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## IN INCOGNITO\*—THE PRINCIPLE OF DOUBLE EFFECT IN AMERICAN CONSTITUTIONAL LAW

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\* “The condition of being unknown, . . . orig. in phrase *in incognito* (taken as L. or It.), in concealment, in an anonymous character.” 7 THE OXFORD ENGLISH DICTIONARY 803 (J. A. Simpson & E. S. C. Weiner eds., 2d ed. 1989).

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## I. INTRODUCTION

Relying explicitly on the “principle of double effect” for the first time in American law,<sup>1</sup> the Supreme Court in *Vacco v. Quill*<sup>2</sup>—a decision noteworthy if for no other reason than for that very reliance—rejected an equal protection claim asserting a right to physician-assisted suicide.<sup>3</sup> Double effect, traced historically to Thomas Aquinas, proposes that under certain circumstances, it is permissible *unintentionally* to cause foreseen “evil” effects that would not be permissible to cause *intentionally*.<sup>4</sup>

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1. Of the 140 published state and federal decisions to use the term “double effect” prior to the Supreme Court’s 1997 decision in *Vacco v. Quill*, 521 U.S. 793 (1997), by far the most common usages of the term have been for purposes irrelevant to the ethical concept of “double effect.” Instead of a philosophical meaning, these cases refer simply to an action or event that has two distinct effects. *See, e.g.*, *Gray v. Texas Co.*, 75 F.2d 606, 608 (8th Cir. 1935) (“When the stem is made the key, the joint duty of holding the chain and winding the watch is performed by the same instrument. A double effect is produced or a double duty performed by the combined result.”).

Only seven cases before *Quill* explicitly refer to “double effect” in a philosophical sense, and in none of these cases is the principle relied upon by the court to justify its holding. *Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 96 F.3d 275, 280 (7th Cir. 1996) (noting as an aside for the benefit of “theology buffs” that a seller’s decision to raise the purchase price of a business during negotiations, foreseeing that the purchaser would opt out of the deal, was not bad faith and comparing the situation to the “the Catholic doctrine of double effect”); *Compassion in Dying v. Washington*, 79 F.3d 790, 823-24, 828 (9th Cir. 1996) (rejecting, in the context of a due process claim, any relevant distinction between prescribing medicine with the “single effect” of killing the patient and administering medicine with the “double effect” of relieving pain yet hastening death), *rev’d sub nom. Washington v. Glucksberg*, 521 U.S. 702 (1997); *Chase v. United States*, 468 F.2d 141, 142, 148 & n.21, 149 (7th Cir. 1972) (affirming convictions despite the defendant’s attempt to justify the burning of draft documents by invoking the doctrine of “double effect”); *DeGrella ex rel. Parrent v. Elston*, 858 S.W.2d 698, 715 (Ky. 1993) (Wintersheimer, J., dissenting) (referring, *sua sponte*, to the principle of “double effect” without further discussion); *Brophy v. New Eng. Sinai Hosp., Inc.*, 497 N.E.2d 626, 640 (Mass. 1986) (Nolan, J., dissenting) (raising, *sua sponte*, the applicability of “double effect” but rejecting its relevance where the death of a patient was caused directly by the withdrawal of food and water and not by an underlying disease); *Hobbins v. Attorney General*, 518 N.W.2d 487, 494, 495 n.1, 497-98 (Mich. Ct. App. 1994) (Shelton, J., concurring in part and dissenting in part) (dissenting from the majority’s denial of a due process right to physician-assisted suicide, noting without further discussion or reliance that palliative care and medication causes the “double effect” of relieving pain and hastening death but ultimately rejecting a distinction between “intended” versus “foreseen” consequences of action), *aff’d in part, rev’d in part sub nom. People v. Kevorkian*, 527 N.W.2d 714 (Mich. 1994); *In re Quinlan*, 355 A.2d 647, 658, 664, 671-72 (N.J. 1976) (holding that a comatose patient’s life support may be withdrawn because of her right to privacy and noting without approval or discussion that the patient’s Catholic father considered it licit to withdraw life support based on the “principle of double effect”).

2. 521 U.S. 793 (1997).

3. *Id.* at 807-08 & n.11.

4. *See* Philip E. Devine, *Principle of Double Effect*, in *THE CAMBRIDGE DICTIONARY OF PHILOSOPHY* 644-45 (Robert Audi ed., 1995).

Applying this principle, the Court distinguished intending the death of a terminally ill patient from merely foreseeing death as a consequence of medical treatment.<sup>5</sup> Based on this distinction and noting that it “comports with fundamental legal principles of causation and intent,” the Court rejected the plaintiffs’ claims.<sup>6</sup>

Criticism of *Quill*, however, was in some circles severe and no doubt fueled by the fact that, as one commentator observed, the Court offered “precious little argumentation or analysis” for reliance on double effect.<sup>7</sup> Critics of the decision focus mainly on two points of contention. First, the Court’s reliance on double effect is allegedly misguided because the principle itself contradicts basic conceptions about intention and culpability.<sup>8</sup> One commentator, noting that the law presumes that agents intend the natural and probable consequences of their actions,<sup>9</sup> asserts, “it is nothing more than self-deception to maintain that the physician who provides terminal sedation foresees, but does not intend, the patient’s death.”<sup>10</sup>

Such criticism of double effect is not novel. Decades earlier, Glanville Williams had rejected a similar attempt to distinguish physician-assisted suicide from other medical treatments of the terminally ill:

What is true of morals is true of the law. There is no legal difference between desiring or intending a consequence as following from your conduct, and persisting in your conduct with a knowledge that the consequence will inevitably follow from it, though not desiring that consequence. When a result is foreseen as certain, it is the same as if it were desired or intended.<sup>11</sup>

The second criticism leveled against the *Quill* decision is that the application of double effect analysis simply has no support in case law. The doctrine of double effect is alleged to be “an obscure, ambiguous, and controversial artifact of medieval Catholic theology. It has no previously recognized status in the law, and it has been either ignored or severely criticized in the philosophical literature.”<sup>12</sup> Similarly, although perhaps less forcefully, another scholar observes: “[The doctrine of double effect]

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5. *Quill*, 521 U.S. at 801-02.

6. *Id.* at 797-99, 801.

7. BEN A. RICH, STRANGE BEDFELLOWS: HOW MEDICAL JURISPRUDENCE HAS INFLUENCED MEDICAL ETHICS AND MEDICAL PRACTICE 142 (2001).

8. *Id.* at 143.

9. *Id.*

10. *Id.*

11. GLANVILLE WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 286 (1958).

12. RICH, *supra* note 7, at 142.

has had little direct effect on legal analysis . . . . It is a highly technical doctrine, and it is far from clear how useful it is in distinguishing between permissible and impermissible actions.”<sup>13</sup>

The contrast between the Court’s confidence that its holding embodies “fundamental legal principles of causation and intent”<sup>14</sup> and critics’ skepticism raises obvious concerns about the ruling’s coherence—concerns that the opinion’s cursory defense of its reliance on double effect fails to negate.

This Article responds to these concerns by supplying what the *Quill* opinion arguably lacks with respect to both criticisms. Part II directly defends double effect as a valid principle of ethical deliberation against contemporary philosophical objections to it. Part III illustrates that, claims to the contrary notwithstanding, double effect analysis is a pervasive, albeit generally unacknowledged, principle employed regularly in American case law. Part IV, drawing on the preceding considerations, argues that *Quill*’s application of the principle of double effect, though lacking a fully articulated foundation, comports with canons of ethical and jurisprudential reasoning.

The principle of double effect in fact constitutes an unremarkable, well-trod mode of analysis applied in numerous contexts. Double effect provides an indispensable model for resolving culpability questions for many situations in which actors are called upon to contemplate conduct intentionally aimed at protecting some important good, although foreseeing at the same time that such conduct will cause unintended harm.

## II. DOUBLE EFFECT AND ITS CRITICS

### A. *Quill* and Its Reliance on the “Principle of Double Effect”

In *Quill*, three terminally ill patients and three physicians<sup>15</sup> brought an

13. JERRY MENIKOFF, *LAW AND BIOETHICS: AN INTRODUCTION* 343 (2001).

14. *Vacco v. Quill*, 521 U.S. 793, 801 (1997).

15. The plaintiff-patients, Jane Doe (anonymous), George A. Kingsley, and William A. Barth, were all terminally ill patients who died before the district court rendered its final judgment. *Quill v. Vacco*, 80 F.3d 716, 718, 722 (2d Cir. 1996), *rev’d*, 521 U.S. 793 (1997). Plaintiff-physicians Timothy E. Quill, Samuel C. Klagsbrun, and Howard A. Grossman were physicians at the time. *Id.* at 718.

The plaintiffs’ claims challenged New York law not only with respect to the rights of the patients to commit suicide with physician assistance but also with respect to the physicians’ asserted claim that “proper and humane medical practice should include the ability to prescribe medication which will enable a patient to commit suicide.” *Quill v. Koppell*, 870 F. Supp. 78, 80 (S.D.N.Y. 1994), *rev’d sub nom.* *Quill v. Vacco*, 80 F.3d 716 (1996), *rev’d* 521 U.S. 793 (1997). The issue of justiciability raised by New York’s assertion of only a “speculative possibility of prosecution” was rejected by the district court. *Id.* at 81 (citing *Doe v. Bolton*, 410 U.S. 179 (1973), a companion case to *Roe v. Wade*, 410 U.S. 113 (1973), which held that the constitutional claim

action against the State of New York claiming that the prohibition of physician-assisted suicide under the state's general prohibition against assisted suicide<sup>16</sup> violated the Fourteenth Amendment of the United States Constitution,<sup>17</sup> which provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."<sup>18</sup> The plaintiffs alleged that New York allowed other competent, terminally ill persons, with the assistance of physicians, to elect medical treatment that had the foreseen effect of causing death,<sup>19</sup> namely, withholding of life support<sup>20</sup> and pharmacologic palliative care.<sup>21</sup> Yet, plaintiffs further alleged, similarly situated persons—like the patient-plaintiffs themselves—were denied the right under New York law to physician-assisted suicide because

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of physicians in fear of prosecution under abortion laws was justiciable).

In further support of its finding of justiciability, the district court noted that Quill already had been subject to a criminal investigation in New York following an earlier incident relating to the prescription of barbituates for a terminally ill patient who eventually used the drug to commit suicide. *Id.* at 80, 82. The investigation arose following Quill's publication of an essay in *The New England Journal of Medicine* describing his experience with this patient. *Id.* at 80; see Timothy E. Quill, *Death and Dignity: A Case of Individualized Decision Making*, 324 *NEW ENG. J. MED.* 691 (1991).

16. Section 125.15, *NEW YORK PENAL LAWS* (Consol. 2004), provides in relevant part: "A person is guilty of manslaughter in the second degree when . . . [h]e intentionally causes or aids another person to commit suicide. Manslaughter in the second degree is a class C felony."

Section 120.30 provides in relevant part: "A person is guilty of promoting a suicide attempt when he intentionally causes or aids another person to attempt suicide. Promoting a suicide attempt is a class E felony." See also *Washington v. Glucksberg*, 521 U.S. 702, 774 n.13, 775 n.14 (1997); *Quill*, 521 U.S. at 797 n.1 (1997).

17. *Quill*, 521 U.S. at 798.

18. U.S. CONST. amend. XIV, § 1. For discussion of the district court's rejection of the plaintiffs' equal protection claim and the appellate court's acceptance of the claim, see *infra* notes 305-15 and accompanying text.

19. *Quill*, 521 U.S. at 798-802 & n.6.

20. "Life-sustaining treatment is any treatment that serves to prolong life without reversing the underlying medical condition. Life-sustaining treatment may include, but is not limited to, mechanical ventilation, renal dialysis, chemotherapy, antibiotics, and artificial nutrition and hydration." *CODE OF MEDICAL ETHICS* § E-2.20 (Am. Med. Ass'n 2004); see also *infra* note 370. By "withholding of life-support," this Article refers without distinction to both the refusal to initiate life support and the discontinuance of life support already begun in respect to terminally-ill patients.

21. *Report of the Council on Ethical and Judicial Affairs of the American Medical Association*, 10 *ISSUES L. & MED.* 91, 92 (1994). The report states:

The intent of the palliative treatment is to relieve pain and suffering, not to end the patient's life, but the patient's death is a possible side effect of the treatment. It is ethically acceptable for a physician to *gradually increase* the appropriate medication for a patient, realizing that the medication may depress respiration and cause death.

*Id.* (emphasis added).

such treatment had the effect of causing the patient's death.<sup>22</sup> Asserting that physician-assisted suicide was "essentially the same thing" as those permitted medical treatments, plaintiffs claimed that the differing treatment under state law was irrational and violated their federal constitutional right to equal protection.<sup>23</sup>

Rejecting the plaintiffs' claims, the Supreme Court held in a majority opinion<sup>24</sup> that New York's distinction between physician-assisted suicide and the accepted medical practices involved application of a familiar distinction recognized in the law:

The distinction comports with fundamental legal principles of causation and intent. . . .

. . . .

The law has long used actors' intent or purpose to distinguish between two acts that may have the same result. . . . Put differently, the law distinguishes actions taken "because of" a given end from actions taken "in spite of" their unintended but foreseen consequences.<sup>25</sup>

The Court observed that actions taken in carrying out physician-assisted suicide are chosen precisely *because of* an intent to bring about the death of the patient: "A doctor who assists a suicide . . . 'must, necessarily and indubitably, intend primarily that the patient be made

22. See *Quill*, 521 U.S. at 796-98.

23. *Id.* at 798. An argument based on the ability of patients to refuse unwanted life-sustaining treatment was asserted by plaintiffs in their complaint and discussed at length by both the district court and the court of appeals. *Quill v. Vacco*, 80 F.3d 716, 721-22, 728-31 (2d Cir. 1996), *rev'd*, 521 U.S. 793 (1997); *Quill v. Koppell*, 870 F. Supp. 78, 84-85 (S.D.N.Y. 1994), *rev'd sub nom.* *Quill v. Vacco*, 80 F.3d 716 (2d Cir. 1996), *rev'd*, 521 U.S. 793 (1997). The argument relying on palliative care, however, was discussed nowhere by the district court, see *Quill*, 870 F. Supp. at 79-85, mentioned *sua sponte* merely in passing by the court of appeals, *Quill*, 80 F.3d at 729, and addressed on the merits only by the Supreme Court, *Quill*, 521 U.S. at 802. It appears to have been raised seriously by the parties for the first time only before the Supreme Court. See, e.g., Oral Argument of Dennis C. Vacco on Behalf of the Petitioners at 2-5, *Vacco v. Quill*, 521 U.S. 793 (1997) (No. 95-1858), reprinted in 255 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 839, 840-43 (Gerald Gunther & Gerhard Casper eds., 1998).

24. Justices O'Connor, Scalia, Kennedy, and Thomas joined Chief Justice Rehnquist's majority opinion. *Quill*, 521 U.S. at 794. Justice O'Connor filed a concurring opinion, and Justices Stevens, Souter, Ginsberg, and Breyer filed concurrences in the judgment. *Id.*

25. *Id.* at 801-03 (citations omitted) (quoting *Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 (1979)).

dead.”<sup>26</sup> Acts involved in the other treatments, however, entail no similar intent but may be carried out for other purposes *in spite of* the fact that they are foreseen to cause the patient’s death: “[P]atients who refuse life-sustaining treatment ‘may not harbor a specific intent to die’ and may instead ‘ferently wish to live, but to do so free of unwanted medical technology, surgery, or drugs’”<sup>27</sup> and “[j]ust as a State may . . . permit[] patients to refuse unwanted lifesaving treatment, it may permit palliative care related to that refusal, which may have *the foreseen but unintended ‘double effect’* of hastening the patient’s death.”<sup>28</sup> In light of this distinction between the actors’ intentions, the Supreme Court found that New York had a rational basis for distinguishing physician-assisted suicide from the accepted medical treatments and, therefore, upheld the state’s prohibition against physician-assisted suicide.<sup>29</sup>

As these statements expressly indicate, and as commentators have confirmed,<sup>30</sup> *Quill*’s rejection of a constitutional right to physician-assisted

26. *Id.* at 802 (quoting *Assisted Suicide in the United States, Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong. 367 (1996) [hereinafter *Assisted Suicide Hearing*] (prepared statement of Dr. Leon R. Kass, M.D., Addie Clark Harding Professor, The College and Committee on Social Thought, University of Chicago)).

27. *Id.* (quoting with approval *In re Conroy*, 486 A.2d 1209, 1224 (N.J. 1985)).

28. *Id.* at 807 n.11 (emphasis added).

29. *Id.* at 800-01. To defeat an equal protection claim such as that in *Quill*, it must be determined that a rational basis justifies the differing legal treatment. *Id.* at 799 n.5; *Quill v. Vacco*, 80 F.3d 716, 725-27 (2d Cir. 1996), *rev’d*, 521 U.S. 793 (1997).

The plaintiffs also claimed that the New York statutes deprived the plaintiffs and physicians of a fundamental liberty right under the Due Process Clause of the Fourteenth Amendment. *Quill v. Koppell*, 870 F. Supp. 78, 83 (S.D.N.Y. 1994), *rev’d sub nom. Quill v. Vacco*, 80 F.3d 716 (1996), *rev’d*, 521 U.S. 793 (1997). Both the district court and the court of appeals rejected the due process claim. *Quill*, 80 F.3d at 723-25; *Quill*, 870 F. Supp. at 82-84. Presumably, the plaintiffs in *Quill* failed to file a protective petition for certiorari under SUP. CT. R. 12(5) on this rejected claim because certiorari had been granted on essentially the same due process argument for physician-assisted suicide in *Washington v. Glucksberg*, 518 U.S. 1057 (1996). See Petition for Writ of Certiorari at i, *Washington v. Glucksberg*, 521 U.S. 702 (1997) (No. 96-110) (petitioning for certiorari based on the due process claim). In rejecting the due process claim, the *Glucksberg* Court reiterated the distinction between physician-assisted suicide and the other actions: “The decision to commit suicide with the assistance of another may be just as personal and profound as the decision to refuse unwanted medical treatment, but it has never enjoyed similar legal protection. Indeed, the two acts are widely and reasonably regarded as quite distinct.” *Glucksberg*, 521 U.S. at 725.

30. See, e.g., Ann Alpers & Bernard Lo, *The Supreme Court Addresses Physician-Assisted Suicide: Can Its Rulings Improve Palliative Care?*, 8 ARCHIVES FAM. MED. 200, 201 (1999) (stating that the *Quill* majority opinion “concludes that the double-effect doctrine provides a rational and constitutional basis for states to allow narcotics given in high dosages for pain relief in terminally ill patients, while prohibiting assisted suicide,” and that the Supreme Court’s “acceptance of the double-effect doctrine may help relieve physicians’ concerns about legal liability for providing adequate pain relief that may hasten death”); Juan Carlos Batlle, *Legal Status of Physician-Assisted Suicide*, 289 J. AM. MED. ASS’N 2279, 2279 (2003) (“Physicians are generally



suicide entails explicit application of the principle of “double effect.”<sup>31</sup> One philosopher, for example, in language strikingly similar to that employed by the Court itself, describes the operative distinction at play in double effect as follows:

[T]he foreseen consequences of one’s bringing about an intended state of affairs are often considered in deliberating, but not as reasons *for* the action—rather, they are sometimes conditions *in spite of which* one acts. It is not for the sake of

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protected . . . under the established principle of ‘double effect,’ wherein one act produces two inseparable effects: one good (relieving pain) and one bad (opiate sedation to the point of death).”); Arthur R. Derse, *Is There a Lingua Franca for Bioethics at the End of Life?*, 28 J.L. MED. & ETHICS 279, 282 (2000) (“The principle of double effect was even commented on favorably by the U.S. Supreme Court in its analysis of the legal consequences of possible lethal effects of providing adequate pain relief during end-of-life care.”); Kevin P. Glynn, *‘Double Effect’: Getting the Argument Right*, COMMONWEAL, Jan. 29, 1999, at 10, 10 (“In its [*Quill* and *Glucksberg*] decisions denying . . . a constitutional right to physician-assisted suicide . . . the . . . Supreme Court recognized the moral distinction between actively helping patients to kill themselves . . . and . . . withholding treatment from . . . terminally ill patients, thereby permitting death. In so doing, the Court gave legal standing to the ethical principle of double effect.”); Yale Kamisar et al., *Assisted Suicide and Euthanasia: An Exchange*, N.Y. REV. BOOKS, Nov. 6, 1997, at 68, 68 (“[N]ot only is Breyer (and O’Connor as well) supporting the ‘double effect’ principle [*in Quill*] . . . he is signaling that the principle may be *constitutionally required*.”); John M. Luce & Ann Alpers, *Legal Aspects of Withholding and Withdrawing Life Support from Critically Ill Patients in the United States and Providing Palliative Care to Them*, 162 AM. J. RESPIRATORY & CRITICAL CARE MED. 2029, 2030 (2000) (“The Supreme Court distinguished assisted suicide from palliative care in *Glucksberg* and *Quill* by accepting the principle of double effect.”); Timothy E. Quill et al., *The Rule of Double Effect—A Critique of Its Role in End-of-Life Decision Making*, 337 NEW ENG. J. MED. 1768, 1769 (1997) (“The recent Supreme Court rulings on physician-assisted suicide illustrate . . . how current law and the rule of double effect evaluate the clinician’s conduct in various end-of-life practices.”).

Relying on the distinction between palliative care and physician-assisted suicide made in *Quill* and confirmed in *Glucksberg*, see *supra* note 29, Attorney General John Ashcroft issued an interpretive rule declaring that use of controlled drugs to effect physician-assisted suicide violates the Controlled Substances Act, 21 U.S.C. §§ 801-904 (1970): “Pain management, rather than assisted suicide, has long been recognized as a legitimate medical purpose justifying physicians’ dispensing of controlled substances. There are important medical, ethical, and legal distinctions between intentionally causing a patient’s death and providing sufficient dosages of pain medication necessary to eliminate or alleviate pain.” 66 Fed. Reg. 56,607, 56,608 (Nov. 9, 2001). The “Ashcroft Directive” criminalizes conduct specifically authorized by the Oregon Death with Dignity Act, OR. REV. STAT. § 127.800-.897 (2003). See *Oregon v. Ashcroft*, 368 F.3d 1118, 1120 (9th Cir. 2004). The Supreme Court has granted certiorari on the government’s petition from adverse rulings on this issue in the lower federal courts. *Gonzales v. Oregon*, 125 S. Ct. 1299 (2005).

31. A variety of ways of referring to the principle of double effect have been employed, including “double effect reasoning” or the “principle,” “rule,” or “doctrine” of double effect. See, e.g., Thomas A. Cavanaugh, *Aquinas’s Account of Double Effect*, 61 THOMIST 107, 107 (1997).

such conditions that one selects an option; it is not these effects to which one is committed in acting.<sup>32</sup>

### B. *Origin of the Principle*

Little debate exists that the principle of double effect in current form originates from the writings of Thomas Aquinas.<sup>33</sup> The *locus classicus* is found in a discussion of self-defense where Aquinas argues that acts resulting in the death of an assailant are permissible based primarily on a distinction that can be drawn between the effect that an agent intends to bring about by his conduct—the preservation of the actor’s life—and the effect of action that is not part of that intention—the death of the assailant:

[N]othing prevents there from being two effects of one act, of which only one is in intention [*in intentione*] and the other outside intention [*praeter intentionem*]. Moral acts, however, receive their character from what is intended and not from what is outside of intention. . . . From the act of defending oneself, therefore, two effects may follow: one being preservation of one’s life and the other the killing of an attacker. Now an act of this type, insofar as the preservation of one’s own life is intended, is not illicit since it is natural for every being to keep itself alive to the extent possible. . . . It is not necessary . . . that a man refrain from carrying out a measured act of defense to avoid the killing of another. A person has a greater obligation to provide for his own life than for that of another.<sup>34</sup>

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32. Joseph M. Boyle, Jr., *Toward Understanding the Principle of Double Effect*, in *THE DOCTRINE OF DOUBLE EFFECT: PHILOSOPHERS DEBATE A CONTROVERSIAL MORAL PRINCIPLE* 7, 15 (P. A. Woodward ed., 2001); *see supra* note 25 and accompanying text.

33. “[B]efore the time of St. Thomas Aquinas there is no indication of a definitely formulated principle of the double effect.” Joseph T. Mangan, *An Historical Analysis of the Principle of Double Effect*, 10 *THEOLOGICAL STUD.* 41, 42 (1949); *see also* Cavanaugh, *supra* note 31, at 107.

Mangan suggests, however, that earlier texts, including biblical texts, clearly support the principle. *See* Mangan, *supra*, at 41-42. Mangan suggests that implicit reference to its operation is illustrated in 1 *Maccabees* 6:43-46 [New Oxford Annotated]:

And Eleazer, called Avaran, saw that one of the beasts was equipped with royal armor. It was taller than all the others, and he supposed that the king was upon it. So he gave his life to save his people and to win for himself an everlasting name. He courageously ran into the midst of the phalanx to reach it; he killed men right and left, and they parted before him on both sides. He got under the elephant, stabbed it from beneath, and killed it; but it fell to the ground upon him and there he died.

*See* Mangan, *supra*, at 42.

34. THOMAS AQUINAS, *SUMMA THEOLOGIAE*, II-II, 64, 7 (3d ed. Biblioteca de Autores

While exhaustive consideration of Aquinas's view on self-defense is beyond the scope of this discussion, several observations are in order. First, to correctly interpret this passage, it is necessary to bear in mind that Aquinas believes that it is never permissible for a private citizen to intend the death of another person, even in cases of self-defense.<sup>35</sup> Second, in taking any action aimed at self-defense, the conduct must be reasonable in light of the threat presented:

Even an act with a good intention, however, can be rendered illicit if not proportioned to the end sought. Hence, if a man in defending his life uses greater force than is necessary it would be illicit; but if he repels the attack by a measured use of force, it would be a licit defense . . . .<sup>36</sup>

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Cristianos 1963) (Author's translation):

*dicendum quod nihil prohibet unius actus esse duos effectus, quorum alter solum sit in intentione, alius vero sit praeter intentionem. Morales autem actus recipiunt speciem secundum id quod intenditur, non autem ab eo quod est praeter intentionem . . . . Ex actu igitur alicuius seipsum defendentis duplex effectus sequi potest: unus quidem conservatio propriae vitae; alius autem occisio invadentis. Actus igitur huiusmodi ex hoc quod intenditur conservatio propriae vitae, non habet rationem illiciti: cum hoc sit cuilibet naturale quod se conservet in esse quantum potest. . . . Nec est necessarium . . . ut homo actum moderatae tutelae praetermittat ad evitandum occisionem alterius, quia plus tenetur homo vitae suae providere quam vitae alienae.*

*Id.* Elsewhere Aquinas observed: "It is possible that a single action according to its natural species may be related to different ends of the will . . . . Thus nothing prohibits acts that are identical according to the species of nature from being morally distinct . . . ." *Id.* at I-II, 1, 3, ad. 3 (Author's translation) ("Possibile tamen est quod unus actus secundum speciem naturae ordinetur ad diversos fines voluntatis . . . . Et ideo nihil prohibet actus qui sunt iidem secundum speciem naturae, esse diversos secundum speciem moris . . . .").

35. *Id.* at II-II, 64, 7.

But because it is not permissible to kill a man except by authority of the community for the common good, . . . it is illicit for a man to intend to kill another in order to defend himself, unless he has public authority, and, in intending to kill a man in self-defense, refers it to the good of the community: as is seen in a soldier fighting against enemies and a judicial officer combating thieves. Although these too would do wrong if they were motivated by merely personal desire.

*Id.* (Author's translation) ("Sed quia occidere hominem non licet nisi publica auctoritate propter bonum commune, . . . illicitum est quod homo intendat occidere hominem ut seipsum defendat, nisi ei qui habet publicam auctoritatem, qui intendens hominem occidere ad sui defensionem refert hoc ad publicum bonum, ut patet in milite pugnante contra hostes, et in ministro iudicis pugnante contra latrones quamvis et isti peccent si privata libidine moveantur.").

