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A Kantian Revision of the Doctrine of Double Effect

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Claremont McKenna College

A Kantian Revision of the Doctrine of Double Effect

submitted to
Professor Alex Rajczi

by
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Abstract

In this paper, I will present a Kantian revision of the Doctrine of Double Effect (DDE). In order to do so, I will explain the concept of jus in bello – focusing in particular on the distinction between intent and foresight. I will then argue that we ought to take an agency-inspired look at the DDE. Finally, I will conclude by arguing for my thesis that Boyle's theory of agency, while good, needs to be revised in order to accommodate concerns stemming from Kant's Formula of Humanity... namely consent.

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Chapter 1: Introduction to Ethical Problems in War

Before entering into a discussion regarding the Doctrine of Double Effect, it will prove pertinent to first engage the idea of there being ethical problems in warfare more generally. As Michael Walzer writes in *Just and Unjust Wars*, “war is hell.” (Walzer, 22) What Walzer meant in saying this is that, “(during war) people are killed with every conceivable brutality, and all sorts of people, without distinction of age or sex or moral condition, are killed.” (ibid) History supports Walzer’s assertion. Think of the roughly 120,000 (at the lowest estimate) Japanese civilians who were killed when the United States dropped two atomic bombs on Hiroshima and Nagasaki. Think of America’s use of drones in the war on terror, which results in headlines such as, “41 men targeted but 1,147 people killed: US drone strikes – the facts on the ground.”¹ The sheer amount of death and destruction that war brings about forces us to ask deep and important questions regarding the ethics of war. When is it permissible to use nuclear weapons in warfare? What rights do innocent civilians have to not be killed? Does a war’s end justify the use of means contrary to our moral intuitions?

These questions are in need of answering because wars have been waged since the beginning of mankind and it doesn’t seem like there will be an end to the bloodshed any time soon. Because of this, a special responsibility is placed upon philosophers who are concerned with ethical dilemmas to develop frameworks by which we might better understand the morality of war. In *Just and Unjust Wars*, Walzer sets out to do just this

¹ Ackerman, Spencer. "41 Men Targeted but 1,147 People Killed: US Drone Strikes – the Facts on the Ground." *The Guardian*. Guardian News and Media, 24 Nov. 2014. Web. 24 Apr. 2016. <<http://www.theguardian.com/us-news/2014/nov/24/-sp-us-drone-strikes-kill-1147>>.

by breaking the morality of war down into three categories: jus ad bellum, jus in bello, and jus post bellum. When translated, these refer to: (1) the criteria that must be met in order to justify a state's going to war, (2) what actions are morally permissible (or not) *during* war, and (3) how we might justly *end* wars. In this paper, I will focus exclusively on jus in bello and, in particular, the Doctrine of Double Effect (DDE). I will conclude by arguing that proponents of the DDE ought to move from an intent/foreseeability standard to an agency-focused one that emphasizes the importance of the consent of the harmed. But we're getting ahead of ourselves here. In the next section, we'll examine jus in bello more broadly and show *why*, exactly, we ought to care about things like the Doctrine of Double Effect.

1a: Jus in Bello

Walzer writes that jus in bello concerns itself with, "the observance or violation of the customary and positive rules of engagement." (Walzer, 21) According to the International Committee of the Red Cross, jus in bello, "is the law that governs the way in which warfare is conducted," and that, "it seeks to minimize suffering in armed conflicts, notably by protecting and assisting all victims of armed conflict to the greatest extent possible."²

My rationale for focusing exclusively on jus in bello stems from my primary concern that, historically speaking, war and the deaths of innocent civilians have been mutually inclusive. But this presents a problem. The average Joe, who works an office job in order to put food on the table for his family, could not be further removed from the

² "Jus in Bello - Jus Ad Bellum." *International Committee of the Red Cross*. N.p., 2014. Web. 24 Apr. 2016. <<https://www.icrc.org/en/war-and-law/ihl-other-legal-regimes/jus-in-bello-jus-ad-bellum>>.

decision making that goes on when his politicians and leaders choose to go to war with another country.³ Something thus seems intuitively wrong when Joe and his entire family are killed as a result of, say, a drone strike. It also seems intuitively wrong to me to suggest that his death is an unavoidable consequence of war. This, to me, represents a serious violation of the basic human right to life.

As Walzer states, *jus in bello*, “is founded on the rights of life and liberty...” (Walzer, 123) And while we might take a philosophical view of the matter, we need look no further than our intuitions to realize that the murder of non-combatants is something we’d like to avoid at all costs.⁴ And insofar as we agree with the claim that the rights to life and liberty are moral goods, then a need arises to develop a standard by which warring countries may abide in order to reduce the suffering of innocent civilians to the greatest extent possible.

Understanding this, let us examine several of the concepts that form the foundation of *jus in bello*. One of these we’ve already mentioned, albeit briefly, and that is the Principle of Non-Combatant Immunity. Let’s use another example to illustrate this concept. Suppose that two countries, X and Y, are at war and that X murders thousands of Y’s citizens⁵ in an attempt to demoralize Y into surrendering. The intuition that I, and many others, have in this situation is that X’s actions are morally reprehensible. Now,

³ Qualification: Many philosophers have argued that citizens in democratic countries who *do* vote for officials (that advocate war) *are* responsible for warfare that subsequently occurs (Alex Rajczi, e-mail message to author, April 20, 2016). We won’t engage this idea for the purposes of this paper. For now, assume that Joe is a pacifist and that he has never voted for an official in his life.

⁴ Note that I am *not* claiming that a state may not permissibly and intentionally target *combatants*. While the right to life is one that I believe to be intrinsically valuable, the fact remains that soldiers *will* die during war. Here, I am making a claim about killing non-combatants. The right to kill combatant or enemy soldiers is one that I will not evaluate in this paper.

⁵ And assume for the sake of the argument that all of these citizens are innocent non-combatants, i.e., they have no stake in the war at hand, none voted for their elected officials, etc.

imagine another scenario in which soldiers from both X and Y are engaged in battle, and X succeeds in killing Y's combatants. Intuitively, X's actions here seem less wrong – from a moral standpoint – than they did in the first scenario. There thus seems to be an intuitive distinction, one that results in different moral judgments, between killing soldiers and murdering civilians.

