

CONTEXTUALIZING, CLARIFYING, AND DEFENDING THE DOCTRINE OF DOUBLE EFFECT

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ACCORDING to the doctrine of double effect (DDE), bad effects that it is not morally permissible to intend may be permissibly accepted as side effects if the good effects one intends are proportionate to the unintended bad side effects. The DDE is often invoked to explain, for instance, why (as is commonly supposed) it may be morally permissible to engage in tactical bombing of a legitimate military target in a just war, despite foreseeing that nearby civilians will be killed, but not permissible to engage in terror bombing, that is, directly targeting civilians to terrorize the population and undermine morale. Many, however, have attacked the DDE, arguing that it is incoherent, lacks an underlying rationale, or leads to apparently absurd conclusions in certain cases. Stephen Kershner and Robert Kelly, for instance, argue in a recent paper that the principle of double effect is incoherent, because the principle presumes that people have stringent moral rights and (in their view) violations of rights should be defined without reference to the intent of the agent.¹ Uwe Steinhoff also criticizes the DDE in two recent papers. In one, he surveys various purported rationales for the DDE and argues that none are convincing.² In another, Steinhoff argues that the intuitive appeal of the DDE is based on biased and methodologically flawed presentations of contrasting cases, such as tactical bombing versus terror bombing. In such cases, Steinhoff believes that differences other than the agent's intent are actually the source of our contrasting judgments and that the typical case comparisons obscure this by failing to make the contrasting cases the same in every respect apart from the agent's intent. When cases are presented in which everything except for agent intent is held constant, Steinhoff sees no difference in intuitive moral permissibility.³

1 Kershner and Kelly, "The Right-Based Criticism of the Doctrine of Double Effect."

2 Steinhoff, "Wild Goose Chase."

3 Steinhoff, "The Secret to the Success of the Doctrine of Double Effect (and Related Principles)."

T. M. Scanlon similarly argues that the DDE's appeal is "illusory" and that agent intent cannot in itself determine moral permissibility.⁴

These and many other criticisms of the DDE rest on a failure to understand the principle's broader theoretical context and presuppositions. It should not be surprising that if one isolates a principle from the broader moral theory of which it is a part (and within which the principle was first formulated), that principle will end up seeming arbitrary and difficult to defend. Analogously, Newton's second law of motion (force equals mass times acceleration) would be puzzling to someone who stumbled upon the formula but did not understand the broader theory of physics of which it forms a part.⁵

In this paper, I aim to clarify and advance the debate surrounding the DDE in three stages. First, I outline a contemporary version of the broader normative theory (i.e., the Aristotelian-Thomistic natural law tradition) within which the DDE finds its proper context and explain how this theory provides a rationale for the DDE. Second, I clarify the DDE's proportionality condition to avoid common misinterpretations. Third, I show how recent criticisms of the DDE fail insofar as they attack a straw man quite different from the "real" DDE (properly formulated and understood within the appropriate theoretical context).

The reader may be tempted to dismiss my argument out of hand because it relies on a moral theory that seems "out of fashion" among academic philosophers, but this would be a mistake for several reasons. First, the theory just might turn out to be true or at least better than the alternatives, but one will never know unless one seriously considers it with an open mind. Second, if (as I believe to be the case) the DDE is inextricably bound up with this broader theory, understanding that is crucial for debates about the DDE. Finally, the DDE's persistent intuitive appeal, in spite of the many supposedly decisive refutations of it, may itself provide a reason to reconsider the only tradition of moral thought that can actually provide a coherent rationale for it.⁶

1. THE DDE'S THEORETICAL CONTEXT

Historically, the DDE has typically been traced to Thomas Aquinas's discussion of self-defense in the *Summa Theologiae*. In this passage, Aquinas claims that while

4 Scanlon, *Moral Dimensions*, ch. 1.

5 This comparison is inspired by Alasdair MacIntyre's argument in chapter 1 of *After Virtue*.

6 I take as evidence of this persistent appeal the fact that many ethicists frequently refer to the DDE and/or rely upon it and that even its critics refer to its intuitive appeal and think it necessary to provide lengthy arguments against it. Further, empirical studies indicate that it has a strong intuitive appeal for many people. See, e.g., Cushman, "The Psychological Origins of the Doctrine of Double Effect."

intentional killing is always wrong (at least for private citizens), self-defense (even by lethal means) can be morally acceptable insofar as the attacker's death is an unintended side effect of an act aimed at saving one's own life.⁷ The term "double effect" comes from Aquinas's claim that "nothing hinders one act from having two effects, one of which is intended, while the other is beside the intention." The reason why this is morally relevant, in Aquinas's view, is that "moral acts take their species according to what is intended, and not according to what is beside the intention."⁸ In other words, Aquinas believes that the agent's intent is crucial for determining the nature of an action in the morally relevant sense, and determining the nature (or species) of an action with precision is important because Aquinas believes that certain types of actions are intrinsically evil and therefore always prohibited regardless of the circumstances. (Note that this does *not* imply that foreseen side effects are morally irrelevant, as I will explain below.)

While Aquinas himself does not offer an explicit defense of this claim about the importance of intent in defining the moral act, so-called "new natural law" theorists have filled this gap in the argument by explaining its place within a broader moral theory that recognizes the existence of absolute moral prohibitions on certain types of actions.⁹ According to the new natural law theory (NNLT) developed by Germain Grisez, Joseph Boyle, and John Finnis, morality is about acting in accordance with the requirements of practical reason. The first principles of practical reason direct us to preserve and promote basic human goods, understood as constitutive aspects of human flourishing that are intrinsically valuable and provide ultimate reasons for action. These goods are recognized as such by an immediate (nondeductive) insight of practical reason once they are experienced.¹⁰ They include life and health, knowledge,

7 While Aquinas states in this passage that public officials may engage in intentional killing for the sake of the public good (as would be the case with capital punishment or a soldier killing in war), Germain Grisez argues that Aquinas's views on capital punishment and killing in war are not really coherent with his broader moral theory but are perhaps due to the influence of the dominant opinions of his day. Grisez argues that a coherent Thomistic view would only allow for nonintentional killing. Thus, capital punishment and killing in war could only be justified as forms of community self-defense in which the killing is not strictly intended (Grisez, "Toward a Consistent Natural-Law Ethics of Killing," 91).

8 Aquinas, *Summa Theologiae*, II-II, q. 64, a. 7, corpus.

9 The label was given by the theory's critics, who coined it to imply (mistakenly, in my view) that the theory marked a substantive (and erroneous) departure from the Thomistic natural law tradition. However, the label is now widely known and used by both friends and critics of the theory alike, so I use it here for the sake of convenience.

