

# The Medical Exception to the Prohibition of Killing: A Matter of the Right Intention?

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GOVERT DEN HARTOGH

*Abstract.* It has long been thought that by using morphine to alleviate the pain of a dying patient, a doctor runs the risk of causing his death. In all countries this kind of killing is explicitly or silently permitted by the law. That permission is usually explained by appealing to the doctrine of double effect: If the use of morphine shortens life, that is only an unintended side effect. The paper evaluates this view, finding it flawed beyond repair and proposing an alternative explanation. It is not the intention of the doctor that counts, but the availability of an “objective” palliative justification.

## 1. The Medical Exception and the Problem of Explaining It

It has long been thought that by using morphine to alleviate the severe pain or dyspnoea of a dying patient, a doctor takes a risk of causing a respiratory depression and thereby the death of the patient. All legal systems permit such palliative actions with a possible life-shortening effect and distinguish them from physician-assisted suicide and euthanasia.<sup>1</sup> This is true even of the Netherlands, Belgium, Luxembourg, and Canada—countries that also permit euthanasia under certain conditions. For in these countries the use of analgesics is considered to be a normal medical action that, depending on the medical indications, is not only permitted to the doctor but may even be his professional duty, and the doctor has the authority to decide about such actions without having to satisfy any special requirements of consultation or reporting. The patient’s hastened death is then considered a “natural” one. Euthanasia is different in all these respects.

The distinction is not only recognized by the law and by the rules of professional medical ethics: It is also psychologically deeply rooted. Dutch doctors have very different feelings about ending the life of a patient by using muscle relaxants than about risking shortening his life by increasing the dosage of morphine (Van Delden et al. 2011, 134ff.; Van der Heide et al. 2012, 150–1).

<sup>1</sup> The permission is sometimes stated by a statute, e.g., in France (Art. L 1110-5 of the *Code de la Santé Publique*) or South Australia (Section 17(1) of the Consent to Medical Treatment and Palliative Care Act 1995). In other cases it is an unwritten norm, usually confirmed by other legal regulations and court rulings (cf. n. 25).

For the last twenty years, however, the view of experts has been that if you are using morphine in the correct way, increasing dosages in accordance with observed symptoms, you will never risk causing a respiratory depression. That risk occurs only when you administer large overdoses (Dahani, Aarts, and Smith 2010; Sykes and Thorns 2003).<sup>2</sup> Because pain and other kinds of suffering may themselves have adverse effects on survival, it may even be the case that the relief of suffering by an adequate use of morphine somewhat postpones the moment of death (Gutstein and Akil 2002). Most experts hold the same view about the appropriate use of benzodiazepines in deep and continuous sedation, in particular when this use is titrated, i.e., adapted to symptoms (Sykes 2013).<sup>3</sup> So my discussion in this paper can be a contribution to counterfactual medical ethics and law only.<sup>4</sup>

However, even in that case it would not be without practical interest. *If* doctors were to have professionally legitimate reasons for using morphine or dormicum in dosages with a life-shortening effect and acted on them, they would have nothing to fear from the criminal law, but if they administered barbiturates or muscle relaxants to their dying patients in order to terminate their sufferings by ending their lives, in most countries they would be liable to be prosecuted for murder or another form of homicide. It is a remarkable fact in itself that the criminal law makes the first an exception to the general prohibition of homicide everywhere, and the second almost nowhere. Is there any morally relevant difference between these actions? It is understandable that proponents of the legalisation of euthanasia and physician-assisted suicide often argue that there is not (for example, Frey 1998; Harris 1995; Kamm 1999; Sumner 2011, chap. 3; and Thomson 1999).

Following an influential statement by Pope Pius II made in 1957, palliative action with a life-shortening side effect is usually justified by an appeal to the doctrine of double effect (Pius XII 1957, 147). Indeed, as we shall see, it is widely believed that by making the very distinction we are discussing, the law already commits itself to that doctrine. That, however, is a mistake: The doctrine gives us only one possible interpretation of the moral relevance of the distinction, an interpretation that is characterised by its focus on the intention of the agent.

After a short exposition of the doctrine (Section 2) I will start my argument by asking what its rationale could be. The most plausible rationale proposed points to differences in the relation between the agent's will and the effects he expects to cause (Section 3). This consideration is clearly relevant to our moral evaluation of the agent, but it can be questioned whether it is also relevant to the assessment of the permissibility of his action (Section 4). In order to answer that question, I will consider two well-known problems in the doctrine of double effect: the problem of identifying the proper object of the permissible intention (Section 5), and the problem of explaining why we cannot simply aggregate the foreseeable good and bad

<sup>2</sup> These findings have been contested, e.g., by Rady and Verheyde (2010).

<sup>3</sup> Remarkably, some guidelines for palliative sedation refer to the doctrine of double effect as justifying the practice, even though these same guidelines consider a life-shortening effect of proper sedation practices improbable: See Den Hartogh 2016.

<sup>4</sup> Legally, it might be of some interest to explain why a doctor who erroneously believes that by using morphine he hastens the death of his patient is not even guilty of attempted homicide.

effects of our action when these concern the same individual (Section 6). I will argue that in this particular context both problems are unsurmountable.

If the distinction, universally made by the law and rooted in the experience of doctors, cannot be explained by the doctrine of double effect, it does not follow that it cannot be explained at all. In the final part of the paper I will propose an alternative account. What the law allows is a type of medical action that is characterised not by the right intention of the doctor but by the (known) availability of justifying reasons (Section 7). I hope to show that if we understand the medical exception in this way, it can be given a plausible rationale (Section 8).

