

## The Doctrine of Double Effect: Some Remarks on Intention and Evaluation

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*Truth uncompromisingly told will always have its ragged edges.*

—Herman Melville

*Abstract.* This essay consists of some clarifying remarks on the doctrine of double effect (DDE). After providing a contemporary formulation of the doctrine we put special emphasis on the distinction between those aspects of an action plan that are intended and those that are merely foreseen (the I/F distinction). Making use of this distinction is often made difficult in practice because salient aspects of the action plan exhibit a felt “closeness” to one another that is difficult if not impossible to articulate with the precision we might like. The essay goes on to examine an especially adroit criticism of DDE best articulated by J. J. Thomson. We conclude with a brand new double effect case (new to the philosophical literature anyway) taken from medicine and Roman Catholic pastoral ministry.

### I.

This essay consists of some clarifying remarks on the doctrine of double effect.<sup>1</sup> First a spoiler—it is this writer’s considered judgment that whatever its merits this controversial principle faces an especially adroit criticism best articulated in the contemporary literature by J. J. Thomson. I intend to discuss this criticism toward the end of the essay. I will close by introducing and defending a new application of the doctrine taken from medicine that should be of special interest to Roman Catholics. But first a fair bit of stage setting.

An important component of the contemporary doctrine of double effect (henceforth DDE) can be formulated as follows: it is sometimes morally worse to act with the intention to produce a bad effect E as *means* to some otherwise

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<sup>1</sup>Thanks to John Robinson for very useful discussion and written comments on previous drafts of this essay.

good end than it is to produce the same bad effect E as a *foreseeable byproduct* of one's endeavoring.<sup>2</sup> Philosophers frequently appeal to DDE both to *explain* the seeming worseness of one action (or set of actions) as opposed to another with an equivalent outcome and to *justify* acting in such a way as to produce a good outcome that is accompanied by a bad effect. A paradigmatic application of DDE is to morally distinguish between two sorts of bombings during the prosecution of war: in the first, strategic bombing (SB), a pilot bombs the enemy's munitions cache in order to gain military advantage while foreseeing that nearby civilians will be harmed by the blast. In the second, terror bombing (TB), a pilot targets the civilians in order to demoralize the enemy. While the same harm comes to the civilians in each bombing, TB seems worse than SB at least partly in virtue of the fact that in TB the harm to the civilians was intended as a means to victory whereas in SB the harm was not so intended.<sup>3</sup> Note that DDE explains the apparent moral difference between the *bombings*, not just the apparent moral difference between the characters of the respective *pilots*. It is often the case that a terror bomber is thought of as a worse *person* than a strategic bomber at least partly in virtue of his acting with the intention to harm civilians, his adoption of a bad means; but this need not be so, and in any case the evaluation of *character* is separate and distinct from the evaluation of the two kinds of *bombings*. To reiterate, DDE states that terror bombing is worse than strategic bombing because of the intention to harm expressed by the act in terror bombing, an intention that is absent in strategic bombing.

It may strike the reader as odd that I have allowed that strategic bombing can, in some instances, be performed so as to reflect more poorly on the character of the pilot than a terror bombing performed by another pilot. But this is exactly right: the strategic bomber, so designated in virtue of his intention to target a military asset rather than civilians, may nonetheless regard the harm done to civilians as a *welcome* foreseeable side effect of his action while the terror bomber may be regretful that he is doing harm to civilians as part of his plan to encourage enemy surrender. Which is just to say that what we can call sadistic bombing cuts across the intended/foreseen (I/F) divide in various ways. In the instance of a pair of pilots with the attitudes just described, the terror bomber exhibits better character than does the strategic bomber. We can have sadistic strategic bombing just as we can have regretful, remorseful, or reluctant terror bombing. I make this point to emphasize one more time that the moral evaluation of character is a different matter from the moral evaluation of action itself. (Of course, it does

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<sup>2</sup>Here's a complete formulation of DDE: An action plan may be morally permissible when the ultimate end(s) are good, the means are neutral at worst, the bad effect is not intended, and, finally, the badness of the bad effect is in proper proportion to the goodness of the ultimate end(s).

