Restrictive versus Permissive Double Effect: Interpreting Aquinas

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The doctrine of double effect (DDE) can have two different functions, permissive and restrictive. According to the first function, agents are exculpated from the negative consequences of their actions, consequences that would be deemed illicit were they intentionally chosen. According to the second, agents are reminded that they are responsible, albeit in a distinctive manner, for the foreseeable damages that flow from their chosen actions. Aquinas has standardly been credited with a permissive version of DDE. I argue by contrast (drawing on the treatment of this issue in my *Thomas Aquinas on War and Peace*, Cambridge University Press, 2017) that the permissive version results from a misreading of *Sum. theol.* II-II, q. 64, a. 7. Other texts in the same work indicate that he embraced a restrictive version of DDE.

The doctrine of double effect (DDE) can have two different functions. On the one hand, it serves to exculpate agents from the negative consequences of their actions, consequences that would be deemed illicit were they intentionally chosen. On the other, it serves to remind agents that they are responsible, albeit in a distinctive manner, for the foreseeable damages that flow from their chosen actions. The first function is permissive; it allows for outcomes that would ordinarily be prohibited. The second function is restrictive insofar as it assigns responsibility for unwanted yet foreseen outcomes; by DDE agents are made aware that they are answerable for these outcomes and should accordingly proceed with caution and take precautionary measures.

Thomas Aquinas is standardly read as an advocate for the permissive view. In this paper I maintain that he is more accurately read as proposing a restrictive application of double effect. My argument proceeds in two stages. First, I explain how a misreading of *Summa theologiae* (henceforth ST) II-II, q. 64 ("De Homicidio"), a. 7 (henceforth DH.7), considered by most to be the founding text of DDE, has given rise to the permissive reading.[1] Then, in the second, briefer stage, I show how some other passages in the ST support the restrictive reading. In particular I show how Aquinas tacitly embraced what the recent literature terms "closeness," namely the supposition that if the connection between an action

and its foreseen side effect is close enough then this side effect should be evaluated as though it were in some measure intended.[2]

The seminal formulation of DDE is usually traced to DH.7 ("whether one individual may licitly kill another in self-defense"). The article is focused on self-defense as exercised by private individuals in peacetime. Aquinas has in mind the situation that can arise when, for example, someone is attacked by roadside thieves. He begins this passage with the observation that "nothing hinders a single act from having two effects," "an effect that is in [the agent's] intention (*in intentione*)" on the one hand, and an effect that "lies outside of [the agent's] intention (*praeter intentionem*)," on the other. From this principle he infers that self-defensive killing by private individuals will be allowable provided that two conditions are met; first, the defender's sole aim must be the protection of self from harm, and secondly, the amount of force used must be proportionate to this aim; should one exceed this measure, the self-defense will be illicit. Aquinas concludes this passage with a brief reflection on homicidal self-defense as carried out by public officers of the law (soldiers or police). Their killing is not restricted by the sole aim of self-protection, for "even while intending to kill another in self-defense," they do this for the sake of the "public good."

This paper is divided into two main parts. In the first I aim to show how the permissive reading that is nowadays attributed to Aquinas derives from a mistaken reading of q. 64, a. 7. On my interpretation this *articulus* does not present a doctrine of double effect. It is rather about something quite different. In advancing this revisionist reading of Aquinas, I make no claim to be innovating. Some of Aquinas's most prominent commentators, Vitoria and Soto, for instance, expressly maintained that DH.7 was not about side-effect harm (DDE).[3] Indeed, the idea that private defenders are prohibited from ever *deliberately* killing their assailants has a modern lineage in Catholic theology. Little trace of this prohibition can be found in Aquinas's day, certainly not among the canon lawyers that he frequented. As late

a thinker as Taparelli d'Azeglio (writing in the first half of the 19th century), himself a student of Aquinas, breaths not a word on the alleged prohibition of deliberate killing when he explicitly discussed private self-defense. Nor does he give a hint of the double-effect reasoning on this topic that is so pervasive today. DDE simply does not arise in Taparelli's account of self-defense.[4]

In the second part of this paper, I examine a few texts where Aquinas does deploy double-effect reasoning, but as we shall see these present a noticeably restrictive reading of the doctrine.