My argument concerns the moral foundations of the law and of professional morality, which, as an institutional arrangement, can be considered a kind of quasi-law. But the concepts of obligation and permissibility that I am interested in are not legal ones. In my view these are always moral concepts, even when they occur in legal or quasi-legal contexts (Den Hartogh 2002, 158–60; Raz 1984). When the law, in particular the criminal law, speaks of obligation, it claims either to track or specify pre-existing moral obligations or to create new ones. Sometimes the claim can be upheld, sometimes it cannot. But I rely on this view only in some passages where I appeal to the actual legal use of the concepts of obligation and permissibility. These passages strongly support my conclusions, but are not essential for reaching them.

## 2. The Doctrine of Double Effect: Conditions of Permissibility

The doctrine of double effect is concerned with cases in which a proposed action has both good and bad effects. A weak formulation of the principal condition would be that it matters whether these effects are *intended*, either as a final end or as a means to that final end, or merely *foreseen*. In particular, for two actions with the same good and bad effects, it may be the case that one action is permitted and the other prohibited because the bad effects are merely foreseen side effects of the first action, but an essential part of the plan that guides and controls the second one. A strong version of the doctrine would hold that it is never permissible to perform an action with bad effects, or some particularly bad effects, when those effects are instrumentally essential for realizing the aim of the action, or part of that aim.

This is the principal condition, but surely not the only one. A requirement of proportionality is an equally essential, albeit neglected, component of the doctrine. It is essential because obviously you cannot justify an action with massively bad effects and only a minor good effect by saying that you intended the good effect to occur but merely foresaw the bad ones. Hence all statements of the doctrine emphasise that there should be a proportionate reason to allow the bad effects to occur in pursuing the good. But what is a proportionate reason? Even in general statements of the doctrine in seventeenth- and nineteenth-century manuals of Catholic moral theology, a systematic answer to that question is lacking.<sup>5</sup> In recent philosophical discussions of the doctrine, the requirement is duly stated, but is then almost

<sup>5</sup> See, for example, the *Cursus Theologicus* of the Salmanticenses, written by Domingo de Santa Teresa in 1647, as quoted by Mangan (1949, 58), and his summary of the work of J. P. Gury, S.J. (1874).

invariably set apart to take care of itself (for example, Boyle 2004, 55; an exception is Kagan 1991). Because of the focus of my discussion I will have to do so as well.

Even when the good effects of a proposed action outweigh the bad side effects to a sufficient extent on a sufficient number of relevant dimensions, it could of course be the case that an alternative action would produce at least the same good effects in a less harmful way. A final requirement, therefore (sometimes understood as an element of proportionality), is subsidiarity.

### 3. Justifying the Doctrine

Why should we suppose the distinction between intended and merely foreseen effects to be morally relevant? One possible justification for it points out that it tracks distinctions in the moral assessment of actions that we are intuitively inclined to make. But even if the distinction squares with some of the intuitive beliefs of most people, a large literature by now exists showing how difficult it is to make it square with all, or even almost all, of them. This type of justification therefore seems to fail. If it succeeded, we would have a reason to suppose the distinction to be relevant, but we would still want to know *why* it is relevant.

A more promising account points to differences in the nature of the agency involved. Our condemnation of pure malevolence is stronger than our condemnation of mere indifference, and this can be explained by saying that it is worse to intend another person's suffering as an end in itself than to accept it as an unavoidable side effect of an action intended for other reasons. The doctrine of double effect proposes that we see these possibilities as forming the endpoints of a continuum, and invites us to put intending something as a means somewhere between these endpoints (Nagel 1986, 180–2). It may not be obvious that this is correct (Kagan 1991, 167–9; Sumner 2011, 69). Suppose two agents are equally reluctant to cause a particular harm, but for one of them it is a causally essential element in the execution of his plan, for the other a contingently unavoidable side effect only. Why should we think that the first agent is more “intent on evil” than the second one? You can be strongly repelled by the means you have to use from the beginning to the end, and only be driven to use them by your clear awareness of the incomparable value of what you can achieve in that way. How does this differ from the attitude the virtuous agent has towards bad side effects?

The difference is that in executing his plan, the agent is *guided and controlled* by the effects he has chosen as a means, but not by the side effects he is ready to take into the bargain (Wedgwood 2011a). In spite of your reluctance, you choose to bring about the state of affairs that supposedly will contribute to the achievement of your ends *for that reason*, and as a result you are committed to bringing it about (Boyle 1980). Once you have chosen that particular way of executing your plan, it even tends to constitute a subplan that during the time of its execution has a certain opaqueness vis-à-vis your plan as a whole (Bratman 1987, chap. 3). You will pick out additional appropriate actions by reference to your subplan, and monitor and improve your effectiveness in executing it, without thinking all the time of your final ends (Hills 2003).

Suppose that we accept that the will in this sense tends to be more strongly identified with the means it chooses than with the side effects it permits to occur. That is a gradual difference that will be more salient in some cases than in others and it

seems to be no more than one of a plurality of dimensions of the identification of the will with the effects it causes, or *agential involvement*, as I will call it (following Wedgwood 2011a; cf. Chappell 2002 on “degrees of actionhood”). Some of these may be of equal or even greater weight than the distinction between intended and merely foreseen actions. One of these dimensions concerns the extent to which the agent is (dispositionally) aware of what he is or may be causing. The agential involvement in recklessness is greater than in mere negligence, in particular when it is characterised by some degree of awareness of the risks (“advertent recklessness”). Another obvious dimension of agential involvement I have already referred to: the attitude taken by the agent vis-à-vis the bad effect caused by his action. Even if we do not deny the relevance of the distinction between intended and merely foreseen effects, we may still hold that an agent who is basically indifferent in regard to the foreseeable bad side effects of his action is more blameworthy than an agent who decides to cause a similar effect because it is instrumentally essentially in the execution of his plan, but only after long hesitation and with utter reluctance.

