

Double Effect, and the Acts-Omissions Distinction

6.1 Is causing a bad thing the same as doing a bad thing?

The principle of double effect, sometimes (especially perhaps in Roman Catholic contexts) termed the ‘doctrine’ of double effect, relies upon a belief which is held by some but not all moral theories. The belief in question is that there are certain types of action which are always wrong. A typical list might include murder, adultery, torture of the innocent, rape and incest. It ought to be admitted that none of the types of action listed stand in no need of further clarification. Is it incestuous to have sexual relations with an adopted stepchild? Is the introduction of ‘foreign’ gametes into a marriage through donor insemination a kind of adultery, as some have thought? Can there be rape within marriage, or should forced sexual relations in marriage be labelled differently? This sense of the vagueness of the boundaries of many of our concepts is one which philosophers find in many different contexts, and not only in ethics.¹ However, we should not be so impressed by the difficulties in sketching conceptual boundaries as to forget the confidence with which we can point to absolutely central applications of each of these terms (the word ‘focal’ is often used for these central cases). The claim that incest is always wrong will clearly mean that any case which is a focal instance (a clear, unambiguous and unarguable instance) of incest is a case of an action which is, in virtue of this fact, wrong.

It is a commonplace to say that our actions have a variety of consequences. Sometimes an action may have consequences which we hold to be good, and which we intend and desire, but may also have bad consequences.² The Chancellor of the Exchequer has a budget to manage; an increase in funding for education may have beneficial consequences in terms of the knowledge and skills of young people, but there is only so much money to go round, and failing to spend it on heating for pensioners might result in a number of deaths from hypothermia next winter. A natural response to this situation is to say that the Chancellor is trying to do good. To see his failure to give extra money to pensioners as an ‘action’ of any sort, whether culpable or not, is wrong. To omit to do one good thing, especially when one’s energies and resources are taken up in doing something else which is also clearly good, is hardly to do something bad.

¹ The so-called ‘Sorites’ paradox, named after the Greek word for a ‘heap’, finds its classical expression in the following thought. We are sure that a single grain of sand is not a heap, and that 500 000 grains piled together is a heap. Removing a grain of sand from a heap does not seem to make it cease to be a heap; but eventually we will remove a grain too many and it will not be a heap. Yet there does not seem a clear point where the removal of one extra grain finally means we have no heap. Equivalent puzzles can be played with the concept of baldness, and other concepts with apparently vague boundaries.

² Anyone bewildered by modern dietary advice will have frequent experience of this; almost anything one can eat seems to have both beneficial and harmful effects!

Someone might object that some particular goods done could be trivial compared to a potential good which is thereby not done. This is a serious matter, raising issues of ‘proportionality’, and it is one to which we must return.

The difficulty in cases where one good is done, but another good thereby left undone, rests on a distinction of acts and omissions which we will discuss in the second part of this chapter. The issue of double effect, though, centres upon the possibility of an action which does good, but which has as one of its material consequences something which ought not to be done. A textbook example will illustrate the point. A woman has cancer of the uterus, the usual treatment being surgery to remove the cancerous tissue. However, she is pregnant, and the pregnancy is at a stage where the possibility of saving both the life of the child, and that of the mother, is remote. However, the operation on the mother will result in the child’s death. The death of the child is clearly bad and unwelcome, but no means for saving both are available to us. (Perhaps the mother would be likely to die before the pregnancy was sufficiently advanced for the child to be viable anyway.) To operate on the mother is to cause the child to die; but if causing the child to die were the same as killing it, the operation would be immoral, because (let us accept) it is always wrong to kill the innocent.

