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# Act-Evaluation, Willing, and Double Effect

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## **ACT-EVALUATION, WILLING, AND DOUBLE EFFECT**

Theorists of common morality, deontologists, virtue ethicists, and absolutists understand differences in an agent's volitional states to influence the ethical evaluation of actions.<sup>i</sup> Amongst other positions, such thinkers understand there to be an important ethical difference between acts of intentional harming and acts that cause harm as a foreseen but not intended concomitant. For example, such thinkers contrast tactical bombing that kills non-combatants as a side-effect of destroying a legitimate military target with terror bombing that kills non-combatants as a means to achieving victory. Many virtue ethicists, deontologists, and absolutists hold that, other things being equal -- for example, the magnitude and probability of the harm -- tactical bombing is more easily justified than terror bombing. This position is often articulated in terms of what is commonly referred to as the “principle,” “rule,” or “doctrine” of double effect and which I shall henceforth call “double-effect reasoning” or “DER.”

Double-effect reasoning concerns acts that both have legitimate goals and cause side-effects that ought to be avoided.<sup>ii</sup> DER presupposes that there is an ethically important difference between what one knowingly and willingly causes as a means or end and what one knowingly and willingly causes as a concomitant of what one knowingly and willingly causes as a means or end. This is often called the intended/foreseen distinction or the intention/foresight

distinction. However, it is not so much a distinction between volitional and epistemic states -- as “intended/foreseen” implies -- as it is a distinction between **different volitional dispositions** towards states of affairs that result from an agent’s action or omission. Giving this distinction moral weight in one’s evaluation of acts amounts to holding that differences in volition -- specifically the differences between willing harm as an end or means and willing harm as a concomitant of what one wills as an end or means -- ground differences in the evaluation of **acts.**<sup>iii</sup>

Some recent thinkers, however, hold that volitional states lack relevance in act-evaluation or what is often called “first-order morality,” while holding that if volitional states have relevance, it is to be found in the evaluation of agents, or “second-order morality.”<sup>iv</sup> These thinkers separate the ethical assessment of actions from the evaluation of agents as responsible for acts and as good or bad agents. Accordingly, they understand there to be a significant gap between the criteria for evaluating an action and those for evaluating an agent. One might hold, for example, that while terror bombing is, other things being equal -- e.g., the number of deaths one causes -- no worse than tactical bombing, the terror bomber might be worse than the tactical bomber. One might think that the terror bomber is worse, not because he does something worse, but because he is, at least proximately, motivated by something worse -- the deaths and terror of non-combatants -- than what motivates the tactical bomber: the destruction of a military installation.<sup>v</sup> More generally, the position comes to holding that acts are to be judged good or bad without reference to the agent’s epistemic and volitional states while agents are to be judged responsible and good or bad partially in terms of their epistemic and volitional states. Those who think that DER mistakenly contrasts acts such as terror and tactical bombing often hold that it

conflates act-evaluation with agent-assessment, or the first and second orders of morality. Thus, the position that the first-order second-order distinction marks a gap between act-evaluations which do not refer to agent's mental states and agent-evaluations which do, is of interest insofar as it bears on the debate concerning the ethical relevance of belief and volition in act-evaluation and the tenability of DER.

In what follows, I have two goals: first, the destructive goal of articulating and criticizing the first-order second-order distinction understood dichotomously. Second, the constructive goal of arguing that differences in volitional states are relevant to act-assessment insofar as volitional states partially constitute an action and themselves admit of important differences. If successful, I will have shown the tenability of DER insofar as it presupposes that there is an ethically significant difference between, for example, the different volitional states that constitute terror and tactical bombing. First, I present a brief account of what constitutes a human action.

