

ABORTION AND THE DOUBLE EFFECT PRINCIPLE

ABORTION may occur either spontaneously or deliberately. By definition, the former occurs accidentally or pathologically – in either case, involuntarily, and as such poses no serious moral problems. The latter, also by definition, is voluntarily brought about and, since this induced type of abortion may further be direct or indirect, the moral implications and consequences are enormous.

To some members of the medical and legal professions, among others, the distinction between direct and indirect abortion is not considered to be valid or of any real worth. To them such a distinction is a question of semantics, a distinction without a difference – possibly an all too easy assessment of moral acts exclusively by their effects or results. To the moral philosopher, however, these distinctions divide right down the line, first the involuntary (spontaneous) from the voluntary (induced); secondly, the indirectly voluntary (unintentional or voluntary in cause) from the directly voluntary (deliberate, intentional or voluntary in itself).

In this essay, I am concerned with indirect abortion which, besides being an application of the double effect principle, actually shows what abortion is not.

I shall first discuss the principle and then apply it.

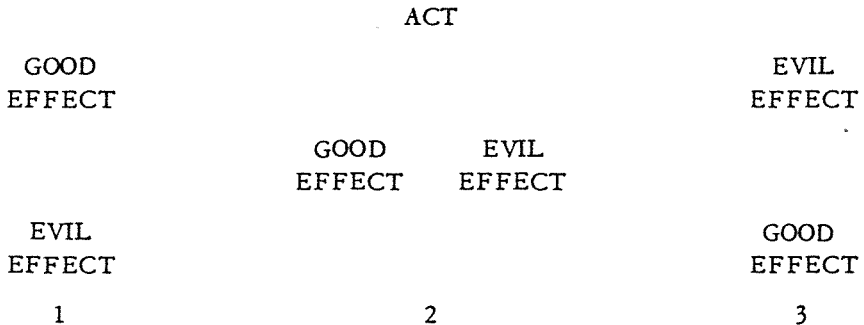
I – THE PRINCIPLE

The double effect principle received its classical formulation in the writings of Thomas Aquinas who discussed it in relation to self-defence.¹ It may be stated as follows:

¹II-II, q.64, a.7: 'Nothing hinders one act from having two effects, only one of which is intended, while the other is beside the intention. Now moral acts take their species according to what is intended, and not according to what is beside the intention, since this is accidental...'. See also Joseph T. Mangan, 'An Historical Analysis of the Principle of the Double Effect', *Theological Studies*, 1949, 10:41-61; C.J. Van der Poel, 'The Principle of the Double Effect', in Charles E. Curran (Ed.), *Absolutes in Moral Theology* (Washington, D.C.: Corpus Books, 1968).

- (1) Where an action, lawful in itself,
- (2) produces two (or more) effects, one of which is good and the other (or others) evil,
- (3) the evil effect may be permitted but not intended,
- (4) provided that:
 - (a) the good effect is not achieved by means of the evil effect,
 - (b) there is a proportionately serious reason for permitting the unintended evil effect, and
 - (c) other morally unquestionable means are ordinarily unavailable.

There are three possible situations in which an act may be said to produce a morally admissible effect and a morally objectionable one. These situations may graphically be expressed as follows:



Are all three situations covered or envisaged by the double effect principle? To paraphrase, if I may, the conditions outlined above:

- (1) The original act must be good or at least indifferent, otherwise the possibility of applying the principle would be ruled out from the start, no matter how good the effects might be.
- (2) The succession of effects or the relationship between them is not chronological but causal: in situation 1, the evil effect flows from the good effect directly, and only indirectly from the original act; in situation 2, the effects are simultaneous only chronologically; in 3, however, the good effect is produced as a result of the evil effect.
- (3) This is another way of saying that the evil effect is not an actual determining factor in the achievement of the good effect but is rather foreseen as an unavoidable by-product of a good act. Gerald Kelly clarifies this point by adding: '... In many, if not most, surgical pro-

cedures and their equivalents, it is not possible to judge the morality of the action independently of its effects. When this is the case, it may be taken as a practical rule that the principle of the double effect is applicable if the conditions are verified'.²