Before launching into the substance of this paper it should be noted that these two functions of double effect — restrictive and permissive — are not mutually exclusive, hence there is no inconsistency in appealing to the permissive function in some situations, and to the restrictive function in others. My chief claim is that Aquinas has often been misconstrued as exclusively favoring the permissive over the restrictive function. This article has accordingly been written to show how, when well understood, the restrictive function plays an important and perhaps even the dominant role in his application of double effect reasoning. That said, it is altogether possible to reject my contention that DH.7 is *not* about DDE, while at the same time agreeing with my argument that Aquinas favors a restrictive application of DDE. In other words, the two considerations are detachable from each other. Nonetheless, if it can be shown that DH.7 is in fact about something other than DDE (and consequently the text most frequently alleged to be in support of the permissive reading can no longer render such a service), this does strengthen the claim that Aquinas was mainly concerned with the restrictive application of DDE.

I

The permissive reading

It is undeniable that the label "double effect" was originally taken from the first sentence in the *responsio* to DH.7 ("from the act of self-defense there follows a double effect..."). Yet, whether a *doctrine* of double effect may be found therein is a matter of some dispute. On the received view, DH.7 is about restricting the scope of private self-defense to actions that may foreseeably result in the attacker's death, but which can never be *chosen* precisely with that outcome in mind. Thus, when Aquinas wrote that a private individual who engages in lethal self-defense must aim solely at preserving his own life, such that his assailant's death would lie outside of his intention (*praeter intentionem*), he meant to assert, so it is claimed, that an agent of this kind may never *deliberately* inflict death upon another as a *means* of saving himself.

Against this received interpretation an objection has been raised.[5] The very notion of side-effect harm presupposes the existence of some prior act that is itself deliberately posited, otherwise an infinite regress will result. In the case of lethal self-defense this prior act will be nothing other than the application of force against an assailant, an application which is chosen precisely as a means of stopping the attack. DDE teaches that agents will be absolved from the liability which ordinarily attaches to the production of a harmful side-effect only if (at a minimum) the deliberate activity that gave rise to the said side-effect was itself not blameworthy.

A surgery to remove a cancerous uterus is unblameworthy provided the requisite conditions are met: the patient consents to the operation, it is carried out by a qualified professional, and no less invasive procedure will be sufficient to eliminate the cancer. It is understood that various side-effect harms will inevitably result, first and foremost loss of the functions associated with the organ that has been removed (and the fetus that is resident in it), but causation of this secondary effect (one that is accepted but not chosen) is justifiable in

light of the primary (and deliberately chosen) effect of the operation, viz., removal of the cancer.

By contrast, in the case of self-defensive killing as carried out by private individuals, the primary effect does not appear to be unqualifiedly good. Very much the opposite would seem to obtain. The deliberate application of force by persons not in a position of authority (i.e. private individuals) is, on Aquinas's account, *prima facie* wrong: "It is not permitted for a man to strike another," he writes in the subsequent *quaestio* "unless he has some authority over the one whom he strikes."[6]

Thus, if Aquinas's aim in DH.7 was to show that defensive *killing* can only be allowed when it issues as the side-effect of an otherwise good act, he would need to mount much the same argument vis-à-vis defensive *striking*. In view of the presumption that stands against striking—it too is a *prima facie* wrongful act, one that requires some sort of justification if it is to be allowed—if DH.7 was indeed constructed as an exemplification of double-effect reasoning, Aquinas would need to show how striking, like killing, is the secondary (and unintended) effect of some deliberately chosen good act. However, no more primary good act is mentioned in Aquinas's text of which striking would be the secondary effect. Unless striking by private individuals can be justified on other grounds (and no such account is given in DH.7), an infinite regress and hence a vicious circularity in our reasoning will inevitably follow. In other words, if defensive striking can be justified *only* when it has the character of a pure side-effect, we cannot by the same token appeal to it in our justification of defensive killing.

The threat of circularity is obscured in the received account, where the primary effect of the double-effect fork is described as an *end* (preserving one's life), rather than in terms of some external *act* (e.g., striking). This nomenclature is indeed taken from the opening of DH.7 where Thomas makes clear that the first of these effects is what is aimed at as an end

(*in intentione* or *intenditur*), while the latter (the assailant's death) lies outside of the agent's intention (*praeter intentionem*). This is, however, not a comment about an act or a means employed, about which Thomas says little or nothing, except for the later comment that private persons should defend themselves with "due moderation." This lack of specification regarding the act would be unsurprising if Aquinas's discussion in DH.7 was not about DDE, but rather about something quite different. But adopting this nomenclature does become a liability in discussions about DDE, because instead of analyzing the exact relation between an external (i.e., chosen) act and its consequences (striking, on the one hand, and death, most notably, on the other), one compares instead a *goal* (that for the sake of which some act is done, i.e., self-preservation) and its unintended consequence (death of the assailant). In other words, our attention gets directed away from the external act of the will (striking), its relation to associated acts (selection of a weapon, etc.) and their combined consequences (how the physiology of the target is impacted), and is instead focused on the agent's interior act and its relation to these same consequences. The specifics of what is done in the world, of paramount importance to any medical doctor or military planner, are obscured by a fixation on the agent's intention.

