

The Problem of Abortion and the Doctrine of the Double Effect

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One of the reasons why most of us feel puzzled about the problem of abortion is that we want, and do not want, to allow to the unborn child the rights that belong to adults and children. When we think of a baby about to be born it seems absurd to think that the next few minutes or even hours could make so radical a difference to its status; yet as we go back in the life of the foetus we are more and more reluctant to say that this is a human being and must be treated as such. No doubt this is the deepest source of our dilemma, but it is not the only one. For we are also confused about the general question of what we may and may not do where the interests of human beings conflict. We have strong intuitions about certain cases; saying, for instance, that it is all right to raise the level of education in our country, though statistics allow us to predict that a rise in the suicide rate will follow, while it is not all right to kill the feeble-minded to aid cancer research. It is not easy, however, to see the principles involved, and one way of throwing light on the abortion issue will be by setting up parallels involving adults or children once born. So we will be able to isolate the 'equal rights' issue and should be able to make some advance.

I shall not, of course, discuss all the principles that may be used in deciding how to act where the interests or rights of human beings conflict. What I want to do is to look at one particular theory, known as the 'doctrine of the double effect' which is invoked by Catholics in support of their views on abortion but supposed by them to apply

elsewhere. As used in the abortion argument this doctrine has often seemed to non-Catholics to be a piece of complete sophistry. In the last number of the *Oxford Review* it was given short shrift by Professor Hart¹ And yet this principle has seemed to some non-Catholics as well as to . Catholics to stand as the only defense against decisions on other issues that are quite unacceptable. It will help us in our difficulty about abortion if this conflict can be resolved.

The doctrine of the double effect is based on a distinction between what a man foresees as a result of his voluntary action and what, in the strict sense, he intends. He intends in the strictest sense both those things that he aims at as ends and those that he aims at as means to his ends. The latter may be regretted in themselves but nevertheless desired for the sake of the end, as we may intend to keep dangerous lunatics confined for the sake of our safety. By contrast a man is said not strictly, or directly, to intend the foreseen consequences of his voluntary actions where these are neither the end at which he is aiming nor the means to this end. Whether the word 'intention' should be applied in both cases is not of course what matters: Bentham spoke of 'oblique intention', contrasting it with the 'direct intention' of ends and means,

¹H. L. A. Hart, 'Intention and Punishment', *Oxford Review*, Number 4, Hilary 1967. Reprinted in Hart, *Punishment and Responsibility* (Oxford, 1968). I owe much to this article and to a conversation with Professor Hart, though I do not know whether he will approve of what follows.

and we may as well follow his terminology. Everyone must recognize that some such distinction can be made, though it may be made in a number of different ways, and it is the distinction that is crucial to the doctrine of the double effect. The words 'double effect' refer to the two effects that an action may produce: the one aimed at, and the one foreseen but in no way desired. By 'the doctrine of the double effect' I mean the thesis that it is sometimes permissible to bring about by oblique intention what one may not directly intend. Thus the distinction is held to be relevant to moral decision in certain difficult cases. It is said for instance that the operation of hysterectomy involves the death of the foetus as the foreseen but not strictly or directly intended consequence of the surgeon's act, while other operations kill the child and count as the direct intention of taking an innocent life, a distinction that has evoked particularly bitter reactions on the part of non-Catholics. If you are permitted to bring about the death of the child, what does it matter how it is done? The doctrine of the double effect is also used to show why in another case, where a woman in labor will die unless a craniotomy operation is performed; the intervention is not to be condoned. There, it is said, we may not operate but must let the mother die. We foresee her death but do not directly intend it, whereas to crush the skull of the child would count as direct intention of its death².