Another concept that forms the basis of jus in bello is the rule of proportionality. As Walzer writes, the rule of proportionality, historically speaking, states that when a nation decides to attack, say, its rivals' munitions factory, the number of civilian casualties that result must not be disproportionate to the value obtained in destroying said factory (Walzer, 219). Let's appeal to an intuitive argument for proportionality to better explain the concept. It appears intuitive that a nation not attempt to destroy a munitions factory if the value of its destruction is very little and the collateral damage that would result is very high. This intuition stems from the basic tenet of jus in bello that we ought to reduce suffering and the loss of human life to the greatest extent possible.

1b: The Doctrine of Double Effect (DDE)

The best way, perhaps, to explain the Doctrine of Double Effect (DDE) is through the use of an example. Imagine that a terrorist organization called, "Z," exists that uses its influence and control of its region to perpetuate extreme violations of human rights. Imagine also that Z has launched successful attacks on nations like the United States that have resulted in the deaths of a countless number of innocent civilians and that, as a result, the US has decided to wage war with Z. Now, suppose that information is relayed to the President of the United States (POTUS) that many leading members of X are meeting at a farm in rural Germany to discuss Z's future plans. The information relayed

to POTUS indicates that bombing the farm will result in the death of Z's leading members as well as the ending of Z's regime. However, it is also the case that one innocent person – the farmer himself – will be killed in the bombing.

Many people, when presented with this hypothetical scenario, might say that intuitively, the death of the farmer may be justified if it results in the collapsing of Z's reign of terror. The Doctrine of Double Effect seeks to make sense of this intuition. First developed by Catholics like Thomas Aquinas, the DDE seeks to reconcile, "the absolute prohibition against attacking noncombatants with the legitimate conduct of military activity." (Walzer, 152-53) It may be broken down as followed: "it is permitted to perform an act likely to have evil consequences (the killing of noncombatants) provided the four conditions hold:

1. The act is good in itself or at least indifferent, which means, for our purposes, that it is a legitimate act of war.
2. The direct effect is morally acceptable – the destruction of military supplies, for example, or the killing of enemy soldiers.
3. The intention of the actor is good, that is, he aims only at the acceptable effect; the evil is not one of his ends, nor is it a means to his ends.
4. The good effect is sufficiently good to compensate for allowing the evil effect; it must be justifiable under Sidgwick's proportionality rule." (Walzer, 153)

Let's examine our hypothetical scenario under these four rules. First, it certainly appears the case that the act in question – bombing the farm and killing Z's leading members – is a legitimate act of war. Check. Second, the direct effect is morally acceptable (enemy soldiers will be killed). Check. Third, the intention of POTUS is good because he, "aims only at the acceptable effect," that is... his *intention* is to kill the leaders of Z and collapse its regime. The death of the farmer, "is not one of his ends, nor is it a means to his ends." (ibid) Check. Finally, "the good effect is sufficiently good to

compensate for allowing the evil effect.” (ibid) More specifically, the value in destroying Z once and for all makes sense from a proportional (and intuitive) standpoint to the single innocent life that will be lost as a result. Check.

As I have just shown, the DDE and its four rules allow us to make sense of the intuition that POTUS would be acting morally if he were to go ahead and bomb the farm, putting an end to Z’s tyrannical and evil regime as a result. The problem, however, is that an innocent life is still lost in the process. In the following section, we’ll address this concern more thoroughly. In order to do so, we’ll look at specific problems inherent in the DDE and at the distinction between intent and foreseeability – which I argue is insufficient to make sense of our intuitions in the full range of DDE cases.

1c: Intent v. Foreseeability

The best way to highlight the distinction between intent and foreseeability that I have mentioned is by examining Warren S. Quinn’s strategic bomber (SB) / terror bomber (TB) thought experiment.

Imagine that there exists a terror bomber who, “deliberately kills innocent civilians in order to demoralize the enemy.” (Quinn, 336) Imagine also that there is a strategic bomber who plans on bombing, “an enemy factory in order to destroy its productive capacity,” despite knowing that innocent lives will be lost as a result (ibid). Now, many of us intuitively feel that there’s a difference, from a moral standpoint, between the deaths in the TB case and the deaths in the SB case. The DDE seeks to explain why TB’s actions are wrong and SB’s might be considered morally permissible. It does so by highlighting the fact that while TB *intends* to murder civilians, SB merely *foresees* that innocents will die as a result of his actions. In order to see how this plays

out, let's apply the four rules of the DDE to the strategic bomber... (1) SB's act certainly appears to be a legitimate act of war, (2) his effect is morally acceptable, i.e., the destruction of the enemy's factory, (3) his **intention** is good... that is, he does not intend on killing civilians, only on destroying the factory, and (4) the good that comes about in destroying the factory outweighs the bad, foreseen consequence of the deaths of innocent civilians.

Now, let's apply the four rules of the DDE to the terror bomber: (1) TB's actions do not seem legitimate [targeting of innocent civilians], (2) the effect he seeks is morally reprehensible, (3) TB's **intentions** are bad, i.e., he intends on murdering civilians, and (4) no good appears to come from his actions to justify bringing in the rule of proportionality.

The role that intent and foreseeability plays in our moral intuitions here is clear. While the strategic bomber does not intend to kill civilians, the terror bomber does. This mere fact alone provides contrasting responses to the third rule of the DDE, which specifically mentions intention as a criterion for evaluating Double Effect cases. Let's pause for a moment. I mentioned earlier that the strategic bomber does not *intend* to kill civilians, only that he *foresees* that casualties will result from his attempting to destroy the factory. But the question arises whether foreseeing that death will occur as a result of one's actions is morally relevant from intending that a death occur. I will argue in the next chapter that it is not.

Chapter 2: Agency v. Intent

In Chapter 1, I presented the idea of there being ethical problems in warfare. I went on to show that one rule of *jus in bello*, the Doctrine of Double Effect, provides guidelines by which we might judge actions that result in civilian deaths as being either morally good or morally bad. I concluded my introduction by showing that intent and foresight play a large role in Double Effect cases and, consequently, on our moral evaluations of actions undertaken during war. If you'll recall, we ended with the question of whether or not the distinction between intent and foresight as presented is morally relevant. I argue that it isn't. In order to understand my position, let us examine Joseph M. Boyle's *Toward Understanding the Principle of Double Effect*.

