

Termination of Pregnancy, Article 40.3.3°, and the Law of Intended Consequences

Shane N. Glackin* & Simon Mills**

Much of the public debate concerning the *Protection of Life During Pregnancy Bill 2013 (2013 Bill)* has either presumed or explicitly claimed that “abortion” is never necessary to save the life of the mother, since procedures intended to save the life of the mother are not “direct” or “intentional” terminations and therefore, by definition, not abortions. The *2013 Bill* itself seems to imply sympathy with this view; others have claimed that it renders the *2013 Bill* unnecessary. We trace this claim to the Thomist “Doctrine of Double Effect”, which is a mainstay of Catholic moral theology, and examine its plausibility in real-life medical cases. We focus in particular on the example of ectopic pregnancy. It is implausible, we argue, that the distinction typically drawn by Catholic theologians between the various procedures available for treating such unviable and life-threatening pregnancies can be explained by either directness or intention. Indeed, no single principle seems capable of distinguishing such cases in a medically or morally significant manner. “Abortion”, then, even narrowly defined as the “direct” and “intentional” termination of a pregnancy, is sometimes necessary and appropriate to save the life of the mother; and “abortion” in this sense is accordingly permitted under the terms of the *2013 Bill*.

I - Introduction

Responding, in December 2012, to the Government’s decision to legislate for *A.G. v. X.*,¹ the four Irish Catholic Archbishops stated:

[i]f what is being proposed were to become law, the careful balance between the equal right to life of a mother and her unborn child in current law and medical practice in Ireland would be fundamentally changed. It would pave the way for the *direct and intentional* killing of unborn children. This can never be morally justified in any circumstances.²

In the same document, under the heading “Notes for Editors”, the author clarified that, for the purposes of the Archbishops’ statement: “[a]bortion, understood as the *direct and intentional* destruction of an unborn baby, is gravely immoral in all circumstances. This

* Lecturer in the Department of Sociology, Philosophy, and Anthropology at the University of Exeter, U.K.

** Barrister-at-Law, Lecturer and External Examiner in Medical Law, Law Society of Ireland.

¹ [1992] 1 I.R. 1 [hereinafter *X.*].

² “Statement by the Four Archbishops of Ireland in Response to the Decision Today by the Government to Legislate for Abortion” <<http://www.catholicbishops.ie/2012/12/18/statement-archbishops-ireland-response-decision-today-government-legislate-abortion>> (date released: 18 December 2012) [emphasis added].

is different from medical treatments which do not directly and intentionally seek to end the life of the unborn baby.”³ But how plausible is it to claim that there are circumstances where the conscious destruction of a foetus or embryo is *not* “direct and intentional” and therefore (according to Catholic teaching) not abortion?⁴

The same position as the Archbishops advanced in their December 2012 statement has been widely propounded by those opposed to the introduction of legislation giving effect to the Constitutional right to have a pregnancy legally terminated when it endangers the life of the mother.⁵ We focus in this paper on the position’s underlying philosophical conceit, known as the “Doctrine of Double Effect” (D.D.E.), and widely discussed by philosophers, theologians, and jurists alike.⁶ We begin by summarising the doctrine in its standard formulations. We then use the specific example of ectopic pregnancy to illustrate its practical application, and show that – on any viable construal – the doctrine fails to distinguish between intentional and unintentional, or direct and indirect, procedures in a way that supports the Archbishops’ claims.

II – What is “Double Effect”?

The D.D.E. may be (briefly but not inaccurately) summarised as follows: an action involving foreseen harmful effects which cannot be avoided if the desired good effect is to be achieved may be justified as long as the following criteria are satisfied:

- (1) The basic act is, when considered independently of its bad effect, not wrong or at least morally neutral.
- (2) The agent intends the good effect, and does not intend the bad effect either as an end in itself or as a means to the good.

³ *Ibid.* [emphasis added].

⁴ The same claim is implicit in the recently-passed legislation, the *Protection of Life During Pregnancy Act 2013*, which makes it “an offence to intentionally destroy unborn human life” (s.22.1), notwithstanding the subsequent stipulation (s.22.4) that various life-saving procedures involving the destruction of such life do not fall under the offence’s rubric.

⁵ Article 40.3.3°, *Bunreacht na hÉireann*, as interpreted in *X*, *supra* note 1; see also *A., B. & C. v. Ireland*, no. 25579/05 [2010] E.C.H.R. 2032 (16 December 2010).

