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## DER and Policy: The Recommendation of a Topic

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DER and Policy: The Recommendation of a Topic

*T. A. Cavanaugh*

*Abstract.* If viable, DER justifies certain individual acts that—by definition—have two effects. Presumably, it would in some fashion (at the very least, redundantly) justify policies concerning the very same acts. By contrast, acts that sometimes have a good effect and sometimes have a bad effect do not have the requisite two effects such that DER can justify them immediately. Yet, a policy concerning numerous such acts would have the requisite good and bad effects. For while any one such act would lack the relevant two effects, a series of such acts and a policy governing such a series would have them. This paper addresses DER’s justification of policies that apply to such acts. It shows that there are certain acts which DER mediately justifies by justifying policies (having the requisite two effects) concerning them. Thus, it recommends the larger topic of DER’s bearing on policy.

## I.

*Introduction.* “I respond saying that nothing prohibits one act from having two effects, of which only one is intended, but the other is beside the intention.”<sup>1</sup> So begins the *locus classicus* of double-effect reasoning (DER), Aquinas’ justification of a private individual’s act of self-

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<sup>1</sup>Aquinas, *S.t.*, II-II, q. 64, a. 7, “*Respondeo dicendum quod nihil prohibet unius actus esse duos effectus, quorum alter solum sit in intentione, alius vero sit praeter intentionem.*”

defense that results in the preservation of the defender and the death of the aggressor. In what follows, I attend to a little-noted topic in the literature on double effect. Namely, taking an individual act as the standard unit which DER justifies, can DER justify policies concerning acts?<sup>2</sup> In particular, can DER justify a policy that, in turn, applies to acts that DER does not (otherwise) justify individually?

Briefly, the paradigm of such an act would be one in which, to revise Aquinas, something does prevent it from having the relevant two effects (particularly, the good effect).<sup>3</sup> More

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<sup>2</sup>An extensive reading of the literature reveals two explicit references (albeit abbreviated) to DER's application to policy: Michael Walzer, *Just and Unjust Wars*, 3<sup>rd</sup> edition, (New York: Basic Books, 2000), 153-4 and Daniel Sulmasy, "Emergency Contraception for Women Who Have been Raped: Must Catholics Test for Ovulation, or is Testing for Pregnancy Morally Sufficient?," *Kennedy Institute of Ethics Journal* 4 (2006): 305-31, at 315.

<sup>3</sup>For example, emergency contraception (EC) given in the case of rape seems to be such an act. (Henceforth, by 'EC' I refer exclusively to the administration of emergency contraception to a victim of rape—and not, for example, to its use after consensual sexual intercourse.) The medical standard calls for the administration of EC to a victim of rape having a negative pregnancy test (lest the EC harm an established pregnancy predating the rape). EC primarily prevents ovulation and, thereby, fertilization. Other than its anovulatory effect, the effects of EC are ambiguous and controverted. It may also prevent implantation of a fertilized ovum—the bad abortifacient effect. The prevention of ovulation or of implantation mutually exclude one another. For if EC prevents ovulation, fertilization will not occur. If fertilization has occurred, ovulation has too, and, thus, can no longer be prevented. Accordingly, when considering any

precisely, such an act would be one that can have the foreseen but not intended bad effect without the intended good effect. As will become more evident, this may occur contingently or with causal necessity. That is, in any individual act, one or the other occurs, but, contingently or necessarily, not both. By contrast, the policy, applying to numerous such acts, would have both the (good) intended and the (bad) foreseen but not intended effects amongst its consequences. Accordingly, one could consider it one policy not prohibited from having two effects, of which only one is intended, but the other is beside the intention. Could DER justify such a policy and, thereby, such acts? What follows focuses on this intriguing question. In answering this question, I will assume the tenability of a standard account of DER.<sup>4</sup> As this paper suggests, DER's relation to policy is a large topic meriting further attention.

## II.

*DER and Policy: Preliminary Definitions and Distinctions.* Clearly, Aquinas applies DER to an action with his characteristically pithy, "nothing prohibits one act from having two  

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individual administration of EC, one cannot use DER to justify the prevention of implantation of a fertilized ovum (the possible bad foreseen but not intended abortifacient effect) by the good (intended) effect of preventing ovulation and, thereby, fertilization. For one or the other occurs, necessarily not both. Thus, EC would uniquely illustrate an act necessarily prevented from having the relevant two effects. For, in EC, the requisite two effects exclude one another with causal necessity. In other cases (as will become evident), the two effects may simply contingently not occur together.

<sup>4</sup>For such an account, see T. A. Cavanaugh, *Double-Effect Reasoning: Doing Good and Avoiding Evil*, (Oxford: Clarendon Press, 2006), 36 *et passim*.

effects.” Moreover, since its origin in Aquinas to the present one finds DER applied to acts. Today, that repertoire of acts includes terminal palliative sedation of an imminently dying patient to relieve otherwise intractable pain (TS), hysterectomy of a gravid cancerous uterus to save the mother’s life (H), and tactical bombing of a military installation that concomitantly kills non-combatants (TB). Assuming its viability, DER certainly applies to individual acts. It does so immediately, itself applying to the relevant acts. I will call this a ‘one-off’ justification of an act by DER.

As I will rely on the concept in what follows, some explanation of what I mean by a one-off justification employing DER seems in order. I mean, as I hope the term conveys, a DER-based evaluation of an individual act in terms of its circumstances and reasonably expected consequences. Such an analysis does not rely on reference to other allied acts. One can perform the evaluation simply by taking into account what one knows about this act. Typically, one employs DER to make such a one-off justification. For example, in the classic tactical bombing (TB) case one faces circumstances in which the destruction of a military target (good effect) concomitantly kills and injures nearby non-combatants (bad effect). If such an act satisfies the criteria of DER (the act is otherwise unobjectionable, the agent intends the good while foreseeing but not intending the bad, and the agent has duly grave reasons to achieve the good while effecting the bad in as mitigated a fashion as practically possible) one may justify it, on its own terms, as it were. A one-off justification illustrates the typical, standard, characteristic use of DER. The present point of introducing the concept of a one-off DER justification is to note that some acts may not admit of such a justification. A policy concerning them, however, may admit of a positive assessment by DER. Thereby, the individual acts may admit of a DER justification

mediated by policy.