This last application of the doctrine has been queried by Professor Hart on the ground that the child's death is not strictly a means to saving the mother's life and should logically be treated as an unwanted but foreseen consequence by those who make use of the distinction between direct and oblique intention. To interpret the doctrine in this way is perfectly reasonable given the language that has been used; it would, however, make nonsense of it from the beginning. A certain event may be desired under one of its descriptions, unwanted under another, but we cannot treat these as two different events, one of which is aimed at and the other not. And even if it be argued that there are here two different events—the crushing of the child's skull

²For discussions of the Catholic doctrine on abortion see Glanville Williams, *The Sanctity of Life and the Criminal Law* (New York, 1957); also N. St. John Stevas, *The Right to Life* (London, 1963).

and its death—the two are obviously much too close for an application of the doctrine of the double effect. To see how odd it would be to apply the principle like this we may consider the story, well known to philosophers, of the fat man stuck in the mouth of the cave. A party of potholers has imprudently allowed the fat man to lead them as they make their way out of the cave, and he gets stuck, trapping the others behind him. Obviously the right thing to do is to sit down and wait until the fat man grows thin; but philosophers have arranged that flood waters should be rising within the cave. Luckily (luckily?) the trapped party have with them a stick of dynamite with which they can blast the fat man out of the mouth of the cave. Either they use the dynamite or they drown. In one version the fat man, whose head is in the cave, will drown with them; in the other he will be rescued in due course³ Problem: may they use the dynamite or not? Later we shall find parallels to this example. Here it is introduced for light relief and because it will serve to show how ridiculous one version of the doctrine of the double effect would be. For suppose that the trapped explorers were to argue that the death of the fat man might be taken as a merely foreseen consequence of the act of blowing him up. ('We didn't want to kill him ... only to blow him into small pieces' or even '... only to blast him out of the cave.') I believe that those who use the doctrine of the double effect would rightly reject such a suggestion, though they will, of course, have considerable difficulty in explaining where the line is to be drawn. What is to be the criterion of 'closeness' if we say that anything very close to what we are literally aiming at counts as if part of our aim?

Let us leave this difficulty aside and return to the arguments for and against the doctrine, supposing it to be formulated in the way considered most effective by its supporters, and ourselves bypassing the trouble by taking what must on any reasonable definition be clear cases of 'direct' or 'oblique' intention.

The first point that should be made clear, in fairness to the theory, is that no one is suggesting that it does not matter what you bring about as long as you merely foresee and do not strictly intend the evil that fol-

³It was Professor Hart who drew my attention to this distinction.

lows. We might think, for instance, of the (actual) case of wicked merchants selling, for cooking, oil they knew to be poisonous and thereby killing a number of innocent people, comparing and contrasting it with that of some unemployed gravediggers, desperate for custom, who got hold of this same oil and sold it (or perhaps they secretly gave it away) in order to create orders for graves. They strictly (directly) intend the deaths they cause, while the merchants could say that it was not part of their plan that anyone should die. In morality, as in law, the merchants, like the gravediggers, would be considered as murderers; nor are the supporters of the doctrine of the double effect bound to say that there is the least difference between them in respect of moral turpitude. What they are committed to is the thesis that sometimes it makes a difference to the permissibility of an action involving harm to others that this harm, although foreseen, is not part of the agent's direct intention. An end such as earning one's living is clearly not such as to justify either the direct or oblique intention of the death of innocent people, but in certain cases one is justified in bringing about knowingly what one could not directly intend.

It is now time to say why this doctrine should be taken seriously in spite of the fact that it sounds rather odd, that there are difficulties about the distinction on which it depends, and that it seemed to yield one sophistical conclusion when applied to the problem of abortion. The reason for its appeal is that its opponents have often seemed to be committed to quite indefensible views. Thus the controversy has raged around examples such as the following. Suppose that a judge or magistrate is faced with rioters demanding that a culprit be found for a certain crime and threatening otherwise to take their own bloody revenge on a particular section of the community. The real culprit being unknown, the judge sees himself as able to prevent the bloodshed only by framing some innocent person and having him executed. Beside this example is placed another in which a pilot whose aeroplane is about to crash is deciding whether to steer from a more to a less inhabited area. To make the parallel as close as possible it may rather be supposed that he is the driver of a runaway tram which he can only steer from one narrow track on to another; five men are working on one track and one man on the other; anyone on the track he enters is