10 Finnis further explains how basic human goods are identified:

There are many objects of human interest, but many of them make sense only as instrumental to, or parasitic on, the realization of other, more basic purposes

the appreciation of beauty, excellence in work and play, friendship, marriage, integrity, and religion.¹¹ Any action that directly or indirectly aims at a basic good is *rational*, for the identification of basic goods just is the identification of intelligible motivations for action.¹² However, an act aimed at a basic good may not be *fully reasonable*, because it may be following *one* of the directives of practical reason (i.e., aiming at one basic good) in a way that fails to respect or take into consideration the *other* directives of practical reason (identifying other goods as also worthy of protection and promotion). For instance, a medical researcher might seek to gain knowledge of a deadly pathogen by deliberately infecting people with it and observing the course of the disease. The researcher's action is rational insofar as it is aimed at the basic good of knowledge, but it is not fully reasonable insofar as it completely fails to respect the health and life of the research subjects (which are also basic goods that practical reason directs us to protect and promote). To act in a fully reasonable way—that is, to act morally—is, in this view, to act in accordance with the *integral directiveness* of practical reason, which means choosing and acting in a way that is compatible with a will toward integral human fulfillment (the fulfillment of all human beings with respect to all of the basic goods). This is one way to formulate the master moral principle of NNL, from which flow all of the theory's more specific moral norms.¹³

and benefits. By reflectively analyzing human volitions—one's own and other people's—with their intelligible objects, one can uncover a number of basic purposes, basic benefits of human action, basic human goods. Each of these is an irreducible aspect of the fulfillment of human persons and is instantiated in inexhaustibly many ways in the lives of human persons. (Finnis, *Moral Absolutes*, 42)

- 11 Pleasure is not a basic good. A full explanation of why this is the case is beyond the scope of this paper, but the basic reason is the Aristotelian insight that pleasure supervenes on activity and that the goodness of pleasure depends on the goodness of the activity that produces it. Thus, pleasure's value is extrinsic, while basic goods have intrinsic value. See Lee and George, *Body-Self Dualism in Contemporary Ethics and Politics*, ch. 3. See also Finnis, *Natural Law and Natural Rights*, 95–97 and corresponding notes in the postscript.
- 12 Because each of the basic goods offers a distinct intelligible benefit, none of the goods is reducible to any of the others or to any more fundamental category of goodness, which means that goods are incommensurable in value. This point will be discussed in greater detail in the next section, as it is crucial for a proper understanding of the proportionality condition.
- 13 Another way to formulate this principle is to say that acting morally is acting with unfettered reason. This formulation recognizes that various forms of emotional motivation can be out of line with rational motivation, thus “impairing the rational guidance of action, fettering one's reason, limiting its directiveness, and harnessing it as feeling's ingenious servant.” It complements the formulation stated above, for subrational motivations out of line with the directives of practical reason fetter reason precisely “by deflecting one

Among the more specific moral norms that flow from this master moral principle is the norm forbidding intentional damage to or destruction of basic human goods. A choice to damage or destroy a basic human good (either as a means to some further end or as an end in itself) sets one's will against that good and thus is clearly incompatible with a will toward integral human fulfillment. This is not the only moral norm that flows from NNLT's master moral principle. One example is the requirement of fairness, which prohibits arbitrarily prioritizing the good(s) of one person or group over another. Another is reasonable fidelity to commitments, which is required for any deep and significant participation in human goods (where such fidelity excludes fanaticism, which would unreasonably discount the importance of competing goods). However, the norm forbidding intentional damage to basic human goods is especially relevant for understanding the DDE, for it is this norm that identifies certain types of actions (specified by the agent's intent) as always immoral, regardless of the circumstances.

At this point, a clarification of what is meant by "intent" is in order. In simple terms, to intend something is to choose it as an end or as a means to the achievement of one's end. What this means can be clarified with reference to the idea of a proposal for action. In choosing to do something, one adopts a proposal for action that includes the end one is seeking to bring about and all of the means one takes to be necessary in one's plan for the achievement of that end. This account of intention is narrow, including *only* what falls within one's proposal for action so described. Any other effects of one's action fall outside of the intention, even if they are causally inseparable from what one intends and even if they are foreseen with certainty.¹⁴ For instance, a soldier who jumps on a grenade seeking to save his comrades by muffling the impact of the blast with his body adopts a proposal for action in which saving the lives of his comrades is the end and muffling the impact of the blast by absorbing the shrapnel with his body is the chosen means necessary in his plan for the achievement of that end. That the absorption of the shrapnel with his body is almost certainly causally inseparable from his own death does not mean that the soldier intends his death. For it is not his death as such but the muffling of the blast and absorption of the shrapnel that he chooses as necessary means

to objectives not in line with *integral human fulfillment*, with the good of all persons and communities" (Finnis, *Moral Absolutes*, 44–45).

14 For further explanation and defense of this narrow account of intentions, see Finnis, Grisez, and Boyle, "Direct and Indirect," 1–44; Tollefsen, "A First Person Account of Human Action," 441–60; and Lee, "Distinguishing between What Is Intended and Foreseen Side Effects," 1–21.

to achieve his end. Only the muffling and absorption, therefore, fall within the proposal for action he adopts.

Having clarified the concept of intention, we can now consider the crucial question: Why does NNLT prohibit only *intentional* damage or destruction to basic human goods, despite recognizing (as will be explained further below) that we nonetheless do have moral responsibility for the foreseeable but unintended side effects of our actions? Several reasons can be given for this. First, the theory holds that the capacity for free choices—choices in which nothing but the choice itself determines what will be chosen—is what makes us moral agents. What we *choose* to do determines our moral character in a way that what we merely accept as a side effect does not. For to choose (i.e., intend) something is to set one's will on that thing, to integrate one's will with it, and to treat it as good, such that if one does not achieve it, one will have failed. As Finnis explains, "In choice, then, the human person integrates himself around, and in a certain sense synthesizes himself with, the object of his choice."¹⁵ The agent's self-determination toward the object of choice and resulting self-constitution around that object persist unless and until a contrary choice is made. But to accept something as a side effect does not implicate one's self-constitution in this way.

Grisez elaborates on this point in explaining the crucial moral difference between intending to kill and accepting someone's death as a side effect of one's action:

A difference of intention can relate identical behavior in quite different ways to our moral attitude, and to the self being created through our moral attitude. If one intends to kill another, he accepts the identity of killer as an aspect of his moral self. If he is to be a killer through his own self-determination, he must regard himself in any situation as the lord of life and of death. The good of life must be rated as a measurable value, not as an immeasurable dignity. Others' natural attitudes toward their own lives must be regarded as an irrational fact, not as a starting point for reasonable community. However, if one intends not the death of another but only the safety of his own life, then one need not identify himself as a killer. One's attitude toward human life itself and toward everything related to it can remain that of a person unwilling to take human life.¹⁶

15 Finnis, "Human Acts," 149.

16 Grisez, "Toward a Consistent Natural Law Ethics of Killing," 76. I should emphasize here that my claims about the nature of intention and its impact on self-determination are not empirical but conceptual and metaphysical, based on the nature of the will and of the act of choosing. Further explanation and defense of these presuppositions is beyond the scope

Note that this integration of the will with the object of one's choice occurs not only when one is choosing something as an end in itself but also when one is choosing something only as a means to some further end, even when that choice of means is made with deep emotional regret (as a spy might regretfully choose to kill his girlfriend as a means to keeping his true identity a secret if she accidentally discovers who he really is).

Second, and related, the prohibitions on what we intend are stricter than prohibitions on what we accept as a side effect, because what we choose to do—what we intend or set our will on in choosing—is by definition completely within our control. By contrast, the transitive effects of our actions on the world are not entirely within our control, for they depend upon a variety of external causal forces as well as upon the free choices of other agents. Thus, it makes sense that the most stringent moral rules should be rules that govern what we choose/intend, by contrast with the unchosen (even if foreseen) effects of our actions.