Boyle argues that while, in the past, philosophers have attempted to draw a distinctive line between intent and foresight, "it is... not clear what significance this difference has – supposing it (the line) can be drawn – for purposes of the moral evaluation of acts. Even if one admits that acts are defined by the agent's intentions and distinguished from foreseen consequences which are merely 'permitted,' one might wonder why it is that an agent's acts have a moral significance which is different from – and more decisive than – the moral significance of the foreseen consequences of what he does." (Boyle, 533) Let's unpack this notion, as it is one that I agree with, a bit further. While the DDE might help us to understand why the terror bomber is seen as being, from an intuitive standpoint, morally worse than the strategic bomber, the fact remains that in both cases innocent civilians die. Now, as I've mentioned earlier, many philosophers have used the DDE to argue that the strategic bomber's actions are actually morally

permissible *if* other conditions of the DDE are met. What Boyle hints at – correctly in my mind – is that even if the foreseen consequences of SB may be permissible under the DDE, it's unclear as to whether this fact alone changes the, “moral significance,” of SB's actions. This is because our intuitive notion – that the deaths of innocent civilians is wrong – holds true for both the terror and strategic bomber cases.

Still, the need remains for Boyle – insofar as he is attempting to vindicate the distinction between intent/foresight – to provide an alternate proposal of said distinction if we're to make sense of the DDE given the DDE's own intuitive appeal. Boyle puts forth a solution based on the agency of actors. As he writes, cases like SB and TB ought to be evaluated according to the, “state of affairs,” intended by the agent in question (Boyle, 534). We may interpret the phrase, “state of affairs,” as being *what* an agent seeks to achieve in choosing to act in one way or the other. Let's pause. A lot of the terminology Boyle uses deviates somewhat from every day English because his article is, for the most part, aimed at philosophers. As such, we'd do well to explicitly define these terms in more detail. When we *choose* to, say, bomb an enemy's factory, we're choosing to, “bring about a certain definite state of affairs.” (Boyle, 535) Insofar as this decision is a, “deliberate free choice[s],” Boyle writes that the, “primary subject of moral evaluations,” ought to be the choices themselves (Boyle, 534). Technically speaking, choices are defined as choosing to bring about state of affair P as opposed to state of affair Q, or vice versa (ibid).

The following question arises from the preceding paragraph: how does an agency-focused interpretation of the DDE differ from an intent/foresight one? Boyle answers this

by appealing to the, “Surgery Example.”⁶ Imagine that in an emergency room, a patient (A) – who is unconscious and will die if surgery does not take place, is put under the care of a surgeon. Imagine also, however, that a high possibility exists that A will be paralyzed as a result of the operation. The intent/foresight distinction here should be clear: (1) the surgeon intends to cure the patient while at the same time (2) foreseeing that she may be paralyzed as a result of the surgery. Now, suppose that the surgeon chooses to go ahead with the operation, that A is paralyzed as a result, and that A comes up to the surgeon afterwards and asks, “why did you paralyze me?” The intuitive response that the surgeon would give in response might go something like followed, “You were about to die, I had no choice but to operate as my intent was to save your life, and I took every possible measure to limit the harm, e.g., paralyzation, that I foresaw as a high possibility.” Here, the surgeon defers to Boyle’s claim that what we foresee, “are conditions in spite of which we act.” (Boyle, 535)

In this example, the surgeon does not *choose* the foreseen negative side-effect of paralyzation (ibid). This is where Boyle’s theory of agency comes back into the picture. While choices and the execution of those choices *are* voluntary – and thus subject to moral evaluations – foreseen side-effects are *not* (ibid). Let’s consider this statement in greater detail. While the surgeon chooses to operate on the patient, he does not choose to paralyze her. Indeed, the surgeon⁷ actually seeks to *avoid* paralyzing A if possible. Likewise, while the strategic bomber chooses to bring about a state of affairs in which an enemy’s productive factory is destroyed, he does not choose to kill innocent civilians

⁶ Boyle does not call this example the, “Surgery Example,” explicitly, but I refer to it as such for the sake of brevity/understandability.

⁷ Insofar he is sound from a medical ethics standpoint

because, like the surgeon, he'd avoid doing so if he could. According to this theory of agency, "choosing and committing to a state of affairs makes you moral or not." (Boyle, 537) In the surgery and strategic bomber examples, agents do not *choose* to execute states of affairs in which unnecessary harm is caused, though they foresee that it will be. The foreseen harms in both instances are therefore not reasons for acting but simply, "conditions in spite of which one acts." (Boyle, 535)

Boyle's proposed theory of agency not only explains tricky scenarios like the Surgery Example, but also illuminates the difference between the strategic and terror bomber cases by better vindicating the distinction between intent and foresight. As I've said earlier, the strategic bomber would like to avoid killing innocent civilians if possible. The same, however, cannot be said of the terror bomber. As Boyle states, it is *choosing* to follow through with a specific course of action that makes one moral or not. As I've shown, there's a sense in which the strategic bomber and surgeon do not choose to cause harm.⁸ The terror bomber, on the other hand, undoubtedly *does*. In other words, killing civilians for TB *is* the choice that he executes.

We may summarize the main takeaway of the preceding paragraph in another way. For SB, what he wants (the destruction of the enemy's factory) is unfortunately and due to circumstance, inextricably tied to what he'd avoid if possible (the deaths of innocent civilians). For TB, what he wants (the demoralization of the enemy) is *not* tied – whether because of circumstance or the like – to what he'd avoid if possible. In fact, the TB would kill *more* civilians if he could. All of this relates back to Boyle's second point

⁸ Because doing so isn't part of the state of affairs they wish to bring about – relating back to Boyle's definitions of agency and choice.

that there exists a difference in attitude between an agent who intends harm and an agent who foresees harm will occur as a result of his actions (Boyle, 536). SB, if told that more civilians were killed than initially expected, would cry out in despair. TB, if told that more civilians were killed than initially expected, would rejoice.⁹ Furthermore, there's the intuitive sense that SB does not commit, "murder," while TB *does*. Traditionally speaking, murder is defined as the intentional killing of another human being.¹⁰