Presumably, if DER immediately justifies individual acts in a one-off manner, it would also justify a policy (in some straightforward way that nonetheless requires articulation) that one crafts to permit precisely those acts. What would this justification of policy look like? Before considering this question, what, more precisely, is meant by a policy?

Briefly, a policy concerning acts is a general rule concerning how to act in certain circumstances that repeat themselves over an extended period of time. Roughly, it has the form, “given circumstances C, do act A.”<sup>5</sup> As such, a policy is a course of action to be followed when the relevant circumstances occur. When agents follow it, a policy results in specified acts. Indeed, a policy-maker (for example, in the case of law, a legislator) fashions a policy (in the case of a legislator, a law) so that agents in the relevant circumstances produce certain acts. By extension of the term (from the intent of the policy-maker to the intent of the policy), one may sensibly speak of the acts it produces as the intent of the policy, or, as policy-intended acts. (Of course, acts are intended by the agents who perform them. Policy-intended acts are also intended by the policies that agents follow—insofar as we sensibly extend the term.)<sup>6</sup>

As an example of a policy (that takes the form of a law), consider the Right-Turn-On Red

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<sup>5</sup>Of course, this is rough, but fit for our purposes. As employed here, “do act A,” includes modal and other variations: do act A, do not do act A, allow act A, prevent act A, may do act A and so on. The point is that as here conceived, policy bears on what, broadly, we refer to as acts.

<sup>6</sup>For example, in the case of law (one of the most common forms policy takes), we regularly speak of the, “law’s intent.”

(RTOR) traffic rule.<sup>7</sup> In the U.S., after stopping at a red light one may proceed with a right turn (unless explicitly forbidden) in the absence of traffic. As noted, the policy takes the general form, “in circumstances C, do act A.” (Or, more precisely, in this instance, we have the modal, “one may do act A.”) The RTOR policy intends to produce safe right turns at red lights and thereby facilitate safe and fuel-efficient traffic flow. Such RTOR acts are the relevant policy-intended acts. The policy also generates (harmful) foreseen but not intended acts such as ill-executed turns that injure and kill pedestrians and bicyclists. Let us distinguish policy-intended acts (henceforth,

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<sup>7</sup>In response to the energy crisis of 1973, Congress directed the U.S. Department of Energy to promulgate the Energy Policy and Conservation Act. The Act requires states to take measures to conserve fuel in order to qualify for certain Federal funds. Amongst the energy-conserving measures one finds the right-turn-on-red (RTOR) policy. RTOR does reduce fuel-consumption, automobile-emissions, and traffic-delays while increasing road-intersection capacity. RTOR also increases—albeit relatively modestly—automobile accidents injuring and killing pedestrians and bicyclists. There are numerous studies of the effects on safety of RTOR. A 1994 overarching report by the National Highway Traffic Safety Administration (NHTSA) entitled, “Safety Impact of Permitting Right-Turn-on-Red,” concludes that, “there are a relatively small number of deaths and injuries each year caused by RTOR crashes. These represent a very small percentage of all crashes, deaths and injuries. Because the number of crashes due to RTOR is small, the impact on traffic safety, therefore, has also been small.” Accessed 17 June 2014; available at:

<http://www.nhtsa.gov/About+NHTSA/Traffic+Techs/current/The+Safety+Impact+of+Right+Turn+on+Red:+Report+to+Congress>

PI acts) from foreseen but not policy-intended acts (henceforth, FNPI acts).

For the sake of clarity, one notes (as will become more evident in the examples that follow) that a PI act is intended both by the policy (again, employing the noted figure of speech) and (at least typically, although not by definition) by the individual agents who perform the relevant acts. An FNPI act is, by definition, foreseen but not intended by the policy. The individual agents who perform the relevant FNPI acts, however, stand variously to these acts with respect to foresight and intent. For example, in the RTOR policy, an FNPI act of harming a pedestrian does not (typically) involve foresight by the agent that he will hit this pedestrian in this act of turning right on red. Rather, while the agent does intend to turn right on red, he characteristically neither foresees nor intends to hit the pedestrian in the crosswalk; it is an accident. By contrast, as we will see in our consideration of a policy permitting TS, amongst the FNPI acts, one finds acts that agents actually intend. So, for example, as will be noted, some agents cloak acts of euthanasia as acts of TS. In such cases, at the level of policy such acts are foreseen but not intended; however, at the level of the individual agents who perform them, such acts are intended. Accordingly, one notes that (as the names suggest) ‘policy-intended’ and ‘foreseen but not policy-intended’ refer to the relation between the policy and the relevant acts. The individual agents who perform the relevant FNPI acts, however, may have mental states differing from that of foreseen-while-not-intended. With the distinction between PI and FNPI acts and the definition of policy in place, consider how one may employ DER to evaluate a policy.

### III.

*DER and Policy: Total and Targeted-Acts Assessments.* As productive of both PI and

FNPI acts, there are two salient ways in which one may so use DER. One can evaluate the policy taking into account both the PI and the FNPI acts to which it gives rise or one can evaluate the policy focusing on the PI acts it aims to produce. Call the two ways of evaluating a policy a total-acts assessment and a targeted-acts assessment (so called because the policy seeks to produce precisely such PI acts).

First, consider a total-acts assessment of, for example, the Right-Turn-On-Red (RTOR) policy. The (good) PI acts would be the relevant safe and fuel-efficient right turns at red lights; the (bad) FNPI acts would be the rights at red lights that injure and kill pedestrians and bicyclists. In a total-acts assessment, one evaluates the beneficial and harmful acts in which the policy results, both those that the policy is crafted to achieve and those that the policy will inevitably lead to, as foreseen but not intended. In effect, the total-acts assessment treats the policy itself as an act that has intended and foreseen but not intended consequences. In the case of a policy, the intended and foreseen but not intended consequences are themselves acts (of other agents). The total-acts assessment tells us whether we should opt for the policy in the first place. For if we find that, for example, the RTOR policy saves too little fuel while causing too many deaths and injuries, we will forego adoption of the policy.

