She has to accept some responsibility for Charlie wronging Ben.

Thomson's thesis, in this case, is supported by the fact that Deborah has to accept some responsibility for Charlie wronging Ben. The fact that in this situation Deborah would be implicated in Charlie wronging Ben supports the thought that Deborah would herself be wronging Ben, and that she therefore may not proceed. Ben's claim, however, is not strong enough to make Deborah's act impermissible. He has some complaint against Deborah, but not one sufficient to require her not to proceed. Ben is, after all, trying to murder someone himself. Charlie acts impermissibly in trying to kill him without any awareness of the justifying reason. That is why Charlie deserves to be punished as if he had attempted murder. But Deborah encourages Charlie only because she knows that Ben can rightfully be killed to save Ana. The significance of saving Ana outweighs the fact that she has to make use of Charlie's murderous intent.

In sum, considerations of Ben's objection boil down to the strength of his transitive rights claims. Ben's claim not to be killed with murderous intent does not translate down to Deborah with sufficient strength to prohibit her from encouraging Charlie to act on that murderous intent. One reason Ben's claim may be so weak is that he can justifiably be killed as a matter of other-defense. Another reason may be that his claim is fundamentally a claim about how others may intentionally act toward him. Perhaps the harm of being subject to action based on an impermissible intent is not great enough to give rise to a stringent translated rights claim against third parties. Taking the second scenario as a whole, it seems legitimate for Deborah to want Charlie to do something impermissible if he is already inclined to do it, if his act is physically identical to one that is justifiable, and if sufficient good would come of his doing it to outweigh the harm he brings on himself by performing an impermissible act. Part of the reason Deborah may encourage Charlie to act impermissibly is also that the victim of Charlie's impermissible action does not press a strong claim against Deborah that she not encourage it. We will see that this issue of the transitivity of rights claims is essential to understanding not only the second scenario, but also the third.

3. The Bargaining Problem: Scenario Three

We have dealt with two kinds of cases so far. First, we dealt with a doctor who we supposed could just as well give the same dose of morphine acting on a plan to engage in palliative care as acting on a plan to engage in euthanasia. We said it was her responsibility if she chose to give the morphine with an illicit intent. Second, we dealt with a killer whose act was accidentally justified. Even if turned out that a third party encouraging him tipped the balance for him and caused him to kill with a murderous intent, the responsibility for that choice was still his. The most worrisome feature of this second scenario

was that by encouraging him to act on a murderous intent, the third party violated the right of his victim not to be killed with murderous intent. But the victim's claim was insufficiently strong to justify prohibiting the third party from encouraging the action.

Let us consider what we should say about encouraging a person who is the only person able to achieve some important good, and who insists that he will do so only if the third party who might encourage him will help protect him from prosecution, or will in some other way aid or encourage him to perform the act with an illicit intent. Suppose that Henry is the commander of an air base in the South Pacific during World War II. He gets orders to bomb an enemy factory to help wage a just war, at a crucial moment to bomb, because intelligence indicates that the factory has built up but not yet shipped out a large number of dangerous munitions. The problem is that, while Henry still has planes, all of his pilots have come down with a horrible flu and are in no condition to fly. There is another soldier on the island, Irving, who Henry knows is a crack pilot. But Irving is not under Henry's command, and Henry cannot order him to fly the mission. Henry can ask him to do it, but Henry knows that Irving has extreme views about warfare. Irving thinks that terrorizing civilians is a morally acceptable way, and indeed one of the most effective ways, of winning the war. Henry knows that there are many civilians who work in and around the factory and that their deaths would likely result from bombing it. Henry accepts this as an unfortunate yet justifiable side effect of bombing the factory. But Henry knows that for Irving, their deaths would be a reason to bomb the factory. He would bomb it intending to kill them. Were Irving to fly the mission, he would fly it as a terror bomber. This, we should suppose, at least for the sake of argument, is impermissible.

Suppose Henry asks Irving if he would be willing to fly the mission. Irving responds by saying that he will do it, but only if Henry gives him permission to fly the mission intending to kill civilians. He will aim at the factory because that is a target with civilians in and around it. But if it seems to him that the factory is too well defended to get a good shot at it, he will pick the best civilian target he can find. He presents this to Henry as a take it or leave it offer. On the one hand, Henry has reason to take it. The mission is a very important mission; it is likely to make a real difference in winning a just war. Moreover, Irving is likely going to behave just as a tactical bomber would, killing no more civilians than would be killed as collateral damage by a tactical bomber. Therefore, viewing Irving simply as a tool of war, Henry can justify using Irving to fly the mission. On the other hand, Irving would fly the mission intending to kill civilians. He would do so impermissibly. Moreover, he is demanding the Henry support him in flying the mission with an impermissible intent. May Henry let him fly the mission?