### **THE HUMAN ACTION**

Amongst other matters, ethics concerns the goodness and badness of both what humans believably and willingly cause -- actions -- and what humans believably and willingly do not cause -- omissions. In short, ethics concentrates on the voluntary. By "believing willing" causing I mean a human being causing something voluntarily, which would exclude what is not up to him to cause and what he causes either in inculpable ignorance or by force. An agent is culpably ignorant if he does not know what he can know but knowingly and willingly chooses not to know. For example, if Joe finds a wallet full of money and chooses not to investigate whose wallet he has found, he is voluntarily and thereby culpably ignorant of whose money he takes. Moreover, an agent is culpable for her ignorance if she does not know something she can know

and has the responsibility to know. For example, if Mary is a physician, she has the responsibility to know if her patient is allergic to penicillin before she administers it. The obligation to know is voluntary insofar as it attends her voluntarily being a doctor.

Ethics is bounded by the voluntary, what humans believingly and willingly cause and what they believingly and willingly do not cause. This is morality's breadth, extension, or territory. In order for something to be considered within ethics, it must fall within the boundaries constituted by belief and volition. In the final section of this paper, I will argue that morality also has a depth which volition establishes and demarcates. It is in terms of this depth that different acts which bring about the same consequences can be contrasted with one another as better and worse, more and less easily justified. Before doing this I will present and articulate what has come to be called the "first-order second-order distinction" as some understand it to mark a gap between act- evaluation and agent-evaluation.

## **DONAGAN**

Alan Donagan proposes what he himself calls "first-order moral questions" which concern actions as "permissible or impermissible" and "second-order moral questions" which concern "questions about the culpability or inculpability of agents".<sup>vi</sup> He describes this distinction, saying:

The distinction between first-order and second-order moral questions is related to a distinction ... between actions considered materially and actions considered formally. Considered materially, an action is a deed, and no reference is made to the doer's state of mind in doing it. Thus, an action is material stealing, or materially considered is stealing, if it is the

forcible or surreptitious taking of what belongs to somebody else.

Considered formally, an action is what its doer wills to do in doing it.

Hence an action which materially is stealing may not be so formally,

because the stealer may honestly believe that what he is taking is his own

property.<sup>vii</sup>

According to Donagan, first-order morality considers effects attributable to an agent without reference to the agent's epistemic and volitional states. Second-order morality considers the agent's mental states regarding actions evaluated in first-order morality. He understands first-order morality to concern actions insofar as they are the effects of human beings as causes, not insofar as they are agent or believing willing causes.

Donagan holds that an action considered materially has no reference to the agent's beliefs or wants. Yet, to consider an action materially is to consider **an action**. When one considers an action, one -- at least implicitly -- considers a **believing willing** causing. Of course, one can ask whether what an agent does is permissible or impermissible without asking, for example, why he does it. Nonetheless, to ask whether what an agent does is permissible or impermissible requires a reference to his epistemic and volitional states which states either establish his responsibility for a specific act or indicate that no **action** occurred.

If one can evaluate an action without reference to an agent's mental states, there would seem to be a substantial gap between the criteria in terms of which one evaluates an action and the conditions establishing an agent's responsibility. In fact, this is Donagan's position, as he states:

Our analysis has shown that a prescription that somebody not do an action

of a certain kind does not entail a prescription that he be blamed if he does it. A deed may be impermissible, and yet its doer be inculpable; and a doer may be culpable even though his deed is permissible.<sup>viii</sup>

Donagan presents two kinds of cases: first, an agent inculpably doing an impermissible deed; second, an agent culpably doing a permissible deed.

Concerning the first case, one can cause something bad that would be impermissible to cause **if** one were to cause it voluntarily. For example, if in inculpable ignorance I ruin your freshly-poured concrete driveway, you can say "if he had ruined the driveway voluntarily, it would have been wrong." However, to say "if one were voluntarily to  $\phi$ , **it** would be wrong" is not to speak about  $\phi$ ing without reference to an agent's epistemic and volitional states, for 'it' refers to  $\phi$ ing voluntarily or believingly willingly  $\phi$ ing. One could say the same thing more exactly by saying:  $\phi$ ing voluntarily -- which is the **only** way one can  $\phi$  -- is wrong.