As it turns out, repeated studies suggest that the RTOR policy does have small negative effects on traffic safety. It increases injuries to and fatalities of pedestrians and bicyclists. Its negative effects are, however, relatively small. By contrast, its positive effects are relatively significant. They include an increase in both fuel-efficiency and road-intersection capacity while decreasing traffic-delays.<sup>8</sup> One can employ DER to make a total-acts justification of the RTOR

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<sup>8</sup>The *Boston Globe* reports that United Parcel Service (UPS) instructs its drivers to plan

policy. For the (PI) RTOR acts are otherwise licit acts; the policy makers intend the relevant (PI) RTOR acts while foreseeing but not intending the relevant (FNPI) acts injurious to pedestrians and bicyclists; and the benefits to be realized by the policy (increased fuel-efficiency, increased intersection-traffic-capacity, decreased emissions, and decreased traffic-delays) compare favorably to the relatively small increase in harm to pedestrians and bicyclists. This illustrates how one relies on DER to make a total-acts justification of a policy.

To take another example of a total-acts assessment while using a standard case of DER, consider a policy legalizing terminal sedation (TS). As noted, TS refers to the use of drugs such as barbiturates at the end of life to treat otherwise intractable pain.<sup>9</sup> One undertakes TS in order to relieve a patient's pain while foreseeing but not intending concomitantly to suppress or depress the terminally ill patient's breathing. TS effects both pain-relief and death by asphyxiation. Understanding the relevant agents (patient, physician, allied caregivers, and family) to be seeking pain-relief while not intending death, TS classically illustrates a sound application

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routes that maximize the number of right turns they take. According to the newspaper, UPS estimates that in 1997 this policy saved the company three million one hundred thousand gallons of fuel while reducing emissions by thirty-two thousand metric tons. Tom Long, *Boston Globe*, "Right turns make the most out of gas," July 10, 2008. Accessed 16 June 2014; available at: [http://www.boston.com/news/local/articles/2008/07/10/right\\_turns\\_make\\_the\\_most\\_out\\_of\\_gas/](http://www.boston.com/news/local/articles/2008/07/10/right_turns_make_the_most_out_of_gas/).

<sup>9</sup>TS sometimes also treats the patient's symptoms such as agonal breathing. For the sake of simplicity, I put this to the side and speak only of pain-relief rather than pain and symptom-relief. Of course, when applicable, symptom-relief counts amongst the good intended effects of TS.

of DER. Of course, a policy legalizing TS seeks to permit such acts.

A policy legalizing TS also results in some acts of active voluntary euthanasia. For, under the guise of TS, agents intent on euthanasia can with relative ease euthanize patients with barbiturates.<sup>10</sup> Those who craft the policy permitting TS foresee but do not intend that the policy also results in such acts of euthanasia. Rather, some agents abuse the policy as a pretense to perform illegal acts of euthanasia. Employing DER, a total-acts assessment of the policy would take into account the (good) PI acts of TS over against the (bad) FNPI acts of euthanasia. One reasonably judges that such a total-acts assessment using DER would find a policy legalizing TS permissible. Indeed, given the widely recognized legal and ethical tenability of TS, one may safely assert that U.S. policy makers have found it so.<sup>11</sup>

Now, let us turn to consider these same cases in terms of DER's targeted-acts assessment of a policy. In such an evaluation, one employs DER to assess the policy insofar as the policy—as a guide for action—produces the relevant PI acts which themselves, in turn, produce intended and

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<sup>10</sup>As noted previously, we here have a case in which the individual agents intend the FNPI acts (so described at the level of policy). That is, the relevant agents intend to euthanize their patients while the policy foresees but does not intend such acts. Accordingly, the diverse examples of RTOR and TS serve a useful purpose as they each illustrate different ways in which intent and foresight play out at the level of policy in contrast to how they function at the level of the individual agents' acts.

<sup>11</sup>Including, for example, the U.S. Conference of Catholic Bishops as reflected in the *Ethical and Religious Directives for Catholic Health Care Services*, 5<sup>th</sup> edition, (Washington, D.C.: United States Conference of Catholic Bishops, 2009), part 5, directive 60, 32.

foreseen but not intended consequences. Notably, the latter are not FNPI acts of the policy; rather, they are foreseen but not intended consequences of the PI act of the individual agent. In the case of the RTOR policy this would be, for example, the foreseen but not intended decrease in funds available for road maintenance due to fewer taxes collected from the (reduced) sale of gas.<sup>12</sup>

Typically, a targeted-acts assessment of a policy amounts to a summation of DER's one-off justifications for each individual (targeted) act. So, if DER were applied to an individual act of turning right-on-red (to stick with that example), one would consider the (intended) benefits of reduced gas-consumption and time-saved versus the foreseen but not intended reduction in tax revenues and, thereby, road-maintenance. Presumably, DER would justify such individual acts. A targeted-acts analysis of the RTOR policy would typically amount to a grand summation of all of the individually DER-justified acts of turning right on red. When a targeted-analysis amounts to such a summation, it has a redundant character. All one has done is to add up, as it were, each

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<sup>12</sup>Of course, (in keeping with its being a total assessment) the reduction in monies available for road maintenance due to a decrease in tax revenues also comes into play in the total-acts assessment of a policy as a consequence of the PI acts. Thus, when one uses a total-acts assessment to determine whether to adopt the RTOR policy, one reasonably considers the associated reduction in road maintenance. In a targeted-acts assessment, however, one does not include the FNPI acts (in the case of RTOR, the acts injurious to pedestrians and bicyclists) as one does in the total-acts assessment. It is in this respect that the two assessments of policy differ. (Rather than in the total-acts assessment excluding the foreseen but not intended consequences of the PI acts.)