⁶ A. McIntyre, “Doctrine of Double Effect” in E.N. Zalta, ed., *The Stanford Encyclopedia of Philosophy* (2011) <<http://plato.stanford.edu/archives/fall2011/entries/double-effect/>> (date accessed: 24 June 2013) [hereinafter McIntyre (2011)].

(3) The circumstances in which the agent must act are sufficiently grave as to justify causing the bad effect, and the agent exercises due diligence to minimize the harm.⁷

This simplifies, but does not substantively alter the content of, the more detailed and – for Catholics – theologically authoritative definition supplied by the *New Catholic Encyclopedia*:

- (1) The act itself must be morally good or at least indifferent.
- (2) The agent may not positively will the bad effect but may permit it. If he could attain the good effect without the bad effect he should do so. The bad effect is sometimes said to be indirectly voluntary.
- (3) The good effect must flow from the action at least as immediately (in the order of causality, though not necessarily in the order of time) as the bad effect. In other words the good effect must be produced directly by the action, not by the bad effect. Otherwise the agent would be using a bad means to a good end, which is never allowed.
- (4) The good effect must be sufficiently desirable to compensate for the allowing of the bad effect.⁸

For purposes of simplicity and brevity, we will focus primarily on the first formulation: nevertheless, our arguments in this paper will be equally applicable to the second, to which we will refer from time to time. Nothing in our argument is dependent for its force on any differences that might exist between the two and we do not further consider any such differences for the purposes of the present discussion.

The doctrine does appear to describe an intuitive distinction: thus, for example, most people will agree that bombing an enemy munitions factory to bring a war to a speedy close may be justified, even if we know that doing so is likely to kill all the occupants of an adjacent school; but bombing the school directly with the intention of ending the war by demoralising the enemy can never be permissible. St. Thomas Aquinas first developed it to explain a similarly intuitive belief, that killing an assailant is permissible as long as one does not *intend* to do so, but only to defend oneself.⁹ The

⁷ This follows the definition given in T.A. Cavanaugh, *Double Effect Reasoning: Doing Good and Avoiding Evil* (Oxford: Oxford U.P., 2006) at 36 [hereinafter Cavanaugh].

⁸ F.J. Connell, “Double Effect, Principle of,” *New Catholic Encyclopedia Vol. 4* (New York: McGraw-Hill, 1967) 1020 at 1021 [hereinafter Connell].

⁹ T. Aquinas, (13th c). *Summa Theologica II, ii*, q. 64, art. 7, “Of Killing,” in W.P. Baumgarth and R.J. Regan, S.J. eds., *Saint Thomas Aquinas on Law, Morality, and Politics* (Indianapolis/Cambridge: Hackett Publishing Co., 1988) at 226–7 [hereinafter Aquinas]. Notwithstanding its 13th-century origins, the

D.D.E. has also formed an explicit part of judicial reasoning in several common-law jurisdictions.¹⁰ More generally, philosophical discussions of intention and action theory are to be found in the criminal law doctrine of *mens rea* and statutory and common law accounts of different mental states, such as purpose, foresight, knowledge, recklessness, and negligence.¹¹

However, the fact that the doctrine accords with unexamined intuition is not enough to justify basing law (or the absence of law) upon it. Before this principle of Catholic moral theology can be incorporated into the law of a pluralist state, we must satisfy ourselves both that it is conceptually well-formed, and that it draws some morally significant line in the place where those who oppose the legislation in question claim. That is, proponents of the D.D.E. must show both that the distinction drawn by the principle is a morally important one and that the various possible cases fall on the correct sides of it. As we shall argue, it is far from clear that there is a single principle at work in all the intuitive cases to which the D.D.E. appeals, or that *any* such principle can satisfactorily divide medical procedures into the morally permissible and impermissible.

We begin with a terminological observation. Medical treatment falling under the D.D.E., according to the view outlined by the Archbishops, does not count as “abortion”. Thus, abortion is *by definition* never necessary to save the life of the mother, and there is consequently no need to legislate for it in those circumstances. This seems decidedly at odds with common usage, and an implausible gerrymandering of linguistic boundaries. One of the D.D.E.’s most influential defenders, and the leading Catholic moral philosopher of the last century, Elizabeth Anscombe, was critical of what she saw as a deep conceptual confusion about the principle: what it tells us, she wrote, is that “the prohibition on murder does not cover *all* bringing about of deaths which are not

D.D.E. did not attain widespread use in moral theology until approximately 1630 under the Portuguese Thomist, John of St. Thomas. See J.T. Mangan, “An Historical Analysis of the Principle of Double Effect” (1949) 10 *Theological Studies* 40 at 41.