Third, avoiding unintended damage to or destruction of basic human goods is literally impossible, for free choice presupposes that we are choosing among a variety of basic goods, each of which offers a distinct benefit that is not reducible to any of the others or to any more basic category of goodness.¹⁷ (If all goods were reducible to some common measure, then there would always be one option that offered all of the benefits that the other options offer, plus more. And if that were the case, the other options would lose all rational appeal and fall away, leaving no room for choice.) Anytime we choose, therefore, we are accepting as a side effect the failure to pursue the other goods that we might have pursued if we had chosen otherwise. If, for instance, I decline an invitation to dine with friends in order to spend the evening working on this paper, I accept that I have missed an opportunity to build up our friendship and that my friends may feel snubbed or neglected by my failure to make time for them. I would thus indirectly (and unintentionally) be damaging the good of friendship as a side effect of my choice to pursue the goods of knowledge and professional excellence. Scarcity of time and resources means that this sort of indirect damage to the goods that could have been but were not chosen is a pervasive and unavoidable feature of life. Any moral theory that did not limit absolute moral

of this paper, but they can be found in, e.g., Lee and George, *Body-Self Dualism in Contemporary Ethics and Politics*, 59–65; Finnis, “Human Acts” and “Intention and Side-Effects”; and Finnis, Boyle, and Grisez, *Nuclear Deterrence, Morality and Realism*, 288–91.

17 As Finnis explains, “There is a free choice (in the sense that matters morally) only when one is rationally motivated towards incompatible alternative possible purposes (X and Y , or X and not- X) which one considers desirable by reason of the intelligible goods (instrumental and basic) which they offer—and when nothing but one's choosing itself settles which alternative is chosen” (Finnis, “Intention and Side Effects,” 194).

prohibitions to actions defined by intention would therefore be impossible to follow and utterly inadequate as a guide to practical deliberation and choice.¹⁸

Obviously, a defense of NNLT and its claims about the existence and nature of moral absolutes is beyond the scope of this paper. My goal in this section has only been to show that natural law theory offers a theoretical context that explains the moral relevance of the DDE's distinction between intention and side effects by offering an account of moral absolutes and why moral absolutes apply only to what we intend.

2. CLARIFYING THE DDE'S PROPORTIONALITY CONDITION

The DDE has been formulated in a variety of ways.¹⁹ At the core of these various formulations is the claim that certain harms that it is not permissible to intend may be permissible to accept as side effects if the acceptance of these side effects is proportionate. Most of the debates about the DDE have focused either on why intent should make such a difference to the moral permissibility of knowingly bringing about certain effects or on how to distinguish between intention and side effects, particularly in cases where the supposed side effects are causally close to or inseparable from what is intended. In this section, I set these debates aside in order to focus on the proportionality condition, because it has been both misunderstood and neglected. The proportionality condition is often interpreted as requiring that the good effects one intends "outweigh" the unintended bad side effects. It is often interpreted, in other words, as some form of utilitarian calculus.

The hypothetical trolley problems that pervade the double-effect literature give the illusion that such a calculus is possible, because the competing goods at stake are presented in a way that makes them commensurable. If a runaway trolley is careening toward five unknown people, and you could save the five by diverting the trolley onto another track on which there is only one unknown person, it is clear that the choice to save five people is proportionate to the unintended side effect of killing one person. Yet once more details about the people are provided, numbers alone are insufficient to make the proportionality determination. What if the one person who will be killed if you divert the trolley away from the five is your eight-year-old daughter? And what if the five are escaped convicts, perhaps convicted rapists or murderers?

18 As Finnis notes, "moral norms exclude irrationality over which we have some control; they do not exclude accepting the inevitable limits we face as rational agents" (Finnis, "Intention and Side Effects," 195). See also Boyle, "Who Is Entitled to Double Effect?," 486–87.

19 For an account of the various traditional formulations and a clarification of their meaning, see Boyle, "Toward Understanding the Principle of Double Effect," 527–38.

From the NNLT perspective, proportionality cannot be determined by the application of a utilitarian calculus, because such a calculus is usually both impossible and incoherent. A utilitarian calculus would only be possible and meaningful if human goods were commensurable in value, as is the case when you are comparing more or less of the same good—for example, “human life” in general—with no knowledge of the particulars that make those goods (e.g., lives) incommensurable.²⁰ In such cases, such as the standard trolley problem, however, there really is no choice to be made, because in the absence of any specific knowledge about who the people are, by saving five lives, you get all the value of one life, plus more. If one is thinking clearheadedly about the scenario, the intelligible appeal of the alternative (letting the track continue on its course to kill the five) simply drops away. The only intelligible option in such a scenario is to divert the trolley to save the five. Most real-life cases, however, are not like this.

NNLT holds that there are multiple basic human goods, each of which has distinct, intrinsic value and cannot be reduced to any other more basic unit of value. What follows from this has sometimes been called the “incommensurability thesis,” according to which “basic values and their particular instantiations as they figure in options for choice cannot be weighed and measured in accordance with an objective standard of comparison.”²¹ In other words, when there are a variety of basic goods (or a variety of instantiations of the same good) that one might pursue, one is faced with multiple intelligible options, each of which has distinct and incommensurable value, and therefore a genuine choice has to be made. This does not mean, however, that choices among incommensurable options are arbitrary or that one can never have a conclusive reason to choose one option over another. For while basic goods

20 Finnis lists a number of other cases in which value comparisons are possible:

States of affairs considered in abstraction from their origins, context and consequences (for example, their relation to a choosing human will) can often be compared in value; a happy village five minutes before and five minutes after a devastating hurricane. And many other comparisons of value are possible. Moral good can be ranked higher than nonmoral, intelligible good higher than merely sensible good, basic good than instrumental, divine and human than animal, heavenly than earthly. More of the same can be compared with less of the same; a genocidal society is worse than a murderous individual; killing is worse than wounding.

Thus, explains Finnis, the “incommensurability which makes proportionalism [or utilitarianism] irrational is incommensurability of goods involved in *options*”—that is, in situations that require a genuine choice, because more than one option has intelligible appeal (Finnis, *Moral Absolutes*, 53).

21 George, “Does the Incommensurability Thesis Imperil Common Sense Moral Judgments?,” 187.

provide first-order reasons for action, these reasons may be defeated (but not destroyed) by moral norms, which are second-order reasons for action. For instance, if I am playing golf and see a child drowning in the water trap, the Golden Rule is a moral norm that provides a conclusive second-order reason to interrupt my golf game in order to save the child. This second-order reason defeats my first-order reason (grounded in the basic value of play) to continue my golf game, but it does not destroy that reason—that is, it would still be intelligible, though not fully reasonable and therefore morally wrong, to continue the game and ignore the child.²²

Therefore, apart from cases in which there is no real choice to be made, because only one option has intelligible appeal, proportionality cannot be a matter of applying a utilitarian calculus to weigh the premoral goods at stake against each other. Instead, proportionality is determined by considering whether or not there are proportionate *moral* reasons for one's choice despite the foreseen bad side effects. In other words, determining proportionality requires considering whether or not any *other* moral norms (apart from the norm forbidding intentional damage or destruction of basic human goods) are violated by one's choice. For morality, according to NNLT, requires acting in line with the *integral directiveness* of practical reason, with due regard for all of the basic human goods in all persons, which means choosing such that one's will is compatible with a will toward integral human fulfillment. As already explained, intentional damage to or destruction of basic human goods is one obvious way of violating that fundamental moral requirement, but it is certainly not the only way.