DER-assessment that has been done on each individual act. As we will see, however, not all targeted-acts assessments need have this reiterative character. For some acts do not admit of a one-off justification by DER while a policy concerning them may be justified by DER. Thus, it is possible that some targeted-acts assessments are not simply the summation of DER's individual justifications of the relevant acts.

Now, consider another example of a targeted assessment while using a standard case of DER, namely, policies permitting TS.<sup>13</sup> Given the relevant re-occurring set of circumstances encountered in caring for patients at the end of life and the application of DER to acting in those circumstances, many individual cases of TS give rise to legal and institutional policies allowing TS. Thus, we find the U.S. Supreme Court ruling on two occasions that states may prohibit physician-assisted suicide (PAS) while permitting TS.<sup>14</sup> Similarly, we find institutional ethical codes in, for example, Catholic hospitals permitting TS while forbidding PAS and euthanasia.<sup>15</sup> In both instances, DER's repeated application to specific sets of circumstances sharing salient similarities gives rise in the different fora (law and Catholic hospitals) to a general rule or policy

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<sup>13</sup>In the legal arena, policy typically takes the form of law. In a practice such as medicine, or in an institution such as a hospital, we might speak of the standard of care as a policy. All instances of policy share a general approach to acting in repeated sets of circumstances.

<sup>14</sup>See the majority and concurring opinions in *Washington v. Glucksberg* 521 U.S. 702 (1997) and *Vacco v. Quill*, 521 U.S., 793 (1997).

<sup>15</sup>See, for example, the *Ethical and Religious Directives for Catholic Health Care Services* (2009), part 5, directive 60 (permitting TS) and directive 61 (forbidding euthanasia and PAS), 32.

applicable in that arena.<sup>16</sup> Presumably, when repeated over time by diverse agents, the DER-based justifications of the many individual acts (the one-off justifications) lead to the adoption of a policy. One sees, as it were, a temporally-extended induction from the use of similar criteria on many individual cases to a policy that will, in turn, deductively be applied to subsequent individual cases.<sup>17</sup> Indeed, presumably, if we look into the historical development of policies regarding TS, we will find a series of one-off justifications of TS prior to the development of the TS policy.<sup>18</sup>

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<sup>16</sup>Indeed, something like this dynamic appears to replicate the history of DER itself. That history suggests that while Aquinas initially applies DER explicitly only to the already noted case of a private individual's homicidal self-defense (and perhaps—at least implicitly—to scandal), the account over time becomes a general approach to certain types of cases that grow to include foreseen but not intended side effects of acts found in medicine, soldiering, and every day life. Thus, an extensive induction occurs over time. That induction discerns a set of acts to which the DER-criteria apply. For a consideration of the historical development of the DER-criteria and the class of acts to which they apply, see Cavanaugh (2006), 1-37.

<sup>17</sup>For a consideration of this dynamic as found in casuistry, see Albert Jonsen and Stephen Toulmin, *The Abuse of Casuistry: A History of Moral Reasoning*, (Berkeley: University of California Press, 1989), especially Chapter 13, "The Achievement of Casuistry," 250-65.

<sup>18</sup>One sees aspects of the development of such a general policy by considering, for example, Pope Pius XII's February 1957 response to an October 1956 query from the Italian Society of Anaesthesiology concerning the morality of using narcotics to relieve pain that also shorten a terminally ill patient's life. The Pope's response (as Papal) amounts to a policy. Of

As the above suggests, a targeted-acts assessment of a TS policy amounts to a summation of the one-off justifications of the PI acts of TS. For example, limiting ourselves to one hospital and the acts of TS conducted, say, over a one year period of time, one might imagine a targeted-acts justification of the policy. That justification would aggregate (intended) good and (foreseen but not intended) bad effects of the actual cases of TS that occurred in the hospital over the past year. Assuming, as is reasonable, that each of those acts were justified by DER, the targeted-acts assessment of the TS policy has a redundant character. For it would amount to an aggregation of the justifications for each individual act of TS.

The above examples illustrate how one might employ DER to make both a total-acts and a targeted-acts assessment of a policy. With these examples in place, let us compare a total and a targeted-acts assessment of a policy.<sup>19</sup> One might understandably think that, as far as policies are concerned, only a total-acts assessment serves any unique purpose. For the targeted-acts assessment appears to amount simply to a re-iteration of what DER would have to say about each

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course, the Pope relies on a standard account of DER (for a treatment of Pius' response, see Cavanaugh (2006), 197). The policy-maker elevates to the status of a policy what up to that point had been a series of one-off DER-based justifications (presumably) already in use by the relevant anaesthesiologists. One sees the fully developed policy in, for example, the noted USCCB's *Ethical and Religious Directives for Catholic Health Care Services*, directive 60, 32.

<sup>19</sup>One notes that one might conduct either policy evaluation in a prospective or retrospective manner. For example, when one contemplates the adoption of a policy, one would conduct both evaluations prospectively. By contrast, when one reviews an adopted policy, one conducts the assessments retrospectively.

individual PI act. Or, in other words, a summation of the one-off DER justifications of the relevant acts. It would appear to serve only as an aggregation of many individual DER (one-off) act-assessments. Whereas, a total-acts assessment introduces something new into our considerations. Namely, should we adopt this policy in light of all the acts it results in, both PI and FNPI?

Indeed, prior to a total-acts analysis it is not likely that the FNPI acts have even entered into the evaluation of any individual act. For the FNPI acts seem most properly to be consequences of the relevant adopted policy rather than attributable to the individual acts (from which policies presumably often originate). Accordingly, it would seem that one considers FNPI acts exclusively or primarily when making a total-acts assessment of a policy. That is, the FNPI acts would not typically enter into the justification of any individual act justified by DER. For example, while one might ask an agent contemplating an individual act of TS: “well, if you do that, what prevents someone else from pretending TS in order to euthanize a patient?”, the justification of the particular act need not address that conjectured outcome. For it is a highly speculative consequence of this individual’s act. Moreover, it would be the act of another agent lacking association with the original agent (who, after all, is not proposing a general policy). By contrast, if a policy permitting TS is adopted to govern the acts of many similarly situated agents, then one appropriately counts FNPI acts of euthanasia amongst the consequences of the adoption of the policy. For in the consideration of a policy that suggests a course of action to agents in certain circumstances, one reasonably considers the other acts that agents in those circumstances may undertake because of the policy’s adoption.

