

# The Right-Based Criticism of the Doctrine of Double Effect

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**ABSTRACT:** If people have stringent moral rights, then the doctrine of double effect is false or unimportant, at least when it comes to making acts permissible or wrong. There are strong and weak versions of the doctrine of double effect. The strong version asserts that an act is morally right if and only if the agent does not intentionally infringe a moral norm and the act brings about a desirable result (perhaps the best state of affairs available to the agent or a promotion of the common good). The weak version asserts that, other things being equal, it is deontically worse to intentionally infringe a norm than to foreseeably do so. A person's intention or mere foresight might still be relevant to his or her blameworthiness or virtue, but this is a separate issue.

**KEY WORDS** Doctrine of Double Effect; Rights; The Right; Norm; Intention; Foresight

## PART ONE: THESES

This paper argues that if people have stringent moral rights, then the doctrine of double effect is either false or unimportant. The thesis matters because the doctrine of double effect is thought to be central to the moral status of violence and causing harm in such areas as abortion, self-defense, suicide, and war. It is also central to Catholic moral ethics.<sup>1</sup> Our strategy is to provide two plausible theories of the doctrine of double effect and show that the notion of rights either conflicts with the principle or makes it largely irrelevant.

Here are strong and weak versions of the doctrine of double effect.

- (1) **Strong Version.** An act is morally right if and only if the agent does not intentionally infringe a moral norm and the act brings about a desirable result (perhaps the best state of affairs available to the agent or a promotion of the common good).<sup>2</sup>

This is an all-things-considered principle. The focus here is on norm-infringement rather than norm-violation because, as a matter of terminology, a norm-infringe-

ment is not always wrong whereas a norm-violation is always wrong. This leaves open whether there are any norm-infringements.

One concern about this formulation is that implies that an act is permissible only if it brings about a desirable result. A desirable result might, and perhaps should, include a proportionality condition. The problem is to fill out that condition without it becoming an optimality condition. Even if a desirable result need not maximize the good, this is still a strong condition. This might be a reason to avoid the strong version. Alternatively, this might indicate that an act that brings about a neutral result or very minor undesirable result is only a very minor wrong.

A less strong version of the doctrine of double effect holds that not intentionally infringing a moral norm and bringing about a desirable result are necessary but not sufficient for an act to be morally right. We might call such a version 'Moderate Version.' This version allows for the satisfaction of other considerations, such as desert, fairness, or rights, to be necessary for an act to be morally right. The Moderate Version, while weaker than the above Strong Version, is still quite strong compared to the weak version of the doctrine of double effect, which is as follows.

- (2) **Weak Version.** Other things being equal, it is deontically worse to intentionally infringe a norm than to foreseeably do so.<sup>3</sup>

On this theory, an intentional norm-infringement is a wrong-making feature of an act. This feature can be overridden or undermined. By 'deontically worse' we mean that, other things being equal, it is morally worse to intentionally infringe a norm than to foreseeably do so. That is, the norms here are moral norms. Other norms, such as norms of etiquette, are not part of the thesis.

Here are two points about interpreting the principle. If a reader thinks that the doctrine of double effect depends on the common good and that it is distinct from the best state of affairs, then she should please focus on the common good where I discuss the best state of affairs below.

A reader might think that something like the strong version of the doctrine of double effect is true, but that an objectionable intention is a sufficient, but not necessary, for an act to be wrong. Such a reader might think that a norm-infringement is a wrong-maker, but not the only one. On this interpretation, the reader should substitute this version for (1): *If an agent intentionally infringes a moral norm, then her act is morally wrong.* On this version, for example, someone who accidentally runs over a pedestrian, acts wrongly even though she did not intentionally infringe a norm. A proponent of such a view might also think that a correct intention is a necessary, but not sufficient, condition for an act to be permissible.

Some versions of the doctrine of double effect are put forth in terms of harm. Warren Quinn notes that a common version of it says, "[T]he pursuit of a good tends to be less acceptable where a resulting harm is intended as a means than where it is merely foreseen."<sup>4</sup> According to a later version he considers, the doctrine says, "[W]e need, *ceteris paribus*, a stronger case to justify harmful direct agency than to justify equally harmful indirect agency." On this account, harmful direct agency is agency that brings harm to a victim in part or whole because the agent deliberately involved the victim as a way of furthering his own purpose.

There are several reasons to focus on a norm rather than a harm. First, if the best theory of harm is the counterfactual comparative account, and I think it is, then too many things are harmful and would then mistakenly trigger a doctrine-of-double-effect analysis. Consider a case in which wealthy Smith decides not to give a large sum of money to middle-class Jones in order to make the latter's life go worse than it would were he to give him the large sum. Intuitively, this does not run afoul the doctrine of double effect. The irrelevance of seeming benefits suggests that the norm is right-based.

Second, events that are harmful but do not set back someone's legitimate interest are not wrong on the doctrine of double effect even when they are intentional. If a woman hits a robber trying to rob her, the woman sets back the robber's interest and, thus, harms him. The woman might even hit the robber to send a message to other potential robbers. This is not the sort of problematic agency with which the doctrine of double effect is concerned. A right is the relevant norm for the doctrine because rights form the boundary of legitimate interest.

An objector might argue that the woman does not hit the robber because what she does is positive rather than negative. The act, though, is still harmful and so this approach cannot support a harm-based version of double effect. In addition, if this solution is to work, the negative valence to the result of her act has to be filled out in a way that is independent of the right, good, or harm. There does not appear to be a plausible way to do this.

Third, intentional harm is permissible if the person who is harmed validly consents to it. The role of valid consent in making what would otherwise seem to be an intention-based wrong into a permissible act suggests that the norm is a right. This is because valid consent prevents a right-infringement but does not change the act's harmful effect or the agent's intention.

