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Preface

Sherry Colb's Insight

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In *A New and Improved Doctrine of Double Effect: Not Just for Trolleys*,¹ Professor Sherry Colb reconceptualizes the doctrine of double effect (DDE) by substituting an objective purpose test for a subjective purpose test. Under traditional DDE, an actor's mental state is critical: a bombardier may target the enemy's strategically important munitions factory despite the likelihood of some unavoidable collateral civilian casualties but may not drop the same payload if the bombardier aims at causing those civilian casualties; a physician may prescribe a lethal narcotic dose to a dying patient to treat the latter's pain despite hastening death but may not prescribe the same dose with the goal of hastening death; etc.

As Professor Colb explains, traditional DDE runs counter to basic principles of tort and criminal law—which hold actors responsible for the reasonably foreseeable consequences of their intended actions, even if they regard some of those foreseeable consequences as regrettable.² In addition, Professor Colb doubts the ability of fact finders to distinguish between mental states in the way that traditional DDE demands. Her reconceptualization renders DDE much more widely useful to explain or justify the law's treatment of not just the canonical examples of bombings, lethal palliative care, abortion, and hypothetical trolleys but also such matters as antidiscrimination law, jury nullification, the Fourth Amendment exclusionary rule, products liability, and especially the law of evidence.

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¹ 55 CONN. L. REV. 533 (2023).

² See *id.* at 536 (citing Norman L. Cantor & George C. Thomas III, *The Legal Bounds of Physician Conduct Hastening Death*, 48 BUFF. L. REV. 83, 126 (2000)).

New and Improved thus makes a very important contribution to the literature on DDE and the varied fields to which she applies reconceptualized DDE. That fact itself should be remarkable. As Professor Colb documents, the standard criticisms of DDE have been around for about as long as the doctrine itself. Meanwhile, her solution—swapping an objective test for a subjective one—is hardly unprecedented. The move from subjective to objective intent is quite familiar. For example, one sees it in the definition of negligence and due care in tort law,³ in the law of qualified immunity,⁴ in the evolution of originalism,⁵ and in other settings.⁶

Why was Professor Colb the first to see what, in retrospect, looks like an obvious solution to a well-known problem? I do not have a good account of the blindness of everyone else (including me)⁷ who previously encountered DDE, but I can offer a hypothesis to explain Professor Colb's insight. In addition to her general brilliance, she had three advantages over the rest of us.

First, whereas most legal scholars who encounter DDE work in legal philosophy or constitutional law (where the issue arises with respect to the canonical cases of abortion and death-inducing palliation), Professor Colb wrote and taught chiefly about criminal procedure and evidence.⁸ As she observes in *New and Improved*, the Supreme Court's treatment of pretextual traffic stops in *Whren v. United States*⁹ invites critique of the Court's assumption that law-abiding drivers can avoid giving rise to reasonable suspicion or probable cause. Having offered that critique decades ago,¹⁰

³ See Stephen G. Gilles, *On Determining Negligence: Hand Formula Balancing, the Reasonable Person Standard, and the Jury*, 54 VAND. L. REV. 813, 822 (2001) ("For as long as there has been a tort of negligence, American courts have defined negligence as conduct in which a reasonable man (nowadays, a reasonable person) would not have engaged."). The reasonable person, as a construct, is necessarily objective.

⁴ See *Harlow v. Fitzgerald*, 457 U.S. 800, 815–20 (1982) (substituting an "objective reasonableness" inquiry for the prior test of *Gomez v. Toledo*, 446 U.S. 635 (1980), which included a consideration of subjective good faith).

⁵ See Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011, 2018–23 (2012) (book review) (describing the shift from original intent to original public (and thus objective) meaning).

⁶ For a challenge to the very distinction between objective and subjective tests, see R. George Wright, *Objective and Subjective Tests in the Law*, 16 U.N.H. L. REV. 121 (2017).

⁷ See, e.g., Michael C. Dorf, *Even a Dog: A Response to Professor Fallon*, 130 HARV. L. REV. F. 86, 89–94 (2016) (accepting conventional framing of DDE as intent-focused).

⁸ Some of Colb's best-known works as a scholar concerned the Fourth Amendment. See, e.g., Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456 (1996); Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment "Reasonableness,"* 98 COLUM. L. REV. 1642 (1998); Sherry F. Colb, *What Is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 STAN. L. REV. 119 (2002). She also made important contributions to the law of evidence. See, e.g., Sherry F. Colb, *"Whodunit" Versus "What Was Done": When to Admit Character Evidence in Criminal Cases*, 79 N.C. L. REV. 939 (2001).

⁹ 517 U.S. 806 (1996).

¹⁰ Sherry F. Colb, *Stopping a Moving Target*, 3 RUTGERS RACE & L. REV. 191, 200 (2001) (explaining that even the most conscientious drivers cannot avoid violating one or more traffic laws whenever they drive).