While this judgment that a total-acts assessment of a policy does draw our attention to

double-effect considerations unique to the adoption of a policy (namely, the FNPI acts), a targeted-acts assessment of a policy need not simply be a grand summation of all of the individual DER act-assessments. For a targeted-acts justification of a policy may justify acts that DER does not justify individually. That is, acts for which DER cannot offer a one-off justification. (Of course, this possibility largely motivates this paper.) Such a targeted-acts assessment of a policy would, of course, not be redundant. Indeed, it would serve as a policy-mediated justification of such acts. Let us now consider this possibility.

#### IV.

*DER's Justification of Acts via Policy.* Consider the following case from Frank Richards' insuperable memoir of the First World War. Michael Walzer presents this case as an instance of DER. Here is the relevant case, as quoted in Walzer:

When bombing dug-outs or cellars, it was always wise to throw the bombs into them first and have a look around them after. But we had to be very careful in this village as there were civilians in some of the cellars. We shouted down to them to make sure. Another man and I shouted down one cellar twice and receiving no reply were just about to pull the pins out of our bombs when we heard a woman's voice and a young lady came up the cellar steps ... She and the members of her family ... had not left [the cellar] for some days. They guessed an attack was being made and when we first shouted down had been too

frightened to answer. If the young lady had not cried out when she did, we would have innocently murdered them all.<sup>20</sup>

Initially, this case might strike one as a straightforward application of DER to an individual act from which two effects follow: the deaths of enemy soldiers and the deaths of the non-combatants. Indeed, Walzer himself presents the case immediately before articulating his account of DER as applied to acts.<sup>21</sup> However, as Walzer himself says in his subsequent discussion (with no comment on the difference between applying DER to an act in contrast to a policy), what is at issue here is DER's justification of a policy rather than the justification of an individual action. Here is Walzer:

Would Frank Richards have been blameless if he had thrown his bombs without warning? The principle of double effect would have permitted him to do so. He was engaged in a legitimate military activity, for many cellars were in fact being used by enemy soldiers. The effect of making "bomb without warning" *his general policy* would have been to reduce the risks of his being killed or disabled

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<sup>20</sup>Since Walzer serves as the historical source of our question, I quote it as he presents it in Walzer (2000), 152. One finds the original text in Frank Richards, *Old Soldiers Never Die*, (London: Faber and Faber, 1933), Chapter XXVI, "Le Cateau Again," 310. (Richards' account includes the lovely detail of the young French lady kissing the gallant soldiers.)

<sup>21</sup>Walzer (2000), 153.

and to speed up the capture of the village, and these are “good” effects. Moreover, they were clearly the only ones he intended; civilian deaths would have served no purpose of his own. And finally, *over an extended period of time*, the proportions would probably have worked out favorably or at least not unfavorably; the mischief done would, let us assume, be balanced by the contribution to victory (emphases added).<sup>22</sup>

Here, Walzer explicitly applies double effect to a policy covering one act (throwing the grenade) admitting of non-conjoined (good or bad) effects (kill the enemy or kill non-combatants) rather than (as is the norm) to one act having conjoined good and bad effects. This case from Richards (via Walzer drawing it to our attention) gives rise to the question: can one apply double effect to a policy that bears on acts to which DER does not itself immediately apply?<sup>23</sup> If so, what, if anything, differs between the policy and the individual acts such that DER applies to the policy

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<sup>22</sup>Walzer (2000), 153-4. Walzer objects to a, “bomb without warning,” policy which, he thinks, a standard account of DER would justify. He then goes on to revise DER modestly by suggesting that one must intend not to produce the bad effect (as Richards does by shouting out before throwing the grenades). The revision, however, is not relevant for our present concern of DER’s relation to policy. Even, “bomb with warning,” faces the issue of applying DER to a policy in contrast to an individual act.

<sup>23</sup>Indeed, for this author this text did—years ago—give rise to this question and, hence, to this paper.

yet not to the acts to which the policy itself applies?

First, let us examine the merits of the claim that DER does not apply to the above-described individual act of throwing a grenade into a cellar of unknown occupants. In the relevant circumstances (and paying attention only to the morally important outcomes) Frank Richards (the World War I soldier) reasonably expects some cellars to be occupied by enemy soldiers and others to have civilians. Thus, limiting ourselves to a DER-analysis of one such act, we encounter the following (morally salient) possible outcomes: 1) Richards throws the grenade into the cellar occupied only by enemy soldiers and, thereby, kills them or 2) he throws the grenade into the cellar occupied only by non-combatants and, thereby, kills them.<sup>24</sup>

How would one employ DER to handle such a case? A straightforward way of putting the question to a DER-theorist would be: “May one throw a grenade into a cellar with the intent of killing the enemy while not intending harm to civilians when one does not know who occupies the cellar and whether one will: 1) kill only the enemy or 2) kill only non-combatants?”

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<sup>24</sup>A reader might understandably wonder about another possibility. Namely, he throws the grenade into the cellar occupied by both enemy soldiers and non-combatants and kills both. While nothing of import hinges on it, I think it correct, (as Walzer seems to, also) to interpret Richards’ case as one in which some cellars have only enemy soldiers while others have only non-combatants. Of course, nothing prevents some cellars from having both while others have only soldiers or non-combatants. This however, would not change the basic problem in such a scenario; namely, that the bad effect may occur without the good. (If one throws the grenade into a cellar occupied only by non-combatants.) Accordingly, I present the case as having just the two alternatives.