Since practical reason grasps human goods as worthy of pursuit not just for me and those I care about but for all who can be fulfilled by them—that is, all human persons—it is unreasonable (and therefore immoral) to arbitrarily prioritize the good of one person or group over another. Thus, there is a requirement to act with fairness, often understood as an application of the Golden Rule. In double-effect cases that involve intended benefits and unintended harms that fall on different people or groups of people, the Golden Rule is usually the appropriate test for determining whether the action meets the proportionality condition. For example, bombing a tiny munitions factory with no particular strategic importance in the course of a just war, even though the factory is

22 For a more detailed discussion of this case along with a full explanation and defense of the incommensurability thesis, see George, "Does the Incommensurability Thesis Imperil Common Sense Moral Judgments?" For further clarification and defense of the incommensurability thesis, as well as an account of its importance for the possibility of free choice, see Boyle, "Free Choice, Incomparably Valuable Options, and Incommensurable Categories of Good," 123–41.

located in the midst of a densely populated city, would be morally wrong even if the civilian deaths were unintended side effects, because the acceptance of those side effects would be unfair (a violation of the Golden Rule), as it would exhibit a wanton disregard for the value of those civilians' lives.

The reason why I invoke the Golden Rule here, rather than simply talking about fairness, is that it is a helpful heuristic device for determining whether or not we have unfairly disregarded or deprioritized the good of others by acting despite foreseeing that they will be harmed. The Golden Rule does this by asking us to imaginatively place ourselves in the other's shoes and consider whether or not we would think we were being treated unfairly if the tables were turned. In the bombing case described above, for instance, we might ask if we would still be willing to bomb the military target if it were right next to a prisoner-of-war camp with many of our own country's soldiers or the people living in that city were citizens of our own country rather than citizens of the country with which we are at war. If the answer is no, then the action violates the Golden Rule and is therefore unfair.²³

Application of the Golden Rule or fairness principle can also explain many philosophers' intuitions regarding the "fat man" variation of the trolley case, in which the only way to stop the runaway trolley from killing five people is to push a fat man over the side of a bridge onto the trolley tracks so that his body will obstruct the course of the train and stop it.²⁴ Some see this variation on the trolley case as involving the intentional killing of the fat man, but for the reasons mentioned earlier when discussing intention, I believe that this interpretation of the case is mistaken.²⁵ It is not the fat man's death in itself that is the means to your end of saving the five (any more than it is the soldier's death that is the means of saving his comrades from the grenade blast in the grenade case previously discussed). Rather, the means to one's end in the fat man case is stopping the train by obstructing its course with his body. Pushing the fat man onto the tracks is wrong not because it is intentional killing but because it is unfair (a violation of the Golden Rule) to force him to do this against his will. If, on the other hand, you are the fat man and you choose to throw yourself in front of the

23 Not all prioritization of one person or group over another is arbitrary. Some degree of self-preference, for instance, is reasonable given that we have more direct control over and responsibility for our own good than we do over and for anyone else's good. Similar arguments can be made for prioritization (up to a point) of the good of family members or others to whom we have a morally relevant connection that gives rise to special obligations. For more on the connection between personal relationships and special obligations, see Moschella, *To Whom Do Children Belong?*, 29–34.

24 See, e.g., Edmonds, *Would You Kill the Fat Man?*, ch. 5.

25 Edmonds, *Would You Kill the Fat Man?*, ch. 5.

train to stop it from hitting the five, you have not done anything wrong (unless accepting your death in this situation would be unfair to others, such as your dependents)—on the contrary, you have heroically accepted your death as a side effect in order to save the people about to be killed by the runaway trolley.

Another moral norm that is particularly relevant to double-effect cases in which one must choose between competing goods is what, following Christopher Tollefsen, I will call the vocation principle.²⁶ According to this principle, it is only from the perspective of one's overall vocational commitments and obligations, broadly understood, that one can establish a reasonable order of priorities among competing basic goods. The reason for this principle is that, while all the goods are in themselves equally worthy of pursuit, none can be pursued meaningfully without a considerable dedication of time and effort that takes away from one's ability to pursue other goods (or other instantiations of the same category of good). A commitment to dedicate oneself in a particular way to a certain good, so as to be able to make a deep and meaningful contribution to human flourishing with respect to that good, therefore provides a reason to prioritize pursuit of that good and enables one to do so without discounting the value of other goods.²⁷ For example, this principle is relevant to determining whether or not my hypothetical choice to forgo having dinner with friends in order to work on my paper meets the DDE's proportionality condition. (Fairness is also at play in this case insofar as the good of my friends is also at stake, but that

26 Curlin and Tollefsen, *The Way of Medicine*, 45–50. Finnis describes this principle as a requirement to make and follow a rational life plan, but I believe Tollefsen is right that the language of vocation, understood in a broad, not specifically religious sense, better captures our common moral experience in this regard. For many if not most people do see at least some of the overarching commitments in their lives (commitments to a particular profession, to a specific sort of service within the community, to marriage, to the raising of children, to long-term care for sick, disabled, or elderly relatives, etc.) as a response to some sort of calling, rather than purely as a matter of choice or preference.

27 A full account of the moral relevance of commitments is beyond the scope of this paper. George offers a brief explanation:

Basic values and their particular instantiations can sometimes be brought into a certain form of rational commensurability with respect to future choices by a choice or commitment (embodied in a choice) which one reasonably makes here and now. In light of a reasonable personal (e.g., vocational, relational, educational) commitment I have made, it may be perfectly reasonable for me to treat, and, indeed, it may be patently unreasonable for me to fail to treat, certain basic values or certain possible instantiations of a single basic value as superior to others in their directive force (for me). Choosing in harmony with one's past reasonable commitments, and, thus, establishing or maintaining one's personal integrity (in the nonmoral as well as the moral sense), constitutes an important moral reason which often guides our choices between rationally grounded options. (George, "Does the Incommensurability Thesis Imperil Common Sense Moral Judgments?," 189)

is not my focus here.) Proportionality in this case would depend on whether my choice reflects reasonable fidelity to my professional commitments or instead flows from a fanatical obsession with professional excellence that reflects a failure to respond adequately to the value of other goods, such as friendship.

In sum, I have argued in this section that the correct way to understand the proportionality condition of the DDE is to think of it not as asking us to determine whether the premoral benefits one is seeking outweigh the foreseen premoral harms one is accepting as a side effect but rather as requiring that there be proportionate *moral* reasons for one's choice, which means determining that accepting the bad side effect(s) does not in itself violate a moral norm. Though I do not pretend to offer an exhaustive list, the moral norms that are most likely to be relevant to this determination are the Golden Rule (or fairness principle) and the vocation principle. Thus, I propose that the DDE be formulated as follows:

Doctrine of Double Effect: Harms that it is never permissible to intend (i.e., harms to basic human goods) may be permissible to accept as side effects if and only if the acceptance of these side effects does not itself violate any moral norm—for example, does not unfairly prioritize one person's or group's good over another's and does not arbitrarily prioritize one good (or instantiation of a good) over another.

While this formulation may seem to lack a genuine proportionality condition, that is not the case, for the second clause is equivalent to: "if and only if there are proportionate moral reasons." I prefer the above formulation, however, because it more clearly indicates what it means for there to be "proportionate moral reasons" to act despite the foreseen harmful side effects.