36. *Id.* (Author's translation) ("Potest tamen aliquis actus ex bona intentione proveniens illicitus reddi si non sit proportionatus fini. Et ideo si aliquis ad defendendum propriam vitam

In these texts, Aquinas recognizes that sometimes the death of an assailant is foreseeable as a consequence of legitimate defensive conduct when appropriately responding to a lethal threat.<sup>37</sup> The harmonization of these views is found in Aquinas's position that the "death of the attacker" need play no part in the agent's intention to act in self-defense.<sup>38</sup> The victim does not *ipso facto* "intend" to kill just because he can keep himself alive only by engaging in conduct that is so forceful that it also has the effect of causing the attacker's death. In such an instance, the actor's conduct is permissible precisely because the death resulting from repelling the attacker is unintentional, and the risk to one's life is significant enough to justify conduct that has that foreseeable result.

Proposing that human acts are morally characterized by what an actor intends (*in intentione*) and not by what is outside intention (*praeter intentionem*), Aquinas explains that an effect is "outside" if it is only accidentally (*per accidens*) related to the effect sought by the actor.<sup>39</sup> Aquinas elaborates this distinction more fully in discussion of "scandal," i.e., acts that lead others into wrongdoing.<sup>40</sup> In that discussion, Aquinas

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*utatur maiori violentia quam oporteat, erit illicitum. Si vero moderate violentiam repellat, erit licita defensio . . .*").

37. "It is not necessary . . . that a man refrain from carrying out a measured act of defense to avoid the killing of another. A person has a greater obligation to provide for his own life than for that of another." *Id.* (Author's translation). See *supra* note 34 for original Latin language. If the killing of the attacker was not a foreseeable consequence of the actor's conduct, Aquinas's point here would be nonsensical. If harm were not reasonably foreseeable, no ethical issue exists for discussion.

38. Aquinas's parallel here is obvious: "[N]othing prevents there from being two effects of one act, of which only one is in intention [*in intentione*] and the other outside intention [*praeter intentionem*]. . . . From the act of defending oneself, therefore, two effects may follow: one being preservation of one's life and the other the killing of an attacker." *Id.* (Author's translation); see *supra* note 34 for original Latin.

39. *Id.* at II-II, 43, 3.

Active scandal, however, may be understood in two ways: in itself [*per se*] and accidentally [*per accidens*]. Accidentally, when it is outside the intention [*praeter intentionem*] of the agent: as for instance when someone, by disordered deed or word does not intend to provide another an occasion of ruin but only to satisfy his own desire. . . . Active scandal in itself [*per se*] occurs when a person intends by word or deed to draw another into wrongdoing.

*Id.* (Author's translation) ("*Scandalum autem activum potest accipi dupliciter; per se scilicet, et per accidens. Per accidens quidem, quando est praeter intentionem agentis: ut puta cum aliquis suo facto vel verbo inordinato non intendit alteri dare occasionem ruinae sed solum suae satisfacere voluntati. . . . Per se autem est activum scandalum quando aliquis suo inordinato dicto vel facto intendit alium trahere ad peccatum.*").

40. *Id.*

notes two different ways of causing scandal: directly (*per se*) or accidentally (*per accidens*).<sup>41</sup>

In scandal *per se*, the actor has the specific goal to induce another, by words or deeds, to do wrong.<sup>42</sup> In scandal *per accidens*, however, the actor “does not seek to provide an occasion of ruin” to the other, but rather seeks “only the satisfaction of [the actor’s own] desire”—even though such actions and words have the effect of causing another to do wrong.<sup>43</sup> Aquinas observes that in scandal *per accidens*, the “causing” of another’s wrongdoing is outside the intention of the agent (“incidental,” one might say in modern usage) because the actor does not engage in the words and actions *in order to* induce the other into wrongdoing.<sup>44</sup>

Developing the analysis further, Aquinas explains that the question of whether scandal caused *per accidens* is always immoral, even when the harmful effect is foreseeable, requires consideration of additional circumstances of the conduct—like the condition in self-defense that acts be moderated to the magnitude of the threat.<sup>45</sup> When acts “incidentally” causing scandal are acts that are not wrong in themselves, and such acts correspond to a duty, Aquinas concludes that the actor often may permissibly engage in the conduct, even if it foreseeably causes scandal to another.<sup>46</sup> When, however, no duty to act exists, and the scandal is foreseen to arise out of another party’s vulnerability as opposed to any entrenched malicious inclination to do wrong, one may be ethically required to forego action.<sup>47</sup>

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41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *See supra* note 36 and accompanying text.

46. *Id.* at II-II, 43, 7.

In must be determined what must be omitted to avoid leading another into wrongdoing. In this connection spiritual goods must be distinguished, Some of these goods are necessary for health and cannot be foregone without doing serious wrong. It is obvious, however, that one person should not do serious wrong to prevent another from doing wrong—for a person is more obliged to care for his or her own spiritual health than that of another. Accordingly, those good acts which are necessary should not be omitted even to avoid causing scandal.

*Id.* (Author’s translation) (“*Considerandum est igitur quid sit dimittendum ne alius scandalizetur. Est autem in spiritualibus bonis distinguendum. Nam quaedam horum sunt de necessitate salutis, quae praetermitti non possunt sine peccato mortali. Manifestum est autem quod nullus debet mortaliter peccare ut alterius peccatum impediatur: quia . . . plus debet homo suam salutem spiritualem diligere quam alterius. Et ideo ea quae sunt de necessitate salutis praetermitti non debent propter scandalum vitandum.*”).

47. *Id.*

In short, while Aquinas holds that it is always impermissible to engage in conduct for the purpose of leading another into immorality, under certain circumstances, it is permissible to unintentionally cause foreseen scandal. Factors affecting whether one may carry out an action foreseen but not intended to cause others to do wrong requires consideration of the importance of the duties or reasons for performing the action and the seriousness and character of the evil effect that will result.

### C. *Elements of the Principle*

Drawing upon this historical consideration, modern formulations of double effect generally reference explicitly or implicitly the following elements:

1. The act of the agent causing the good effect must be at least ethically neutral, if not praiseworthy, considered in itself (i.e., prior to assessment under double effect).
2. The good effect must follow causally from the act in such a way that the intended good effect cannot be regarded as “caused by” the evil effect.
3. The reason(s) for performing the act—the intended good effect—must be of sufficient importance to justify causing the evil effect.
4. The evil effect caused by the act must not *in fact* be willed as a means or as an end by the agent.<sup>48</sup>

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With respect to goods which are not necessary for spiritual health, a distinction must be made. Scandal can sometimes arise from such conduct by virtue of others' malice . . . . Sometimes, however, scandal can arise from others' weakness, or ignorance . . . . In these latter cases, such acts are either to be hidden or postponed . . . that this type of scandal may cease.

*Id.* (Author's translation) (“*In his autem spiritualibus bonis quae non sunt de necessitate salutis videtur distinguendum. Quia scandalum quod ex eis oritur quandoque ex malitia procedit. . . . Quandoque vero scandalum procedit ex infirmitate vel ignorantia . . . . Propter quod sunt spiritualia opera vel occultanda, vel etiam interdum differenda . . . huiusmodi scandalum cesset.*”).

48. As Mangan stated:

All moralists agree substantially on the statement of the principle, although some word it a little differently from others. Some authors express four conditions, others taking one or another condition for granted express only three or two conditions. . . . [I]n its full modern dress, it may be expressed as follows: A person

Double effect proposes that *under certain conditions*, it is licit to perform an *otherwise* ethically unobjectionable act for the sake of some good end even if that act is foreseen to cause an evil consequence. The important limitations are that the evil effect cannot cause the good effect, good reason must exist for causing the good effect at the cost of the evil effect, and one cannot bring about the evil effect other than as a mere side effect of one's intended end.

The terror bomber/strategic bomber scenario—perhaps the most well-known example of double effect analysis—illustrates these elements:

Munitions factories are often located in or near civilian populations. An act of bombing a munitions factory, then, often has two effects, the destruction of the munitions factory and the destruction of innocent human life. In the case of the strategic bomber (SB), the bomber undertakes the destruction of a munitions factory even though it is clear that innocent civilians will be killed in the process. In the case of terror bombing (TB), the bomber *seeks* to kill civilians so as to bring war to an early end. Both SB and TB know that they will kill civilians, and both undertake this mission in order to bring war to a speedy end. However, SB is said solely to foresee the deaths of the civilians, while TB intends the deaths of the civilians.<sup>49</sup>

As this example clarifies, from an exterior “physical” perspective the actions of the strategic and terror bombers are essentially indistinguishable. Any differing ethical nature of their respective conduct, therefore, can be ascertained only by considering the differing character of each actor's cognitive or psychological state relative to those effects. Similar to the impossibility of distinguishing a case of self-defense from murder solely by analysis of a physical description of the killing act itself, in the case of the bombing it is not possible to distinguish between the two

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may licitly perform an action that he foresees will produce a good and a bad effect provided that four conditions are verified at one and the same time: 1) that the action in itself from its very object be good or at least indifferent; 2) that the good effect and not the evil effect be intended; 3) that the good effect be not produced by means of the evil effect; 4) that there be a proportionately grave reason for permitting the evil effect.

Mangan, *supra* note 33, at 42-43; *see also* DAVID S. ODERBERG, MORAL THEORY: A NON-CONSEQUENTIALIST APPROACH § 3.1.2, at 90-91 (2000) (describing double effect and its four basic conditions).

49. Christopher Kaczor, *Distinguishing Intention from Foresight*, 41 INT'L PHIL. Q. 77, 78-79 (2001).

agents unless one considers how each agent is cognitively and volitionally disposed toward the practical possibility of “killing civilians” and the significance of this distinction.

Double effect proposes that, based on distinctions between the actors’ intentions, the strategic bomber’s conduct is ethically permissible while the terror bomber’s is not. Although various means by which the end of military victory could be accomplished might have been available to the actors, the terror bomber chooses the killing of civilians as a means to that end. Thus, for this actor, killing civilians constitutes a specific goal of practical reason that is caused as an integral—not incidental—part of the agent’s volitional plan to attain his end. The terror bomber *tries* to kill civilians in order to achieve victory and thus in a real, positive sense *wants* that effect to come about.<sup>50</sup> For the strategic bomber, however, awareness that his chosen means of attaining victory, destroying a military target, also has the foreseen effect of killing noncombatants does not play any similar active function in practical deliberation. The deaths of civilians are perceived as a tragic but unavoidable side effect of the means chosen to achieve victory.

#### D. Critique of the Principle—A Vacuous Concept?

Criticism of double effect, however, is neither rare nor new. As far back as the seventeenth century, Pascal satirized proponents of double effect for insinuating that by mere “direction of the intention,” an actor could avoid culpability for conduct that would otherwise be immoral.<sup>51</sup> Reacting against “Jesuitical” appeal to double effect to justify duelling, Pascal remarked sardonically:

You have only to draw up a syllogism in due form, and, with a direction of the intention, you may despatch your man at once with a safe conscience. Thrice happy must those hot spirits be who cannot bear with injuries, to be instructed in this doctrine! But woe to the poor people who have offended them! Indeed . . . it would be better to have to do with persons who have no religion at all than with those who have been taught this system.<sup>52</sup>

Centuries later Glanville Williams echoed the point, remarking that if double effect “means that the necessity of making a choice of values can

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50. As Anscombe pointed out: “The primitive sign of wanting *is trying to get . . .*” G. E. M. ANSCOMBE, INTENTION § 36, at 68 (2d. ed. 1963).

51. BLAISE PASCAL, THE PROVINCIAL LETTERS 68 (Thomas M’Crie trans., Wipf & Stock Publishers 1997) (1657).

52. *Id.* at 68.



be avoided merely by keeping your mind off one of the consequences, it can only encourage a hypocritical attitude towards moral problems.”<sup>53</sup>

In *Doing Away with Double Effect*, Alison McIntyre offers a contemporary critique of the principle.<sup>54</sup> Although admitting that “many morally reflective people have been persuaded that something along the lines of DE [double effect] must be correct” because of the “intuitive appeal” of its illustrations,<sup>55</sup> McIntyre rejects the principle arguing that such acceptance stems from understandable, albeit erroneous, ethical concerns.<sup>56</sup>

First, she suggests that ethically reflective persons, when confronted by assertions that moral absolutes do not exist, are motivated to secure *some* rational basis for ethical distinctions.<sup>57</sup> McIntyre believes that these persons, focusing on the contrast between intentionally caused harms and merely foreseen harms, precipitously conclude that this contrast “commits one to accepting a secular version of DE which would explain why the prohibited option is impermissible.”<sup>58</sup>

Second, McIntyre suggests that misguided adherence to double effect also arises as an overreaction to claims that *no* ethical significance attaches to the distinction between merely foreseen and intended harms.<sup>59</sup> Because at least in *some* contexts this distinction has relevance to assessing an

53. WILLIAMS, *supra* note 11, at 286. H. L. A. Hart makes the same point, asserting that any attempt to morally distinguish between intentionally causing an effect and unintentionally causing that same effect as a foreseen but unintended result “can only be explained as the result of a legalistic conception of morality.” H. L. A. HART, *Intention and Punishment*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 125 (1968).

54. Alison McIntyre, *Doing Away with Double Effect*, 111 ETHICS 219 (2001).

55. *Id.* at 219. McIntyre provides the following examples: (1) Terror/Strategic Bombers: The terror bomber intentionally and impermissibly targets civilians, while the strategic bomber permissibly and intentionally aims at military targets, merely foreseeing that he will kill civilians in the process; (2) Assisted Suicide/Pain Relief: One doctor impermissibly injects morphine intending to kill the patient, while another doctor permissibly injects morphine intending to relieve the patient’s pain, knowing this will unintentionally hasten the patient’s death; (3) Abortion/Hysterectomy: A doctor impermissibly intentionally kills a fetus to save the life of the mother, while a doctor permissibly and intentionally removes the cancerous uterus of a pregnant woman merely foreseeing that the act causes the death of the fetus; (4) Pre-Emptive Killing/Self-Defense: A man who knows another is plotting his death and intentionally kills that other person before he strikes would act impermissibly, but a man who defended himself against a deadly attack, merely foreseeing that the blow would be fatal, would act permissibly; and (5) Trolley Car: Throwing an innocent person before a runaway trolley to save five others would be impermissible, but diverting a train away from a track containing five people to a track containing only one person, knowing that one person would die as a result, would be permissible. *Id.* at 219-20.

56. *Id.* at 220.

57. *Id.*

58. *Id.*

59. *See id.*

actor's responsibility, these persons erroneously conclude that the significance of the distinction is properly captured by double effect.<sup>60</sup>

In McIntyre's view, however, the illustrations of double effect support neither inference:

The examples adduced to support DE often do illustrate a moral contrast that can be expressed using the distinction between intention and foresight, but not the particular distinction between intending to bring about harm instrumentally and bringing about harm incidentally as a foreseen side effect that is supposed to serve as the normatively neutral ground of DE. . . . [A] careful account of the moral contrasts illustrated by these examples will undermine rather than support DE.<sup>61</sup>

Elaborating this thesis, McIntyre offers a series of limitations, or as she refers to them, "constraints," upon double effect that she maintains any reasonable proponent of double effect should accept.<sup>62</sup> "The fact that a harm was brought about as a merely foreseen side effect of pursuing a good end does not, all by itself, show that it was brought about permissibly. Other conditions of permissibility must be applied."<sup>63</sup>

For purpose of brevity, McIntyre's "constraints" may be summarized as follows:

Constraint 1. In double effect, a proportion must exist between the benefit(s) to be achieved by bringing about the good effect in comparison with the evil effect(s) caused. This constraint includes a duty to minimize the evil effect(s) when reasonably possible.<sup>64</sup>

Constraint 2. Double effect is concerned with the permissibility of causing "harms foreseen as side effects of promoting a good end" and excluding the causing of "harms intended as means to a good end."<sup>65</sup> Double effect

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60. *Id.*

61. *Id.*

62. *Id.* at 221.

63. *Id.*

64. *Id.* at 221. This limitation combines two related constraints offered by McIntyre: (1) "A principle of proportionality is often mentioned in this connection, but this must amount to more than the simple requirement to weigh the value of the good end to be achieved against the disvalue of the harmful side effect," *id.* at 221, and (2) "The agent must be disposed to minimize harms that are brought about as a side effect," *id.* at 224.

65. *Id.* at 226. "Double Effect is not concerned with what agents intend to bring about as ends, or with their motives or ultimate aims; it is limited to a contrast between harms intended as

presupposes that an agent may not permissibly intend evil as an end.<sup>66</sup>

Constraint 3. Double effect is not concerned with instances when a foreseen effect is neither an intended end nor a chosen means and “is one that an agent need not attend to, because it is not his responsibility, or should not attend to, because the agent has some reason to set it aside when deliberating . . . . DE does not apply to explain the permissibility of bringing it about.”<sup>67</sup>

Constraint 4. In order to apply double effect, there must be some reasoned basis for distinguishing what an agent intends as a means and as an end from what is merely foreseen that does not prejudice permissibility.<sup>68</sup>

Upon close scrutiny of these limitations, McIntyre believes that it becomes evident that an action’s permissibility depends not upon application of the intended-foreseen distinction, but rather upon satisfaction of these additional constraints. For McIntyre, the basic premise of double effect is not so much wrong as superfluous.

Before considering the particulars of McIntyre’s attempt to deconstruct double effect, however, it can be noted generally that her qualification of the principle by the addition of further limitations beyond the intended/foreseen distinction offers nothing original to the discussion. As seen both in Aquinas’s discussion and in modern formulation of double effect, the intended/foreseen distinction, although a necessary and fundamental condition, does not exhaust the required analysis. Conditions very similar to those proposed by McIntyre are included in most reflective accounts of double effect.<sup>69</sup>

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means to a good end and harms foreseen as side effects of promoting a good end.” *Id.*

66. *Id.*

67. *Id.* at 237. This limitation incorporates a similar constraint offered by McIntyre:

Cases in which an agent may permissibly allow a harm to occur as a consequence of inaction but could not permissibly intend to bring about the harm as a means to a good end do not confirm DE but, rather, demonstrate the moral significance of the distinction between causing and allowing.

*Id.* at 229.

68. *Id.* at 233. “In addition, the standard for what counts as intended must not be so narrow as to count any regrettable aspect of one’s means as a consequence that is merely foreseen.” *Id.* at 233.

69. *See supra* note 48.

The inferences, however, that McIntyre attempts to draw from these constraints are indeed novel. For purposes of this analysis, the limitations can be broken down into two categories. Constraint 1 and Constraint 2, on their terms, apply generally to every case of double effect and, as will be shown below, constitute the foundation for McIntyre's general rejection of the principle. Constraint 3 and Constraint 4, however, address difficulties associated with the application of double effect only in cases of special complexity. Accordingly, the following Part will focus discussion on Constraint 1 and Constraint 2 and their function in McIntyre's general effort to undermine double effect. The limitations found in Constraint 3 and Constraint 4 will be taken up in Part IV, dealing with particular application of double effect in *Quill*.<sup>70</sup>

### 1. The Intended/Foreseen Distinction

McIntyre asserts that critical reflection upon Constraint 1 and Constraint 2 reveals that the intended/foreseen distinction as understood by double effect is not in fact relevant to ethical assessment of action. Rather, satisfying the other conditions performs the heavy ethical lifting.

With respect to Constraint 1, McIntyre reiterates that under double effect, one does not determine permissibility solely by the fact that he or she intends some good end and only foreseeably causes harm.<sup>71</sup> Rather, the intended good also must provide a reason sufficient to justify causing the unintended evil effect.<sup>72</sup> In elaborating this condition, McIntyre correctly stresses that this responsibility includes the elimination of any unnecessary harm involved in attaining one's intended end.<sup>73</sup>

McIntyre, however, immediately questions why the intended/foreseen distinction remains relevant.<sup>74</sup> Once an actor determines that the intended good is reasonable in light of the minimal amount of foreseen but unintended harm that will be caused to bring it about, McIntyre suggests that under the same conditions, it is difficult to see why a person could not intentionally cause that harm to bring about the good effect.<sup>75</sup> Referring specifically to the alleged ethical contrast between physician-assisted suicide and palliative care,<sup>76</sup> she states,

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70. See *infra* Part IV.A.2.

71. McIntyre, *supra* note 54, at 221.

72. See *id.* at 223.

73. *Id.* at 224-25.

74. See *id.* at 223.

75. *Id.* at 228.

76. As McIntyre states it, double effect proposes that:

[a] doctor who intends to hasten the death of a terminally ill patient by injecting a large dose of morphine would act impermissibly because he intends to bring

Once all this is spelled out, the skeptic about DE can ask: “Is it really true that under similar circumstances death could not be brought about intentionally in order to cut short the patient’s suffering?” Proponents of DE must be able to show that the justification for causing harm as a side effect would not also apply to causing the same kind of harm, in similar circumstances, as a means to the same good end.<sup>77</sup>

In short, if double effect concedes that it is permissible to cause the death of the patient as a side effect in view of an intended good effect, why would it not be permissible *under those same circumstances* to intentionally kill the patient as a means to that good effect?

## 2. Willing Evil as a “Means” Versus Willing Evil as an “End”

Because the inference McIntyre draws from Constraint 1 is that it would be permissible to intentionally kill the patient in order to relieve pain—she logically turns to consideration of Constraint 2’s proscription against intending evil to achieve a good effect. McIntyre first notes that double effect does not provide a rationale for prohibiting action aimed at evil *ends*.<sup>78</sup> Instead, double effect is concerned primarily with distinguishing impermissible cases of intending harm as a *means* to a good effect, which the principle always condemns, from unintentionally causing harm as a side effect of the pursuit of some intended good, which double effect sometimes permits.

McIntyre argues, however, that double effect cannot so facilely “co-opt” the noncontroversial ethical prohibition against intending evil as an end—intending evil as one’s “goal”—to justify why willing evil *as a means* is also wrong:

Presumably, we all condemn those who act with evil motives and aim at harm as an end or as a means to an evil end. . . . Because it distinguishes DE from an uncontroversial moral platitude, [Constraint 2] clarifies just what it is that proponents of DE must supply in providing a rationale for it:

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about the patient’s death. However, a doctor who intended to relieve the patient’s pain with that same dose and merely foresaw the hastening of the patient’s death would act permissibly.

*Id.* at 219.

77. *Id.* at 223.

78. *Id.* at 228 (“Double Effect itself does not provide the grounds for condemning someone who acts with malicious aims.”).

a justification for linking the wrongfulness of certain cases of instrumental harming to the wrongfulness of acting on malicious aims.<sup>79</sup>

In McIntyre's view, double effect conflates without justification the wrongfulness of willing evils as "ends" with willing evils as "means."<sup>80</sup> "In giving a rationale for DE, many authors assimilate intending as a means to intending as an end."<sup>81</sup> McIntyre observes that an actor who wills evil only instrumentally can experience exactly the same regret and reluctance that the double effect actor does when causing unintended foreseen harms, a fact that she believes reveals the error of double effect on this point:

To intend harm only as a means to some good end is compatible with feelings of regret, reluctance, and, in short, a range of attitudes that would also be present in cases in which harmful side effects are present. Opponents of DE typically argue that a properly regretful agent with a clear-sighted grasp of just why she was causing a particular harm as a means to a good end would be able to acquit herself of the particular moral charge of manifesting a bad attitude or, more precisely, a worse attitude than what would be manifested if the harm were brought about as a side effect and so merely foreseen.<sup>82</sup>

In view of these observations, McIntyre concludes that double effect's identification of the wrongfulness of willing evil "as an end" with the wrongfulness of willing evil "as a means" begs the question. If proponents of double effect assert that "instrumental intending [i.e., intending an evil as a means] shares all of the objectionable characteristics of aiming at harm as an end, then skeptics about DE may well accuse [its proponents] of simply begging the question."<sup>83</sup> If double effect's only explanation of what is wrong with willing evil as a means is that it is wrong to will evil as an end, then double effect begs the question in face of an assertion that there is a relevant distinction between the two: "If that same side effect could permissibly be brought about as a means, then DE may not be in play at all."<sup>84</sup>

In sum, McIntyre argues that if a proportionate reason justifies bringing about some evil as an unintentional but foreseen side effect of pursuing some intended good, this suggests that, absent other concerns, intentionally

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79. *Id.* at 229.

80. *Id.* at 227.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

bringing about that harm as a means to that good effect also should be justified. The only concern is double effect's proscription against intending evil as a means. In response, McIntyre asserts that opponents of double effect simply can assert that willing evil as a means constitutes a different case from willing it as an end.<sup>85</sup> In such instances, the actor need not desire the intended means for its own sake, but regretfully, and only in order to bring about the intended good. In support of this conclusion, opponents of double effect can point to the fact that the very evil intended as a means is precisely the same evil that proponents of double effect are willing to cause, albeit as a side effect, to achieve that good effect.

This logic, in fact, parallels that underlying the plaintiffs' equal protection claim in *Quill*. Because certain accepted medical procedures carried out with respect to terminally ill patients result in their foreseeable but unintended death, plaintiffs assert that it should make no difference if that effect is directly intended as the means in physician-assisted suicide.<sup>86</sup> As the Second Circuit stated:

New York does not treat similarly circumstanced persons alike: those in the final stages of terminal illness who are on life-support systems are allowed to hasten their deaths by directing the removal of such systems; but those who are similarly situated, except for the . . . attachment of life-sustaining equipment, are not allowed to hasten death by self-administering prescribed drugs.<sup>87</sup>

According to this argument, conflating the cases is proper because the harm—the death of the patient—is justified by a similar good caused in each case—the relief of suffering. Whether death comes about as a mere side effect or functions as the intended means of bringing about that good effect is allegedly irrelevant.

### 3. Begging the Question

McIntyre's critique pointedly challenges double effect's supposition that intending evil as a means is ethically distinct from causing it as a

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85. *Id.* at 227-28.

86. *See Quill v. Vacco*, 80 F.3d 716, 729 (2d Cir. 1996), *rev'd*, 521 U.S. 793 (1997).

87. *Id.* As the idea is reiterated in an amicus brief (referred to as the "philosopher's brief") filed on behalf of the plaintiffs in *Quill*: "If it is permissible for a doctor deliberately to withdraw medical treatment in order to allow death to result from a natural process, then it is equally permissible for him to help his patient hasten his own death more actively, if that is the patient's express wish." Brief of Ronald Dworkin et al. as Amici Curiae at 11-12, *Vacco v. Quill*, 521 U.S. 793 (1997) (No. 95-1858), *reprinted in* 255 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW, *supra* note 23, at 168, 178-79.

foreseen side effect. At the same time, however, it is obvious that her denial of a meaningful distinction between the two falls subject to the same question-begging critique. If it is correct that double effect merely *assumes* that an ethical connection exists between intending evil as an end and intending it as a means, McIntyre's bald denial of any connection is just as ineffectual.

McIntyre in fact in the end concedes that her argument fails to undermine double effect's position that it *does* make a difference whether an actor intends evil as a means or merely foresees it as a side effect.<sup>88</sup> She recognizes that, even if proponents of double effect accepted all of her additional constraints, which many of them do, they still could insist that the intended/foreseen distinction remains a necessary condition of permissibility:

Proponents of the doctrine could concede much of this while also claiming that the special force of DE is to set limits on the absolute prohibition on intentional harming. . . . [T]he proponent might argue, even though DE might need to be supplemented with other principles or claims to explain the permissibility of some cases of incidental harming, that does not show it to be otiose.<sup>89</sup>

#### E. *The Meaning of Intention*

McIntyre's concession, however, does not render her efforts entirely futile. Her argument is valuable precisely because it highlights the need for

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88. McIntyre, *supra* note 54, at 242.

89. *Id.* Following this concession, McIntyre proposes still another argument against double effect based on attempts to apply the doctrine double of effect to a particularly problematic set of cases. *Id.* Based on her objection that the employment of double effect in these examples purportedly contradicts itself, McIntyre submits that double effect is undermined:

These examples show that absolutists have not consistently interpreted DE as a prohibition on instrumental harming . . . . And insofar as these examples have persuaded nonabsolutists that there is something to the use of the [intended/foreseen] distinction in DE that is correct, they show that some examples cited as confirming illustrations of DE actually undermine it.