While anti-climactic, one cannot answer this question using a one-off act-evaluation relying on DER. For, quite simply, (in scenario 2) there is no good effect such that the bad effect can be justified by the good. For if only non-combatants are in the cellar, one might throw the grenade and kill only non-combatants. In such a case, there would be no good effect to justify the harm to the civilians.

Thus, if DER is to be employed (and I think it can be) to analyze such acts as presented by Frank Richards, it must do so at the level of policy (as Walzer suggests), not at the level of the individual act. This act does not admit of a one-off act analysis by DER. One can, however, analyze this act by DER as one of a series of acts. That is, via a policy bearing on the act. Now, before looking at a DER justification of such a policy, what about this one-off act renders it un-analyzable by DER while other one-off acts are assessable?

With respect to an analysis by DER, this act has two salient features. First, the act is able to have the bad effect without the good (in scenario 2). For, as stipulated, if one throws the grenade one possibly: 1) kills the enemy (only good effect) or 2) kills non-combatants (only bad effect). Second, the agent does not know what effects the act will have. The first characteristic gives rise to the second. Because the act possibly has the bad without the good effect, the agent does not know which effect it will have. This possibility of having the bad without the good effect markedly contrasts with the noted standard cases to which DER applies (e.g., hysterectomy, terminal sedation, and tactical bombing). In these paradigmatic cases, the practical problem that typically gives rise to double effect partially consists in the inextricability of the bad from the good effect. Indeed, the good effect characteristically causally necessitates the bad

effect.<sup>25</sup> Thus, in standard DER cases, one does not have the bad effect without the good. For example, in the case of TS, the causality by which the barbiturate relieves pain also suppresses or depresses respiration. Accordingly, one does not face a scenario in which one kills the patient but does not relieve the patient's pain.<sup>26</sup> Thus, DER characteristically addresses cases in which the good effect necessitates the bad. Moreover, the agent reasonably expects by this one act to effect the good and the bad, its causally necessitated concomitant.

By contrast, in Richards' grenade case (putting aside the scenario in which no one occupies the cellar and attending only to the morally salient outcomes), the agent reasonably expects to kill either the enemy or non-combatants, not both. One cannot employ DER in a one-off manner to justify acting in such a case. However, if one looks at a policy to be followed over

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<sup>25</sup>Those familiar with double effect will correctly sense that I limit my consideration to cases in which the good effect causally necessitates the bad effect, not the converse. Were the bad effect to be the (sole) causally necessary cause of the good effect, a rational agent aware of this and intending the good effect—given that one necessarily intends the necessary means to one's intended end—would, thereby, intend the bad effect (and violate DER). For, in such a scenario, the bad effect would be the intended necessary means to the intended good effect.

<sup>26</sup>One might object that killing the patient does relieve the patient's pain. This, however, is not so. Ceasing to exist ends pain but it does not relieve it. (By contrast, as is the case in TS, an analgesic relieves pain.) Characteristically in TS, death does not occur without pain relief. Or, more generally in standard cases of DER, the bad effect does not occur without the good. For, as noted, paradigmatically, the bad attends the good as a causally necessitated concomitant.

a series of such acts, the policy will have the requisite good effects to justify the bad effects.<sup>27</sup>

What would a targeted-acts justification of such a policy look like?<sup>28</sup> Let us take the policy that Richards proposes, roughly: “in an area recently occupied by both the enemy and civilians, after calling out to prevent harm to civilians, throw grenades into cellars in order to kill enemy soldiers.” Can DER justify this policy in terms of the acts it targets to produce? It can.

Consider how the policy satisfies the DER criteria. The policy seeks to produce the PI act of killing the enemy by throwing grenades into cellars. This PI act has the foreseen but not intended consequence of killing civilians. First, but for the bad effect of harming non-combatants, throwing grenades into cellars in order to kill the enemy is legitimate. Second, the policy intends the good PI act of killing the enemy while foreseeing but not intending to kill civilians. Indeed (as Walzer notes favorably), the policy proposes that the agent take risks (call out) to reduce or even eliminate this bad effect. Third, and finally, the seriousness of securing the good has due proportion to the gravity of avoiding the harm to civilians which harm the policy attempts to mitigate by warning prior to throwing grenades. Thus, DER can justify this policy in terms of a targeted-acts assessment. Thereby, while it cannot in a one-off manner justify the individual acts that fall under this policy, it does mediately justify them.<sup>29</sup>

Now, consider an importantly different case to which DER may apply at the level of

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<sup>27</sup>Of course, the policy cannot be fashioned solely for a single act. Rather, it must be an actual policy covering numerous such acts so that it really does have the requisite good effects.

<sup>28</sup>I will use the EC policy to illustrate a total-acts justification.

<sup>29</sup>Of course, the policy requires a total-acts DER justification. For the sake of brevity, I will not here provide that. I will provide such a justification for the EC policy.

policy, but not at the level of a one-off justification of an act; namely, emergency contraception (EC). For our present purposes, the salient characteristic of EC is that not only is the relevant bad effect able to occur without the good effect, but the bad and good effects mutually exclude one another. That is, they are com-impossible.<sup>30</sup> Focusing on its morally prominent effects, EC prevents ovulation or prevents implantation of a fertilized ovum—the bad abortifacient effect. The prevention of ovulation and the prevention of implantation mutually exclude one another. For if EC prevents ovulation, fertilization will not occur. If fertilization has occurred, ovulation has too, and, thus, can no longer be prevented. Accordingly, when considering any individual administration of EC, one cannot justify (applying DER in a one-off manner) the possible prevention of implantation of a fertilized ovum (the bad foreseen but not intended abortifacient effect) by the good (intended) effect of preventing ovulation and, thereby, fertilization. For one or the other occurs, not both. Indeed, necessarily not both. If one may justify acts of EC by means of DER, one must do so mediately, via a targeted-acts justification of the EC policy. Can one so justify an EC policy? Let us turn to that question.

