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A CRITIQUE OF BERNARD HÄRING'S APPLICATION OF THE DOUBLE EFFECT PRINCIPLE

Paul J. MICALLEF

THE PRINCIPLE of the double effect 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:

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.²

In this essay, I am concerned not so much with the principle itself or with any detailed analysis of it as with a particular application of the principle proposed by Bernard Häring.

Häring uses the following case, typical of the kind of dilemmas that arise in medical ethics, to illustrate how rigidity in applying the principle of the double effect renders the principle meaningless. However, the contrary position, his own, illustrates how flexibility in applying the principle shows up the non-applicability of the principle itself.

The case is told by a gynecologist and reads as follows:

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

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1. *II-II*, q. 64, a.7. See also Joseph T. MANGAN, "An Historical Analysis of the Principle of the Double Effect", *Theological Studies*, 10 (1949) 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).
 2. For various formulations and interpretations of the principle, see P. KNAUER, "La détermination du bien et du mal moral par le principe du double effet", *Nouvelle Revue Théologique*, 87 (1965) 356-376; "The Hermeneutic Function of the Principle of Double Effect", *Natural Law Forum*, 12 (1967) 132-167; Richard McCORMICK, "Le principe du double effet", *Concilium*, 120 (1976) 105-120.

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.³

Häring claims that the solution proposed by the noted moralist is inflexibly based on the distinction between direct and indirect abortion and results "in too literal or mechanical applications". So he goes on to propose a solution of his own which, he says, follows a less artificial line of reasoning.

On the great moral certainty, he says, 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".⁴

Häring's solution of the particular case he brings up disregards the requirements of the double effect principle. On the contrary, his solution falls outside the framework of the principle and he assumes that he applies the principle less artificially simply by providing a distinction between malicious and non-malicious abortion. In this regard, while he condemns the former he appears to justify the latter mainly on the grounds that there is a proportionately serious reason for permitting the destruction of the fetus and "on the great moral certainty" that the fetus had no chance of survival.

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 (in the context, "dissection of the principle" would be a better way of putting it), there is a very important aspect which Häring overlooks. The distinctions and the

3. Bernard 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.

The English edition of this case speaks of "a malign tumor"; the French edition, *Perspective chrétienne pour une médecine humaine* (Paris: Fayard, 1975), p. 109, speaks of "une tumeur bénigne". According to Dr. Jacques E. Rioux, Directeur, Clinique de planification des naissances, Centre Hospitalier de l'Université Laval, Quebec, there is no doubt that we are here dealing with a benign tumor which in turn raises the question whether removal of the tumor was necessary in the first place.

4. *Ibid.*, p. 137.

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 morally licit medical intervention), and another area which is not (i.e., when fetal life is directly involved as an end in itself or as a means to an end).

There is, in fact, more to the principle than appearing to justify particular cases 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 the fact that there are actions which, conducive to the destruction of fetal life though they be, are *not* in fact abortion in the moral sense. Most gynecologists would even say that they are not abortion in the medical sense either. In fact, both spontaneous abortion and indirect abortion are instances or illustrations of what abortion is not, even though for practical purposes retention of the terminology concerning direct and indirect actions is unavoidable.

Much of the controversy (and misunderstanding) surrounding the 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 then argued that as long as the evil effect is in some way "voluntary" or somehow comes within the intentional order, it makes no difference whether it is willed in the moral sense or foreseen in the practical sense — which is basically why this dichotomy is all too often considered to be a distinction without a difference or one that implies 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".⁵

It must be admitted that within this context, the term "voluntary" and its derivatives or its variations 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, it is not in any way voluntary. For this reason "voluntary" should not, in my opinion, be part of the definition of the foreseen evil effect. In other words, the principle is an attempt to offer guidelines to distinguish as well as it possibly can between what is sought as an end in itself and what is permitted or tolerated as an unavoidable result of an otherwise morally acceptable action.

To this effect, Dr. Mary S. Calderone tells of a group of eminent doctors who implicitly affirmed the validity of this aspect of the principle when they refused to

5. Glanville WILLIAMS, *The Sanctity of Life and the Criminal Law* (London: Faber & Faber, 1958), p. 178.

classify hysterectomy for uterine fibroids as a therapeutic abortion, even though therapy had lead to the destruction of the fetus.⁶

At the *Symposium on Aspects of Female Sexuality*, held in New York in 1958, Dr. S.A. Cosgrove made a similar though somewhat marginal statement. He stated in this respect that he would not perform 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.⁷

In Häring's application, the mother would have been saved by the direct termination of the pregnancy and in the circumstances which he describes his solution falls outside the framework of the double effect principle. His solution may indeed be, as he claims, "simple and more convincing" but his use of words like "less literal", "less mechanical" does not make it any more acceptable within the double effect principle. I hasten to add, however, that it may be acceptable on other grounds.

At this point, it would be worth reviewing briefly the position taken by the noted moralist cited by the gynecologist. The moralist claims that the moral course to follow would have been "to remove the bleeding uterus with the fetus itself". Such an action, in the moralist's opinion, would have come under the double effect principle. I am not so sure that he is right either.

The moralist claims that the doctor "was not permitted to interrupt the pregnancy while leaving the womb intact". Interrupting the pregnancy *and* removing the uterus would have been, in his opinion, "a lawful direct intention and action to save life".

The moralist's position leaves no doubt as to the manner in which the mother should have been saved: the mother should have been saved by directly removing a vital organ — and with it the child — thereby rendering the mother incapable of bearing other children.

The double effect principle's general terms of reference ensure that its applications will not be measured by the foot rule nor calculated with the assistance of tables. If one must therefore allow it to serve us rather than to strangle us, the principle does not appear to stipulate the conditions laid down by the moralist. In the circumstances, a less drastic course of action, as one might have to put it, would have been sufficient. In this particular case, the less drastic course of action would have been to remove the child because as Häring rightly points out, in agreement with the gynecologist, the child would have died in any event as would the mother.

The uterus contracted by the removal of the child. It would also have contracted by the removal of the uterus itself. But removal of the uterus would not have been in the best interests of the mother and I would say of life itself.

6. Cited in Richard A. McCORMICK, "Abortion", *America*, 113 (1965) 877-881; see also R.J. BURLESON and J.C. BRAGG, "Full Term Abdominal Pregnancy", *Journal of the American Medical Association*, 143 (1951) 1349-1350.

7. Ruth R. DOORBAR and Esther U. COKE, "Summary of Some Issues Raised during the Discussion Period", *Quarterly Review of Surgery, Obstetrics and Gynecology*, 16 (1959) 240.

It would seem then that both Häring and the moralist are at fault: Häring in that he discusses the case outside the framework of the principle and assumes that his solution falls within it; the moralist in that he attempts to make the principle applicable to a case where it is not.

The case proposed puts forward two very simple courses of action: on the one hand, preservation of the mother's life and the various consequences accompanying this action; on the other, removal of the uterus and the death of the child. In ethical terms, whether the preservation of the mother's life and fertility is less commendable than the removal of a pregnant uterus. It is not a question of a choice between two evils; if anything, it is rather a question of two values though the value that would have been safeguarded by the removal of both uterus and child is not easy to see.

Within the terms briefly explained above, the gynecologist's intervention and Häring's interpretation *outside the framework of the double effect principle* appears to have been the medically reasonable and morally humane course to follow. This position, however, represents the beginning and not the end of the ethical argument involving mortal conflicts between mother and unborn child.