Perhaps Henry can liken his predicament with that of a prosecutor negotiating with a criminal for a plea bargain. If a prosecutor knows a criminal did

a crime for which he deserves significant punishment, letting him off with the penalty for a relatively insignificant crime is morally hard to justify. But if a criminal has really valuable information on a number of others, many prosecutors would arrange to drop the most serious charges in exchange for the information. Henry might feel like agreeing to let Irving fly the flight with a kind of immunity is like that. But there is a significant difference between Henry's choice and a prosecutor's choice. Plea bargaining does not license new criminal activity. It may sometimes have that effect, but that is not literally what it is. The past crime is done, and now all that is being offered is a waiver or reduction of punishment. There is no implication that the act was permissible. No prosecutor legally could agree to this proposal: "I have information you need, which I will give it to you if you will give me immunity for the crime I want now to commit."

Perhaps Henry is not stuck with Irving's take it or leave it offer. Perhaps he can push for an intermediate position not to put any restrictions on the intention with which Irving acts, but without letting him off the hook if he deviates from the legitimate flight plan. If he bombs civilians who are not in or in the immediate vicinity of the factory, Henry will do nothing to prevent him from being prosecuted. There are two problems with this intermediate solution. First, Irving may not accept it. It still leaves him subject to prosecution, and he may demand more than that. Second, it is not that easy to pull intention out of the picture. Suppose Irving's bombs miss the factory and kill a large number of civilians. Whether he deserves punishment depends on what he was intending. If he was trying to hit the factory, and through no fault of his own things just went wrong, then he does not deserve punishment. If he decided to act on a different plan than the one Henry approved, then he does deserve punishment. Trying to hold him responsible simply for the targets he actually hits, without regard for his intent, may actually be unjust to him.

Thus we need to determine if Henry may encourage Irving to perform an impermissible act, *qua* impermissible act, in the particular sense of licensing or helping him to perform it with that intent, if he thinks that the result is sufficiently likely to be an act that is physically identical with a permissible act, and the permissible act is sufficiently important. To do so, we need to address the core of Thomson's principle. Is it impermissible to encourage an impermissible act, *qua* impermissible act, for the sake of the agent, the victims, a third party who would encourage the performance of the act, or because of some other deontic principle?

The impermissibility cannot be for the sake of the agent. We have already seen that the agent should be responsible for his own choice to do an impermissible act, and that the harm to him of encouragement in that direction may be outweighed by the benefits to others. It also cannot be for the sake of the person doing the encouraging. A third party in Henry's position has the authority to sacrifice himself for the interests of others in almost all ways.

Surely he can choose to accept any burdens that may fall on him from his encouraging Irving to perform an impermissible act qua impermissible act. It also cannot be for the sake, understood as for the welfare, of those who would be harmed by the act, since it would be permissible to use something that is not an agent with the same risk profile. The best candidate explanation is some other deontic principle, namely the principle of transitivity of rights that we examined when looking at the second scenario. As we noted in discussing the case of Grant and the terrorist, the potential victims of the terrorist not only have rights against the terrorist that he not kill them; they also have rights that translate down the line and bar others from aiming to encourage the terrorist to kill them. The justificatory force of any good that may come of his killing them is blocked by their rights not to be killed.

Perhaps the same can be said of the victims of the bomber. They have a right not to be targeted by terror bombers that goes beyond the right not to be hit when there is no legitimate target nearby. It is a right that all possible victims of terror bombers have not to be targeted as a means of winning a war. If the right makes it impermissible to terror bomb, then it should likewise make it impermissible to encourage terror bombing. More specifically, it should make it impermissible for Henry to strike a bargain with Irving to allow him to terror bomb for the good he expects to result. Moreover, the victims, unlike Ben in the second scenario, have rights that are not weakened by their own culpable actions, but that should transmit down the line at full strength. Still, there is reason to doubt that the transitivity of rights is, in this case, sufficiently strong to block Henry from encouraging Irving to violate them. Encouraging a terrorist to kill five victims who otherwise would not die has the potential to make a great difference. But encouraging a terror bomber when he is likely to act no differently than a tactical bomber, when the people who die are likely to die anyway, and when the odds of others dying is so small that the benefits would justify imposing the risk if something other than an agent were the weapon of choice, seems a different matter. People whose harm is only that they are wrongly targeted have a more minor right at stake.

Not only is this right more minor, there is something distinct about the third party's position when the act, physically described, could permissibly be performed. It would clearly be wrong of Henry to try to get Irving to perform the act with an illicit intent. But if Irving is the one insisting on performing the act with an illicit intent, and Henry is merely acquiescing because it is sufficiently important that the act be done, Irving still takes the bulk of the responsibility. Henry's acquiescing is problematic. Unlike the first scenario, in which the third party does not approve of performing the act with the wrong intent, in this case, Henry is, in some sense, taking responsibility for his performing the act with the wrong intent. Henry should not do so lightly. But Henry's position is not the same as Irving's, and the claims against Irving

are stronger than the claims against Henry not to license or encourage him to act that way.