One could of course attempt to get around the infinite regress objection by limiting justifiable self-defense to some sort of mere blocking motion. But it would be hard to find support for this minimalist construal of legitimate self-defense in Aquinas or in the canon law writings of his day that provided the intellectual background for his comments on this topic.

That self-defense requires some measure of harm causing renders it an inauspicious starting point for discussions of DDE. Unlike the standard cases of say, collateral damage in wartime, where there is a clear differentiation between the target of harm and those who suffer by extension as bystanders, in self-defensive action, the *person against whom* the defender deliberately directs his blows, and *the one who suffers death* (purportedly as a side-

effect harm), is the self-same subject. In this respect, the self-defense example that is discussed based on DH.7 differs from most other standard examples of double-effect: the case of fetal harm previously mentioned or collateral damage in wartime.

Moreover, to all appearances the defender stands to benefit from the harm that he has done to the assailant, since this is precisely what stops his wrongful attack. *Prima facie* it would seem disingenuous to speak of this harm and the resulting death as though they were pure externalities that were of no benefit whatsoever to the defender. By contrast, in the standard illustrations of collateral damage, for instance of children living in proximity to a munitions factory that is bombed, it intuitively makes sense to say that no harm whatsoever was intended against them when the factory was bombed. Should they die nonetheless in the resulting conflagration, it makes perfectly good sense to say that their death offered no benefit to the military operation. They are *incidentally* rather than *usefully* affected.[7] On the other hand, an aggressor who dies upon being struck by his defender would appear to be *usefully*, and not just *incidentally* affected. The aggressor's death does remove in a decisive way the threat he posed to the defender. It is true that advocates for the received view of DDE deny this implication. Joseph Boyle, for instance, writes that lethal self-defense will be allowable only under condition that "the assailant's death is not what ends the threat, but is rather a consequence of what stops the attack."[8] To illustrate this point John Finnis provocatively asserts that it is entirely possible to "spear an assailant's heart in self-defense without intending to kill" him.[9]

Setting aside the substance of this claim—namely that upright defenders do not intend the death of their assailants although they may foresee with certitude that this outcome will follow as a direct consequence of the defender's action—I will nonetheless observe that this represents a challenging way to launch into a discussion of DDE. Other examples, of the collateral damage sort, would have provided Aquinas with a considerably more accessible

path toward illustrating this teaching. Read in conjunction with the regress problem mentioned above, we should be willing to entertain the possibility that DH.7 was written by Aquinas, not as an instantiation of double effect, but with an entirely different purpose in mind. What purpose could that have been?

Is DH.7 about something other than DDE?

An alternative reading of DH.7 was in fact proposed by Hugo Grotius[10]:

> It has been well said by Thomas [Aquinas] — if he is rightly understood — that if a man in true self-defense kills his assailant the slaying is not intentional (*ex intentione*); not that, if reason supplies no other means of saving oneself, it is not sometimes permissible to do with set purpose (*destinato*) that which will result in the death of the assailant; rather it is that in such a case his death is not chosen as something primarily intended (*quiddam primario intentum*), as in a judicial punishment, but is the only resource available at the time.

On this reading, when St. Thomas distinguished two sorts of killing, intentional and non-intentional, his aim was not to set up a contrast between harm deliberately inflicted, on the one hand, and side-effect harm, on the other. The contrast was meant instead to differentiate between inflicting harm instrumentally, as a *means* of self-preservation, versus causing harm as the very *goal* of one's action. In the latter instance, the agent's *primary* intention is to visit harm on another, either to avenge a past wrong (i.e., retributive punishment, as in Grotius's example), as an expression of hatred, or because of the pleasure it procures (cruelty). Grotius's *primario intentum* would then correspond to Aquinas's *intentio*, an act of the will that is directed to some end.[11] Thus, within the context of DH.7, the killing that was designated as *praeter intentionem* would formally exclude all non-instrumental rationales for terminating another's life (retribution, for instance) that, by the logic of this article, will legitimately be exercised only by public officials acting on behalf of the common good. Killing by private individuals is accordingly restricted strictly to defensive actions, in the sense that revenge killing would emphatically be ruled out. Yet, so construed, the scope of legitimate defense proves to be quite broad, allowing for even a deliberate act of homicide,[12]

if, under the circumstances, this is reasonably viewed as the only effective (and proportionate) response to an attack that is underway or imminent.