The focus here is intention in action. In general, we think that intention is a mental state. On this account, an intentional act (for example, doing act A) is the execution of an intention to do A. An intention is sometimes prior to the action (prospective intention) and sometimes simultaneous to it (intention in action).<sup>5</sup>

There are some objections to this theory. First, on one account, if an agent intends to do an act, then he intends to intentionally do that act. This account might appear to be circular because the intention depends on a second intention.<sup>6</sup> However, one way around the circularity is if a prospective intention focuses on an act rather than an intentional act. Another way the account would not be circular is if the prospective intention refers to an act done from an intention in action and an intention in action refers to an act rather than an intentional act.

A second problem occurs if an intention causes an act. Here some concerns arise. One concern is that if a cause must precede an event and an intention in action is simultaneous to it, then an intention does not cause an act.<sup>7</sup> One simple way around this problem would be to allow for simultaneous causation.<sup>8</sup> Another concern is that an intention must cause the act in the correct (non-deviant) way.<sup>9</sup> There is an issue as to whether the correct way can be filled out in a way that allows the intention to explain the act (for example, an intention causes an act in a non-deviant way when it causally directs and guides the act). Still another

concern is whether an intention is essential to an act and, if so, whether and why the intention is distinct from the act.<sup>10</sup>

Nothing here rests on these issues. Specifically, nothing rests on whether intention in action or intention as doing is true because both theories have the same problem with the relation of the norm at the heart of the doctrine to moral rights. We point out these issues just to note that the argument was formulated with intention in action in mind.

The first part of the paper, above, sets out the theses. The second part briefly sets out the notion of rights and then argues that the doctrine of double effect depends on individuals having them. The third part argues that the doctrine does not easily fit with individuals' rights. It then explains the doctrine's intuitive appeal. The fourth and fifth parts respond to objections.

## **PART TWO: THE DOCTRINE OF DOUBLE EFFECT AND RIGHTS**

A right is a claim.<sup>11</sup> One person has a claim against a second person if and only if the second owes the first a duty. The right is legal if the duty is legal and moral if the duty is moral. Our focus is on moral rights. Some rights are quite stringent.<sup>12</sup> This stringency explains, for example, why it is wrong to push a fat man in front of a trolley to save five innocent people who are on the tracks (call this case 'Fat Man'), cut open a healthy patient without his consent in order to transplant his organs so as to save five who will die without them (call this case 'Surgeon's Harvest'), or frame an innocent homeless person in order to stop a riot that will result in five innocent people being killed (call this case "Frame").<sup>13</sup> The right-stringency, though, need not be absolute.

Intuitively, people have rights to their body and property. This likely protects them against force, fraud, or theft, at least when not done for defensive purposes. Depending on the theory, such rights are justified by the right-holder's interests or autonomy. On another theory, they are justified by the interests or autonomy of the relevant class of individuals. It is thought that rights trump consequences in the sense that they can make an action right or wrong even if the performance of that act does not bring about the best result.

To see the relation of rights to the main non-consequentialist theories of the right, consider the following.

### **Case #1: Freshman**

College freshman Al fantasizes to the image of senior Betty. He uses her to get an image to run his fantasy.

By using her, we mean that he looks at her to get an image and then incorporates the image into his fantasy. On the Doctrine of Double Effect, his intention makes his action wrong only if he does something to her or takes something that is hers. Whether he does so depends on what rights she has. A similar thing is true of whether his act is wrong because of what it causes to happen to her or something that is hers. Note that Al does not harm Betty, so he does not commit a doctrine-of-double-effect wrong on a version of the doctrine that focuses on harm.

A similar thing is true for other non-consequentialist theories of the right. On the harm principle, for example, we have to decide when someone has a legitimate interest. This presupposes a theory of rights.

### Case #2: Paris Hilton

Paris Hilton falls in love with Rick Salomon. This causes some of her fans to be heartbroken and thus harms them. Intuitively, Paris did not act wrongly even though she sets back her fans' interests. This is because, on a non-consequentialist account, they do not have a legitimate interest in whom she loves.<sup>14</sup>

The notion that the right depends on what someone has a legitimate interest in and the notion that rights set the boundary for legitimate interest applies in a similar way to the doctrines of double effect, doing and allowing, and causing and not causing.<sup>15</sup>

This section tried to briefly show that the most plausible versions of non-consequentialism, including the doctrine of double effect, assume people have rights. This is true for the Strong Version, Moderate Version, and Weak Version because they all face the same boundary issue. If this is correct, then were the doctrine to conflict with the notion that people have rights, this would make it incoherent.

### PART THREE: ARGUMENTS AGAINST THE DOCTRINE OF DOUBLE EFFECT

Here is the first argument against the strong version of the doctrine of double effect.

(P1)	If, in the context of the doctrine of double effect, a norm is right, then the doctrine of double effect is false.
(P2)	In the context of the doctrine of double effect, a norm is a right.
(C1)	Hence, the doctrine of double effect is false. [(P1), (P2)]

Premise (P1) rests on the notion that if the norm is a right, then in most cases it is wrong to infringe it. The wrongness of infringing a right is independent of the agent's doctrine-related attitude (intention or mere foresight) unless the right is overridden or undermined. Given the stringency of a right, it will only rarely be overridden or undermined. Below we discuss objections to this assumption, specifically, people do not have moral rights or moral rights focus on, and only on, intentions.

The second premise rests on several pieces of evidence.<sup>16</sup> First, in standard cases such as Fat Man, Surgeon's Harvest, and Frame, the norm intuitively seems to be a right. Second, what justifies the norm in these and other relevant cases (consider, for example, autonomy, dignity, interest, intrinsic value, or rationality) also justifies a right. Third, examples of norms that are not rights are either imperfect duties and not relevant to the doctrine or are too narrow to be relevant to these cases and ones like them. An example of the former is the duty to be

charitable. Because it is not owed to anyone in particular and can be satisfied in a number of different ways, it is not relevant to these sorts of cases. An example of the latter is the norm to promote one's talents or to not harm oneself. Even if this is not a duty, this norm is not relevant to many of the sorts of cases with which the doctrine is concerned, in particular, cases in which one person would harm another. Also, it is unclear why this reflexive norm is not a duty a person owes to him- or herself and, thus, a right.