¹⁰ For example England (*R. v. Desmond, Barrett and Others*, *The Times* (28 April 1868); *R. v. Steane* (1947) K.B. 997) and the U.S. (*Vacco v. Quill*, 521 U.S. 793 (1997); *Washington v. Glucksberg*, 521 U.S. 702 (1997)).

¹¹ See, generally, D.J. Baker, *Glanville Williams Textbook of Criminal Law*, 3rd ed. (London: Sweet and Maxwell, 2012) at chs. 4–6 [hereinafter Baker]; D. Ormerod, *Smith and Hogan’s Criminal Law*, 13th ed. (Oxford: O.U.P., 2011) at ch. 5.

intended. Not that such deaths are not often murder.”¹² In other words, Anscombe argues, the doctrine under certain circumstances *permits* instances of an otherwise morally impermissible action; what it does *not* do is to change the nature of those actions. Murders in self-defence are on this view nevertheless murders, and “therapeutic” abortions nevertheless abortions.

It is already dubious, then, that a correct understanding of the D.D.E. supports the position of its proponents regarding the need for legislation. But having noted this, we shall grant the point; in what follows we speak, *arguendo* and against inclination, of morally permissible medical procedures as indirect or unintentional “terminations”, and reserve “abortion” for those procedures which are both direct and intentional.

We will focus in this article on the particular example of ectopic pregnancy, and the range of medical interventions appropriate to its treatment. This provides a useful preliminary basis on which to assess the plausibility of the Church’s account of “direct and intentional”, without invoking the more complex clinical scenarios which a fuller discussion of necessary termination would have to consider. It also displays a rather finer level of shading and nuance than the somewhat simplistic “craniotomy versus hysterectomy” dilemmas which have dominated the literature on abortion and D.D.E. at least since 1967.¹³

III –Directness and Intention in the treatment of Ectopic Pregnancy

An ectopic pregnancy arises when a fertilised embryo implants somewhere other than the uterus, typically (but not always) in the fallopian tube. There is no possibility of the embryo’s survival in such a scenario; but if the pregnancy is allowed to continue it

¹² G.E.M. Anscombe, “Medallist’s Address: Action, Intention and ‘Double Effect’” 56 Proceedings of the American Catholic Philosophical Association (1982) 12 at 21. Cf. the two, characteristically cutting, sentences that make up G.E.M. Anscombe, “A Comment on Coughlan’s ‘Using People’” (1990) 4 Bioethics 62. See also the discussion in A. McIntyre, “Doing Away with Double Effect” (2001) 111 Ethics 219 at 222 [hereinafter McIntyre (2001)].

¹³ In that year, such cases are discussed both in H. L. A. Hart, “Intention and Punishment” (1967) Oxford Review 4, repr. in H.L.A. Hart, *Punishment and Responsibility* (Oxford: Oxford U.P., 1968) 113 [hereinafter Hart, *Punishment and Responsibility*] and P. Foot, “The Problem of Abortion and the Doctrine of Double Effect,” (1967) 5 Oxford Review 5, repr. in B. Steinbock & A. Norcross, eds., *Killing and Letting Die*, 2nd ed. (New York: Fordham U.P., 1994) 266.

presents a severe risk to the mother's life via the likely rupture of the fallopian tube and consequent internal bleeding. The treatment of ectopic pregnancy is permitted in principle under Catholic theology, because it can – depending on the method used – be regarded as an *indirect* termination. However, not all of the available methods are permissible; and thus examination of each of the available methods (together with the reasons for their permissibility or otherwise) proves instructive in testing the cogency of double effect in the setting of the destruction of “unborn human life”.

Three approaches are typically open to the clinician seeking to treat an ectopic pregnancy: doctors may remove the fallopian tube, and with it the embryo (salpingectomy); they may surgically open the tube to remove the embryo, leaving the tube intact; or they may halt the continued growth of the embryonic cells chemically, by administration of the drug methotrexate.

However, it is exactly the choice between these possible methods which is purportedly limited by, and raises difficulties with, the issues of directness and intention. It is only moral, by the lights of the Catholic Church,¹⁴ to use the first of these procedures to treat an ectopic pregnancy: removing the pregnancy in the course of removing the fallopian tube. When the method used is either methotrexate or the surgical opening of the tube – both of which destroy the ectopic pregnancy but leave the woman's fallopian tube intact, maximising the possibility of becoming pregnant again in the future¹⁵ – the embryo's destruction is not only direct, but intentional in the relevant sense. That is to say, in the terms of the *New Catholic Encyclopedia*, the “good effect” intended by the medical team – the destruction of the embryo – is *identical* with the “bad effect” of the treatment; it cannot then be the case that one is intended and the other not.