Imagine a woman trapped on a boat with a psychopathic killer. Escape being impossible (the boat is on the high seas, and its radio connection with the outside world has been severed), she decides that her safety can be assured only by killing the assailant. No other means will protect her during the time (conceivably quite long) that they will live together on the boat, since, even if she manages to incapacitate him temporarily, he will likely recover to threaten her anew.[13]

The contrast between these two different aims that might be adopted in killing — self-defense under conditions of necessity on the one hand, and punishment on the other — was a staple in the canon law literature of Aquinas's time.[14] He was well versed in Gratian's *Decretum,* and often cites from this work in the *Summa theologiae.* Hence Aquinas might very well have operated with this contrast in mind in DH.7. One could still object that the idea of deliberate defensive killing, while perhaps acceptable to the canonists, was nonetheless opposed to the teaching of Augustine, whose authority was certainly higher in Aquinas's eyes.

It is true that the prohibition of defensive killing does figure prominently in *De libero arbitrio* I (chap. 5, § 33), a passage (written ca. 388) mentioned in DH.7, obj. 2, where Thomas sums it up by saying that "it is illicit to kill another person to preserve one's own bodily life." He offers no express refutation in his reply, nor is it clearly affirmed there. Likewise, in obj. 1, citing Letter 47 to Publicola Aquinas speaks of someone who intends (*intendit occidere*) to kill in self-defense, and in his reply he seemingly agrees with Augustine that such would be wrong if done to save one's life.[15] However, in a much later text we find Augustine willing to countenance deliberate homicide in self-defense. Thus, in letter 153 to Macedonius, he wrote (ca. 413) that "when one human being kills another, it makes a great

difference whether this is done out of a passion to hurt someone or [inversely, when doing] this… is necessary to escape or help someone else, as when a robber is killed by a traveler, or an enemy by a soldier."[16] The former rationale is condemnable, he suggests, while the latter is not.

In this instance the mature Augustine seems to be affirming what he had denied in his youthful writing, namely that private self-defensive killing can be morally justified, provided this is done, not out of desire for revenge or for illicit gain, but under the press of necessity and with the sole aim of protecting oneself or another from wrongful attack. This, in fact, was how Gratian read the text.[17]

What's more, within the same *quaestio* 5, Gratian also cited (canon 8) Augustine's letter 47[18] to Publicola, which, as already noted above, emphasized how the Gospel prohibition on killing was addressed specifically to pleasure taken in revenge (*uindicta delectet*). The letter makes clear that other sorts of killing are not included under the prohibition. Should one, for instance, engage in good and licit actions that without evil intent result in the death of others, no blame will attach to these "evil consequences" (*mali accideri*t). Augustine speaks of these consequences as lying "outside of our will" (*praeter nostram uoluntatem*), a formula that is very likely the source of Aquinas's better known "*praeter intentionem*" as it appears in DH.7.[19]

It could still be objected that the terminology of *praeter intentionem*, as utilized by Aquinas in DH.7, does not lend itself in his lexicon to the *choice* of a means, however reluctantly such a means might be employed. This is the path followed by Boyle, who argues that St. Thomas standardly employs *praeter intentionem* as signifying a pure side-effect, to the exclusion of an agent's deliberate selection of some item as means to an end. Boyle does however recognize that in Aquinas's earlier *Summa contra Gentiles* (of which all but the

fourth book was written some ten years earlier than the ST), *praeter intentionem* is used to signify the choice of a means.

This occurs in *ScG* III (chap. 6) where, reflecting on Aristotle's example of the sailors who cast their cargo overboard to avoid capsizing (*Nic. Ethic.* 1110a8—10), Aquinas comments that although this act is not willed or intended *per se*, it is nevertheless willed for the sake of something else (*vult propter aliud*), namely protection from drowning, and in this sense it must be described as a regrettable expedient or means. St. Thomas most often discusses this sense of *praeter intentionem* under the heading of the "mixed voluntary." According to this concept, an act that one would ordinarily find repulsive, hence 'non-voluntary' in the sense of being antithetical to the will, can nonetheless be rationally desired (chosen) under circumstances of imminent danger. The similarity with the case of lethal self-defense is indeed salient,[20] yet Boyle resists the comparison because later in the ST Aquinas utilizes *praeter intentionem* solely to designate the will's relationship to side-effect harm.