To this example we may add two others. One, again a textbook case from the area of palliative medicine, concerns the use of drugs to relieve pain which require for their continuing effectiveness a progressive increase in dosage; but one effect of high dosages of the medicine may be death. A doctor who enters into such a course of treatment is likely to do so, being aware of the likelihood that the good outcome (continued suppression of pain) will be accompanied by an earlier death than would have been the case otherwise, and moreover a death caused by the very treatment itself.³

The other case we will discuss concerns the separation of Siamese twins. It is sometimes the case that Siamese twins can be separated without loss of life to either; and sometimes separation is impossible. In a recent case, a pair of twins was separable only with the expected loss of one life, this being the expense of offering the other a chance of survival to adulthood. The principle of double effect, as applied to this case, asks: is the means of prolonging the life of one of the twins an unacceptable action, namely killing the other? Because killing a child would be immoral, we ought not to perform such an action.

6.2 The Principle of Double Effect

The principle of double effect is often said to have its foundation in a text from the New Testament, where the Apostle Paul, reflecting on the goodness of the salvation which God offers to human beings, asks whether this goodness is so good that it could justify us in

³ It should be added that, though a textbook case, palliative care is an area of medicine where changes of treatment have rendered such a scenario largely redundant.

continuing to live sinful lives.⁴ ‘Should we continue in sin, that grace may abound?’ He answers this rhetorical question with a firm ‘no’, and his negative answer has served as a subsequent pattern for moral reflection on the range of difficult cases in which the only apparent means of achieving a good end involve some identifiable bad consequence. In short: we may never perform a morally wrong action to achieve a good end.

What the principle of double effect offers is a series of criteria by which we may decide whether we are actually doing bad in order to bring about good. The criteria are formulated in various ways, but may be presented as follows:

The end sought must be morally good;

The bad consequence(s) must not precede the good one(s), but be later or at least be simultaneous with it or them;

Any morally negative side-effects must be proportionate to the good intended.

The first of these is intended to rule out trivial or even immoral aims, and thus ensure that the situation is one of sufficient moral gravity to be worthy of discussion. The second is an attempt to do justice to the concern that the bad effect not be a means to the good. If a Siamese twin’s death is the cause of securing the life of the sibling, then it is regarded as a means, and is morally unacceptable (due to the general prohibition on killing the innocent); if the separation of the twins results in one of them dying, perhaps very quickly after the operation, and the other living, the death will not be a means to the end of securing the life, and the criterion of temporal precedence will not be violated. The third criterion serves to rule out the attainment of small goods at great cost. It raises the spectre of measuring outcomes again, one which we met with in our discussion of utilitarianism, and rather than repeat our assessment of the difficulties we may merely note that there is an issue here which needs to be addressed. In the case of the Siamese twins, the choice may be between two short lives and one longer one, and the ‘currency’ in which the question of proportionality is being debated is at least reasonably common. Where the choice is between pain on the one hand and causing an early death on the other, issues of proportionality will be much more obviously problematic.

We should note that nothing in the principle mentions questions of probability. It is no part of the acceptability of an action which is carried out under the principle of double effect that the bad but foreseen consequence is only likely. The bad outcome may be an absolute certainty, and the action still acceptable, as long as the total package of means and ends may be morally intended; that is, as long as the desired consequence, the undesired but foreseen consequence, and the means chosen to achieve this set of outcomes, form a morally acceptable package. The principle of double effect, as it is often invoked in contemporary ethics, is designed to show some of the conditions which would need to be satisfied for moral acceptability.⁵

It may be helpful to have before us some instances of actions which would be ruled out by the

⁴ Romans 6: 1.

⁵ Thus, it was no part of the case of the separation of the Siamese twins Jodie and Mary, carried out with much media attention in late 2000, that Mary would probably not survive. That judgement of probability could have been raised to the status of certainty, and made no difference to the case. What was uncertain in the case in question was whether Mary’s death would be necessary as a means to securing Jodie’s future. Medical experts could offer judgements on the basis of evidence, but the only evidence which could finally determine the matter was discovered in the operating theatre after the decision had been made to separate them. After the separation, it was strongly implied that Mary’s death had indeed been a means to secure Jodie’s future. This would be enough for a believer in the principle of double effect, who also holds that killing the innocent is always wrong, to claim that the separation was, in this circumstance, immoral, and ought not to have been performed.

principle of double effect. One such, which certainly received condemnation from some quarters at the time, was the saturation bombing of Dresden during World War II. Another was the dropping of the atomic bomb. Each of these had a good aim (the early end of the war). Each had a bad effect (the violation of rules of non-combatant immunity, constituting the killing and maiming of many non-combatant civilians). These acts were clearly intended as means to an end; they were, expressed in these terms, immoral means, not morally intendable in the context of any package of outcomes at all. In each of these cases the action can be described directly by the phrase 'killing non-combatants', which is held to be a case of a type of action which is always immoral.