*Id.*

Without engaging in tangential discussion of whether application of double effect to these examples is incoherent, critique of double effect based on its employment with respect to a limited subset of difficult cases does not undermine the general validity of the principle. A proponent of double effect simply could agree with McIntyre that double effect has been erroneously applied in those cases without putting the general validity of the principle into question. For further discussion of McIntyre's limitation in Constraint 4 and the "closeness" problem, see *infra* note 340 and accompanying text.



clarification of double effect's claims about the relation between means, ends, and side effects and their relative moral import. In light of the preceding discussion, it becomes evident that two distinct, albeit related, difficulties arise with respect to double effect. First, assuming satisfaction of its other elements, double effect must explain why causing evil as a foreseen side effect differs ethically from intending evil as an end; and second, having established the reasonability of that distinction, double effect must explain why, in a situation where evil could permissibly be caused as a side effect, it could not be intended as a means. In short, double effect must navigate a narrow obstacle course. As suggested by McIntyre's attempted deconstruction, double effect must offer a coherent account for why causing evil is permissible in one case but not in the other.

### 1. Practical Reason: Intention and Side Effects

Dealing first with differentiating between responsibility for intended effects and foreseen consequences of action, one philosopher has described the puzzle presented as "the problem of the package deal":<sup>90</sup>

Suppose a rational agent believes that his *A*-ing would result in a bad effect, *E*, seriously considers *E* in his deliberation about whether to *A*, and yet still goes on to make a choice in favor of *A*-ing. How could such an agent fail to intend to bring about *E*?<sup>91</sup>

This statement of the problem properly focuses attention on the necessity for double effect to clarify how an actor may be understood not to intend a result even when that consequence is foreseen to follow from conduct. The answer to this question hinges naturally on what the notion "to intend" entails and the role that intentions play in constituting personal responsibility.<sup>92</sup> In short, even the most elaborate and extended critiques of double effect reduce to fundamental questions about the nature of "intention."

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90. MICHAEL E. BRATMAN, INTENTION, PLANS, AND PRACTICAL REASON 143 (1987) (emphasis added).

91. *Id.*

92. Proponents of double effect concerned with articulating its contours have not always focused on this broader issue. *See, e.g.*, Joseph M. Boyle, Jr., *Praeter Intentionem in Aquinas*, 42 THOMIST 649, 650 (1978) ("[W]hy should the difference between what one intends and what one foresees but does not intend be important for the definition and moral evaluation of kinds of human acts? This . . . question requires a long answer; I will set it aside . . ."). But see *supra* note 32 and accompanying text for Boyle's elaboration of a positive account of why the intended/foreseen distinction makes an ethical difference, articulated in more detail in the cited article.

Although etymological interpretation sometimes can be misleading, in this context it provides a helpful starting point for discussion. The term “intention” traces to the Latin *intendere*: to hold out, point, stretch out (the hand, finger, arm, etc. towards or at); to direct the eyes, sight, hearing etc.; to direct one’s steps, set out (for); to be aimed or to point to a particular object; to direct one’s efforts or activities, turn (to); to aim at, purpose.<sup>93</sup> The common notion shared by all these examples is a movement or “reaching” (Latin “-tend”) exercised with respect to or “toward” (Latin “in-”) some perceived object—some person, place, or thing.

Contemporary philosophical notions of intention corroborate this etymological sense. To intend or to have an intention implies that an agent inclines or “tends” toward some specific object grasped cognitively. Contemporary theorists develop this notion more precisely by asserting that intentional action is characterized as acting “for a reason”: “For all actions *A*, *A* is an intentional action only if *A*’s agent had a reason for *A*-ing and (his having) that reason was a cause of his *A*-ing.”<sup>94</sup>

Elaborating this notion of a “reason” by way of illustration, a guest might respond to a host’s question, “Why did you knock my glass over?” by answering that his hand was pushed, he was bumped, he had a spasm, or some other similar explanation. By such responses, the guest, though acknowledging being the physical cause of the spill, would deny *personal* responsibility and thus culpability for the glass being spilled. The guest, however, also might respond, “Because I saw the waiter slip some powder into your glass, and you were about to drink it.” Here, the actor offers a description of his cognitive state to indicate that he *meant* to knock over the glass—that cognition explains why he did it. By answering the question, “Why did you do *X*?” in this way, however, an agent implies that his mental state offers an explanation for why he should be held *personally* responsible for what happened. If it were not so, offering a description of one’s mental state in response to the question “why?” would be a non sequitur. Further, the host’s acceptance of the response presupposes that he or she appreciates the explanatory force of the reason given.

It is, however, at the same time true that the guest’s answer fails to provide a *complete* explanation for why an agent acts. Purely *descriptive* accounts of some perceived state of the world, such as the guest’s simple awareness that the waiter had slipped powder into the host’s drink and the host was about to drink it, does not *fully* explain why the guest *tries to do* anything about it. The same cognitively grasped state of affairs could, for example, equally provide a guest with a reason for *not* tipping the glass over, e.g., if the guest were heir apparent to the host’s fortune.

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93. See OXFORD LATIN DICTIONARY 937 (P. G. W. Glare ed., 1983) (defining *intendo*).

94. ALFRED R. MELE, IRRATIONALITY: AN ESSAY ON AKRASIA, SELF-DECEPTION, AND SELF-CONTROL 32 (1987).

In addition then to purely descriptive knowledge about possible states of affairs, other psychic factors must be introduced to explain why an agent chooses *to do* something—to explain why a person *acts* for a reason. As one philosopher observes:

In itself the fact that Helen wonderfully resembles the immortal gods will not lead anyone to consort with her or the fact that the pool contains crocodiles lead swimmers to vacate it; these will *be reasons* only to persons who *desire* charming companions or are *averse* to being eaten.<sup>95</sup>

Appetitive factors, referred to in this text as “desire” and “aversion,” bridge the gap between simple cognitional awareness and intention.<sup>96</sup> Of course, the concepts of “appetition,” “motivation,” or “wanting” are themselves notoriously opaque.<sup>97</sup> It suffices for present purposes to observe that any rudimentary attempt to understand intention demands reference to a complex of psychic elements. Only taken together can these elements account for why an actor, by means of “an intention,” not only cognitively grasps some state of affairs but also acts to make that state of affairs obtain. For conduct to be intentional it must be caused both by knowledge and desire.

Contemporary “belief-desire” models of intentional action capture the operation of both factors.<sup>98</sup> Donald Davidson provides a standard sketch:

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95. WILLIAM CHARLTON, *WEAKNESS OF WILL* 96 (1988) (emphasis added).

96. See ANSCOMBE, *supra* note 50, § 35, at 66 (“The role of ‘wanting’ in the practical syllogism is quite different from that of a premise. It is that whatever is described in the proposition that is the starting-point of the argument must be wanted in order for the reasoning to lead to any action.”); 1 ARISTOTLE, *On the Soul*, in *THE COMPLETE WORKS OF ARISTOTLE* 641, 688 (Jonathan Barnes ed., 1984) (circa 350 B.C.): “[T]hought is never found producing movement without appetite.” (“*nun de ho men nous ou phainetai kinôn aneu orexeôs.*”).

97. “The concept designated by the verb ‘to want’ is extraordinarily elusive. A statement of the form ‘A wants to X’—taken by itself, apart from a context that serves to amplify or to specify its meaning—conveys remarkably little information.” Harry G. Frankfurt, *Freedom of the Will and the Concept of a Person*, 68 J. PHIL. 5, 7 (1971), *reprinted in* MORAL RESPONSIBILITY 65, 67 (John Martin Fischer ed., 1986). Gary Watson, in the same context states, “I am going to use ‘want’ and ‘desire’ in the very inclusive sense now familiar in philosophy, whereby virtually any motivational factor that may figure in the explanation of intentional action is a want.” Gary Watson, *Free Agency*, 72 J. PHIL. 205, 207 n.2 (1975), *reprinted in* MORAL RESPONSIBILITY, *supra*, at 80, 83 n.2. Other terms which have been employed by philosophers in the attempt to capture this notion are: “appetite” (“*orexis*” from “*oregein*”: to stretch out for, reach toward), ARISTOTLE, *supra* note 96, at 688, and “pro-attitude,” DONALD DAVIDSON, *Intending*, in *ESSAYS ON ACTIONS AND EVENTS* 83, 83 (1980).

98. See, e.g., Donald Davidson, *How is Weakness of the Will Possible?*, in *ESSAYS ON ACTIONS AND EVENTS*, *supra* note 97, at 21, 31.

When a person acts with an intention, the following seems to be a true, if rough and incomplete, description of what goes on: he sets a positive value on some state of affairs (an end, or the performance by himself of an action satisfying certain conditions); he believes (or knows or perceives) that an action, of a kind open to him to perform, will promote or produce or realize the valued state of affairs; and so he acts (that is, he acts *because* of his value or desire and his belief). Generalized and refined, this description has seemed to many philosophers, from Aristotle on, to promise to give an analysis of what it is to act with an intention; to illuminate how we explain an action by giving the reasons the agent had in acting; and to provide the beginning of an account of practical reasoning, i.e. reasoning about what to do, reasoning that leads to action.<sup>99</sup>

## 2. Intention and Responsibility

Based on such an understanding of intention, its relation to the constitution of personal responsibility can be understood more clearly. A variety of mental states of mind, or even no state of mind at all, can satisfy mere efficient causality. If merely bringing about results in the world appropriately grounded personal responsibility, an agent could be held ethically responsible for all effects of action—be they intended, negligent, purely fortuitous, or even unconscious. *Personal* responsibility, however, implies more than simply being an efficient cause of effects.

Agents are held personally responsible in the strongest and most precise sense only for deliberate intentional conduct.<sup>100</sup> This is true

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99. *Id.*

100. See, e.g., Sanford H. Kadish, *Complicity, Cause, and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 326-30 (1985):

Events in the physical world follow one another with an inevitability, or natural necessity, that is conspicuously absent from our view of voluntary human actions. . . . Thus, the conception of causation appropriate to physical events is out of place in the human realm.

. . . .

. . . Human actions stand on an entirely different footing. . . . Except in special circumstances, [an agent] possesses volition through which he is free to choose his actions. He may be influenced in his choices, but influences do not work like wind upon a straw. . . . [H]is actions are his and his alone, not those of his genes or his rearing, because if he had so desired he could have chosen to do otherwise. This is the perception that underlies the conception of responsibility . . . .

*Id.* at 326-27, 330.

precisely because when acting intentionally, understood in the sense described, a person causes possible states of affairs to come about *because*—and this is the crucial factor—the actor affirmatively wants and chooses those specific, cognitively grasped states to be made real. In choosing to engage in certain types of conduct or produce particular effects because of one’s beliefs and desires—an intention—an actor is psychologically connected in a unique causal mode with the very realities he or she “creates.” By such conduct, the actor identifies and participates in the very value of the objects intended. In short, attribution of personal responsibility is nothing more than recognition of the actor’s causal identification with the objects of intention—the awareness that, by intentionally causing effects, agents *reflexively* express and establish their own ethical character.<sup>101</sup>

Consideration of the role played in practical deliberation by merely foreseeable effects, however, carries with it no set of comparable implications. The term “foreseen” denotes precisely the limited role that such awareness plays in the consciousness of the actor. “To foresee” bespeaks a purely cognitive grasp of some possible state of affairs without any corresponding appetitive inclination. “Foreseen effects” are identified as such precisely because they provide no focal point for an actor’s volitions or desires. In fact, to the contrary, the notion of simple foreseeability suggests that the actor, though aware of those possible states of affairs, lacks any affirmative volitional disposition toward them.

Thus, the notion of a foreseen effect denotes implicit denial of any identification between those results and the desires and beliefs of the actor.

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101. As Carlos Moya states:

Our account of human intentional action includes the subjective point of view of a reflective agent. The ability to commit oneself to act goes hand in hand with the ability to make one’s own desires and other sorts of reasons objects of reflection and evaluation. This reflective capacity allows human agents to place their own desires and urges at a distance and to judge them worth pursuing or not. . . . This is one sense in which agents can be said to be the source of their own actions, independently of the past history of the world.

CARLOS J. MOYA, *THE PHILOSOPHY OF ACTION* 168-69 (1990). In a similar vein, Harry Frankfurt observes:

The ability to care requires a type of psychic complexity that may be peculiar to the members of our species. By its very nature, caring manifests and depends upon our distinctive capacity to have thoughts, desires, and attitudes that are *about* our own attitudes, desires, and thoughts. In other words, it depends upon the fact that the human mind is *reflexive*.

HARRY G. FRANKFURT, *THE REASONS OF LOVE* 17 (2004).

Because it is precisely an affirmative cognitional *and* volitional movement toward objects that captures the essence of intent, it makes no sense to refer to merely foreseen effects as objects of intention. Actors cannot, for example, be said with respect to merely foreseen effects to be trying to bring those states of affairs about.

Whether one chooses to call foreseen consequences mere “side effects,” “unintended effects,” or, as some do, “obliquely inten[ded]” or “indirectly inten[ded]”<sup>102</sup> makes no distinction in reality. Their import is the same: a fundamental distinction exists between choosing objects of practical reason and desire in their own right and bringing about effects that are not desired by the actor in their own right but are merely foreseen to result from the pursuit of intended objects.

### 3. Side Effects and Responsibility

Such a view, however, does not entail that causing unintended foreseen effects is *ipso facto* permissible. Instead, all that discussion thus far establishes is that causing such effects cannot be understood as wrong *because* it is intentional. This distinction may, however, as J.L. Austin noted with respect to excuses, only get one “out of the fire into the frying pan.”<sup>103</sup>

In such cases, however, it is true that the wrongfulness of the conduct does not have superadded upon it the same moral blameworthiness as would be the case if the harm were caused intentionally. Though the actor may be culpable because he or she intended some good unreasonable in light of the evil caused, he or she was not the type of person that brought that effect about because he or she *wanted* to cause it. As John Finnis states in this context, “One may well be culpable in accepting [such foreseen effects]. But the ground of culpability will not be that one intended them, but that one wrongly—unfairly—accepted them as incidents of what one did intend.”<sup>104</sup> In fact, negative ethical judgments can attach to cases of causing merely foreseeable but unintended effects whenever the harmfulness of the side effect is unjustified in view of the good intended. And it is precisely in these circumstances that double effect

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102. “A second question is whether a belief that one will *A* in executing some intention ensures that one intends to *A*. . . . One way of talking about such cases . . . is to say that [the proposed effect] is ‘directly intentional,’ whereas [the foreseen but undesired effect] is only ‘obliquely intentional’ (or indirectly intentional).” Michael E. Bratman, *Intention*, in *THE CAMBRIDGE DICTIONARY OF PHILOSOPHY*, *supra* note 4, at 380, 381; *cf.* JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 86 (J. H. Burns & H. L. A. Hart eds., Clarendon Press 1970) (1789).

103. J. L. Austin, *A Plea for Excuses*, in 57 *PROCEEDINGS OF THE ARISTOTELIAN SOCIETY* 1, 3 (1957).

104. John Finnis, *Intention in Tort Law*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 229, 244 (David G. Owen ed., 1995).

becomes relevant—in the attempt to evaluate when it is permissible to cause foreseen harm though intentionally aiming at a permissible good effect.

Returning to consider the strategic/terror bomber scenario in light of this analysis,<sup>105</sup> the death of innocent civilians may be understood from the point of view of the strategic bomber as an unavoidable, yet tragic and unintended, effect of destroying the enemy munitions plant. The death of civilians, although caused in fact by the agent's action, is not in any way grasped as a cognitional object that the agent *affirmatively aims at constituting* in reality as an object valued in itself either as an end or as a means. That is, it is not something the agent intends.<sup>106</sup> Accordingly, under double effect, if the munitions plant is of sufficient strategic importance to a nation's war effort to protect its citizens from harm, under most accepted ethical standards of conduct, bombing such a facility would be permissible despite the foreseen consequences for nearby civilians.<sup>107</sup>

The importance of this fine-grained analysis of the ethical significance of intent cannot be overstated. Superficial discussions of intention and foreknowledge often disparage such terminological considerations as matters of arbitrary definition rooted in abstract interpretations of human behavior. In reality, the distinctions considered here constitute elementary descriptions of common interior experience of practical reasoning and choice. Direct introspection validates the experience of a uniquely powerful form of causality under personal control—the experience of successfully effecting states of affairs in the world as a direct result of one's affirmative belief-desire state. "Intent," taken strictly, is the name reserved for that particular causal phenomenon. Such definition, by its terms, explicitly prescind from anything else that may be "caused" or "come to be" or "be brought about" by an actor's conduct and relegates such effects to the category of "unintended."

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105. See *supra* notes 49-50 and accompanying text.

106. Some philosophers have developed indirect tests, such as the following examples, to confirm that the agent is not deceiving himself about whether he intends a particular effect or not: (1) there is no engagement in practical reasoning about how to achieve the bad effect; (2) there is no endeavor to bring it about so that the evil effect occurs and no regret if one's intended goal succeeds but surprisingly the effect fails to occur; and, (3) other alternatives causing the good effect that do not entail the evil effect will be considered if feasible. Cf. BRATMAN, *supra* note 90, at 148.

107. See, e.g., Emanuel Gross, *Use of Civilians as Human Shields: What Legal and Moral Restrictions Pertain to a War Waged by a Democratic State Against Terrorism?*, 16 EMORY INT'L L. REV. 445, 488 (2002) (discussing the application of double effect to the killing of innocent civilians in war settings).

#### 4. Intending Evil as a “Means” and Culpability

Having provided a reasoned basis for distinguishing the moral import of intending ends versus merely foreseeing side effects, however, skeptics of double effect, like McIntyre, can understandably demand an explanation for why, if double effect concedes that causing an evil effect can be justified by an intended good, that same harm cannot permissibly be intended as a means to that good effect. As McIntyre queried, if one may ease pain by use of palliative therapy that is foreseen to end life, why is it not permissible to end life in order to relieve pain?<sup>108</sup> If willing a means is distinguishable from willing an end, it arguably is not obvious that intending evil as a means to a good end is always wrong, especially when double effect would allow that same evil to be knowingly caused as a foreseen side effect of pursuing that same intended good.

The logical subordination of a means to an end is indeed an important ethical insight that McIntyre correctly highlights.<sup>109</sup> As reflected in Davidson’s description of practical reasoning quoted above,<sup>110</sup> choice of any particular act as a means is made possible only by discernment that that act is “of a kind open to him to perform, [and] will promote or produce or realize the valued state of affairs.”<sup>111</sup> In other words, means *as such* are good because they are “instrumental”—in one way or another, to greater or lesser degree, causally lead to the intended end.

The conclusion McIntyre attempts to draw from this, however, is overreaching. No dispute exists that the ethical character of an intended end often redounds to specify ethical evaluation of a means chosen to achieve that end. If, for example, the goal sought to be achieved through some chosen means were evil, the means-act directed at that end would be ethically condemned precisely because of its role in bringing about that evil. For example, if a person’s motivation for donating to an orphanage were to gain access for predatory sexual behavior, it is noncontroversial that those particular acts of almsgiving would be ethically flawed, though almsgiving considered in itself be praiseworthy.

Double effect, however, recognizes that the ethical resonance of ends upon means is circumscribed and often asymmetrical. In cases, for example, where evil means are employed to achieve good ends, it is not true that the moral goodness of those ends exhaustively specifies the ethical character of the means. Shooting the rich and stealing their money cannot be justified merely by putting the money to good use in funding an orphanage, even if one sincerely wants to help the children.

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108. McIntyre, *supra* note 54, at 223; *see supra* notes 76-77 and accompanying text.

109. *See id.* at 227-28; *see supra* notes 74-77 and accompanying text.

110. *See supra* note 99 and accompanying text.

111. Davidson, *supra* note 98, at 31.



This result is not anomalous, however, because the constraint that conduct be aimed at a good purpose is only *one* of the necessary conditions for ethical permissibility. Although it is clear that if an end is evil it follows that means directed at that end are unethical, it is a basic logical error to conclude that simply because an end is *not* evil, the means to that end also must not be evil.<sup>112</sup>

Double effect's first element recognizes this complexity, providing that the means chosen by the agent must be in itself ethically neutral or praiseworthy considered apart from evaluation of its effects.<sup>113</sup> Ulterior motives or purposes of conduct cannot be the sole criterion for ethical evaluation of chosen means, which require independent normative assessment in themselves.

Thus, McIntyre's claim that simply because an unintended side effect may be permissible under double effect that therefore the same evil may be intended as a means to the good is seriously put into question. A means—though constituted as such because of the end to which it is directed—cannot in its ethical evaluation be reduced merely to a question of the ethical character of the end.

The very mobility of the means-end model of practical reasoning employed by McIntyre to undermine double effect further confirms the applicability of this critique to her argument. Analysis of the malleability of practical reasoning, in fact, provides a specific response to McIntyre's demand that a proponent of double effect provide "a justification for linking the wrongfulness of . . . instrumental harming to the wrongfulness of acting on malicious aims."<sup>114</sup>

The weakness of McIntyre's argument lies in its failure to appreciate the pliable and transitory nature of the means-end relation. What is a means or end in one phase of practical deliberation often plays a different role in other phases of deliberation. In view of this fact, McIntyre gives up nothing ethically by conceding that it is always wrong to intend evil as an end but permissible to intend evil as a means.

#### a. Means as Ends

Seldom, in fact, is it the case that what is chosen as a *means* in one stage of practical deliberation fails to function as an intended end with respect to a subsequent phase. This point can again be illustrated by

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112. Such an argument involves a type of "fallacy of the consequent." Cf. JOHN A. OESTERLE, LOGIC: THE ART OF DEFINING AND REASONING 258 (2d ed. 1963). If it is raining outside, the ground must be wet, does not entail that if it is not-raining outside, the ground is not wet. There may be other reasons why the ground is wet. *Id.*

113. See *supra* note 48 and accompanying text.

114. McIntyre, *supra* note 54, at 229; see *supra* note 79 and accompanying text.

reference to the bombing scenario.<sup>115</sup> Although McIntyre does not return to this example in her later arguments, her thesis would require the conclusion that if double effect would allow an enemy to be permissibly weakened by the bombing of a munitions plant at the cost of foreseen but unintended deaths of innocent civilians, then it is permissible to weaken the enemy by intentionally killing those civilians.

In both cases the ultimate ethically unobjectionable end sought by the strategic and terror bombardiers is identical—the end of war and domestic peace. Further deliberations about this end, however, uncover for the actors various ways that victory might be achieved. Among these options, two appear most likely to accomplish the goal: weakening the enemy by diminishing its military capacity or demoralizing the enemy’s will to fight by killing large numbers of innocent civilians.

Whichever alternative is selected, however, *further* deliberation is required concerning how to achieve *that* as an end—how best to diminish military capacity for the strategic bomber or how to kill civilians for the terror bomber. The necessity of engaging in specific means deliberation concerning the killing of innocent civilians patently illustrates that, in such a case, the actor must indeed become fixed in both thought and desire on killing civilians in a way that the strategic bomber does not. Killing innocent civilians becomes for the terror bomber a specific goal of practical reason that plays an integral, not incidental, part of his or her plan for victory.

Even though ulterior motives may exist behind killing civilians that provide a “non-evil” motive for that choice, in the specific, discrete choice of how to accomplish such killing—the choice to bomb *in order* to kill innocents—the agent intends killing civilians as an end. By so acting, however, the actor brings about the killing of civilians in precisely the *affirmative volitionally constitutive* manner that McIntyre concedes makes willing evil as an end wrong.<sup>116</sup>

#### b. Ends as Means

McIntyre’s attempt to distinguish willing evil as a means from willing evil as an end is also flawed for a parallel reason. McIntyre’s analysis appears consistent with more conventional ethical theories in conceding that evil can never be intended as an end. If, for example, the question were abstractly posed about whether it was ethically permissible to intentionally kill an innocent person, McIntyre might be expected to agree that such an end is impermissible.

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115. See *supra* note 49 and accompanying text.

116. “[O]pponents of DE can readily accept that there is a general moral prohibition on aiming at harm as an end.” McIntyre, *supra* note 54, at 226; see also *supra* note 79 and accompanying text.

The problem, however, is that any significance to her concession that it is always wrong to intend evil as an end evaporates when placed in a context in which any particular evil can always be construed to function as a mere means to some ulterior good. Take, for example, the sinking of an oceanliner. Assuming the absence of a sufficient number of life preservers for the complement of passengers, double effect could conceivably justify one passenger claiming a preserver for his child even though foreseeing that such conduct would unintentionally but inevitably result in the death of another passenger. Under double effect, the death of the passenger would arguably be a permissible but unintended side effect of the first passenger's choice. However, under no circumstances could a passenger intentionally kill another passenger in order to obtain access to his life preserver.

Under McIntyre's thesis, however, contrary to what might initially have been assumed by her concession that it is never permissible to intend harm as an end,<sup>117</sup> it apparently would be permissible for the first passenger to intentionally kill the second passenger in order to assure his or her own survival. As long as one can analyze the harm done as a means and not an end, *any* harm, no matter what type, can be justified under the right circumstances.

As the preceding examples illustrate, concrete evil actions, such as killing innocents, can function either as intended ends toward which other means are directed (e.g., bombing a munitions factory in order to kill innocent civilians) or as an intended means by which some other end is accomplished (e.g., killing innocent civilians in order to attain military victory). Most conventional ethical theories would condemn such conduct considered under either aspect. Under McIntyre's theory, however, one arbitrarily restricts one's ethical evaluation to that phase of practical deliberation where the evil in question functions merely as a means to some more remote end.

Because, however, all conduct can be seen as motivated by very remote formal ends such as a general pursuit of happiness, self-fulfillment, well-being, or even the mere exercise of autonomy, conceding that it is always wrong to intend evil as an end provides no substantive limitation on ethical conduct. None of these ultimate ends of conduct is wrong, and any particular action arguably could be seen as a mere means to one of these ultimate ends.

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117. See *supra* note 79 and accompanying text.

## 5. Utilitarianism and Double Effect

Further, even if one were to limit the permissible range of evil means to evils that overlap with unintended foreseen harmful effects that would be permitted by double effect, the fact that one *intentionally* chooses those evils carries with it an ethical import distinct from mere foreknowledge. Choosing evil and intentionally making it part of one's plan involves a distinctly personal and intimate causal connection between the actor and those evil effects.

Thomas Nagel corroborates this point, observing that double effect captures an important distinction between *agent-relative* and *agent-neutral* reasons for acting.<sup>118</sup> While alternative courses of action can be evaluated from abstract or "objective" utilitarian frames of reference, Nagel argues that such analysis excludes consideration of relevant normative limitations applicable to *human choices* considered from the subjective point of view of the acting person; such abstract views represent an agent-neutral "view from nowhere."<sup>119</sup> While arguably it may from a general perspective be true that it would be "better" if five persons live and only one die, that fact, under normal ethical sensibilities, cannot justify intentionally killing one innocent to accomplish that state of affairs.<sup>120</sup>

Instead, proper moral evaluation of action demands independent normative assessment of the actor's subjective—intentional—responsibility for bringing particular effects about, an assessment that sometimes may diverge from what an *external* judgment about the goodness of comparative states of affairs would yield.<sup>121</sup> In short,

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118. "[T]he traditional principle of double effect . . . remains the right point of convergence for efforts to capture our intuitions. The principle says that to violate deontological constraints one must maltreat someone else intentionally." THOMAS NAGEL, *THE VIEW FROM NOWHERE* 179 (1986) (footnote call number omitted).

119. *Id.* at 3-12.

120. Nagel stated:

The detached, objective view takes in everything and provides a standpoint of choice from which all choosers can agree about what should happen. But each of us is not only an objective self but a particular person with a particular perspective; we act in the world from that perspective, and not only from the point of view of a detached will, selecting and rejecting world-states. So our choices are not merely choices of states of the world, but of actions. Every choice is two choices, and from the internal point of view, the pursuit of evil . . . looms large.

*Id.* at 183.

121. Nagel further stated:

The issue is whether the special, personal perspective of agency has legitimate significance in determining what people have reason to do—whether, because of this perspective, I can have sufficient reason not to do something which,

evaluation of effects of action on the general state of affairs of the world does not provide an adequate standard for judging the moral interior worth of human choices.