As Anscombe says:

A rule as you consider it in deciding to obey or disobey it does not run: do not **voluntarily** do such-and-such, for you cannot consider whether to do such-and-such voluntarily or not. ... Voluntariness is presupposed in [the person's] **considering whether** to do [such-and-such]. Thus it does not come into his considerations of what to do.<sup>ix</sup>

Morality's threshold is the voluntary; thus, once inside morality, we attend, implicitly or explicitly, to the voluntary. My inculpably ruining your driveway is like a tree's doing so: it is not voluntary. My doing so, however, is more easily conflated with my voluntarily and wrongly doing so because while both a tree and I can ruin your driveway, only I can **voluntarily** ruin it.

The second case Donagan mentions concerns an agent being culpable although his deed is permissible. For example, giving food to a hungry person is permissible. Yet, I am blamed if the reason I did it was to get the hungry man to commit a crime. I am not blamed for the permissible act, however. For, conceptually, if one performs a permissible deed one cannot be to blame for it insofar as it is permissible. Thus, in the two types of acts that Donagan describes, it is conceptually the case that one cannot blame an agent for an act that is permissible nor can one hold that an agent's act was impermissible while asserting that he was not to blame. In short, the criteria of act-evaluation cannot be entirely divorced from the criteria in terms of which agents are responsible for acts.

Once one acknowledges that an act, because it is a believing willing causing, cannot be evaluated without reference to an agent's epistemic and volitional states and that these states establish an agent's responsibility for the act, then the putative gap between act and agent-evaluation closes, at least with respect to the evaluation of an agent as responsible for an act. When understood as marking a dichotomy, the first-order second-order distinction faces a conceptually insuperable difficulty: speaking of an action without reference to an agent's epistemic and volitional states.

## **BENNETT**

Donagan is not alone in understanding the first-order second-order distinction as marking a dichotomy. Jonathan Bennett explicitly follows Donagan's account of this distinction. According to Bennett, first-order morality is **entirely** divorced from a consideration of the mental states of agents. He says:

The meanings of the transitive verbs in our standard repertoire [of



first-order morality] are silent about what agent knew or wanted, and therefore about what he intended; so the source of an emphasis on intention must be sought elsewhere.<sup>x</sup>

According to Bennett, since first-order morality makes no reference to an agent's mental states, intention cannot bear on act-evaluation. He holds that if intention has significance it would be in agent-assessment.<sup>xi</sup>

What are the transitive verbs of which Bennett speaks? He gives as examples “‘hurt’, ‘help’, ‘betray’, ‘reward’, and ‘harm’.”<sup>xii</sup> Thus, according to Bennett, to say "I hurt him" is to remain silent about what I knew or wanted. Following Austin, a plea for excuses is in order. Bennett's position seems to be that the only excuse to the accusation of hurting, for example, would be to say "it did not really hurt" -- which will probably add insult to injury. That is, the only excuse would be to comment on resulting states of affairs, never to refer to mental states. Yet, to an accusation of hurting the accused might respond: "I did not **know** that it hurt" or "I knew, but I did not **want** to hurt you." The accuser implies that the transitive verb applies. The excuser can assert that it does not apply because he did not know, and, therefore, as described, **that action** did not occur. Or, he can assert that he knew but did not want to hurt, and, therefore, ‘hurting’ is not an entirely appropriate description insofar as it implies that he sought to cause the harm.

The accused is not mistaken to focus on his epistemic and volitional states in responding to the accusations. For the transitive verbs of common morality are **not** silent about agent's epistemic and volitional states. They are, however, at times vague and ambiguous insofar as I can cause you harm without believing or wanting. Yet, to cause you harm without believing that

what I cause is harmful is not an **act** of hurting. In fact, to cause some upshot without thinking will at times not be to act at all, for example, if while asleep I roll over and hurt you. Moreover, to cause you pain, for example, without willing to is not to hurt you, at least in one sense of 'hurting'. For example, if I am a physician and the shot I give you hurts, I may note that although I knew that it would hurt, that was not my goal. I concede that I caused you pain and to that extent 'hurt' you, but I deny that I 'hurt' you insofar as 'hurting' implies **wanting to hurt**.