Hence, if people have moral rights, then the strong version of the doctrine of double effect is false. Consider, next, the weak version.

(P1)	A norm is a right.
(P2)	If a norm is a right, then a person's intention is not an important wrong-making feature.
(P3)	If a person's intention is not an important wrong-making feature, then the doctrine of double effect is unimportant.
(C1)	Hence, the doctrine of double effect is unimportant. [(P1)—(P3)]

The justification for (P1) rests on the arguments given above.

Premise (P2) is true because if a norm is a right and rights are quite stringent, then an intention is usually not morally relevant. This is because the rightness or wrongness of an act will almost always depend on whether a right is infringed or not. The agent's intention or mere foresight would be a mere tiebreaker. It would be relevant only when a right is weak or unimportant or, perhaps, when it is barely respected or infringed. Because this will occur infrequently and only in marginal cases, a person's attitude is not an important wrong-making feature.

The argument would only show that the doctrine applies in some cases rather than all cases involving intention and wrongdoing. The grounds for claiming that such tie-breaking cases occur infrequently is an empirical claim. The evidence is that for significant rights, people rarely act in cases in which equally stringent rights conflict. On this theory, an intention changes one's duty only when significant-and-opposing rights tie in stringency. It is unclear whether rights can oppose each other. If natural rights are consistent with one another and all non-natural rights derive from natural rights, then rights cannot conflict. Let us set this issue aside. Perhaps the doctrine would be relevant for insignificant rights if, in that context, equally stringent rights conflict more often. Still, the doctrine would not do the work on important issues that proponents of the doctrine think it does. Consider, for example, abortion, death penalty, and euthanasia.

Premise (P3) rests on the notion that the doctrine's importance, if it is important, depends on its determining acts' deontic status. Intention might be relevant to issues such as criminality, moral responsibility, or virtue, but not via the doctrine of double effect. The idea, then, is that (P3) is trivially true.

Let us return to the Strong Version. The doctrine of double effect's problematic relation to rights, at least the strong version, can be seen in that it gets the wrong result in a couple of cases. In these cases, rights explain why it gets the wrong result.<sup>17</sup> Consider first Lifeguard.

### Case #3: Lifeguard

Lifeguards Mitch and CJ see five persons drowning. They know that if they do not drive there right away all five will drown. They drive toward the beach but sprawled out in the middle of the road is an unconscious man. He is there as a result of his having suffered an epileptic fit while walking down to the beach. If they stop to help him all five will drown. If they run over him, they will break his spine and kill him. They cannot drive toward the beach without running over him.<sup>18</sup>

Intuitively, Mitch and CJ should stop because not doing so would violate the unconscious man's right to his body or life. The strong version of doctrine of double effect, however, would tell the two to drive over the man because doing so is neither their goal nor the means to their goal. Hence, it is unintentional. Because it brings about the best state of affairs, it is permissible.

The Strong Version of the doctrine says, "An act is morally right if and only if . . ." This is stronger than permissible. Would Mitch and CJ be obligated to drive over him on the strong view (where this is understood as obligated to do the right thing and not simply the less bad of two bad options)? Perhaps the implausible obligation is a reason to prefer the Moderate Version rather than Strong Version.

Consider next Panzer.

### Case #4: Panzer

The Nazis strap Jewish children to the front of their tanks and invade England (following Hermann Goering's elimination of RAF fighters). Antitank gunners would increase their chance of killing the tanks if they use the children's head as a target when firing. The heads are located at the vulnerable point where the turret rests on the chassis. Given the power of the British antitank rounds, the children will die no matter what.<sup>19</sup>

Intuitively, the anti-tank gunners may use the children's head when firing if they may fire at the tanks at all. This is because the gunners will be infringing the children's rights no matter what they do. This is true whether they do so intentionally or merely foreseeably. Both the Strong Version and Weak Version of the doctrine of double effect would say it is wrong to do so because the children are being used as a means to accomplish an antitank gunner's goal and this use is accompanied by an innocent's death and right infringement. As such it is an intentional killing of an innocent and, hence, wrong (whether all-things-considered or other-things-being-equal wrong).

Note that if the gunners' only option available to kill the tanks is to use the children's head as a target when firing, it seems more appealing to intuitions.



This suggests that an intentional defensive killing, when it is the only way to defend oneself against an unjust attacker, is sometimes permissible. This adds to the above criticism of the doctrine of double effect since it entails otherwise.

Consider third Motorcycle Gang.

### Case #5: Motorcycle Gang

A motorcycle gang goes to gang rape a teenage woman in a hot tub. The only way for the woman to defend herself is to shoot them with the Glock that her mother insisted she put in her purse. The mother loaded them with hollow point bullets that will kill those who are shot. A couple members of the gang (who are present) donate their unique blood weekly to five small children with blood disorders. The weekly gift keeps them alive.<sup>20</sup>

Intuitively, the woman may shoot her attackers. On the strong version, though, she may not because doing so would bring about worse results than not doing so. Perhaps if the desirable outcome is less consequentialist, that is, less tied to bringing about the best consequences, the woman may shoot the bikers.

A doctrine of double effect proponent might argue that the woman may shoot them because an attacking gang member is an unjust attacker and an unjust attacker forfeits a right against defensive violence. On this argument, then, the moral norm is a right. This fits nicely with the above right-based objection to the doctrine.

The Moderate Version gets Lifeguard correct, but Panzer and Motorcycle Gang incorrect. Let us assume that right-infringement is a separate wrong-maker from an intentional norm infringement. The nature and content of norm is then mysterious. Let us set this concern aside. In Panzer, the use of the anti-tank rounds would be wrong because they infringe on the children's rights. It seems counterintuitive that the British people should have to tolerate a Blitzkrieg-style tank invasion and not be permitted to shoot back because the Nazis immunized their tanks in this manner. Some philosophers with whom we have discussed this do not share this intuition. Alternatively, they argue that this shows that the Strong Version and Moderate Version are false, but not the Weak Version, because the norm-infringement is overridden by the bad consequences of the unjust invasion.