#### 4. Agential Involvement and Permissibility

Agential involvement is evidently an important consideration in judging the culpability of an agent in performing an action that is to be considered wrong because of its bad effects. But is it also a relevant consideration in judging the permissibility of that action? When the good effects of the action strongly outweigh the bad effects, it may be the case that every observer will consider the action *a* right or even *the* right action to perform. If the agent secretly enjoys the bad effect, that will even then be a stain on his moral character, but should we therefore say that he should not perform that action? If, however, this aspect of agential involvement is irrelevant in judging permissibility, how can we be sure that other aspects are relevant?

According to a prominent view in the recent literature, we should indeed clearly distinguish between the moral assessment of an agent and that of his actions. In judging the action, we have to consider the facts of the matter that give the agent reasons to perform it or refrain from performing it. If the reasons for performing are at least as strong as the reasons for not performing, the action is permissible. And if it is permissible for one agent, given the circumstances, it is permissible for all agents under the same circumstances, even though one of the agents acted *for* the right reasons and the other did not, and the first agent is therefore morally to be commended as much as the other is to be chided (Alexander and Ferzan 2009; McCarthy 2002; Rachels 1994; Scanlon 2008, chaps. 1 and 2).<sup>6</sup>

In evaluating the view that the agent’s intention is relevant to assessing his character but irrelevant to determining the permissibility of his action, it is of central importance which conception one subscribes to of the rights and duties that determine permissibility. A plausible view is that rights and duties, and hence permissibility in the relevant sense, should primarily be understood not from the perspective

<sup>6</sup> A prominent argument for this view is that for an agent who considers the permissibility of an action it would be misdirected to “look inward” to identify the motivating reasons he would have if he did it (Kamm 2008, 167–8; Scanlon 2008, 19–20, 28–30; Thomson 1999, 514ff.). I agree with Wedgwood 2011b that this particular criticism misfires. In deliberation, the agent takes a first-person point of view: The reasons he considers he therefore necessarily sees as (possibly) his own.

of the deliberating agent but from the second-person perspective, the perspective of the people who ask themselves what they can reasonably expect the agent to do (Den Hartogh 2002, chap. 2; cf. Hanser 2005). This seems a particularly plausible view of the rights and duties that the law purports to create or to acknowledge, and of the rights and duties of professional morality. Even in deliberating about the relevance of his duties to his practical decisions, the agent should consider what other people may legitimately expect him to do.

If one takes that view, it may seem obvious that intentions are basically irrelevant to permissibility. A right is a protected interest, in a wide sense including interests in autonomous agency. However, it could be argued, what matters to right-holders is only that these protected interests are not damaged in fact: What does not matter to them is the attitude with which they are either damaged or respected. You are just as dead, whether your death is a means to the killer's end or a mere side effect. Why should people whose interests are protected by rights be interested in the degrees of agential involvement in actions that damage or fail to damage those interests?

The general answer to this question is clear. It is, interestingly, provided by Thomas Scanlon himself, one of the leading authors arguing against the relevance of intentions for issues of permissibility. Degrees of agential involvement may have a predictive value for future harm.<sup>7</sup> This is immediately clear when an agent acts in a certain way *in order* thereby to cause harm to others. Such an individual is much more dangerous than the person who only hesitantly and with utter reluctance accepts the same amount of harm as a contingently unavoidable side effect of his action. The first agent, as Wayne Sumner (2011, 68) says, is "targeting and pursuing" his victim (cf. Duff 1990, 111: "one who tries to kill me [...] *attacks* my life [...]"). If the criminal law aims at protecting people from harm, it will properly consider the first agent to be more of a threat.

But this is only a general argument for the relevance of degrees of agential involvement for ranking offences on a scale of wrongness. Does it also substantially matter to a right-holder whether the harm caused to his protected interest is intended by the agent as a means or as a mere side effect?

If we consider that question in a legal context, two points can be made that are both in accordance with our intuitive judgments. The first point concerns the magnitude of the harm that is produced, either directly or indirectly. In a classical German case of 1875, Thomas van Bremerhaven, the owner of a ship, placed dynamite and a detonator in it in order to blow it up at sea and pocket the insurance money for the ship. There is hardly any jurisdiction in which it would matter that the death of the crew was a mere side effect of his plan. In such a case the very fact that you know that people are going to die as a result of your action, and take it into the bargain, by itself shows wanton disrespect for those people's highest interests. It may even be the case that the disrespect is more pronounced when the agent could have avoided the side effect, for example by merely postponing the execution of his plan (cf. the passage from Stephen 1883, 92, quoted in Horder and Hughes 2007, 7–8). It is doubtful whether the person planning to kill the same number of people as

<sup>7</sup> Scanlon has a limited conception of the predictive value of agential involvement: It is only relevant when someone else is prepared to enter into a relation or conversation or into cooperation provided the agent's actions convince him of the agent's good intentions. But, as Walen (2006) has stressed, the agent's disposition to cause harm in the future may be equally relevant to the potential victim outside of such contexts.

an instrumentally essential part of his plan to achieve a comparable benefit is even more dangerous, and even if this is true, the difference is too slight to be taken into account in a judgment of permissibility. The fact that agential involvement makes a significant difference is only plausible in lesser offences, such as attempted criminal damage (Tadros 2005, 234).<sup>8</sup>

The second point is that in any case regarding such lesser crimes in which a court would differentiate between intention and mere foresight, it would be beyond dispute that even the merely foreseen effect would be harmful, and the accused's action therefore wrong in any case, even if, perhaps, not wrong enough to warrant condemnation and punishment. In such cases, higher degrees of agential involvement apparently only aggravate or magnify a more basic wrong. But that was not the conclusion of the court in the famous English case of Dr. John Bodkin Adams or in the notorious Dutch case of Dr. Peter Vencken: They were not deemed to have done anything wrong at all, but rather what they were professionally allowed or even required to do.<sup>9</sup> Differences in agential involvement cannot explain such judgments. Neither the criminal law nor professional morality concerns itself with "basically" right actions committed for the wrong reasons.