Given the possible prevention of implantation of a fertilized ovum (the bad abortifacient effect), those who acknowledge the inviolability of human life from conception to natural death understandably encounter a case of conscience when considering administering EC to a victim of rape. As noted above, EC does not admit of a one-off justification by means of DER. A policy of administering EC, however, would not lack the requisite two effects. For in some cases one would effect the good effect and in others the bad effect. Thus, nothing prevents the policy from

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<sup>30</sup>Whereas, in Richards' grenade-case, the bad effect is contingently separate from the good, not excluded by causal necessity.

having the good and the bad effects. Therefore, one may be able to employ DER to make a targeted-acts justification of the policy which, in turn, may justify the individual acts that fall under it. Here follows such a targeted-acts assessment of the EC policy.

Let us consider the first criterion of DER; namely, that absent the bad effect, the act is otherwise ethically unobjectionable. Clearly, absent the bad abortifacient effect, the administration of EC to a victim of rape has much to recommend it. By so acting, one cares for a victim brutalized by rape by preventing the possible further injury of fertilization of her ovum by the perpetrator's semen. This possible further injury compounds the savage act she has already suffered. To prevent such possible further violence is a caring, compassionate, medically sound, and ethically commendable goal to seek. To the extent available after such an egregious act, it stops the outrageous offense. Thereby, it shows the community's solidarity with the victim while also displaying its abhorrence of the heinous act. Were it to lack the abortifacient effect, it could not be found objectionable. Thus, a targeted-acts assessment of the EC policy meets the first criterion of being unobjectionable but for the foreseen bad abortifacient effect.

Now, consider the (two-part) second criterion, the intent of the good and the foresight with absence of intent of the bad effect. The intent of the EC policy (originating in the intent of the policy-makers) is to prevent further possible injury to a victim of rape. Thus, it satisfies the first part of the second criterion; for the good is intended. Yet, what of the absence of intent concerning the bad effect? The means by which one (sometimes, but one does not know precisely when) prevents the further possible injury of fertilization also (at other unknown times) prevents implantation. The good effect is not realized by means of the bad; indeed, the two mutually exclude one another. Simply put, one is not able to intend to prevent fertilization by preventing

implantation. In light of this notable characteristic, those who fashion the EC policy can make the policy foreseeing but not intending that the administration of EC results, as it may, in the abortifacient effect of preventing implantation of a fertilized ovum. That is, they need not intend the bad effect in order to intend the good.<sup>31</sup> Accordingly, those who acknowledge the inviolability of life from the moment of conception credibly claim not to intend to take innocent human life in the administration of EC. Thus, a targeted-acts assessment of the EC policy satisfies the second DER criterion.

Now, consider the third and final DER criterion as applied to a targeted-acts assessment of the EC policy. Recall that the third criterion attends to the relative gravity of the reasons to effect the good and to avoid the bad, while taking into account the exercise of due diligence to mitigate the bad as much as practically possible.<sup>32</sup> Caring for the brutalized woman who has

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<sup>31</sup>As is the case in double effect cases more generally, one is able to intend (presumably, as do those who lack an appropriate concern for human life from the moment of conception) both effects. Our question, however, is whether one who does intend anovulation (the prevention of fertilization) necessarily also intends the prevention of implantation of a fertilized ovum. One need not.

<sup>32</sup>One commonly used drug for EC is Levonorgestrel, a progestin. As a progestin, its (widely acknowledged) primary effect (which occurs within seventy-two hours of administration) is the prevention of ovulation (anovulation). As previously noted, ambiguity and controversy surround the secondary causal mechanisms of EC. One of its secondary effects may be the thinning of the uterus' endometrium such that implantation of a fertilized ovum does not occur. Thus, it may be an abortifacient; of course, this is morally problematic. Given that there is no test

suffered rape includes stopping the attack upon her. The administration of EC within the first seventy-two hours after a sexual assault prevents the further offense to her bodily integrity of conception by her attacker. The administration of EC offers her a modicum of consolation that the assault is over. All of these and allied effects are real, documented, and regularly realized in the administration of EC post sexual assault. For every twenty-five hundred administrations of EC after rape, it may also result in between one and four abortions (prevention of implantation of fertilized ovum).<sup>33</sup> For the sake of our consideration, let us say that it possibly results in two abortions for every twenty-five hundred administrations, or one in every one thousand two hundred and fifty.

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for fertilization, some propose that prior to administration of EC, the physician ought to test for ovulation which, in turn, has some predictive value concerning whether fertilization has occurred. If the test indicates that ovulation has occurred and, hence, that fertilization may have occurred, then since EC in this instance may have an abortifacient effect, they would counsel non-administration. For a thoughtful clinically informed critique of the ovulation approach, see Sulmasy (2006). For a comprehensive treatment of the debate, see Thomas Davis, Jr., "Plan B Agonistics: Doubt, Debate, and Denial," *National Catholic Bioethics Quarterly* 10 (2010): 741-72. For Davis' criticism of Sulmasy's account, see Davis (2010), 766-67.

<sup>33</sup>I get this figure from Sulmasy (2006), 311. The range from one to four results from the statistical probability of pregnancy following rape ranging from a low of one to a high of four percent. Sulmasy considers the four percent a significant overestimate; I use a figure of two percent. For a criticism of Sulmasy's figures (upon which figures I here partially rely), see Davis (2010), 767-8.

How does one exercise prudence in such a manner as to make a judgment concerning the gravity of acting to realize the good at issue compared to the seriousness of avoiding the bad possibly associated with so acting? Two considerations come to mind. First, the abortifacient effect is a possible outcome. We are not sure if it actually does occur. By contrast, we do know that the goods at issue really are at issue. While not at all decisive, this is a morally relevant difference that tends in favor of administering EC. Second, if the abortifacient effect does occur, how does its occurrence relate to other known rates of fetal death associated with current medical care? That is, do we or would we currently offer a medical intervention to a woman in the presence of such an abortifacient risk? To take one relatively common example, amniocentesis is a test conducted during pregnancy to determine the health of the fetus. One legitimate reason to offer amniocentesis is to determine if the fetus itself needs specific medical interventions for its own benefit.<sup>34</sup> Amniocentesis, however, does risk miscarriage of the fetus. In fact, amniocentesis testing currently results in a loss of the fetus' life between one in one hundred to one in four hundred times, or between one and one-quarter of one percent.<sup>35</sup> Of course, this loss of life does morally differ from the theoretically possible abortifacient effect of EC. For, when conducted in

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<sup>34</sup>Unfortunately, many who employ amniocentesis do so objectionably in order to abort the fetus, given test results showing possible fetal-defects. Nonetheless, some do have recourse to the test with a view to providing care for the fetus. When done for the benefit of the fetus, amniocentesis is legitimate.