<sup>3</sup>This example is taken from Jonathan Bennett, "Morality and Consequences," *The Tanner Lectures on Human Values II*, ed. S. McMurrin (Salt Lake City: University of Utah Press, 1981).

count against the terror bomber that he is doing something impermissible, this despite his misgivings or regretful attitude towards the killings.)

## II.

One of the most difficult problems connected with trying to apply DDE has come to be known as the “closeness problem.”<sup>4</sup> The problem is just that of properly discriminating closely related parts of an action (or actions) from one another so as to make distinctions between what is intended and what is merely foreseen. Here is a classic case that introduces the closeness problem: Roman Catholic teaching permits the performance of a hysterectomy on a pregnant woman in cases where the uterus is malignantly cancerous and thus poses a threat to the woman’s health and/or life. In permitting this operation, which the doctor and patient know to a practical certainty will kill the fetus, DDE is employed to distinguish the hysterectomy itself, which is the means to destroying the cancer, from the bringing-about of death of the fetus within the womb, which also obtains as a result of the procedure. This course of action is morally distinguished from craniotomy, in which the head of an improperly placed fetus is crushed so as once again to preserve the health and/or life of the pregnant woman. This latter operation has traditionally been forbidden on the grounds that the intended means, skull crushing, is felt to be “too close” to an (intended) killing of the fetus, (intended) killing of an innocent human life—as the Church regards the fetus—being absolutely forbidden.

In challenging the usefulness of DDE, Herbert Hart asked why we should not want to say that in craniotomy the doctor executes the following plan: to preserve the woman’s health and/or life by removing a dangerous blockage by crushing the skull of the fetus, with the foreseen but unintended effect of causing the death of the fetus.<sup>5</sup> In response to this challenge, proponents of DDE have either just appealed to a “felt closeness” between skull crushing and killing and left the resolution of other hard cases to a sort of Potter Stewart test, or more recently have tried to ground a feeling that the effects in question are too close in subtle points of metaphysics, mereology and/or biology.<sup>6</sup>

With all this in mind, an earlier essay of mine recently was criticized for trying to resolve the closeness problem for double effect along “Stewartesque”

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<sup>4</sup>Philippa Foot, “The Problem of Abortion and the Doctrine of the Double Effect,” in her *Virtues and Vices and Other Essays* (Berkeley: University of California Press, 1978).

<sup>5</sup>H. L. A. Hart, *Punishment and Responsibility*, 2 ed. (Oxford: Oxford University Press, 2008).

<sup>6</sup>Supreme Court Justice Potter Stewart is famous for having said of pornography that he could not articulate its precise boundaries but that “he knew it when he saw it” (*Jacobellis v. Ohio*, 378 U.S. 184 [1964]).

lines.<sup>7</sup> It's worth taking a look at the criticism to see if some semblance of my investigation can be salvaged, or at least to see if anything can be learned from my missteps. We should set up some provisional fixed points against which to evaluate my efforts. First off, we want to say that there does seem to be something morally worse about terror bombing than tactical or strategic bombing. DDE proponents usually contend that the difference in evaluations of the acts is grounded in the I/F distinction. Specifically, DDE proponents contend that in terror bombing the pilot intends to kill a sizable number of non-combatants whereas in strategic bombing the pilot has no such intent; rather, she merely foresees to a practical certainty that this same sizable number of non-combatants will be killed by an intended attack on a nearby military target.

