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Double-effect Reasoning Defended: A Response to Scanlon

T. A. Cavanaugh

Abstract: Common morality endorses some form of an exceptionless prohibition against killing innocents. Natural lawyers employ double-effect reasoning (DER) to address hard cases involving deaths of the innocent. Current deontologists (Scanlon and Thomson) criticize DER-proponents as conflating act- with agent-evaluations. Scanlon develops this critique extensively. I respond to his criticism. He maintains that the DER-advocate tells a badly-motivated agent to refrain from an obligatory act. Thus, he asserts, the natural lawyer who employs DER errs. Instead, Scanlon proposes, one ought to assess the act as permissible while blaming the agent. I argue that DER does not succumb to this critique. Moreover, Scanlon's particular criticism nicely shows the reasonableness of the approach the DER-thinker takes, namely, that defective agents produce defective acts. Thus, employing DER does not lead to a confusion of act- with agent- evaluations. Rather, it results in coherent assessments of both.

"The denial of any distinction between foreseen and intended consequences, as far as

responsibility is concerned, was not made by Sidgwick in developing any one 'method of ethics'; he made this important move on behalf of everybody and just on its own account; and I think it plausible to suggest that this move on the part of Sidgwick explains the difference between old-fashioned utilitarianism and that consequentialism, as I name it, which marks him and every English academic philosopher since him. By it, the kind of consideration which formerly would have been regarded as a temptation, the kind of considerations urged upon men by wives and flattering friends, was given a status by moral philosophers in their theories. It is a necessary feature of consequentialism that it is a shallow philosophy."

–G. E. M. Anscombe, *Modern Moral Philosophy*

I. Introduction: Double Effect.

Right reason finds the killing of innocent persons exceptionlessly wrong. Just as in cases of other absolute norms (such as the U.S. Constitution's legal norm that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," which gives rise to jurisprudential casuistry), that against killing innocents leads to case-based ethical reasoning.¹ Double-effect reasoning (DER) arises out of reflection upon hard ethical cases and the absolute prohibition of killing the innocent.² Recently, T. M. Scanlon has found DER wanting. In this paper, I respond to his criticism.

"How does the moral assessment of an action, in particular the moral permissibility of performing it, depend on the agent's intentions?" (Scanlon, 2008, 8) Thus, Scanlon begins his account of permissibility. He hopes to "explain why intent seems to be relevant to permissibility

in the particular way claimed by the doctrine of double effect, even though this apparent significance is illusory” (2008, 8).³ We read this in the first chapter of *Moral Dimensions*, entitled “The Illusory Appeal of Double Effect” (Scanlon, 2008, 8). Before considering Scanlon’s account, DER requires attention.

Briefly, thinkers who propose DER hold the following: answers to the question “what makes conduct permissible or impermissible?” partially depend upon answers to the prior question “what makes conduct to be conduct?” It is not for nothing that DER-proponents such as Aquinas and (following his lead) Anscombe each explicitly and at length address the more fundamental question (what makes an action an action?) Such thinkers partially rely on mental states such as intent and deliberation when they attempt to answer act-evaluation questions.⁴

Historically, DER arises out of Aquinas’ accounts of natural law and human action. One finds the *locus classicus* in Thomas’ *Summa theologiae* IIaIIae, q. 64, a.7. There, in inchoate form, Aquinas presents the basic criteria of DER. Employing those criteria, he, in effect, proposes that an otherwise permissible act⁵ productive of good and bad is permissible if the agent intends the good while foreseeing, but not intending, the bad (either as an end or as a means). Were the agent to intend the bad (as a means or end), the otherwise permissible act would be impermissible.⁶ More or less following Aquinas, DER-proponents hold that, in certain cases, *ceteris paribus*, foresight of a bad consequence ethically differs from intent of the same, such that the former is permissible while the latter is not. For example, DER-theorists contrast some instances of tactical bombing from consequentially comparable terror bombing insofar as (in an otherwise just war) the former does not, while the latter does, incorporate the agent’s intent to harm non-combatants (as a means). Thus, advocates of DER hold that the distinction between intent and foresight (henceforth the I/F distinction) has ethical import. More to the point

for our purposes, they hold that in the debated cases, the I/F distinction marks off impermissible acts from permissible acts. Scanlon disputes precisely this point. Yet, exactly how does DER lead one astray; in what does the supposed illusion consist?