From this it follows, intuitively, that not *all* civilian deaths may be considered murder under Boyle's agency-focused interpretation of the DDE.¹¹ This is because, "the actual world is such that the realization of most human choices is by way of causal initiatives which bring about many states of affairs other than that state of affairs which the agent *intends*¹² to realize through his performance,"¹³ second, "some of these states of affairs are contrary to one or more basic goods,"¹⁴ and finally, "these facts require that one committed to a normative theory demanding respect for a set of basic goods hold the ~~PDE~~ DDE."¹⁵ (Boyle, 538) This is because if one does not, "respecting the goods becomes an impossibility, since any performance can – and many performances do – bring about what is contrary to one or more basic goods." (ibid)

⁹ Note that some philosophers, such as Warren S. Quinn, have argued that actually, both SB and TB must celebrate the deaths of innocent civilians. This is because these deaths are, for Quinn, TB's goal and because SB would not have succeeded in executing his chosen state of affairs if the foreseen deaths of civilians does not occur (Quinn, 347)

¹⁰ Alex Rajczi, e-mail message to author, April 20, 2016

¹¹ Even if the strategic bomber's actions *do* result in the deaths of civilians.

¹² Here, Boyle argues that the distinction between intent and foresight might be better explained through deference to the, "states of affairs," one actually chooses, intends, and commits to.

¹³ e.g., the surgeon chooses to bring about a state of affair in which his patient is cured, but this results in a consequent state of affair in which the patient is paralyzed

¹⁴ e.g., the paralyzation of A seems bad; the killing of innocent civilians in the SB case seems bad

¹⁵ Because one must always weigh the state of affairs one intends on realizing against the consequent, negative states of affairs that might result and because one must – at least in the examples shown – make a decision in the end whether to proceed or not.

Boyle concludes by stating that, “to sum up: the ~~PDE~~ DDE is a coherent doctrine of justification. But it continues to be misunderstood because the theory of agency which it presupposes is ignored. If this view of human agency is false, then the ~~PDE~~ DDE must be abandoned; but if this theory of agency is true, and if the normative theory which makes use of the ~~PDE~~ DDE can be defended, then the ~~PDE~~ DDE is a long way toward vindication.” (ibid) As I have stated, I – for the most part – agree with Boyle’s theory of agency. That being said, I believe it must be revised in order to accommodate specific concerns – namely Kantian ones – that Boyle does not explicitly address. In the following chapter, I will raise these concerns and show that unintuitive results arise when we take Boyle’s argument as presented.

Chapter 3: Kantian Concerns Regarding the Theory of Agency Proposed by Boyle

In Chapter 2, I evaluated Joseph M. Boyle's proposed revision of the Doctrine of Double Effect, which seeks to vindicate the intent/foresight distinction by bringing in an additional, agency-focused aspect. I then went on to provide arguments for why such a view coheres better with the DDE.¹⁶ I ended the chapter by claiming that though I agree that an agency-focused interpretation of the distinction between intent/foresight seems more plausible than a purely intent/foresight one, problems still remain with Boyle's argument as presented. In this chapter, I will highlight these problems and show that they arise from his neglecting to consider Kantian concerns. And because Boyle argues that *if* his theory of agency is correct, "... then the ~~PDE~~ DDE is a long way toward vindication," it is necessary to determine whether the problems I'll raise in this chapter impel us to revise his theory so as to better vindicate the DDE *as well as* his agency-focused interpretation of the distinction between intent/foresight (Boyle, 538).

3a: Kant's Formula of Humanity (FHE)

Because I'll be raising Kantian concerns regarding the theory of agency proposed by Boyle, it will prove pertinent to explain just what, exactly, Kant says regarding this issue. Kant argues, in his *Groundwork of the Metaphysics of Morals*, that, "every rational being *exists* as an end in itself, *not merely as a means* for the discretionary use for this or that will, but must in all its actions, whether directed towards itself or also to other rational beings, always be considered *at the same time as an end.*" (Kant, 40)

¹⁶ Note that Boyle actually frames this as a conditional. (Boyle, 538)

Andrew Schroeder provides the following analysis/outline of Kant's argument for this claim:

1. "If morality is real...
2. ... it must work like this: we take something that, because its value is unconditional, is a required end for all rational beings; and we use it to ground what is the true principle of a will -- that is, we use it to ground a law for all rational wills.
3. Rational nature, or humanity, is that thing.
4. Any rational being must think of herself in this way -- i.e. as unconditionally valuable.
a. When we act, we must think that the ends we pursue are good. That is, we must think that they're worthwhile in some sense -- otherwise, why would we be pursuing them? (See CPrR 5:60, cf. Gwk 4:428.)
b. We only see these ends as good, though, because of their relationship to our inclinations; if you no longer have a taste for chocolate, it ceases to appear good to you.
c. Therefore, we (ought to?) see these objects as having only conditional value.
d. The condition of their value (i.e. what makes them valuable) can't merely be that we have inclinations towards them, nor can it be the inclinations themselves, since we sometimes think that the objects of our inclination and our inclinations themselves are bad.
e. The condition of their value must be that we chose them -- that they're our ends.
i. Our humanity must have the power to confer value (or we must take it to have that power). (Restatement of 4e.)
ii. To confer value, something must itself have value.
iii. Our humanity is valuable. (<i>From 4e1, 4e2.</i>)
iv. If that value were conditional, something else must be its condition. That is, something else must confer value upon it. (<i>Definition</i>)
v. But, we act as if our choosing something is <i>sufficient</i> to make it valuable. <i>Or</i> (4e5*) There are no other candidates to confer value on humanity.
f. So, we must take our humanity to have unconditional value. (<i>From 4e3, 4e4, 4e5/5*</i>)
5. But we must not forget that, so far, this is merely a claim about how things seem to people when they act -- we haven't proven that rational beings are in fact valuable in this way.