Let's also provisionally accept that the different roles that killing innocents play in the practical reasoning of the two pilots TB and SB are responsible for the difference in our moral evaluations of their respective bombings and that the important factor is indeed the I/F distinction. I think standard SB versus TB is the most persuasive case for the moral significance of DDE. Now Mark Johnston and David Lewis have cleverly and independently constructed a variation on SB versus TB in which the deaths of the non-combatants actually play no role at all in inducing an enemy surrender, functioning neither as intended means nor intended ends. In this case what induces the surrender is simply the bomb blast itself, not the resultant deaths.<sup>8</sup> The case is striking because it seems much more like TB than SB, and it seems it should be regarded as an impermissible strategy when by the letter of the law it is not. Lewis and Johnston, acting as devil's advocates, think this case puts a burden on DDE proponents because the doctrine gets the case intuitively wrong.

In looking at the case, I tried to show how a rather inclusive conception of what is intended in acting would produce the correct evaluation. More precisely,

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<sup>7</sup>Neil Francis Delaney, "Two Cheers for 'Closeness': Terror, Targeting and Double Effect," *Philosophical Studies* 137 (2008): 335–67; Dana Nelkin and Samuel Rickless, "So Close and Yet So Far: Why Solutions to the Closeness Problem for the Doctrine of Double Effect Come Up Short," *Nous* 2013, doi: 10.1111/nous.12033.

<sup>8</sup>The Johnston-Lewis case is as follows: Suppose the enemy command is in a war room such that all they can see are video screens that alert them to the detonation of a megabomb over one of their cities. What elicits a surrender then is not the sight of civilian slaughter at all; rather it is simply detection of the blast. Johnston and Lewis suggest that in this case the pilot intends simply the detonation of the megabomb. The civilian deaths are not part of his means at all; rather they are an unintended but foreseen side effect. Neither Johnston nor Lewis published on the case: as I noted in "Two Cheers for 'Closeness,'" Johnston's version of the case comes from his comments on my dissertation. I have been reliably informed that this case very much resembles one proposed by David Lewis. Presumably the reference is to a case attributed to Lewis and discussed by Warren Quinn in his "Actions, Intentions and Consequences: The Doctrine of Double Effect," (*Philosophy and Public Affairs* 18 [1989]: 334–51).

I suggested that in this case involving a felt “closeness” between bombing and killing we might want to leave DDE undisturbed and argue that despite appearances the deaths were intended as part of a “complex intention” (drop bomb and kill civilians) as Wilfrid Sellars used the phrase.<sup>9</sup> Since the deaths are in this sense intended, routine application of DDE in fact deems the bombing morally worse than (normal) strategic bombing. Now so far all I’ve done is some clever accounting; the obvious question that the critics rightly raise is just: when do we attribute to a pilot this damning complex intention? Or, which comes out to the same thing, why aren’t the civilian deaths simply foreseen in Johnston-Lewis? And Sellars has a ready answer: we attribute the complex intention involving the anticipated killings because the anticipated killings are, or at least should be, strong reasons against acting (bombing). In short, Sellars thinks that in a case like Johnston-Lewis the pilot has *chosen* the killings along with the bombing itself as parts of what Michael Bratman has called a “Package Deal,”<sup>10</sup> and that, when an outcome is chosen in this way, it is always taken to be intended at least as part of a complex intention.

The problem with this “Package Deal” analysis is that it threatens to do too much: precisely, it will make standard strategic bombings impermissible, because the anticipated civilian deaths are always strong reasons against dropping bombs on military targets. So, coming full circle, as I now see things I threw the baby out with the bathwater by introducing Sellarsian intentions. Sellars’s notions of holistic choice and complex intention formation can accommodate Johnston-Lewis because of their inclusiveness, but they yield an intuitively jarring evaluation of ordinary SB in virtue of this same feature. Notice that we cashed out what is “intended” as including means, ends, and anticipated effects that function as serious reasons against acting. And we see that that approach threatens to swamp I/F altogether. We’ll need a more exclusive or narrow concept of intention if DDE as regularly formulated is to be a useful ethical principle.