II. *The Purported Error: Conflation of Act-with Agent-Assessment.*

While acknowledging the intuitive appeal of the I/F distinction, Scanlon (2008, 17-8) proposes that DER's advocates misplace its import (2008, 21-4).⁷ Scanlon proposes the Deliberative/Critical (henceforth, D/C) distinction as explanatory of the I/F distinction's appeal. As Scanlon acknowledges (2008, 27), the D/C distinction resembles an Act-assessment/Agent-assessment (henceforth Act/Agent) distinction one finds, e.g., in Judith Jarvis Thomson. Thomson asserts that to use DER and, more specifically, to acknowledge the I/F distinction's ethical import, amounts to:

...a failure to take seriously enough the fact—I think it is plainly a fact—that the question whether it is morally permissible for a person to do a thing is just not the same as the question whether the person who does it is thereby shown to be a bad person (Thomson, 1999, 517).⁸

Scanlon slightly modifies Thomson's Act/Agent distinction by specifying that the deliberative element concerns the action's permissibility while the critical element concerns:

...a special kind of agent-assessment, in which what is being assessed is not the agent's

overall character but rather the quality of the particular piece of decision making that led to the action in question (2008, 27-8).

Accordingly, as Scanlon notes, the D/C distinction has a more narrow scope than Thomson's Act/Agent distinction. The Deliberative portion of the D/C distinction assesses the act in terms of its permissibility. The critical aspect of the distinction evaluates the agent in terms of this instance of deciding (in contrast to an overall character-assessment). Thus, Scanlon proposes the D/C distinction as a specification of the Act/Agent distinction. From the standpoint of a defense of the ethical import of DER's I/F distinction, however, the (modest) difference between the Act/Agent and D/C distinctions remains moot. For the relevant question concerns the I/F distinction's moral import as applied to the permissibility of certain acts. Regardless, what follows addresses Scanlon's account (while suggesting more generally that the standard criticism, that DER-thinkers conflate act- with agent-evaluation, fails).

Briefly, the D/C distinction bears on the I/F distinction insofar as Scanlon proposes that the deliberative employment of an ethical principle (such as one bearing on the use of deadly force in a just war (2008, 28)), "may concern what the agent sees as reasons for acting, or other features of his state of mind, but they need not and often do not do so" (2008, 22). That is, according to Scanlon, an Agent's mental states, and, in particular, intentions, typically do not serve as a basis for rendering an act permissible or impermissible. More specifically, in the standard cases of tactical/terror bombing, which DER contrasts as permissible/impermissible, reference to an agent's intent lacks direct ethical relevance.⁹

III. *Terror Bombing.*

Consider the military cases. Scanlon writes that his account of principles admitting exceptions complemented by the D/C distinction is the “best” (he admits that it is not the only; indeed, DER appears to be the chief competitor, albeit ultimately mistaken) way of understanding ethical principles concerning lethal war conduct (2008, 28).¹⁰ Here follows Scanlon’s description of the exceptions to the relevant principle:

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 uses 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 (2008, 28).

On the face of things, an initial reading of these exceptions suggests that the use of deadly force upon combatants (terror bombing) is, at times, a permissible exception.¹¹ For, as customarily understood in the literature, terror bombing involves the targeting of non-combatants to the extent necessary (and no more) in order to shorten the war by undermining support for the same. Moralists who debate these matters conceive of terror bombing as militarily advantageous.¹² Indeed, for this very reason, they take it as a perfect foil to tactical bombing by which to consider the merits of DER and its competitors. So conceived, it would seem to be permissible, according to the above criteria.