Complications remain, however. Some possible victims of Irving's bombing, people not near the factory, would die only if Irving flies the mission as a terror bomber. They seem to have a stringent transitive right that Henry not license or encourage Irving to bomb them. Henry cannot simply say to them that when he promised Irving that he could fly the mission as he wanted, he imposed on them no more risk than he would have imposed using some sort of missile. They can object that if Irving bombs them, they have been wronged and they deserve redress. Moreover, Henry's encouraging Irving is relevantly different from Deborah's encouraging Charlie, which is an act that also might lead to harms that cannot be justified regardless of Charlie's intent. Deborah does not hold herself out as willing to protect Charlie if he gets in trouble for acting on his murderous intent. Henry, by contrast, may be able to encourage Irving to fly the mission only if he does hold himself out as willing to protect Irving, even if Irving causes harms that cannot be justified regardless of his intent. This stronger complicity in Irving's impermissible actions seems inconsistent with the possible claims of certain victims for redress. Thus there is reason to think that Henry should take some version of the middle position in his bargaining with Irving. He may have to tell Irving that he can license him to fly the mission, but cannot protect him if he departs from the mission as Henry wants it flown. If this proves an unacceptable bargain for Irving, then Henry's choice may be either to make a dishonest promise to Irving that he will help protect him from prosecution should he stray from the legitimate military target, or to forgo the bombing run.

The possibility that Henry might have to forgo the bombing mission implies that Henry is more restricted being in command of an agent than he would be if he could use a missile with the same risk profile. This may seem counter-intuitive. But agents have choice, while things that are not agents do not. Only agents can wrong others. The appeal of Thomson's principle reflects the way we have to treat agents who act wrongly. As a general matter, it is impermissible to aim to help agents wrong others. Henry simply cannot morally justify licensing or encouraging Irving to bomb victims who would not die were it not for the fact that Irving was seeking to kill them. Thus we see, in the end, that Thomson's principle is not completely off the mark. It seems accurate with regard to actions that are prohibited because they violate rights that protect interests other than an interest in not being acted upon with an illicit intent. Thomson might want to argue that this shows that actions that are problematic because they are performed with an illicit intent are not impermissible. But it shows no such thing. There are reasons to hold that it may at least sometimes be impermissible to act on an illicit intent. Just to mention one, there is reason to think that actions merit punishment if and only if they are impermissible, and certain actions merit punishment if and only if

performed with an illicit intent. A better way to understand the cases we have discussed is that they show that it may sometimes be permissible to encourage acts that are impermissible if those acts are impermissible because they are performed with an illicit intent.

Thomson's principle is less plausible than a weaker version according to which there is a strong presumption against encouraging others to perform impermissible acts. This presumption may be nearly beyond rebutting in cases in which the act is impermissible because it would violate rights that protect against harms other than the harm of being acted upon with an illicit intention. The presumption may be easier to rebut in cases in which the act is impermissible because it would violate rights that protect against the harm of being acted upon with an illicit intention. The point can also be expressed in terms of the transitivity of rights. Rights that protect against the harm of being acted upon with an illicit intent translate less powerfully than at least some other rights into restrictions on third parties encouraging the rights violation.

This last way of putting the point may show something about acts that are impermissible because of the intent with which they are performed. Perhaps it is best not to think of them as impermissible because they violate a certain kind of right. Perhaps rights with regard to the intentions of others are purely, or generally, secondary reflections of the prior fact that acting with certain intentions is impermissible. Or perhaps it is simply the case that the interest in not be acted upon with an illicit intent is usually not so great, and the rights that protect it are usually not very stringent, especially when translated to restrictions on third parties.³

Notes

1. Judith Jarvis Thomson, "Physician-Assisted Suicide: Two Arguments," *Ethics* 109 (1999), p. 516. See also, Judith Jarvis Thomson, "Self-Defense," *Philosophy and Public Affairs* 20 (Fall 1991), pp. 293–294.
2. See Michael Bratman, *Intention, Plans and Practical Reason* (Cambridge, Mass.: Harvard University Press, 1987), esp. ch. 10.
3. I want to thank Mattias Kumm, Nien-he Hsieh, Vicki Howle, Jennifer Culbert, Shelly Kagan, Angie Smith, Liz Harman, Joseph Rahill, Michael Stelmack, Janine Szokoly, and the editor of the *Journal of Value Inquiry* for their many valuable questions and comments.