In Motorcycle Gang, the Moderate Version entails that the defensive shooting is wrong because it would fail to bring about the desirable result. This is counterintuitive. Perhaps the desirable result could be further qualified by the requirement that an undesirable effect be brought about in a direct (or proximate) manner. While its proponents deny this, directness is likely a function of foreseeability. If both the agent's intentions and what he foresees or should foresee are now wrong makers, then we have made wrongness largely, if not entirely, a function of blameworthiness. If so, then this should be done directly through the following principle: *A person acts wrongly if and only if he is blameworthy.* Alternatively, blameworthiness can be incorporated via principles that parallel the Moderate Version and Weak Version.

If we think that a person can do the wrong thing but not be blameworthy for it, the two should not be run together. One reason to think this is the notion,



found in both morality and law, that a person might do the wrong thing, but have an excuse for doing so. Directness and foreseeability might separate from blameworthiness if the first two (directness and foreseeability) are met in the case of negligence and blameworthiness is not.<sup>21</sup> The problem of closeness occurs when one event is intended under one description, a second is not intended, and the two events are close if not identical. The problem arises as to whether an agent has infringed on the relevant double-effect-related norm with regard to the second event.<sup>22</sup> The directness (or proximity) of an act to a result is a different issue from the closeness of an intended event to a second. Hence, we can sidestep the closeness problem.

On some accounts, directness is distinct from foreseeability. Suppose I am sitting on a bus and unbeknownst to me someone places their drink on the floor, out of my sight, but next to my foot. If I spill it when I stand up, I directly caused that to happen but did not (nor should I have) foresee it. In *Motorcycle Gang*, the woman in the hot tub directly killed the bikers, but she did not directly make their mothers cry, even if she foresaw the latter. She directly put a hole in the precise location on their t-shirts under their biker jackets, even if she did not foresee this. If directness is its own metaphysical property, and not a stand-in for foreseeability, then perhaps it can do the work doctrine proponents need it to do here.

If the Weak Version holds that the norm is a moral right, the norm is quite stringent. This is because rights are quite stringent. While rights can be overridden, the consequentialist gain to do so must be very weighty. The stringency of rights can be seen in *Fat Man* and *Surgeon's Harvest*. It can be seen in cases not involving life or death in that we do not think that forced kidney or plasma donation is permissible when such a donation is required to save someone's life. Here the right infringed is a right to control one's body and a property right over one's organ. It can also be seen in *Frame* where the right that prevents someone from being incarcerated is more stringent than the value of the innocent lives that would be lost due to rioting. Here the right is one that makes it wrong to incarcerate an innocent person.

Another intuitive case for rights in the context of the doctrine of double effect can be seen in this case.

### **Case #6: Sophie**

Sophie is a non-Jewish Polish woman in a Nazi prison. A Nazi prison guard selects her daughter to be killed. She begs the guard to kill her instead.<sup>23</sup>

There is an issue as to whether she is intentionally trying to kill an innocent (herself) as opposed to merely suggesting to the guard that he kill an innocent. There is also an issue as to whether she is bringing about better results. We are assuming that her life is as valuable as her daughter's life. Leaving these issues aside, which the proponent of the doctrine of double effect would ultimately need to resolve, it intuitively seems that substituting her own life for that of her daughter is permissible. This would not be true, though, if she tried to substitute

a Jewish girl for her daughter. The difference between substituting herself and the Jewish girl is a matter of rights. She has rights to herself but not to the Jewish girl.

The underlying explanation for this argument is that people find doctrine of double effect intuitively plausible because a person's intention is relevant to her blameworthiness and virtue, rather than the right, and they confuse these issues.<sup>24</sup> This makes sense of the intuitive appeal of the doctrine. It also makes sense as to why we think that a person ought to think of another person in a certain way, even if the person who is thought about doesn't have a right to be thought about in one way rather than another.

The role of praise and blame might also explain what happens in collective action. If one thinks that there is collective action, and we are not sure there is, then there is a problem if there are no collective intentions. Note that a collective intention is distinct from individuals having a shared intention or interlocking intentions.<sup>25</sup> The argument against collective intention rests on the notion that an intention is a feature of a mind and only an individual has a mind. If this is true, then this is a problem for the doctrine of double effect. It is not a problem, though, for individualized theories of blame and virtue. Nor is it a problem for theories of the right that focus on the rights of the individuals acted on and make this focus independent of the agent's mindset. It is not even a problem for the doctrine of double effect if the doctrine is relevant to individuals' actions rather than those by collections.

## PART FIVE: OBJECTIONS

### Objection #1: Intention is a weak wrong-making feature of an act

An objector might claim that an agent's intention might be a wrong-making feature even if it rarely transforms a permissible act into a wrong one or a wrong act into a permissible one. The idea, then, is that intention makes an act slightly more wrong than it would otherwise be. Similarly, mere foresight would make an act slightly more permissible than it otherwise would be. Given the stringency of rights, though, the contribution here is likely small. If rights are so stringent that they almost always determine the permissibility or wrongness of an act and if intention is a rare tiebreaker, then the intensifying or weakening effect of the agent's intention or mere foresight is generally unimportant. Its unimportance would fit poorly with the central role assigned to it by many who argue with regard to abortion, self-defense, suicide, and war. Consider, for example, those who think that the doctrine makes terror bombing wrong and strategic bombing permissible. Consider, also, someone who thinks that the doctrine explains why someone may sacrifice his life to save others, but not allow suicide.

The stringency of rights is likely justified because they create a sphere of moral non-interference that allows people to shape their lives. The idea is that people need moral elbow room to shape their lives and that rights are part or all of the protection of such elbow room. It might also be justified by the respect owed to an individual with dignity, unique perspective, distinct life, and so on. On some account, the elbow room is also provided by two-way liberties (absences of duties

to do something or not do it) that allow people to shape their lives by pursuing their self-chosen projects. On such an account, the two-way liberties apply to acts within the sphere of non-interference.