Boyle's analysis is not quite compelling because there are a number of parallel passages in the *Prima Pars* of the ST[21] where Thomas uses the phraseology of *per accidens* and *praeter intentionem* to designate things willed secondarily, as a means, in contrast to things willed in and for themselves. From these passages it can be gleaned that when Thomas employs *praeter intentionem* and equivalent terms (*per accidens* or *per consequenti*) in so doing his purpose is not necessarily to exclude all intentionality whatsoever from the resulting effects, but rather to deny that these effects are *per se intentam*, namely desired as the primary goal of the agent's action. He does not thereby exclude that these effects might be willed as conducive to some end.[22]

In sum, based on the foregoing, it is entirely possible that the argumentation in DH.7 was directed to a problem very different than DDE as applied to homicidal self-defense; the point of the *articulus* was rather (I have argued) to explain how self-defensive killing by

private individuals will be justifiable only when it wholly excludes the aim of punishment. Employing force as a necessary and proportionate measure to protect oneself (or others) from unwarranted attack—and exercised under conditions of imminence—was not encompassed under this exclusion, as Aquinas would have recognized with the canonists (and perhaps even by Augustine in his later writings) that such a measure could prescind from sentiments of revenge.

II

Aquinas's restrictive DDE

Under the supposition that DH.7 is not about DDE, is there anywhere else in Aquinas's corpus of writings that a teaching on DDE may be found?

Two passages in the ST specifically examine the broader category of side-effect harm. They can help us identity how Aquinas approached what today is goes under the heading of DDE.

First, in I-II, q. 77, a. 7, he explains how we can speak of something being voluntary[23] in two quite different ways. In the most obvious and most proper sense (*secundum se*), an outcome (effect) is voluntary when "the will tends to it directly."[24] Inversely, an outcome can be voluntary in its cause (*secundum suam causam*) when "the will tends [directly] to that cause" but "[indirectly] to the [resulting] effect."[25] From the context St. Thomas makes clear that in either case the agent bears responsibility for the outcome, fully for what was *per se* ("directly") intended, and secondarily, in a diminished but real sense, for what is "indirectly" voluntary *in causam*.

To describe this state of affairs Thomas offers as the example of someone who gets drunk. Under the scenario envisioned this was something the drinker intended to do, hence his condition of drunkenness was voluntary *secundum se*. By extension, all that he does while in this drunken state may be imputed to him as well. St. Thomas says that the said acts are in

some manner voluntary (*quasi voluntarium*), even though the agent lacked rational awareness at the time of their commission. When he decided to get drunk, he knew, however vaguely (or at the very least could and should have known) that he might thereby be led to do what the next day he would sorely regret. These non-rational acts done in the state of drunkenness are so many unintended consequences (side effects) of his initial decision to get drunk. Even though the passage in question is about a sinful act, Aquinas's main point also has relevance for our good deeds; here too we are accountable for the foreseen (or foreseeable) negative consequences irrespective of the fact that we did not aim at them directly. These side-effects are voluntary, albeit in a sense analogous (thus not identical) to what we have chosen deliberately (hence "directly"). However, in contrast to deliberately wrongful action, where the responsibility we bear for harmful side effects entails culpability (these side-effects stand as an aggravating condition), with respect to our good actions such culpability does not automatically follow. If we have taken proper precautions to limit the harm, and the harm is not wholly disproportionate to the good we seek to achieve, it will not be counted against us as a fault. This is restrictive DDE in a nutshell.

A second, and more detailed account, is earlier given in I-II, q. 73, a. 8. Focused again on acts sinful in kind, here St. Thomas likewise contrasts harm (*nocumentum*) done as the direct object of sin (*per se obiectum peccati*) versus harm that flows from that sin as an indirect (*non intentum*) consequence. Even though *simpliciter* the agent does not wish (*non vellet*) that this consequence should come about, nonetheless, he bears responsibility for its causation; his resulting culpability will vary according to the degree of foresight—*de facto* and *de jure*—that he possessed concerning the eventuality in question. By the logic of Thomas's argument these degrees of responsibility will similarly be applicable to the performance of acts good in kind (hence DDE is relevant here), with the caveat that the doers

will be accountable, but not necessarily blameworthy, for the negative externalities they have produced by their intentional action.