If you accept excuses that refer to my beliefs and desires then you understand the transitive verb to refer to my epistemic and volitional states -- amongst other things. Since ordinary users of ordinary language do accept such excuses we have reason to hold that the transitive verbs of morality are **not silent** about what agent knew or wanted, and, therefore, are not silent about what he intended. Attention to belief and desire -- and, thereby, to intention -- appears appropriate in act-evaluation.

## **THE ERROR**

Why think that one could evaluate an action without referring to the agent's epistemic and volitional states? There is one very good reason -- the "ontological reason." States of affairs are objectively good or bad. For example, a hungry person's having food is good. Of course, to hold this we need not refer to any **agent's** beliefs or desires about the hungry having food. Indeed, the goodness of states of affairs such as the goodness of the hungry having food causes us to have beliefs and desires about the goodness and desirability of the hungry having food. If I walk down the street with a bag full of bagels and, without my knowing or willing it, one falls out and rolls down the sidewalk to a homeless hungry man, this is good. I, however, am not involved **as an agent**. The bagel's rolling down the sidewalk is not an act of mine, for it is not an **act**.

Nonetheless, it might be good insofar as it brings about the hungry man's being fed. To say that it is good, regardless of my beliefs and desires, that the bagel rolls down the sidewalk to the hungry man, is not to say that there is **some action** which can be evaluated as good without reference to my beliefs and desires. The error -- the "ontological fallacy" -- occurs in thinking that one can speak of actions as being ethically good or bad without reference to an agent's beliefs and desires. One might -- mistakenly -- think this insofar as without reference to an agent's beliefs and desires one can speak of good and bad states of affairs that **if** caused believably and willingly would partially constitute actions as ethically good or bad. However, if the condition of being caused voluntarily is not fulfilled, one **cannot** speak of these good and bad states of affairs as being ethically good or bad, permissible or impermissible **acts**.

### **THE ETHICAL RELEVANCE OF VOLITIONAL STATES**

I have argued that insofar as an action is a believing willing causing, when one speaks of an action one must refer to an agent's beliefs and volitions, if only implicitly. Moreover, I have argued that insofar as one must refer to an agent's mental states in act-evaluation and these states establish an agent's responsibility, act-evaluation cannot be divorced from a corresponding assessment of an agent as responsible. I now want to argue that since an action is a believing willing causing, insofar as willing admits of important differences, act-evaluations should take into account these differences. I will focus on three distinct volitional states: willing something as an end, for its own sake; willing something as a means, as ordered to the realization of one's end; and willing something as a concomitant either of one's end or of one's means. That is, to will something as a concomitant or side-effect is to will it neither as one's end nor as ordered to the realization of one's end, but to will it solely as an associate of one's end or means. These

three states relate to one another causally.

What one wills as an end determines what one wills as a means. For example, if I want to catch fish, I must employ some means of doing so: a net; a rod, reel and lure; or a grenade. It is my wanting to catch fish that leads me to want to use this lure and this pole. What one wills as an end may also cause one to will something else as a concomitant. For example, my wanting to catch fish may also cause me to bring a good fishing spot to the notice of other fishermen. Thus, my end determines what I will as a means and sometimes it directly determines what I will as a concomitant. Similarly, what one wills as a means sometimes itself directly determines what one wills as a concomitant. For example, in using a lure, I may snag the bottom or some seaweed, whereas if I used a net or a grenade, I would not. Of course, using such means to catch fish involves other concomitants. Thus, both what one wills as a means and what one wills as an end at times determine what one wills as a concomitant. What one wills as a concomitant, however, does not determine what one wills as an end or as a means. To speak in terms of depth or intensity, to will something as an end is to will it most deeply or most intensely; to will something as a means is to will it with less depth or intensity than what causes one to will it as a means; and, to will something as a concomitant is to will it with the least depth or intensity, or to will it most superficially.

Insofar as an action is constituted by what an agent believingly and willingly causes, and insofar as willing admits of these three distinct depths or intensities, the goodness and badness of actions that cause consequentially similar states of affairs to obtain will vary partly in accordance with the different volitional states that constitute the different actions. That is, other things being equal, an action that brings about a bad state of affairs as an end is worse than one that brings

that bad state of affairs about as a means. An action that brings that bad state of affairs about as a concomitant is not as bad as the actions that bring it about as an end or as a means. In short, goodness and badness of acts vary in part with the depth or intensity with which good and bad states of affairs are willed such that the **more deeply** or **more intensely** some good or bad state of affairs is willed, **the better** or **the worse** the action. For the action is in part that depth or intensity of willing that good or bad state of affairs.