Professor Colb was also attuned to the Court's logic—which maps perfectly onto and may have thus been part of the inspiration for her reconstructed DDE.

Likewise with the law of evidence. As Professor Colb explains, non-specialists can easily be deceived by the shorthand judges use to rule on objections, under which evidence is either “admissible” or “inadmissible.”¹¹ She would never have made that mistake. Having worked assiduously over three decades to explain the law of evidence to thousands of students, for her the conditional nature of admissibility determinations—admissible for purpose *X* but not for purpose *Y*—was never far out of mind.

Second, Professor Colb often drew on her personal experiences as inspiration for her scholarship, and for *New and Improved* she had experiences with respect to two of the canonical instances of DDE. *New and Improved* recounts her years-long correspondence with a pro-life activist. Out of those conversations came a refined understanding of DDE arguments. In addition, Professor Colb wrote the Article while suffering from stage 4 cancer. Although she had previously given considerable thought to the legal rights of dying patients,¹² when the issue became personal, she saw it from a new perspective. She had long seen lethal palliation as inadequate to preserve autonomy and dignity for individuals who wanted to hasten death. Contemplating her own demise, Professor Colb held fast to that view, in part because, as a resident of New York State—which does not allow physician aid in dying—she gave considerable thought to the logic of lethal palliation (which New York does allow). Her conclusion that lethal palliation is inadequate was partly a product of having thought very deeply about its logic.

Third, Professor Colb was an extraordinarily empathic person. As her colleague and husband for over thirty-one years, I can attest to a great many episodes I witnessed involving students, stray dogs, and perfect strangers. After Professor Colb died, I received dozens of cards and emails recounting her numerous extraordinary acts of generosity.

Professor Colb truly felt for others, but that also meant that she had a remarkable ability to read people's negative emotions. She noticed even the subtlest expression of anger or hostility. She could read tone in an email or a text message. This ability was more curse than gift. Although Professor Colb rarely reacted in a way that created open conflict, she ended up absorbing anger or hostility that others would not have noticed.

Over time, however, Professor Colb learned to cope with her exceptional

¹¹ Colb, *supra* note 1, at 558 (attributing the misimpression to “judges on television and in real life [who] seem to rule up or down on whether a piece of evidence or testimony will be admitted”).

¹² See Brief Amicus Curiae of State Legislators in Support of Respondents (Sherry F. Colb, Counsel of Record), *Vacco v. Quill*, 521 U.S. 793 (1997) (No. 95-1858), and *Washington v. Glucksberg*, 521 U.S. 702 (1997) (No. 96-110), 1996 WL 709339.

ability to sense other people's emotions. Her coping mechanism fits neatly and may have been another element of the inspiration for her reconceptualized DDE. What was the coping mechanism? Professor Colb gave people the benefit of the doubt, regardless of whether there was any real doubt. For example, if someone made an unreasonable request backed by a passive-aggressive suggestion of obligation, Professor Colb would ignore the subtle pressure and simply decline. She came to evaluate what people said to her not based on their actual intentions (which she could usually read easily enough) but based on whether objectively good reasons existed for what they were saying or asking. In other words, she turned to objective purposes.

Readers need not take my word for this point. They need only look to Professor Colb's book *Mind If I Order the Cheeseburger? And Other Questions People Ask Vegans*.¹³ The book consists of thirteen chapters, each addressing a different question. Many of the questions are frequently posed in bad faith. *What about plants?*¹⁴ Does the interlocutor really think that a cow and a cabbage are equivalent? *If we all became vegan, won't farmed animals disappear?*¹⁵ Really? Are people eating animals for the benefit of those animals? It is easy to dismiss these sorts of questions, but in *Mind If I Order the Cheeseburger?*, Professor Colb took the opposite approach. She recognized the "defensive" nature of many such questions but nonetheless proceeded based on "the premise that it is useful to take the questions posed by non-vegans seriously and to answer them well."¹⁶

Professor Colb's experiences across multiple domains led her to see value in considering the objectively best reasons for how people act, regardless of their actual subjective intentions. I have thus offered what might be called a psychological account of how Professor Colb came upon her reconceptualization of DDE. However, I should be clear that her very logic makes the validity of my causal account ultimately irrelevant. If her account of DDE is persuasive—as I believe it is—then it does not matter why or how she came up with it.

¹³ SHERRY F. COLB, *MIND IF I ORDER THE CHEESEBURGER? AND OTHER QUESTIONS PEOPLE ASK VEGANS* (2013).

¹⁴ That's the title of Chapter 1. *See id.* at 1.

¹⁵ That's the title of Chapter 12. *See id.* at 156.

¹⁶ *Id.* at xx.