By contrast, to take the case of the pregnant woman with cancer of the uterus, an action to remove the cancerous tissue will not be rightly described as an abortion, even if it has the effect of the death of the baby. Were she not pregnant, the same treatment would be prescribed; there is no other, more appropriate treatment, given the fact that she is pregnant. Were the baby, *per impossibile*, to survive, the doctor would not think that this constituted a failure in achieving the goal desired.⁶ Similarly, bringing about an earlier death through the use of palliative care techniques, properly administered, is not killing, though an immediate massive overdose of the same medicines with a view to causing death certainly would be.

6.3 Guidance or responsibility?

What is the principle of double effect for? One suggestion, which we have relied upon so far and which has been its major use in modern medical ethics and social policy, has been to help us in making a judgement regarding what ought to be done. It helps here by setting principled limits to what is morally possible, and gives a framework within which ostensibly similar cases, such as two instances of the separation of Siamese twins, might actually contain morally relevant differences affecting the range of legitimate actions open to us. Sometimes there may be no actions available to us morally which could bring about a good end. This may often be the case in military contexts; the only means of bringing about the end we seek being an immoral means, we cannot achieve the end.

Another possible use of the principle lies in the assessment, after the event, of the moral status of a person who has performed or failed to perform some action. Assuming that we hold the destruction of a human embryo to be unacceptable morally, we will say that the good end of achieving an advance in knowledge of the causes of cancer, maybe leading eventually to a cure, cannot justify the direct act of destroying embryos to gain that knowledge. Whereas in the cases which form acceptable applications of the principle of double effect the unintended bad consequence could be regarded as a side effect of the action performed, here the destruction of the embryo just is (a part of) the action performed, and no side effect at all. (The method of

⁶ The action, even though it brought about the destruction of the foetus, would not count as an abortion; an important distinction morally, but also legally. The doctor, if performing the operation in England or Wales, would not need to go through the requirements of the 1967 Abortion Act (Amended 1980), for example.

investigation is directly destructive of the embryo, and the knowledge gained, whatever further consequences it may have, cannot in itself outweigh the destruction of the life. The case fails on just about every count.) Here, a medical researcher who attempted to gain knowledge by such a route would be acting immorally, and the principle helps us to see where this judgement of guilt is focussed. On the other hand, those who shorten the lives of patients by offering palliative care may feel guilty, and the principle of double effect may offer a basis on which to demonstrate to them that they have behaved properly in what they have done.⁷

Whether a principle which is used in the assessment of a person's exercise of moral responsibility for past deeds can be sustained without it developing into a tool of moral judgement on future actions may properly be doubted, though it is fair to say that one strong motivation for the development of the principle within Roman Catholic teaching has been the assessment of the moral status of an individual in relation to an action already performed. Ironically, it may be this which constitutes one of the major theological objections to the use of the principle - as a principle of moral justification, it seems to open up a second avenue of justification of the individual apart from the one which is central to Christian theology, and which is supposed to be exclusive. The principle philosophical attack on the principle comes, not unexpectedly, from utilitarianism.

6.4 Utilitarian objections

Utilitarians, it will be remembered, reject the notion that any type of action classified more specifically than 'promoting pleasure and minimising pain' can have an absolute moral status. No type of action is good in itself except 'promoting utility'; no type of action is bad in itself except 'diminishing utility'. Hence, for the utilitarian, adultery, incest, injustice, and a host of other terms which are often taken to label absolutely wrong actions merely label types of performance which are generally wrong, but which could be rendered right by an appropriate context. The worry of those who look to double effect for guidance - 'One outcome of my action will be the death of an innocent person; how, then, can I act in that way?' - is brushed aside at a stroke. All that matters is utility maximization; if the utility function is not maximized by the death of this innocent person the action should not be performed. On the other hand, if utility is maximized by the person's death, the action will be the right one, and should be done as a moral duty.