¹⁴ A contrary view is occasionally articulated within Catholic bioethics, but C. Kaczor and J.E. Smith note that only a “minority of faithful theologians argue that salpingostomy, the procedure that removes the embryo but keeps the tube intact, does not involve a direct attack on the embryonic human being”: J.E. Smith and C. Kaczor, *Life Issues, Medical Choices: Questions and Answers for Catholics* (Cincinnati, OH: Servant Books, 2007) at 55. This minority account remains contrary to church teaching: M.A. Anderson *et al*, “Ectopic Pregnancy and Catholic Morality - A Response to Recent Arguments in Favor of Salpingostomy and Methotrexate” 2011 (11.1) *National Catholic Bioethics Quarterly* 667.

¹⁵ Obviously, if a woman has only one tube intact – perhaps because of a previous D.D.E.-compliant salpingectomy on the other side – incision and methotrexate are the *only* methods of treatment which leave open the possibility of future pregnancy.

Nor, in Cavanaugh's formulation, can any sense be attached to "minimizing the harm" of the bad effect.¹⁶

Terminations by these latter methods are therefore impermissible under Catholic moral teaching. Yet since all three procedures fundamentally aim to safeguard the life of the mother by removing the threat of a ruptured fallopian tube as a consequence of the ectopic pregnancy, the distinction drawn by the D.D.E. appears arbitrary at best. It also looks implausible as a guide to the relative *moral* status of the procedures. Where they are indicated as appropriate, the forbidden procedures are, all things being equal, *less harmful* than salpingectomy, since they are both less invasive procedures,¹⁷ and maximise the possibility of future pregnancy.

A. Directness

Let us examine the procedures in terms of the criterion of directness first. Moral philosophers have often distinguished between directly *doing* harm and merely *allowing* it to happen.¹⁸ Both are morally problematic, it is held, but the former is more serious; while the evil of knowingly allowing harm to happen may occasionally – as in the D.D.E. – be outweighed by the pursuit of a significantly greater good, the active doing of harm can never be permissible. Thus a surgeon performing an "abortion" is held to *directly* destroy the foetus, while his counterpart who permissibly terminates the foetus merely *allows* it to be destroyed in the course of saving the mother's life.

Much like the D.D.E., however, the intuitive force of this distinction has been severely undermined by ethicists in recent decades. In James Rachels's famous thought-

¹⁶ To repeat, lest there be confusion; we do not believe that any substantive differences exist between the two formulations, and no such differences are material to the point being made here.

¹⁷ Recall that the salpingostomy involves opening – but not removing – the tube, allowing removal of the ectopic embryo with preservation of the tube, while methotrexate does not interfere with the integrity of the fallopian tube at all. Conversely salpingectomy involves, by definition, the removal of some or all of the fallopian tube, with obvious – again, by definition – consequences for the functioning of that tube.

¹⁸ For a comprehensive overview, see F. Howard-Snyder, "Doing vs. Allowing Harm" in E.N. Zalta, ed., *The Stanford Encyclopedia of Philosophy* (2011) <<http://plato.stanford.edu/archives/win2011/entries/doing-allowing/>> (date accessed: 24 June 2013) [hereinafter Howard-Snyder].

experiment,¹⁹ for instance, both Smith and Jones plot to drown their respective young cousins in the bathtub, in order to become sole heir to their families' wealth. Smith drowns his cousin as planned; Jones, who arrives to find his cousin already unconscious beneath the water, having slipped and fallen, simply refuses to save him, and stands *ready* to drown him should he revive. It is implausible that Jones's actions are less morally reprehensible than Smith's, argues Rachels, so whatever distinction exists between direct and indirect harm cannot be a moral one. Numerous attempts have been made, with varying degrees of success, to reformulate the distinction and so to provide a basis for its intuitive force;²⁰ but we doubt that any useful restatement will distinguish morally between the three possible treatments for an ectopic pregnancy.

B. Intention

Suppose, however, that it *is* possible to coherently distinguish the removal of the tube containing the ectopic pregnancy from either the administration of methotrexate or the removal of the ectopic pregnancy alone (leaving the tube intact) on the basis that the first instance is "indirect", while the latter two are "direct". Could the same be said with any plausibility about intention, the second criterion in the Archbishops' statement? Each procedure is performed with the same absolute and necessary intention of destroying the ectopic pregnancy; if the ectopic pregnancy is not destroyed, then the intended treatment has failed.²¹ If methotrexate does not destroy the embryonic cells, or if a surgical incision in the fallopian tube fails to remove them, then the treatment must be deemed unsuccessful. The very same applies, however, when the tube is removed; in the event that doctors were subsequently to discover that the unviable ectopic pregnancy had somehow survived and implanted elsewhere in the same woman's body, the surgical procedure would be judged a failure. The parallels with many alternative clinical scenarios where removal of an embryo or foetus from a woman's womb is indicated should be readily apparent; for example where prompt surgical treatment of a uterine cancer is indicated.