3. RESPONSE TO RECENT CRITICISMS OF THE DDE

Having situated the DDE within its proper theoretical context and reformulated the DDE's proportionality condition in a way that is coherent with that context, I now seek to defend the DDE, thus contextualized and reformulated, from recent criticisms.²⁸

3.1. *Kershnar and Kelly's Right-Based Critique of the DDE*

Kershnar and Kelly argue that the DDE is incoherent or trivial, because it presumes that people have stringent moral rights, but "if people have stringent

28 Of course, since space limitations make it impossible to defend the broader natural law theory that makes sense of the DDE, the best I can do here is to offer a dialectical defense conditional on the truth of that broader theory.

moral rights, then the doctrine of double effect is either false or unimportant.”²⁹ The authors consider both strong and weak versions of the DDE and conclude that the strong version is false and the weak version is trivial. I agree that the weak version—“other things being equal, it is deontically worse to intentionally infringe a norm than to foreseeably do so”—is indeed trivial, so I will focus here on their critique of the strong version.

They formulate the strong version as follows:

An act is morally right if and only if the agent does not intentionally infringe a moral norm and the act brings about a desirable result (perhaps the best state of affairs to the agent or a promotion of the common good).³⁰

Both clauses in this formulation are problematic, but here I will focus only on the first clause, around which the bulk of the authors’ argument revolves.³¹ The DDE is presented as prohibiting intentional infringement of *moral norms* rather than prohibiting intentional *harm*.³² As explained in section 1, however, the true absolute moral prohibition that is presumed by the DDE is an absolute prohibition on intentional harm to basic human goods.

Kershnar and Kelly offer several reasons for formulating the DDE as they do. They argue, first, that “if the best theory of harm is the counterfactual comparative account, . . . too many things are harmful and would then mistakenly

29 Kershnar and Kelly, “The Right-Based Criticism of the Doctrine of Double Effect,” 215.

30 Kershnar and Kelly, “The Right-Based Criticism of the Doctrine of Double Effect,” 215.

31 While it is less important to the overall argument, Kershnar and Kelly’s formulation of the DDE is also problematic because it lacks a genuine proportionality condition. They recognize that this is a concern, and note that “a desirable result might, and perhaps should, include a proportionality condition.” However, they avoid this because they presume that a proportionality condition must be utilitarian in nature. As they state, “the problem is to fill that condition without it becoming an optimality condition” (“The Right-Based Criticism of the Doctrine of Double Effect,” 216). As explained above, however, proportionality need not be understood in this way. Kershnar and Kelly do mention the possibility of a “moderate version” of the doctrine of double effect that “allows for the satisfaction of other considerations, such as desert, fairness, or rights, to be necessary for an act to be morally right” (216). This is closer to the interpretation of proportionality I have proposed here.

32 While this point is not central to my argument, Kershnar and Kelly’s framing of the DDE as prohibiting intentional infringement of moral norms seems to be a category mistake, for what we intend, strictly speaking, is what we take to be good, what we take to offer some intelligible benefit, either in itself, or as a means to the benefit we seek. Thus, while people knowingly and intentionally act in ways that violate moral norms, they do not *intend* the violation of moral norms just as such (except perhaps in unrealistic hypothetical cases). Rather they intend to do something (in pursuit of some perceived benefit) which violates a moral norm.

trigger a doctrine-of-double-effect analysis.”³³ However, on my account, the only harms that would require a double-effect analysis are harms to basic human goods, since those are the only harms that are (if intentional) absolutely morally prohibited according to NNLT.³⁴ Second, Kershnar and Kelly do not think intentional harms are wrong unless they “set back someone’s legitimate interests,” and they offer the example of a woman hitting a robber to defend herself as a case of intentional harm that is morally permissible for this reason.³⁵ In cases of self-defense, however, the tradition of double-effect reasoning beginning with Aquinas himself has held that harming (or even killing) others in self-defense is justified only if the harm is a side effect of an act that seeks to preserve one’s own life (or some other important good) by rendering one’s attacker harmless. Harm to the attacker’s life or health is not part of the proposal one adopts in such cases and is therefore not intended, for if a blow temporarily stuns the attacker without actually damaging his health, one will still have achieved one’s goal.³⁶ Third, Kershnar and Kelly claim that “intentional harm is permissible if the person who is harmed validly consents to it.”³⁷ Yet this is not true in the natural law tradition, according to which intentional harm to basic human goods is always wrong, regardless of consent.

These problems with Kershnar and Kelly’s formulation of the DDE are crucial for understanding why their argument—while perhaps successful as a critique of other versions of the DDE—fails as a critique of the DDE as presented in this paper and as generally understood in the natural law tradition. Kershnar

33 Kershnar and Kelly, “The Right-Based Criticism of the Doctrine of Double Effect,” 217.

34 Further, given (as explained above) that any choice to pursue one good rather than another involves damage to the good not chosen, I believe that double-effect reasoning is in fact pervasive (though often implicit) in our moral deliberations. The reason why double-effect analysis is implicit in most cases is that the harm to the good not chosen is usually quite obviously a side effect, and thus the moral analysis is really about proportionality, which comes down to the application of the relevant moral norm—e.g., the Golden Rule or the vocation principle, as described above.

35 Kershnar and Kelly, “The Right-Based Criticism of the Doctrine of Double Effect,” 217.

36 Many of the other cases Kershnar and Kelly discuss in their article also incorrectly interpret the harm as intentional when it would actually be a side effect on the account of intention explained in section 1. For instance, in the “Sophie” case a woman in a Nazi prison asks the guard to kill her instead of her daughter. Kershnar and Kelly believe that Sophie is intentionally trying to kill herself, but this is false (“The Right-Based Criticism of the Doctrine of Double Effect,” 223). Sophie is intending to save her daughter by taking her daughter’s place. Her death is a side effect. If the guard is moved by her offer and decides not to kill either of them, or if they are unexpectedly rescued before the execution takes place, she will still have achieved her goal, which means that her death was not necessarily part of her proposal for action.

37 Kershnar and Kelly, “The Right-Based Criticism of the Doctrine of Double Effect,” 223.

and Kelly's argument against the strong version of the DDE rests on the claim that the DDE presumes that people have rights and that the relevant norms that the DDE forbids one from intentionally infringing are rights. They go on to conclude that the DDE is incoherent because infringing a right is wrong regardless of whether or not one does so intentionally or as a side effect.

The problem with this argument, however, is that it interprets the DDE in a way that is not coherent with the DDE's theoretical context. In the natural law tradition, absolute rights are the flip side of absolute moral prohibitions, and absolute moral prohibitions (as explained above) are prohibitions on *intentional* harms to basic human goods. One can also speak of rights more generally as articulating the requirements of justice from the perspective of the beneficiary. On this broader account of rights, one can also violate others' rights by, for instance, unfairly accepting harm to their basic goods as a side effect.³⁸ This, I believe, is the correct explanation for why many—including Kershnar and Kelly—think that pushing the fat man over the bridge in the fat man version of the trolley problem would violate the fat man's rights. Thus, my account preserves common intuitions about the fat man case without adopting Kershnar and Kelly's view of absolute rights as defined independent of the agent's intention.

Kershnar and Kelly do consider the objection that their argument begs the question by failing to recognize that "intentions are at the core of rights."³⁹ They believe, however, that defining rights violations as intentional infringements of a norm, combined with their formulation of the DDE as forbidding intentional norm-infringement and their definition of norms as rights, leads to an infinite regress. This problem is resolved, however, by correctly formulating the DDE in light of its proper theoretical context within the natural law tradition. If we recognize that the DDE is premised upon the existence of moral absolutes that prohibit certain acts as specified by their intent (i.e., the intent to damage basic human goods), then the idea that intentions are at the core of absolute rights is completely coherent with the DDE and presents no problem of regress.