Scanlon, however, differs. He says, “[t]he death of noncombatants is not rendered a

‘military advantage’ by the fact that it would shorten the war by undermining public morale” (2008, 29). This (controverted) claim strikes one as *ad hoc*. Moreover, history suggests otherwise.¹³ That is, undermining public morale seems to many to confer precisely a military advantage upon those who terror bomb. One reasonably thinks that military law repeatedly prohibits targeting civilians because those who conduct war find harming non-combatants militarily advantageous.¹⁴ How does one define a military advantage such that terror bombing does not confer such an advantage? Following Scanlon’s schema, one cannot do so by speaking in normative terms about what *ought to be* or about what is a *permissible* military advantage. For that is exactly the issue we attempt to resolve. Although Scanlon finds DER defective, he does share its judgment concerning the impermissibility of harming non-combatants. Unfortunately, the advocate of DER lacks confidence concerning the ability of Scanlon’s own account to rule out terror bombing. Absent articulation of why such bombing does not result in a military advantage, our attempts to understand his account on that point must remain speculative conjectures. Perhaps we can find a more promising point of engagement with his argument against DER elsewhere?

IV. *Agents’ Lack of Control over Intended Ends.*

Scanlon’s dispute with the I/F distinction reduces to a more basic issue concerning how much control agents have over their intentions of ends pursued in action, or over the reasons on account of which they act. As he uses the term, ‘reason’ refers to the intended end on account of which the agent acts. So, to stick with our military example, tactical bombing instances the act of dropping bombs with the intended end or reason of furthering the war effort. No dispute here; we

remain on common territory. According to Scanlon, however, fulfilling the criteria for an exception to the prohibition, the deed is permissible, regardless of the intended end with which the agent performs it. Here we encounter the disputed terrain. So, for example, according to Scanlon, if a vengeful agent intends to drop bombs in order to terrorize civilians while concomitantly and foreseeably, but not intentionally, destroying military installation, she merits blame although her deed remains permissible.

Why does her reason, her actually intended end (e.g., of vengeance for the deaths of her loved ones) in the here and now case of acting, not enter into the considerations that bear on the Deliberative permissible/impermissible act-evaluation (in contrast to only bearing on agent-assessment in the Critical use of the principle)? Scanlon writes:

Why, then, doesn't the question of permissibility apply to the reasons for which an agent acts as well as to the expected effects of the action? The answer ... is that the question of permissibility arises only with respect to alternatives between which an agent can choose (2008, 88).

He thinks that choices concerning why we do what we do (reasons or proximate ends we intend) are not open to us. While true of all agents, Scanlon illustrates the point against DER by means of an anomalous agent. He says:

a normally competent agent ought to be able to understand them [right reasons] and see that they provide reasons. It does not follow that an agent who, for whatever reason, does not see the force of such a reason is nonetheless in a position to *choose* to see its force, or

to act on it (original emphasis, 2008, 61-2).

So, it is because an *abnormally incompetent* agent (to use his implicit phrase) lacks and cannot here and now choose to acquire the relevant right reason to act (that the normally competent agent possesses, and thus does not need here and now to acquire) that intent does not figure into the act-assessment as the DER-advocate proposes. (According to Scanlon, neither the competent nor incompetent agent can choose to act for a reason, the force of which he does not currently see. They differ in that the incompetent agent lacks the right reason possessed by the competent agent.)

Numerous questions arise concerning the import of this example. Consider three. First, does the inept agent reveal a defect in DER? Second, what does the proponent of DER actually say (if anything at all) to such an incompetent agent? Third, how does DER fare in this engagement? Consider these questions in order.

Putting aside the military cases, Scanlon exemplifies the incompetent agent in an obligatory case of rescue as follows:

agent hates the person who needs help and would be happy to see him die, but she saves him anyway because she does not want him to die *right then*, since that would mean that his heir, with whom she is locked in a bitter political contest, would have much more money to spend on his campaign (2008, 57).

Here we encounter, for lack of a better name, the malevolent narcissist, morally corrupt agent, or ethically lost soul. Certainly, these descriptions are too tendentious; let us continue to use

“incompetent agent”—again, implied by Scanlon himself. Incompetent agent faces an innocent in dire need of rescue. Her incompetence consists in being able to rescue only insofar as it serves her bad intended end or wrong reason. Notably, Scanlon (without comment) relies upon the obligatory character of rescue. Call this the case of the incompetent agent/obligatory act.