At this juncture Aquinas makes a further distinction within the category of unintended consequences. Sometimes these consequences are only *per accidens* connected to the deliberate object of action. Being hard or impossible to foresee, the responsibility borne by the agent for their causation is minimal, although, when the act is sinful, they will still accrue to him as an aspect of his overall guilt (he should not have been engaged in the act at all, hence, as its author, he can rightly be blamed for the unforeseeable damages that have issued as a result). But in other instances the consequences will be *per se* connected to the intentional deed. *De jure* foreseeable (although perhaps not *de facto* foreseen), by reason of their necessary connection to it, these unintended results cannot be separated from the deed itself. “Whatever is *per se* consequent upon a sin pertains in some manner to the very species of the sin itself.”

While obviously focused on deliberate wrongdoing, the above reasoning applies *mutatis mutandis* to actions of a more neutral character as well. Should a negative consequence inherently attach to an otherwise good act, it is inevitable that this negativity—hence blameworthiness—will attach to the act as well, even though the consequence was in no way intended by the doer. Let us assume for the sake of argument that there can be a use of nuclear weapons that is not *per se malum*, that is, some conceivable circumstances in which their use might be compatible with recognized norms of war, such as to destroy a military facility buried deep in a mountain at a remote location. Should nonetheless this same weapon be detonated in close proximity to an urban area, even though it had a military and not a civilian target, the devastation (shock waves and radiation) wrought on this broader area cannot but color our assessment of the act itself (targeting this precise installation with this weapon). Despite what one would have wished otherwise, employed in this setting the act is

inherently indiscriminate by reason of its necessary consequences, and no amount of double effect reasoning will render it otherwise.

In contemporary philosophical parlance, the idea that a particular kind of unintended negative consequence is immediately and invariably connected with a determinate act goes under the heading of "closeness." Finnis's example of spearing a man's heart while not intending to kill him could not be grounds for exoneration within a version of DDE that operates with "closeness," for under no feasible description will spearing his heart not result in his death. Of course, it is possible that one had aimed at the man's shoulder but struck his heart instead. But it is not an accident of this sort that Finnis wished to illustrate by the above example, for his purpose was to show how a condition of definite foresight is wholly compatible with DDE. But if I am right that Aquinas does embrace closeness, then Finnis's example fails to exemplify DDE as Aquinas understood it. Indeed on at least one occasion (DH.5, ad 4) when Thomas considered a case similar to the one envisioned by Finnis—Samson pulling down the temple (Judg. 16) to bring punishment upon his enemies (rejoicing above) and in the process knowingly causing his own death—Thomas does not employ DDE to explain why this death should not be deemed a suicide (a path later followed later by Vitoria). Why did Thomas not appeal here to DDE when it was seemingly available to him?

This is due, I have argued, to the fact that Aquinas formulated DDE under the restrictions that follow from "closeness." On this basis he could not approve of the doctrine as it is standardly formulated today by Boyle, Finnis and other Catholic moralists who assume that a condition of definite foresight regarding the negative consequences (consequences that would be wrong were they directly chosen) of an otherwise good (or indifferent) action does not automatically disqualify the moral soundness of the actions in question. Thomas would likely have rejected this permissive reading of DDE as part and parcel of the Gospel command "to forbear from uprooting the cockle to spare the wheat"

(Matt. 13:29). "Vengeance should be delayed until the last judgment," Thomas comments in DH.2, ad 1, on this passage, "rather than that the good be put to death together with the wicked." What he could allow under his more restrictive reading of the doctrine would be the "risked consequence,"[26] namely a situation in which the negative outcome is possible but not inevitable.[27] Things contingently joined cannot with certitude be inferred the one from the other; the multiplicity of possible consequences that can originate from a single act provides a basis for virtuous risk-taking. Rarely is this an easy task, hence Aquinas posited a special moral/intellectual virtue—*prudentia*—to guide our decision-making in this fraught domain.[28]

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[1] Here I draw on the more elaborate comments that may be found in Gregory M. Reichberg, *Thomas Aquinas on War and Peace* (Cambridge: Cambridge University Press, 2017), pp. 173-200.

[2] For the seminal formulation of "closeness", see Warren S. Quinn, "Actions, Intentions, and Consequences: The Doctrine of Double Effect," *Philosophy and Public Affairs* 18 (1989): 334-51, at p. 338.