¹⁹ J. Rachels, "Killing and Letting People Die of Starvation" (1979) 54 (208) *Philosophy* 159.

²⁰ Howard-Snyder, *supra* note 18.

²¹ This standard – which is strict, but intuitively appropriate to the ectopic case – is referred to by S. Uniacke as "the test of failure"; S. Uniacke, "Double Effect, Principle of" in E. Craig, ed., *Routledge Encyclopedia of Philosophy* v.1.0 (London: Routledge, 1998), CD-ROM 041516916.

Proponents of the D.D.E. must therefore provide a technical definition of “intention”, which contrary to ordinary usage distinguishes salpingectomy from incision and methotrexate. But none of the candidate definitions seems persuasive.

One popular strategy distinguishes between intent and foresight; merely foreseeing the destruction of a foetus or embryo as the predictable consequence of one’s action is not the same, supposedly, as intending it.²² This is unconvincing for a number of reasons, of which we mention two. Firstly, in cases like the ectopic pregnancy discussed above, or in certain surgical interventions in a viable pregnancy, it is simply implausible to claim that there is no intention to destroy the foetus or embryo; if there is a line between intending and foreseeing, then many ostensibly permissible procedures clearly fall on the “wrong” side of it. That is, in most such cases there is a very deliberately calculated intention to bring forward the death of the foetus (assuming that we are dealing with cases of unviability), without which the other intention (*i.e.* saving the life of the mother) will founder. The second problem is that this distinction leaves us with a moral standard whose consequences seem unreasonably easy to evade; we are effectively permitted to privately pick and choose which of the anticipated consequences of our actions we take responsibility for. It would be again implausible to suppose that we can get out of moral trouble simply by deciding to intend only those effects of our actions that suit us, whether or not the D.D.E.’s proportionality conditions are met.²³

There is a viable *philosophical* distinction to be made here (which Jeremy Bentham expressed as distinguishing between “direct” and “oblique” intention²⁴), but as H.L.A. Hart demonstrated, it has not historically been regarded as morally or legally

²² *E.g.* Aquinas, *supra* note 9; British Medical Association, *Withholding and Withdrawing Life-prolonging Medical Treatment: Guidance for Decision Making*, 3rd ed., (Oxford: Blackwell, 2007): “[a]lthough the health care team may foresee that withholding or withdrawing life-prolonging treatments will result in the patient’s death, this is fundamentally different from action taken with the purpose or objective of ending the patient’s life”: section 14.1 at 18. For a good overview, see Cavanaugh, *supra* note 7 at ch. 3 (“The I/F Distinction: Distinguishing Intent from Foresight”).

²³ This goes for both formulations of the D.D.E. above, that “[t]he circumstances ... are sufficiently grave as to justify causing the bad effect”, and that “(t)he good effect must be sufficiently desirable to compensate for the allowing of the bad effect”; neither constraint is sufficient to neutralise the problem of selective intending.

²⁴ J. Bentham, *An Introduction to the Principles of Morals and Legislation* (Oxford: Clarendon Press, 1907/1789) at ch. IX, §17.

significant at common law, which has tended to use “the beautifully ambiguous expression, ‘He contemplated this outcome’, to cover both.”²⁵ Once the defendant possesses foresight that the outcome is virtually certain as a result of his or her actions, the criminal law has generally held that he or she thereby possess the requisite intention to bring about that outcome, whatever further “real” and legitimate motives he or she may adduce.²⁶ In Lord Hailsham’s celebrated formulation, what is intended must be taken to cover “the means as well as the end and the inseparable consequences of the end as well as the means.”²⁷

Not all versions of the D.D.E. have rested on this distinction. Perhaps the strongest recent formulation of the doctrine is the one developed by Warren Quinn, which effectively collapses the Archbishops’ intention condition into that of directness.²⁸ Standard accounts of the D.D.E., Quinn argues, all too often fail to provide any rationale for the distinction, any grounds to suppose that the moral distinctions made are not just intuitive, but *correct*; worse, they routinely fail to exclude many of the cases that, even intuitively, they ought to.²⁹ He takes as an example Anscombe’s influential account of intentionality, which “pretty well maps our ordinary ways of speaking”; we intend some effect by our action, she argues, if that effect is what we would make reference to if asked why we had so acted, whereas our actions will count as unintended, and so merely foreseen, if the appropriate answer is of the form “it can’t be helped if I am to”³⁰