In Section 3 I acknowledged that morally differentiating between intended and merely foreseen harmful effects can be explained by a corresponding difference in agential involvement. In this section I argued that, generally speaking, differences in agential involvement can be relevant for judgements of permissibility, because they may be correlated to differences in potential for future harm. But I also pointed to some initial considerations that make it doubtful whether we can hope to find along these lines a plausible account of the medical exception to the prohibition of killing.

## 5. The Proper Description of the Object of One's Intention

In this section and the next one, I will argue that this really is a dead end, and try to explain why it is. In order to do so, I will discuss two by now traditional arguments, the first one providing an objection to the doctrine of double effect as such, the second one an objection to the application of the doctrine to a particular class of cases that includes symptom alleviation with a possible life-shortening effect. My aim in reconsidering these arguments is to discuss whether either objection can be defused in such cases.

The first problem was described in general terms for the first time by Philippa Foot in 1968.<sup>10</sup> In most cases in which you do not intend the bad effect as your final

<sup>8</sup> Tadros (2011, chap. 7) nevertheless argues for the direct relevance of intentions in the criminal law; contrary to Scanlon's view, they would not matter only because of their predictive value. However, he agrees that people's interests are much more important in the criminal law than intentions to cause harm: We do not punish people who do the right things for bad reasons, and do not distinguish between homicide with foresight and with intention. But if the relevance of intentions is direct, how can it be limited in this way?

<sup>9</sup> *R v Adams* [1957], Crim LR 365; *Vencken Rb Breda* 10/7/2004, AR5394.19/7/2005. Even more clearly argued is the judgment in this case of the disciplinary court of 10/3/2005, *Medisch Contact* 2005, 499–501. For a comparable Belgian decision see Delbeke 2007.

<sup>10</sup> Foot (1979), generalizing an observation about craniotomy made by Hart (see n. 11).

end, but as a means to that end only, it is possible to differentiate between the aspects of your action that are instrumentally necessary for achieving your end and the bad aspects, because they are only contingently connected. If you have to choose harmful instruments in order to achieve good ends, it is in most cases because the available instruments are all blunt ones. To cite the best-known example from the literature, if a military commander considers bombing a large city in order to undermine the enemy's morale, his aim need not be that the inhabitants of that city die, but only that they will seem to be dead for the duration of the war (Bennett 1995, 210). Hence he could claim that the death of civilians is merely an unavoidable side effect.

Interestingly, some Catholic authors have made similar claims in order to get rid of some standard applications of the doctrine of double effect that they did not like. For example, if a doctor performs a craniotomy and wants to justify his action, he could say: If I had succeeded in narrowing down the skull of the foetus sufficiently for him to pass the birth canal without causing his death, I would, of course, only have been greatly relieved.<sup>11</sup> Hence the death of the foetus is merely an unintended side effect. Similarly, some authors have realized that, recognizing rational agency to be a basic human good, they seem to be committed to an absolute prohibition of deep continuous sedation until death. But they have escaped that conclusion by arguing that what the medical practitioner in deciding to sedate strictly needs to intend is not to eliminate the patient's consciousness altogether, but only to extinguish those elements of her consciousness that constitute her suffering. For it is, they submitted, only contingently true that we cannot eradicate those elements without eradicating more (Jansen and Sulmasy 2002; Sykes 2013). It has even been suggested that when a neonatologist uses muscular relaxants in order to end a dying baby's gasping, he may intend only to stop the baby's breathing, not its life (Perkin and Resnik 2002).

Surely, such moves should make us feel uneasy. If they are allowed, we may wonder whether the doctrine is not largely losing its bite (Duff 1990, 90; Kuhse 1987, 98). If throwing your body on a grenade in order to save your comrades' lives need not be condemned as suicide, since you only want your body to function as a shield (Finnis, Grisez, and Boyle 2001, 33), why is a similar action to be condemned if you only want to prevent the cancerous cells in your body from growing further, or to put your nerves out of operation to stop feeling pain? Why, on the other hand, is it still wrong if you do not throw your own body on the grenade but that of one of your comrades? Or why are you supposed to violate the absolute prohibition of killing an innocent person when all you really want to do is to remove her organs for transplantation?

The challenge for defenders of the doctrine of double effect is to find criteria for the identification of cases in which the good and bad effects are, in Foot's terms, "too close" to each other to be separated or, in Charles Fried's terms, too "tightly bound to be disaggregated" (Foot 1979; Fried 1978, 24). It would be beyond the scope of this paper to discuss in detail the proposals that have been or could be made. Instead I hope to contribute to the discussion by making a general point about all of them, but it will be helpful to make that point by reference to some particular proposals before making it in a fully general way.

<sup>11</sup> First suggested by Hart (1968, 123), adopted by Boyle (1977, 309; 1991, 480), Grisez (1970, 340), and Masek (2009, 572).

One possibility would be to argue that the relation between the strictly intended outcome and the bad effect is too close, if the use of the blunt instrument invariably causes the bad effect to occur in all contexts (McMahan 1994).<sup>12</sup> Another option would be to suggest that the doctrine is particularly concerned with cases in which the means an agent plans to use in order to achieve his aim are *overinclusive* because both the good and the bad effects are inseparable parts of the state of affairs that the agent will have to realize in order to achieve his end. They are not causally related to each other, and they are not constitutive elements of each other either, but they are constitutive elements of that larger state of affairs.