Phillipa Foot makes a similar point in her critique of utilitarianism and defense of double effect.<sup>122</sup> She observes that utilitarian models of moral goodness refer to judgments about whether the causal effect of action maximizes general welfare, in whatever way that notion may be defined, and thus purports to create the best state of affairs.<sup>123</sup> Foot criticizes the seeming irresistible rationality of this theory because the very concept of moral goodness operative in it disassociates itself from the experience of moral value giving meaning to that concept in the first place.<sup>124</sup>

While Foot acknowledges, for example, that it makes sense to advocate that benevolence and justice be spread as extensively as possible throughout society, she notes that the experience of being benevolent and just provides no grounds for believing that such a maximized “state of affairs” ought to be brought about by acts involving contrary virtues.<sup>125</sup> Moral values are experienced as normative for individual acts and not in the form of general admonitions about general “states of affairs.”<sup>126</sup> “[M]oral injunctions can be like orders which say not ‘See to it that there is less shouting’ (which might be obeyed *by* shouting) but rather ‘Don’t shout.’”<sup>127</sup>

In response, then, to McIntyre’s demand for an explanation for why an evil effect may not be intended as a means to a good effect though double effect may permit that same foreseen effect if unintended, the preceding considerations show that the utilitarian underpinning of her view fails to

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considered from an external standpoint, it would be better if I did. . . . If considerations of what I may do, and the correlative claims of my victim against me, can outweigh the substantial impersonal value of what will happen, that can only be because the perspective of the agent has an importance in practical reasoning that resists domination by a conception of the world as a place where good and bad things happen whose value is perspective-free.

*Id.* at 180-81.

122. “Let us now consider . . . a moral distinction between what the agent ‘directly intends’, that is what he aims at either as means or end, and what he ‘indirectly intends’ in foreseeing it as a consequence of his action. The moral relevance of this distinction has often been challenged. I think, however, that it must be allowed.” PHILLIPA FOOT, *Morality, Action and Outcome*, in *MORAL DILEMMAS* 88, 91 (2002) (footnote omitted).

123. *Id.* at 92-93.

124. *Id.* at 95.

125. “[B]enevolence gives us no reason to say, for instance, that it would be a ‘good state of affairs’ or ‘good total outcome’ if the sacrificing of a few experimental subjects allowed us to get cancer under control.” *Id.* at 99.

126. *See id.*

127. *Id.*

grasp the fundamental nature of intention and its relation to personal culpability.

The fact that a particular “end” or state of affairs may be preferable in the abstract does not allow an agent to intend to bring that state of affairs about. A contrary position ignores the fact that achieving that objectively preferred state entails intentional acts specifically directed at evil effects. In so doing, it ignores the insight that an actor’s affirmative volitional desire to bring about harmful consequences as means or ends constitutes immoral or unethical choice in its primary form. Based on the understanding of a unique personal culpability that flows from *intentional* choices of evil as a means or end, nothing problematic is suggested by double effect’s claim that foreseen evil effects may sometimes permissibly be caused though not intended.

#### F. *Synopsis*

Recent criticism of the principle of double effect argues that what makes double effect initially plausible is an intuition that there are important ethical implications suggested by the distinction between what an actor intends and foresees. These philosophers, however, ultimately conclude that despite this insight, it is not the principle of double effect but other moral principles that correctly “corral” how those factors determine moral permissibility. In short, these critiques assert that double effect reduces to application of more basic ethical principles.

In response to the challenges to double effect presented by the “package deal” argument and McIntyre’s allegations of question-begging, proponents of double effect can point to the preceding account of intentional action. An agent’s intention with respect to both ends and means establishes distinct ethical import flowing from the *intended* causing of effects as distinguished from the causing of merely *foreseen* effects.

The ethical significance of this distinction hinges on the insight that culpability tracks an actor’s mental state—a particular application of the general thesis in ethics and law that culpability relates to an agent’s state of mind and not merely to the physical consequences of action. Through cognitional-affective inclinations, a person constitutes and designates specific effects as affirmatively and subjectively willed to come to be. Because a unique causal relation exists between the mental state of “intention” and its effects, a unique personal responsibility is constituted. Intended objects are identified and causally tied to the psychic state of an actor in a manner that is not true of merely foreseen but unintended effects.<sup>128</sup>

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128. Nagel stated:

Although explicit discussion of double effect for a significant period of time was limited primarily to Catholic circles, this is no longer the case. As illustrated by Nagel's and Foot's discussions, the principle has gained wide acceptance in secular thought. No doubt the principle is appealing precisely because of its elasticity in dealing with complex moral situations where agents, though attempting to intentionally bring about good effects, cannot do so without causing foreseen bad results. Attempted applications of the principle of double effect<sup>129</sup> have been carried out with respect to numerous contemporary ethical issues including, among others, affirmative action,<sup>130</sup> same-sex unions,<sup>131</sup> syringe exchange programs,<sup>132</sup> use of stem cells in medical research,<sup>133</sup> use of condoms to prevent HIV infection,<sup>134</sup> and craniotomies to save the life of the mother.<sup>135</sup>

This widespread acceptance of the principle and the attempt to apply it in numerous ethical contexts rebuts any assertion that double effect "has been either ignored or severely criticized in the philosophical literature."<sup>136</sup>

What is the relation between evil and intention, or aiming, that makes them clash with such force?

The answer emerges if we ask ourselves what it is to aim at something, what differentiates it from merely producing the result knowingly.

The difference is that action intentionally aimed at a goal is guided by that goal. Whether the goal is an end in itself or only a means, action aimed at it must follow it and be prepared to adjust its pursuit if deflected by altered circumstances—whereas an act that merely produces an effect does not follow it, is not *guided* by it, even if the effect is foreseen.

What does this mean? It means that to aim at evil, even as a means, is to have one's action guided by evil.

NAGEL, *supra* note 118, at 181.

129. This Article offers no endorsement of any of these individual attempts to apply double effect. Rather, citation to them is made solely to provide some indication of the contemporary widespread recognition and acceptance of the principle.

130. See, e.g., William Cooney, *Affirmative Action and the Doctrine of Double Effect*, 6 J. APPLIED PHIL. 201, 201 (1989).

131. See, e.g., Gary Chartier, Comment, *Natural Law, Same-Sex Marriage, and the Politics of Virtue*, 48 UCLA L. REV. 1593, 1622-30 (2001).

132. See, e.g., Laura Ferguson et al., *Syringe Exchange in Pennsylvania: A Legal Analysis*, 8 TEMP. POL. & CIV. RTS. L. REV. 41, 51-53 (1998).

133. See, e.g., Heather Johnson Kukla, Note, *Embryonic Stem Cell Research: An Ethical Justification*, 90 GEO. L.J. 503, 537-39 (2002).

134. See, e.g., Clifford Longley, *The Moral Issue That Makes Me Ashamed to Be a Catholic: People Are Needlessly Dying of AIDS Because the Church Cannot Admit It Is Wrong About Condoms*, INDEPENDENT (London), July 16, 2000, at 24.

135. Donald B. Marquis, *Four Versions of Double Effect*, in THE DOCTRINE OF DOUBLE EFFECT: PHILOSOPHERS DEBATE A CONTROVERSIAL MORAL PRINCIPLE, *supra* note 32, at 156, 163-70.

136. RICH, *supra* note 7, at 142.

The preceding discussions confirm instead that double effect offers first, a lucid rationale for distinguishing intended ends from merely foreseen effects and second, a basis for explaining why it is wrong to intend evil as a means even if the same foreseen harm may be permitted as a side effect.

In so doing, the principle provides a resolution between two exaggerated approaches to human conduct: an overly scrupulous application of ethical norms and a reductionist utilitarianism. Double effect recognizes that the mutability of the world produces situations where apparently legitimate options for choice of certain goods include the bringing about of foreseen but unintended harms. Overly ideological and impractical applications of moral norms would prohibit action in all such circumstances and arguably create unbearably restrictive burdens. Utilitarianism, on the other hand, rejects commonly accepted moral norms by claiming that morality has more to do with objective evaluations of states of external affairs than intentions and states of mind of actors with respect to their individual actions and their direct consequences.<sup>137</sup>

By marking out the distinctive moral import of “intention” as the correct and fundamental starting point for attribution of personal responsibility, double effect is able to present a way out of this dilemma. It offers a solution that respects the existence of absolute ethical norms applicable to individual actions and yet, at the same time, acknowledges that at times such norms are not violated even if one’s conduct foreseeably, but unintentionally, causes harms that those norms seek to prevent.

### III. DOUBLE EFFECT AND AMERICAN CONSTITUTIONAL LAW

#### A. Legal “Intent” and Double Effect

A jurisprudential premise inspiring much of American law—drawing upon English common law and classical roots—is that an actor’s mental state or “state of mind” determines, in important respects, the culpability and punishment that should be meted out for particular actions.<sup>138</sup> This

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137. See generally JOHN STUART MILL, UTILITARIANISM AND OTHER ESSAYS (Alan Ryan ed., Penguin Books 1987) (1861) (providing the philosophical foundations of utilitarian thought).

138. The United States District Court for the Eastern District of New York stated:

While “up to the twelfth century the conception of *mens rea* in anything like its modern sense was non-existent,” [Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 981 (1932)], it should be remembered that the very nature of most offenses rendered them unlikely or impossible of commission without some level of intent and that state of mind “seems to have been a material factor, even from the very earliest of times, in determining the extent of punishment.” *Id.*

Toward the end of the Middle Ages, the modern focus on the criminal’s state of mind gradually began to evolve. “[T]he history of the recognition of culpable



reflects a traditional view that it is not merely the physical causing of an effect that constitutes the basis for culpability. Rather, legal culpability depends upon a unique causal relation between an actor's specific mental state and occurrences in the world.<sup>139</sup>

As shown in Part II, double effect in many respects is based upon a similar premise. Double effect dictates that ethical judgments about particular actions depend upon the satisfaction of a number of conditions relating to one's mental state and its connection to particular effects of conduct. Accordingly, in determining whether critics of *Quill* are correct in asserting that application of double effect has no precedent in the law, it is appropriate to consider the legal "state of mind" conditions for determinations of culpability in a variety of areas of substantive constitutional law and to explore whether similarities exist between these conceptions and double effect.

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states of mind should be viewed as a continuing process of self-civilization." Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 [HASTINGS L.J.] 815, 850 (1980) (describing evolution of culpability distinctions from ninth century to present). By the end of the twelfth century, the Roman law, with its concept of *culpa*, and the canon law, with its [sic] emphasis on moral guilt, began to influence the development of doctrines of culpability. [Sayre, *supra*, at 982-83].

United States v. Cordoba-Hincapie, 825 F. Supp. 485, 490-91 (E.D.N.Y. 1993).

139. Justice Oliver Wendell Holmes, for example, did not

deny that criminal liability, as well as civil, is founded on blameworthiness. Such a denial would shock the moral sense of any civilized community; or, to put it another way, a law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear.

OLIVER WENDELL HOLMES, *THE COMMON LAW* 42 (Mark DeWolfe Howe ed., Little, Brown & Co. 1963) (1881). Relying on such statements, two legal scholars summarize the function of the *mens rea* requirements as follows:

Although strict liability might provide a more effective deterrent to misconduct, justice is offended by the imposition of sanctions where there is no moral culpability. . . . The reason that different degrees of mental culpability result in different sanctions is not for deterrent value, but because our tradition of justice demands that we attempt to achieve proportionality between the moral blameworthiness of the defendant and the sanction for his wrong.

Sean E. Brotherson & Jeffrey B. Teichert, *Value of the Law in Shaping Social Perspectives on Marriage*, 3 J.L. & FAM. STUD. 23, 27 (2001).

## 1. Increasing Foreseeability and Culpability

One possible explanation for rejection of double effect, both philosophically and as applied in legal analysis, can be found in an overly simplistic view of what properly accounts for varying types of culpability. Often in legal discussions, infelicitous statements can be found proposing that culpability for negligent, reckless, and intentional conduct differs based on the relative foreseeability of harm:

The legal definition of “intentional” is essentially the same, whether found in tort law or in criminal law . . . . “The principal difference between negligent and intentional conduct is ‘the difference in the probability, under the circumstance known to the actor and according to common experience, that a certain consequence or class of consequences will follow from a certain act.’”<sup>140</sup>

According to this view, as one proceeds from simple negligence, to gross negligence, to recklessness, to willful indifference, to knowledge (the quintessential form of foreseeability), culpability increases in direct proportion to the increasing certainty of harm.<sup>141</sup> The implication of this

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140. *Shepard v. Circuit Court for Outagamie County*, 525 N.W.2d 764, 767 (Wis. Ct. App. 1994) (quoting *Gouger v. Hardtke*, 482 N.W.2d 84, 88 (Wis. 1992) (quoting *Pachucki v. Republic Ins. Co.*, 278 N.W.2d 898, 902 (Wis. 1979))). “As the probability of injury to another, apparent from the facts within the acting party’s knowledge, becomes greater, his conduct takes on more of the attributes of intent, until it approaches and finally becomes indistinguishable from that substantial certainty of harm that underlies intent.” W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 31, at 169-70 (W. Page Keeton ed., 5th ed. 1984); *accord* 57A AM. JUR. 2D *Negligence* § 30 (2004).

141. Gary Franklin explains:

Insistence [sic] upon discrete objective standards may be unrealistic and impracticable; the distinctions often dissolve upon application. The Second Restatement of Torts divides culpable states of mind into three strata: intent, recklessness, and negligence. Each of these strata subjects an actor to a different degree of liability. In practice, however, these three standards are not distinct at all, but rather shade into one another to comprise a continuum of culpability. A single act may subject an actor to any of the three levels of liability for the consequences of his act. The determinative factors are the extent of the risk of harm and the actor’s knowledge of the extent of the risk. Thus, an actor who believes that particular consequences are “substantially certain” to result from his act is held to the highest level of culpability, that of intent, whereas knowledge of a “strong probability” subjects the actor to a lower level of culpability, recklessness. Similarly, as the probability of harm decreases further, the conduct approaches the lowest level of culpability, negligence.

interpretation is that nothing unique separates intentional misconduct from other types of wrongdoing. Intentional action is wrong just because it has more of the same thing that makes other forms of conduct wrong—greater foreseeability of harm.

This understanding of the distinction between different types of legal culpability, however, oversimplifies the law and thus misstates it. The law does not, in fact, always regard conduct as more culpable because harm is more foreseeable. Assuming, for the sake of argument, that Lee Harvey Oswald acted alone in intentionally shooting President Kennedy,<sup>142</sup> and assuming that the likelihood of his having struck the President was remote,<sup>143</sup> it is not true that Oswald would therefore be less culpable than a secret service agent who, for the sake of argument, could have caused similar harm to the President by negligently discharging a service revolver. Oswald's intentional conduct would be more culpable even if the harm risked by his conduct was less probable than the same harm risked by a secret service agent's negligent conduct. This example disproves the thesis that greater causal probability of a harm occurring primarily distinguishes the culpability of intentional conduct from negligent conduct.<sup>144</sup>

This argument, of course, does not deny that increasing foreseeability of harm does sometimes justify increased culpability. After it is established that some harm is unreasonable and unlawful at a specified level of risk, increased foreseeability naturally compounds fault. In cases of *purposefully* intended harm, however, as in the Kennedy assassination, courts adjudicate culpability using a more fundamental set of ethical and

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out of "Smart Money," 40 U. MIAMI L. REV. 979, 991-93 (1986) (footnote call numbers omitted).

142. See PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT KENNEDY, REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT KENNEDY 19 (1964); Jonathan Simon, *Ghosts of the Disciplinary Machine: Lee Harvey Oswald, Life-History, and the Truth of Crime*, 10 YALE J.L. & HUMAN. 75, 75-76 (1998) ("The Commission's most famous conclusion, that Lee Harvey Oswald, acting alone, shot and killed President John F. Kennedy, has been the subject of ceaseless public debate.") (footnote call number omitted).

143. See, e.g., EDWARD JAY EPSTEIN, INQUEST: THE WARREN COMMISSION AND THE ESTABLISHMENT OF TRUTH 140-45 (1966) (describing both the difficulty weapons experts have in firing the same rifle at the same rate as Oswald and Oswald's poor marksmanship in the military).

144. LaFave offers a similar example:

[I]f *A* shoots *B* at such a distance that his chances of hitting and killing him are small, but with the desire of killing him, he intends to kill him; and if by good luck the bullet hits *B* in a vital spot, *A* will be held to have intended to kill *B*, sufficient for guilt of murder of the intent-to-kill variety.

1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 5.2(a), at 341 (2d ed. 2003) (citing *Studstill v. State*, 7 Ga. 2 (1849)).

legal criteria not captured by the notion of culpability based on mere probability of harm.

## 2. Intent: Desire and “Substantial Certainty”

Other statements of the law provide “thicker” conceptions of intention and confirm this preceding critique. Any modern law student, for example, is familiar with the *Restatement (Second) of Torts*’s definition of intent: “The word ‘intent’ is used . . . to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.”<sup>145</sup> This definition, applicable in diverse areas of substantive law beyond tort law, captures two distinct instances in which conduct may for legal purposes be considered “intentional”—when a particular result is “desired” or when a particular result is foreseen with “substantial certainty” to follow from one’s conduct.<sup>146</sup>

Relying precisely on this two-fold definition of intent, opponents of double effect challenge an attempt to claim, as the Court did in *Quill*, that a legal distinction exists between intending effects in the *Restatement*’s sense of “desired” (e.g., physician-assisted suicide’s intent that the patient “be made dead”) and causing effects with “substantial certainty” though not “desired” (e.g., the causing of foreseeable death by withholding life support or palliative care).<sup>147</sup> Opponents of double effect believe that definitions of intent like those in the *Restatement* confirm that foreseen, substantially certain results are intended, and unproblematically embody the legal view that a person intends the natural and probable consequences of his or her acts.<sup>148</sup>

The commentary of the *Restatement* itself, however, disproves that argument:

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145. RESTATEMENT (SECOND) OF TORTS § 8A (1965). Here “desire” cannot refer simply to an ephemeral emotional state but refers generally to any affirmatively specified object of a volitional inclination.

146. LaFave stated:

[T]he traditional view is that a person who acts (or omits to act) intends a result of his act (or omission) under two quite different circumstances: (1) when he consciously desires that result, *whatever the likelihood of that result happening from his conduct*; and (2) when he knows that that result is practically certain to follow from his conduct, whatever his desire may be as to that result.

1 LAFAVE, *supra* note 144, § 5.2(a), at 341 (emphasis added).

147. *See supra* notes 7-10 and accompanying text.

148. *See supra* notes 9-10 and accompanying text.

All consequences which the actor desires to bring about are intended . . . . Intent is not, however, limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.<sup>149</sup>

Despite what one might infer upon a superficial reading of this passage, careful consideration of its content reveals that the exemplar notion of intent envisioned by the *Restatement* drafters depends upon effects that the actor *desires* to bring about. An actor's intention, taken in this sense, is coextensive only with consequences of conduct that the actor brings about because of specific desires for those consequences. Only after securely fixing this paradigmatic conception of intent are the drafters able to extend its scope. As the commentary continues, if a person foresees that some consequence is "certain, or substantially certain, to result," that conduct can be regarded as intentional only because the actor "is treated by the law as if he had in fact desired to produce the result."<sup>150</sup>

In extending the meaning of intent to objects not desired but merely foreseen, the drafters openly concede that the law imposes a fiction. More clearly than any other argument offered by proponents of double effect to rebut claims that no distinction exists between intent as "desire" and intent as "substantial certainty," the *Restatement's* "treating" of substantial certainty "as if" it were desire confirms that the two acts are, at least functionally, distinct and that intention as desire constitutes the primary meaning of intent.

While it remains to consider why the *Restatement* may treat knowledge with substantial certainty "as if" it were actual intent, this analysis confirms, at least theoretically, the model of intentional action applied in ethical contexts described in Part II. Intentional action in its paradigmatic form constitutes a distinct form of human conduct<sup>151</sup> where responsibility is primarily determined, not by an evaluation of the degree of probability that one's conduct will cause a given harm, but based on an affirmative psychological connection between the awareness and desires of the actor and the effects specified by those thoughts and desires.

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149. RESTATEMENT (SECOND) OF TORTS § 8A cmt. b.

150. *Id.* (emphasis added).

151. "The difference between a negligent act and an intentional act such as the crime of rape or assault lies in the mental state of the actor. 'This different-in-kind argument is rooted in the moral culpability involved in intentional acts, which is objectively absent from the mind of a negligent actor.'" *Stellas v. Alamo Rent-A-Car, Inc.*, 673 So. 2d 940, 944 (Fla. 3d DCA 1996) (quoting B. Scott Andrews, Comment, *Premises Liability—The Comparison of Fault Between Negligent and Intentional Actors*, 55 LA. L. REV. 1149, 1159 (1995)).

This functional distinction recognized by the *Restatement* confirms the basic distinction made between intended and merely foreseen consequences in double effect. Although it remains to be seen whether this functional distinction acknowledged in the *Restatement* is given effect in the law, the theoretical recognition of the distinction by the *Restatement* clearly supports double effect's claim that a logical opening is created that may permit, under certain circumstances, unintentionally causing foreseen harms that would be prohibited if purposely brought about.

### 3. "Substantial Certainty" as Intent

Presumably, some justification explains the *Restatement's* fiction that an actor who merely foresees a substantially certain result be treated "as if he had in fact desired to produce the result."<sup>152</sup> Examination of such justifications may, in turn, prove helpful for determining if and when imposition of such a fiction may *not* be appropriate—if, as double effect proposes, there are circumstances in which a person is not legally culpable for causing unintended harm, even when foreseen with substantial certainty.

#### a. Evidentiary Presumption of Intent from Consequences

Undoubtedly, one factor justifying the fiction of substantial certainty as "intent" is its evidentiary value. Actors' intentions are not always simple matters to discern in law or otherwise. Defendants, if not deliberately concealing or misrepresenting their prior intentions, often rationalize or fail to accurately recall them. Further, defendants may be indisposed because of sickness or death or otherwise be unavailable or simply refuse to testify as to their actual intent. In view of these difficulties, juries are sometimes permitted to presume the intent or desire of an actor based on the "natural and probable" consequences of the actor's actions (of which effects foreseeable with substantial certainty qualify *par excellence*).<sup>153</sup> On this ground, the *Restatement* fiction makes

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152. See *supra* notes 149-50 and accompanying text.

153. See, e.g., *United States v. Aguilar*, 515 U.S. 593, 613 (1995) (Scalia, J., concurring in part and dissenting in part) ("[T]he jury is entitled to presume that a person intends the natural and probable consequences of his acts."); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 514 n.19 (1979) (Rehnquist, J., dissenting) ("[T]he law presumes that one intends the natural and probable consequences of one's actions or inactions."); *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 570 n.22 (1973) (Marshall, J., concurring in the result) ("Indeed, perhaps the oldest rule of evidence—that a man is presumed to intend the natural and probable consequences of his acts—is based on the common law's preference for objectively measurable data over subjective statements of opinion and intent.").

sense precisely because evidence of what was foreseeable often tends to prove what the actor actually desired to bring about.<sup>154</sup>

This interpretation of the fiction, however, offers little help for theoretical opposition to double effect. If the substantial certainty test of intent is warranted only because of its value in establishing the actual “desired” intent of the actor, it actually confirms the distinction between intent and mere foreknowledge.<sup>155</sup> While it may be the case in tort law that a conclusive legal presumption of intent exists based on evidence of the foreseen natural and probable consequences of one’s action, it would be a logical fallacy to conclude either that the two are equivalent in reality or, without further argument, that such a conclusive presumption applies in all legal contexts.

#### b. Increased Foreseeability of Harm and Intent

The evidentiary usefulness of the substantial certainty test of intent is, however, not the only justification that supports its adoption as a criterion of liability. As the very notion of the law of negligence provides, a person can be culpable for bringing about foreseeable harmful effects precisely when the person does not intend such effects.<sup>156</sup> Applying a similar criterion of liability to situations in which unlawful harms are foreseen with substantial certainty though not intended, it appears appropriate to impose greater liability. Culpability exists *a fortiori* because the actor foresees with even more certainty that some unlawful harm will be the result.

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154. “[H]is thoughts must be gathered from his words (if any) and actions in the light of all the surrounding circumstances. Naturally, what he does and what foreseeably results from his deeds have a bearing on what he may have had in his mind.” 1 LAFAYE, *supra* note 144, § 5.2(f), at 357.

155. The distinction between the two is clearly reflected in one court’s justification of the presumption rule:

[T]his fiction is grounded upon sound policy, for, as outlined above, a rule focusing on foreseeable, rather than intended, consequences operates in sensible and fair fashion to deter the conduct sought to be avoided and to punish those whose actions are blameworthy, even though undertaken for purposes that may or may not be culpable.

United States v. Neiswender, 590 F.2d 1269, 1274 (4th Cir. 1979). If it proves true, however, that some acts are unlawful only if they are shown to have a culpable purpose, the automatic operation of the fiction would in fact be improper. See *infra* notes 182-92 and accompanying text.

156. For an analysis of the operation of double effect in negligence law—an analysis that supports and corroborates application of the principle in the context of the legal analysis of intentional constitutional conduct addressed in the present Article—see Edward C. Lyons, *Balancing Acts: Intending Good and Foreseeing Harm—the Principle of Double Effect in the Law of Negligence*, 3 GEO. J. L. & PUB. POL’Y (forthcoming 2005).

Similar to the philosophical “package deal” argument considered in Part II,<sup>157</sup> Glanville Williams noted that “one type of case in which it is reasonable to say that an undesired consequence can be intended in law is in respect of known certainties.”<sup>158</sup> Williams provides the example of the pain and discomfort associated with a dental visit.<sup>159</sup> Williams states that although the actor does not desire the pain in itself, “[i]t is accepted not as an end in itself but as part of the package, and the package as a whole is desired—otherwise one would not go to the dentist.”<sup>160</sup> Here, Williams merely restates his view, articulated years earlier, that “[w]hen a result is foreseen as certain, it is the same as if it were desired or intended.”<sup>161</sup>

The attempt to collapse intent as purpose and intent as “substantial certainty” under a legal version of the “package deal” theory is, however, subject to two significant deficiencies. First, the *Restatement’s* treatment of substantial certainty “as if” it were actual intent creates an onus to *explain why* the two cases should be treated the same. Reiterating that consequences are intentional because they follow conduct with substantial certainty merely restates the question. The propriety of treating such consequences *as* intentional is the very point at issue. Secondly, the “package deal” argument assumes that the law, in fact, always treats purposeful causing of harm the same as it treats causing foreseen but undesired harm—the very thesis denied by the Supreme Court in *Quill*.<sup>162</sup>

Ultimately, then, any final evaluation of the proper scope and justification for treating “substantial certainty” as a *de jure* proxy for actual intent requires investigation of whether any contrary instances exist in the law—whether instances can be found in the law when actors are not held liable for consequences that are foreseen with substantial certainty. If such instances exist, they may provide insight into the justification for when it is *not* appropriate to treat an actor “*as if he had in fact desired to produce the result*”<sup>163</sup> and, more importantly, confirm a place for double effect analysis in the law.

### B. Intent as “Purpose”—*Vacco v. Quill*

This inquiry turns discussion directly to consideration of *Quill’s* claim that “the law distinguishes actions taken ‘because of’ a given end from actions taken ‘in spite of’ their unintended but foreseen consequences”<sup>164</sup>

157. See *supra* note 90 and accompanying text.

158. Glanville Williams, *Oblique Intention*, 46 CAMBRIDGE L.J. 417, 418 (1987).

159. *Id.*

160. *Id.*

161. WILLIAMS, *supra* note 11, at 286.

162. See *Vacco v. Quill*, 521 U.S. 793, 801-02 (1997).

163. RESTATEMENT (SECOND) OF TORTS § 8A cmt. b (1965) (emphasis added).

164. *Quill*, 521 U.S. at 802-03 (quoting *Pers. Adm’r v. Feeney*, 442 U.S. 256, 279 (1979)).



and its further claim that such a distinction “comports with fundamental legal principles of causation and intent.”<sup>165</sup> Although the opinion, as noted in the introduction to this Article, has been criticized for offering “precious little argumentation or analysis”<sup>166</sup> for its reliance on double effect, it cannot be said to have offered no justification. In support of its claim, the Court cited a number of cases, in differing substantive legal contexts, that clearly distinguish between an actor causing an effect purposefully as opposed to causing that same effect with substantial certainty.<sup>167</sup>

### 1. Criminal Law

The Court offers a defense of its reliance on the double effect intended/foreseen distinction first by citing cases in the constitutional criminal law context that consider various forms of culpable mental states of mind or *mens rea* required to convict actors of criminal violations.<sup>168</sup>

#### a. *Morissette v. United States*<sup>169</sup>

In *Morissette*, the Court was called upon to determine whether a federal statute prohibiting theft of government property required only proof that the actor voluntarily took property that did not belong to him or, more specifically, required proof that the actor knew the property belonged to the government.<sup>170</sup> Rejecting the position that no specific knowledge or purposeful intent was required, the Court engaged in a lengthy consideration of the common law’s requirement of proof of *mens rea*.<sup>171</sup> The Court concluded that Congress would not have eliminated all *mens rea* requirements in codifying a common law crime without indicating that it meant to do so.<sup>172</sup>

Examining the particular mental state required for conviction under the statute before it, the Court observed that Congress employs a variety of mental state distinctions.<sup>173</sup> In the course of this analysis, the Court

165. *Id.* at 801.