### III.

I want to take this opportunity to make a recommendation (which will likely not be heeded) concerning the recent flood of literature on the closeness problem. I think we should interpret Foot as simply *observing* that there will be cases of arguable closeness where double effect either needs a complementary conception of intention as I formulated in my prior article or will simply require some moral judgment, perhaps even moral expertise. I do *not* take Foot to be

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<sup>9</sup>Wilfrid Sellars, “Thought and Action,” in *Freedom and Determinism*, ed. Keith Lehrer (New York: Random House 1966), 105–39. Cited and discussed by Michael Bratman in *Intention, Plans and Practical Reason* (Stanford: CSLI Publications, 1999), at 192n9.

<sup>10</sup>Bratman, *Intention, Plans and Practical Reason*, 143.

at all suggesting that we sharpen our knives and come up with ever more precise formulations of double effect so as to generate explicitly and transparently principled solutions to various puzzle cases that come up (e.g., human shields) or can be devised. I titled my previous article “Two Cheers . . .” for a very good reason: namely, I intended to convey my sense that the closeness problem is technically intractable and forces its defenders to rely on the Potter Stewart test, sometimes even what Dershowitz calls “the giggle test.” This is a limitation of DDE as a moral guide. I suppose DDE is limited in that it calls upon resources some analytic philosophers find objectionable. Two, not three cheers. But in any case, I repeat my recommendation that this peculiar cottage industry be abandoned and most importantly that Foot stop being credited with encouraging it.

This said, I can't resist adding a new case to the literature on closeness. Suppose a Navy SEAL is storming a darkened room where he knows a hostage is being held such that the hostage's body is right in front of a trip switch which must be shot out. The trip switch is right behind the hostage's heart, in fact. The Navy SEAL, knowing all this, listens intently for the sound of the hostage's heartbeat in the dark, then fires his weapon so that the bullet goes through the hostage's heart and body and crucially neutralizes the trip switch. Now, the question that arises is: Has the Navy SEAL *intended* to kill the hostage in firing or is the death merely foreseen? Talk about closeness.<sup>11</sup>

#### IV.

As I noted at the outset, DDE has elicited a shrewd and substantial criticism from J. J. Thomson.<sup>12</sup> In essence her criticism is that DDE improperly locates the target of any evaluative judgment in the *action* performed as opposed to in the *character* of the agent who performs the action. Consider two plans, one in which a pilot intends to bomb a mob of civilians so as to terrify and demoralize the enemy, the other in which the pilot intends to bomb a military target while merely foreseeing that the blast will kill the same mob of civilians. Let us further suppose that in the first case the pilot merely foresees that his bomb will destroy the military target as well. The upshots of the two pilots' successfully executed action plans are in one sense the same: a destroyed military target and identical civilian casualties. Now it has been widely argued by advocates of DDE that the

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<sup>11</sup>Readers may recognize in this curious puzzle a reference to a notorious passage in Jonathan Bennett's *The Act Itself* in which he derides an unnamed philosopher's contention that one cannot intentionally shoot a bullet through a man's heart without intending to kill that man. The unnamed philosopher is Charles Fried, and the relevant passage is taken from Fried's *Right and Wrong* (Cambridge: Harvard University Press, 1978).

<sup>12</sup>Judith Jarvis Thomson, “Physician-Assisted Suicide: Two Moral Arguments,” *Ethics* 109 (1999): 497–518.