⁷ The question of proving intention could be central to any moral assessment, or even legal challenge, arising from an action performed. It is true that the pregnant woman with a cancerous uterus may be devastated at the news of the pregnancy, and regard the loss of the child as a welcome side effect. The doctor and patient may together decide that shortening life is desirable, and use accelerating doses of a medicine with palliating properties as the only available legal means to their end. In most cases, the character of the agents concerned will bear witness more eloquently than anything which could be discovered by a process of questioning. In each case we need to answer the question: would it have been a frustration of any part of the agent's desires if the 'bad side effect' had not occurred? A nurse who overheard a doctor say, in tones not just of surprise but of frustration, 'Isn't he dead yet?', might offer some evidence of a relevant kind!

The utilitarian, in other words, has no sympathy for the issue which gave rise to the problems in the first place. Utilitarians will seek to make common cause with the criterion about proportionality, but will claim that this is all there is in the matter: do the total good consequences outweigh the total bad consequences? In its handling of the case of the Siamese twins Jodie and Mary, the media frequently betrayed a strong utilitarian sentiment in desiring the prolongation of Jodie's life not simply at the expense of Mary's, but by the means of sacrificing Mary's.

If there are any morally absolute prohibitions in ethics, it does seem that something like the principle of double effect will need to be a feature of our moral reasoning. The utilitarian attack is actually based upon its stand concerning the question of moral absolutes, and it is here that it loses patience with the apparent squeamishness of those who uphold the principle. Why, they may say, if in the two cases one ends up with one living and one dead twin, should we not treat the cases as similar? The only difference is that in one case the death was an indirect but inevitable result, in the other a direct consequence, of our action. To a non-utilitarian, however, that may be all the difference in the world.

6.5 Acts and omissions

We spoke throughout the discussion of the principle of double effect of 'acts' and 'actions'. It was suggested that the principle might leave us with situations where the only way to bring about a good end would be an immoral action. Because no immoral action should be performed, no action will be possible. This thought relied upon the notion of an intrinsically immoral type of action. This was conceived as being quite different from a situation where I have a certain resource which I can allocate - say, money raised through taxes - and can do a range of goods with the money. I cannot do all of the goods which might be done, because there is a limited amount of money, and very many goods. I must select the goods which I will do, and any selection will rule out others, simply because of limited resources. My failure to commit more resources to mental health is a result of the priority I give to social services. An intelligent electorate will have to come in time to realise that their politicians cannot do everything which it might be desirable to do. There may be praise or blame attached to the spending priorities which are arrived at (too much or too little on defence at the expense of education or health, perhaps).⁸ What there should not be is a sense that everything is possible. There are certainly some 'omissions' which should be seen in the context of a total package of actions, rather than as isolated failures to work for some good.

Just as the utilitarian will resist the principle of double effect on the grounds that there are no intrinsically immoral actions, so the utilitarian will be concerned at a sharp distinction between

⁸ The development of 'QALYs' in health service resource allocation is one model for attempting to give a reasoned basis for the distribution of spending. Though the technique of QALYS might be questioned, the importance of moral thinking in the area of resource allocation is clearly a very important one.

acting and not acting. Where I face a choice based upon the consequences of my actions, one possible set of consequences will be those which arise from my doing nothing; so doing nothing should, from the perspective of moral evaluation, count as an action.

To this extent, utilitarianism is an ethic of extreme responsibility: in every circumstance at all times it is my duty to perform the most utility-maximizing action, and where 'doing nothing' is most utility-maximizing, that is what I should 'do'.