166. RICH, *supra* note 7, at 142; *see supra* text accompanying note 7.

167. *Quill*, 521 U.S. at 802-03.

168. *Id.*

169. 342 U.S. 246 (1952), *cited in Quill*, 521 U.S. at 802.

170. *Id.* at 247-48, 260.

171. *Id.* at 250-63.

172. *Id.* at 262-63.

173. *Id.* at 264. The Court stated:

Congress has been alert to what often is a decisive function of some mental element in crime. It has seen fit to prescribe that an evil state of mind, described variously in one or more such terms as “intentional,” “willful,” “knowing,” “fraudulent” or “malicious,” will make criminal an otherwise indifferent act, or

expressly recognized that “[k]nowledge . . . is not identical with intent.”<sup>174</sup> Although the Court concluded that the statute at issue only required proof of “knowledge” that the property belonged to the United States for conviction, the Court observed that Congress sometimes “required a specific intent or purpose.”<sup>175</sup>

As an example of such a requirement, the *Morissette* Court referred to its holding in *Cramer v. United States*,<sup>176</sup> where it interpreted the Constitution’s requirement that “[t]reason against the United States, shall consist . . . in adhering to their Enemies, giving them Aid and Comfort.”<sup>177</sup> In *Cramer*, the Court had held that conviction for treason requires not only proof of acts that knowingly aid and comfort the enemy but also a finding that the accused had the specific intent of siding with, or “adhering” to, the foreign country by means of such acts—“if there is no adherence to the enemy in this, if there is no intent to betray, there is no treason.”<sup>178</sup> If an actor simply were aware that conduct had the consequence of aiding and comforting the enemy, but had no purpose of betraying the United States,<sup>179</sup> conviction for treason would be improper.

Following this citation to *Cramer* as illustrating a specific intent crime, the Court in *Morissette* turned its attention to a related evidentiary issue concerning whether a jury could presume an actor’s traitorous intent based merely on the foreseeable consequences of the actor’s conduct.<sup>180</sup> In *Morissette*, the trial court had instructed the jury that the legal presumption of the actor’s intent to steal or convert government property existed if it were proven that the defendant voluntarily took the property in question.<sup>181</sup>

This issue, as already indicated, is important because the evidentiary inference that can be drawn from proof of the “natural and probable consequences” of conduct offers significant support for the *Restatement’s* conclusive presumption that actors be treated “as if” they had actual intent—especially when there is evidence that they were “substantially

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increase the degree of the offense or its punishment.

*Id.* (footnote call number omitted).

174. *Id.* at 270.

175. *Id.* at 264-65.

176. *Id.* at 265 & n.27 (citing *Cramer v. United States*, 325 U.S. 1 (1945)).

177. *Cramer*, 325 U.S. at 53-54 (quoting U.S. CONST. art. III, § 3, cl. 1).

178. *Id.* at 29.

179. *Cramer* offers the example of an actor aiding the enemy by engaging in conduct for the purpose of “profiteering.” *Id.* “Profiteering” is defined as “The taking advantage of unusual or exceptional circumstances to make excessive profits . . . during war.” BLACK’S LAW DICTIONARY 1247 (8th ed. 2004).

180. *Morissette*, 342 U.S. at 275.

181. *Id.* at 249.

certain” of the consequences.<sup>182</sup> Some legal commentators argue that it is this very presumption that undermines *Quill*’s attempt to assert that anything like double effect can operate in the law. If the law posits a presumption of intent from foreseen effects, any attempt to distinguish intent from foreknowledge will be inappropriate. As one commentator states:

[M]ost problematic from a legal perspective, . . . DDE [(the doctrine of double effect)] accepts the proposition that the bad effect may be foreseeable but nonetheless unintended. The law, to the contrary, presumes that a person intends the natural and probable consequences of his or her actions. . . . Since intent is an essential element of many criminal offenses, the prosecution’s burden of proof could never be met unless such a presumption were in place.<sup>183</sup>

Expressly contradicting this assertion, however, *Morissette* and its progeny unequivocally hold that, in many criminal law contexts, operation of a mandatory presumption is unconstitutional. The Supreme Court has held that, in at least some criminal law contexts, an irrebutable presumption of a defendant’s intent based on the natural and probable consequences of his or her conduct conflicts with a defendant’s right to a presumption of innocence beyond a reasonable doubt and thus interferes with the right to a jury trial.<sup>184</sup>

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182. See *supra* notes 145-50 and accompanying text.

183. RICH, *supra* note 7, at 143; Rich also has stated:

[T]he law (the Supreme Court’s decisions in the physician-assisted suicide cases to the contrary notwithstanding) has traditionally postulated the presumption that every person of sound mind intends the natural and probable (i.e., foreseeable) consequences of her actions. From that perspective, there is no principled moral distinction between the consequences of one’s actions that are intended and those that are merely foreseen.

Ben Rich, *Double Effect and Medical Ethics*, UC DAVIS MED., Spring 2004, at <http://www.ucdmc.ucdavis.edu/ucdavismedicine/alumni/ethics.html> (last visited Mar. 2, 2005).

Rich’s view, if correct, would not only disprove double effect but also undermine attempts to rationally distinguish intentional and negligent conduct. If, as Rich asserts, no principled basis exists for distinguishing between causing foreseeable natural and probable effects of conduct and causing intended effects, many cases of negligently inflicted harm should be treated as intentional harming. For further elaboration of this critique, see generally Lyons, *supra* note 156.

184. *Morissette*, 342 U.S. at 275.

In the later cases of *Sandstrom v. Montana*<sup>185</sup> and *Francis v. Franklin*,<sup>186</sup> the Court, relying upon its holding in *Morrisette*, further developed its legal reflections upon presumptions of intent.<sup>187</sup> In *Sandstrom*, the jury was instructed that “[t]he law presumes that a person intends the ordinary consequences of his voluntary acts.”<sup>188</sup> In *Francis*, the instruction was that “[a] person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted.”<sup>189</sup> Rejecting the constitutionality of both jury instructions, the Court found that no *mandatory* presumption of intent based on evidence of the natural and probable consequences of conduct was proper, even if it merely created a presumption that shifted the burden of proof to the defendant to rebut.<sup>190</sup> In a comment especially relevant for present purposes, the Court in *Sandstrom* observed, “[A] defendant’s state of mind or intent is an element of a criminal . . . offense which . . . cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent from proof of an effect.”<sup>191</sup> Instead, the Court found that only an instruction that informed the jury that it *may conclude or not* under all the circumstances that evidence of the natural and probable consequences of effects established actual intent was constitutional.<sup>192</sup>

*Morrisette*’s discussion of specific intent crimes with reference to *Cramer* and its rejection of the constitutionality of conclusive, mandatory presumptions based on “proof of an effect” disproves the claim of double effect opponents that the law always regards an actor as intending the “natural and probable consequences” of conduct. Moreover, that discussion also rebuts the claim that the law allows no distinction to be drawn between actors engaging in conduct purposefully and engaging in conduct when effects are foreseen to follow with substantial certainty. Instead, *Morrisette* and its related cases support the contrary conclusions—that in certain contexts, the law allows for a distinction to be made between what an actor intends and what an actor foresees and that actual intent cannot always be presumed based on the foreseen “natural and probable consequences” of conduct.

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185. 442 U.S. 510 (1979).

186. 471 U.S. 307 (1985).

187. *Francis*, 471 U.S. at 313; *Sandstrom*, 442 U.S. at 522.

188. 442 U.S. at 513.

189. 471 U.S. at 309.

190. *Francis*, 471 U.S. at 313-18; *Sandstrom*, 442 U.S. at 521-24.

191. *Sandstrom*, 442 U.S. at 523 (emphasis omitted) (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 435 (1978)).

192. *Id.* at 523-24. “[T]he fact-finder *may* (but need not) conclude under those circumstances that *A* intended to kill *B*. . . . [T]he matter is reduced to an inference (or ‘permissive presumption’) rather than a true presumption of the mandatory sort.” 1 LAFAYE, *supra* note 144, § 5.2(f), at 356.

b. *United States v. Bailey*<sup>193</sup>

In *Bailey*, another case cited in *Quill* supporting its reliance on double effect analysis, the Court was presented with the following issue: whether conviction for the crime of unlawfully escaping from federal custody requires a purposeful intent to avoid confinement or simply proof of intent to avoid inhumane conditions with the concomitant knowledge that fleeing such conditions entails leaving federal confinement.<sup>194</sup> Although the Court eventually concluded that the statute required only that the defendant “knew his actions would result in his leaving physical confinement without permission,”<sup>195</sup> the Court, expanding on its reasoning in *Morissette*, again engaged in extended analysis of *mens rea* in criminal law.

Rejecting analysis of the case under the traditional categories of “specific intent” versus “general intent” because of ambiguities associated with those terms in different contexts,<sup>196</sup> the Court turned attention to the American Law Institute’s *Model Penal Code* (MPC) section 2.02(1) for articulation of the mental states required for culpability.<sup>197</sup> The Court focused particular attention upon the distinction drawn between an actor engaging in conduct “purposely” and an actor engaging in conduct merely “knowingly.”<sup>198</sup> Summarizing this distinction, the Court in *Bailey* stated:

[A] person who causes a particular result is said to act purposefully if “he consciously desires that result, whatever the likelihood of that result happening from his conduct,” while he is said to act knowingly if he is aware “that that result is practically certain to follow from his conduct, whatever his desire may be as to that result.”<sup>199</sup>

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193. 444 U.S. 394 (1980), cited in *Quill*, 521 U.S. 793, 802 (1997).

194. *Id.* at 401.

195. *Id.* at 408.

196. *Id.* at 403 (citing WAYNER. LAFAYE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW § 28, at 201-02 (1972)).

197. Section 2.02(1) provides in relevant part: “[A] person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.” MODEL PENAL CODE § 2.02(1) (1962).

The Foreword to the MPC lists thirty-four states that revised their criminal codes between 1962 and 1983. *Foreword* to MODEL PENAL CODE (1962). Some scholars assert a smaller impact of the MPC upon state law. See, e.g., Danye Holley, *The Influence of the Model Penal Code’s Culpability Provisions on State Legislatures: A Study of Lost Opportunities, Including Abolishing the Mistake of Fact Doctrine*, 27 SW. U. L. REV. 229, 236 (1997) (asserting that twenty-two states had adopted the MPC’s basic culpability structure).

198. *Bailey*, 444 U.S. at 403-06.

199. *Id.* at 404 (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 445 (1978) (quoting LAFAYE & SCOTT, *supra* note 196, at 196)). The MODEL PENAL CODE provides in relevant part:

(a) Purposely.

In discussing these differing bases for imposing liability, the Court observed that often a distinction between “purposely” and “knowingly” is irrelevant because ““there is good reason for imposing liability whether the defendant desired or merely knew of the practical certainty of the results.””<sup>200</sup> The Court went on to observe, however, that sometimes the law does take account of the difference between purpose and knowledge.<sup>201</sup> Referring again to the law of treason taken up in *Morissette*,<sup>202</sup> the Court offered two additional legal contexts in which the distinction between purpose and knowledge is relevant for imposing liability in criminal law: 1) the inchoate criminal offenses of attempt and conspiracy and 2) the law of homicide.<sup>203</sup>

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A person acts purposely with respect to a material element of an offense when . . . it is his conscious object to engage in conduct of that nature or to cause such a result . . . .

(b) Knowingly.

A person acts knowingly with respect to a material element of an offense when . . . he is aware that it is practically certain that his conduct will cause such a result.

§ 2.02(2).

200. *Bailey*, 444 U.S. at 404 (quoting *United States Gypsum Co.*, 438 U.S. at 445 (quoting LAFAYE & SCOTT, *supra* note 196, at 197)).

The Court in *United States Gypsum Co.* noted that, when a business engages in anticompetitive behavior, the certainty of the consequences of which are clear to the perpetrator after having expressly weighed the costs, benefits, and risks, there is no reason not to impose criminal liability for producing effects the law prohibits. 438 U.S. at 445-46.

A requirement of proof not only of . . . knowledge of likely effects, but also of a conscious desire to bring them to fruition or to violate the law would seem . . . both unnecessarily cumulative and unduly burdensome. Where carefully planned and calculated conduct is being scrutinized in the context of a criminal prosecution, the perpetrator’s knowledge of the anticipated consequences is a sufficient predicate for a finding of criminal intent.

*Id.*

201. *Bailey*, 444 U.S. at 404-05.

202. The *Bailey* Court cited its decision in *Haupt v. United States*, 330 U.S. 631 (1947). *Bailey*, 444 U.S. at 405. In *Haupt*, the father of a German saboteur was tried for treason based on allegations that he had provided his son with lodging and other aid and comfort. *Haupt*, 330 U.S. at 632-33. In order to ascertain liability, the jury was instructed that if the “defendant’s intention was not to injure the United States but merely to aid his son ‘as an individual, as distinguished from assisting him in his purposes, if such existed, of aiding the German Reich, or of injuring the United States, the defendant must be found not guilty.’” *Id.* at 641. Mere knowledge of the son’s unlawful plans did not automatically transform otherwise normal fatherly actions into traitorous comfort and aid. *Id.* The conviction was affirmed only because other evidence showed the father’s purposeful approval of the son’s efforts to aid the enemy. *Id.* at 642.

203. *Bailey*, 444 U.S. at 405.

In the crimes of attempt and conspiracy, the Court cited to the MPC's discussion providing that "in attempts, complicity and conspiracy . . . a true purpose to effect the criminal result is requisite for liability."<sup>204</sup> Attempts or conspiracies to commit a crime require in many instances more than mere knowledge that one's actions might have the effect of furthering or bringing about a particular result that is criminalized under the law. Instead, conviction often requires proof that the actor purposely intended that his conduct either bring about the unlawful result or further the criminal enterprise.<sup>205</sup>

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204. *Id.*; MODEL PENAL CODE § 2.02 cmts. (1962).

205. *E.g.*, *Hartzel v. United States*, 322 U.S. 680, 681-82 & n.2, 689 (1944) (reversing a defendant's conviction for violation of Espionage Act of 1917 which prohibited the "attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States"). The Court in *Hartzel* held that, although the defendant had circulated pamphlets that might have had the effect of causing such results among draft-age persons, no attempt to violate the Act could be found because no evidence permitted the inference beyond a reasonable doubt that the defendant had "a specific intent or evil purpose at the time of the alleged overt acts to cause insubordination or disloyalty in the armed forces." *Id.* at 686-87. LaFave cites this case to support his claim that "there are several areas of the criminal law in which there may be good reason for distinguishing between one's objectives and knowledge." 1 LAFAVE, *supra* note 144, § 5.2(b), at 342-43.

Many states adopt the MODEL PENAL CODE approach with respect to attempt, e.g.:

[O]ur State legislature manifested a desire to treat intent and knowledge as distinct mental states when imposing criminal liability for conduct. Consequently, the difference between intent and knowledge should not be treated as a metaphysical distinction which can be ignored. Knowledge is not intent as defined by our statutes . . . . Accordingly . . . in a prosecution for attempted murder . . . the incompatible elements must be omitted from the jury instructions.

*People v. Kraft*, 478 N.E.2d 1154, 1160 (Ill. App. Ct. 1985). "Knowledge that the consequences of an accused's act may result in death (or grave bodily injury) . . . is not enough; specific intent to kill is required. Both the indictment and the instructions must unambiguously reflect this." *People v. Jones*, 405 N.E. 2d 343, 346 (Ill. 1980) (citation omitted).

The law of conspiracy is similar in many contexts. *See, e.g.*, ARK. CODE ANN. § 5-3-401(1)(A) (Michie 2005) ("A person conspires to commit an offense if with the purpose of promoting or facilitating the commission of any criminal offense . . . [h]e agrees with another person or other persons [to] . . . engage in conduct that constitutes that offense . . . ."); N.H. REV. STAT. ANN. § 629:3(I) (2005) ("A person is guilty of conspiracy if, with a purpose that a crime defined by statute be committed, he agrees with one or more persons to commit or cause the commission of such crime . . . ."). As one court has construed such statutory languages:

[O]ne must have "the purpose of promoting or facilitating the commission of any criminal offense." This phrasing serves to exclude from the provision's application persons who engage in conduct that furthers the ends of a conspiracy, but who have no purpose to do so. This is so even if the person knows his conduct assists in the accomplishment of criminal objectives . . . .

The *Bailey* Court noted that in the law of homicide, statutory or common law “often distinguishes, either in setting the ‘degree’ of the crime [homicide] or in imposing punishment, between a person who knows that another person will be killed as the result of his conduct and a person who acts with the specific purpose of taking another’s life.”<sup>206</sup> Apart from any discussion of killing another in contexts involving self-defense—where clearly defensive intentions of the actor play a significant role—purposeful homicide is consistently punished more severely than conduct merely foreseen to have as a consequence the death of another. As Wayne LaFave observes, “a majority [of jurisdictions] . . . classify intentional and knowing killings differently.”<sup>207</sup>

Careful examination of the import of *Quill*’s references to *Morissette* and *Bailey*, and their related cases, establishes that in restricted but significant instances the law distinguishes between an actor purposely intending an effect and an actor foreseeing that effect with substantial certainty as the “natural and probable consequence” of his conduct. Considering those cases requiring a specific purpose over and above mere knowledge, one significant reason justifying this requirement appears to be that the criminal prohibition at issue is aimed not just at preventing some objective harm, but precisely at punishing a certain type of subjective human conduct, conduct that is *purposefully* aimed at that unlawful result. Considering the examples of treason, attempt, conspiracy, and homicide, it is not unreasonable to infer that a unique degree of culpability is and should be imposed when the actor *purposefully* sets out to engage in wrongdoing that causes those harms. As the drafters of the MPC observe:

[A]ction is not purposive . . . unless it was his conscious object to perform an action of that nature or to cause such a result. It is meaningful to think of the actor’s attitude as

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Cate v. State, 606 S.W.2d 764, 766-67 (Ark. 1980).

206. 444 U.S. at 405.

207. 1 LAFAVE, *supra* note 144, § 14.2(a), at 429. Colorado, for example, like numerous other states, defines the degrees of murder and distinguishes punishment precisely on the basis of purpose versus knowledge. COLO. REV. STAT. ANN. § 18-3-102 (West 2005). Section 18-3-102 provides: “A person commits the crime of murder in the first degree if . . . [a]fter deliberation and with the intent to cause the death of a person other than himself, he causes the death of that person or of another person.” *Id.* § 18-3-102(1)(a). Section 18-3-103 provides: “A person commits the crime of murder in the second degree if the person knowingly causes the death of a person.” *Id.* § 18-3-103(1). First degree murder is punishable by life imprisonment or death with no possibility of parole, while second degree murder is punishable by eight to twenty-four years imprisonment with parole possible after five years. *Id.* § 18-1.3-401(1)(a)(V)(A); *see also* ARK. CODE ANN. §§ 5-10-102, 5-10-103, 5-4-401 (Michie 2005); N.H. REV. STAT. ANN. §§ 630:1-a, 630:1-b (2005); TENN. CODE ANN. §§ 39-13-202, 39-13-210, 40-35-111 (2005).



different if he is simply aware that . . . the prohibited result is practically certain to follow from his conduct.<sup>208</sup>

## 2. Constitutional Equal Protection Law

The *Quill* Court's additional reliance on *Personnel Administrator of Massachusetts v. Feeney*<sup>209</sup> to support its double effect analysis corroborates these points. It is from *Feeney* that the Court draws its explicit statement that "the law distinguishes actions taken 'because of' a given end from actions taken 'in spite of' their unintended but foreseen consequences."<sup>210</sup>

In *Feeney*, a female plaintiff brought an action alleging that a Massachusetts statute extending a preference for veterans in civil service hiring violated her rights under the Equal Protection Clause.<sup>211</sup> The preference for veterans overwhelmingly operated in favor of male applicants.<sup>212</sup> Rejecting the plaintiff's claim, the Court observed that the Equal Protection Clause "guarantees equal laws, not equal results."<sup>213</sup>

The Court went on to explain that no constitutional violation occurs when a rational law, neutral on its face, happens to have a disproportionate impact on one segment of the population.<sup>214</sup> The Court stated that correcting for any such effects is the province of legislatures: "The calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility."<sup>215</sup> The Court further stated that even when purportedly neutral laws have a "disproportionately adverse effect" upon a specially protected class, such as a specific gender or race, violation of equal protection exists "only if that impact can be traced to a *discriminatory purpose*."<sup>216</sup>

In support of this assertion, the *Feeney* Court cited to *Washington v. Davis*.<sup>217</sup> In *Davis*, Caucasians passed a mandatory governmental employment test in significantly greater numbers than African-

208. MODEL PENAL CODE § 2.02 cmt. 2 at 233.

209. 442 U.S. 256 (1979).

210. *Vacco v. Quill*, 521 U.S. 793, 802-03 (1997) (quoting *Feeney*, 442 U.S. at 279 (1979)).

211. 442 U.S. at 259.

212. *Id.*

213. *Id.* at 273, 281.

214. *Id.* at 272 ("When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern.").

215. *Id.*

216. *Id.* (emphasis added). "Certain classifications . . . in themselves supply a reason to infer antipathy. . . . This rule applies as well to a classification that is ostensibly neutral but is an obvious pretext for racial discrimination." *Id.*

217. *Id.* at 273 (citing 426 U.S. 229 (1976)).

Americans.<sup>218</sup> A race-based equal protection challenge to the exam was rejected on the ground that “there had been no showing that racial discrimination entered into the establishment or formulation of the test.”<sup>219</sup>

Applying this standard for liability, the Court in *Feeney* found that, although the preference did favor males disproportionately in its effect, it was neutral on its face because it disadvantaged all nonveterans, male or female.<sup>220</sup> In attempting to establish a discriminatory purpose behind this purportedly neutral policy, however, the plaintiff argued that proof of the legislature’s discriminatory intent could be based on “the presumption . . . that a person intends the natural and foreseeable consequences of his voluntary actions.”<sup>221</sup> The plaintiff argued:

[T]here is no reason to absolve the legislature from awareness that the means chosen to achieve this goal would freeze women out of all those state jobs actively sought by men. . . . [T]he cutting-off of women’s opportunities was an inevitable concomitant of the chosen scheme—as inevitable as the proposition that if tails is up, heads must be down. Where a law’s consequences are *that* inevitable, can they meaningfully be described as unintended?<sup>222</sup>

Responding to the plaintiff’s question of whether such inevitably foreseeable discrimination could be described as “unintended,” the Court stated that the “rhetorical question implies that a negative answer is obvious, but it is not.”<sup>223</sup> Instead, the Court carefully distinguished the meaning of “intent” as “purpose” from its broader, less precise meaning that also encompassed mere acceptance of foreseen adverse consequences of conduct.<sup>224</sup> The Court stated, “‘Discriminatory purpose,’ however,

218. *Id.*

219. *Id.*

220. *Id.* at 275. “Veteran status is not uniquely male. Although few women benefit from the preference, the nonveteran class is not substantially all female. To the contrary, significant numbers of nonveterans are men, and all nonveterans—male as well as female—are placed at a disadvantage.” *Id.*

221. *Id.* at 278.

222. *Id.* (quoting *Feeney v. Massachusetts*, 451 F. Supp. 143, 151 (D. Mass. 1978) (Campbell, J., concurring)). As one commentator has summarized the foreseeability of the damages: “Not only was the adverse impact on women ‘severe,’ it was also fully foreseeable prior to adoption of the policy and crystal clear during its years of operation.” Mark S. Brodin, *The Role of Fault and Motive in Defining Discrimination: The Seniority Question Under Title VII*, 62 N.C. L. REV. 943, 976-77 (1984) (footnote call number omitted).

223. *Feeney*, 442 U.S. at 278.

224. *Id.* at 278-79. “The decision to grant a preference to veterans was of course ‘intentional.’ So, necessarily, did an adverse impact upon nonveterans follow from that decision. . . . It would thus be disingenuous to say that the adverse consequences of this legislation for women were

implies more . . . . It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”<sup>225</sup>

Because the plaintiff in *Feeney* offered no evidence that the legislature enacted the preference “because of” a purpose to discriminate against women instead of merely “in spite of” that foreseen, arguably inevitable consequence, the Court found no violation of equal protection.<sup>226</sup> Illustrating how a permissive rather than mandatory presumption of intent properly operates in such a situation, the Court explained:

[W]hen the adverse consequences of a law upon an identifiable group are . . . inevitable . . . a strong inference that the adverse effects were desired can reasonably be drawn. But in this inquiry—made as it is under the Constitution—an inference is a working tool, not a synonym for proof. . . . [H]ere, the inference simply fails to ripen into proof.<sup>227</sup>

*Feeney*, like the other cases cited by the Supreme Court in *Quill*, supports the view that double effect analysis is clearly present in the law. Although governmental conduct may have inevitable and foreseeable consequences—even involving disproportionate effects on constitutionally protected classes—as long as a rational nondiscriminatory purpose justifies such action, the law finds nothing impermissible or unconstitutional in the conduct.<sup>228</sup>

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unintended, *in the sense* that they were not volitional or in the sense that they were not foreseeable.” *Id.* at 278 (emphasis added).

225. *Id.* at 279.

226. *See id.* at 279, 281.

227. *Id.* at 279 n.25. Although the Court rejected proof of intent based on merely the certainty of the foreseen consequences, this does not deny that sometimes a discriminatory purpose can be inferred from circumstantial evidence. One particularly important factor will be whether the defendant can offer evidence of an alternative, legitimate interest served by the decision and the unavailability of less discriminatory alternatives. *Cf. Brodin, supra* note 222, at 976 (listing the relevant factors for proof of discrimination). Apparently, the plaintiff in *Feeney* failed to offer such evidence. *See* 442 U.S. at 274-75.

228. Courts continue to regularly cite *Feeney* in cases finding that an unintentional disparate impact upon certain classes of persons is constitutional. *See, e.g., Anderson v. Cornejo*, 355 F.3d 1021, 1024 (7th Cir. 2004) (rejecting a claim that a higher rate of airport searches of African-American women than some other groups denoted racial discrimination and stating that “searches designed to catch smugglers comport with the Constitution even if they produce a disparate impact”); *United States v. Moore*, 54 F.3d 92, 96-97 (2d Cir. 1995) (rejecting a claim that a sentencing ratio equating one hundred grams of cocaine to one gram of crack constitutes discrimination against African-Americans because “Congress had a valid reason for mandating

*Feeney* also confirms the view that what is at play in statutes distinguishing purpose from mere knowledge is precisely the effort to isolate for punishment the greater culpability associated with actual intent. In limiting or increasing liability for purposeful acts, legislatures presumably seek to impose greater punishment and deterrence upon acts that involve especially egregious “attitudes” or “desires” of the actors. In such cases, these interior dispositions or “purposes” are considered wrong in addition to the “objective” harm brought about by such conduct. As evidenced by the equal protection claims asserted in *Davis* and *Feeney*, the constitutional prohibition against discrimination appears aimed not so much at eradicating racial and gender distinctions wherever found and however caused, but rather primarily at prohibiting such discrimination when it results from a specific mental state: *purposeful* discrimination.