bound to be killed. In the case of the riots the mob has five hostages, so that in both the exchange is supposed to be one man's life for the lives of five. The question is why we should say, without hesitation, that the driver should steer for the less occupied track, while most of us would be appalled at the idea that the innocent man could be framed. It may be suggested that the special feature of the latter case is that it involves the corruption of justice, and this is, of course, very important indeed. But if we remove that special feature, supposing that some private individual is to kill an innocent person and pass him off as the criminal we still find ourselves horrified by the idea. The doctrine of double effect offers us a way out of the difficulty, insisting that it is one thing to steer towards someone foreseeing that you will kill him and another to aim at his death as part of your plan. Moreover there is one very important element of good in what is here insisted. In real life it would hardly ever be certain that the man on the narrow track would be killed. Perhaps he might find a foothold on the side of the tunnel and cling on as the vehicle hurtled by. The driver of the tram does not then leap off and brain him with a crowbar. The judge, however, needs the death of the innocent man for his (good) purposes. If the victim proves hard to hang he must see to it that he dies another way. To choose to execute him is to choose that this evil shall come about, and this must therefore count as a certainty in weighing up the good and evil involved. The distinction between direct and oblique intention is crucial here, and is of great importance in an uncertain world. Nevertheless this is no way to defend the doctrine of double effect. For the question is whether the difference between aiming at something and obliquely intending it is in itself relevant to moral decisions; not whether it is important when correlated with a difference of certainty in the balance of good and evil. Moreover we are particularly interested in the application of the doctrine of the double effect to the question of abortion, and no one can deny that in medicine there are sometimes certainties so complete that it would be a mere quibble to speak of the 'probable outcome' of this course of action or that. It is not, therefore, with a merely philosophical interest that we should put aside the uncertainty and scrutinize the examples to test the doctrine of the double effect. Why can we not argue from the case of the

steering driver to that of the judge?

Another pair of examples poses a similar problem. We are about to give a patient who needs it to save his life a massive dose of a certain drug in short supply. There arrive, however, five other patients each of whom could be saved by one-fifth of that dose. We say with regret that we cannot spare our whole supply of the drug for a single patient, just as we should say that we could not spare the whole resources of a ward for one dangerously ill individual when ambulances arrive bringing in victims of a multiple crash. We feel bound to let one man die rather than many if that is our only choice. Why then do we not feel justified in killing people in the interests of cancer research or to obtain, let us say, spare parts for grafting on to those who need them? We can suppose, similarly, that several dangerously ill people can be saved only if we kill a certain individual and make a serum from his dead body. (These examples are not over-fanciful considering present controversies about prolonging the life of mortally ill patients whose eyes or kidneys are to be used for others.) Why cannot we argue from the case of the scarce drug to that of the body needed for medical purposes? Once again the doctrine of the double effect comes up with an explanation. In one kind of case but not the other we aim at the death of an innocent man.

A further argument suggests that if the doctrine of the double effect is rejected this has the consequence of putting us hopelessly in the power of bad men. Suppose for example that some tyrant should threaten to torture five men if we ourselves would not torture one. Would it be our duty to do so, supposing we believed him, because this would be no different from choosing to rescue five men from his torturers rather than one? If so, anyone who wants us to do something we think wrong has only to threaten that otherwise he himself will do something we think worse. A mad murderer, known to keep his promises, could thus make it our duty to kill some innocent citizen to prevent him from killing two. From this conclusion we are again rescued by the doctrine of the double effect. If we refuse, we foresee that the greater number will be killed but we do not intend it: it is he who intends (that is strictly or directly intends) the death of innocent persons; we do not.