38 Property rights (which are not absolute rights according to the natural law tradition) would fall under this category of intention-independent rights. Property rights flow from the Golden Rule, not from the norm prohibiting intentional damage to basic goods, and the justification for private property in the natural law tradition is indirect, based on the instrumental value of private ownership for both the individual and common good. It is also worth noting that the Thomistic natural law tradition does not view one's body as property, for the tradition holds that the body is an intrinsic aspect of the person and that persons cannot be owned. For a natural law account of property rights (and their limits), see Boyle, "Fairness in Holdings."

39 Kershnar and Kelly, "The Right-Based Criticism of the Doctrine of Double Effect," 226.

Given that Kershnar and Kelly's formulation of the DDE, their concept of rights, and their concept of intention are all at odds with the natural law tradition within which the DDE finds its proper theoretical context, it is no surprise that they find the DDE to be incoherent. If I presented an analysis of Newton's second law of motion but did so by giving an account of force, mass, and acceleration at odds with the basic principles of Newtonian physics, I would likewise be likely to conclude that the second law of motion is incoherent. Kershnar and Kelly's *version* of the DDE is indeed incoherent with *their* broader theoretical presuppositions, but their argument leaves the real DDE—accurately understood within the context of the natural law tradition—completely untouched.

3.2. Steinhoff on the Lack of a Rationale for the DDE

Steinhoff examines a number of purported rationales for the DDE and claims to find none of them persuasive. Here I will only consider Steinhoff's discussion of the rationale that is in line with the account I have provided in section 1, along with his presentation of several cases that might be considered a challenge to that rationale.

Steinhoff first considers Thomas Nagel's argument that the rationale for the DDE is based on the special wrongness of aiming at evil. Steinhoff quotes the core of Nagel's argument: "to aim at evil *even as a means*, is to have one's action *guided* by evil. . . . But the *essence* of evil is that it should *repel* us. . . . So, when we aim at evil we are swimming head-on against the normative current."⁴⁰ Steinhoff believes that Nagel's analysis of the phenomenological importance of aiming at evil has already been decisively refuted by Bennett and others. Bennett argues that Nagel's argument is persuasive only in cases where the evil is intended *as an end*, not cases (such as the standard terror bomber case) where the evil is sought only as a means to some further good.⁴¹ This argument, however, fails to appreciate that intending as a means is still *intending* and thus still involves setting oneself in the direction of the evil. For ends and means are relative. Every end can also be intended as a means to some further end, and every means is itself a proximate end.

Bennett's failure to grasp this fundamental point can be seen in his argument that the only difference between the tactical bomber (who accepts the civilian deaths as a side effect of a raid on a military target) and the terror bomber (who seeks civilian deaths to terrorize the population and end the war) is simply a difference in "how intensely or thoroughly hostile they are" to the civilians. Each bomber, says Bennett, will "manoeuvre towards" the civilians' death in a

40 Steinhoff, "Wild Goose Chase," 3; and Nagel, "The Limits of Objectivity," 132.

41 Steinhoff, "Wild Goose Chase," 3; and Bennett, *The Act Itself*, 224.

variety of ways. The tactical bomber, just like the terror bomber, “relentlessly and ingeniously pursues, *for as long as he has any reason to*, a path that inevitably leads to” the death of the civilians.⁴² Yet this account of the intentions of each bomber is imprecise. The terror bomber maneuvers toward the civilians’ death, but the tactical bomber maneuvers toward the military target and avoids (insofar as is possible) killing the civilians. For instance, if the bombing can be done at a time when fewer civilians are likely to be around, he will do that. If he has access to a type of bomb that is more accurate and less likely to cause collateral damage, he will use that one. Bennett might respond that here I am bringing in differences in probable outcomes, which he does think can make a difference morally, but that is not my point. Rather, my point is that the tactical bomber is not aiming at the civilian deaths *in any way* or showing any hostility at all toward the civilians. This absence of hostility is shown in his deliberations about the precise way in which he will carry out the raid.⁴³ By contrast, the terror bomber really is aiming at the deaths (even if only as a means) and will maneuver and deliberate with that end in mind. The end of killing the civilians may be a proximate one, sought merely for its usefulness in achieving a further goal, but it is nonetheless still an end. Thus, Bennett’s supposed refutation of Nagel’s argument that intentions matter (at least phenomenologically) because to aim at evil is to have one’s action be “guided by evil” is not as decisive as Steinhoff takes it to be.

Steinhoff is nonetheless ultimately correct to say that Nagel’s view is insufficient to provide a rationale for the DDE, but not because Nagel’s phenomenological account of the difference between intending evil and aiming at evil is faulty. Rather, Nagel’s argument, while suggestive, is insufficient because it is simply meant to explain why “the fact that you must try to produce evil” is “phenomenologically important.”⁴⁴ When considering whether or not this fact is “morally important,” Nagel states that there is no “decisive answer.”⁴⁵ The NNLT view is compatible with Nagel’s phenomenological analysis but also provides the missing rationale for the moral significance of this analysis. NNLT does this by recognizing, first, that practical reason directs us to preserve and promote the good in all of its fundamental dimensions; second, that to intend something (even as a means) sets one’s will (and with it one’s whole self) in the direction

42 Bennett, *The Act Itself*, 223.

43 Technically, the terror bomber need not be “hostile” to the civilians either, if by “hostile” one means that he seeks their deaths as an end in itself.

44 Nagel, *The View from Nowhere*, 183. Note that while the passage Steinhoff quotes comes from an earlier essay prior to the book’s publication, that passage is identical to the one in the book.

45 Nagel, *The View from Nowhere*, 183.

of what one intends; and thus, third, that to intend damage to a basic good (even as a means) is always inherently contrary to the integral directiveness of practical reason, while acceptance of such damage as a side effect is not.⁴⁶

Steinhoff also relies on the argument of Dana Kay Nelkin and Samuel C. Rickless, who deny that it is always wrong to intend great harm. They believe, for instance, that it is not wrong to intend harm to an unjust attacker.⁴⁷ This claim, however, directly contradicts the natural law account. As already noted, at the very origin of the DDE is a case of killing in self-defense, and the reason why the DDE is invoked to justify such killing is precisely that intentional killing is considered wrong even in response to an unjust attack.⁴⁸ Once again, it is not surprising that the DDE would seem incoherent or unnecessary if the core moral premise that gave rise to it—that is, that some intentional harms are never morally permissible, regardless of the circumstances—is simply denied. The rationale for the DDE provided by the NNL is therefore not refuted by the arguments of Bennett or Nelkin and Rickless on which Steinhoff relies.

3.3. *Steinhoff on the Lack of Intuitive Support for the DDE*

The rest of the arguments that Steinhoff criticizes in his article differ so significantly from the natural law account that they are not worth discussing here.⁴⁹ In the course of his discussion of one of these arguments, however, Steinhoff considers Alexander Sarch's comparison of two cases of arson—a pair of cases that Steinhoff believes are superior to those usually used to test our intuitions because the arson cases actually keep everything equal except for the difference in intent.⁵⁰ Steinhoff believes that such properly constructed examples actually do not elicit the intuitions that would support the DDE. Here are the two arson cases as described by Steinhoff:

46 For more on the insufficiency of Nagel's rationale for the DDE and of other attempts to provide a rationale for the DDE apart from the natural law tradition, see Boyle, "Who Is Entitled to Double Effect?," 475–94.