For example, the tactical bomber would rather cause the deaths of the non-combatants than forgo destroying the military installation. He wants their deaths as a concomitant. This wanting of their deaths derives entirely from his wanting to destroy the military installation as an end and nothing derives from his wanting their deaths. For example, he does not choose some type of bomb in order to kill the non-combatants. The willing of non-combatant deaths partially constituting tactical bombing is not as deep as the willing of non-combatant deaths that constitutes terror bombing. Willing terror and non-combatant deaths as means to the end of victory constitute terror bombing. The prospect of non-combatant deaths and terror **causes and defines** terror bombing. Of course, the goals of terror and non-combatant deaths do not ultimately or solely cause terror bombing. Ultimately, like tactical bombing, terror bombing occurs for the sake of winning the war. Nonetheless, proximately, terror bombing instantiates a more intense wanting of terror and non-combatant deaths than does tactical bombing. Accordingly, other things being equal, terror bombing is worse than tactical bombing.

If there were some third type of bombing the goal of which were solely to kill and terrorize non-combatants -- call it "punitive bombing" -- this would surely be worse than both terror and tactical bombing.<sup>xiii</sup> But why? Other things being equal, it cannot be worse in terms of

its consequences. It is worse -- and, the worst kind of bombing -- because it instantiates the **deepest** level of volitional commitment to something bad. For in punitive bombing the terror and deaths of the non-combatants are ends in themselves, sought for their own sake. Other things being equal, punitive bombing is worse than terror bombing and terror bombing is worse than tactical bombing. These comparative relationships hold insofar as these acts instantiate willings that vary in depth or intensity. In short, different volitional attitudes towards consequentially similar resulting states of affairs make for differences in act-evaluation or in first-order morality.

As we have seen, however, this position is controverted. For example, Jonathan Bennett says:

[I]f a first-order morality's basic concern is to oppose behaviour that has relational property RP, that does not give it a derivative concern with beliefs about or attitudes towards RP. For example, a morality's having a basic concern with the causing of pain does not give it a derivative concern with beliefs about the causing of pain. Such beliefs are relevant to judgements in the associated second-order morality, but not to first-order judgements of wrongness.<sup>xiv</sup>

According to Bennett, if some ethic were to oppose the causing of pain, it should not have any concern about an agent's volitional states concerning the causing of pain in the assessment of an action because volitional states are not relevant in act-evaluation. Thus, differences in volitional states would not be relevant in the evaluation of acts, although they might be relevant in the evaluation of agents, according to Bennett. Yet, in an ethic fundamentally opposed to causing pain, causing pain just for the sake of causing pain would be

the **worst** act because to want something for its own sake is to want it most completely and deeply. Therefore, an act instantiating the willing as an end of what ought to be avoided is **most deeply wrong**. This truth cannot be captured, however, if first-order morality consists only of what an agent believably and willingly brings about without reference to distinct volitional states. For to bring something about as an end, or as a means, or as a side-effect is to bring it about voluntarily or believably and willingly. If one does not contrast these distinct volitional states that partially constitute actions, then one's act-evaluations remain superficial insofar as they cannot attend to the depth or intensity of which volition admits.

One who holds that differences in willing do not make for differences in act-assessments must explain why ethics is demarcated in terms of believing and willing and yet the variations of which willing admits make no difference in act-assessment. For example, ethics has little to say if I harm or help you in inculpable ignorance or by force and without willing to (say someone pushes me into you). Yet, ethics has much to say if I believably and willingly harm or help you. It is puzzling to hold that harm or benefit coming about in accordance with belief and volition has fundamental importance in ethics -- by establishing that an action occurred -- while holding that further differences of which willing admits make **no difference at all** in act-evaluation. Such a position is out of step with ethic's central concern with what humans believably and willingly cause and with what humans believably and willingly do not cause. Just as the goodness and badness of resulting states of affairs partially constitute moral goodness and badness insofar as agents believably and willingly cause those states of affairs, so also the intensities or depths of which willing admits (as an end, as a means, or as a concomitant) establish differences in act-evaluation. Thus, actions are better or worse, permissible or

impermissible partially in terms of these different volitional states.