first pilot's mission is morally worse than that of the second, and that this is so mainly because the first pilot has adopted a plan that includes killing civilians as a means to the (good) end of winning the war, whereas the second pilot's plan involves no such use of the civilian deaths (and hence demonstrates no intention to kill them). In these important respects DDE distinguishes the two cases from the moral point of view. In light of the identical consequences, Thomson wonders why we are disposed to condemn the first pilot's mission while allowing that the second pilot's mission may be morally permissible. The missions produce the same (immediate) outcomes (installation destroyed, civilians killed) save that one terrorizes the enemy command and population while the other subverts the enemy's battle readiness. She suggests that the moral difference many if not most of us sense is in our assessment that the first pilot's character is worse than that of the second pilot. Specifically, insofar as the first pilot intends to kill the mob he is a bad man. Thomson flatly rejects any moral difference between the missions themselves. It's not simply a conclusion grounded in thoroughgoing consequentialism. It is just that Thomson takes DDE to produce a condemnation of the first pilot for an intention that he executes, and she doesn't see how this difference in mental state (alone, anyway) can rightly affect evaluation of purposive behavior.

William Fitzpatrick has suggested that really there is no problem for DDE presented by the Thomson objection that the token intention of the agent doesn't matter to the moral evaluation of the act itself.<sup>13</sup> He suggests as a matter of clarification of the doctrine that, instead of demanding a specific token intention from the particular agent, the act performed by the agent is morally permissible (if not required) if there is an available pathway/by-chain through which some (other) agent might have acted so as to produce the bad effect in question as a mere side effect. So, say I crash the plane from a death wish while some other fellow might have crashed the plane and killed the passengers with the intention of putting an end to a terrorist attack (by crashing the plane into a field in PA). On Fitzpatrick's account, my action is permissible if there is a way some other agent might have brought about the same net result without the death wish, rather (say) having made a calculation that she will save a great number of innocent lives and critical landmarks. This example seems to support Fitzpatrick's reconstruction of double effect. Now we might ask if this really is a proper *reconstruction* of what T. A. Cavanaugh has dubbed "double effect reason-

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<sup>13</sup>William Fitzpatrick, "Acts, Intentions and Moral Permissibility: In Defence of the Doctrine of Double Effect," *Analysis* 63 (2003): 317–21.

ing” or DER,<sup>14</sup> or if it rather introduces a different, albeit plausible, principle for evaluating and justifying actions.

I’m inclined to argue that intentions *do* matter, *pace* Thomson. We might say that the first pilot’s plan itself and his execution thereof is infused with his nasty intention to kill civilians—to target and kill them with the intention of demoralizing the enemy is a terroristic act. The second pilot’s act is a military act that produces collateral damage. This is to say that sometimes the intention with which an action (plan) is performed is part of our very understanding of the act itself. Perhaps the crime of murder is the simplest case. Murder is what Jonathan Bennett calls a thick concept, one in which the best description of the action is bound up with intent. Without such intent, all we have is a knowing bringing about of death. We do ordinarily condemn murders more so than we do the latter sort of knowing killings. And it is true that those who commit murder are ordinarily in virtue of this considered bad men and women; but the order of explanation is either simply holistic (a bad act done by a bad agent) or perhaps even flows from the bad act performed *back* to an assessment of the agent’s character. In any case, DDE is best articulated and understood when taken together with a theory of human action according to which *what* is done depends on the manner in which behaviors are performed. The manner involves the sense of purpose that underlies the performance, or put another way, precisely the intention being executed.<sup>15</sup>

Another way we might proceed with our investigation as to *why* often TB evokes different moral sentiments from SB would be to allow that *both* TB and SB involve an intention to kill civilians, and that something else explains the differing sentiments. I can see two ways of doing this. First, we may say that in addition to involving an intention to kill civilians, TB (but not SB) involves treating the civilians as means to the pilot’s (or Commander’s) ends of winning the war, or maybe even better, using them. Sometimes philosophers talk as if the intention in TB just *is* the treating of the civilians as means to an end; but this may be a mistake. We can say that SB intends the complex (bomb military target and kill civilians), but that SB is not using them in the pernicious way that TB is so doing. If we say this, we have some choices in interpreting our

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<sup>14</sup>T. A. Cavanaugh, *Double-Effect Reasoning: Doing Good and Avoiding Evil* (Oxford: Oxford University Press, 2006).