Such an account would, indeed, explain the anomalous character of some of our problematic cases. Inducing full unconsciousness in order to prevent further suffering, thereby also stopping the exercise of rational agency, is an obvious example of the use of such an overinclusive means. As regards the terror bombing case, it has often been suggested that it is really easy to explain: Yes, the military commander intends the population of the city he decides to bomb to *appear* to be dead, rather than to be dead, but in order to make them appear dead he *causes* them to be dead—that is the proximate means he chooses (Delaney 2008, 337–8; Fitzpatrick 2006, 590). However, the relation between death and the appearance of death is not a causal one. If you are dead you will appear dead, although the opposite is not true. Hence causing death is not strictly a “means” of causing the appearance of death: It is one way of causing it, characterised by “overkill.” In the gasping case the doctor wants to stop the child’s gasping by stopping its breathing. However, in order to achieve this, he administers a drug that causes an irreversible loss of the capacity of spontaneous breathing, and this amounts to death, at least on a plausible conception of it (Pallis and Harley 1996; President’s Council 2008). Again, death is a noncausally necessary result of the use of the means he has chosen.<sup>13</sup>

Against all such proposals the same objection can be brought forward. First consider the broader proposal: The relation between the strictly intended outcome and the bad effect is “too close” if the first state of affairs is supposed always to cause the second, irrespective of further circumstances. Suppose that you learn that, contrary to everyone’s expectations, the bad effect has not occurred, for example that after a craniotomy the foetus has not died immediately. That is no reason for you to change your plans.<sup>14</sup> Hence in executing your plan, you are not guided and controlled by your expectation of that effect.

In some cases, the fact that the bad effect does not occur may indirectly inform you that your action has probably failed to contribute to your intended end, and in

<sup>12</sup> On a more revisionist understanding of the doctrine (Fitzpatrick 2006; 2012; Wedgwood 2011a), the effects are already too close if the bad effect necessarily occurs in the actual context, e.g., because of the presence of civilians in the area to be bombed.

<sup>13</sup> For an extensive discussion of such distinctions, see Kamm 2007, chap. 5, esp. 147–52. But her discussion does not concern possible refinements of a principle that essentially refers to the agent’s intention.

<sup>14</sup> I am using here a version of the so-called failure test (Donagan 1991, 496; Duff 1980, 150). According to this version, the agent should ask himself during the execution of his plan whether the mere fact that he has not still produced the effect by itself gives him a reason to change his plan. If at any time he concludes that he should adapt it if possible, the effect is part of his intention (Jansen 2010; cf. Hills 2003). I do not claim, however, as the proponents of the failure test do, that it gives us determinate results in all cases: I am using it only as a vehicle of exposition.

that case you may have a reason to adapt your plans. But you may have a reason of that kind even when you fail to cause a mere side effect. If after his campaign of carpet-bombing, a military commander learns that there are still civilians around in the area, he may conclude that there may also still be enemy combatants in it, and therefore decide to bomb it again. But even in that case he still does not bomb the area in order to cause civilians to die.

The same is true when the bad effect is a nonexcludable part of an overinclusive state of affairs that you have chosen to bring about because it is the only possible way in which you can achieve your aim. If you learn that you have not realized the bad effect, that is at most *an indication* that you have a reason to adapt your plan. It is not itself that reason.

This leads me to the following conclusion. It may or may not be possible to distinguish between effects that we count as intended and as merely foreseen in a way that gets all effects on the side of the distinction where we want them to be, including, in the case of the medical exception, death, on the side of the merely foreseen. In order to decide that, we would have to consider further refinements of our criteria for identifying the proper objects of intentions. What, however, in the process will be increasingly doubtful is *whether such refinements are still tracking our basic interest in the distinction*. We have seen (Section 3) that the one promising account of that interest appeals to a difference in agential involvement. But if the agent chooses a blunt instrument, and his use of it satisfies proper criteria of subsidiarity, he will only be “guided and controlled” by his plan to use that instrument to the extent that it is productive of the end that he intends to achieve. He will not correct his plan in order to preserve its bluntness. He may use other information about the effects of his plan as *indications* of its success, and even draw reasons for adapting his plans from that kind of information. But information that guides and controls his plan in this indirect way only may concern mere side effects, on every understanding of that concept.

Hence a defender of the doctrine faces a dilemma: Either he specifies the doctrine in a way that gives him the results he wants, and the doctrine is then in need of another justification, or he agrees that it has to be justified by relevant differences in agential involvement, and he then has to accept that most of the agents who have traditionally been accused of violating the doctrine can easily refute that accusation, because their actual plans have not been guided and controlled by the bad effects directly. In that case the intention we have to consider in order to check for improper forms of agential involvement is too thin to be the object of a meaningful prohibition.

## 6. Multiperson and One-Person Cases

Suppose that we can find a satisfactory way out of this dilemma. We may then have saved the doctrine of double effect and some of its applications. But the application of the doctrine to the medical exception to the prohibition on killing will still have to overcome a second, even more formidable objection.

If we consider the cases in which an appeal to the doctrine has traditionally been made, we will find that in almost all these cases the intended good and the merely foreseen bad effect pertain to different people or at least different individuals. If it is necessary to remove a pregnant woman’s uterus in order to save her life, the foetus will be killed and the mother saved. If an attack on a proper military objective, e.g.,

enemy troops or an arms factory, is to be justified, even though the attack can be predicted to kill some civilians, the good effect is a benefit to the people who by the armed intervention are to be saved from injustice. If there is any overlap between these people and the civilians who will be sacrificed, that is quite accidental. In such cases what the doctrine forbids is to balance the good and bad effects in order to calculate the greatest good for the greatest number. When the effects of our action concern different people, we cannot, the doctrine tells us, simply aggregate good and bad effects. When an action causes greater good effects for A and lesser bad effects for B, and the good results cannot be obtained without the bad ones, the overall positive balance does not justify the action. Moral theories that suggest otherwise do not take “the separateness of persons” seriously enough, as John Rawls famously claimed (Rawls 1971, 26–7).