Here is another way to understand this response. When we ask whether someone's doing an act was obligatory, permissible, or wrong, typically all we ever need to do is calculate the total balance of rights infringements (for example, add them up, determine their stringency levels, determine degree of infringements, factor in both infringements and satisfactions of negative and positive rights). Once we know which rights have been violated and how they weigh against each other, then we will have the output of whether it was obligatory, permissible, or wrong. The picture here is, roughly, Rossian, maybe a bit of consequences thrown in if significant enough. Moreover, in only really rare cases will we add and weigh everything up and it comes out a wash in terms of rights and, possibly, consequences. Only then do we look at intentions and, perhaps, other mental states to break the tie. Otherwise, they do no or almost no work in the original calculation.

Finally, when we talk about intention, what double-effect proponents are picking up on is the agent's responsibility or virtue. That is, while the rightness, wrongness, and permissibility of actions depends on a "rights calculation," blame and virtue depend on things like mental states. So when the proponent utters the sentence, "Doctor X did not do something wrong in performing that abortion," what she really means to say is, "Doctor X is not blameworthy or vicious for performing that abortion, even if it is (pro tanto, all things considered, etc.) wrong." The proponents, on this view, are just confusing concepts.

How might a proponent respond? If we mean intention is less important to the correct application of *strictly normative* terms, and more apt for the application of other *value* terms like 'blame' and 'vice,' then the point has less punch. What we want to know is what people ought to do. If the doctrine of double effect helps us figure out blame and praise and virtue, it seems like it is important. Especially if we think people ought to sometimes do the wrong thing because it is praiseworthy or virtuous in those circumstances. The main argument in this paper should not be merely verbal.

## **OBJECTION #2: THE ABOVE ARGUMENT BEGS THE QUESTION AGAINST THE DOCTRINE OF DOUBLE EFFECT**

A second objector might argue that the above argument begs the question against DDE.<sup>26</sup> He points out that the above argument assumes that intentions are mostly irrelevant to whether someone has a right not to be harmed in classic cases like Fat Man, Surgeon's Harvest, or Frame. The objector then argues that the problem is that DDE supporters do not think this. Warren Quinn, the objector continues, views intentions not merely as a tie breaker or operating at the margin. On his view, rights are not fully describable without referring to the right not to be treated in a certain way, where what it means to be treated in a certain way is to figure in the plans of another in a certain way. In other words, for Quinn and other DDE proponents, intentions are at the core of rights. The objector concludes that the above argument merely begs the question.

The problem with this objection is that if DDE prohibits the intentional infringement of a norm (whether all things considered or other things being equal) and the norm is itself a right that prohibits the intentional infringement of something (likely a norm), then the doctrine generates a regress. Consider that the objector claims that DDE proponents are committed to these propositions.

- (1) One may not intentionally infringe a norm.
- (2) A norm is a right.
- (3) A right prohibits the intentional infringement of a norm.

If we combine (1) and (2), we end up with the following: *one may not intentionally infringe a right*. If we combine this conclusion with (3), we end up with the following: *one may not intentionally infringe the right prohibiting the intentional infringement of a right*. After a few iterations of this, we end with the following conclusion.

- (4) *One may not intentionally infringe the right prohibiting the intentional infringement of a right prohibiting the intentional infringement of a right*.

The circularity does not change if we change intentionally infringe to use via direct agency. Direct agency occurs when the agent deliberately involves someone in something in order to further his purpose and does so by way of her being involved in this way.<sup>27</sup> The problem reappears because there would now be a regress involving direct agency. Even if the norm is a right prohibiting an incorrect intention (or direct agency) regarding a narrow matter, the problem of a prohibition of an intention of an intention of an intention still occurs, albeit to an increasingly narrow matter.

In addition, the notion that one person can have a right to what a second intends is mistaken. One person has a right to what a second intends only if the first owns the second's body or thoughts. This is because for the person acted on to have a right to how another thinks about him, rather than acts toward him, when the thought does not itself physically or psychologically affect him, depends on his owning the thoughts or thing that has such thoughts. It is counterintuitive that one person owns this in another. As a result, the theory of rights that the objector claims that Quinn and others hold cannot save DDE.

The DDE proponent might claim that the intention is an essential feature of the act to which the right applies, but then the issue would be why the right would cover only those acts that have the intention in question.<sup>28</sup> In addition, we intuitively think that people have rights to their bodies and properties and that any interference with them, even merely foreseen and inadvertent ones, infringes this right.

Another objector might also hold that intentions are at the core of rights. According to the above argument, the objector holds the following three propositions, the conjunction of them generates a regress.

- (1) One may not intentionally infringe a norm.
- (2) A norm is a right.
- (3) A right prohibits the intentional infringement of a norm.

This objector continues that the above objector need not accept (1) or (3).

The argument for premise (1) is that it either explicitly or implicitly lies at the heart of the doctrine of double effect. After all, it is concerned with distinguishing between intentional and merely foreseen results. The above discussion of the nature of the norm supports premise (2). Following the above objector, premise (3) asserts that intentions are at the core of rights. The intention either refers to another norm or does not do so. If it does refer to another norm, then (3) captures this idea. If it does not refer, then the content of the prohibited intention is unspecified.

The norm cannot be against harm because it is permissible to intend harm when a person whom the agent harms consents to be harmed or forfeits his right against it. Consider, for example, a case when a person wishes to be punished because of a sense of guilt. Consider, also, a case of violent self-defense. There is an issue as to whether consented-to harm is actual harm, but it can be in the sense that it sets back a person's interest at least in an other-things-being-equal sense. If doctrine-of-double-effect-related harm is limited to an all-things-considered setback to an individual's interest, then all sorts of things that appear to be harmful would not be relevant to the doctrine. This would occur in cases in which the seemingly harmful act benefits a person by preempting even greater harm. Consider, for example, when a loan shark's enforcer breaks a borrower's leg. If he were not to do so a second enforcer would have broken both the borrower's legs and done so far more severely. Intuitively, the harm in this case is related to the doctrine of double effect.