How does this accord with our ordinary moral intuitions? It seems that we are inclined to distinguish between achieving some end by a positive act, and doing so by omission. Arthur Hugh Clough's well-known lines, in relation to the question of euthanasia,

That shalt not kill, but need not strive

Officiously to keep alive⁹

demonstrate something of this thought. It is one thing to fail to keep someone alive by inaction; quite another to kill. The utilitarian may well say that because there is no difference in outcome, there can be no morally relevant difference. Which position is right?

We ought to acknowledge that in fact the utilitarian might actually feel the consequences of direct killing to be more serious than those of indirectly causing death by inaction. The consequences might include effects upon the agent, or some general social disutility associated with the direct killing. The utilitarian case is based upon outcomes, of course, and, because inactions have consequences, the moral significance of an act-omission distinction still collapses. The utilitarian might agree that killing is worse than letting die, but not because killing is 'in itself' wrong.

We should also acknowledge that any intuitions we may have which make omissions less morally serious than actions can be undermined in certain circumstances. Where I (as a medically incompetent layman) fail to act in an emergency in a fashion which might have saved a life, this seems less culpable than if I were medically qualified. A police officer who ignores a fight outside a public house may be liable for censure, whereas a member of the public might be thought brave for intervening, but innocent of any wrongdoing if he did not do so. These are examples of areas in which knowledge or social role may 'turn an omission into an act'.

These examples might, however, point us towards the real root of the acts-omissions distinction. As with the case of double effect, there are two functions which the acts-omissions distinction might play. One concerns the formation of a moral judgement upon a case where action seems called for, and the other is the making of a judgement of moral culpability concerning someone who has acted or failed to act. In the case of many things which I fail to do, but which it would have been good for me to do, it seems reasonable to say that I could not have been expected to do them. This will be simply because I did not know that this would be a good thing to do. Ignorance may turn out to be, here at least, some sort of defence. How, though, do we know who has the insight required to make them guilty of their inactions? Perhaps we assume (charitably) that anyone who does not act for some potential good is ignorant of the possibility of the action. Then certain exceptions to blame make sense; some people have knowledge and qualifications which would make ignorance culpable, so we assume knowledge and censure inaction, but many people do not. In the case of the police

⁹ Arthur Hugh Clough, from his 1862 poem 'The Latest Decalogue'

officer, which seems a little different, we might say that certain people are charged with certain special duties which would make inaction culpable.

If this were right, it would imply that the acts-omissions distinction has a functional role in ascribing praise and blame. (This might still be distinct from holding it to have a role in moral judgement.) If anyone did have the appropriate knowledge of the significance of some possible action, their failure to perform it might not- probably would not - be morally innocent. Is there a difference between my failure to point out the wear on your car tyres, and my causing equivalent damage to them with a knife? On the assumption that anyone who fails to act for some good (in this case, preventing an accident) is ignorant of the possible good, we simply assume that, where I fail to point out to you that one of the tyres on your car is getting a bit bald, and you have an accident due to tyre wear, I did not notice, or did not know the likely consequences. The fact that this is a false assumption - I did notice, but omitted to say anything - might still make me in fact morally blameworthy, for all that no one will actually blame me.

Perhaps this issue of praise and blame is indeed at the heart of the acts-omissions distinction. The distinction does, however, have a significant role in defending certain judgements regarding what should or should not be done in relation to particular cases. To take the example implied by Clough: a patient is dying of a disease which is causing considerable pain and distress. The disease is incurable; the symptoms are not readily treatable. All parties (patient, family, doctors) are in agreement that death would be a merciful release. There is no question of availability of resources being an issue in this case; the medical and other care which the patient needs in the weeks or months leading to death are readily affordable.¹⁰ Equally, there is no doubt that cheap and affordable means are available to cause the patient's death. Everyone hopes that the patient will die quickly; is it not, then, a simple evasion of responsibility to do what can be done to ensure that the patient does die quickly?