### 3. Synopsis

*Quill*'s reliance on *Morissette*, *Bailey*, *Feeney*, and their related cases substantiates the Court's claim that a legitimate legal distinction can be drawn between types of conduct distinguished only by the mental state of the actor. While such a distinction is not recognized by the law in all contexts, the law will sometimes treat actions that purposely have an unlawful effect as their intended goal in a way different from the way that it treats actions foreseen but not intended to bring about that same effect. As discussed above, the driving force behind such a distinction is found in the view that sometimes law is concerned not merely with punishing an actor for the effects of conduct but with punishing a unique type of subjective culpability—that associated with an actor's purposeful intent.

#### C. *Intent as “Purpose”—Applicability in Other Areas of Constitutional Law*

Before turning to consider application of double effect in *Quill* directly, it is important to note that corroboration of *Quill*'s basic insight regarding the law's recognition of a distinction between intent and knowledge is reflected

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harsher penalties for crack as opposed to powder cocaine: the greater accessibility and addictiveness of crack”) (quoting *United States v. Stevens*, 19 F.3d 93, 97 (2d Cir. 1994)); *Jones v. Bd. of Comm'rs*, 737 F.2d 996, 1004 (11th Cir. 1984) (rejecting the claim of African-American applicants that bar rules forbidding applicants to the bar from taking the bar exam more than five times were discriminatory and noting that the applicants “make no charge that [the Board of Commissioners] adopted the five-time rule even in part because of its discriminatory impact on blacks.”); *Soberal-Perez v. Heckler*, 717 F.2d 36, 42 (2d Cir. 1983) (rejecting the claim of Hispanic plaintiffs that the failure of the Secretary of Health and Human Services to provide forms and services in Spanish constituted a violation of the Equal Protection Clause and stating that “[i]t is not difficult for us to understand why the Secretary decided that forms should be printed and oral instructions given in the English language: English is the national language of the United States”).

in other areas of constitutional law not cited by *Quill*. In order to corroborate *Quill*'s holding and to highlight the operation of double effect in other legal contexts, the following section shall consider additional examples in constitutional law where a distinction is drawn between intent and knowledge.

### 1. First Amendment Law

In the context of free exercise, establishment, and free speech claims, clear distinctions are drawn in the law between the intention of governmental action and incidental but foreseen effects caused by such action. In each substantive area of constitutional law, the Court clarifies that the boundary of culpability in many instances is demarcated precisely by the distinction between the effects that the government specifically intends by its conduct and the incidental effects that flow from that intended conduct, which in one way or another, may interfere with general constitutional values such as freedom of religion, separation of church and state, and freedom of speech.

#### a. Free Exercise

In *Employment Division, Department of Human Resources v. Smith*,<sup>229</sup> the Court rejected a free exercise claim of two Native Americans challenging an Oregon statute prohibiting use of the hallucinogen peyote.<sup>230</sup> The Court held that “if prohibiting the exercise of religion . . . is not the object . . . but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.”<sup>231</sup> In support of the Court’s holding, it expressly cited *Washington v. Davis*,<sup>232</sup> connecting a constitutional “purposeful” intent requirement under the Free Exercise Clause to the “discriminatory purpose” intent requirement applied in *Feeney* under the Equal Protection Clause.<sup>233</sup>

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229. 494 U.S. 872 (1990). The plaintiffs, members of the Native American Church whose religious practices included use of peyote, were denied state unemployment compensation based on their work-related “misconduct” of peyote ingestion—conduct constituting a felony in the State of Oregon. *Id.* at 874; see OR. REV. STAT. § 475.992(4) (2005); OR. ADMIN. R. 855-080-0021(3)(v) (2005).

230. *Smith*, 494 U.S. at 878-79. In its opinion, the majority asserted that over one hundred years of free exercise jurisprudence contradicted any proposition that asserted that “an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.” *Id.*

231. *Id.* at 878.

232. 426 U.S. 229 (1976).

233. *Smith*, 494 U.S. at 886 n.3.

Though foreseen to interfere with a citizen's exercise of religious practice, *Smith* provides that as long as the intent or purpose of the law is neutral with respect to religion—conceals no invidious purpose to hinder the free exercise of religion—and is generally applicable, any detrimental effect upon religious practice caused by it would not constitute grounds for alleging a violation of the Free Exercise Clause.

According to the Court in *Smith*, the Free Exercise Clause's language that "Congress shall make no law . . . prohibiting the free exercise [of religion]"<sup>234</sup> forbids only acts purposely aimed at burdening religious practice.<sup>235</sup> On such an interpretation of the term "prohibit," a generally applicable, neutral law, whether it directly proscribes or compels action, does not impermissibly "prohibit" free exercise. Though such a law may foreseeably interfere with conduct that for some citizens constitutes acts that have religious significance, this negative impact on free exercise is viewed merely as an unintended incidental or fortuitous effect of the neutral law.<sup>236</sup>

The presence of double effect analysis in *Smith* is obvious. Oregon's governmental purpose clearly was the effective enforcement of its drug laws.<sup>237</sup> *Smith* provides that as long as a legitimate purpose exists, and the

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234. U.S. CONST. amend. I (emphasis added).

235. See *Smith*, 494 U.S. at 878.

236. The *Smith* Court's holding was, and continues to be, highly controversial and provided the impetus for Congress to pass the Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (codified at 5 U.S.C. § 504, 42 U.S.C. §§ 2000bb to 2000bb-4 (1994)). Though the Supreme Court found in *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997), that the RFRA was unconstitutional as applied to the States, there is still debate concerning its applicability to federal statutes and regulations. See, e.g., Patrick K.A. Elkins, Comment, *The Devil You Know!: Should Prisoners Have the Right to Practice Satanism?*, 41 HOUS. L. REV. 613, 634 n.218 (2004) (describing a split in the federal circuits regarding the continuing applicability of the RFRA to federal law).

For further discussion of the notion of "prohibition" and the Supreme Court's "intent" requirement under the Free Exercise Clause, see Douglas W. Kmiec, *The Original Understanding of the Free Exercise Clause and Religious Diversity*, 59 U. MO.-K.C. L. REV. 591, 597-98 (1991), and Edward C. Lyons, Note, *Oregon v. Smith and the Religious Freedom Restoration Act: An Educational Perspective*, 20 J.C. & U.L. 333, 340 n.31 (1994).

237. Justice O'Connor, in her concurring opinion, concluded that Oregon's interest in enforcing its drug statutes was not only reasonable but constituted a "compelling interest": "There is also no dispute that Oregon has a significant interest in enforcing laws that control the possession and use of controlled substances by its citizens. . . . [R]espondents do not seriously dispute that Oregon has a compelling interest in prohibiting the possession of peyote by its citizens." *Smith*, 494 U.S. at 904-05 (O'Connor, J., concurring in the judgment).

Justice O'Connor's concurrence illustrates that double effect analysis is equally applicable even if claims are reviewed under strict scrutiny or any other constitutional standard. Requiring that the governmental interest be compelling and narrowly tailored in view of the burden on citizens' activities does not change the analysis under double effect, except by increasing the standard for what sufficiently counts as a reasonably intended good to justify the unintended harm. Application

statute is neutral with respect to religion, the Constitution does not prohibit foreseen but unintended effects that may incidentally burden religious practices.<sup>238</sup>

### b. Establishment

Interpreting the Establishment Clause of the First Amendment providing that “Congress shall make no law respecting an establishment of religion,”<sup>239</sup> the Supreme Court in *Lemon v. Kurtzman*<sup>240</sup> developed its well-known three-prong test for determining whether an Establishment Clause violation has occurred:

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. . . . First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute

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of strict scrutiny would not alter the operation of double effect analysis because it still permits the unintentional but foreseen negative effect on religious practices. As Justice O’Connor concedes:

To say that a person's right to free exercise has been burdened, of course, does not mean that he has an absolute right to engage in the conduct. Under our established First Amendment jurisprudence . . . the freedom to act, unlike the freedom to believe, cannot be absolute. Instead, we have respected both the First Amendment’s express textual mandate and the governmental interest in regulation of conduct by requiring the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest.

*Id.* at 894 (O’Connor, J., concurring in the judgment) (citation omitted).

238. *Accord* *Miller v. Reed*, 176 F.3d 1202, 1205-07 (9th Cir. 1999) (holding that denial of a driver’s license based on religiously motivated refusal to provide a social security number did not violate free exercise rights); *Hines v. S.C. Dep’t of Corr.*, 148 F.3d 353, 358 (4th Cir. 1998) (holding that a neutral prison grooming policy requiring all male inmates to keep their hair short and remain clean-shaven did not violate the inmates’ right to free exercise of religion); *Swanson ex rel. Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 703 (10th Cir. 1998) (holding that a school district’s financially based, neutral regulation denying home-schooled children the right to attend classes at a public school part-time did not violate the free exercise of rights of parent to direct the student’s education); *Intercommunity Ctr. for Justice and Peace v. INS*, 910 F.2d 42, 43, 46 (2d Cir. 1990) (holding that the Immigration Reform and Control Act requiring employers to verify the residence and immigration status of employees did not violate the free exercise rights of a religious organization whose beliefs compelled its adherents to provide employment to persons in need without regard to residence, nationality, or immigrant status).

239. U.S. CONST. amend. I.

240. 403 U.S. 602 (1971).

must not foster “an excessive government entanglement with religion.”<sup>241</sup>

Although application of the *Lemon* test has a controversial history, and the Court has struggled for consistency in its application over the years,<sup>242</sup> more recent cases, at least those relating to governmental involvement in aid to sectarian schools,<sup>243</sup> hold that as long as the intent of a legislative act is not to purposely aid religion, unintentional incidental benefits accruing to a religion that result from such action can be permissible under the Constitution.

In *Agostini v. Felton*,<sup>244</sup> for example, the Court, applying the *Lemon* test, considered the constitutionality of a federally funded program providing on-site remedial instruction to disadvantaged children at private, religiously affiliated institutions.<sup>245</sup> Under the applicable federal statute, any student qualified who resided in a low-income public school district and who was at risk of failing the state’s performance standard.<sup>246</sup> The federal program required that program funds be made available “to all eligible children, regardless of whether they attend public schools”<sup>247</sup> and that “services provided to children [at] private schools must be ‘equitable in comparison to services and other benefits for public school children.’”<sup>248</sup>

Reviewing the statute under the *Lemon* test, the Court recognized, without discussion, that the program in question clearly had a “‘secular legislative purpose’” in seeking to provide remedial assistance with respect

241. *Id.* at 612-13 (citation omitted) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970)).

242. Members of the Court have, for example, suggested tests distinct from the *Lemon* test as appropriate for evaluating Establishment Clause violations: “[W]hile there continues to be indications of adherence to the *Lemon* Test, the Court has at least suggested the use of other tests in analyzing Establishment Clause challenges.” Laura J. Bach, Note, *For God or Grades? States Imposing Fewer Requirements on Religious Home Schoolers and the Religion Clauses of the First Amendment*, 38 VAL. U. L. REV. 1337, 1365 (2004).

243. “The debate over the impermissible establishment of religion has historically been played out, in large part, in the nation’s public schools. It is in this context that courts and legislatures have attempted to determine when and if public funds can be used to aid private religious schools.” Robert A. Dietzel, Comment, *The Future of School Vouchers: A Reflection on Zelman v. Simmons-Harris and an Examination of the Blaine Amendments as a Viable Challenge to Sectarian School Aid Programs*, 2003 MICH. ST. DCL L. REV. 791, 793 (2003).

244. 521 U.S. 203 (1997).

245. *Id.* at 209, 219-22. The program, provided pursuant to Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 6301-7941, channeled federal funds to the states to provide remedial education and other secular assistance to enable qualifying students to meet “[s]tate student performance standards.” *Agostini*, 521 U.S. at 209-10 (quoting § 6315(c)(1)(A)).

246. 20 U.S.C. § 6315(a), (b)(1)(B).

247. *Agostini*, 521 U.S. at 209 (citing 20 U.S.C. § 6312(c)(1)(F)).

248. *Id.* at 209-10 (quoting 20 U.S.C. § 6320(a)(3)).



to secular state educational performance standards.<sup>249</sup> What remained at issue, however, was whether the program had the impermissible principal or primary “‘effect’ of advancing or inhibiting religion”<sup>250</sup> and thus triggered the “excessive entanglement” element of the *Lemon* test—an element that the court noted often involved the same considerations.<sup>251</sup> Discussing circumstances under which a violation of the Establishment Clause might be found, the Court indicated that these elements centered around the question of whether the governmental conduct had the effect of “‘inculcati[ng] . . . religious belief[.]”<sup>252</sup> Based on two of its recent Establishment Clause decisions, the Court found that no such effect or entanglement existed and that the Title I program was constitutional.<sup>253</sup>

First, the Court noted that it had already rejected the view that the mere physical presence of governmental employees on the grounds of private religious institutions “‘inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion.”<sup>254</sup> Further, the Court noted that when governmental funds are “‘made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited,” no impermissible effect of direct assistance occurs.<sup>255</sup> Rather,

249. *Id.* at 218-19 (quoting *Sch. Dist. v. Ball*, 473 U.S. 373, 382-83 (1985)).

250. *Id.* at 223.

251. *Id.* at 232-33. “Thus, it is simplest to recognize why entanglement is significant and treat it . . . as an aspect of the inquiry into a statute’s effect.” *Id.* at 233.

252. *Id.* at 223. “As we have repeatedly recognized, government inculcation of religious beliefs has the impermissible effect of advancing religion.” *Id.*

253. *Id.* at 234 (citing *Bowen v. Kendrick*, 487 U.S. 589, 613-14 (1988); *Witters v. Wash. Dep’t of Servs. for Blind*, 474 U.S. 481, 488-89 (1986)). “New York City’s Title I program does not run afoul of any of three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion: it does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement.” *Id.*

254. *Agostini*, 521 U.S. at 223 (citing *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993)). In *Zobrest*, the parents of a deaf child attending a Catholic high school brought an action under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1487 (2000), seeking to require the school district to provide an on-premises interpreter for their child. *Zobrest*, 509 U.S. at 3. The Supreme Court held that provision of such an interpreter would not violate the Establishment Clause: “When the government offers a neutral service on the premises of a sectarian school as part of a general program that ‘is in no way skewed towards religion,’” it follows under our prior decisions that provision of that service does not offend the Establishment Clause. *Id.* at 10 (citation omitted) (quoting *Witters*, 474 U.S. at 488).

255. *Agostini*, 521 U.S. at 225 (quoting *Witters*, 474 U.S. at 487 (quoting *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 782-83 (1973))). In *Witters*, a blind student pursuing biblical studies at a Christian college appealed the denial, based on establishment grounds, of financial aid from the Washington Commission for the Blind. *Witters*, 474 U.S. at 483-84. The Supreme Court held that the First Amendment did not preclude the state from extending assistance under a vocational rehabilitation assistance program to a blind person who chose to study at a Christian college. *Id.* at 487-88. Summarizing the holding of *Witters*, the Court in *Agostini* held

comparing such instances to a government employee donating his paycheck to charity, aid to any private religious educational programs under such conditions comes about “‘only as a result of the genuinely independent and private choices of’ individuals.”<sup>256</sup>

Parallel with the unintentional but foreseen *burdens* that may be imposed upon free exercise of religion under *Smith*, the unintentional but foreseen *benefits* that run to religion under *Lemon*, at least as applied in cases such as *Agostini* and the cases upon which it relies, provide no basis for a finding of unconstitutionality. Similar to the operation of double effect analysis in the Free Exercise Clause context under *Smith*,<sup>257</sup> the *Lemon* test, at least in certain circumstances, recognizes no Establishment Clause violation when a neutral, generally applicable statute or program purposely aims at achieving a legitimate secular end—even though it may have the unintended, incidental effect of benefiting religion in particular circumstances.<sup>258</sup>

### c. Free Speech

In *United States v. O’Brien*,<sup>259</sup> David Paul O’Brien alleged constitutional infringement of his Free Speech rights based on his indictment and conviction for burning his selective service registration certificate (draft card).<sup>260</sup> O’Brien argued that he had burned his card “to influence others to adopt his antiwar beliefs . . . and reevaluate their place in the culture of today” and claimed that the prohibition against destruction

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that:

[W]e have departed from the rule . . . that all government aid that directly aids the educational function of religious schools is invalid. In *Witters* we held that the Establishment Clause did not bar a State from issuing a vocational tuition grant to a blind person who wished to use the grant to attend a Christian college and become a pastor, missionary, or youth director. Even though the grant recipient clearly would use the money to obtain religious education, we observed that the tuition grants were “‘made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited.’”

*Agostini*, 521 U.S. at 225 (citation omitted) (quoting *Witters*, 474 U.S. at 487 (quoting *Nyquist*, 413 U.S. at 782-83 n.38)).

256. *Agostini*, 521 U.S. at 226 (quoting *Witters*, 474 U.S. at 487).

257. See *supra* Part III.C.1.a.

258. See *Agostini*, 521 U.S. at 225-26. As seen in *Zobrest* and *Witters*, *supra* notes 254-55, if such incidental benefits arise as incidental and unintentional effects of applying neutral federal programs or regulations, they often can provide not inconsequential benefits to religious groups.

259. 391 U.S. 367 (1968).

260. *Id.* at 369-70. The Universal Military Training and Service Act, 50 U.S.C. §§ 451-471a, as modified by 1965 amendments, created criminal liability for anyone who “‘knowingly destroys [or] knowingly mutilates’” the certificate. *Id.* § 462(b).

of the card therefore was unconstitutional because it “was enacted to abridge free speech, and because it served no legitimate legislative purpose.”<sup>261</sup>

Rejecting O’Brien’s claim and affirming the conviction, the Supreme Court found that even if the “communicative element” of O’Brien’s conduct was “sufficient to bring into play the First Amendment,” it did not “follow that the destruction of a registration certificate [was] constitutionally protected.”<sup>262</sup> Instead, distinguishing the regulation of conduct that had both “nonspeech” and “speech” elements, the Court found that “a sufficiently important governmental interest in regulating the nonspeech element [of conduct] can justify incidental limitations on First Amendment freedoms.”<sup>263</sup>

Disagreeing with O’Brien’s contention that the legislative prohibition against mutilation or destruction of the certificates was intentionally or purposely directed at curtailing the speech element, the Court found that the regulation was imposed for a variety of substantial reasons unrelated to the suppression of symbolic speech. These included proving registration for the draft, determining immediate fitness, or lack thereof, for the draft in a case of national emergency, facilitating communications between the registrant and the proper local board, and reminding the registrant of the continuing obligation to notify the local board of any change in address or status.<sup>264</sup>

Similar to other First Amendment examples considered above, *O’Brien* provides another instance where governmental conduct intentionally aimed at certain important ends can permissibly have unintended but foreseen consequences, incidentally restricting the free speech of citizens without violating the First Amendment.<sup>265</sup>

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261. *O’Brien*, 391 U.S. at 370.

262. *Id.* at 376.

263. *Id.*

264. *Id.* at 378-79.

265. *Cf. Zalewska v. County of Sullivan*, 180 F. Supp. 2d 486, 491-92 (S.D.N.Y. 2002) (rejecting the plaintiff’s claim that a regulation requiring employees to wear pants violated her First Amendment right to wear a skirt as an expression of her cultural values and holding that the nonspeech professional and safety purpose of the dress code justified any incidental burden on the plaintiff’s rights); *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 329 (S.D.N.Y. 2000) (rejecting the plaintiff’s free speech challenge to a law forbidding distribution of computer code capable of “circumventing . . . access control measures” and holding that “the anti-trafficking provision of the DMCA had nothing to do with suppressing particular ideas of computer programmers and everything to do with functionality—with preventing people from circumventing technological access control measures,” similar to “laws prohibiting the possession of burglar tools [which] have nothing to do with preventing people from expressing themselves by accumulating what to them may be attractive assortments of implements and everything to do with preventing burglaries”); *Isaacs ex rel. Isaacs v. Bd. of Educ.*, 40 F. Supp. 2d 335, 338 (D. Md. 1999) (holding

#### d. Synopsis

The First Amendment free exercise, establishment, and free speech cases considered above all illustrate that, in certain circumstances, unintended and incidental effects may be permitted under the Constitution that would not be permissible under the same conditions if they were the purposeful and intended goal of governmental action.<sup>266</sup> In each case, while

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that a school's "no hats" policy did not violate the First Amendment rights of a girl who wished to wear an African headwrap to celebrate her African-American and Jamaican heritage because "[i]t is . . . abundantly clear that the school's interest in banning hats in the classroom to foster a good learning environment is unrelated to the suppression of free expression"); *Humanitarian Law Project v. Reno*, 9 F. Supp. 2d 1176, 1188 (C.D. Cal. 1998) (holding that a law forbidding material support to terrorist organizations did not infringe on the First Amendment rights of citizens who wished to donate to these groups because the law's "burden on Plaintiffs' right to make political contributions to the [terrorist groups] is not imposed because the government disfavors the political speech promoted by the [terrorist groups], as distinguished from the political views of other groups not subject to the statute," but rather "Congress prohibits all material support to the [terrorist groups], because pursuant to her delegated authority, the Secretary has determined that these organizations engage in terrorist activity that threatens 'the national defense, foreign relations, or economic interests of the United States'") (footnote call number omitted) (quoting 8 U.S.C. § 1189(d)(2) (1994)); *In re C.P.K.*, 615 N.W.2d 832, 836 (Minn. Ct. App. 2000) (rejecting the plaintiff's free speech claim based on punishment for burning crosses on school grounds in violation of statute against "incendiary devices" and holding that "the statute here regulates explosive or incendiary devices without regard to ideas expressed"); *State v. Vaughn*, 29 S.W.3d 33, 38-39 (Tenn. Crim. App. 1998) (holding that a motorcycle helmet law did not impinge on the free speech rights of bikers who wished to express their respect for their dead comrade by riding sans helmets because "the statute requiring helmets is content-neutral, as it has no relation to speech or other forms of expressive conduct, nor does it seek to suppress expression as its purpose," and because "[t]he state interest of protecting the safety of motorcyclists on public roadways would indeed be less effective without a regulation requiring the cyclists to wear protective headgear").

266. In some instances, such as the content limitation on free speech in cases of "fighting words," intentional restrictions on some constitutional rights may be permitted under various standards of justification such as a "compelling interest test" or other such tests. *See, e.g.,* *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (affirming the constitutionality of an intentional prohibition on speech that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action"). In such instances, however, greater justification is demanded than is required to justify unintentional, incidental effects like those subject to *Smith*.

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993), for example, the Supreme Court noted that some intentional governmental conduct is never permissible. "[A] law targeting religious *beliefs* as such is never permissible." *Id.* (emphasis added). On the other hand, sometimes the government may seek to intentionally prohibit particular religious *practices*. *See id.* In such a case, however, "the law is not neutral and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Id.* (citation omitted).

Although double effect most often is taken up in contexts where the intended harm is never permissible because it is always ethically prohibited, as in the intentional killing of an innocent person, sometimes such absolute harms are not at issue and a weaker application of double effect is possible. In other words, while it may be permissible to intentionally cause some harmful effect,

demanding that the conduct be justified by a countervailing governmental interest significant enough to justify those effects, the Court also specifically required that such effects be unintentional and incidental. Tracking the analysis under double effect, these cases provide further instances in the law where the foreseen/intended distinction constitutes a necessary condition justifying unintentional incidental restrictions on conduct otherwise constitutionally protected.<sup>267</sup>

## 2. Civil Rights Law

Similar considerations can be found in Fourteenth Amendment civil rights cases, often involving issues concerning private employers' alleged violation of one or more federal statutes protecting employees from adverse employment actions based on race, sex, age, etc.<sup>268</sup> In general,

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that intentional harming would require a greater justification than when harm was merely an unintentional, foreseen side effect.

As one philosopher expresses this weaker application of double effect: "According to one of the common readings of [double effect], the pursuit of a good tends to be *less acceptable* where a resulting harm is intended as a means than where it is merely foreseen." Warren S. Quinn, *Actions, Intentions, and Consequences: The Doctrine of Double Effect*, in *THE DOCTRINE OF DOUBLE EFFECT*, *supra* note 32, at 23, 23 (emphasis added). In such a case, the principle of double effect still holds true in asserting that *under the same circumstances* it would not be permissible intentionally to cause a harm that may permissibly be caused as a foreseen, unintended side effect.

267. Consistent with the additional conditions under double effect, when the governmental interest is not strong enough, even unintentional burdens on conduct will not be permissible. In a free speech context, for example, even if the incidental burden on the speech aspect of conduct is only incidental (i.e., unintended), that will sometimes not be justified because the governmental purpose is not proportionate to the incidental burden. *See, e.g., Bellecourt v. City of Cleveland*, 789 N.E.2d 1133, 1138 (Ohio Ct. App. 2003) (holding that the burning of an effigy of the Native American sports mascot Chief Wahoo implicated free speech rights and that the city's interest in preventing the safety hazard was not sufficient to justify restricting burning the effigy on a paved area barricaded from the public), *rev'd in part on other grounds*, 820 N.E.2d 309 (Ohio 2004).

268. Title VII of the Civil Rights Act provides in relevant part:

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

allegations of such unlawful discrimination break down into two distinct categories of claims: disparate *treatment* claims and disparate *impact* claims.

#### a. Disparate Treatment

In disparate treatment claims, the plaintiff-employee is required to prove that the defendant-employer intentionally subjected him or her to adverse employment action because of race, sex, age, nationality, etc, and thus must prove express discriminatory intent or motive. In *St. Mary's Honor Center v. Hicks*,<sup>269</sup> a case involving a disparate treatment claim based on race, the Court cited to its early Title VII decision in *McDonnell Douglas Corp. v. Green*,<sup>270</sup> holding that a plaintiff can establish a prima facie case of discriminatory intent by proving by a preponderance of the evidence,

(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.<sup>271</sup>

As the Court clarified in *Hicks*, to avoid a compelling presumption of discriminatory motive or intent, the burden of going forward then shifts to the employer "to rebut the prima facie case—*i.e.*, the burden of 'producing evidence' that the adverse employment actions were taken 'for a legitimate, nondiscriminatory reason.'"<sup>272</sup> Assuming that the employer is able to provide such evidence, the plaintiff is then permitted to present evidence that the employer's "stated reason for . . . rejection was in fact pretext."<sup>273</sup> Under *Hicks*, the presumption created by the prima facie case at that point drops out and the "trier of fact proceeds to decide the ultimate question: whether plaintiff has proven 'that the defendant intentionally

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42 U.S.C. § 2000E-2(a) (2000).

269. 509 U.S. 502 (1993).

270. 411 U.S. 792 (1973).

271. *Id.* at 802, cited in *Hicks*, 509 U.S. at 506.

272. *Hicks*, 509 U.S. at 507.

273. *Id.* at 530 n.5 (Souter, J., dissenting) (quoting *McDonnell Douglas Corp.*, 411 U.S. at 804).

discriminated against [him]’ because of his race.’<sup>274</sup>

In *Hicks*, an African-American employee alleged that he had been demoted and fired because of his race.<sup>275</sup> Despite a promising start and promotion as a correctional officer at a halfway house, the employee, after coming under the authority of a new immediate supervisor, was subjected to various disciplinary actions and eventually fired.<sup>276</sup> The trial court held that the employee had established a prima facie case of discrimination by demonstrating that he was African-American, was qualified for the position, was demoted and fired, and that the position was thereafter open until filled by a Caucasian.<sup>277</sup> The employer responded that it did not take the adverse action against the employee because of his race, but rather because of the employee’s violations of the company rules and the severity and number of violations.<sup>278</sup>

The Supreme Court in *Hicks* ruled that this evidence was sufficient to rebut the presumption created by the plaintiff’s prima facie case and remanded for further proceedings.<sup>279</sup> On remand, the district court held that although the reasons given for firing the employee were pretextual because the employers were in fact motivated by personal animosity unrelated to the race of the employee.<sup>280</sup> Hence, the employee was not fired because of racial discrimination.

This judgment was, in turn, discussed and affirmed by the court of appeals, which pointed out several salient facts supporting the conclusion that the employee was not demoted and fired because of race.<sup>281</sup> These facts included a high percentage of African-Americans in the company’s workforce, the review board that recommended disciplinary action was nearly half composed of African-Americans, and half the supervisory positions at the company were offered to African-Americans.<sup>282</sup>

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274. *Id.* at 511 (quoting *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981)).