At one time I thought that these arguments in favor of the doctrine of the double effect were conclusive, but I now believe that the conflict should be solved in another way. The clue that we should follow is that the strength of the doctrine seems to lie in the distinction it makes between what we do (equated with direct intention) and what we allow (thought of as obliquely intended). Indeed it is interesting that the disputants tend to argue about whether we are to be held responsible for what we allow as we are for what we do.⁴ Yet it is not obvious that this is what they should be discussing, since the distinction between what one does and what one allows to happen is not the same as that between direct and oblique intention. To see this one has only to consider that it is possible deliberately to allow something to happen, aiming at it either for its own sake or as part of one's plan for obtaining something else. So one person might want another person dead and deliberately allow him to die. And again one may be said to do things that one does not aim at, as the steering driver would kill the man on the track. Moreover there is a large class of things said to be brought about rather than either done or allowed where either kind of intention is possible. So it is possible to bring about a man's death by getting him to sea in a leaky boat, and the intention of his death may be either direct or oblique. Whatever it may, or may not, have to do with the doctrine of the double effect; the idea of allowing is worth looking into in this context. I shall leave aside the special case of giving permission, which involves the idea of authority, and consider the two main divisions into which cases of allowing seem to fall. There is firstly the allowing which is forbearing to prevent. For this we need a sequence thought of as somehow already in train, and something that an agent could do to intervene. (The agent must be able to intervene, but does not do so.) So, for instance, he could warn someone, but allows him to walk into a trap. He could feed an animal but allows it to die for lack of food. He could stop a leaking tap but allows the water to go on flowing. This is the case of allowing with which we shall be concerned, but the other should be mentioned. It is the kind of al-

⁴See, e.g., J. Bennett, 'Whatever the Consequences', *Analysis*, January 1966, and G. E. M. Anscombe's reply in *Analysis*, June 1966. See also Miss Anscombe's 'Modern Moral Philosophy' in *Philosophy*, January 1958.

lowing which is roughly equivalent to enabling; the root idea being the removal of some obstacle which is, as it were, holding back a train of events. So someone may remove a plug and allow water to flow; open a door and allow an animal to get out; or give someone money and allow him to get back on his feet.

The first kind of allowing requires an omission, but there is no other general correlation between omission and allowing, commission and bringing about or doing. An actor who fails to turn up for a performance will generally spoil it rather than allow it to be spoiled. I mention the distinction between omission and commission only to set it aside. Thinking of the first kind of allowing (forbearing to prevent), we should ask whether there is any difference, from the moral point of view, between what one does or causes and what one merely allows. It seems clear that on occasions one is just as bad as the other, as is recognized in both morality and law. A man may murder his child or his aged relatives by allowing them to die of starvation as by giving poison; he may also be convicted of murder on either account. In another case we would, however, make a distinction. Most of us allow people to die of starvation in India and Africa, and there is surely something wrong with us that we do; it would be nonsense, however, to pretend that it is only in law that we make the distinction between allowing people in the under developed countries to die of starvation and sending them poisoned food. There is worked into our moral system a distinction between what we owe people in the form of aid and what we owe them in the way of non-interference. Salmond, in his jurisprudence, expressed as follows the distinction between the two.

A positive right corresponds to a positive duty, and is a right that he on whom the duty lies shall do some positive act on behalf of the person entitled. A negative right corresponds to a negative duty, and is a right that the person bound shall refrain from some act which would operate to the prejudice of the person entitled. The former is a right to be positively benefited; the latter is merely a right not to be harmed⁵.

As a general account of rights and duties this is defective, since not all

⁵J. Salmond, *Jurisprudence*, 11th edition, p. 283.

are so closely connected with benefit and harm. Nevertheless for our purposes it will do well. Let us speak of negative duties when thinking of the obligation to refrain from such things as killing or robbing, and of the positive duty, e.g., to look after children or aged parents. It will be useful, however, to extend the notion of positive duty beyond the range of things that are strictly called duties, bringing acts of charity under this heading. These are owed only in a rather loose sense, and some acts of charity could hardly be said to be owed at all, so I am not following ordinary usage at this point.