What should the agent do? Should she rescue the person in dire need for her wrong reason, refrain from acting for the wrong reason and not save victim, or should she “help him for the right reason” (Scanlon, 2008, 57)? Unfortunately, this last option is not available to her. For, if she lacks the reason, as she in fact does, she cannot here and now bring herself to see the right reason for this obligatory deed. Here and now she can only choose between doing the right deed for the wrong reason or refraining from doing the right deed. According to Scanlon, were we to listen to the proponent of DER, we would tell the abnormal agent to refrain from doing the obligatory deed if she were capable of doing it only for the wrong reason. Ultimately, this is why the advocate of DER errs; he would tell an incompetent agent: *refrain from doing an obligatory deed*.¹⁵ Before considering if the DER-theorist actually does tell the inept agent to refrain from the right deed (our second question), does this supposed response by the DER-advocate to the unfit agent reveal a defect in DER (our first question)?

Two points come to mind. First, why ought an act-assessment conform to standards normed to inadequate agents? Briefly, consider Scanlon’s own overarching contractualist theory. He writes, “thinking about right and wrong is, at the most basic level, thinking about what could be justified to others on grounds that they, *if appropriately motivated*, could not reasonably reject” (emphasis added, 1998, 5). Obviously, absent satisfaction of that important condition, contractualism collapses. Why think that DER does not also make such a standard stipulation? Indeed, given the abnormal agent’s corruption, it would seem to be a basic assumption in most

accounts of act-evaluation that one norms to the competent agent.¹⁶

Second, consider a modest alteration to the incompetent agent/obligatory act case as it bears on Scanlon's account. Call it the incompetent agent/impermissible act or the Robynne Hood case. It goes as follows: when she acts for the right reason (of relieving the poor), and thus merits assessment as a good agent, Robynne lacks control over her objectionable intended means (stealing). Of course, Robynne can choose not to steal; however, then she must give up acting for the right reason, too. This case serves as the isomorph to the incompetent agent/obligatory act case. If the former is plausible, so too is the latter, by parity of reasoning. Thus, if we are to regard stealing as impermissible, we must tell Robynne to refrain from acting for the right reason. For, otherwise, she acts impermissibly. Yet, this is her way of being a good agent. Therefore, we must tell her not to be a good agent. Following the logic of Scanlon's argument concerning the irrelevance of intent to act-assessment, we ought to get rid of the concept of permissibility in the evaluation of acts. For, otherwise, we will tell incompetent agents such as Robynne not to be good agents. Rather, permissibility belongs to the (Critical) agent-assessment phase of ethical analysis. Only consequences ought to be employed in act-assessment (an upshot Scanlon, a staunch opponent of consequentialism, would find highly unpalatable). Scanlon's account succumbs to Robynne Hood cases.¹⁷

Of course, you might reject—as do I—this line of reasoning as specious. The question for Scanlon is: if this line of argument is not sound, then why is his argument against the I/F distinction acceptable? Of course, neither argument works. So, in answer to our first question: No. The inability of incompetent agents to act for the right reason does not serve as a basis for rejecting the I/F distinction in act-assessment. For we need not (nor should we) norm act-evaluations to inept agents, Robynne-Hood-like or otherwise. Let us consider the second of our

three questions: what does the DER-theorist actually say about the incompetent agent/obligatory act?

An extensive reading of the literature suggests that the case does not arise in the immediate vicinity of considerations of DER. Two reasons come to mind for why proponents of DER do not address Scanlon's case. First, one typically employs DER to discern permissibility in cases of non-obligatory action such as the aforementioned tactical bombing, and, classically, hysterectomy of a gravid, cancerous uterus and terminal palliative sedation at the end of life. Scanlon asks an importantly different question, namely: is an obligatory action permissible when accompanied by double effects in which the agent intends the bad and not the good? (Of course, the question has affinities to the one the DER-theorist asks. The relevant point concerns the import of the difference obligatoriness makes to one's answer, as will become evident, below.) Second, and perhaps more importantly, thinkers who use DER address competent agents. Certainly, its advocates do propose that an agent ought to do the right deed for the right reason and to refrain from doing the right deed for the wrong reason. In the case of the incompetent agent, Scanlon supposes that DER-theorists would err by telling her not to do the obligatory deed. Yet, *if* the only way she can do the right deed is for the wrong reason, why is it so clear to Scanlon that the DER-advocate would require that one actually tell the incompetent agent to refrain from the obligatory deed?