275. *Id.* at 505.

276. *Id.* at 504-05.

277. *Id.* at 506 (citing *McDonnell Douglas Corp.*, 411 U.S. at 804).

278. *Id.* at 505.

279. *Id.* at 507, 525.

280. *Hicks v. St. Mary’s Honor Ctr.*, No. 88-109C(5), 1995 WL 879968, at \*4 (E.D. Mo. Aug. 31, 1995), *aff’d*, 90 F.3d 285 (8th Cir. 1996).

281. *Hicks*, 90 F.3d at 286-87.

282. *Id.* at 291.

### b. Disparate Impact<sup>283</sup>

In disparate impact claims, unlike in disparate treatment claims, there is no requirement that the plaintiff prove that the defendant-employer intentionally subjected an employee to adverse action because of race, religion, nationality, etc. Rather, the gravamen of the action is simply that when an employer's facially neutral employment policy is not justified by a business necessity, any disparate effect upon a protected class or employee caused by that policy is prohibited.<sup>284</sup> As the Supreme Court stated in *Griggs v. Duke Power Co.*, developing and applying disparate impact analysis to Title VII discrimination claims, "Congress directed the thrust of the [Civil Rights] Act [of 1964] to the *consequences* of employment practices, not simply the motivation."<sup>285</sup>

Similar to the procedural burden-shifting regimen seen in disparate treatment claims above, the Court in *Griggs* and its progeny, and Congress in the Civil Rights Act of 1991,<sup>286</sup> provide that in order to present a prima facie case a plaintiff must present specific evidence that an employer's

283. In reference to disparate impact, one commentator notes:

[D]isparate impact is actionable under only a subset of federal antidiscrimination legislation. Examples go both ways: The Americans with Disabilities Act reaches disparate impact, see 42 U.S.C. § 12112(b)(3)(A) (2000), but the Age Discrimination in Employment Act may not, see Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (2000); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (declining to decide whether disparate impact theory is available under ADEA); *id.* at 618 (Kennedy, J., concurring) (noting that there are substantial reasons disparate impact analysis should not apply under the ADEA). Title VI, which prohibits racial discrimination in any program receiving federal funding, has no express disparate impact standard in its original text, and unlike with Title VII, none has been read in by judicial construction. . . . As the above discussion shows, the set of federal antidiscrimination statutes is too varied to make it possible to say that Congress either does or does not hold an antidiscrimination norm that reaches disparate impact.

Richard A. Primus, *Bolling Alone*, 104 COLUM. L. REV. 975, 1027 n.187 (2004).

284. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

285. *Id.* at 432 (emphasis added). "[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Id.*

Note that the constitutional equal protection analysis based on claims of disparate impact analysis differs from that under Title VII. Under the constitutional analysis, as seen above, specific discriminatory intent must be found, although at times the evidence may permit it to be *inferred* from a disparate impact. In Title VII, no such actual discriminatory intent need be found so long as there is a disparate impact that is not justified by business necessity. The Supreme Court ultimately rejected the Title VII disparate impact analysis with regard to constitutional equal protection claims in *Washington v. Davis*, 426 U.S. 229, 239 (1976).

286. 42 U.S.C. § 2000e-2(k)(1)(a)(i) (2000).



facially neutral employment practice has a disparate impact based on race, color, religion, or another protected class.<sup>287</sup> In defense, the employer may offer proof that “the challenged practice is job related for the position in question and consistent with business necessity.”<sup>288</sup> If the employer is able to provide such evidence, no violation of civil rights will be found. If, on the other hand, the employer is unable to show that the employment practice in question is necessary for the carrying on of its business, it will be found to have violated Title VII.<sup>289</sup>

In *Griggs*, an employee alleged that promotion policies within an electric generating plant had an adverse effect upon African-Americans.<sup>290</sup> Although the company had decided to permit African-American employees to work outside of its Labor department, it adopted a policy requiring a high school education to transfer out of Labor into a higher paying department.<sup>291</sup> Additionally, the company required all employees placed outside of Labor to pass two aptitude tests.<sup>292</sup> A study of standardized testing, including the tests issued in this case, established that only six percent of African-Americans passed the tests compared to fifty-eight percent of Caucasians.<sup>293</sup>

The company responded that the education and testing requirements were added to “improve the overall quality of the work force.”<sup>294</sup> Evidence presented at trial, however, established that workers who had been admitted to non-Labor sectors before these requirements were imposed performed satisfactorily despite their lack of high school education or a passing score on aptitude tests.<sup>295</sup> Although there was no assertion that the company had a discriminatory intent, the court ruled that the policies of the company had a unlawful disparate impact on African-American employees.<sup>296</sup>

287. See, e.g., *Griggs*, 401 U.S. at 429-31.

288. 42 U.S.C. § 2000e-2(k)(1)(a)(i); Title VII also explicitly prohibits employers from claiming that intentional discrimination is justified by business necessity. *Id.* § 2000e-2(k)(2); see also *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52-53 (2003) (distinguishing between the burden-shifting approaches in disparate treatment versus disparate impact cases).

289. A plaintiff may also prevail even if an employer shows a business necessity when there is evidence that there is a non discriminatory “alternative employment practice and the respondent refuses to adopt such alternative employment practice.” 42 U.S.C. §§ 2000e-2(k)(1)(A)(ii), 2000e-2(k)(1)(C).

290. *Griggs*, 401 U.S. at 427-28.

291. *Id.* at 427.

292. *Id.* at 427-28.

293. *Id.* at 430 n.6.

294. *Id.* at 431.

295. *Id.* at 431-32.

296. *Id.* at 432, 436.

### c. Synopsis

The operation of double effect analysis is present, although with differences, in both disparate treatment and disparate impact analyses. In either case, intentional purposeful discrimination against an employee on the basis of one or more of the protected categories is always unlawful. At the same time, however, under differing conditions, unintentional incidental adverse employment action against members of protected classes may be permitted.

The difference is found in the contrasting requirements an employer must satisfy in order to justify that incidental detrimental effect. In disparate treatment cases, so long as the employer offers a legitimate nondiscriminatory reason that is not a mere pretext, its actions will be lawful.<sup>297</sup> In disparate impact cases, however, the employer must offer a justification that shows that the policy behind its discriminatory practices is necessary for the carrying on of its business.<sup>298</sup> Absent such a showing, the employer's policy, even if rationally related to its business pursuits, will not be lawful.

Both types of cases reflect the basic premise of double effect that unintentional, foreseen side effects are permissible if justified by a sufficiently reasonable purpose. As the law provides, what constitutes a sufficiently good purpose varies in disparate treatment and disparate impact cases.<sup>299</sup>

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297. See *supra* note 272 and accompanying text.

298. See *supra* note 288 and accompanying text.

299. The rationale for this distinction, though not obvious at first, finds its logic in a variety of considerations. First, there are significantly different penalties imposed upon employers in each case. Under amendments to federal law under the Civil Rights Act of 1991, compensatory and punitive damages are allowed for intention-based disparate treatment claims while the remedies available for disparate impact claims are only reinstatement and back pay. 42 U.S.C. § 1981(a)(1) (2000) ("In an action brought by a complaining party under . . . the Civil Rights Act of 1964 . . . against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) . . . the complaining party may recover compensator and punitive damages . . . from the respondent."); see *id.* § 2000e-5(g)(1).

In disparate treatment cases involving intentional discrimination and the potential for greater punishment, the law logically sets up a higher burden for the plaintiff and an easier defense for the employer. In disparate impact cases, however, where plaintiffs are not required to prove discriminatory intent, and damages are allowed only for reinstatement and back pay, employers have a heavier burden in defending their policies. Further, while cases often can be brought under both theories on the same set of facts, disparate treatment cases often involve limited, acute adverse employment actions taken against single individuals whereas disparate impact cases often involve the application of company-wide discriminatory policies with potentially wider-ranging discriminatory class-action effects.

#### D. Conclusion

Contrary to strong statements asserted by opponents of double effect in reaction to the Court's express reliance on double effect in *Quill*, the preceding considerations amply illustrate that no inherent inconsistency exists between double effect analysis and legal conceptions of intent and culpability. In fact, within circumscribed but not rare circumstances, constitutional law recognizes, both for determining liability and imposing punishment, that a relevant distinction exists between the intentional or purposeful causing of effects and the causing of similar effects as merely foreseen or incidental side effects of conduct. Of particular significance, the Supreme Court's rejection in multiple contexts of the propriety of mandatory legal presumptions of intent based on the foreseeable and probable effects of conduct explicitly disproves the claim that the law requires a finding that actors "intend" the substantially certain consequences of their conduct.

While it is true that double effect analysis does not carry over into all areas of law, for example, in the law of intentional torts, no doubt exists that in important areas of constitutional criminal law, First Amendment jurisprudence, and federal civil rights, the distinction between specifically intending certain effects and merely foreseeing effects plays a pivotal role in liability determinations. Such an analysis belies any assertion that double effect "has had little effect on legal analysis . . . and it is far from clear how useful it is in distinguishing between permissible and impermissible actions."<sup>300</sup> Contrary to this contention, double effect, in fact if not in name, has been shown to operate regularly at the most fundamental level of culpability analysis in numerous areas of constitutional law, providing a rational and apparently uncontroversial basis for distinguishing conduct that is lawful from that which is not.

#### IV. THE *QUILL* DECISION

Having established in Parts II and III, both philosophically and as corroborated in case law, that a difference bearing significant ethical and legal import exists between intending an effect and merely foreseeing that effect as an unintended consequence of one's conduct, it remains to consider whether the Supreme Court's analysis in *Quill* comports with these insights.

Without reiterating the facts, procedural background, or case law relied upon by the Supreme Court in *Quill* to support its double effect thesis, it is clear that controversy over the opinion centers on the Court's conclusion

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300. MENIKOFF, *supra* note 13, at 343; *see supra* note 13 and accompanying text.

that physician-assisted suicide can be rationally distinguished from accepted forms of medical treatment for the terminally ill solely on the basis of the actors' differing states of mind.<sup>301</sup>

In *Quill*, the Court found that physician-assisted suicide specifically requires that participants “‘must, necessarily and indubitably, intend primarily that the patient be made dead.’”<sup>302</sup> In withholding life support and palliative care, however, the Court found that the patient and physician need not have any such intent, although they may indeed foresee that the patient will die—the treatments “‘have the foreseen but unintended ‘double effect’ of hastening the patient’s death.”<sup>303</sup> Based on the Court’s finding that as opposed to physician-assisted suicide, these latter forms of treatment entail no purposeful intent to kill, the Court held that New York law distinguishing them had a rational basis and did not violate the Equal Protection Clause.<sup>304</sup>

The determination, however, of whether the distinction made between physician-assisted suicide and the other forms of conduct at issue in *Quill* actually satisfies the conditions required by the principle of double effect requires further consideration. In this context, it will be necessary and beneficial to consider in some detail those arguments made in other lower courts and Supreme Court decisions bearing directly on the issues raised in *Quill*.

#### A. *Withholding of Life Support and Physician-Assisted Suicide*

Rejecting plaintiffs’ constitutional equal protection claim, the district court in *Quill* described the difference between physician-assisted suicide and the withholding of life support in the following manner:

Plaintiffs . . . argue that . . . refusal of [life support] treatment is essentially the same thing as committing suicide with the advice of a physician. . . . To certain ways of thinking, there may appear to be little difference between refusing treatment in the case of a terminally ill person and taking a dose of medication which leads to death. But to another way of thinking there is a very great difference. In any event, it is hardly unreasonable or irrational . . . to recognize a difference between allowing nature to take its

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301. See *supra* notes 1-10, 24-29 and accompanying text.

302. *Vacco v. Quill*, 521 U.S. 793, 802 (1997) (quoting *Assisted Suicide Hearing*, *supra* note 26, at 367 (prepared statement of Leon R. Kass, M.D., Addie Clark Harding Professor, The College and Committee on Social Thought, University of Chicago)).

303. *Id.* at 807 n.11.

304. *Id.* at 794.

course, even in the most severe situations, and intentionally using an artificial death-producing device.<sup>305</sup>

Thus, in the opinion of the district court, death in physician-assisted suicide results directly from the biological effect on the patient's body caused by the lethal drug prescribed by the physician. In the case of withdrawal of artificial life support such as a respirator or a kidney dialysis machine, however, the court indicates that death is directly caused, not by withdrawal of that support, but by "allowing nature to take its course,"<sup>306</sup> that is, from the inability of the patient, arising out of an underlying pathological state, to breathe or to purge blood of its toxins.

Reminiscent of the discussion of double effect in Aquinas,<sup>307</sup> the withholding of life support can be understood to have two foreseen effects: one is the patient's relief from the burden of treatment that promises no substantial benefit and the other is the death of the patient. In such a case, it is argued that double effect is satisfied because the intended good effect is the relief from burdensome, futile treatment. Such relief, however, does not come about by means of the death of the patient but by the removal of the burdensome treatment itself. While such withholding may have the foreseeable result of causing the death of the patient due to his or her compromised physical state, death does not function, either physically or in the intentional plan of the actors, as the means to the intended relief, but is merely a concomitant effect of removing the burdensome medical treatment.

Physician-assisted suicide, on the other hand, fails to track double effect in any analogous manner. While the provision of a lethal dose of drugs is arguably aimed at a permissible end—the patient's relief from suffering—it is not the case that the death of the patient caused by the drugs functions either physically or in the mind of the actors as an unintended concomitant side effect of some neutral means chosen to relieve suffering. Rather, it is precisely the killing of the patient that is the physician's and patient's goal in prescribing and accepting the lethal dosage and that itself functions as the intended means to the relief from suffering. As explained in Part II, however, double effect excludes intentionally causing evil as a means to a good end.

The court of appeals in *Quill*, however, bolstered by statements of Justice Scalia in his concurrence in *Cruzan v. Director, Missouri Department of Health*,<sup>308</sup> rejected the propriety of the district court's

305. *Quill v. Koppell*, 870 F. Supp. 78, 84 (S.D.N.Y. 1994), *rev'd sub nom.* *Quill v. Vacco*, 80 F.3d 716 (1996), *rev'd*, 521 U.S. 793 (1997).

306. *Id.*

307. *See supra* Part II.B.

308. 497 U.S. 261, 296-97 (Scalia, J., concurring).

analysis of the distinction between physician-assisted suicide and the withholding of life support.<sup>309</sup> In *Cruzan*, Justice Scalia had denied properly designating an act as “suicide” merely based on a distinction between whether death resulted from a positive act or from mere “passive acceptance of the natural process of dying.”<sup>310</sup> Scalia pointed out that an actor can commit suicide by omission as well as commission.<sup>311</sup> Elaborating this point, he observed:

It would not make much sense to say that one may not kill oneself by walking into the sea, but may sit on the beach until submerged by the incoming tide; or that one may not intentionally lock oneself into a cold storage locker, but may refrain from coming indoors when the temperature drops below freezing.<sup>312</sup>

Fastening on Scalia’s comments in *Cruzan*, the court of appeals in *Quill* rebuffed the district court’s distinction between physician-assisted suicide and the withdrawal of life support as positive killing versus merely “allowing nature to take its course.”<sup>313</sup> Instead, the court of appeals ruled in favor of the plaintiffs on their equal protection claim, citing further statements made by Scalia in *Cruzan* asserting that what properly characterizes a “suicide” (either by omission or commission) is that “the cause of death in both cases is the suicide’s conscious decision to ‘pu[t] an end to his own existence.’”<sup>314</sup> The court of appeals concluded without argument or discussion that, in agreeing to withhold life support, a patient makes an intentional decision to do precisely that, and it held that withdrawal of life support was in fact a permissible form of suicide:

New York law does not treat equally all competent persons who are in the final stages of fatal illness and wish to hasten their deaths . . . .

. . . .

. . . [T]hose in the final stages of terminal illness who are on life-support systems are allowed to hasten their deaths by directing the removal of such systems; but those who are similarly situated, except for the previous attachment of life-

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309. *Quill v. Vacco*, 80 F.3d 716, 729 (2d Cir. 1996), *rev’d*, 521 U.S. 793 (1997).

310. *Cruzan*, 497 U.S. at 296 (Scalia, J., concurring).

311. *Id.* at 296-97 (Scalia, J., concurring).

312. *Id.* at 296 (Scalia, J., concurring).

313. *Quill*, 80 F.3d at 729.

314. *Id.* (quoting *Cruzan*, 497 U.S. at 296-97 (Scalia, J., concurring)) (alteration in original).

sustaining equipment, are not allowed to hasten death by self-administering prescribed drugs. . . .

. . . The ending of life by these means is nothing more nor less than assisted suicide.<sup>315</sup>

### 1. Justice Scalia's Concurrence in *Cruzan*

The court of appeals in *Quill*, however, seriously misconstrued Justice Scalia's point in *Cruzan*. It assumed that he was asserting that any decision of a patient or physician to omit some action having the foreseeable effect of causing death was a "suicide." Justice Scalia's point was much more circumscribed.

In Scalia's view, two considerations are relevant in determining whether a patient may ethically refuse medical treatment. First, and most importantly, such treatment is not proper if the omission is exercised with the intended purpose of suicide. Second, assuming that the intended purpose of the treatment is not the death of the patient, the good that *is* intended by the omission must be justified in light of the foreseen effect of the patient's death.<sup>316</sup>

It is in respect to the first issue that Justice Scalia noted the primary consideration for determining whether an act is suicide: "the suicide's conscious decision to 'pu[t] an end to his own existence.'"<sup>317</sup> In order to be a suicide, the issue is not whether death results from a commission or an omission, but whether the specific intent or purpose of the conduct was to cause one's own death. A person can intentionally commit suicide by refusing to eat just as well as by intentionally shooting himself.<sup>318</sup> Justice Scalia sought to clarify that a death caused by an omission, such as a "hunger strike," does not escape characterization as suicide simply because death comes about as a natural consequence of omitting to eat.

With respect to the second issue, Justice Scalia proposes that, even if death is not intentional because the agent does not make a conscious decision to end his or her life, these two conditions do not render the action permissible.<sup>319</sup> Rather, what must also be taken into account is whether the decision to withhold treatment is reasonable in terms of the benefits and

315. *Id.* at 727, 729.

316. *See Cruzan*, 497 U.S. at 296-97 (Scalia, J., concurring).

317. *Id.* (Scalia, J., concurring) (quoting 4 W. BLACKSTONE, COMMENTARIES \*189 (1765-1769)).

318. *See id.* at 296 (Scalia, J., concurring) ("Starving oneself to death is no different from putting a gun to one's temple as far as the common-law definition of suicide is concerned; the cause of death in both cases is the suicide's conscious decision to 'pu[t] an end to his own existence.'" (quoting BLACKSTONE, *supra* note 317, at \*189)).

319. *See id.* at 296-97.

burdens offered to the patient by means of such conduct.

Traditionally, this distinction has been expressed as an ethical obligation to undergo “ordinary” medical care to preserve one’s life but not to undergo “excessive” or “heroic” measures.<sup>320</sup> As Scalia explains:

I readily acknowledge that the distinction between action and inaction has some bearing upon the . . . judgment of what ought to be prevented as suicide—though . . . it would seem to me unreasonable to draw the line precisely between action and inaction, rather than between various forms of inaction. . . . [T]he intelligent line does not fall between action and inaction but between those forms of inaction that consist of abstaining from ‘ordinary’ care and those that consist of abstaining from ‘excessive’ or ‘heroic’ measures.<sup>321</sup>

Scalia’s analysis here closely tracks the proportionality prong of double effect. When the rationale for withholding medical treatment is not to intentionally cause death, and when death results from such “inaction,” it is permissible only so long as that omission is reasonable in light of the foreseen evil effect and the intended good.<sup>322</sup>

While the *Quill* court of appeals may appropriately cite Scalia’s statement in *Cruzan* to call into question the correctness of the natural processes rationale relied upon by the district court, its purported reliance on his further comments to justify its conclusion that no distinction exists between physician-assisted suicide and withdrawal of life support runs roughshod over the very point Scalia was attempting to clarify. The court failed to recognize Scalia’s emphasis on the intentional nature of suicide and the normative conditions limiting when conduct unintentionally causing foreseen death is permissible.

## 2. McIntyre’s Third Constraint on Double Effect: Omissions and Double Effect

In connection with this point, it is appropriate to consider one of the

320. See, e.g., *Farnam v. CRISTA Ministries*, 807 P.2d 830, 847 (Wash. 1991) (“It is openly accepted that ‘life-sustaining treatment’ was not meant to include basic, ordinary medical care.”); John T. Noonan, Jr., *Dealing with Death*, 12 NOTRE DAME J.L. ETHICS & PUB. POL’Y 387, 395 (1998) (“One . . . is not called to the morality of Don Quixote. If one is not called to remedy all evils, one may—even in the case of one’s own body—draw a line where extraordinary efforts are not required. The morality is not mediocre but that of common humanity.”).

321. *Cruzan*, 497 U.S. at 296 (Scalia, J., concurring).

322. Compare this to John Finnis’s similar reading of Scalia’s concurrence in *Cruzan*, rejecting Dworkin’s view that Scalia would regard a person who refused a necessary amputation as committing suicide. John Finnis, *The “Value of Human Life” and “The Right to Death”: Some Reflections on Cruzan and Ronald Dworkin*, 17 S. ILL. U. L.J. 559, 565 (1993).



two constraints on double effect offered by McIntyre that was not addressed in Part II.<sup>323</sup> McIntyre notes that, in discussions of double effect, illustrations are sometimes proffered suggesting that evil effects can be justified under the doctrine precisely because such effects are caused by an omission of the actor. McIntyre correctly notes that, in such scenarios, the principle of double effect is in fact sometimes not in play at all. As stated in Part II, her constraint (Constraint 3) provides:

*DE* [(double effect)] is not concerned with instances when a foreseen effect is neither an intended end nor a chosen means and “is one that an agent need not attend to, because it is not his responsibility, or should not attend to, because the agent has some reason to set it aside when deliberating . . . . *DE* does not apply to explain the permissibility of bringing it about.<sup>324</sup>

To make her point, McIntyre offers the example of a terrorist who threatens to kill five people if the innocent moral protagonist does not intentionally kill one innocent person.<sup>325</sup> In such circumstances, McIntyre points out that the ethical permissibility of the actor doing nothing—even if that “omission” results in the terrorist shooting five innocent people—does not require any appeal to double effect analysis.<sup>326</sup> Rather, under anything but the most strained and crass utilitarianism, no one would hold the actor culpable for the death of the five. Culpability lies solely with the terrorist and his moral agency. No authentic ethical reason exists for imputing causal responsibility to the innocent actor for the harm to the five innocents. As McIntyre states, “[t]he contrast between what you foresee as a result of the agency of others and what you intend as a result of your own agency is doing all of the explanatory work here.”<sup>327</sup>

Although the evil effect of the terrorist’s conduct is foreseen and not intended, double effect has no explanatory role because there is no relevant ethical sense in which the actor’s omission, under any plausible theory, could be considered a candidate for *responsibility* in the first place, and thus it does not need to be justified. In situations like the terrorist killings, the actor need not offer any explanation under double effect for his omission because in no significant moral sense is the actor responsible for the effects caused by his “omission” of not killing the innocent party.

Connecting McIntyre’s denial of the applicability of double effect to

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323. See *supra* note 70 and accompanying text.

324. See *supra* text accompanying note 67 (quoting McIntyre, *supra* note 54, at 237).

325. McIntyre, *supra* note 54, at 231.

326. *Id.*

327. *Id.* at 232.

such situations with the district court's justification of withdrawal of life support by reference to the "omission" of letting nature take its course raises the question of whether a coherent basis exists for confirming the propriety of the *Quill* decision *without* appealing to double effect. In other words, does the omission argument work *and* not implicate double effect?

A legal discussion relevant to this point is the distinction between a person's duties with respect to omissions and a person's duties with respect to commissions. In many, if not most, circumstances, harm that befalls others or that is inflicted by third parties is generally not imputable to an actor, say a passerby, simply because he or she could have done something to prevent the harm but did not. Where no legal duty exists, no obligation to act exists, and therefore, no justification need be produced for allowing the harm to occur. This legal example illustrates McIntyre's point in Constraint 3.<sup>328</sup> If there is no duty to act, an omission cannot be the basis for culpability that requires justification.

Sometimes under ethics and the law, however, affirmative duties do exist to prevent harm or render aid to third parties. As Scalia notes in *Cruzan*, the duties of a parent to a child or of a physician to a patient starkly illustrate instances where omissions standing alone cannot validate denials of culpability.<sup>329</sup> Rather, when a general affirmative duty to prevent some harm to another exists, arguments must be introduced to justify an actor's failure to so do so.<sup>330</sup> These cases do not fit into McIntyre's model in Constraint 3 because, in such cases, the actor cannot exculpate himself merely by pointing to his or her omission.

Applying this analysis to physicians and terminally ill patients, it is clear that the relationship is not generally one where the physician, like the bystander or actor *vis-à-vis* the terrorist, can exculpate himself merely by pointing to the fact that his conduct was that of omission. In such a context, as the *Quill* court of appeals correctly points out, a commission/omission distinction standing alone cannot, in McIntyre's words, "do[] all of the explanatory work."<sup>331</sup> Rather, as Scalia's comments correctly indicate, determining whether a duty exists to continue life support requires application of double effect. It first must be determined whether there is an intent to cause death, and assuming no such intention

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328. See *supra* notes 67, 324.

329. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 297 (1990) (Scalia, J., concurring).

330. Scalia noted that it would be no defense to a murder charge for parents to argue that the death of their infant was not affirmatively "caused" by any action on their part "but by the natural process of starvation, or by the infant's natural inability to provide for itself." *Id.* at 297 (Scalia, J., concurring). Again, it would not be a defense to a physician criminally liable for failure to provide care that the patient's immediate cause of death was the underlying condition that the physician failed to but could have treated. *Id.* (Scalia, J., concurring).

331. McIntyre, *supra* note 54, at 232; see *supra* note 327.

exists, further evaluation must be made regarding whether the intended benefit the treatment offers is justified in spite of the harm it will unintentionally effect upon the terminally ill patient.

In other words, Constraint 3 does not dispense with the necessity of double effect analysis in cases involving the withdrawal of life support simply because death may be a natural consequence. While the fact that an “evil” effect results from an omission rather than a commission may sometimes provide evidence that an effect was not intentional, that fact standing alone will not always absolve an actor of responsibility. Although the court of appeals’ decision misconstrued the import of Scalia’s position in *Cruzan*, it was correct in pointing out that the district court’s attempt to ethically distinguish physician-assisted suicide from withholding of life support solely on the basis of the fact that death results from a natural process does not end the moral inquiry.<sup>332</sup>

### B. Palliative Care and Physician-Assisted Suicide

Corroborating this critique of the district court’s reasoning in *Quill*, the Ninth Circuit *en banc* decision in *Compassion in Dying v. Washington*<sup>333</sup> notes that the approach taken by the district court in *Quill* could never logically justify a distinction between palliative care and physician-assisted suicide. In palliative care, no argument can be made that the death of the patient results merely from letting nature take its course. As Judge Reinhardt describes it:

[Palliative care] commonly takes the form of putting a patient on an intravenous morphine drip, with full knowledge that, while such treatment will alleviate his pain, it will also indubitably hasten his death. There can be no doubt, therefore, that the actual cause of the patient’s death is the drug administered by the physician . . . .<sup>334</sup>

In fact, the prior discussion’s rejection of the view that an omission standing alone can be the primary factor ethically distinguishing withholding of life support from physician-assisted suicide is important precisely because it clarifies that double effect does not depend upon the evil effect resulting from an omission. Rather, all that is required is that the evil effect not be intended and not function as a means to the intended good effect. In connection with Reinhardt’s point concerning the active causation of death in palliative care, McIntyre properly observes that

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332. See *supra* notes 313-15 and accompanying text.

333. 79 F.3d 790 (9th Cir. 1996) (*en banc*).