6. Every rational being thinks of herself as unconditionally valuable for this same reason. That is, the same argument which I use to justify my own unconditional value also applies to everyone else.
<ul style="list-style-type: none"> a. (6) just points out that an argument like (4a) – (4f) applies to any rational being. Therefore, to deny that some object had unconditional value, you’d have to: <ul style="list-style-type: none"> i. Deny some step from (4a) to (4f), which is impossible for any rational agent to do. ii. Deny the object was a rational being. (The only premises in the argument for (4) relied on facts about rational nature; therefore they hold of any rational being.)
7. Therefore, we can conclude that we all must think of each other as unconditionally valuable; this can be used to ground all laws of rational action.
8. From the above, we can conclude that in all action, we’re required to never treat humanity as a mere means, but rather always at the same time as an end.
<ul style="list-style-type: none"> a. A means is by definition conditionally valuable, and <i>qua</i> means, it is only conditionally valuable. Therefore, if you regard something as unconditionally valuable, you regard it not merely as a means, i.e. as an end. Thus, if you ought regard humanity as unconditionally valuable, you ought always regard it as an end, and never merely a means.”¹⁷

The preceding argument for Kant’s Formula for Humanity may be concluded as, “if you ought regard humanity as unconditionally valuable, you ought always regard it as an end, and never merely a means.”¹⁸ This point is echoed in the quotation from Kant earlier presented. Let’s look at several examples in order to demonstrate this point. The first is the, “Lying Example.” Suppose that you decided to lie to a friend in order to get him to perform action X for you under false pretenses. Insofar as we accept Kant’s argument as true, then you would – in this instance – be using your friend as a means to

¹⁷ Andrew Schroeder, Sakai post to author, April 4, 2016.

¹⁸ *ibid.*

advancing your own agenda. But because this violates the Formula of Humanity argued for above, according to Kant, your decision to lie would be immoral.¹⁹

Now, Warren S. Quinn, in *Actions, Intentions, and Consequences: The Doctrine of Double Effect*, utilizes a Kantian interpretation of the DDE. He does so, of course, to make a distinction between direct and indirect harm of the DDE that he believes to be better than a simple intent/foresight distinction (Quinn, 343-344) I will not, for the purposes of this paper, engage Quinn's notion of direct versus indirect harm. That being said, several passages of his essay illuminate precisely what I'm attempting to get at by revising Boyle's proposed theory of agency to a Kantian inspired one. For example, Quinn states that, "civilians in wartime have negative rights not to be killed." (Quinn, 346)²⁰ He goes on to state that, "someone who un-willingly suffers because of what we intend for him as a way of getting our larger goal seems to fall under our power and control in a distinctive way. And there may be something morally problematic in this special relation – something over and above what is morally objectionable in the simpler relation of bringing about or not preventing harm." (Quinn, 348) And, "[the] DDE might therefore seem to rest on special duties of respect for persons, duties over and above any duty not to harm or to prevent harm." (ibid)

Let's pause once again in order to make some clarificatory remarks. Quinn's paper seeks to find a distinction between direct and indirect harm. I will not, for the purposes of this paper, explain this distinction because (1) I do not find that it coheres

¹⁹ In this paper, I will not present my own positive argument for the FHE nor will I defend it. Needless to say, as I am a Kantian, I agree with the FHE wholeheartedly. Delving into its details, however, is beyond the scope of this paper.

²⁰ Again, for the purposes of this paper, we'll not go discuss the distinction between negative and positive rights.

with Boyle's agency-focused interpretation of the DDE and (2) I believe that several of Quinn's statements can stand alone as reasons to support the revision of Boyle's proposed theory so as to accommodate Kant.

Now, Quinn goes on to say that the terror bomber case is unique, "in the particular way in which victims enter into an agent's strategic thinking. An indirect agent (the strategic bomber) may be certain that his pursuit of a goal will leave victims in its wake. But this is not because their involvement in what he does or does not do will be useful to his end. The agent of direct harm (the terror bomber), on the other hand, has something in mind for his victims – he proposes to involve them in some circumstance that will be useful to him precisely because it involves them. *He sees them as material to be strategically shaped or framed by his agency.*" (ibid)²¹

In other words, while the terror bomber treats his victims, "as if they were then and there *for his purposes*," the strategic bomber does not view his his victims, "strategically at all and therefore not treated as for the agent's purposes rather than their own." (ibid) The terror bomber thus, to use Boyle's terminology, brings about a state of affairs in which, "the victims are made to play a role in the service of the agent's goal that is not (or may not be) morally required of them." (Quinn, 349) Furthermore, as Quinn writes, "the DDE rests on the strong moral presumption that those who can be usefully involved in the promotion of a goal only at the cost of something protected by their independent moral rights (such as their life, their bodily integrity, or their freedom)

²¹ Note that this contradicts the quotation from Kant that, "every rational being *exists* as an end in itself, *not merely as a means* for the discretionary use for this or that will, but must in all its actions, whether directed towards itself or also to other rational beings, always be considered *at the same time as an end.*" (Kant, 40)

ought, prima facie, to serve the goal only voluntarily.” (ibid)²² There is thus the intuitive sense, for Quinn, that in the terror bomber case, “... unwilling victims are not only harmed but, in some sense, used.” (Quinn, 350)

And, to conclude, “the Doctrine of Double Effect thus gives each person some veto power over a certain kind of attempt to make the world a better place at his expense,” because, “people have a strong prima facie right not to be sacrificed in strategic roles over which they have no say.” (Quinn, 350-351) As a result of this, a task arises, “... to define the forms of respect that we owe to one another, and the resulting limits that we may not presume to exceed.” In the next chapter, I will propose a definition of respect that, “we owe to one another,” by arguing for a Kantian revision of Boyle’s proposed theory of agency based on the idea of consent. Before doing so, however, we must demonstrate why Boyle’s argument as presented neglects to take FHE considerations into account. It is this task that I will take up in section *3b*.