47 Nelkin and Rickless, "So Close, Yet So Far," 403, cited by Steinhoff, "Wild Goose Chase," 4.

48 When Aquinas discusses self-defense, he does say that public authorities (unlike private citizens) may sometimes intend to kill or maim. Grisez and other NNL theorists, however, believe that Aquinas's view on this matter is inconsistent with his broader moral theory and make the case for an absolute prohibition on intentional killing of human beings, regardless of whether they are guilty or innocent, and regardless of whether the killer is a private citizen or a public official. Grisez, "Toward a Consistent Natural Law Ethics of Killing."

49 Warren Quinn's proposed rationale for the DDE, which Steinhoff discusses and critiques at length, is also criticized by Boyle from an NNL perspective in "Who Is Entitled to Double Effect?" (Quinn, "Actions, Intentions, and Consequences").

50 Sarch, "Double Effect and the Criminal Law," 462.

In the first case, Alan is paid to burn down a building, and he indeed burns it down to get the money, foreseeing with certainty the death of a victim who happens to be in the house. He regrets the victim's death, but the money is more important to him. In the second case, Bobby is paid to kill the victim (he would not get the money if the victim survived) by burning down the house, and in order to get the money he indeed kills the victim by burning down the house. He regrets the victim's death, but the money is more important to him.⁵¹

I agree with Steinhoff that (*contra* Sarch's claim) Alan and Bobby are equally culpable, despite the fact that Alan accepted the victim's death as a side effect while Bobby intended the victim's death. Yet the DDE, properly understood, does not presume that intending harm is the only or worst way to act immorally. The DDE as I have explained it, and as the natural law tradition has long understood it, only says that some harms that it is never permissible to intend *may* be permissible to accept as a side effect if and only if the acceptance of the side effect is proportionate (i.e., does not violate any other moral norm). Callous disregard for the harms that will result as a side effect of one's actions may be just as bad as or worse than the intentional infliction of harm. The arson cases therefore do not show that the DDE, properly understood, yields counterintuitive results.

What about other cases—carefully formulated to keep everything equal except for the case of intent—that Steinhoff presents in a different article and uses to argue that our intuitions about them do not support the DDE? I do not believe that any of the cases presented, if analyzed in light of the account of the DDE I have offered above, are any more problematic than the arson cases. Here I look at only one of Steinhoff's pair of cases by way of example:

Pedestrian I: A private person (pursuing a just cause) throws his hand grenade on a mark X in front of a pedestrian, intending that the pedestrian will die.

Pedestrian II: A private person (pursuing a just cause) throws his hand grenade on a mark X in front of a pedestrian, foreseeing that the pedestrian will die.⁵²

Steinhoff says that he discerns no difference in the justifiability of the two cases. I disagree. But for those who share Steinhoff's intuition, I would argue that the reason why it is hard to see the difference in the cases is that we are not told

51 Steinhoff, "Wild Goose Case," 13–14.

52 Steinhoff, "The Secret to the Success of the Doctrine of Double Effect (and Related Principles)," 247.

what the “just cause” is or why throwing the grenade onto the X is necessary for the cause. One might thus be inclined to think that throwing the grenade is wrong in both cases, because we have not been presented with proportionate moral reasons for throwing the grenade despite the foreseen bad side effect. And I believe that we also find it hard to imagine why one could not warn the pedestrian and wait for her to move before throwing the grenade. Thus, the case is a very bad test of intuitions.⁵³

Allow me to propose a better set of cases—a revised version of the original trolley cases—that meet Steinhoff’s desiderata of keeping everything equal except the intent:

Trolley and Politician I: A runaway trolley is careening toward five people who are stuck on the track. The people will be killed if the trolley hits them. You could divert the trolley onto a side track by flipping the switch. There is one person stuck on the sidetrack who will be killed if you do this. That person happens to be a local politician whose policies you believe are harmful to the community. You choose to divert the trolley onto the sidetrack intending to save the five and foreseeing (but not intending) the death of the public official.

Trolley and Politician II: A runaway trolley is careening toward five people who are stuck on the track. The people will be killed if the trolley hits them. You could divert the trolley onto a side track by flipping the switch. There is one person stuck on the sidetrack who will be killed if you do this. That person happens to be a local politician whose policies you believe are harmful to the community. You choose to divert the trolley onto the sidetrack intending to save the five and also intending the death of the public official (as a means to ending the harmful community policies).

I think that the moral difference in these cases is clear and that while the action in *Trolley and Politician II* is morally wrong, the action in *Trolley and Politician I* is morally right. If your intuitions do not support this conclusion, consider the difference it would make to the deceased politician’s spouse if you gave

53 While there is a significant body of empirical literature regarding the DDE, I do not engage with this literature because my critique of Steinhoff is not empirical. Rather, my appeal here (like Steinhoff’s appeal in presenting the Pedestrian cases) is an appeal to the judgment of the reader, not a prediction of how most people would respond to the case. Further, most of the empirical literature on this issue is based on assumptions that are incompatible with natural law theory—e.g., the assumption that our intuitive judgments about morality are primarily the result of psychological causes or “structural feature(s) of the mind,” rather than, for instance, the result of education and habituation through prior choices, as discussed in note 54 below. Cushman, “The Psychological Origins of the Doctrine of Double Effect,” 765.

him an honest account of your actions in each case. In Trolley and Politician I, you could honestly say: “I am very sorry about your loss. I know that I have publicly criticized your wife’s policies, but I swear to you that the only reason I diverted the trolley was to save the five. My reasons for acting truly had nothing to do with my political disagreements with your wife.” In Trolley and Politician II, however, you could not honestly say this. While you could honestly say that you acted to save the five, you could not honestly say that saving the five was your *only* reason or deny that your political disagreements (and accompanying desire to remove his wife from the scene by killing her) were part of the reason for your choice. To the mourning widower, I believe that this difference would indeed be morally significant, and considering this perspective may help sensitize us to the objective moral difference between the two cases.

Steinhoff has thus not provided any clear evidence that the DDE runs contrary to common intuitions. At any rate, my own defense of the DDE is not intuition-based but rather based on the moral theory outlined above, which I believe to be true for independent reasons.⁵⁴

3.4. Scanlon on Critical and Deliberative Uses of Principles

Like Steinhoff, Scanlon argues that the DDE’s intuitive appeal is illusory. Since many of Scanlon’s critiques of the DDE overlap with those I have already addressed in response to Steinhoff, I focus here on an aspect of Scanlon’s critique that has not already been implicitly addressed in the preceding sections. Scanlon believes that the appeal of the DDE in many cases is due to a failure to distinguish between what he calls the “critical” and “deliberative” uses of moral principles. In their use as a guide to deliberation, moral principles identify “the considerations that make it permissible or impermissible to do X under the circumstances in question.”⁵⁵ Critical use of moral principles, however, goes

54 Indeed, I am generally skeptical of attempts to base moral claims on intuitions, for I believe that morality is a matter of practical reasonableness, while intuitions (at least as the word is commonly used) are based on feelings, and feelings are shaped by beliefs (which may or may not be true), as well as by bias and numerous other subrational factors. Nonetheless, those whose feelings have been shaped by true moral beliefs and who habitually seek to avoid the distortions of bias or other subrational factors in their judgments will tend to have moral intuitions that correspond to moral truth. Further, natural law theory holds that practical reason’s first principles (i.e., the identification of basic human goods) are self-evident to those who understand their terms and that the most basic moral requirements of natural law are easily accessible to reason. Thus, we would expect that those basic requirements—such as the Golden Rule—would be widely agreed upon at least implicitly by most people who seek to lead morally upright lives. For these reasons, showing that the implications of one’s moral theory accord with at least some people’s moral intuitions—or at least do not seriously contradict them—does have some value.