<sup>15</sup>When we think about an action from the point of view of a person on the receiving end, say a nearby civilian in tactical/strategic bombing, the fact that there’s no intention to kill them in the mind of the bomber certainly doesn’t seem to matter much. The thought that intentions *do* matter to the moral assessment of the action comes from thinking about cases like insulting gestures, where the action needs to be *interpreted* to have an effect from the point of view of the target, and when considering the action from the point of view of an observer who can express sentiments and/or propose punishment.



greater disapprobation for TB. It might be the case that using civilians in this way makes the action plan worse than that in SB, full stop, or it might be that using the civilians reflects poorly on the character of the pilot, or it might be both.

Finally, we might try to distinguish TB from SB morally by noting that oftentimes TB exhibits a *callous disregard* for innocent life whereas SB does not. This may have something to do with the moral difference sometimes, but I suggest we proceed with caution here. It's crucial to note that, as suggested at the start of this essay, callous disregard *need* not attend terror bombing, and might well attend strategic bombing. In cases where callous disregard attends strategic bombing, I think we will want to say that nevertheless the action plan is morally permissible (provided the military asset is targeted as usual), but that SB has a bad character. Finally, we note that the pilot charged with terror bombing may exhibit genuine regret at what she is planning to do, and that this reflects well on her character. There may even be sets of cases where the attitudes displayed towards the civilian deaths are such that while TB itself is morally impermissible unlike SB, we nevertheless end up evaluating the *character* of the terror bomber herself as just as or even less reprehensible than the strategic bomber.

## V.

I'd like to conclude this short essay with a new application of DDE that strikes me as illuminating a way that complex intentions *can* figure usefully in our practical reasoning. The case should be of special interest to Roman Catholic moral philosophers. I will outline a possible way of employing DDE so as to permit married couples to engage in sexual intercourse while employing condoms when one of the partners has been previously infected with the HIV virus. This application has contemporary relevance especially to ministry in the African continent, where HIV infection has reached epidemic proportions.

We begin with the thought that standard sexual intercourse is an important if not integral component of a loving sexual union between partners united in the sacrament of marriage. This is a crucial presupposition, for were it not so then the ultimate end of wholesome sexual congress between married persons as an expression of their abiding love for one another would fail to be a proportionately important good in relation to the bad aspect of condom usage, specifically that it interferes with natural procreative processes in what has traditionally been referred to as an "artificial" way.

Having said this, it seems that a married couple one partner to which has been previously infected with the HIV virus could adopt the following joint complex intention: to engage in sexual intercourse while endeavoring to prevent the transmission of the virus to the uninfected partner. They would do this through condom usage, which has been shown to be highly effective in preventing the

spread of HIV during standard sexual intercourse. It does not seem unreasonable in such a case that the stipulated bad aspect of condom usage, namely that it interferes with natural procreative processes, is not intended at all, but is rather a merely foreseen side effect of the joint complex intention that has been adopted in furtherance of a good end previously identified.

It's important to note that the HIV-positive husband is *not* in any way trying or intending to interfere with procreative processes; he very well might regard such interference as a *regrettable* foreseen side effect of his intentions to love his wife and avoid infecting her. So, in this sense, it almost seems like the plan in the case involving the use of the condom has a sort of purity as an act that arguably is not quite present in the case of natural family planning.

Whether or not the risks of infection even with the proper usage of the condom outweigh the value a couple may jointly attach to engaging in sexual intercourse is left open for consideration. In these difficult cases it may simply be proper to recommend a lifetime of abstinence. It is further left open as an exceedingly delicate question whether or not wholesome intercourse can be or should be such a vital component of loving married life that it can be properly pursued when one of its natural purposes has been significantly compromised, in this case by the use of artifice. In any event, this final application of double effect is intended as a sincere meditation on how one might sanction the use of condoms within the sacrament of marriage given the gravity of the health crisis we face.

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