3b: Applying the Formula of Humanity to Boyle’s Proposed Theory of Agency

3b1: The Issue of Consent

Let’s begin with Boyle’s argument that, “foreseeability is voluntary but not in the same way that executing choices is.” (Boyle, 535) As one will recall, Boyle uses the, “Surgery Example,” in order to demonstrate this point. In Chapter 2, I extended this example to the SB and TB cases. In particular, I stated that under Boyle’s perspective, SB would avoid death if possible while TB would seek it. This difference makes all the

²² Note that Quinn allows for exceptions to this rule in, “cases in which people have or would have strong moral obligations to give themselves to the service of a goal even at such personal costs – especially cases in which it would be indecent of them to refuse.” (Quinn, 349)

difference for Kant, who claims that we ought to treat people as ends-in-themselves, thereby respecting their rights to life (Quinn, 349).²³

The problem with Boyle's surgery example, however, is that we may be unable to extend it to the strategic/terror bomber cases as easily as I did in Chapter 2. This is because, in the surgery example, the foreseen harm is pain and not death. The same cannot be said for SB and TB, where the foreseen harm *is* death. I believe that this – for Kantian reasons – is an important distinction to make. If, for example, you were to ask the patient in the surgery example which he'd prefer – suffering a little pain in order to save his life or dying – I'm certain that he'd pick the former. Such a choice would align itself with the FHE's claim that, "every rational being *exists* as an end in itself," and that rational beings must, "always be considered *at the same time as an end.*" (Kant, 40) Or that, in other words, "any rational being must think of herself in this way – i.e., as unconditionally valuable."²⁴

Furthermore, the difference in the degree of harm in the surgery example when compared to the SB and TB cases weakens the analogy between the two. This is because with SB and TB, we're concerned with death as a harm and not pain as a harm. If you were to ask the innocent civilian who dies as a side-effect of SB's chosen state of affairs whether he'd prefer to die in order to facilitate said state of affairs or to live, I'm certain that he'd pick the latter. The same holds for the TB case.

This brings us to one of my main criticisms of Boyle, which is that he neglects to consider the consent of those who are harmed in his evaluation of the DDE. In his

²³ (Kant, 40)

²⁴ Andrew Schroeder, Sakai post to author, April 4, 2016.

surgery example, there is little doubt that the patient him or herself would *consent* to foreseen harm if it meant that his or her life would be saved. The same cannot be said, however, for the SB and TB cases because the foreseen harm in both *is* death. And who among us would consent to being murdered? Who among us, in both cases, would even be granted the opportunity to choose to consent or not?

By focusing on the agency of the actor, Boyle neglects to consider that the consent of the injured plays as important a role in our moral evaluation of Double Effect cases. In any surgery, patients are informed of the possible side-effects of the operation in question as well as to the possibility of death.²⁵ They're then typically given the option of either choosing to go ahead with the surgery or not. Boyle's example rests on the hidden premise that any rational patient would consent to surgery and its foreseen harms if doing so meant his or her life would be saved. In the SB and TB cases, however, the innocent civilians who lose their lives never consent to dying. This holds true even if they *would* consent, because they're never asked the question in the first place.

3b2: Kant's Formula of Humanity and its Relation to Consent

In section 3b1, I introduced the idea of there being issues of consent with regards to Boyle's proposed theory of agency. In this section, I will explain why Kant's Formula of Humanity illuminates and informs said issues.

As I've stated earlier, Kant states that, "every rational being *exists* as an end in itself, *not merely as a means* for the discretionary use for this or that will, but must in all its actions, whether directed towards itself or also to other rational beings, always be

²⁵ That is, if consent is possible given a specific situation. Emergency surgery situations, like the one I presented earlier, differ in this regard.

considered *at the same time as an end.*” (Kant, 40) Let’s apply this principle to the examples of non-consent written about in section 3b1. If one will recall, I argued that in Boyle’s surgery example, the patient never consents to being operated upon because – first and foremost – she was unconscious when admitted to the emergency room. That being said, it seems likely that she would have consented to the surgery if she were conscious, because doing so was the only possible way that the surgeon could have saved her life. Now, Kant argues that one should treat people as ends in themselves (ibid). In Boyle’s example, the surgeon does not *use* the patient in order to advance his own personal agenda or see his patient, “... as material to be strategically shaped or framed by his agency.” (Quinn, 348) Rather, his end is to bring about a state of affairs in which the patient is cured. In choosing this as his end, he respects the dignity of the patient, as well as the FHE, because he treats his patient’s life as, “unconditionally valuable,” in its own right.²⁶

Let us now apply Kant’s Formula of Humanity to the strategic and terror bomber cases. The strategic bomber does not use the civilians who will die as a consequence of his actions as a means to his end. This is because, as Quinn argues, SB doesn’t see his victims, “strategically at all and therefore not treated as for the agent’s purposes rather than their own.” (Quinn, 348) The terror bomber, on the other hand, takes the attitude that his victims exist, “then and there *for his purposes.*” (ibid) Using Kant’s Formula of Humanity, SB does not treat his victims as a means to realizing his chosen state of affairs, while TB does.

²⁶ Andrew Schroeder, Sakai post to author, April 4, 2016.

3b3: Objections and Subsequent Responses to the Account Provided in 3b2

The main issue with applying Kant's Formula of Humanity to the examples provided in section 3b2 is this: the consent of the injured is never taken into account in any of the three cases. If (1) I am to argue that consent plays a role in the Formula of Humanity and (2) that the surgeon and strategic bomber are morally righteous with regards to the Formula of Humanity while the terror bomber is not, more needs to be (1) said regarding why the non-consent of the victims in the SB case differs from the TB case and (2) why the non-consent in SB does not constitute a violation of the Formula of Humanity. I argue, with regards to (1), that the non-consent in both the SB and TB cases are equivalent in their moral standing but that, with regards to (2) the non-consent in SB does not constitute a violation of the Formula of Humanity in the same way that TB does.

First, it is not the case that consent is equivalent to a general standard of morality.²⁷ For example, when I kill someone in self-defense, the person I harm never consents to being killed.²⁸ That being said, there's an intuitive sense in which my action in this instance is still morally permissible. The famous, "Trolley Problem," demonstrates this idea more explicitly.²⁹ Suppose that you are the conductor of a train and that the train is headed down a path that will undoubtedly kill five people. Suppose further that the only way to save these five people is by switching the train onto another track, that this is the only other option available to you, but that doing so will undoubtedly kill one person. Now, were you to switch the train's path, intuitively, your action would seem permissible. The Doctrine of Double Effect seeks to make sense of these intuitions. Note

²⁷ Alex Rajczi, e-mail message to author, April 20, 2016.