### **OBJECTION #3: THE ARGUMENT FAILS BECAUSE PEOPLE DO NOT HAVE RIGHTS**

A third objector might argue that she agrees with the paper's conclusion but would run the argument the other way. She agrees that the doctrine of double effect conflicts with rights-based ethics, but concludes from this that we should reject rights-based ethics.<sup>29</sup> In fact, the objector continues, we should be surprised if double effect was useful in anything other than Aquinas' ethical system. In this system, an action is right if it is an objectively good or neutral kind of act, it is appropriate given the circumstances (including consequences), and the agent intends the good. In such a system, she notes, rights do not play a role at all. Although you could translate some of the right-making features of objectively good actions and some circumstances into "rights," they would be significantly weaker than what most contemporary rights theorists want. Aquinas, she argues, focuses mainly on the effects of acting on the agent, not on others. She concludes that a lot of people who take the doctrine seriously agree with his system to some degree (for example, a lot of his theory found its way into the Catholic catechism).

The problem with this is that the various non-consequentialist theories presuppose rights to set the boundaries of a person's legitimate interest. For example, if Paris Hilton were to make love to a disreputable celebrity and this harms her fans by making them jealous or disappointed, this does not require that she have the right intention or act in a way that brings about the best consequences because they have no right over her intimacy. Similarly, if the harm principle is true, this

again does not provide a good reason for coercing Paris because while her act might harm her fans (their well-being is set back because they are in pain), the harm is not tied to something in which they have a legitimate interest. The same is true for the doctrine of doing and allowing and the doctrine of causing and not causing.

Moral rights are also needed to provide the boundaries for various activities in the state of nature. Consider, for example, when two neighbors in the state of nature disagree about how loud one may play his stereo or the smoke generated by one of the neighbor's burning tires. If there is a right answer as to the extent to which one person may engage in these activities before he interferes with the second's property rights, then there is a moral right that sets the boundary of permissible activity.

#### **OBJECTION #4: THE ARGUMENT FAILS BECAUSE MORAL RIGHTS ARE NOT LIMITED TO OWNERSHIP RIGHTS AND THOSE DERIVED FROM THEM**

A fourth objector might argue that rights are not limited to ownership (specifically, ownership of one's body and property). She argues that this is not true for the moral right against defamation. Intuitively, she argues, if one person defames a second, then the first infringes the second's right. However, she notes, the second does not own the first's body or property and, thus, the relevant right here cannot be explained in terms of ownership. The same is true for intellectual property. The assumption here is that information can be property even if it is abstract, universal (rather than particular), or not something into which a person can mix his labor or first occupy.

If all moral rights are ownership rights, then the objector is correct in that a number of activities (for example, blackmail, defamation, and using another's intellectual discovery without the discoverer's consent) are not right infringements. This intuitively seems correct. Consider, for example, the paradox of blackmail. If one person has the right to say or not say true but embarrassing facts about a second and the second has the right to give or not give the first money, it is hard to see how combining two activities that the agents have a right to do could produce a right infringement. A similar thing is true for defamation. If one person does not have a right to control what a second person thinks, says, or writes, particularly when on his own land and in private, it is hard to see why the first would have such a right in other circumstances.

Even if not all moral rights are ownership rights, though, this does not change the above argument. It still is the case that people usually may not infringe someone's right even if doing so is done merely foreseeably and when it brings about the best results. That is, the argument is the same and, arguably, even stronger when it is combined with the best theory of rights. This might not be the ownership theory of rights.



**PART FIVE: MORE OBJECTIONS<sup>30</sup>****Objection #5: The argument fails because rights are often weak, unimportant, or in conflict with one another**

A fifth objector claims that the above argument asserts that if a norm is a right and rights are stringent, then an intention is usually not morally relevant. This is because the rightness or wrongness of an act will almost always depend on whether a right is infringed or not. On our account, the agent's intention or mere foresight would be a mere tiebreaker. It would be relevant only when a right is weak, unimportant, or conflicts with another right. Because this will occur infrequently, a person's attitude is not an important wrong-making feature. The objector argues that we have not shown that rights are usually stringent or that rights rarely conflict.

The notion that rights are stringent relates to what rights are thought to do. Rights theorists usually assert that rights trump (or preempt) consequences except when those consequences are very important. On such an account, rights usually trump utilitarian considerations. This is why, for example, it intuitively seems wrong to push a fat man in front of a trolley or cut up a healthy person and distribute his organs even when doing so saves five lives at the cost of only one life. Any moral consideration that trumps the value of four innocent lives is stringent. I focus on trumping consequences rather than utility in order to explore deontology that is compatible with theories of the good that are not purely hedonic.

The notion that rights rarely conflict rests on the notion that people have rights to their body and property and that other rights derive from them. Even if there were rights that are not body or property rights or rights that derive from them, it is unclear what work rights would do if people were to have waves of negative and positive rights that often conflict. Such an account would require that agents determine the more stringent right and act on it. It is hard to see why such an approach would do anything other than maximize the ground of such rights, whether it is interests or autonomy. It would thereby be similar to, if not extensionally equivalent to, consequentialism.

The objector might respond that rights can and do conflict. In fact, he might continue, the above argument presupposes a particular view of rights.

[I]t is plausible to hold that the cases the author cites, such as "Fat Man, Surgeon's Harvest, and Frame," are all those in which stringent rights conflict with each other. . . . For example, in the case of Lifeguard, the author argues that the agents should stop to help the unconscious man in order to protect his right rather than run him over to save drowning people. However, it is plausible to think that the drowning people also have rights to life, which might well be stringent, and these rights are in conflict with the unconscious man's. (And in this case DDE turns out to favor their rights over the unconscious man's.) The author does not consider this possibility presumably because of certain view about rights, such as that . . . there is no positive right to be saved. However, this is a substantive view to be defended.