In these cases, as in particular Warren Quinn has argued, the doctrine of double effect is similar to the second formula of Kant’s categorical imperative, on one interpretation of that principle: We should always treat people as ends in themselves, and never merely use them as means.<sup>15</sup> Quinn’s reformulation of the doctrine of double effect, or, rather, his alternative doctrine, forbids us in the pursuit of a good end to *involve* other people in foreseeably harmful ways without their consent. In order to determine whether in a course of action that we are contemplating we are using people as a mere means or “involving” them, we could ask ourselves Gauthier’s question: Suppose these people were not present on the scene, would our plan still make sense? (Gauthier 1986, 204, on the “Lockean proviso,” discussed by Van Donselaar 2009, chap. 2). When the woman’s uterus does not contain a foetus, or when no civilians are endangered by our bombing raid, our plan can proceed. We will only be relieved. But if a craniotomy is necessary, the problem only exists because of the presence of the foetus.<sup>16</sup> And if we consider bombing cities in order to break the morale of the enemy civilian population, the plan makes no sense if these cities are known to have been evacuated.<sup>17</sup>

In the case of a doctor using morphine for pain relief, however, it is the same person who will reap both the supposed benefit and the supposed loss possibly produced by the action: the end of his suffering and the end of his life. So why can we not simply aggregate these possible effects and do what is in his best interests overall? If any plausible proportionality test has been satisfied, death will not be an evil on balance to the patient, whether or not continued life will still contain some residual goods. His death or, more precisely, the one open future that involves his hastened death, will therefore be welcome, a cause of relief to everyone who means

<sup>15</sup> “In these cases, but not in their indirect counterparts, the victims are made to play a role in the service of the agent’s goal that is not (or may not be) required of them” (Quinn 1993, 349; cf. Kagan 1991, 173ff.).

<sup>16</sup> Quinn (1993, 192) calls this the “eliminative case” and observes that (even disregarding the issue of the moral status of the foetus) it is an open question whether “elimination” should be treated as morally on a par with exploitation. Cf. Philippa Foot’s (1979) discussion of the fat man in the cave, and generally the literature on innocent threats. Cf. also the discussion of two kinds of human shield in Mapel 2001.

<sup>17</sup> Quinn (1993, 191) calls this the “opportunistic” case, but “exploitative” would be a more appropriate term.

him well. So, again, why are we not allowed to aggregate? (Kamm 2007, 132–5; Sumner 2011, 70; Thomson 1999, 511).<sup>18</sup> Why would it be wrong for the doctor to aim at the realization of a state of affairs of which the patient's death is a possible, or even an unavoidable, component?

At least one answer has been proposed to this question, making it less rhetorical than I made it sound. It could be suggested that such a state of affairs can never be preferable on balance because life itself is a basic and therefore incommensurable good (Finnis 1980, chaps. 4 and 5; Finnis, Boyle, and Grisez 1987, chaps. 10 and 11; Grisez 1970, chap. 6; Grisez 1978; and many other works by these authors). But if this is true, it cannot be permissible, either, to act with the intention to alleviate a patient's suffering, only foreseeing that his life may, or will, be shortened. That action could not possibly satisfy the doctrine's proportionality requirement. That requirement can only be met if we are justified in judging that, of the alternative courses of life still accessible to the patient, the alternative with the shorter life span and less suffering is overall the best one for him.<sup>19</sup>

In Section 6 we saw that a higher degree of agential involvement can magnify a basic wrong. But if there is no basic wrong to begin with, because the bad effect is an inseparable part of a beneficial larger whole, and the separateness of persons is not at stake, there is nothing to be magnified either. In that case the bad effect by itself is not even relevant in assessing the agent's virtue. If the best possible outcome for the patient is realized, it does not in any way reflect badly on the agent's character if he is happy to have contributed to realizing it.<sup>20</sup>

It is interesting to note that, particularly outside the Catholic tradition, this particular application of the doctrine to a case where the good and bad effects concern the same person is really the only one that is widely considered to be plausible. All other applications are multiperson ones. Even in the Catholic tradition there is hardly a serious attempt to apply it to other one-person cases involving basic human goods. We would hesitate to amputate a person's limbs in order to save the life of another person, but not to make the same amputation as a means to save the life of that person himself, although this is an injury to a basic human good on any

<sup>18</sup> Some authors, e.g., Shiffrin (1999), argue that we are not allowed to cause harm to someone by an action that also produces greater good to that person, but only by an action that prevents greater harm. But that principle, if valid, cannot explain the difference between symptom relief with a possible life-shortening effect and euthanasia. In any case it does not essentially refer to the agent's intention either, and it might be justified by the kinds of considerations I discuss in Section 8.

<sup>19</sup> Grisez (1978, 56) and Finnis, Boyle, and Grisez (1987, 263–7) reply that determining the moral acceptability of bad side effects does not require the weighing of the nonmoral value of goods. But all the principles they propose instead (which, by the way, seem to me to all require such weighing) apply to multiperson cases only, and it is indeed hard to see how the supposed side effect of the use of morphine can be justified in any other way than by claiming that it is more important to the patient not to suffer any more than to live a bit longer.