<sup>35</sup>The range is partially due to the competency of the practitioner performing the procedure. See Maura Parker Quinlan, "Amniocentesis: Indications and Risks," *Virtual Mentor: American Medical Association Journal of Ethics* 10 (2008): 304-6, at 305.

an ethical manner, one has recourse to amniocentesis in order to care for the fetus while one does not administer EC for the sake of the fetus. Nonetheless, amniocentesis offers a currently accepted intervention (when undertaken on behalf of the fetus) that has a well-documented significantly higher incidence of fetal death (taking the middle of the range, one in two hundred or one-half of one percent) than does EC (one in one thousand two hundred and fifty or eight-hundredths of one percent). This higher likelihood of fetal death in the case of amniocentesis (over six times more likely) may capture the morally important difference that, when conducted ethically, one undertakes amniocentesis for the fetus. Thus, a higher loss of fetal life would seem to be in order, as is the case. Accordingly, it seems reasonable to claim that if the rates of fetal death due to amniocentesis are acceptable, so too would be those of EC. Thus, the gravity of pursuing the goods at issue in the administration of EC after sexual assault appears to have due proportion to that of avoiding the evil abortifacient effect.

One who employs DER to make a targeted-acts assessment of an EC policy can justify such a policy. The justified policy in turn, justifies the acts of EC that fall under it. As previously noted, the targeted-acts justification of this policy does not merely sum the one-off DER justification of the acts falling under it. For DER does not immediately justify those acts for the reason noted; namely, their lack of the requisite two effects. Thus, while DER cannot be used immediately to justify any individual act of administering EC, it does mediately justify such acts. Moreover, the above targeted-acts analysis shows the uniqueness and worthwhileness of the concept of a targeted-acts analysis. As noted, however, while a targeted-acts analysis does justify a policy in terms of its aims, one has not fully analyzed a policy until one also makes a DER-based total-acts analysis. For this reason, I now turn to consider a total-acts analysis of the EC

policy.

We have looked at the EC policy's PI acts (the prevention of ovulation and, thereby, of fertilization in a victim of rape). We have yet, however, to consider the EC policy's FNPI acts. Recall that those acts are attributable principally to the adoption of the EC policy. (As, for example, the right-turns-on-red injurious to bicyclists and pedestrians lay principally at the feet of the policy as FNPI acts.) What may be the FNPI acts of an EC policy? A policy maker in a Catholic hospital would have to give great salience to the (bad) FNPI acts of scandal and confusion amongst the relevant public. For example, some might (mistakenly yet understandably) equate EC post rape with the liceity of contraception more generally. Others, particularly given the ambiguity around EC's abortifacient effect and the sometimes recondite character of DER, might think (again, erroneously, but understandably) that the EC policy amounts to holding that, in dire circumstances, it is permissible to intend to abort a fetus. It does not require much of an imagination to conceive of the confusion that might ensue when the EC policy of the local Catholic hospital is made public (as it should be). A total-acts justification of the EC policy would, thus, take into account the PI acts over against the FNPI acts of scandal.

Let us grant that the relevant FNPI acts are these foreseen but not intended instances of scandal. I propose that DER would justify the EC policy in a total-acts manner. For, first, but for the noted objectionable FNPI acts (and the noted abortifacient effects of administering EC), the PI acts are commendable. Second, the policy intends the PI acts while foreseeing but not intending the relevant FNPI acts. Third, the gravity of one's obligation to achieve the goods at issue by means of the PI acts compares very favorably to that of avoiding the FNPI acts of scandal. Moreover, one can take due educational measures to mitigate the scandal. Thus, DER

justifies the EC policy in a total-acts manner. Accordingly, the EC policy is justified by DER in both a total and a targeted-acts manner. In turn, the EC policy justifies the acts that fall under it. Thus, DER mediately justifies individual acts of administering EC.

Before concluding, one again notes the two features that appear to render an act capable only of a targeted-acts policy-mediated justification by DER. Namely, the act's possible lack of the good effect and the agent's corresponding ignorance of what he will here and now effect by his act. Of course, were the agent to know which of the two effects he will here and now effect, recourse to DER would not be necessary. For, if he knows that he will effect the bad without the good, he would refrain from acting; were he to know that his act will effect the good without the bad, he would need no further justification for acting. Given that he here and now does not know what his act will effect while he does know, over time, what following a policy concerning such acts will effect over time, recourse to policy is in order. For, at the level of policy which treats of repeated acts over time, one no longer encounters the lack of the good effect nor the ignorance of what one will effect by following the policy. Rather, one knows that, over time, some proportion of good to bad effects will be realized. If that proportion is just, then the other criteria of DER being satisfied, one may be able to offer both a targeted-acts and a total-acts justification of the policy employing DER. If one may, then one has thereby justified the PI acts that fall under the policy. Employing DER at the level of policy, one has mediately justified acts that cannot be immediately justified by DER.

In conclusion, it has been shown that, assuming its viability as a means of morally evaluating certain acts, DER justifies both policies concerning acts that it immediately justifies and some policies concerning specific acts that it does not immediately justify. Concerning the

latter type of policy (that bears on acts lacking the requisite two effects for a DER-justification), since the policy has the needed good and bad effects, it admits of a DER-justification. Thereby, DER justifies the acts that fall under the policy mediately. Clearly, the larger (and almost entirely neglected) topic of DER's bearing on policy deserves further attention. Hopefully, the preceding recommends the topic.

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