[3] For references to the primary sources and secondary literature, see Reichberg, *Thomas Aquinas on War and Peace*, p. 179 (footnote 16), and p. 184 (footnote, 23). Also, for a more recent discussion of the relevant sources, although with a different interpretation of DH.7 than my own, see Daniel Schwartz, "Thomas Aquinas and Antonio de Córdoba on self-defence: saving yourself as a private end," *British Journal for the History of Philosophy* 26 (2018): 1045-1063

[4] Luigi Taparelli d'Azeglio, *Saggio di dritto natural appoggiato sul fatto* (first published in Paleermo, 1840-1843), vol. 1, book II, chap IV, §§ 379-97. I have consulted the French translation, *Essai théorique de droit naturel basé sure les faits* (Paris: Casterman, 1875), pp. 156-161.

[5] See Gareth Matthews, "Saint Thomas and the Principle of Double Effect," in Scott MacDonald and Eleonore Stump, *Aquinas's Moral Theory* (Ithaca and London: Cornell University Press, 1995), pp. 63-78.

[6] ST II-II, q. 65, a. 2. For Aquinas, striking (*verberatio*) consists in "deliberately causing a pain of sense in someone." This can be done out of any number of motives. The whole supposition of the text is that this is *prima facie* wrong, unless a justification can be given, based on reasons of justice. One of these reasons is punishment rightly due, as when parents have the authority to discipline their children. Self-defense can be another justification. But in either case, striking is not a *prima facie* good that could stand as the positive pole of a double-effect fork, unlike, say, surgery to remove a cancer.

[7] The terminology is from Quinn, p. 348.

[8] "*Praeter Intentionem* in Aquinas," *Thomist* 42.4 (1978): 649-665, at p. 66. "In such a case," he adds, "one is not saved because the assailant is dead but the assailant dies because one has stopped the attack" (ibid.).

[9] "If, as Aquinas seems to assert and never denies, one can spear an assailant's heart in self-defense without intending to kill, it is possible to wage war, too—lethally and often

successfully—without that intent" (*Aquinas*: *Moral, Political, and Legal Theory* [Oxford: Oxford University Press, 1998], p. 287).

[10] *De iure belli ac pacis*, II, I, IV(2). In adopting this viewpoint, Grotius echoed a reading of DH.7 that had been proposed earlier by Vitoria in his commentary on DH.7.

[11]"[I]ntentio respicit finem secundum quod est terminus motus voluntatis" (ST I-II, q.12, a. 2).

[12] Toward the end of DH.7 (body of the article) St. Thomas speaks of soldiers (and ministers of the judge, i.e., police) who, authorized by legitimate authority, intentionally kill in self-defense (*intendens hominem occidere*) and in so doing direct this killing to the public good (*refert hoc ad publicum bonum)*. This allusion to the public good indicates how, on Aquinas's understanding, when in the line of duty soldiers and police kill defensively, their action implicitly has the character of a sanction. In other words, it is never, under such conditions, purely defensive. We should avoid reading into this text the modern supposition that soldiers face off on the battlefield as moral equals whose posture toward each other is purely defensive. Aquinas was writing well before this conception emerged in the seventeenth century. For him, soldiers on the unjust side are complicit in supporting an unjust cause and in battle they are rightly made the targets of a sanction. In this sense, when soldiers kill, even to avoid being killed themselves, the killing that they undertake does not have the character of a mixed voluntary action—a purely regrettable means—as it must have for private defenders (see Reichberg, *Thomas Aquinas on War and Peace*, pp. 197-199, and 240).

[13] Legal and moral discussion about battered women has been an important venue to test the

normative boundaries of private self-defense; see Whitley R.P. Kaufman, "Self-Defense, Imminence, and the Battered Woman," *New Criminal Law Review* 10/3 (2007): 342–370.

[14] See the passages from various canon law sources (the anonymous gloss "*Qui repellere possunt*" ["Resist injury"], Raymond of Peñafort and William of Rennes) that are reproduced in G. M. Reichberg, H. Syse, and E. Begby, *The Ethics of War: Classic and Contemporary Readings* (Maldon: Blackwell, 2006), pp. 109-111 and 134-137.

[15] On the face of it, this would be contrary to my contention that intending to kill is acceptable if chosen (as a means) to save one's life. However, if one reads the full letter to *Publicola*, it becomes clear that what Augustine wants to exclude as illicit is any killing that has intermingled with it pleasure taken in revenge (*vindicta delectet*). He is aware that this can happen to private self-defenders, just as it can happen to soldiers. It is this sense of *intentio*, really wanting to see the other person dead out of contempt for him, that must be excluded: not killing as the ultimate expediency to save oneself.