(4a) Again, this condition is not primarily concerned with the time factor in the sequence of effects. It is essentially concerned with their causal relationship, i.e., under no consideration may the evil effect cause the good effect. Hence, the achievement of the good effect through the medium of the evil effect, as in situation 3, is not covered by the double effect principle. On the contrary, it is the situation which involves the principle: the end justifies the means.³

(4b) Some proportion between the good to be achieved and the evil permitted is required and if it is lacking, the act is vitiated by reason of its circumstances. What, in practice, that proportion might be is all too often difficult to establish. In theory, one might suggest that the good intended and the evil permitted should at least be equivalent or nearly so, not so much quantitatively as qualitatively.

(4c) This condition is a specification of the above conditions. It is obvious that if it can be helped and the evil to follow is avoidable, then it should be avoided. But since no one can always prevent the existence of evil, so also may he – in instances where he has no control over evil – tolerate evil consequences even from his own actions.

In all cases involving this principle, the morality of the act does not depend so much upon what actually happens, nor when it happens – chronologically – as on what is intended, or what directly causes the good effect. The principle takes one back to the very essence of the moral act: the direct object of the will-act and the means to achieve it.

II – ITS APPLICATION

Let me now illustrate the principle by taking a typical case which, in my opinion, captures the essence of what the principle involves. The case is told by a gynaecologist and reported by Bernard Häring:

²Gerald Kelly, *Medico-Moral Problems* (St. Louis: The Catholic Hospital Association, 1966), p. 13; – 'Direct and Indirect Abortion', *Hospital Progress*, 1948, 12:67-71.

³Cf. J.F. Leibell, *Readings in Ethics* (Chicago: Loyola University Press, 1926), pp. 193-207.

I was once called upon to perform an operation on a woman in the fourth month of pregnancy, to remove a malign uterine tumor. On the womb there were numerous very thin and fragile varicose veins which bled profusely, and attempts to suture them only aggravated the bleeding. Therefore, in order to save the woman from bleeding to death, I opened the womb and removed the fetus. Thereupon the uterus contracted, the bleeding ceased, and the woman's life was saved. I was proud of what I had achieved, since the uterus of this woman, who was still childless, was undamaged and she could bear other children. But I had to find out later from a noted moralist that although I had indeed acted in good faith, what I had done was, in his eyes, *objectively* wrong. I would have been allowed to remove the bleeding uterus with the fetus itself, he said, but was not permitted to interrupt the pregnancy while leaving the womb intact. This latter, he said, constituted an immoral termination of pregnancy, though done for the purposes of saving the mother, while the other way would have been a lawful direct intention and action to save life. For him preservation of the woman's fertility and thereby, under some circumstances, preservation of the marriage itself, played no decisive role.⁴

Häring notes that the solution proposed by the noted moralist, based as it is on the distinction between direct and indirect abortion, results 'in too literal or mechanical applications' and proposes one of his own which, he says, follows a different and less artificial line of reasoning: on the 'great moral certainty' that without direct intervention there is no chance of survival for both the mother and the child, the doctor 'accepts the only chance to protect and serve life which Divine Providence has left to him. He saves the life of the mother while he does not truly deprive the fetus of its right to live, since it would not survive in any event if he failed to save the mother's life. Moreover, the preservation of the mother's fertility is an additional service to life'.⁵

⁴Bernard Häring, 'A Theological Evaluation', in John T. Noonan, Jr., *The Morality of Abortion* (Cambridge, Mass.: Harvard University Press, 1970), pp. 136-137; also in — *The Law of Christ* (Westminster, Md.: Newman Press, 1966), p. 212. Emphasis is author's.

⁵*Ibid.*

Häring's solution may be commendable in that he attempts to strike a balance between maternal and fetal rights but it does not apply the conditions of the double effect principle as does the noted moralist's. The principle can be invoked only if the fetus is not the direct target of attack or if the mother is not saved by the direct removal of the fetus.⁶ In this particular case, the noted moralist's application of the double effect principle is valid; Häring's is not.

Of course, outside the framework of the double effect principle, the question remains whether removing the fetus is less commendable than preserving the mother's life and fertility.