334. *Id.* at 823.

sometimes double effect is expressed incorrectly in language implying that evil effects are merely “permitted” or “allowed” rather than actually being caused by the actor’s conduct:

Proponents of DE should emphasize that it is a misinterpretation of the principle to think of it as classifying unintended harms that are the direct causal consequence of an agent’s action as something which the agent didn’t really do, or isn’t really responsible for, as if the status of being “merely foreseen” caused the gravity of a harm to be massively discounted or the person’s agency to be changed from causing to allowing.<sup>335</sup>

This, in fact, is the problem with understanding the operation of double effect to be properly captured by the “allowing nature to take its course” argument.<sup>336</sup> If unintended evil effects were permissible only when resulting from the natural consequences of an actor’s omission, palliative care could never be justified. In such treatment, there is no question that administration of opioids is a substantial factor causing the patient’s death.

Similarly, a strategic bomber’s acts may often just as directly cause the death of innocent civilians as they destroy the military installation, and acts of self-defense involving lethal force may just as directly cause the death of an assailant as his or her fending off. Any demand that the physical, causal relation between an actor’s conduct and its harmful effect suggesting that the harm is simply “allowed” or “permitted” would be misleading and justify criticism of double effect as fanciful. Proper characterization of double effect must concede that often the foreseen harms, though unintended, do in a foreseeable, physical, causal sense often directly result from the actor’s conduct.

Having conceded this point, however, it remains to determine whether double effect can adequately distinguish palliative care from physician-assisted suicide. In this context, it is appropriate to consider the fourth and final constraint offered by McIntyre.<sup>337</sup> In Constraint 4, McIntyre clarifies that double effect is not appropriately applied if the specific conduct chosen as a means to the good effect cannot be distinguished from the evil effect itself.<sup>338</sup> In order to apply double effect then, there must be some reasoned basis for distinguishing “what an agent intends as a means and as an end from what is merely foreseen” that does not prejudge

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335. McIntyre, *supra* note 54, at 232.

336. *See supra* note 305 and accompanying text.

337. *See supra* note 68 and accompanying text.

338. McIntyre, *supra* note 54, at 233.

permissibility.<sup>339</sup> When engaging in conduct subject to analysis under double effect, the actor must have a sufficiently clear and legitimate basis for distinguishing what constitutes the “means to the good effect” from “the evil effect” itself. Only such a distinction prevents the actor from violating the proscription against causing evil as a means to a good end. In philosophical circles, this difficulty is referred to as the problem of “closeness.”<sup>340</sup>

A contemporary example suggesting the problem of closeness has been presented by the recent case of the Maltese conjoined twins, Jodie and Mary.<sup>341</sup> The girls’ parents had traveled to Britain to receive better medical care after they learned that their daughters would be born conjoined.<sup>342</sup> The girls were joined together at the pelvis, and each had her own set of arms and legs.<sup>343</sup> In their common area, they shared an aorta, bladder, torso, and partial spinal column.<sup>344</sup> There was a single heart and pair of lungs in Jodie’s chest cavity.<sup>345</sup> Mary survived from blood and oxygen circulated by Jodie’s heart and lungs.<sup>346</sup>

Doctors predicted that both girls would die within months after birth due to their inability to circulate enough blood and oxygen from the heart and lungs in Jodie’s body.<sup>347</sup> They also believed that if the twins were separated, Jodie had a good chance of survival, although Mary would certainly die.<sup>348</sup> Doctors expected to begin the separation process by determining the structure of the twins’ anatomy.<sup>349</sup> They first would separate the pelvic bones, and then the spines.<sup>350</sup> The physicians understood, however, that once they clamped off that portion of the single

339. *Id.*; see *supra* note 68 and accompanying text. “In addition, the standard for what counts as intended must not be so narrow as to count any regrettable aspect of one’s means as a consequence that is merely foreseen.” McIntyre, *supra* note 54, at 233.

340. See, e.g., PHILIPPA FOOT, *The Problem of Abortion and the Doctrine of the Double Effect*, in *VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY* 19, 21-22 (1978).

341. Christopher Kaczor, *The Tragic Case of Jodie and Mary: Questions About Separating Conjoined Twins*, 70 *LINACRE Q.* 159, 164 (2003).

342. Jacob M. Appel, *Ethics: English High Court Orders Separation of Conjoined Twins*, 28 *J.L. MED. & ETHICS* 312, 312 (2000).

343. *Id.*

344. Jennifer N. Sawday, Note, *Separating Conjoined Twins: Legal Reverberations of Jodie and Mary’s Predicament*, 24 *LOY. L.A. INT’L. & COMP. L. REV.* 65, 66 (2002).

345. *Id.* at 65.

346. *Id.* at 65-66.

347. *Id.*

348. *British Doctors Begin Surgery to Separate Conjoined Twins*, *N.Y. TIMES*, Nov. 7, 2000, at A14.

349. *Id.*

350. *Id.*

aorta extending into Mary's body from Jodie's, Mary would die from lack of oxygenated blood.<sup>351</sup>

In this case, the closeness problem arguably surfaces in view of the following question: Does this separation procedure count as a case of morally indifferent conduct by returning each twin's body to its "naturally defective state" with the intended good result of saving Jodie and the unintended but foreseen evil result of Mary's death, or does the separation procedure, involving the purposeful clamping and severing of the aorta from Jodie to Mary, itself merely constitute an intentional killing or mutilation of Mary?<sup>352</sup> While resolution of the closeness problem in this case is beyond the scope of this Article, it illustrates the difficulty encountered in some double effect cases that even proponents might reasonably disagree about and to which McIntyre's Constraint 4 is directed.

Judge Reinhardt's analysis of palliative care suggests that he believes palliative therapy represents a case very similar to the "closeness" problem just described:

[W]e excuse the act or, to put it more accurately, we find the act acceptable, not because the doctors sugarcoat the facts in order to permit society to say that they couldn't really *know* the consequences of their action, but because the act is medically and ethically appropriate even though the result—the patient's death—is *both foreseeable and intended*.<sup>353</sup>

The claim is that the very act of relieving pain by administration of opioids is precisely the intentional killing of the patient. In such case, the Ninth Circuit concluded that no meaningful distinction exists between palliative care and physician-assisted suicide, and thus double effect cannot be applied to justify the one and condemn the other. Reinhardt asserts that any attempt to distinguish palliative care from physician-assisted suicide is a distinction without a difference:

[W]e see little, if any, difference for constitutional or ethical purposes between providing medication with a double effect and providing medication with a single effect, as long as one of the known effects in each case is to hasten the end of the patient's life. . . . To us, what matters most is that the death of

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351. *Id.*

352. For a discussion of the distinct interpretations that might be given this conduct, see, for example, Luke Gormally, *The Maltese Conjoined Twins*, SECOND OPINION, Oct. 2001, at 36.

353. *Compassion in Dying v. Washington*, 79 F.3d 790, 823 n.95 (9th Cir. 1996) (emphasis added).

the patient is the intended result as surely in one case as in the other. . . . To the extent that a difference exists, we conclude that it is one of degree and not of kind.<sup>354</sup>

In response, proponents of double effect can concede that in palliative care the conduct engaged in is similar to physician-assisted suicide to the extent that, in some circumstances, the quantity of opioid necessary to relieve a patient's pain may indeed constitute a lethal dose. As explained in Part II, however, application of double effect often involves the contrast of two acts that from a physical perspective may be very similar or even identical in their effects.<sup>355</sup> What *is* crucial for successfully distinguishing between the two acts is the ability to clearly show that in one of the cases the evil effect can be distinguished from what is intended as a means and end in the other.

Upon close examination, acts of palliative care clearly can be distinguished from physician-assisted suicide on this basis. Administration of opioids in palliative care neither logically nor in practice demands its identification with intentional killing. Provision of opioids is the standard medical treatment for traumatic pain, and in the vast majority of cases, including cases of terminally ill patients, death is a rare and an unusual outcome.<sup>356</sup> In a terminally ill patient, adequate pain relief and/or sedation usually results before serious depression of respiration and death.<sup>357</sup> More particularly, the psychological effect of pain relief, mediated by the stimulation of opioid receptors in the brain, is clearly distinguished from the distinct physiologic effect of respiratory depression also mediated by

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354. *Id.* at 824.

355. *See supra* note 49 (discussing similarities between the strategic bomber's and terrorist bomber's actions from a physical point of view but contrasting the actors' mental states).

356. Susan Anderson Fohr, *The Double Effect of Pain Medication: Separating Myth from Reality*, 1 *PALLIATIVE MED.* 315, 319 (1998). Fohr states:

[T]here is no debate among specialists in palliative care and pain control on this issue. There is a broad consensus that when used appropriately, respiratory depression from opioid analgesics is a rarely occurring side effect. The belief that palliative care hastens death is counter to the experience of physicians with the most experience in this area. . . . Of course, it is possible that treatment by inexperienced physicians may lead to unintentional overdoses of medication, but this is neither inevitable nor unavoidable.

*Id.*

357. "Appropriately prescribed narcotics rarely cause clinically significant *respiratory depression*. The threshold for such depression is always above the sedative threshold which itself is above the analgesic threshold." *Id.* at 317 (quoting M. H. Levy, *Pain Management in Advanced Cancer*, 12 *SEMINARS ONCOLOGY* 394 (1985)).

stimulation of those receptors.<sup>358</sup> Pain relief does not result from respiratory depression.

On these facts, it becomes obvious that the physical cause of pain relief intended in palliative care is itself not mediated or “instrumentally” caused by the concomitant effect of respiratory depression. Thus, the psychological effect of pain relief mediated directly by stimulation of opioid receptors can be clearly and unproblematically distinguished from the distinct effect of respiratory depression that in some rare instances foreseeably causes death. Here, any closeness problem is avoided because the means intended to achieve the effect of pain relief—administration of opioid and stimulation of opioid receptors—does not entail intending the other concomitant effect—respiratory depression.

In physician-assisted suicide, however, the intent of the actor with respect to means and ends is significantly different. The intent in providing a lethal opioid dosage is precisely to stimulate the opioid receptors *in order to cause* respiratory depression, and by that means, to intentionally cause death. While such conduct may be directed toward a morally acceptable ulterior end of the patient’s relief from suffering, it is achieved in physician-assisted suicide precisely by the intentionally chosen means of killing the patient by respiratory depression.

Despite this clear and arguably unproblematic distinction between the two states of mind found in physician-assisted suicide and palliative care—made possible by the distinct physical effects that result from opioid administration—some opponents of double effect, such as Judge Reinhardt in his Ninth Circuit opinion, continue to insist that no legitimate distinction can be found.<sup>359</sup>

Given the support for the distinction, however, in both professional medical practice and in the law’s recognition that in many contexts purposeful acts can be distinguished from acts carried out with mere knowledge, Judge Reinhardt’s response is simply inadequate. Its failure seriously to engage the legal, medical, and ethical arguments supporting a distinction between these practices and the highly subjective nature of that rejection emphasizing what *it* “sees” and what “matters most” to *it* suggests that such a facile dismissal cannot count as a serious piece of legal or rational analysis.<sup>360</sup>

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358. Geoffrey Hanks & Nathan Cherny, *Opioid Analgesic Therapy*, in OXFORD TEXTBOOK OF PALLIATIVE MEDICINE § 8.2.3, at 316, 316-17 (Derek Doyle et al. eds., 3d ed. 2004). Scientific research indicates that opioids affect a number of different receptors in the brain. *Id.* Activation of these receptors by the binding of an opioid causes, with some variation, a multiplicity of physiologic effects including pain relief (“analgesia”), euphoria, reduced gastrointestinal motility, and respiratory depression. *Id.*

359. See, e.g., *Compassion in Dying*, 79 F.3d at 824.

360. An illustration of Reinhardt’s and the majority’s unwillingness to honestly engage



In light of the preceding considerations of the lower court decisions in *Quill* and *Glucksberg*,<sup>361</sup> it becomes clear that a distinction between physician-assisted suicide and the accepted medical treatments satisfying double effect analysis requires a specific set of conditions that none of the lower court decisions adequately capture. Particularly helpful in this regard are insights suggested by Scalia's concurrence in *Cruzan*<sup>362</sup> and McIntyre's analysis of various constraints upon double effect.<sup>363</sup> These discussions reveal four conditions necessary for distinguishing between the practices in a way that satisfies the demands of double effect.

First and foremost is the distinction between actual intent and knowledge. As Scalia points out in *Cruzan*, the most significant element defining suicide and distinguishing it from other types of acts that cause death is a state of mind constituting a conscious decision to put an end to one's life.<sup>364</sup> Following closely upon this point, any proper account of a distinction between physician-assisted suicide and the other acts cannot solely be based on a commission/omission basis. Rather, the essential question is whether, in the context of a physician's duty of beneficence to the terminally ill patient, the conduct in question can be justified by an

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arguments distinguishing physician-assisted suicide from palliative care is reflected in the dismissive treatment given to the American Medical Association's amicus brief's effort to distinguish physician-assisted suicide and palliative care:

The American Medical Association . . . argu[es] that doctors who give medication with knowledge that it will have a double effect, including hastening death, should not be deemed to have violated Washington's assisted suicide law. The organization struggles mightily, albeit unsuccessfully, to distinguish for legal purposes between the administration of medication for a dual and a single effect. . . . *The line the AMA seeks to draw conflicts with reason as well as with the proper constitutional approach.*

*Id.* at 828 n.102 (emphasis added).

It might seem odd that, despite devoting so much effort attempting to establish that no distinction exists between physician-assisted suicide and the other medical practices, the court of appeals refused to rule on the plaintiffs' equal protection claims in *Compassion in Dying*, but instead ruled for the plaintiffs only on their due process claims. *See id.* at 798. The strategy of the court of appeals, however, appears clear. Without wishing expressly to so state, the *en banc* opinion's due process ruling hinges entirely on the equal protection issue. Only by identifying physician-assisted suicide with other accepted medical practices—practices that citizens arguably have a constitutional liberty right to under *Cruzan*—can the court of appeals find a justification for the due process right to physician-assisted suicide. By refusing to rule directly on the equal protection claim, however, the court of appeals arguably sought to avoid the possibility of direct scrutiny of that purported identification under an equal protection analysis.

361. *See supra* Part IV.A.1.

362. *See supra* Part IV.A.2.

363. *See supra* Part II.D.

364. *See supra* note 314 and accompanying text.

intended good that reasonably accounts for why it makes sense to cause—either by omission or commission—that grave, albeit unintended, harm. Finally, as disclosed by consideration of McIntyre’s “closeness” problem and Judge Reinhardt’s majority *en banc* opinion in *Glucksberg*, the account must show how neither accepted medical practice constitutes the intentional killing of the patient as an acceptable *means* to the intended end of relief from suffering.

### C. Quill’s Resolution

The Supreme Court’s decision in *Quill* rejecting the plaintiffs’ equal protection claim corroborates all these requirements for application of double effect.

#### 1. Intention and Foreseeability

As explained at length in Part III, the Supreme Court, citing *Bailey*, *Morissette*, and *Feeney* and explicitly referring to the principle of “double effect,” proposed that a distinction between physician-assisted suicide and the accepted medical practices exists based on a difference between actual intent and mere foreknowledge of the death of the patient.

As the Court explained, the law has drawn a distinction in specific areas between conduct engaged in “because of” a particular effect—with the purpose of bringing that effect about—and conduct that is carried out “in spite of” that effect—with the mere knowledge that an act done for other purposes will have such an effect.<sup>365</sup> Applying this distinction to the facts

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365. *Vacco v. Quill*, 521 U.S. 793, 802-03 (1997). In connection with this point, the Court cites, *inter alia*, Judge Kleinfeld’s dissenting opinion in *Compassion in Dying*: “When General Eisenhower ordered American soldiers onto the beaches of Normandy, he knew that he was sending many American soldiers to certain death. . . . His purpose, though, was to . . . liberate Europe from the Nazis.” *Id.* at 803 (quoting *Compassion in Dying*, 79 F.3d at 858 (Kleinfeld, J., dissenting)) (alteration in original). Here, what General Eisenhower wants (defeat of Nazis) and what he plans to bring about in order to reach that goal (sending troops into battle) does not *logically* require that Allied soldiers die. Although General Eisenhower may know as a matter of fact that some of his men will be required to make the ultimate sacrifice, he does not need the deaths to make his intended end come about.

Contrast this example, however, with the United States’s bombing of Hiroshima and Nagasaki in August of 1945. NORMAN F. CANTOR, *THE AMERICAN CENTURY: VARIETIES OF CULTURE IN MODERN TIMES* 406-07 (1997). In those cases, President Truman, in conjunction with United States military advisors, decided that, in order to end the war in the Pacific Theatre quickly and with less loss of American lives, the atomic bomb should be used against Japanese civilian populations. *Id.* In that case, closely paralleling the case of the unethical terror bomber, the death of civilian noncombatants was precisely the means chosen to accomplish the end sought—demoralizing the Japanese nation’s will to fight on.

[T]he reason for selecting Hiroshima for atomic attack was not that its modest

of the case before it, the Court observed that in physician-assisted suicide, a physician “‘must, necessarily and indubitably, intend primarily that the patient be made dead.’”<sup>366</sup> Acts involved in carrying out the accepted treatments, however, do not entail such an intent: “[P]atients who refuse life-sustaining treatment ‘may not harbor a specific intent to die’ and may instead ‘ferverently wish to live’”<sup>367</sup> and “[j]ust as a State may . . . permit[] patients to refuse unwanted lifesaving treatment, it may permit palliative care related to that refusal, which may have the foreseen but unintended ‘double effect’ of hastening the patient’s death.”<sup>368</sup>

## 2. Commission/Omission

Although the character of an omission can present an important fact bearing on the determination of whether an agent actually intends a harmful effect, it is clear in *Quill* that the Court did not consider the commission/omission distinction as a primary factor for determining whether a medical treatment that is foreseen to causally contribute to the death of the patient is permissible.

The Court, like the district court, noted that the immediate cause of death in some instances represents an important factual distinction between the withdrawal of life support and physician-assisted suicide: “[W]hen a patient refuses life-sustaining medical treatment, he dies from an underlying fatal disease or pathology; but if a patient ingests lethal medication prescribed by a physician, he is killed by that medication.”<sup>369</sup>

In *Quill*, dealing only with medical practices relating to the terminally ill, the term artificial life support logically corresponds to practices, as

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military installation challenged the US or its forces . . . . It was rather that Hiroshima met the requirement that some Japanese city be destroyed, without warning, by an attack designed to maximize the shock of destruction of people and structures, and so overcome Japanese willingness to continue the war.

JOHN FINNIS ET AL., NUCLEAR DETERRENCE, MORALITY AND REALISM 93 (1987).

366. *Quill*, 521 U.S. at 802 (quoting *Assisted Suicide Hearing*, *supra* note 26, at 367 (prepared statement of Leon R. Kass, M.D., Addie Clark Harding Professor, The College and Committee on Social Thought, University of Chicago)); *supra* note 26 and accompanying text.

367. *Id.* (quoting *In re Conroy*, 486 A.2d 1209, 1224 (N.J. 1985)).

368. *Id.* at 807 n.11.

369. *Id.* at 801 (citing *People v. Kevorkian*, 527 N.W.2d 714, 728 (Mich. 1994)); *In re Conroy*, 486 A.2d at 1226 (stating that when a feeding tube is removed, death “result[s] . . . from [the patient’s] underlying medical condition”); *In re Colyer*, 660 P.2d 738, 743 (Wash. 1983) (“[D]eath which occurs after the removal of life sustaining systems is from natural causes . . . .”); Council on Ethical and Judicial Affairs of the Am. Med. Ass’n, *Report of the Council on Ethical and Judicial Affairs of the American Medical Association*, 10 ISSUES L. & MED. 91, 93 (1994) (“When a life-sustaining treatment is declined, the patient dies primarily because of an underlying disease”).

defined by many states, that prolong the “dying process.”<sup>370</sup> Hence, in *Quill*, it is not illegitimate for the Court to emphasize that the immediate cause of death at issue would indeed not be the withdrawal itself, but the underlying dysfunctional physical state of the patient.

In its discussion of palliative care and its differentiation from physician-assisted suicide, however, the Court did not rely on any similar factual distinction between commission and omission. In the case of physician-assisted suicide, it is clear that the lethal dose of drugs, and not simply the underlying pathological condition, causes death. Although it may be true that death in palliative care rarely occurs under the proper administration of pain relief, sometimes the cause of death, as in physician-assisted suicide, will be administration of the drug and its effect upon the body of the patient.

In such instances, the Court acknowledged that it is only the intent of the actor that can properly distinguish palliative care from physician-assisted suicide.<sup>371</sup> As argued above, the legitimacy of this distinction is

370. Iowa, for example, defines “[l]ife-sustaining procedure” to encompass “any medical procedure, treatment, or intervention . . . which meets both of the following requirements: a. Utilizes mechanical or artificial means to sustain, restore, or supplant a spontaneous vital function. b. When applied to a patient in a terminal condition, would serve only to prolong the dying process.” IOWA CODE ANN. § 144A.2(8) (West 2005). In conjunction with this, Iowa defines “terminal condition” to mean

an incurable or irreversible condition that, without the administration of life-sustaining procedures, will, in the opinion of the attending physician, result in death within a relatively short period of time or a state of permanent unconsciousness from which, to a reasonable degree of medical certainty, there can be no recovery.

*Id.* § 144A.2(13). Many states adopt similar definitions. *See, e.g.*, ALA. CODE § 22-8A-3(8)(2004); COLO. REV. STAT. ANN. § 15-18-103(7) (West 2003); GA. CODE ANN. § 31-32-2(6)(2002); 755 ILL. COMP. STAT. 35/2-(d) (West 2004); IND. CODE ANN. § 16-36-4-1 (West 2004); LA. REV. STAT. ANN. § 40:1299.58.2(9) (West 2004); MO. ANN. STAT. § 459.010(3) (West 2004); OHIO REV. CODE ANN. § 2133.01(Q) (West 2004); 20 PA. CONS. STAT. ANN. § 5403 (West 2004); WASH. REV. CODE ANN. § 70.122.020(5) (West 2004); WIS. STAT. ANN. § 154.01(5) (West 2003).

In view of the limitation of *Quill* to claims concerning medical treatment of terminally ill patients, whether the holding also supports the legal permissibility of the withdrawal of hydration and nutrition in cases of persistent vegetative state (PVS) patients who are not dying or terminally ill is not at issue and thus not addressed by this Article. The question of whether withdrawal of hydration and nutrition in such patients where the actual immediate cause of death would be starvation is more problematic and raises issues of closeness and proportionality. *See supra* note 340 and accompanying text. For an ethical consideration rejecting the permissibility of such practices, see PONTIFICAL ACAD. FOR LIFE & WORLD FED’N OF CATHOLIC MED. ASS’NS, LIFE-SUSTAINING TREATMENTS AND VEGETATIVE STATE: SCIENTIFIC ADVANCES AND ETHICAL DILEMMAS (2004), available at [http://www.vatican.va/roman\\_curia/pontifical\\_academies/acdlife/documents/rc\\_pont-acd\\_life\\_doc\\_20040320\\_joint-statement-veget-state\\_en.html](http://www.vatican.va/roman_curia/pontifical_academies/acdlife/documents/rc_pont-acd_life_doc_20040320_joint-statement-veget-state_en.html).

371. *Quill*, 521 U.S. at 801-02.

found in the fact that pain relief occurs in a physical manner that does not involve intending the death of the person as a *means* to that effect, even if it is the case that death flows just as immediately as an effect from the intended means as does the good effect.

Based on these considerations, it is evident that in withholding life support or administering palliative care in terminally ill patients, the intent of the actors (both physician and patient) is not necessarily associated with an intention that the patient die.

### 3. Reasonability of Choice

Turning to the proportionate reason analysis under double effect, it appears generally that withdrawal of life support and palliative care can be ethically justified only under circumstances in which the patient is terminally ill. For only in those circumstances would the benefit of continued treatment be so small as to justify the foreseen evil effect of the death of the patient. In the context of differentiating physician-assisted suicide from the accepted medical practices, the Court indicated that the permissibility of the withholding of life support and palliative care requires a balancing of the intended good in view of the harm foreseen.<sup>372</sup>

Applying this “proportionate reason” element of double effect, the Court noted that withholding life support is permissible because it has as its end “to cease doing useless and futile or degrading things to the patient when [the patient] no longer stands to benefit from them.”<sup>373</sup> The Court further noted that the patient may ““ferverently wish to live, but to do so free of unwanted medical technology, surgery, or drugs.””<sup>374</sup> In these comments, the Court recognized that the good of the patient to be physiologically and psychologically free from invasive and burdensome medical treatment is justified only in light of the patient’s dire condition. The conduct deprives the patient of no significant benefit by unintentionally curtailing a life that would otherwise extend for only a short while.

Similarly, in the case of palliative care, the Court noted: “The same is true when a doctor provides aggressive palliative care; in some cases, painkilling drugs may hasten a patient’s death, but the physician’s purpose and intent is, or may be, only to ease his patient’s pain.”<sup>375</sup> In such a case, the Court recognized that even though the provision of pain relief may on

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372. *Id.* at 801-02, 807 n.11.

373. *Id.* at 801 (quoting *Assisted Suicide Hearing*, *supra* note 26, at 368 (prepared statement of Leon R. Kass, M.D., Addie Clark Harding Professor, The College and Committee on Social Thought, University of Chicago)).

374. *Id.* at 802 (quoting *In re Conroy*, 486 A.2d at 1224).

375. *Id.*

occasion foreseeably cause death by respiratory depression, such pain relief justifies, in light of the objectively dire state of the patient's terminally ill status, any minimal decrease in life span.

In *Quill*, then, the distinction drawn between physician-assisted suicide and the accepted forms of medical treatment satisfies the reasonability element of double effect and, in so doing, provides a sufficiently rational basis for rejecting the plaintiffs' constitutional equal protection claims.

#### 4. No Instrumental Intention of Harm

The preceding points illustrate, without need of further elaboration, that the Court recognized that in both withholding of life support and palliative care a physician may foresee to a moral certainty that a patient will, or very likely may, die as a consequence of the treatment, but that the patient's death is itself not part of the actor's intent. While death may result either from withholding of life support or from palliative care, neither case entails a physician or patient intending to relieve the burden or pain by means of death. Both psychologically and physically, the conduct chosen involves nothing that constitutes the intentional killing of the patient, but rather is conduct with both a good and a harmful effect. In each case, the good effects result from causal means that do not involve the operation of the evil effect as a means.

While, from a sympathetic point of view, physician-assisted suicide may be considered to have a legitimate ulterior end—relief of pain and the burden of extended terminal illness—the specific intent in physician-assisted suicide differs from these treatments precisely because the actor's intention is that the patient “be made dead” in order to achieve those ulterior ends.<sup>376</sup>

### V. CONCLUSION

This Article has attempted to elaborate in detail the ethical and philosophical justification for the Supreme Court's explicit reliance on the doctrine of double effect as well as to confirm legal precedent for that reliance in American case law's tacit endorsement of the principle in multiple areas of substantive constitutional law.

In the treatment of intentional action, a distinction is drawn in ethics and legal considerations, in circumscribed but important areas, between an actor's “specific intent” or purpose and the effects of conduct that are merely foreseen. If the intended good is significant enough or the harm considered not important enough to justify interfering with the actor's

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376. See *supra* notes 26, 301, 366 and accompanying text.

pursuit of those intended goods, the action will be permitted even though it is foreseen to have a harmful result.

Applying such reasoning in *Quill*, the Supreme Court rejected the plaintiffs' argument that New York state law distinguishing withholding of life support and palliative care from physician-assisted suicide was "irrational" or "arbitrary."<sup>377</sup> The Supreme Court concluded that "[l]ogic and contemporary practice support New York's judgment that the . . . acts are different, and New York may therefore, consistent with the Constitution, treat them differently."<sup>378</sup> Though not all may agree with the Court's decision, its reliance on the principle of double effect conforms to widely, if not universally, accepted ethical and medical norms and has a secure foundation in American law.

Although double effect has several conditions that make its utilization in some cases difficult, and in others inappropriate, this does not render the doctrine otiose. Operation of some form of the principle, by whatever name, is inevitable. In an imperfect world where duties and interests often collide, the possibility of choices of action foreseen to have both good and harmful consequences cannot be avoided. In rare circumstances, ethics and the law require that a person refrain from acting altogether. More often, however, they provide that a determination of whether an actor may pursue the good effect, although knowing it will or may unintentionally cause a harmful effect, requires a more complex analysis—a double effect analysis.

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377. *Quill*, 521 U.S. at 807-09.

378. *Id.* at 808.