²⁸ *ibid.*

²⁹ *ibid.*

here, however, that the consent of the injured is never taken into account nor is it in the self-defense, emergency surgery, and strategic/terror bomber cases. Thus, there's the sense in which consent does not play a necessary and primary role in the DDE. That being said, as Quinn writes, "the DDE rests on the strong moral presumption that those who can be usefully involved in the promotion of a goal only at the cost of something protected by their independent moral rights (such as their life, their bodily integrity, or their freedom) ought, prima facie, to serve the goal only voluntarily." (Quinn, 349)

The sole victim in the trolley case, the victim in the self-defense case, the patient in the emergency surgery case, and both sets of victims in the TB and SB cases are not harmed voluntarily. But, there remains the sense that, if we're to treat people as ends in themselves, we ought not – according to Kant – use them in the pursuit of our goals without their consent. So two questions arise: (1) does the strategic bomber³⁰ use his victims in the pursuit of his own agenda and (2) does the non-consent of the injured in the SB case violate Kant's Formula of Humanity? My answer to the first question is no; my answer to the second is possibly.³¹

First, it doesn't seem like the strategic bomber uses his victims in order to promote his chosen state of affairs, i.e., the bombing of the factory. Nor does he view his victims as existing, "then and there for his purposes." (Quinn, 348) This relates back to Boyle's claim that, "the actual world is such that the realization of most human choices is by way of causal initiatives which bring about many states of affairs other than that state of affairs which the agent intends to realize through his performance." (Boyle, 538) The

³⁰ And the other related cases, e.g., the trolley case, the self-defense case, and the emergency surgery case.

³¹ And that if it does, it does so in a lesser (from a moral standpoint) way than is the case in the TB example.

state of affairs that the strategic bomber chooses is not the state of affair in which innocent civilians are killed. Indeed, as was stated earlier, SB would avoid the deaths of civilians if it were possible (Chung, 10). So too would the surgeon, the person who kills out of self-defense, and the trolley driver. Thus, there's the intuitive sense in which the harmed in all of these cases are *not* used in the pursuit of their harming agents' chosen states of affair.

The second problem – whether the non-consent in the SB case violates Kant's Formula of Humanity – is a bit of a trickier puzzle to solve. A response one could give to this relates back to the line from Quinn that, “those who can be usefully involved in the promotion of a goal only at the cost of something protected by their independent moral rights (such as their life, their bodily integrity, or their freedom) ought, *prima facie*, to serve the goal only voluntarily.” (Quinn, 349) If we reject the claim that SB does not use his victims as a means to attain his chosen state of affairs, then the issue of consent and voluntariness need not affect Kant's Formula of Humanity because the harmed are not used as a means to an end.³² The conclusion that would logically follow from this would be that SB's action does not violate the Formula of Humanity.

However, it most certainly seems to be the case that we're not respecting the harmed, in the SB case, as ends-in-themselves because they *do* die. The question thus becomes (2a) whether the violation of, “independent moral rights (such as their life, their bodily integrity, or their freedom),” – something seen as intuitively *bad* given Kant's Formula of Humanity – is permissible even if we're not violating these rights in order to promote our own agendas (Quinn, 349).

³² The same holds for the trolley case, the self-defense case, and the emergency surgery case.

Boyle's response to (2a) might go as followed: because, "the actual world is such that the realization of most human choices is by way of causal initiatives which bring about many states of affairs other than that state of affairs which the agent *intends* to realize through his performance," and, "some of these states of affairs are contrary to one or more basic goods," and finally, "these facts require that one committed to a normative theory demanding respect for a set of basic goods hold the ~~PDE~~ DDE." (Boyle, 538) Here, the states of affairs in which victims are harmed is in contrast with basic goods, i.e., the independent moral rights to life, bodily integrity, and freedom, proposed by Kant's Formula of Humanity (Quinn, 349). But if we're committed, as I am, to Kant's basic goods, then, as Boyle states, we must use the DDE in order to actually *respect* said goods.

It's important to note, however, that Boyle makes no reference to the idea of consent that I have claimed is vital to our judgments rising from the DDE. I argue that the non-consent in the SB and TB cases is equivalent because in both instances, civilians are killed – resulting in a violation of their, "independent moral rights to life, bodily integrity, and freedom,"—without their consent (Quinn, 349) That being said, I do not believe that the non-consent in SB represents a violation of Kant's Formula of Humanity in the same way that TB does.

The trolley case is perhaps best useful in demonstrating the argument I am presenting here. Here, one life is sacrificed to save five. Neither the one nor the five, if killed, consent to their lives being taken from them. If we suppose that the trolley driver is a Kantian, however, it still remains a fact that he must choose a course of action, despite knowing that either one he chooses will violate peoples' rights to life. Returning to my claim that consent may not always be able to be given in situations like the trolley

and surgery cases³³, there nevertheless remains an imperative for agents to act in cases where consent isn't an option. This holds true even if the non-consent of the harmed results in a violation of his or her's right to life. But because, as Boyle states, "the actual world is such that the realization of most human choices is by way of causal initiatives which bring about many states of affairs other than that state of affairs which the agent *intends* to realize through his performance," and, "some of these states of affairs are contrary to one or more basic goods," one must, "hold the DDE," so as to (1) "respect a set of basic goods," and (2) make a decision even if the consent of the harmed is unable to be given (Boyle, 538).

In other words, while I accept that taking another's life without their consent is a violation of Kant's Formula of Humanity, I also accept Boyle's claim that the real world contains situations in which consent is simply impossible. If we're to respect the basic rights that humans have to life and their subsequent rights to consent, we must utilize the DDE in situations where consent can't be given so as to *respect* the good of consent *itself*, even if the good is ultimately violated.