To introduce considerations about *incompetent* agents regarding *obligatory* acts as a basis for rejecting DER puzzles. This is particularly so insofar as Scanlon concedes that normally competent agents can do what DER would ask of them (2008, 61-2). Namely, they can act for the right reasons they possess. Indeed, this would appear to form part of the basis for regarding them as competent. Thus, the I/F distinction *can* play a role in the deliberative employment of

principles by normally competent agents. No doubt, Scanlon will maintain that it ought not. The basis for that claim, however, must rest elsewhere than in a normally competent agent's inability to act for the right reason. But for his own imagined extrapolation from what DER says about competent agents facing non-obligatory acts, Scanlon offers no textual or other grounds for his confident assertion that those who employ DER have a clear position concerning the incompetent-agent/obligatory-act hypothetical. Regardless, what do DER theorists have to say about such cases?

Aquinas' consideration of moral dilemmas (what he calls perplexity, *perplexus*) serves as an instance of a DER theorist considering Scanlon's incompetent agent/obligatory act case.¹⁸ Aquinas denies the existence of what we, following him, may call a simple moral dilemma; namely, an act in which Agent, through no fault of her own, finds herself incapable of acting morally: damned if she does, damned if she does not, as it were. Aquinas does think, however, that there are instances in which an agent can cause herself to be in a moral dilemma. A rash promise, for example, exemplifies such a case. If I make a promise, the keeping of which requires a wrongful act of me, I have gotten myself into a circumstance in which, no matter how I act, I act impermissibly.

Here is Aquinas:

and there is no difficulty in saying that, if some condition is presupposed, it is impossible for a man to avoid sin; just as, if we presuppose the intention of vainglory, one who is required to give alms cannot avoid sin. For, if he gives alms, because of such an intention, he sins; but, if he does not give alms, he violates the law (*de Veritate*, 17, 4, ad 8).

This instances a (perhaps, *the*) DER-advocate's response to Scanlon's imagined obligatory case of rescue by an incompetent agent. When faced with obligatory action, the DER-theorist would tell the abnormally incompetent agent to do the right deed for the wrong reason (or the only reason for which he is able to do it). When he so acts, he acts permissibly and wrongly. Of course, here Scanlon will object that we must take the assessment of wrong and put it within agent-assessment. For, how could a right, obligatory act also be wrong?

Aquinas nicely answers this question:

just as in syllogisms, given one error (*inconvenienti*) it is necessary that others follow; so also in morals, one error posited, from necessity others follow. Just as, supposing that someone seeks empty glory, he sins, whether on account of vainglory he does or does not do what he is obliged to do (*facere tenetur*) (*Summa theologiae*, IaIIae, q.19, a. 6, ad 3).

Why think, as Scanlon does, that an act produced by an incompetent agent has nothing wrong with it? Is it not, as Aquinas notes, more reasonable to think that an inept agent produces inapt acts? It is logical that the incompetent agent's act be permissible (in fact, obligatory) while also being wrong, bent, defective, and bad: given one absurdity, others must follow.

V. Conclusion: DER Emerges Unscathed.

Let us consider our third and final question. How does DER fare? Scanlon's quarrel with DER amounts to a claim that the advocate of DER must tell an incompetent agent to refrain from

doing an obligatory deed. As we have seen, employing DER does not require (or, for that matter, even incline one in the direction of) such a position. The critique of the I/F distinction's appeal as illusory rests upon an unexamined assumption, namely, that if one thinks that act-analysis concerning permissibility partially depends on an agent's intent, then given an incompetent agent, one must tell her to refrain from doing her duty. For she can only do so by acting for the wrong reason. As Aquinas' treatment of perplexity suggests, however, the DER theorist does not hold this, nor need he. Beginning with a false assumption about DER, Scanlon rejects the account as illusory. Moreover, Scanlon's alternative approach to hard cases does not inspire confidence in those who share his deontological commitments (in particular, its apparent inability to assess terror bombing as impermissible). Fortunately, we do not require such an alternative: DER emerges unscathed.