There is no duty to save. One reason to think there is no such duty is that such a duty is counterintuitive. Consider, for example, an investment banker who considers embezzling his clients' money and sending the money to the third world for famine relief. It is counterintuitive that he is torn between conflicting rights. If right-infringement leads to a residue duty to apologize or compensate those whose right he has infringed, the banker would owe an apology or compensation to the people who would have benefitted from his theft. This is counterintuitive.

A second reason is that if one person has a duty to save a second and the duty is owed to the second, then the second has a claim (that is, a right) to be saved. The idea here is that a duty one person owes a second is identical to the second having a claim against the first. The other idea is that a right is a claim. If a second person were to have a right against the first to be saved, then the second would have a right to the first's body or labor. This is because he would have a claim that the first use his body or labor in a way that benefits the first. However, the second does not have a right to the second's body or labor. He does not own them. Nor has he contracted to rent or benefit from them. Thus, a duty to save, at least if owed to a particular person (as the objector seems to assume in the case of Fat Man, Surgeon's Harvest, and Frame), results in a sharply counterintuitive picture of rights. A picture in which the desperate own a potential beneficiary's body or labor or have some other right that entitles them to benefit from these things.

#### **OBJECTION #6: THE ARGUMENT FAILS BECAUSE THE DOCTRINE OF DOUBLE EFFECT GROUNDS RIGHTS**

A sixth objector might argue that the doctrine of double effect grounds rights rather than depending on them. Here is how such an objection might go.

While the author's argument might show that non-consequentialist theories had better vindicate certain claims of right (at least given that people's moral intuitions are tenable), this falls short of establishing that they need to presuppose a theory of right, or to be right-based. This is because non-consequentialist theories can instead ground the claims of right in such a way that the admitted claims of rights turn out to be intuitive. For example, in Kant's theory, what is basic is the Categorical Imperative, which involves no reference to rights; rights are derivative. However, if Kant's theory succeeded, a plausible theory of right would ensue, or so Kantians think. The usual formulation of DDE might well be taken to partially ground rights, rather than presuppose them. Given that DDE dictates that it is wrong to harm a person by intending to do so but that it is sometimes permissible to harm a person without such an intention, people turn out to have (stringent) rights not to be harmed as an end or as means, but not to have (stringent) rights not to be harmed simpliciter. On this view, DDE is not generally inimical to stringent rights, but rather underwrites them.

The problem with this objection is that it is unclear what the content of the right would be were it to derive from the doctrine of double effect. It cannot be a right to one's body or property because such rights do not derive from the doctrine. It cannot be a right not to be harmed because, intuitively, there is no right to not be harmed except in cases in which a person has a legitimate interest. Consider

Freshman and Paris Hilton. The notion of legitimate interest depends on a notion of rights that is independent of the doctrine of double effect. The right in question cannot be a right not to intentionally have one's right infringed because this would require a doctrine-of-double-effect-independent sense of the right that should not intentionally be infringed or, as argued above, regress results. In short, there is no plausible right that derives from the doctrine and satisfies our intuitions.

This same objection applies to the Kantian Categorical Imperative. In a case like Freshman, we have to discover whether the freshman treats the woman about whom he fantasizes merely as a means. This requires we have a criterion for treatment as opposed to non-treatment and a criterion for treatment that treats a person merely as a means as opposed to treatment that does not do this. It is hard to see how this might be done without introducing notions of causation and boundaries of legitimate interest. These are right-based considerations and ones that do not depend on the doctrine of double effect.

## **PART SIX: CONCLUSION**

In conclusion, if people have stringent moral rights, and we think they do, then the doctrine of double effect is false or unimportant, at least when it comes to making acts permissible or wrong. A person's intention or mere foresight might still be relevant to his or her blameworthiness or virtue, but this is a separate issue. Perhaps many of the intuitions that surround the doctrine can be explained by its relevance to these matters.

One last objection is worth considering. An objector might argue that the paper is clear and convincing, but the thesis (that stringent moral rights entail the falsity or irrelevance of the doctrine effect) is obvious and, thus, not worth publishing. She might continue by asserting that it is also clear that this explains the sort of counterexamples present in the paper that plague the doctrine of double effect. Still, as far as we can tell, the argument is not in the literature. The Doctrine of Double Effect is at the center of many ethical discussions. It can be seen in Catholic moral doctrine, philosophical discussions about permissible behavior in business, medicine, self-defense, and war, and various legal doctrines with regard to what is a crime and the severity with which it is punished. Thus, if it is clear that moral rights are incompatible with the Doctrine of Double Effect, this is a significant result. This becomes even more significant if the most plausible versions of non-consequentialism all assume people have rights.

One objection we repeatedly received with regard to this paper is that on the basis of our theory of a right, albeit the standard one in the literature, it straightforwardly follows that the doctrine of double effect is false. We have two responses. First, if it were true, then the double-effect proponents have the burden of explaining why people either do not have rights or why rights are undermined or overridden in the type of context that the doctrine of double effect is supposed to do work. Second, sometimes, straightforward arguments are new and significant. We think this is true here.<sup>31</sup>