We have suggested above that a consistent utilitarian reply to this question will need to take into account the effects upon the medical profession of extending the concept of medical care to include direct action to kill patients. These effects may be very unwelcome, and might make utilitarians deeply unhappy about (for example) legislating to allow such instances of euthanasia. Those less pessimistic about the consequences may well feel deeply impatient during the process of a patient's dying: 'She wants to die; why not help her to die?' The answer which seems deeply rooted in current practice is that killing is an act, and culpable; letting die is not an act, so not culpable. If she dies, it will be of the disease, not of a lethal injection. We did not give her the disease, so we did not kill her. This position relies, obviously enough, on the belief in moral absolutes (in this case, a suitably nuanced version of 'do not kill'). To this extent the acts-omissions distinction goes along with a belief in moral absolutes. It also implies a strong acceptance of the anti-utilitarian principle that there are chains of events and consequences at play in the world for which we have no responsibility, and in which we may intervene only if we can do so without violating these moral absolutes. In its secularist forms, utilitarianism may be said to have replaced a vision of the world in which responsibility could ultimately be said to rest with God with a new vision, in which human beings have a new and

¹⁰ In fact, in a case like this one, those who campaign against legalizing euthanasia may be most worried at just this point; killing might well, in a variety of ways, be a cheaper option than even very routine medical care, and this cost might at some point become a factor in making 'medical' judgements.

ever more absolute responsibility for what happens.¹¹ In its theologically motivated forms (such as Joseph Fletcher's *Situation Ethics*¹²) it takes a similar view of responsibility, this time allied to a vision of God's having endowed human beings with an ever larger arena for the exercise of responsibility, and a greater and greater capacity to exercise it.

It is no accident that Kantian deontology sees God's role in part as the guarantor of the moral worth of living within a more limited arena, the simple following of the path of duty. Morality can be trusted in, because of the great coordinating intelligence behind the moral universe; therefore any qualms which we may have about the pain of the patient who is dying (but whom we may not kill), or - to take a fantastical example - our lack of the medical knowledge which would enable us to cure leukaemia in all sufferers at a stroke (but which can only be obtained by vivisection on a human being) can be put to one side.

6.6 Conclusion

Perhaps secularization in ethics and the use of utilitarianism go hand in hand. It was Elizabeth Anscombe's contention over 40 years ago that with the loss of God from the framework within which moral philosophers did their thinking, many of their key concepts had lost any purchase (concepts such as obligation, owing and so forth).¹³ She pointed the direction back towards virtue ethics, a path which has become increasingly well trodden in the last 20 years (and which has perhaps opened the way for a better appreciation of the way in which religious traditions have contributed towards the formation of the moral vision of their adherents). There are a number of philosophers who in different ways are treading a path which owes its allegiance to visions of moral reason of a more Kantian persuasion.¹⁴ In each of these anti-utilitarian trends as also in the renewal of natural law theory in moral philosophy and jurisprudence (the philosophy of law),¹⁵ we see the possibility of an affirmation of moral limit of certain types of action which may never be performed. Much of what we have discussed in this chapter depends upon this affirmation. How we make moral judgements and the judgements we actually come to make depend heavily on whether we accept or reject this position. It seems right then to end this introduction with such a clear demonstration of the importance of a central philosophical controversy to the work of solving real life moral problems

¹¹ This goes hand in hand with a strong commitment to technological progress. The more control over nature we may have, the greater our capacity to exercise this enlarged responsibility.

¹² Joseph Fletcher, *Situation Ethics* (London: SCM Press, 1966)

¹³ G E M Anscombe 'Modern Moral Philosophy' in her *Collected Philosophical Papers Volume III* (Oxford Basil Blackwell 1981) pp 26 42

¹⁴ To mention just three who are in different ways working within a recognizably Kantian inheritance, John Rawls, Onora O'Neill and Christine Korsgaard.

¹⁵ See for example the works of John Finnis such as his *Natural Law and Natural Rights* (Oxford OUP 1980) and *Moral Absolutes* (Washington D C Catholic University of America Press 1991) and (a treatment aimed at a theological audience) Germain Grisez, *The Way of The Lord Jesus 1: Christian Moral Principles* (Chicago Franciscan Herald Press 1983) These authors are discussed in the wide ranging work edited by Nigel Biggar and Rufus Black, *The Revival of Natural Law* (Basingstoke Ashgate 2000).