As noted at the outset, the preceding responds principally to Scanlon's critique. Nonetheless, given the general form of his criticism, the above suggests that those who employ the Act-/Agent-evaluation distinction against DER err. For, as Scanlon nicely puts it, the agent in question lacks competence *qua* agent. Accordingly, insofar as agents as agents produce acts, the defective agent makes a flawed product, a defective act, as ought to be expected and, more importantly, as ought to be.¹⁹

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Endnotes

¹ For a consideration of U.S. Constitutional casuistry analogous to DER, see Cavanaugh, 2006, 192-5; see also, Lyons, 2005.

² Various called the “principle,” “rule” or “doctrine of double effect,” DER consists of a set of criteria for assessing the permissibility of an otherwise permissible act productive of a to-be-avoided effect. (Concerning the phrase, “otherwise permissible act,” see note 5, below.)

“Doctrine” connotes an authoritative teaching. This gives some the impression that DER—which originates in the work of the mediaeval theologian and saint, Thomas Aquinas—is ultimately a religious teaching. It is not; rather it is a way of reasoning about hard ethical cases. “Principle” and “rule” bring to mind one criterion rather than a number of criteria. This misleads some to think that the I/F distinction alone matters, discounting the import of the other criteria. To avoid such confusions, I employ the phrase “double-effect reasoning.”

³ Empirical investigations repeatedly confirm the widely held nature of the intuition that intent has ethical significance in act-evaluation. Moreover, diverse studies suggest an approximation to DER- like judgments differentiating consequentially comparable acts in terms of (im)permissibility. See, for example, Mikhail, 2011, 148-52, *et passim*. If DER rests on an illusion, it is broadly shared.

⁴ Anscombe at once single-handedly revives action theory while initiating the on-going debate concerning DER. She regards the denial of the I/F distinction’s moral import as definitive of that ethic she names “consequentialism” (Anscombe, 1958, 10). Aquinas authors DER, as noted. Less well noted, however, is the fact that his introduction of DER (found in *Summa theologiae*, IIaIIae, q.64, a.7) occurs only after an extensive treatment of human action found in the prior part of the same work, IaIIae, q. 1-21. Aristotle, whom both Anscombe and Aquinas

closely follow, notes that ethics concerns actions. Therefore, he holds, a sound account of the former requires treatment of the latter. We read Aristotle's insuperable inaugural account of human action in *Nicomachean Ethics* III, i-v. There, he articulates accounts of the voluntary and the deliberate. (The latter he understands to be itself a voluntary action concerning action, a second-order act, as it were, characteristic of adult humans). "Intent" is a Latin word; thus, we do not find that term in Aristotle. Rather, we find *prohairesis*, or "choice," and *bouleusis*, or "deliberation." He applies the account, for example, to acts of justice and injustice at *NE*, V, viii. There he notes that differences in mental states such as decision and deliberation in part make an act to be one of justice or injustice. Needless to say, mental states alone do not make acts permissible or impermissible. Good and bad effects of acts—the world, creatures, and humans being better or worse off because of acts—also play crucial roles in act-evaluations.

⁵ "Otherwise permissible act" refers to a partial act-evaluation that rests upon a partial act-description. A certain type of act, described up to a point, but not yet entirely, would be an otherwise permissible act. An act of bombing in a just war causing the destruction of a munitions dump and harm to non-combatants where one has already satisfactorily answered questions concerning the necessity of the act, the inevitability of the harm, the proportionality between the good and the bad effects, and so on, instances an otherwise permissible act. The question(s) remaining concern solely the role of the different intentions structuring the various acts that could be so described. Were a bomber to intend the destruction of the dump while foreseeing but not intending the harm to non-combatants, we would have an instance of tactical bombing. By contrast, were a bomber to intend harm to non-combatants while foreseeing but not intending the destruction of the ordinance, we would have a case of terror bombing.