In any case, beyond what Häring calls the 'too literal or mechanical applications' of the principle and what in fact any explanation of the principle gives the impression of being, there is a very important matter which is all too often overlooked. The distinctions and the principle that arises from them are commonly thought to provide the basis for an exception to the absolute or near-absolute moral condemnation of abortion. In this context, abortion is thought to be permissible provided it comes within the terms and conditions of the double effect principle. In other words, it may appear that there is an area of therapeutic abortion which is morally admissible (i.e., when the directly intended action is a licit medical intervention), and another area which is not (i.e., when fetal life is directly involved as an end in itself or a

⁶For a listing and discussion of a number of morally admissible instances, where treatment which may prove detrimental to the fetus may be carried out and to which the double effect principle applies, see Charles J. McFadden, *Medical Ethics* (Philadelphia: F.A. Davis, 1966), pp. 168-190; T. Lincoln Bouscaren, *Ethics of Ectopic Operations* (Milwaukee: Bruce Publishing Co., 1944), pp. 37-38; 165-167. Nonetheless, the principle — particularly in its applications — is not exempt from sharp disagreement even among brilliant moralists who would otherwise accept it. Following the publication of *Casti Connubii*, Agostino Gemelli, O.F.M., questioned the morality of removing a pregnant cancerous uterus; Arthur Vermeersch, S.J., argued that such removal is a standard case of double effect. For the full account of the debate (without either moralist convincing the other), see: Gemelli, 'De l'avortement indirect', *Nouvelle Revue Théologique*, 1933, 60:509; Vermeersch, 'Avortement direct ou indirect', *ibid.*, 60:600; Gemelli, 'Encore l'avortement indirect', *ibid.*, 60:693; Vermeersch, 'Une courte conclusion', *ibid.*, 60:695. (In his 1928 edition of *Theologia Moralis*, para. 628, Vermeersch applied the principle as well to ectopic pregnancies).

means to an end). There is, in fact, more to the principle than appearing to justify an area of therapeutic abortion. The full import of the principle is not that it points up an exception nor that it lays down conditions as to when abortion is right and when it is wrong, nor that it is an attempt to achieve a moral balance between maternal and fetal rights. The thrust of the principle lies precisely in its attempt to establish that there are actions which, conducive to the destruction of fetal life though they be, are *not* in fact abortion in the moral sense — and some doctors would even say that they are not abortion in the medical sense either. In fact, both spontaneous abortion and indirect abortion are instances of what abortion is not, even though for practical purposes retention of the terminology concerning direct and indirect actions is unavoidable. Hence it is not correct to say that moral philosophy recognizes abortion as justified or justifiable when it comes within the double effect principle; but rather that one is not morally liable for the destruction of fetal life unavoidably resulting from an act which is otherwise good, provided the good effect is at least of proportionate value to the evil effect which so follows, or which one can foresee that it would follow.

At the *Symposium on Aspects of Female Sexuality*, held in New York in 1958, Dr. S.A. Cosgrove stated to this effect that he would not do a therapeutic abortion since he did not consider it 'good medicine', but that he would treat a definite life-threatening disease even if fetal death might result from the treatment. Dr. Cosgrove attributed his objection to therapeutic abortion to his greater medical knowledge resulting from long medical experience and denied being motivated by other than medical considerations.⁷ Dr. Mary S. Calderone also tells of a group of eminent doctors who implicitly affirmed the validity of this principle when in their abortion statistics they refused to classify hysterectomy for uterine fibroids as a therapeutic abortion, even though therapy had lead to the destruction of fetal life.⁸

⁷Ruth R. Doorbar and Esther U. Coke, 'Summary of Some Issues Raised During the Discussion Period', *Quarterly Review of Surgery, Obstetrics and Gynaecology*, 1959, 16:240.

⁸Cited in Richard A. McCormick, 'Abortion', *America*, 1965, 113:877-881; see also R.J. Bureson and J.C. Bragg, 'Full Term Abdominal Pregnancy', *Journal of the American Medical Association*, 1951, 143:1349-1350.

Since the principle was originally formulated and is used to justify self-defence, individual and collective, can it apply to abortion and particularly when the mother's life is in danger?