Let us now see whether the distinction of negative and positive duties explains why we see differently the action of the steering driver and that of the judge, of the doctors who withhold the scarce drug and those who obtain a body for medical purposes, of those who choose to rescue five men rather than one man from torture and those who are ready to torture the one man themselves in order to save five. In each case we have a conflict of duties, but what kind of duties are they? Are we, in each case, weighing positive duties against positive, negative against negative, or one against the other? Is the duty to refrain from injury, or rather to bring aid?

The steering driver faces a conflict of negative duties, since it is his duty to avoid injuring five men and also his duty to avoid injuring one. In the circumstances he is not able to avoid both, and it seems clear that he should do the least injury he can. The judge, however, is weighing the duty of not inflicting injury against the duty of bringing aid. He wants to rescue the innocent people threatened with death but can do so only by inflicting injury himself. Since one does not in general have the same duty to help people as to refrain from injuring them, it is not possible to argue to a conclusion about what he should do from the steering driver case. It is interesting that, even where the strictest duty of positive aid exists, this still does not weigh as if a negative duty were involved. It is not, for instance, permissible to commit a murder to bring one's starving children food. If the choice is between inflicting injury on one or many there seems only one rational course of action; if the choice is between aid to some at the cost of injury to others, and refusing to inflict the injury to bring the aid, the whole matter is open

to dispute. So it is not inconsistent of us to think that the driver must steer for the road on which only one man stands while the judge (or his equivalent) may not kill the innocent person in order to stop the riots. Let us now consider the second pair of examples, which concern the scarce drug on the one hand and on the other the body needed to save lives. Once again we find a difference based on the distinction between the duty to avoid injury and the duty to provide aid. Where one man needs a massive dose of the drug and we withhold it from him in order to save five men, we are weighing aid against aid. But if we consider killing a man in order to use his body to save others, we are thinking of doing him an injury to bring others aid. In an interesting variant of the model, we may suppose that instead of killing someone we deliberately let him die. (Perhaps he is a beggar to whom we are thinking of giving food, but then we say 'No, they need bodies for medical research.')

Here it does seem relevant that in allowing him to die we are aiming at his death, but presumably we are inclined to see this as a violation of negative rather than positive duty. If this is right, we see why we are unable in either case to argue to a conclusion from the case of the scarce drug. In the examples involving the torturing of one man or five men, the principle seems to be the same as for the last pair. If we are bringing aid (rescuing people about to be tortured by the tyrant), we must obviously rescue the larger rather than the smaller group. It does not follow, however, that we would be justified in inflicting the injury, or getting a third person to do so, in order to save the five. We may therefore refuse to be forced into acting by the threats of bad men. To refrain from inflicting injury ourselves is a stricter duty than to prevent other people from inflicting injury, which is not to say that the other is not a very strict duty indeed.

So far the conclusions are the same as those at which we might arrive following the doctrine of the double effect, but in others they will be different, and the advantage seems to be all on the side of the alternative. Suppose, for instance, that there are five patients in a hospital whose lives could be saved by the manufacture of a certain gas, but that this inevitably releases lethal fumes into the room of another patient whom for some reason we are unable to move. His death, being of no use to us, is clearly a side effect, and not directly intended. Why

then is the case different from that of the scarce drug, if the point about that is that we foresaw but did not strictly intend the death of the single patient? Yet it surely is different. The relatives of the gassed patient would presumably be successful if they sued the hospital and the whole story came out. We may find it particularly revolting that someone should be used as in the case where he is killed or allowed to die in the interest of medical research, and the fact of using may even determine what we would decide to do in some cases, but the principle seems unimportant compared with our reluctance to bring such injury for the sake of giving aid.