⁶ Readers familiar with DER will realize that the above does not separately state the (typically three) criteria of DER; rather, it isolates the (often) disputed issue concerning the role of different intentions in rendering consequentially comparable acts (im)permissible. In the relevant cases, *ceteris paribus*, changes from one intent to another can render what would be otherwise a permissible act to be impermissible. E.g., (permissible) bombing with the intent of destroying military installation accompanied by foresight (but not intent) of non-combatant-harm (tactical bombing) can become (impermissible) bombing with the intent of harming non-combatants accompanied with foresight (but not intent) of destroying a military installation while consequences remain the same. We do not here speak of one at times permissible or impermissible act, depending on intent. Rather, we have two distinct acts constituted by radically different intents which, in turn, result in significantly different act-evaluations, notwithstanding comparable consequences. Because Scanlon objects precisely to this claim (as does Thomson), I focus on such cases (namely, those in which changes to intent move the act-assessment from permissible to impermissible). One finds numerous statements of the DER criteria. A gathering of the same can be found in the account of DER Scanlon considers (2008, 218). That is, Cavanaugh, 2006, 1-37.

⁷ He thinks that intent (sometimes, albeit rarely) has relevance in act-assessment (or in deliberative employment of a principle). It does so in special “expression and expectation cases” (Scanlon, 2008, 39 *et passim*). As he notes, these do not instance the type of cases DER addresses. Thus, a consideration of them lacks relevance to our current inquiry.

⁸ Critics of DER repeatedly make this move. Indeed, one finds Thomson’s (1999) version of this distinction in critics such as Bennett. As Bennett notes (1995, 46), Donagan (1977) first

refers to it as the First-order/Second-order distinction. Indeed, we can see lineaments of it in Mill's response to Davies (found only in the second edition), ([1864] 2001, 18-9). In any case, the response has become standard fare amongst critics of DER. For a more complete consideration of and argument against the distinction as understood and employed by critics of DER, see Cavanaugh, 2006, 122-34.

⁹ "Direct" because intent might predict something having relevance, such as likely consequences (Scanlon, 2008, 30).

¹⁰ Given that war has been the subject of ethical reflection since at least Cicero in *de Officiis* (44bc) whom Augustine follows, whom, in turn, Aquinas relies upon, one wonders that we do not see at least hints of Scanlon's account as a viable alternative to DER in the perennial tradition. Contemporary military ethicists (such as Michael Walzer, 2000, 155) employ DER. Moreover, international laws concerning the conduct of war rely on DER, as do combatants who attempt to abide by those laws (Cavanaugh, 2006, 180-3).

¹¹ In Scanlon's account concerning military acts and, more generally, acts referred to throughout the work, a reader notes the general absence of such concrete verbs as "bomb," "target" and "aim." (Do they make intent too much a part of the act-descriptor to think it has no role in act-evaluation?) Whatever the case, instead of "use destructive and potentially deadly force upon combatants," I will employ the standard "terror bomb." All of the points which follow in this passage and elsewhere could be made using the circumlocution (along the lines of "use lethal force in the form of bombs upon non-combatants." I employ the more commonly used terms. Nothing rides on such usage.

¹² See, for example, the characteristic dispute exemplified by Quinn and Bennett regarding

terror and tactical bombing (Bennett, 1995, 218-21).

¹³ To consider one historical example, Walzer sets out the British debate of WWII concerning the various *military* benefits to be realized by the indiscriminate bombing of German cities (2000, 255-63). As Walzer notes, Churchill and Arthur Harris (who orchestrated the bombing) regarded such bombing principally as a means of prosecuting the war against their enemy. Of course, this does not justify such bombing. It does, however, cast doubt upon the claim that such bombing does not confer a military advantage.

¹⁴ For the relevant laws of war, see Roberts and Guelff, 2000. Consider this from the 1977 Geneva Protocol I, article 54, paragraph 1: “Starvation of civilians *as a method of warfare* is prohibited” (emphasis added, Roberts and Guelff, 2000, 450). For further examples, see the relevant sections of The Hague Convention of 1907, Convention IV, article 25, (Roberts and Guelff, 2000, 78); article 22 of the 1923 Hague Draft Rules of Aerial Warfare (p. 144), and 1977 Geneva Protocol I, article 51, paragraph 2, (p. 448). All of the above cited conventions rule out targeting civilians. Notably, tacticians regard the targeting of non-combatants as a military advantage for many reasons other than the lowering of morale. Reasons, interestingly, more concretely related to proximate goals in the conduct of war. In short, targeting civilians is a broadly useful (albeit unjust) tactic. For example, one targets civilians (needless to say, wrongly) so that they flee their habitations in order thereby to impede the movement of enemy troops.