But now, argues Quinn, the problem we previously identified of selective intending arises; a philosophically sophisticated surgeon – or bomber – can phrase his answer in such a way as to make any action whatever come out unintentional. For example, the bomber might argue that his legitimate intent is to demoralise the enemy

²⁵ Hart, *Punishment and Responsibility*, *supra* note 13 at 121. Cf. Glanville Williams, “Oblique Intention” (1987) 46(3) Cambridge Law Journal 417.

²⁶ See, e.g., the famous pacifist aircraft-grounding cases of *R. v. Lemon* [1979] A.C. 617 and *R. v. Jones* [2007] 1 A.C. 136. Laudable motivations have sometimes been allowed to stand as *exculpatory* – see *Gillick v. West Norfolk and Wisbech A.H.A.* [1986] A.C. 112 – but the *mens rea* has not usually been thought to be thereby removed.

²⁷ *Hyam v. D.P.P.* [1974] A.C. 55 at 74. See more generally Baker, *supra* note 11 at 106-112.

²⁸ W.S. Quinn, “Actions, Intentions, and Consequences: The Doctrine of Double Effect” (1989) 18 *Philosophy and Public Affairs* 334 [hereinafter Quinn].

²⁹ *Ibid.* at 335.

³⁰ G.E.M. Anscombe, *Intention*, 2nd ed. (Oxford: Blackwell, 1963) at 41-5.

by *persuading* them – potentially falsely – that hundreds of children are dead, but then arguing that their actual deaths “can’t be helped if I am to effectively achieve my (permissible) goal.”³¹ It thus becomes legitimate to knowingly bring about a massacre, so long as one “intends” it only as an *apparent* massacre.

This consequence looks devastating to the D.D.E.; any morally heinous action at all might be justified, so long as we pare down our official intentions accordingly. Clearly there is *something* illegitimate about the legalistic trimming of intentions in this way, but the D.D.E. gives us no resources to say just what. We need, as Quinn says, some way of stating the obvious fact that the bombing is *essentially* a massacre, and only *derivatively* an apparent massacre, rather than *vice versa*. But the only possible ground for doing so will be our prior intuitions about intention and responsibility; and it is exactly these that the D.D.E. has been formulated to justify. The doctrine can avoid wildly implausible results, then, only at the cost of circularity.³²

Quinn proposes instead to construe the distinction in terms of direct and indirect intention. That is, when our surgeon decides to take the Church-approved option of removing the fallopian tube, “[e]ven if he cannot deny that, in some ordinary sense, he ‘intends’ the fetus’s death, he can rightly insist that the effects on the fetus of his surgery are nothing toward his medical purpose.”³³ His intention, then, is an indirect one. In the incision and methotrexate cases, conversely, the destruction of the embryonic cells seems to be directly intended, in Quinn’s sense; if the destruction does not take place, the medical purpose has not been achieved by the doctor.

This is the strongest available version of the D.D.E.,³⁴ but it is not apt to give much comfort to those who oppose legislating for Article 40.3.3°, since it is far from obvious that it is *this* distinction between direct and indirect intention which underpins our moral intuitions regarding double effect cases. Quinn further distinguishes between

³¹ J. McMahan, “Revising the Doctrine of Double Effect” (1994) 11(2) *Journal of Applied Philosophy* 201 at 203 [hereinafter McMahan].

³² Quinn, *supra* note 28 at 340-1.

³³ *Ibid.* at 342.

³⁴ Though see McMahan, *supra* note 31 at 204 for a “friendly” list of suggestions for possible improvements of the basic approach. None alters the force of the arguments we make in this paper.

those actions intended as a means, and those intended as side-effects: if a bomber calculates that his destroying the munitions factory – in and of itself permissible – will *also* advance the same war effort by killing the schoolchildren, he exercises *direct opportunistic agency*; the doctor's agency in chemically or surgically removing the foetus (leaving the tube intact) is similarly direct, but merely *eliminative*. That is, the presence of the schoolchildren presents the bomber with an opportunity to further his aims; the foetus, by contrast, is merely something that stands between the doctor and her goal of saving the mother.³⁵ But phrased this way it seems obvious that it is the opportunistic/eliminative distinction, rather than the directly/indirectly intended distinction, which carves the cases at their moral joints. After all, the bomber might plausibly deny, in a way that is not available to the doctor, that his intention to blow up the school along with the factory was direct in Quinn's sense; however, this would scarcely be regarded an exculpation, but a terminological quibble, quite unrelated to the question of his responsibility.³⁶