My conclusion is that the distinction between direct and oblique intention plays only a quite subsidiary role in determining what we say in these cases, while the distinction between avoiding injury and bringing aid is very important indeed. I have not, of course, argued that there are no other principles. For instance it clearly makes a difference whether our positive duty is a strict duty or rather an act of charity: feeding our own children or feeding those in faraway countries. It may also make a difference whether the person about to suffer is one thought of as uninvolved in the threatened disaster, and whether it is his presence that constitutes the threat to the others. In many cases we find it very hard to know what to say, and I have not been arguing for any general conclusion such as that we may never, whatever the balance of good and evil, bring injury to one for the sake of aid to others, even when this injury amounts to death. I have only tried to show that even if we reject the doctrine of the double effect we are not forced to the conclusion that the size of the evil must always be our guide.

Let us now return to the problem of abortion, carrying out our plan of finding parallels involving adults or children rather than the unborn. We must say something about the different cases in which abortion might be considered on medical grounds.

First of all there is the situation in which nothing that can be done will save the life of child and mother, but where the life of the mother can be saved by killing the child. This is parallel to the case of the fat man in the mouth of the cave who is bound to be drowned with the others if nothing is done. Given the certainty of the outcome, as it

was postulated, there is no serious conflict of interests here, since the fat man will perish in either case, and it is reasonable that the action that will save someone should be done. It is a great objection to those who argue that the direct intention of the death of an innocent person is never justifiable that the edict will apply even in this case. The Catholic doctrine on abortion must here conflict with that of most reasonable men. Moreover we would be justified in performing the operation whatever the method used, and it is neither a necessary nor a good justification of the special case of hysterectomy that the child's death is not directly intended, being rather a foreseen consequence of what is done. What difference could it make as to how the death is brought about?

Secondly we have the case in which it is possible to perform an operation which will save the mother and kill the child or kill the mother and save the child. This is parallel to the famous case of shipwrecked mariners who believed that they must throw someone overboard if their boat was not to founder in a storm, and to the other famous case of the two sailors, Dudley and Stephens, who killed and ate the cabin boy when adrift on the sea without food. Here again there is no conflict of interests so far as the decision to act is concerned; only in deciding whom to save. Once again it would be reasonable to act, though one would respect someone who held back from the appalling action either because he preferred to perish rather than do such a thing or because he held on past the limits of reasonable hope. In real life the certainties postulated by philosophers hardly ever exist, and Dudley and Stephens were rescued not long after their ghastly meal. Nevertheless if the certainty were absolute, as it might be in the abortion case, it would seem better to save one than none. Probably we should decide in favor of the mother when weighing her life against that of the unborn child, but it is interesting that, a few years later, we might easily decide it the other way.

The worst dilemma comes in the third kind of example where to save the mother we must kill the child, say by crushing its skull, while if nothing is done the mother will perish but the child can be safely delivered after her death. Here the doctrine of the double effect has been

invoked to show that we may not intervene, since the child's death would be directly intended while the mother's would not. On a strict parallel with cases not involving the unborn we might find the conclusion correct though the reason given was wrong. Suppose, for instance, that in later life the presence of a child was certain to bring death to the mother. We would surely not think ourselves justified in ridding her of it by a process that involved its death. For in general we do not think that we can kill one innocent person to rescue another, quite apart from the special care that we feel is due to children once they have prudently got themselves born. What we would be prepared to do when a great many people were involved is another matter, and this is probably the key to one quite common view of abortion on the part of those who take quite seriously the rights of the unborn child. They probably feel that if enough people were involved one must be sacrificed, and they think of the mother's life against the unborn child's life as if it were many against one. But of course many people do not view it like this at all, having no inclination to accord to the foetus or unborn child anything like ordinary human status in the matter of rights. I have not been arguing for or against these points of view but only trying to discern some of the currents that are pulling us back and forth. The levity of the examples is not meant to offend.