I have argued a number of points. First, insofar as epistemic and volitional states constitute actions and establish an agent's responsibility for actions so constituted, act-evaluation and the evaluation of an agent as responsible cannot come apart. Second, insofar as willing partially constitutes an action, and itself admits of three distinct intensities or depths, act-evaluations must take into account these different depths instantiated in consequentially similar acts. If the above arguments stand, act-evaluations and assessments of agents as responsible ought to be understood as integrated with one another, not as dichotomous. Moreover, act assessments ought to reflect the various depths of which volition admits, as, for example, double effect reasoning does.

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#### NOTES

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<sup>i</sup>See, for example, Shelly Kagan's portrayal of common morality in *The Limits of Morality* (Oxford:Clarendon Press, 1989), 128-182; Thomas Nagel, "The Limits of Objectivity," in Sterling McMurrin, ed., *The Tanner Lectures on Human Values* i (Salt Lake City:University of Utah Press, 1980), 132; Jorge Garcia, "The New Critique of Anti-Consequentialist Moral Theory," *Philosophical Studies* 71 (1993):1-32; and Elizabeth Anscombe, "War and Murder," in *Ethics, Religion and Politics; The Collected Philosophical Papers of G.E.M. Anscombe* iii (Minneapolis: University of Minnesota Press, 1981), 51-61.

<sup>ii</sup>Although it has not been explicitly employed to analyze such acts, DER applies to acts that have good foreseen side-effects that the agent does not intend. For example, if I realize that by paying an employee a certain wage I will assist him in raising his family, but I am entirely indifferent to so assisting him.

<sup>iii</sup>The controversy concerning the ethical relevance of the intended/foreseen distinction focuses on the contrast between what one wills as a means and what one wills as a concomitant



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(foresees), leaving out as non-controversial the contrast between what one wills as an end and what one wills as a concomitant. In the last section of this paper, I argue that one best understands willing as an end, willing as a means, and willing as a concomitant as distinct states on a continuum of volitional intensity or depth. Thus, willing as an end ought **not** to be left out of a consideration of the ethical relevance of the intended/foreseen distinction.

<sup>iv</sup>See, e.g., Alan Donagan, *The Theory of Morality* (Chicago:Chicago University Press, 1977), 52-74 and 112-131; Jonathan Bennett, *The Act Itself* (Oxford:Clarendon Press, 1995), 46-61 and 194-196; Claire Finkelstein, "The Irrelevance of the Intended to **Prima Facie** Culpability: Comment on Moore," *Boston University Law Review* 76 (1996):335-346; William Frankena, *Thinking About Morality* (Ann Arbor: The University of Michigan Press, 1980), 48-54; and Helga Kuhse, *The Sanctity-of-Life Doctrine in Medicine: A Critique* (Oxford:Clarendon Press, 1987), 158-165.

<sup>v</sup>See, for example, Finkelstein, 344.

<sup>vi</sup>Donagan, 55.

<sup>vii</sup>Donagan, 55, emphasis added.

<sup>viii</sup>Donagan, 112.

<sup>ix</sup>G.E.M. Anscombe, "Two Kinds of Error in Action," in *Ethics, Religion and Politics; Collected Philosophical Papers*, iii (Minneapolis: University of Minnesota Press, 1981), 8.

<sup>x</sup>Bennett, 45.

<sup>xi</sup>Ultimately, Bennett does not think that the intended/foreseen distinction relied on in DER has ethical relevance even in agent-assessment. Bennett, 221-224.

<sup>xii</sup>Bennett, 45.

<sup>xiii</sup>In calling this "punitive bombing" I follow Bennett, 215.

<sup>xiv</sup>Bennett, 49.