The distinction between intention and “mere” foresight, then, is best construed on Quinn's view as distinguishing between opportunistic and eliminative agency. The Archbishops' implied distinction between “direct and intentional” abortion and merely “direct” termination would thus indicate the difference between direct opportunistic agency and direct eliminative agency. But the options for treating an ectopic pregnancy are all plainly eliminative rather than opportunistic. Indeed, the point generalises; only in the curious case where surgeons *made use of* the presence of a foetus to save the mother's life could the procedure count, by these lights, as a direct opportunistic – and *a fortiori* “direct and intentional” – abortion. That is to say, only a procedure exploiting the foetus – which is in the realm of science-fiction fantasy – is morally forbidden. So if the D.D.E. represents the Church's position, as outlined in the Archbishops' statement, then on its least philosophically problematic interpretation, the law might place *no*

³⁵ *Ibid.* at 344.

³⁶ Quinn seems to believe that opportunistic agency is *necessarily* direct. Whether or not this is the case, the point is that the question of directness is *per se* irrelevant to the question of guilt. See further the discussion by M. Bratman, *Intention, Plans, and Practical Reason* (Cambridge, Mass.: Harvard U. P., 1987) at 156, and the rejoinder by McIntyre (2001), *supra* note 12 at 239.

restrictions whatsoever on terminations to protect the life of the mother, without thereby violating the principle.³⁷

If Quinn's formulation of the D.D.E. places no restrictions at all on the steps a doctor may take to save the life of the mother, we may presume that it will be unamenable to those who oppose the present legislation as insufficiently restrictive. But if it is also the least problematic formulation, we must consider the possibility that the D.D.E. simply does not map the moral geography very reliably or helpfully. It may help to consider Antony Duff's clear and illuminating tripartite classification of the foreseen effects of an agent's actions:

those which he directly intends ... for which he is responsible as their intentional agent; those which are, or ... should be, relevant to the practical reasoning which informs his action as providing reasons against that action, for which he will also be held responsible as their intentional agent ... ; and those which are agreed to be irrelevant to his action, for which he is not to be held responsible as their intentional agent.³⁸

So I may walk across the lawn, knowing that doing so will damage the grass: (1) *in order* to damage the grass (possibly to infuriate the gardener); (2) regretting that I will damage the grass, but (rightly or wrongly) considering the time thereby saved to be more important; or (3) indifferently.³⁹

Formulations of the D.D.E., as Duff argues, tend to focus on the distinction between cases of type (1) on the one hand, and types (2) and (3) on the other; this is equivalent to the distinction between those effects which are "directly intended" and those which are not. But this way of setting up the problem wrongfully elides cases of types (2) and (3).⁴⁰ To claim that a case is not of type (1), deliberately and maliciously intended, is not to establish that it is of type (3), morally neutral. So when we deny that an agent has acted maliciously or deliberately in bringing about some foreseeable bad effect, we do not thereby commit ourselves to the idea that it is unobjectionable.

³⁷ We are extremely grateful to Dr. D. Elstein for his discussion of this issue in response to a previous version of this paper.

³⁸ R.A. Duff, "Intention, Responsibility, and Double Effect" (1982) 32 (126) *The Philosophical Quarterly* 1 at 6.

³⁹ *Ibid.* at 1-2.

⁴⁰ *Ibid.* at 2-3.

Let us return to our ectopic pregnancy case. Unquestionably, none of the treatments in this, or any other case of termination to save the life of the mother, falls under (1); doctors do not in any sense or to any degree save women's lives *in order to* terminate pregnancies.⁴¹ Indeed, as McIntyre notes, most formulations of the D.D.E. would in any case be powerless to rule against type (1) cases where otherwise justifiable actions "are carried out with secret and malicious intentions"; the best that proponents can do in such circumstances is simply to deny that the D.D.E. is relevant to the deliberations of any but "well-intentioned agents who seek to realize good ends."⁴²

It seems equally clear that few, if any, such terminations are – or are purported to be – of type (3). That is, while there are undoubted controversies over the moral status of the foetus in absolute terms, it is exceedingly rare that terminations sought *for explicitly medical reasons* are not performed regretfully, and with the conviction that another outcome would be pursued, were one available which equally protected the life of the mother. In accordance with the requirements of the *New Catholic Encyclopedia*, in other words, the doctor accepts that "[i]f he could attain the good effect without the bad effect he should do so."⁴³ Again, moreover, the D.D.E. does not in general purport to say anything about cases of type (3); if these are not acknowledged by the agent to have a harmful effect, then there is little point to discussing whether the harmful effect is overridden by a good effect, because unintended.