¹⁵ Consider the lineaments of the following argument:

- 1) Agents produce acts.
- 2) Competent agents produce (positive value term) acts.

3) Incompetent agents produce (negative value term) acts.

Thus, it is *prima facie* reasonable to think--as do DER advocates--that the incompetent agent's act will be defective, just as she is, for the act is her product; defective artists produce defective art. Indeed, they do so precisely in their defectiveness as producers. The opponent of that (almost?) analytical claim bears the burden of proof. Because such considerations would take us too far afield from our quarry, put them to the side and let us return to the engagement between Scanlon and DER.

¹⁶ In the very work in which his critique of DER occurs, Scanlon proposes a revisionist account of blame in which "people can be blamed for things [such as reasons] that are not under their control" (2008, 212). This puzzles. According to Scanlon, act-assessment ought not refer to an agent's reasons, because incompetent agents do not exert control over their reasons. Yet, such agents themselves can be assessed as blameworthy although they lack this control. Why does the absence of control not result in a judgement of non-blameworthiness concerning agents analogous to that of permissibility concerning their acts? Alternatively, if lack of control does not affect agent-blameworthiness, why ought lack of control over reasons affect act-permissibility?

¹⁷ Hallvard Lillehammer moots an allied undeveloped form of this criticism (Lillehammer, 2010, 582). Lillehammer's critique, however, misses Scanlon's account. For Scanlon holds that an incompetent agent can choose not to act at all, a point Lillehammer does not adequately acknowledge. What an incompetent agent cannot choose to do is to do the right deed for a reason other than the wrong reason. Thus, to turn the argument against Scanlon, one needs to imagine a

symmetrical case such as Robynne Hood.

¹⁸ For a few texts of Aquinas on perplexity, see, for example, *Summa theologiae*, IaIIae, q. 19, art. 6, ad 3; *S.t.*, IIIa, q. 64, art.6, ad 3; and *de Veritate*, q. 17, art.4., ad 8.

¹⁹ I thank Professor Christopher Tollefsen for his insightful comments upon an earlier version of this paper; thanks also to the audience at the 2012 ACPA annual conference for their helpful discussion of the same. Thanks, too, to Professor Scanlon for his generosity and graciousness in discussing double effect while at Stanford University in the Spring of 2012.

Bibliography

- Anscombe, G.E.M. (1958) “Modern Moral Philosophy,” *Philosophy* 33:124 (1958): 1-19.
- Bennett, J. (1995) *The Act Itself* (Oxford: Clarendon).
- Cavanaugh, T.A. (2006) *Double-Effect Reasoning: Doing Good and Avoiding Evil* (Oxford: Clarendon).
- Donagan, A. (1977) *The Theory of Morality* (Chicago: Chicago University Press).
- Lillehammer, H. (2010) “Scanlon on Intention and Permissibility,” *Analysis*, 70:3, 578-85.
- Lyons, E. (2005) “In Incognito—The Principle of Double Effect in American Constitutional Law,” *Florida Law Review*, 57: 469-563.
- Mikhail, J. (2011) *Elements of Moral Cognition: Rawls’ Linguistic Analogy and the Cognitive Science of Moral and Legal Judgment* (New York: Cambridge University Press).
- Mill, J.S. ([1864] 2001) *Utilitarianism*, 2nd edition, Sher, G., ed. (Indianapolis:

-
- Hackett Publishing Co.).
- Roberts & Guelff (2000) *Documents on the Laws of War*, 3rd edition (New York: Oxford University Press).
- Scanlon, T.M. (2008) *Moral Dimensions: Permissibility, Meaning, Blame* (Cambridge: Harvard University Press).
- (1998) *What We Owe to Each Other* (Cambridge: Harvard University Press).
- Thomson, J.J. (1999) "Physician-Assisted Suicide: Two Moral Arguments," *Ethics* 109, 497-518.
- Walzer, M. (2000) *Just and Unjust Wars*, 3rd edition (New York: Basic Books).