John T. Noonan, Jr., who does not otherwise consider abortion as morally justifiable, sees some justification for it on the basis of St. Thomas Aquinas' considerations on self-defence.⁹ Speaking of homicide, St. Thomas makes a distinction between killing 'sinners',¹⁰ and killing 'innocents',¹¹ declaring that it is lawful, sometimes mandatory, to kill the former but 'in no way lawful' to kill the latter. Speaking of self-defence as such, however, and without making any distinctions at all between 'sinners' and 'innocents', Aquinas declares that under the conditions of the double effect principle it is lawful for 'someone' to kill 'someone'.¹² On the basis of these distinctions, Noonan argues that, for an argument to be made to justify abortion to save the mother's life, 'much would depend on how absolutely Thomas meant his declaration... that "in no way is it lawful to kill the innocent". If the statement held literally, it would seem to preclude capital punishment for a repentant thief, who has become innocent, as most men become innocent, by repentance; yet Thomas justified capital punishment'.¹³

In my opinion, the texts cited by Noonan appear to leave no doubt that, from the moral standpoint, St. Thomas meant his declaration to be taken categorically. As for inflicting punishment on a repentant thief, Noonan appears to overlook the fact that the repentant thief is not innocent absolutely.¹⁴ At any rate, he goes on to say that 'it cannot be said definitely how Thomas would have answered... in the case of therapeutic abortion to save the mother's life', but later on in his discussion Noonan concludes that 'once the humanity of the fetus is perceived, abortion is never right except in self-defence'.¹⁵

The moral acceptance of abortion to save the mother's life is en-

⁹ John T. Noonan, Jr., 'An Almost Absolute Value in History', in Noonan, *op. cit.*, pp. 25-26.

¹⁰ II-II, q. 64, a. 2.

¹¹ *Ibid.*, a. 6; also *De Malo*, q. 13, a. 4 ad 11: 'To kill the innocent imports a determination of evil, and this can never be well done'.

¹² II-II, q. 64, a. 7.

¹³ Noonan, *op. cit.*, p. 25.

¹⁴ I-II, q. 105, a. 2, ad 9.

¹⁵ Noonan, *op. cit.*, pp. 25-26, 58.

dorsed in similar terms by other contemporary moralists but, other than stating that the burden of proof lies with him who would take life, none offer any criteria as to how self-defence or danger to the mother's life may be interpreted and applied in concrete situations.¹⁶ In abortion decisions, self-defence may be so construed as to cover just about any situation: once the principle of self-defence in abortion is established and accepted, one immediately becomes involved in the same sort of situation that the medical and legal professions had put themselves in when they first acknowledged the necessity of abortion 'in good faith for the purpose only of preserving the life of the mother'. One immediately becomes involved in questions of interpretation, rendering the moralist incapable of defending his position unless he also accepts to interpret this exception 'reasonably and prudently' – in effect, any difficult personal and social situation. Glanville Williams points out to this effect that 'once abortion is permitted to save the mother's life and preserve her health and working capacity, there can be no convincing reason for stopping short at this point and refusing to take account of wider social grounds'.¹⁷

Much of the controversy (and misunderstandings) surrounding the double effect principle and its applications is largely due to the kind of language used to describe the resulting evil effect. The evil effect is invariably described as a foreseen but unintended by-product of a directly-willed action. It is contended that as long as the evil effect is in some way 'voluntary', it makes no difference whether it is directly or indirectly willed – which is basically why this dichotomy is considered to be a distinction without a difference or one that implies

¹⁶ Cf. Francis Simons, 'The Catholic Church and the New Morality', *Cross Currents*, 1966, 16:437-439; Charles E. Curran, *A New Look at Christian Morality* (Indiana: Fides Publishers, 1968), pp. 242-243; Church Assembly Board of Social Responsibility of the Church of England, *Abortion: An Ethical Discussion* (London: Church Information Offices, 1965), pp. 31-32, 66; Karl Barth, *Church Dogmatics* (Edinburgh: T. & T. Clark, 1961), III:4, pp. 415-427; William H. Van der Marck, *Toward A Christian Ethic*, trans. D.J. Barrett (Westminster, Md: Newman Press, 1967), pp. 56-57; Daniel Callahan, *Abortion: Law, Choice and Morality* (New York: MacMillan, 1970), Chaps. XI-XII; Germain Grisez, *Abortion: The Myths, the Realities and the Arguments* (Washington, DC: Corpus Books, 1971), Chaps. VI-VII.