55 Scanlon, *Moral Dimensions*, 22.

beyond identifying “which considerations are relevant to the permissibility of such an action and how they should be taken into account,” because it requires also “asking whether the agent in question in fact took those considerations into account in the proper way.”⁵⁶ Scanlon illustrates this distinction with the following example: “I have promised to sell you my house, and . . . under the circumstances this counts as a decisive reason for doing so. In particular, the fact that I could get more money by breaking my promise and selling the house to someone else is not a sufficient reason to do that. But suppose I do break the promise in order to get this benefit.”⁵⁷ Scanlon says we might be tempted to say that his action was wrong because he “acted for a bad (selfish) reason,” but in fact the reason why the action was wrong is that he “had promised to sell you the house.”⁵⁸ The former, argues Scanlon, “is a criticism of the way [he] went about deciding, not an explanation of why [his] action would be wrong.”⁵⁹ He believes, therefore, that we are mistaken when we make judgments of permissibility by using moral principles critically rather than deliberatively.

This contention is relevant to Scanlon’s critique of the DDE because Scanlon believes that appealing to intent to explain why, for instance, terror bombing is impermissible and tactical bombing is permissible is to make the mistake of determining permissibility through the critical rather than deliberative use of moral principles. Scanlon believes that the difference between the two cases flows not from differences in intent but from general moral principles about conduct in war. In particular, “the principle relevant to these cases states a class of exceptions to the general prohibition against the use of deadly force, and specifies the limits to those exceptions.”⁶⁰ He spells out this principle more concretely as follows:

In war, one is sometimes permitted to use destructive and potentially deadly force of a kind that would normally be prohibited. But such force is permitted only when its use can be expected to bring some military advantage, such as destroying enemy combatants or war-making materials, and it is permitted only if expected harm to noncombatants is as small as possible, compatible with gaining the relevant military advantage, and only if this harm is “proportional” to the importance of this advantage.⁶¹

56 Scanlon, *Moral Dimensions*, 22–23.

57 Scanlon, *Moral Dimensions*, 23.

58 Scanlon, *Moral Dimensions*, 24.

59 Scanlon, *Moral Dimensions*, 24.

60 Scanlon, *Moral Dimensions*, 28.

61 Scanlon, *Moral Dimensions*, 28.

He believes that it is this principle—rather than differences in the agents' intent—that accounts for our judgment that tactical bombing, but not terror bombing, is permissible.

Yet Scanlon's argument here simply begs the question of why the use of force in war should only be allowed for the destruction of military targets rather than for the purposes of killing civilians to demoralize the population and bring the war to a swift conclusion. What, in other words, is the moral justification for this principle limiting the exceptions to the general prohibition on the use of deadly force? Indeed, both the exceptions and the limits of those exceptions sound suspiciously *ad hoc*, tailored to explain the difference between tactical and terror bombing. Scanlon does recognize that his discussion simply presupposes the existence of the moral principles upon which he relies (principles that have roots in the natural law tradition) without any attempt to defend them or to justify "the importance they attach to the distinction between combatants and noncombatants." He believes, however, that he does not need to do so, because his point was merely to show that "these principles need not be understood as making permissibility dependent on intent."⁶² Unless, however, he can provide some plausible explanation for these principles that is completely independent of intent, he has not actually proven his point.

There is nothing *ad hoc*, by contrast, about the NNL account of the distinction between tactical and terror bombing. For NNL holds that intentional damage or destruction of basic human goods (such as life) is always wrong, because it is always incompatible with a will toward integral human fulfillment, while accepting death as a side effect is not *necessarily* wrong, because it is not *necessarily* incompatible with a will toward integral human fulfillment. This account also provides an explanation of what Scanlon takes to be the relevant moral principle in this case by spelling out the underlying moral justification of that principle. In the absence of any better account of the moral difference between tactical and terror bombing, therefore, the NNL account (including the DDE) remains the best explanation.

Further, the NNL account outlined in section 1 shows that the distinction between the "critical" and "deliberative" uses of moral principles does not work and begs the question by presuming that agent intent is morally irrelevant (which is precisely what the distinction is trying to prove). In the NNL view, actions can only be identified (in the morally relevant sense) and judged from the first-person perspective. Determining, for example, whether lethally shooting an assailant is an act of homicide or self-defense depends on the proposal that I adopted in choosing to shoot. Was my choice to shoot an adoption of

62 Scanlon, *Moral Dimensions*, 32.

the proposal “I am going to save my life and rid the community of this dangerous criminal by killing him” or the proposal “I am going to incapacitate this attacker so that I can get away and save my life”? If I adopted the first proposal, my act would be homicide (though the circumstances would likely diminish my culpability); if I adopted the second, it would be self-defense. I have already explained why, from the NNL perspective, intent has this moral significance. Further defense of the view is beyond the scope of this paper and has been provided elsewhere.⁶³ My point here is simply to note that Scanlon’s use of the critical/deliberative distinction is incompatible with the broader moral theory that provides the proper theoretical context for the DDE. Once again, therefore, it is unsurprising that one would find it difficult to defend the DDE if one jettisons the core assumptions of the tradition of moral thought within which the DDE was developed.

4. CONCLUSION

My goal in this paper has been threefold: first, to explain the rationale for the DDE within the broader theoretical context of natural law theory; second, to provide an account of the proportionality criterion that is in line with that theoretical context; and third, to (conditionally) defend the DDE, properly understood, from recent attacks. I have argued that while recent critiques of the DDE may be successful in attacking their own version or interpretation of the DDE, they are largely attacking a straw man. The “real” DDE remains untouched by their critiques. This argument does not necessarily imply that the DDE is justified—only that it stands or falls with the broader natural law theory of which it forms a part and thus cannot be successfully defended or critiqued in isolation from that broader theory. Yet this is precisely what many critics of the DDE (such as those discussed above) attempt to do.⁶⁴ I should clarify that my argument is not meant to show that the DDE stands or falls specifically with the “new” natural law approach—though I believe that this approach offers the most consistent and rigorous version of natural law ethics—but rather that it stands or falls with natural law theory broadly construed to include any theory that has an account of absolute moral prohibitions in which the prohibited

63 See, e.g., Tollefsen, “A First Person Account of Human Action.”

64 As one reviewer has pointed out, these critics would likely also disagree with the broader moral and metaphysical framework within which the DDE is embedded, but their critiques do not directly engage with this framework and often do not even acknowledge its existence. Instead, they treat the DDE as an isolated principle rather than part of a broader natural law theory.

act-types are identified at least in part by agent intent.⁶⁵ For those already inclined to reject both the DDE and natural law theory more generally, this paper may not present much of a challenge, though it may nonetheless offer a helpful clarification of what is actually at stake in the debate. On the other hand, for those who believe that the DDE does capture an important moral truth but are skeptical of natural law theory, this paper suggests that coherence requires them to either abandon the DDE or reevaluate their skepticism of natural law.⁶⁶

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65 I believe that to justify such an account of absolute moral prohibitions one would also need (1) an objective account of human well-being (i.e., human goods) knowable through reason and (2) an account of moral norms in which acting morally is fundamentally about having a will or character that is correctly disposed toward human well-being. However, defending this claim is beyond the scope of this paper.

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