<sup>20</sup> In the multiperson case, an act could be allowable because of the availability of a justification (see Section 8), but the agent could nevertheless be blameworthy for doing it with the wrong intention, e.g., causing civilian casualties for basically punitive reasons. There is no analogy to this possibility in the one-person case.

plausible Aristotelian account.<sup>21</sup> So is exercising rational agency. But Catholic doctrine actually only points to the great importance to people of the possibility of exercising that capacity without disallowing it to be weighed against other benefits at all. That it concerns a basic human good is never advanced as a reason to categorically forbid deep and continuous sedation or general anaesthesia.<sup>22</sup> In such cases a supposed difference in agential involvement does not seem to matter either.

I conclude that it cannot be one doctrine that explains both the permissibility (under strict conditions) of causing collateral harm in war and the medical exception to the prohibition of killing.

## 7. Another Explanation: The Availability of a Justification

I started this paper by observing that all legal systems, even including the Dutch, Belgian, and Canadian ones, distinguish between medical action that provides relief of suffering to a patient but at the same time may hasten his death, and medical action that ends his suffering by ending his life. I have added that the distinction is deeply felt to be relevant by all medical practitioners, even if they consider both types of action to be justifiable under certain conditions. The relevance of the distinction is usually justified by appealing to the doctrine of double effect. Having found that this justification is not really plausible, however, we should not conclude that the distinction cannot be justified at all. Both the universality of the legal distinction and the basic character of the relevant intuitions of doctors suggest that we should look further.

It may be helpful to consider the law again. In English law the crucial case is *Adams* ([1957], Crim LR 365), and the crucial statement in that case is Devlin J's explanation that, even though to shorten life by days or weeks is to cause death no less than to shorten it by years, a doctor "is still entitled to do all that is proper and necessary to relieve pain and suffering even if the measure he takes may incidentally shorten life." This statement has always been taken as an application of the doctrine of double effect: Often it is even supposed to have introduced that doctrine into English law. Actually, however, the judge makes no reference to Dr. Adams's intentions at all, but only to the availability of a medical justification.

It is true that later decisions considerably muddled the waters (on such cases, see Lewis 2008, 350, n. 5; Otłowski 1997, 175–6; and Williams 2007, 34–9). More generally, it is generally agreed that the English legal doctrine of *mens rea* is "worryingly opaque," precisely in regard to the relevance of the distinction between intention and foresight (Grubb 2004, 1110; cf. Ashworth and Horder 2009, 175; Clarkson, Keating, and Cunningham 2010, 150–1; Price 1997). To some extent this unfortunate state of affairs is to be explained by the fact that the courts wanted to vindicate the medical exception without making any legal room for euthanasia, and did not

<sup>21</sup> Garcia (2007) replies that the amputation of a nonfunctioning limb is not an evil. But in many surgical operations the operating physician creates injuries to healthily functioning body parts. Even in the multiperson case of living donation, Catholic doctrine is proportionalist rather than absolutist.

<sup>22</sup> The teaching of the Roman Catholic Church on this issue does not appeal to double effect; it is proportionalist rather than absolutist. For a summary see Davis 2008; cf. IACB 2012. The same is true of Kant's (1991, 223) personal view of the medical use of narcotics.

realize that it is possible to do this without relying on the doctrine of double effect (Lewis 2008, 350; Price 1997, 324; Williams 2007, 15–6).<sup>23</sup> Nevertheless, an alternative way to vindicate the medical exception can be found in the law itself.

Many legal systems have a doctrine of the criminal mind that is incompatible with the doctrine of double effect. The Dutch doctrine of *opzet* (*dolus*, intent), for example, stipulates two conditions, one regarding belief and one regarding volition (Rommelink 1994, 191ff.; Van Dijk 2008).<sup>24</sup> Regarding belief, the agent has to be aware in advance that the action he plans will have a harmful effect or effects. No special mental act of recognition of this prospect is required, only awareness in the dispositional sense. As regards volition, it is enough that, being aware of this significant probability, the agent decides to execute his plan. He does not take the harmful effect as a reason to renounce the action, and in this sense allows the effect to occur. He may intend it as his end or as a means to his end, or he may only take it into the bargain: That does not matter. Nevertheless, Dutch law has room for the medical exception: What it allows is “hastening death as a subsidiary effect of a treatment that is necessary for the alleviation of suffering and adjusted to that end” (Staatscommissie 1985).

There are good reasons for the criminal law, in addition to those I considered in Sections 5 and 6, to focus on justifications, and not on intentions. In the first place there is the issue of proof. The law, like all external observers and probably also the agent himself to a large extent, has to infer purpose and even knowledge from the actual actions and utterances of the offender and the circumstances in which they made sense. But it is often difficult to establish the actual intention of the agent in this way, and it will be particularly difficult if there is a medical justification for the doctor’s action. In the Dutch *Vencken* case the prosecution relied on testimony of things Dr. Vencken had said, allegedly showing his intention to end the life of his patient. But for the courts it was enough to establish that he had not used excessively high dosages of morphine and dormicum.

A second additional reason to focus on the availability of medical justifications, rather than on the intentions of the doctor, consists in the fact that a substantial part of medical activity needs a similar justification. What a medical practitioner does often causes harm, in particular injury and suffering, to the patient; hence it does at first sight seem an offence, for example, a case of battery. But doctors are nevertheless allowed, and indeed often professionally required, to act that way. In some jurisdictions this general medical exception is explicitly stated by statute; in others it should be considered a customary norm, usually confirmed by court decisions.<sup>25</sup>

<sup>23</sup> Even in legal systems that do not rely on any distinction between intention and foresight in their account of the criminal mind, the doctrine is sometimes invoked to explain the medical exception. See, for example, the German *Dolantin* case (BGH, NJW 1997, 807ff.).