¹⁷ Glanville Williams, *The Sanctity of Life and the Criminal Law* (London: Faber & Faber, 1958), p. 215.

a choice between two evils and of justifying an otherwise immoral action, conveniently labelled as a foreseen but unintended and unavoidable evil consequence, simply by providing what may well appear to be a mere 'verbal escape mechanism'.¹⁸ I, for one, find the term 'voluntary' in this context and in general the terminology used misleading. What is willed is the direct act and whatever effect is directly intended and sought. The evil effect is neither intended nor willed in any way. Granted that it is foreseen, and foreseen to be unavoidable (independently of the strict concept of abortion), it is in no way voluntary, for which reason 'voluntary' should not, in my opinion, be part of the definition of the foreseen evil effect.

Though he is unsympathetic towards the principle, Williams makes a valid point when he says: 'To the eye of common sense, a result that is foreseen as certain, as a consequence of what is done, is in exactly the same position as a result that is intended'. But he is wrong in thinking that the principle can be applied by 'merely keeping your mind off one of the consequences'. 'Two surgeons', he writes, 'both remove a tubal fetus, but the one desires to save the mother and laments the destruction of the foetus, while the other decides to destroy the foetus in order to save the mother. Apparently the second surgeon sins, while the first is without sin'.¹⁹ I have yet to see a more distorted application of the principle.

No one is probably more interested in defending the most fundamental of human rights — wherever this is found: in man, woman or child, born or unborn — than the moralist. But the moralist is also very much concerned about how human life, maternal or fetal, is safe-guarded. The moralist does not make a simple equation: save the mother = destroy the fetus (nor vice versa). He is as quick to condemn maternal death as he is fetal death. There is no preference of one over the other. His concern is restricted to the means as to how one life is being saved. Is it being saved at the expense of the other? Is one life being destroyed as a direct means to save the other?

Actually, the moralist's course of action within the framework of

¹⁸*Ibid.*, p. 187.

¹⁹*Ibid.*, pp. 186, 286. For various misconceptions concerning the principle and its applications, see H.L.A. Hart, 'Intention and Punishment', *Oxford Review*, 1967, 4:5; Philippa Foot, 'The Problem of Abortion and the Doctrine of the Double Effect', *Ibid.*, 1967, 5:5.

the double effect principle is a negative one: nothing may be done to directly procure the death or destruction of either one or the other. As Josef Fuchs puts it: 'There is in fact no commandment to save the mother at all costs. There is only an obligation to save her in a morally permissible way... Consequently only one obligation remains: to save the mother without attempting to kill the child'.²⁰

In the last analysis, the double effect principle is much more demanding, requiring that we ask first not quite 'what am I preventing or solving?', which has the utilitarian ring about it, but rather 'what am I doing?': 'The question... is all the more urgent', writes Richard A. McCormick, 'because it is precisely the question our society nearly always neglects. Direct abortion... describes a lethal action performed with the intention that death should follow for the fetus. Indirect abortion refers to an action designed and solely intended to achieve some other purpose, even though death is foreseen as an unavoidable concomitant. The distinction, it must be noted, does not immediately assert that direct killing is right or wrong. Nor does it claim to be able to classify clearly all lethal interventions. It simply identifies direct intervention as something recognizably distinct from indirect taking of life. It only highlights the meaning of the action'.²¹

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²⁰ Josef Fuchs, *Natural Law, A Theological Investigation* trans., H. Reckter and J.A. Dowling (New York: Sheed & Ward, 1965), p.131.

²¹ Richard A. McCormick, 'Aspects of the Moral Question', *America*, 1967, 117:717-718; P. Knauer, 'La Détermination du bien et du mal moral par le principe du double effet', *Nouvelle Revue Théologique*, 1965, 87:356.