## ENDNOTES

1. See F. Connell, "Double Effect, Principle of," *New Catholic Encyclopedia*, vol. 4 (New York: McGraw-Hill, 1967), 1020–2.
2. The idea for this formulation comes from Thomas Aquinas, *The Hackett Aquinas: Basic Works*, J. Hause, and R. Pasnau, eds. (Indianapolis: Hackett Publishing Company, 2014), J. J. Boyle, "Toward Understanding the Principle of Double Effect," *Ethics* 90 (1980): 527–538; and G. Grisez, "Toward a Consistent Natural-Law Ethics of Killing," *The American Journal of Jurisprudence* 15 (1970): 64–96.
3. The idea for this formulation comes from Warren Quinn, "Actions, Intentions, and Consequences: The Doctrine of Double Effect," *Philosophy and Public Affairs* 18.4 (1989): 334–351.
4. *Ibid.*
5. See John Searle, *Intentionality: An Essay in the Philosophy of Mind* (New York: Cambridge, 1983).
6. See Carl Ginet, *On Action* (Cambridge: Cambridge University Press, 1990).
7. See Irving Thalberg, "Do Our Intentions Cause Our Intentional Actions?" *American Philosophical Quarterly* 21 (1984): 249–60.
8. For discussion of this issue, including examples of defenders of simultaneous causation, see Neil Williams, *The Powers Metaphysic* (Oxford: Oxford University Press, 2019).
9. See Donald Davidson, *Essays on Action and Events* (Oxford: Clarendon, 1980).
10. See Gertrude Anscombe, *Intention* 2nd ed. (Oxford: Blackwell, 1963).
11. For such an account of a right, see Matthew Kramer, "Rights Without Trimmings," in M. Kramer, H. Steiner, and N. Simmonds, eds., *A Debate Over Rights* (New York: Oxford University Press, 1998), 7–111.
12. For a theory of stringent moral rights, see Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974).
13. For discussion of trolley and related cases, see Philippa Foot, "The Problem of Abortion and the Doctrine of Double Effect," *Oxford Review* 5 (1967): 5–15, Judith Jarvis Thomson, "The Trolley Problem," *The Yale Law Journal* 94 (1985): 1395–415, and Judith Jarvis Thomson, "Killing, Letting Die, and the Trolley Problem," in W. Parent, ed., *Rights, Restitution, and Risk* (Cambridge: Harvard University Press, 1986), 78–93.
14. The idea for this example comes from Rick Salomon, dir., *1 Night in Paris* (Red Light District Video, 2004).
15. The idea for this point comes from Joel Feinberg, *Harm to Others: The Moral Limits of the Criminal Law* (New York: Oxford University Press, 1984).
16. For the notion that the doctrine of double conflicts with rights, see Camillo Bica, "Another Perspective on the Doctrine of Double Effect," *Public Affairs Quarterly* 13.2 (1999): 13–139. This article goes beyond this one in showing that the norm in the doctrine of double effect is a right, the conflict characterizes the most plausible and recent versions of the doctrine, and that the right cannot incorporate the intention or vice versa.
17. There is an issue as to whether the doctrine of double effect gets the right results in the sort of cases that are supposed to support it. Specifically, the strategic and terror bombing cases, trolley cases, and redirection of resources and Guinea pig cases. For the argument that the doctrine gets the right results, see Dana Nelkin and Samuel Rickless, "Three Cheers for double effect," *Philosophy and Phenomenological Research* 89.1 (2014): 125–58. For the argument that it does not, see Uwe Steinhoff, Steinhoff, "The Secret to the

Success of the Doctrine of Double Effect (and Related Principles): Biased Framing, Inadequate Methodology, and Clever Distractions," *The Journal of Ethics* 22.3–4 (2018): 235–263.

18. The characters in this example come from M. Berk, G. Bonann, and D. Schwartz, *Baywatch* (Los Angeles, California: National Broadcasting Company, 1989–2001). For a similar case, see Foot, "The Problem of Abortion and the Doctrine of Double Effect," 5–15.

19. The idea for this example comes from Robert Nozick's discussion of innocent shields. See Nozick, *Anarchy, State, and Utopia*.

20. The idea for this example comes from an actual sexual assault described in Hunter S. Thompson, *Hell's Angels: The Strange and Terrible Saga of the Outlaw Motorcycle Gangs* (New York: Penguin Random House, 1967).

21. The idea for the notion that people cannot be basically blameworthy for negligence (blameworthy and not in virtue of being blameworthy for something else), see [ ], Gideon Rosen, "Culpability and Ignorance," *Proceedings of the Aristotelian Society* 103.1 (2003): 61–84, and Michael Zimmerman, "Negligence and Moral Responsibility," *Nous* 20.2 (1986): 199–218.

22. See Philippa Foot, "The Problem of Abortion and the Doctrine of Double Effect," *Oxford Review* 5 (1967): 5–15 and Germain Grisez and Joseph Boyle, *Life and Death with Liberty and Justice: A Contribution to the Euthanasia Debate* (Notre Dame: University of Notre Dame Press, 1979).

23. The idea for this case comes from William Styron, *Sophie's Choice* (New York: Penguin Random House, 1979), [ ] and [ ].

24. See David McCarthy, "Intending harm, foreseeing harm and failures of the will," *Nous* 36.4 (2002): 622–642 and Thomas Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (Cambridge: Belknap Press, 2010).

25. For the notion of collective intention, see Margaret Gilbert, *Sociality and Responsibility: New Essays in Plural Subject Theory* (Lanham, Maryland: Rowman, 2000). For the notion of a shared intention, see Michael Bratman, "Shared Intention." *Ethics* 104.1 (1993): 97–113

26. We owe this objection to [ ].

27. The notion of direct agency comes from Quinn, "Actions, Intentions, and Consequences: The Doctrine of Double Effect," 334–51. For a development of Quinn's notion, see Jeff McMahan, "Revisiting the doctrine of double effect." *Journal of Applied Philosophy* 11 (1994): 201–12.

For an argument that it does not solve the problem it is designed to solve, the problem of closeness, see Uwe Steinhoff, "Bennett, intention, and the DDE—The sophisticated bomber as pseudo-problem," *Analysis* 78.1 (2018): 73–80.

28. We owe this objection to [ ].

29. We owe this objection to [ ].

30. We owe the objections in this section to [ ].

31. We are grateful to Harvey Berman, Jim Delaney, Neil Feit, Jack Freer, Shane Hemmer, David Hershenov, Phil Reed, Travis Timmerman, and participants in the October 27, 2018 Romanell Conference for their incredibly helpful comments and criticisms of this article