<sup>24</sup> For Belgian law, see Vansweevelt 2008. This has been the traditional legal view in the Low Countries since the Middle Ages (Monballyu 2014, 70–2).

<sup>25</sup> In English law most clearly stated by Lord Mustill in *Brown* [1994] 1 AC, 212, 266 (HL): “proper medical treatment [...] is a category of its own.” In the parliamentary discussion about the Dutch Penal Code in 1880 the Minister of Justice Modderman considered the general medical exception so self-evident that he rejected the suggestion to codify it (Rommelink 1994, 358).

The law should not be interested in the doctor's intention but in the (known) availability of a justification.<sup>26</sup> That is the preferable legal arrangement, and often the preferable interpretation of the existing law. Similar considerations apply to professional morality and to any system of moral assessment that focusses on the second person's point of view.

This doctrine of justification by "objective" indications could still be called a doctrine of double effect, though it may be advisable not to put it that way, because the notion of double effect is so strongly connected with a reference to intention. The name would not be improper in itself, for what the "new" doctrine justifies is acting in a certain way when the action has two effects, and only one of these effects is considered to be its justification. In comparison with the justifying effect, the other effect can then even be called a mere side effect. It does not matter whether that side effect is considered to be harmful or not. What matters is that even if it is not harmful, for some reason it is not accepted as a justification.

## 8. Justifying the Explanation

What could that reason be? This question needs to be asked, and not only because of its independent interest. The fact that the law everywhere makes a certain distinction may suggest the moral importance of that distinction, but this suggestion has to be confirmed by an explanation of its importance.

So how to explain that the law only permits actions with a foreseeably life-shortening effect when they also cause effects from an approved list, which does not include all effects that are good for the affected person on balance? Why does the law not simply allow aggregation of the good and bad effects, even when they concern the same person? Even if you agree that under some circumstances it will be better for you to die than to survive in a state of severe suffering, that does not mean that you are prepared to grant everyone the *authority* to decide whether or not you are in such a state, not even necessarily with your own consent, if that can still be given. There are too many possibilities of mistake and abuse. Together these possibilities also constitute a public bad: In considering each particular case we should consider not only the possible consequences of the decision for the persons directly involved in it but also the external effects of giving someone authority to make that decision, including the effects on people's sense of basic trust.

On the other hand, on the traditional understanding of the effects of the use of morphine, it would be highly undesirable never to allow anyone to do anything with possible life-shortening consequences: People would have to be left to die in pain or to suffocate. Faced with such conflicting considerations, the proper strategy for the law is to create exceptions to the general prohibition that on the one hand maximally mitigate the unwanted consequences of a general prohibition but on the other hand, by their clearly limited scope, and sometimes by prescribing adequate monitoring procedures, minimise the risks of error and abuse, and of a loss of trust.<sup>27</sup>

<sup>26</sup> As Enoch (2007, 4, n. 4) notes, it is not entirely clear whether Quinn's reinterpretation of double effect, here discussed in Section 6, "falls on the mental-state or the causal-structure side." Kamm (2007, 84–6) gives a more detailed analysis of Quinn's views, showing that some things he says fall on the causal-structure side.

<sup>27</sup> Your right to life should then be understood, at least in part, as a Hohfeldian *immunity*, correlated to other people's lack of the power to weigh your interests in life against other considerations.

The revised double-effect doctrine can be seen to provide a solution to this equation. Only doctors are granted the authority to decide on an action that risks hastening death, and then only in cases in which there is a clear palliative indication for such actions, an indication that also determines the maximum dosages to be used. If they welcome the death of a patient as an end to his sufferings, they are not to be condemned for that, but in order to justify their actions they should still be able to point to the palliative indication. The scope of their power can be even more restricted by other stipulations that need not be particularly relevant by themselves: limiting its exercise to cases involving patients with a terminal illness (South Australia), with a limited life expectancy, or in a dying stage. These are the actual strategies employed by the law: The odd thing is only that in most countries so little is normally being done by way of monitoring. The availability of a medical indication is only one such indirectly significant barrier, not an application of a general doctrine of double effect to a special case.

The law has an interest in limiting the range of exceptions to the prohibition of killing. By itself, however, this is not a decisive reason to forbid either physician-assisted suicide or euthanasia. A second exception could be introduced, in the same way as the first one, for similar and actually more pressing reasons: by specifying both its benefits and its risks, and by maximizing the benefits and minimizing the risks by a special legal regime. That regime could limit the authority to help people end their lives to a special group, in particular physicians, by stipulating the conditions under which they are allowed to proceed, and by designing special procedures for monitoring and oversight. All jurisdictions that have introduced a second exception have embedded it in such systems of legal safeguards, in all cases to a much greater extent than in the case of the first exception (for an overview and evaluation, see Lewy 2011). All proposals of this kind have to be evaluated on their own merits. The authors (mentioned in Section 1) who have argued that there is no morally significant difference between the alleviation of symptoms with a possible life-shortening effect, on the one hand, and physician-assisted suicide and euthanasia, on the other, have failed to recognize this particular interest of the law and its moral importance.

Nevertheless these authors have a point. Other arguments that are traditionally brought forward against legally permitting physician-assisted suicide or euthanasia, for example appeals to the sanctity of human life, the dignity of the human person, or the integrity of the medical profession, can only be consistently accepted by people prepared to oppose all other medical exceptions to the prohibition of "killing the innocent" as well. For the distinctions between medical exceptions that these appeals require can only be justified by reference to the doctrine of double effect, understood in terms of the intentions of the agent. But that justification is flawed beyond repair.

*Department of Philosophy  
University of Amsterdam  
Oude Turfmarkt 141-147  
1012 GC  
Amsterdam  
The Netherlands  
E-mail: g.a.denhartogh@uva.nl*

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