Let's apply this notion to the strategic and terror bomber cases. Now, I have argued that: (1) non-consent isn't always immoral because consent is sometimes impossible to be given,³⁴ (2) non-consent need not always result in a violation of Kant's Formula of Humanity,³⁵ (3) SB and TB are both instances in which consent isn't given,

³³ (Chung, 19)

³⁴ (Chung, 22)

³⁵ As shown by the example in which you kill another out of self-defense. While it is certainly true that one's killing another out of self-defense does not respect the latter's independent right to life, it is also true that according to the fourth argument of Kant's Formula of Humanity, rational beings must think of themselves as ends-in-themselves (Kant, 40). Thus, one could argue that it is the person who attempts murder that is violating the Formula of Humanity. The person who subsequently kills out of self-defense does so because she thinks of her life as an end in itself (ibid).

and finally (4) the non-consent in the SB case doesn't represent a violation of Kant's formula in the same way that the non-consent in the TB case does. My argument for (4) stems from Boyle's argument that SB, unlike TB, at least *respects* the good of consent by utilizing the DDE³⁶ while TB does not.³⁷ That being said, as I've said earlier, there still remains the sense that we're not respecting the harmed – with regards to Formula of Humanity – in the SB case as, “ends-in-themselves because they *do* die.” (Chung, 21)

The question thus arises whether we can view SB as similar to the trolley driver in that the latter has no choice but to violate the Formula of Humanity because (1) the single individual who is killed in order to save five never consents to giving his life³⁸ and (2) killing one to save five or killing five to save one are the only options that the trolley driver has.³⁹

It seems to me that there is no easy response to this question. First, it certainly seems to be the case that if the strategic bomber were able to inform the innocent civilian who'd die as a result of his actions that a bombing was to take place (and to get as far away from the factory as possible), then he would be acting in alignment with the notion of consent because he'd give the civilian the option to either (1) stay and die or (2) leave and live. But this presupposes that consent may be possible in such a situation. We can, however, easily imagine scenarios in which the strategic bomber might not be able to inform the civilian because the civilian might inform the factory of upcoming attack, the

³⁶ Represented by the fact that he would seek to avoid unnecessary death if possible while TB would not. (Chung, 10-11)

³⁷ Returning to a point made earlier, “SB, if told that more civilians were killed than initially expected, would cry out in despair. TB, if told that more civilians were killed than initially expected, would rejoice.” (Chung, 11)

³⁸ Nor do the five who are killed, if the driver doesn't change tracks, consent.

³⁹ Note that I use the phrase, “killed,” here to refer merely to the fact that lives will be lost. I am *not* claiming that those who die in the trolley case are *murdered*.

strategic bomber himself does not learn that the factory exists in time to get consent from the civilian, etc.

Second, the strategic bomber's decision to go ahead and bomb the factory (resulting in the death of the civilian) may not be as limited as the trolley driver's. If one will recall, the trolley driver must either kill one to save five or kill five to save one. As I stated, these are the only two possibilities open to him. We can easily imagine situations in which the strategic bomber *must* bomb the factory (and as a result, bring about the death of a civilian).⁴⁰ But we can also imagine scenarios in which this might not be the case and where the strategic bomber needn't necessarily bomb the factory even though doing so might be useful.⁴¹

I argue that if it is *possible* for the strategic bomber to give the choice to the civilian – who will be killed – to either flee or stay, then he must do so in order to respect Kant's Formula of Humanity. If it isn't possible, then SB must defer to the DDE in order to respect the FHE. Likewise, if the emergency surgery example presented earlier were modified such that the patient were conscious and able to give consent, then it would be immoral (and actually illegal)⁴² for the surgeon to not warn the patient of the harm that might come to her if the operation were to take place. Note that this differs from Boyle's proposed theory of agency because (1) he makes no explicit claim to the idea of consent and its relation to the morality of an agent's choice of executing one state of affairs or another and (2) it explicitly rules out as immoral situations in which consent *could* be

⁴⁰ If, for example, the factory is currently in the process of developing weapons that **will** be used to bring about the mass death of innocent civilians.

⁴¹ Here, we refer back to the Proportionality Rule of the DDE.

⁴² Alex Rajczi, e-mail message to author, April 20, 2016

offered but isn't.⁴³ Thus, while I agree with Boyle's claim that *if*, "this (his) theory of agency is true,⁴⁴ and if the normative theory which makes use of the ~~PDE~~ DDE can be defended,⁴⁵ then the ~~PDE~~ DDE is a long way toward vindication," – I've argued, in this chapter, that we must take offering consent to be a fundamental component/revision of the theory of agency Boyle proposes.

⁴³ If the agent were to act, "in spite of," the fact that harm that would occur (in every sense that Boyle intends that phrase to mean) and if he choose to do so even *if* he could – given the situation at hand – offer the right to consent to the to-be-harmed.

⁴⁴ I have argued for this theory in Chapter 2.

⁴⁵ And many people, have, indeed accepted Kant's normative claims about ethics. Note that many Universities have academic philosophers devoted *solely* to studying Kant's works.

Chapter 4: Concluding Remarks

I began this paper by introducing the idea of there being ethical problems in warfare and subsequently went on to explain the rules of *jus in bello*. I noted that, as Walzer states, “(*jus in bello* is) founded on the rights of life and liberty.” (Walzer, 123) I then introduced several rules of *jus in bello*, focusing in particular on the Doctrine of Double Effect. Following this, I examined the DDE’s third condition, e.g., “the intention of the actor is good, that is, he aims only at the acceptable effect; the evil is not one of his ends, nor is it a means to his end,” and showed that – in alignment with Boyle – distinguishing intent/foresight by paying deference to agency better vindicates the DDE (Walzer, 153).⁴⁶ I then went on to state that while I agree with Boyle’s claims, there exist Kantian concerns – namely issues of consent – with his argument as presented. In order to demonstrate this, I outlined Kant’s Formula of Humanity and applied it to Boyle’s proposed theory of agency. I concluded by, in section 3b3, addressing objections to my argument. In doing so, I have hoped to fill a hole I believe Boyle leave opens in his theory of agency and, in doing so, support the notion of the DDE qua, “a coherent doctrine of justification.” (Boyle, 538) My suggested revision of agency – which finds its basis in the Kantian notion of consent – respects the rights to life and liberty Walzer states as being crucial to our understanding of *jus in bello* (Walzer, 123).⁴⁷

⁴⁶ Note that Boyle actually states that, “... *if* this (his) theory of agency is true, and if the normative theory which makes use of the ~~PDE~~ DDE can be defended, then the ~~PDE~~ DDE is a long way toward vindication.” (Boyle, 538) In this paper, I have provided reasons as to why I believe his theory (for the most part) to be true.

⁴⁷ I’d like to thank Dr. Alex Rajczi, Ph.D., professor of philosophy at Claremont McKenna College, for his invaluable advice without which this paper would not have been possible.

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