[16] Citing from the translation in E.M. Atkins and R.J. Dodoro, *Augustine's Political Writings* (Cambridge: Cambridge University Press, 2001), p. 81 (with the words in brackets added).

[17] *Decretum*, causa 23, q. 5, canon 19; Gratian refers to it as contained in letter 54 (which corresponds to letter 153 in the standard numbering of Augustine's letters as used by Atkins and Dodoro).

[18] Gratian refers to it as letter 154, which corresponds to letter 47 in the standard numbering.

[19] Letter 47 to Publicola is cited by Aquinas in *ST* II-II, q. 64, a. 7, obj. 1, but without express mention of Augustine's formula *praeter nostrum uoluntatem*. T.A. Cavanaugh (*Double-Effect Reasoning* [Oxford: Oxford University Press, 2006], p. 5) speculates that Alan of Lille was the source of Aquinas's employment of the term "*praeter intentionem*" in DH.7. In light of the fact that Aquinas never cites Alan in the ST or ScG, it is more likely that both Alan and Thomas drew from the same passage in Augustine's letter 47 to Publicola, hence the similarity in their terminology.

[20] In one of his treatments of the mixed voluntary (*Quodl.* V, q. 5, a. 3 [pp. 375-76, "*Utrum ea quae per timorem fiunt, sint voluntaria*"]), Aquinas mentions homicide as an example of an act that can become desirable in particular circumstances, even though *in universali consideratum* it is an unqualified evil. The special case of homicidal self-defense is not, however, mentioned.

[21] Thus, in I, q. 49, a. 2, discussing whether God can be the cause of evil in the universe, Aquinas proceeds from the principle that "the form which God principally intends (*principaliter intendit*) in created things is the good of the [whole] universe. This entails that God causes [i.e. intends] so to speak accidentally (*quasi per accidens*) and by way of consequence (*ex consequenti*) the corruption of things." Among the types of corruption, St. Thomas mentions death. This evil, he explains, is imposed on sinners so as to rectify the violated order of justice. To emphasize how death of the sinner is willed, not primarily in and for itself (*principaliter intendit*), but secondarily and only in view of that end, St. Thomas affirms how in this respect death is willed by God *quasi per accidens.* Similarly, in II-II, q. 19, a. 10, ad 2, he affirms that although God does will (*vult*) death as a punishment for sin, it is not thereby desired for its own sake (*inquantum est mors*) but rather as incorporated into

the end of justice (*sub ratione iustitiae*).

[22] Further confirmation of this reading may be found in *In Tim.* 2:4 (§62), where the stock example of a merchant who throws his cargo overboard to protect the ship from capsizing is used by St. Thomas to explain why God does will the eternal punishment of sinners, although not *per se*, but solely as assumed into his pursuit of justice.

[23] "[A]liquid potest esse voluntarium…."

[24] "[V]oluntas directe in ipsum fertur…." To avoid confusion, it should be noted how later in the same article when St.Thomas distinguishes *voluntarium directe vel indirecte* he is concerned with a different problem (than something willed *secundum se* vs. *secundum suam causam*) namely with consequences that flow from intentional *in*action (*indirecte autem, illud quod voluntas potuit prohibere, sed non prohibit*). As he writes in the parallel passage of *ST* I-II, q. 6, a. 3, *voluntarium directe* is what proceeds from an agent insofar as he is deliberately active (*inquantum est agens*), while *voluntarium indirecte* proceeds from an agent by virtue of his voluntary inaction (*vult non agere*). On Quinn's terminology this is the difference between *doing* and *allowing* (p. 334), a doctrine that runs parallel to, but should not be equated with double effect. In what follows, I use "direct" and "indirect" in reference to Aquinas's first, but not his second usage.

[25] "*[V]oluntas fertur in causam et non in effectum*…." Vis-à-vis negative consequences, this "*voluntarium secundum causam*" Quinn aptly terms "harmful indirect agency," whereas what Thomas calls "*voluntarium secundum se*" in Quinn's lexicon is labeled "harmful direct agency" (p. 346). See also *De malo* q. 3, a. 12, ad 1-4.

[26] I borrow this term from Cavanaugh, *Double-Effect Reasoning*, pp. 7-12.

[27] Employing the example of someone who strikes a woman knowing her to be pregnant, Aquinas alludes to this category of risked consequence in DH.8, where he contrasts it to the accidental consequence.

[28] I thank Daniel Shields who commented on this paper at the 2017 ACPA annual meeting.