So the interest of the D.D.E. focuses entirely on cases of type (2); terminations for which the doctor regards himself – correctly – as morally responsible, and which he regrets having to bring about, but which he nevertheless feels himself justified in bringing about in view of the good, life-saving end thereby achieved. But now it is hard to see what positive work, if any, the D.D.E. is doing. We may take its proportionality condition to be implicit in the formulation of (2); the agent considers the regrettable

⁴¹ Various public figures have claimed or implied that legislating to allow abortion in cases of suicidal ideation – as specifically mandated by the *X*. case, *supra* note 1, absent a Constitutional Amendment – would "open the floodgates" to type (1) cases. The attitude this view reveals towards both pregnant women and psychiatric professionals seems to us both contemptible and unworthy of serious discussion. For a response to these floodgates claims, see F. de Londras & L. Graham, "Impossible Floodgates and Unworkable Analogies in the Irish Abortion Debate" [2013] 3(3) *I.J.L.S.* 54 (this edition).

⁴² McIntyre (2001), *supra* note 12 at 228.

⁴³ O'Connell, *supra* note 8 at 1021.

harm to be outweighed by the benefit gained. But the other elements of the D.D.E., the additional strictures about directness and intentionality, as we have seen, turn out either unhelpful or false, depending on how they are formulated. That is, they either divide type (1) cases from type (2) in line with intuition, telling us nothing – or nothing, at any rate, that the opponent of legislation wishes to hear – about how to distinguish between permissible and impermissible type (2) cases; or they make deeply counterintuitive distinctions, surrendering entirely the persuasive force that motivated the D.D.E. in the first place.

IV – Conclusion

What should we make of this? It seems hard to escape the conclusion urged in recent years by both T.M. Scanlon and Alison McIntyre;⁴⁴ not only does the D.D.E. provide an unhelpful framework for analysing moral problems like the treatment of ectopic and other life-threatening pregnancies, but its problems stem from the fact that no *single* principle can be formulated which explains what is morally decisive in *all* the cases from which it draws its intuitive appeal. Candidate principles can be and are proposed; but they neither draw all the lines where their supporters wish, nor explain satisfactorily why the lines thus drawn should be kept within.

Perhaps this should not be surprising; it would be after all remarkable if a principle developed three-quarters of a millennium ago to explain the morality of self-defence – whether or not one thinks it divinely inspired – correctly predicted the ethical contours and nuance of modern warfare and obstetrics, to say nothing of end-of-life issues. Moral distinctions must be made and defended, but there appears to be no such

⁴⁴ McIntyre (2001), *supra* note 12 at 255 writes:

[w]hat have generally been taken to be illustrations of DE compose instead a gallery of miscellaneous objections to simple forms of direct consequentialism that can be expressed, with more or less strain, using the distinction between intended and merely foreseen consequences. They are tied together by nothing more penetrating than the claim that the distinction between what an agent foresees and what an agent intends sometimes matters, and matters a great deal, to moral evaluation. The assumption that there is just one way in which it matters has led to such confusion that many have started to doubt that the distinction could be of any real utility.

See also McIntyre (2011), *supra* note 6; T.M. Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (Cambridge: Basic Books, 2008).

distinction which is of general application to all the cases under consideration; and this means that appealing to a general principle of this sort is unhelpful to resolving the vexed and persistent political, legal, and moral question of how the State is to provide in law for its duty “to defend and vindicate ... the right to life of the unborn and ... the equal right to life of the mother.”⁴⁵

To be sure, the spectrum of abnormal physical health during pregnancy is such that there will be medical interventions where treatment can plausibly be said to neither directly nor intentionally kill the foetus. To take just one example, a lifesaving treatment such as certain forms of cancer chemotherapy may *increase* the risk of foetal death, but cannot be said to directly *cause* it. But the idea that a clear, medically and morally significant line exists between “the direct and intentional destruction of an unborn baby”, on the one hand, and the full range of interventions permissible by Catholic doctrine, on the other, remains unpersuasive. Attempting to draw a statutory line in the same place, in order to preserve the symbolic purity of an “abortion-free” jurisdiction, would in our opinion be folly.

⁴⁵ Art. 40.3.3°, *Bunreacht na hÉireann*.